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Employer Waivers of COVID-Related Liability

As employees continue to return to their offices and places of business, companies are grappling with risk management related to COVID-19, including potential liability to employees who contract COVID-19 on the job. Hundreds of employees have already filed lawsuits against their employers, asserting claims ranging from negligence to wrongful death to public nuisance in connection with the illness of the employees or their family members. At the same time, organizations that have required their customers and patrons to waive liability (such as Disney and the New York Stock Exchange) have garnered significant press coverage. Many employers are asking if they should consider requiring their employees to sign similar waivers.

As described below, while there may be little legal downside in requiring such waivers, there also may be limited upside, both legally and practically. Although there is considerable variation in the laws of the various states and laws in this area are still evolving, in many states, such waivers will not have any effect either because they are preempted by workers' compensation laws, because they are otherwise invalid and unenforceable, or because employers may have existing protections from liability arising from negligent conduct.

I. Background

Based on public policy considerations including concern about the unequal bargaining power between an employer and employee, many states prohibit an employer from enforcing a waiver of an employee's claims related to workplace injury or otherwise limit such waivers to claims arising from the employer's negligence only. For example, in New York, "courts have long found agreements between an employer and an employee attempting to exonerate the employer from liability for future negligence whether of itself or its employees or limiting its liability on account of such negligence void as against public policy." Richardson v. Island Harvest, Ltd., 166 A.D.3d 827, 828 (2018) (citations omitted). The California Labor Code provides that "[a]n employer shall in all cases indemnify his employee for losses caused by the employer's want of ordinary care," a right that is not waivable. Cal. Lab. Code § 2800. In Indiana, "[a]ll contracts between employer and employee releasing the employer from liability for damages arising out of the negligence of the employer by which the employee is injured, or, in case of the employee's death, to his representative, are against public policy, and hereby declared null and void." Indiana Code § 22-3-10-1. These policy considerations apply with particular force when workers are potentially exposed to COVID-19 through the action or inaction of their employers.

II. Workers' Compensation Laws Typically Provide the Sole Remedy for Workplace Injury or Illness

Generally, state workers' compensation laws provide an employee's exclusive remedy against his employer for injuries or occupational diseases arising from or occurring because of his employment that stem from an employer's negligent conduct. See, e.g., N.Y. Workers' Comp. § 11. Most states will not enforce waivers of the right

to receive these benefits, and some states deem such agreements to be contrary to public policy. See, e.g., Pennsylvania Workers Compensation Act § 204(a), 77 Pa. Stat. Ann. § 71 ("No agreement, composition, or release of damages made before the date of any injury shall be valid or shall bar a claim for damages resulting therefrom; and any such agreement is declared to be against the public policy of this Commonwealth."); Neb. Rev. Stat. § 48-131 ("No agreement by an employee to waive his or her rights to compensation under the Nebraska Workers' Compensation Act shall be valid."); Wisconsin Statutes §102.16(5).

Whether COVID-19 is considered an "occupational disease" subject to workers' compensation varies by state, and individual state laws may make distinctions depending on the date of contraction of COVID-19, the role of the employee, and other factors. Traditionally, to show that she has contracted an occupational disease, an employee must demonstrate that the illness was contracted within the course and scope of her employment and there was a particular risk based on the work conditions that exceeded the risk to the general public. Moreover, some states actually prohibit workers' compensation benefits for the contraction of "ordinary diseases of life" to which the general public is exposed. See, e.g., Georgia Code section 34-9-280(2); Indiana Code § 22-3-7-10(a); Nebraska Revised Statute 48-151(3); Oklahoma Statutes §85A-65.

