

# Legal Issues In The Age of Coronavirus

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# Topics Covered

- Workplace Safety & Communications Strategies
- EEO Considerations
- Paid Sick Leave & FFCRA
- Privacy
- Litigation Worries
- Liability Protections

# Workplace Safety: OSHA Compliance

- Critical for “essential” and re-opening businesses amid COVID-19
- OSHA advises evaluating risks, using preventative measures
- OSHA’s Guidance for COVID-19 outlines:
  - Workplace and administrative controls
  - Recommended policies and practices
  - Required postings
- Need for coordination and planning re internal and external communications

# Workplace Safety: Sick Employees

- Ill or symptomatic employees should be required to tell employer ASAP
- Send the worker home -- until tested and cleared, or isolation time has passed
- Deep clean if they came to work (closing to the public if necessary)
- Notify co-workers who had direct contact with employee and advise of signs of the virus
- Depending on nature of business and interactions between employees, consider whether other employees need to be sent home as well to self-quarantine
- Raises PR and communications issues; best practice for high visibility clients is to develop communications and protocols now

# EEO Risks

- Federal and State EEO laws not suspended in COVID-19 era
  - Heightened concerns re ADA (disability discrimination)
  - Heightened risks of age and national origin discrimination
- ADA medical confidentiality rules still apply
- Employer rights for medical exams are broader in a pandemic
- Employees with chronic health conditions entitled to accommodations due to heightened risk
- Leave beyond FFCRA may be a reasonable accommodation

# Paid Sick Leave Patchwork

- FFCRA
- Pre-COVID State and Local PSL
- State and Local Emergency PSL
- Existing Employer Policies and Practices
- PSL laws may require payment, but some laws do not permit forced use of PSL by employer

# Families First Coronavirus Response Act (“FFCRA”)

- Federal statute imposing paid leave obligations on employers
- Applies to employers with fewer than 500 U.S. employees
- In effect April 1, 2020 – December 31, 2020
- Sets the floor for statutory leave entitlement
- Substantial penalties for noncompliance
- Two Entitlements to Paid Leave Under the Act:
  - (1) Emergency Paid Sick Leave Act (EPSL)
  - (2) Emergency Family and Medical Leave Expansion Act (EFMLEA)

# Other State & Local Paid Sick Leave Rules

- Varies based on the worker's location
- Some states and cities had pre-COVID PSL requirements (which remain in effect)
- Additionally, some states and municipalities have enacted new and additional Emergency COVID PSL requirements
  - FFCRA “gap-filling”
  - Some rules apply to industry-specific workers, or industry-specific work assignments

# CARES Act – Employment Intersections

- Expands unemployment insurance entitlement and benefits
- Provides employers with an Employee Retention Credit
- Loan forgiveness tied to maintenance of payroll. Furloughs, RIFs and salary reductions can affect entitlement and payback obligations

# Privacy Issues Will Be Prominent Going Forward

- Enormous amounts of data will likely be collected as part of reopening procedures.
- Data likely to be collected include:
  - Temperatures of visitors/guests/customers
  - Observations regarding behavior/actions of the same
  - Similar biometric data to measure enforcement and effectiveness of social distancing measures
- Collection of identification data may be needed as well for “contact tracing” purposes

# Potential Pitfalls of Data Collection

- Increasing numbers of states expanding the definition of “personal” information:
  - California Consumer Privacy Act
  - NY SHIELD law
- In those states, “personal information” much broader than before:
  - Includes biometric data, which is being defined very broadly
- Failure to obtain consent, properly protect, or even delete information could lead to claims of privacy violations

# Privacy Protection Considerations

- First and foremost, do not store or retain data unless absolutely necessary
- If you do collect data, make sure to follow applicable state regulations, including on:
  - Consent
  - Protection of data
  - Required disclosures
  - Obligations regarding sharing or deletion of data
- Note that there are some federal bills proposing liability exemption for privacy violations, but passage is not certain.

# Lessons Learned: Litigation Stemming from the 9/11 Attacks

# Legal Landscape: Before September 11, 2001

- Victims of 1993 and 1995 terrorist attacks on the World Trade Center brought claims against manufacturers of fertilizer used in explosive devices for:
  - negligence for failing to design, manufacture and sell a less detonable product;
  - products liability design defects because the fertilizer was unreasonably dangerous and defective; and
  - failure to warn.
- Defendants moved to dismiss to failure to state a claim. District Court granted the motion. Third Circuit Court of Appeals affirmed, holding:
  - Manufactures owed no duty of care to property owners.
  - Manufacturers did not proximately cause bombing.
  - Manufacturers had not duty to warn that products could be altered to cause harm.
  - Owner could not establish that building would not have been bombed but for the failure to warn.

