ARTICLE:
PREMISES LIABILITY AND THE CORONAVIRUS: AN OUTLINE OF RISKS AND RESPONSIBILITIES

*By Amer Lakhani**

I. Introduction

If an individual contracts COVID-19 after visiting a specific property, and the exposure of the COVID-19 is traced to that specific property, who is liable to the individual? Does the liability depend on whether the infected individual was a customer/licensee or an employee of the property owner? Does it matter whether the property to which the exposure of COVID-19 is traced to was required to remain open or closed by public authorities?

On March 19, 2020, California Governor Gavin Newsom issued a shelter-in-place order directing all residents of California to stay at home except to maintain continuity of operations of essential critical infrastructure sectors.[1] In accordance with the shelter-in-place order, the State Public Health Officer issued a list of "Essential Critical Infrastructure Workers" grouped into thirteen essential critical infrastructure sectors. Businesses that were specified as being part of the critical infrastructure sectors included, among others, healthcare facilities, research centers, suppliers, manufacturers, private security organizations, private emergency medical services providers, groceries, pharmacies, convenience stores, carry-out and quick service restaurants, food manufacturing facilities, farms, animal diagnostic and food testing laboratories, gas stations, truck stops, and banks.[2]

As a result, many California business have been required to stay open as essential businesses during the COVID-19 outbreak. Despite the shelter-in-place order, many businesses have conducted operations even though they are non-essential businesses, and some have indeed violated the shelter-in-place and stay at home orders imposed by the authorities. Many properties include multiple commercial tenants and have common areas that are under the property owner's control. Property owners that have remained open during the COVID-19 outbreak are thus exposed to liability in the event that individuals that visit the business, and become infected with COVID-19 on the premises. Moreover, there have been various shelter-in-place orders issued by cities and counties

---

*Amer Lakhani is a transactional associate in Miller Starr Regalia's Walnut Creek office.

throughout California that are stricter than the Governor's Executive Order, and can thus result in increased liability for the property owner.

This article explores potential sources of liability on landowners or occupiers in California for two types of infected individuals: (1) employees of the landowner or occupier and (2) customers/licensee of the landowner or occupier. Specifically, this article explores the application of workplace injury rules and the application of a landowner liability laws to COVID-19 infections traced to a specific property.

II. Liability to Employees

Under California's worker's compensation law, an "injury" includes any injury or disease arising out of the employment. Under California's Code of Regulations, an injury or illness is " 'work-related' if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness."[3] "Work environment" is defined as "the establishment and other locations where one or more employees are working or are present as a condition of their employment. The work environment includes not only physical locations, but also the equipment or materials used by the employee during the course of his or her work."[4] The regulations do provide exceptions for injuries that occur at the "work environment" but are not considered "work-related," including injuries or illnesses where "the employee was present in the work environment as a member of the general public rather than as an employee"; "the injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment"; "the injury or illness is solely the result of an employee doing personal tasks (unrelated to their employment) at the establishment outside of the employee's assigned working hours"; or "the injury or illness is solely the result of personal grooming, self-medication for a non-work-related condition, or is intentionally self-inflicted."[5] The regulations also specifically exclude the common cold or flu from the definition of work-related injury or illness.[6]

Diseases contracted by employees generally fall under two categories for purposes of worker's compensation law—occupational diseases and non-occupational diseases. Occupational diseases means "any abnormal condition or disorder caused by exposure to environmental factors associated with employment, including acute and chronic illnesses or diseases which may be caused by

 © 2020 Thomson Reuters

inhalation, absorption, ingestion, or direct contact." The California Supreme Court defined an "occupational disease" as one that "occurs as a result of continuous, latent exposure to harmful substances."[7] An example of an occupational disease is asbestosis contracted by workers that have repeatedly been exposed to asbestos.