To address the uncertainty regarding whether COVID-19 meets the criteria of an occupational disease, numerous states have passed laws or issued guidance providing that certain types of employees (in particular essential workers) who contracted COVID-19 within specific timeframes are presumed to have contracted the disease through the course of their employment.[1] For example, California's Governor issued Executive Order N-62-20 providing that, for the purposes of awarding workers' compensation benefits, a COVID-19-related illness of an employee is presumed to arise from their employment if the employee was diagnosed with COVID-19 within 14 days after performing labor or services at his place of employment at his employer's direction between March 19, 2020 and July 5, 2020.[2] After the Executive Order expired, on September 17, 2020, Governor Newsom signed into law SB 1159 that extended the protections beyond July 5th for essential workers, such as health care workers and firefighters, and for all other employees only if there is a COVID-19 "outbreak" at the employee's work place.[3] Governor Lamont of Connecticut issued a similar executive order creating a "rebuttable presumption" that an employee who missed work between March 10, 2020 and April 6, 2020 and was diagnosed with COVID-19 contracted COVID-19 as an occupational disease arising out of the course of employment, provided that the employee was required to work outside the home in the preceding 14 days; the presumption also extends to "essential" workers who missed a day of work between April 7, 2020 and May 7, 2020 who were diagnosed with COVID-19.[4] An employer can rebut the presumption of coverage only if it can prove by a preponderance of the evidence that the employment was not the cause of the employee's contracting COVID-19. Alaska, Arkansas, Florida, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, North Dakota, Utah, Wisconsin, and Wyoming have also enacted laws or issued executive orders or other guidance pertaining to workers' compensation coverage for COVID-19.[5] Similar legislation has also been proposed or is pending in several other

[1] For a round-up of state legislation, see National Council on Compensation Insurance, Inc., "State Activity: Covid-19 WC Compensability Presumptions," available at https://www.ncci.com/Articles/Documents/II_Covid-19-Presumptions.pdf.

[2] https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf.

[3] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB1159.

[4] Executive Order No. 7JJJ, available at https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7JJJ.pdf.

[5] *See* Alaska Bill SB 241; Arkansas Executive Order 20-19; Florida Office of Insurance Regulation Informational Memorandum OIR-20-05M; Illinois Bill HB 2455; Kentucky Executive Order 2020-277; Michigan Executive Order 2020-128; Minnesota Laws 2020, Chapter 72; Missouri Emergency Rule 8 CSR 50-5.005; New Hampshire Emergency Order #36, #53; New Jersey Bill SB 2380;

states including Louisiana, Massachusetts, New York,[6] North Carolina, Ohio, Pennsylvania, Rhode Island, and Virginia.

III. Waiver Agreements with Employees do not Protect Employers From OSHA Complaints or Enforcement Action

Employers also should be cognizant that their general duty to maintain a safe workplace cannot be contracted away by employee waivers. Specifically, the Occupational Safety and Health Act of 1970 (OSH Act) requires employers to provide their employees with working conditions that are free of known dangers. 29 USC § 654. The Occupational Safety and Health Administration (OSHA) has identified COVID-19 contracted in the workplace as a reportable injury.[7] In an OSHA investigation or enforcement action, it could reflect badly on an employer if a mandatory waiver suggests that the employer is abdicating responsibility for maintaining a safe work environment. Moreover, OSHA's guidelines require employers to make a reasonable and good faith inquiry to determine whether it is "more likely than not" that workplace exposure played a causal role in a particular case of COVID-19 — meaning that, regardless of the existence of a waiver, an employer may have to claim responsibility for cases of COVID-19 contracted by its employees.

IV. Enacted and Proposed Federal and State Laws Limiting Corporate Liability

At both the federal and state level, there have been legislative efforts to shield employers from liability stemming from their employees or customers contracting COVID-19. In areas protected by such laws, employers may have less need for COVID-19 liability waivers.

In 2020, Senate Republicans proposed a bill to shield companies, including retroactively, from liability in COVID-19 exposure actions brought by employees, unless a plaintiff can prove "by clear and convincing evidence" that the defendant company was the source of the exposure, had not made reasonable efforts to comply with applicable law or guidelines, and engaged in gross negligence or willful misconduct. Safeguarding America's Frontline Employees to Offer Work Opportunities Required to Kickstart the Economy Act ("SAFE TO WORK ACT"), S.4317, 116th Cong. (2020). The SAFE TO WORK ACT would not preempt state workers' compensation laws, however. Senate Republicans also proposed putting similar provisions in a federal relief bill enacted in December 2020 that ultimately did not include the liability shield.