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“WTC bombing was not a natural or probable consequence of any design defect in defendants’ products. In addition, the terrorists’ actions were superseding and intervening events breaking the chain of causation.”

*Port Auth. of NY and NJ v. Arcadian Corp.*, 189 F.3d 305 (3d Cir. 1999).

# The Legal Landscape: After September 11, 2001

- Claims filed against Port Authorities, security companies, Boeing and others.
- Defendants sought dismissal, arguing no duty to Plaintiffs existed because Defendants could not have reasonably anticipated the actions of the terrorist.
- District Court found that:
  - Airlines and security companies have a duty to secure against terrorists.
  - Terrorist hijacking was a foreseeable hazard.
  - Failure of manufacturers to design impenetrable cockpit door was a proximate cause of crashes.

The danger of a plane crashing as a result of a hijacking was “the very risk that Boeing should reasonably have foreseen.”

*In re September 11 Litigation*, 280 F.Supp.2d 279 (S.D.N.Y. 2003)

# The Legal Landscape: After September 11, 2001

- Litigation against Port Authority of New York and New Jersey related to 1993 World Trade Center bombing.
- Plaintiffs argued that Port Authority negligently failed to provide adequate security.
- Jury found Port Authority partly liable.
- Appellate Court affirmed verdict, holding defendant had duty to provide “reasonable” mitigation measures.
- Decision overturned by NY Court of Appeals on sovereign immunity grounds, not on whether the terrorist threat was foreseeable.

“The jury had before it evidence that the risk reasonably to be perceived by defendant was of an event potentially monstrous . . . And, in view of the extensive nature of foreseeable harm, it would appear indisputable that the jury could have fairly concluded that [defendant failed to] reasonably minimize the risk of harm . . . .”

*Nash v. Port Auth. of NY and NJ*, 51 A.D.3d 337 (N.Y. App. Div. 2008), *overruled by In the Matter of World Trade Center Bombing Litig. V. Port Auth. Of NY and NJ*, 957 N.E.2d 733 (N.Y. 2011)

# Are Liability Protections Available?

- One of the hottest topics associated with the pandemic
- Medical malpractice liability laws passed in New York, New Jersey, Michigan
- HOWEVER, no general liability protection laws passed as of yet
- Congress currently debating liability protection statute:
  - Senate Majority Leader has labeled it a “Red Line” for the next stimulus bill

# Will Existing Liability Statute Help?

- **PREP Act?**

- Possibly: covers FDA approved/regulated drugs and biologics
- Also applies to medical devices and respirators
- It provides immunity for dispensing/deployment of covered items, so there could be liability protections for security officers dispensing PREP Act covered products.

- **SAFETY Act?**

- Only applies for terrorism
- BUT, could be used as a factual defense regarding policies and procedures to manage facilities, guests, and employees during pandemic situation.

# Think About What It Takes To Get SAFETY Act Protections ...

- The requested award is well-defined:
  - It must cover specific policies, procedures, and/or technologies
- There are well drafted, thorough, and documented policies and procedures.
- Repeatability: There is regular training on how to use the policies and procedures.
- Effectiveness: The “technology” actually works.
- Continuous Improvement: The “technology” is regularly reviewed, updated, and amended as needed.

# Applying The SAFETY Act To Push Back

- Acting on public health information
  - A SAFETY Act application can cover your policies, procedures, and process for deciding whether to act upon information.
- Reasonable measures to screen for persons infected with COVID-19
  - The SAFETY Act Office regularly reviews and deems effective screening procedures, including for people exhibiting behavior indicative of illness/injury.
- “Failure to follow proper incident response procedures”
  - Same thing here – incident response procedures are a basic component of SAFETY Act submissions
- SAFETY Act makes it easier to push back against claims

# What About Insurance?

- Insurers are claiming with near uniformity that insurance policies won't cover pandemic coverage.
  - Stems from the decision to exclude pandemic claims after SARS
- State legislators are looking to force insurance carriers to pay business interruption claims regardless of policy exclusions language.
- BUT – there are in fact many good arguments that insurance coverage exists:
  - Mostly through event cancellation policies and “communicable disease” policy language.
- In short – read your policy and talk to your broker or lawyer!



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