Infectious diseases such as tuberculosis and HIV have also been determined to be occupational diseases, as employees claiming compensation for each of those diseases worked under employment conditions that required them to be exposed to these diseases for a prolonged period of time.[8] Although it is possible COVID-19 could be analogized to HIV or tuberculosis for certain workers, such as in hospitals or laboratories, it seems unlikely that COVID-19 would be considered an occupational disease in most contexts, as occupational diseases are more typically industrial diseases that develop over a prolonged period of time due to repeated exposure to a harmful substance.

Non-occupational diseases are typically not considered work-related injuries. A non-occupational disease has been defined as "one that is not contracted solely because of an exposure at work or because it is related to a particular type of work." The California Supreme Court has specified that an "ailment does not become an occupational disease simply because it is contracted on the employer's premises."[9] The disease must have been contracted due to the employment or must have arisen out of the employment, and there must be a causal link between the disease the employment. An employee will not be compensated for a disease simply because the disease was contracted while the employee was visiting the place of employment.[10]

Generally, non-occupational diseases are not compensable to employees. However, there are two important exceptions to the general rule that non-occupational diseases or their treatment are not compensable. First, a non-occupational disease is compensable if the employment subjects the employee to an increased risk compared to that of the general public.[11] Second, a non-occupational disease is compensable if the immediate cause of the disease is an intervening human agency or instrumentality of employment.[12]

Under the first exception, if an employee's risk of contracting the disease by virtue of the employment is materially greater than that of the general public or more common at the place of employment than among the general public, the disease may be compensable. In *Bethlehem Steel Co. v. Industrial Acc. Com.*,[13] the

California Supreme Court held that shipyard workers who had contracted a contagious eye disease were entitled to benefits even though there was a similar epidemic in the community, as the evidence showed that the disease started in the shipyards, and the occurrence of the disease was much less in the general community than it was in the shipyards.[14]

California's Worker's Compensation Appeals Board has found various instances of infectious diseases that meet the first exception, i.e., are non-occupational diseases that occurred during employment that subjects the employee to an increased risk compared to that of the general public. In *City of Fresno v. WCAB (Bradley)* (1992),[15] the Worker's Compensation Appeals Board found that a police detective's work with drug addicts and drug paraphernalia subjected the police detective to a higher risk of exposure to hepatitis B than the general population. As a result, the police detective's claim for the hepatitis B infection was compensable.[16] Similarly, the Worker's Compensation Appeals Board found that a teacher had a greater risk for viral respiratory tract infections because of the teacher's repeated exposure to viruses brought into the classroom by her students.[17] In contrast, a delivery driver's contraction of hepatitis from eating doughnuts at one of the driver's stops was not compensable because the delivery driver was not subject to a higher level of exposure for hepatitis than the general public.[18]

For COVID-19 claims to be compensable to an employee under the first exception for non-occupational diseases, the employee must be able to show that the nature of the employment posed a greater risk of contracting COVID-19 than that of the general public. Thus, property owners must ensure that their employees do not incur a higher risk of contracting COVID-19 than the general public during the course of their employment. Although it will not be enough for an employee to show that the contraction of COVID-19 occurred on the employer's Premises, the employer must be able to show that it followed guidelines provided by authorities to ensure that the employer was not putting its employees at a greater risk of contracting COVID-19 than the general public.

Under the second exception, the immediate cause of the disease must be an intervening human agency or instrumentality of employment. For example, a nurse's assistant that was required to undergo testing and treatment for tuberculosis, and developed an adverse reaction to the treatment, was entitled to compensation because the treatment arose out of the employment.[19] As such,

 © 2020 Thomson Reuters

if there is an event occurring at a place of employment that can be considered an intervening human agency or instrumentality of employment that results in an employee's contraction of COVID-19, such as, perhaps, the employer refusing to provide appropriate personal protective equipment, the employee's contraction of COVID-19 may be compensable by the employer.