Several states also have enacted legislation to protect companies from liability stemming from COVID-19 exposure, including Georgia, Kansas, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, Tennessee, Utah and Wyoming.[8] The protections vary, with many states providing enhanced protections for businesses deemed essential,

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North Dakota Executive Orders 2020-12, 2020-12.1, 2020-12.2; Utah Bill H.B. 5006; Vermont Bill SB 342; Wisconsin Act 185; Wyoming Bill SF1002.

[6] While legislation is pending in New York that would create a rebuttable presumption that certain frontline and essential workers contracted COVID-19 in the performance of their job duties (Senate Bills 8117, 8226), the New York Workers' Compensation Board has released guidelines stating that, depending on the facts, employees may be entitled to workers' compensation benefits due to COVID-19 exposure.
See http://www.wcb.ny.gov/content/main/TheBoard/covid-19-workers-compensation-q-a-june-2020.pdf.

[7] *See* OSHA, "Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)," *available at* https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19.

[8] *See* Georgia Bill SB 359; Kansas Bill HB 2016; Louisiana Act No. 305; Mississippi Act 3049; North Carolina Bill SB 704; Ohio Bill HB 606; Oklahoma Bill SB 1946; Tennessee Bill SB 8002; Utah Bill SB 3007; Wyo. Stat. 35-4-114 (SB 1002)

such as manufacturers of personal protective equipment. For example, the Georgia COVID-19 Pandemic Business Safety Act (SB 359) creates a rebuttable presumption that a plaintiff bringing a civil case related to COVID-19 exposure assumed the risk of exposure, transmission, infection, or potential exposure. Louisiana Act No. 305 provides that, without preempting workers' compensation laws, "[n]o owner, operator, employee, contractor, or agent of a restaurant" in substantial compliance with applicable health and safety protocols "shall have civil liability for injury or death due to COVID-19 infection transmitted through the preparation and serving of food and beverage products by the restaurant during the COVID-19 public health emergency . . .unless the injury or death was caused by gross negligence or willful and wanton misconduct." North Carolina SB 704, enacted in May, limits civil liability stemming from COVID-19-related claims against "essential businesses" and "emergency response entities," unless the business was grossly negligent, reckless or intentionally caused the harm. Under Utah Senate Bill 3007, businesses are "immune from civil liability for damages or an injury resulting from exposure of an individual to COVID-19 on the premises owned or operated by the person (business owner), or during an activity managed by the person," except in cases of willful misconduct, reckless infliction of harm, or intentional infliction of harm, and also without preempting workers' compensation laws.

V. Practical Considerations

There may be little legal downside to asking employees to sign waivers, that remind employees of the risks and precautions required in the workplace, even if they do not ultimately have the desired legal effect. That said, given their doubtful enforceability, employers may also want to consider the message sent to employees (and regulators and the public) about the employer's priorities if such waivers are required. For example, there has been considerable outrage expressed against certain schools and universities that tried to impose waivers on students.[9]

If an employer does move forward with drafting a waiver for its employees to sign, the employer should make sure that the waiver: (1) is clear and unambiguous, (2) is written in language that can be easily understood, and (3) does not purport to waive liability for intentional, reckless, or grossly negligent conduct. Employers should consult with counsel who actively monitor developments in this space to ensure that the waiver incorporates the latest legal precedent and governance best practices.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Lauren Perlgut at 212.701.3558 or lperlgut@cahill.com; or Mark Gelman at 212.701.3061 or mgelman@cahill.com; or email publications@cahill.com

[9] *See* https://www.fastcompany.com/90532051/legal-expert-dont-sign-covid-19-liability-waivers.