

Protecting Your Business From Liability Claims Stemming From COVID-19 Exposure

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Litigation Alert

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Businesses of every nature – including grocery stores, banks, daycares, gyms and restaurants – may face increasing liability claims from customers and third parties claiming to have been exposed to the novel coronavirus, or COVID-19, while at their location. The novel virus raises issues as to whether businesses have a heightened duty of care to their customers, and what type of exposure businesses face if a customer claims to have been exposed to COVID-19 while at their premises.

Recently, a lawsuit was filed against Princess Cruise lines for gross negligence in allowing passengers to be exposed to COVID-19 on a cruise ship. The lawsuit alleges that the cruise ship was allowed to go out to sea knowing that it was infected from two previous passengers who came down with symptoms of COVID-19. It further claims that the passengers were not warned of the potential exposure either before or after they boarded the ship.

In other news reports around the country, business owners have reported taking extraordinary precautions to prevent customers' risk of contracting COVID-19. For example, one grocery store recently reported that it discarded \$35,000 worth of food after a customer coughed on fresh produce.

With the rapidly evolving public health crisis surrounding COVID-19, and new cases being reported daily, it is expected that more and more lawsuits will be commenced against businesses for the alleged failure to safeguard customers from contracting the virus.

How Does COVID-19 Affect Liability to Customers?

In both New York and New Jersey, business owners have a duty to take reasonable measures to limit customers' exposure to dangerous conditions. A business owner must take reasonable or due care to provide a safe environment to their customers. This duty of care generally requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in a safe condition and to avoid creating the conditions that would render the premises unsafe.

Does a Business Have an Enhanced Duty to Follow CDC Guidelines?

New York has abandoned all distinctions between business invitees and guests, and a heightened duty of care is imposed on a business owner only in specific situations, such as where a special relationship exists or children are involved. *See Adams v. N.Y.C. Transit. Auth.*, 88 N.Y.2d 116, 122 (N.Y. 1996). In New Jersey, a heightened duty of care exists for any invitee to make reasonable inspections to discover defective conditions. Restatement (Second) of Torts § 343 (1965).

There is currently no specific heightened or enhanced duty for a company to follow the Centers for Disease Control and Prevention's (CDC) guidelines. However, it may be best practice for businesses to follow CDC guidelines to avoid potential third-party liability claims given the abundance of information and guidance available to the public regarding social distancing and other preventative measures. The CDC, as well as the New York and New Jersey Departments of Health, have offered guidance to help prevent workplace exposure to COVID-19.

Businesses should exercise reasonable diligence to understand the risks of failing to take reasonable precautionary measures. Failure to do so may increase exposure to health inspections and lawsuits from third parties.

What Are the Reasonable Expectations of a Customer During the COVID-19 Crisis?

In New York, a customer's contributory negligence or assumption of risk is not an absolute bar to recovery, but bears on the defendant's duty and the alleged breach of that duty. See CPLR 1411. A person assumes a risk where he or she voluntarily subjects himself or herself to a known peril. Similarly, in New Jersey, the concept of contributory negligence is treated as an affirmative defense to an established breach of the defendant's duty.

Given the extensive media coverage on the virus, recommendations to the public to stay indoors, and tips to stay at least six feet away from one another if one must go outside, there will be at least some degree of culpability if an individual claims to have contracted COVID-19 while at a business' premises. This is particularly true if the individual fails to adhere to the CDC's recommended distancing guidelines.

How Businesses Can Protect Themselves Against Third-Party COVID-19 Liability Claims

Businesses should take reasonable precautions to limit their customers' exposure to COVID-19 while at their premises. Businesses can follow the CDC guidelines by using reasonable mitigation strategies which include, but are not limited to:

- separating sick employees;
- educating employees about how they can reduce the spread;
- using proper building ventilation, filtration and humidity control;
- practicing proper hand hygiene (e., providing sufficient hand sanitizer and soap);
- practicing proper respiratory hygiene (e., providing tissues and places to properly dispose of tissues);
- encouraging customers to stay at least six feet apart while at the company's premises;
- discouraging handshaking; and
- routine cleaning and disinfection (e., high contact surfaces, dust, removing trash, cleaning restrooms).

As a practical matter, it will be difficult for a customer to prove causation given the nature of the virus and the ongoing inability to pinpoint where and when people have contracted the virus.

If you have any questions about how a business can mitigate their premises liability during the COVID-19 pandemic, please a member of the Litigation Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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