It is important to point out that *ordinarily* the burden of proof to establish that the employee was subject to a special or greater risk of contracting a disease than that of the general public is on the employee, not the employer.[20] Moreover, there must a causal connection between the employment and the disease.[21]

These burdens of proof have been altered in the specific case of COVID-19, after Governor Newsom, in May 2020, signed Executive Order N-62-20. This executive order creates a rebuttable presumption that a COVID-19-related illness arose out of and in the course of the employment for awarding workers' compensation benefits if an employee testing positive for or was diagnosed by a licensed physician with COVID-19 within 14 days after a day that the employee performed labor or services at the employee's place of employment at the employer's direction, and the day on which the employee performed such labor or services was on or after March 19, 2020. The rebuttable presumption may be controverted by other evidence, but if it is not controverted, Executive Order N-62-20 requires the Worker's Compensation Appeals Board to find in accordance with the presumption, and the employee will be eligible for all applicable benefits for the COVID-19-related illness.[22]

III. Liability to Customers

As with all negligence claims, an individual that suffers an injury on a property must show that (i) the property owner or possessor had a duty of care towards the injured party, (ii) there was a breach of the duty of care, (iii) the breach of the duty of care was the proximate cause of the injuries to the third party, and (iv) the injured party suffered damages.[23] In California, every landowner or possessor owes a duty of care to third parties that enter the property. Under California law, "everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself."[24]

Among the factors to be considered in determining whether an owner is

responsible for premises liability for an injury to a third party include (i) the likelihood of injury to plaintiff, (ii) the probable consequences of such injury, (iii) the burden of reducing or avoiding the risk, (iv) the location of the land, and (v) the possessor's degree of control over the risk-creating condition.[25] A landowner or possessor's duty to third parties is limited to that of "ordinary" care, not extraordinary care.[26] The landowner or occupier's duty is not absolute or based on a duty to keep the premises absolutely safe.[27]

There are various factors for determining whether a landowner or occupier owed a duty of care to an injured person, including (1) the foreseeability of harm; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of connection between the plaintiff's injury and the landowner's conduct; (4) the moral blame attached to the landowner's conduct; (5) the policy of preventing future harm; (6) the burden on the landowner and the consequences to the community of imposing a duty on the landowner; and (7) the availability, cost, and prevalence of insurance for the risk.[28]

Of each of the aforementioned factors, the primary factor in determining whether a duty of care is owed is foreseeability.[29] However, the foreseeability factor is balanced against the burden of duty to be imposed on the landowner.[30] The degree of foreseeability is dependent on how great or small the burden of preventing the harm that caused the injury.[31] Foreseeability and the burden of preventing the harm are likely to be the most important factors in determining whether a landowner or occupier is liable for a third-party's infection of COVID-19 that can be traced back to the premises. The infected individual must be able to show that the contraction of COVID-19 was foreseeable during the individual's visit to the premises, while also showing that the burden imposed on the landowner or occupier in preventing the spread of COVID-19 would not be unreasonably high.

To determine whether there was a breach of that duty of care, the test is one of "reasonableness," i.e., whether the landowner or occupier acted as a reasonable person in managing the property in view of the probability of injury to others.[32] As such, landowners and occupiers must take precautions determined to be reasonable under the circumstances in ensuring that their premises do not pose a risk of COVID-19 infections to third parties.

Courts make an important distinction between claims of premises liability based on misfeasance (where the defendant created the risk) and nonfeasance

© 2020 Thomson Reuters

(where the defendant failed to undertake some measures in preventing the risk) in determining whether a landowner or occupier owes a duty of care.[33] For COVID-19 claims, the landowner or occupier's liability will likely be based on an accusation of nonfeasance by the landowner or occupier. However, if the landowner or occupier opened the facility in violation of a stay-at-home order, or failed to implement mandatory or recommended precautions to mitigate risk of infection that are part of such an order, an injured person may be able to make a claim based on misfeasance, as the landowner or occupier created the risk of the spread of COVID-19 by violating the order.

To determine whether the breach of the duty of care was the proximate cause of the injuries, the injured person must show that the defendant's breach of duty to exercise ordinary care was a substantial factor in bringing about the harm to the plaintiff.[34] Causation "cannot be established based on mere speculation, conjecture and inferences drawn from other inferences . . ."[35] Due to the rapid spread of COVID-19, it may be difficult for infected individuals to prove with certainty that a visit to a specific property resulted in that individual's contraction of COVID-19. However, analogizing to Governor Newsom's Executive Order in the employment context, one could argue that the same principle should apply to owners or occupiers of property.

A tenant owes the same duty of care as the owner of the real property, and the tenant must act reasonably in preventing injury to third parties visiting the premises.[36] A defendant need not own, possess, and control property in order to be held liable; control alone is sufficient.[37] As such, a tenant has the same duty of care for third parties for the spread of COVID-19 as a landowner.

Both the property owner and the tenant of the property may have a duty of care towards individuals that access common areas on the property if the common areas are under both the property owner's and the tenant's control.[38] A property owner that has leased the property and is not occupying the property only has a duty of care when the property owner has the right to prevent the presence of the dangerous condition on the property, particularly in common areas that are not under a tenant's exclusive control.[39] As such, if a property owner has the ability to prevent individuals that visit common areas on the property from contracting COVID-19, such property owners may have a duty of care towards such individuals, even if they have leased the property and are not in possession of the property.

© 2020 Thomson Reuters

IV. Mitigating COVID-19 Risk Through Insurance Coverage

An employee or a third-party may bring a claim against a landowner or occupier for damages resulting from infection of COVID-19 on the premises. A landowner or occupier may attempt to mitigate their exposure for COVID-19 claims by carrying an insurance policy that would cover financial losses. Commercial General Liability Insurance provides coverage for third-party claims alleging bodily injury, property damage, or personal injury. Such insurance may mitigate financial losses as a result of COVID-19 claims brought forth by third parties. However, some Commercial General Liability Insurance policies may contain provisions that limit or preclude coverage for COVID-19 damages, including exclusions for bacteria and viruses, exclusions for pandemics, or an exclusion for pollution. Landowners and occupiers that have such insurance coverage should review whether their Commercial General Liability Insurance policies have such exclusions from coverage.

Worker's Compensation Insurance provides coverage for claims that an employee was injured by COVID-19 during the course of the employment. As stated above, the coverage depends on whether the employee's exposure to COVID-19 occurred at the location of the employment. Exclusions from coverage may apply for an employer's willful misconduct and failure to comply with health and safety laws and regulations. As such, if an employer purposefully violates a stay at home order, the employer may be barred from coverage under a Worker's Compensation Insurance policy.

Finally, Pollution Liability Insurance and Environmental Liability Insurance provides coverage for losses arising from pollutants, with coverage including bodily injury and clean-up costs. Such coverage may be available for COVID-19 claims, as COVID-19 would likely fit the definition of a pollutant, unless the insurance policy contains an exclusion for communicable disease. Landowners and occupiers that have Pollution Liability and Environmental Liability Insurance policies should determine whether their policies provide coverage for communicable diseases such as COVID-19.

V. Conclusion

COVID-19 imposes unique risks on property owners and their tenants, as they may be liable to two types of individuals if those individuals were to contract COVID-19 on the Premises. Property owners and occupiers should follow guidelines recommended by the authorities to ensure that their Premises

 © 2020 Thomson Reuters

do not pose a risk of infection of COVID-19. Moreover, property owners and occupiers should ensure that they are mitigating their risk from COVID-19 claims by procuring appropriate insurance policies that provide the right type of coverage for the property owner or occupier.

ENDNOTES:

[1]Executive Order N-33-20, Executive Department of the State of California, available at https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf.

[2]Essential Critical Infrastructure Workers List, available at https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf.

[3]Cal. Code Regs., tit. 8, § 14300.5(a).

[4]Cal. Code Regs., tit. 8, § 14300.5(b)(1).

[5]Cal. Code Regs., tit. 8, § 14300.5(b)(2).

[6]Cal. Code Regs., tit. 8, § 14300.5(b)(2)(H).

[7]*Fruehauf Corp. v. Workmen's Compensation Appeals Bd.*, 68 Cal. 2d 569, 574-575, 68 Cal. Rptr. 164, 440 P.2d 236 (1968).

[8]*Layden v. Industrial Indemnity Co.*, 25 CCC 40 (1959); *Federal Insurance Co. v. WCAB (Doe)*, 60 CCC 422 (1995).

[9]*LaTourette v. W.C.A.B.*, 17 Cal. 4th 644, 653, 72 Cal. Rptr. 2d 217, 951 P.2d 1184 (1998).

[10]*LaTourette v. W.C.A.B.*, 17 Cal. 4th 644, 655, 72 Cal. Rptr. 2d 217, 951 P.2d 1184 (1998).

[11]*LaTourette v. W.C.A.B.*, 17 Cal. 4th 644, 654, 72 Cal. Rptr. 2d 217, 951 P.2d 1184 (1998).

[12]*LaTourette v. W.C.A.B.*, 17 Cal. 4th 644, 654, 72 Cal. Rptr. 2d 217, 951 P.2d 1184 (1998).

[13]*Bethlehem Steel Co. v. Industrial Acc. Commission*, 21 Cal. 2d 742, 135 P.2d 153 (1943).

[14]*Bethlehem Steel Co. v. Industrial Acc. Commission*, 21 Cal. 2d 742, 749-750, 135 P.2d 153 (1943).

[15]*City of Fresno v. WCAB (Bradley)*, 57 CCC 375 (1992).

[16]*City of Fresno v. WCAB (Bradley)*, 57 CCC 375 (1992).

[17]*Culver City Unified School District v. Workers' Compensation Appeals Board (Grawe)*, 82 Cal. Comp. Cases 757, 2017 WL 2822796 (App. 2d Dist. 2017) (writ denied).

[18]*McKeown v. WCAB*, 53 CCC 332 (1988).

[19]*Maher v. Workers' Comp. Appeals Bd.*, 33 Cal. 3d 729, 908-909, 190 Cal. Rptr. 904, 661 P.2d 1058 (1983).

[20]*Bethlehem Steel Co. v. Industrial Acc. Commission*, 21 Cal. 2d 742, 743-744, 135 P.2d 153 (1943).

[21]*LaTourette v. W.C.A.B.*, 17 Cal. 4th 644, 654, 72 Cal. Rptr. 2d 217, 951 P.2d 1184 (1998).

[22]Executive Order N-62-20, Executive Department of the State of California, available at https://www.gov.ca.gov/wp-content/uploads/2020/05/5.6.20-EO-N-62-20-text.pdf.

[23]*Sharon P. v. Arman, Ltd.*, 21 Cal. 4th 1181, 1188, 91 Cal. Rptr. 2d 35, 989 P.2d 121 (1999) (disapproved of by, *Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826, 107 Cal. Rptr. 2d 841, 24 P.3d 493 (2001)) and (disapproved of by, *Reid v. Google, Inc.*, 50 Cal. 4th 512, 113 Cal. Rptr. 3d 327, 235 P.3d 988 (2010)).

[24]Civ. Code, § 1714(a).

[25]*Sprecher v. Adamson Companies*, 30 Cal. 3d 358, 360, 372, 178 Cal. Rptr. 783, 636 P.2d 1121 (1981); see also Miller & Starr California Real Estate 4th § 19:42.

[26]Civ. Code, § 1714(a).

[27]*Brunelle v. Signore*, 215 Cal. App. 3d 122, 131, 263 Cal. Rptr. 415 (4th Dist. 1989); see also Miller & Starr California Real Estate 4th § 19:42 (2020).

[28]*Vasilenko v. Grace Family Church*, 3 Cal. 5th 1077, 1092, 224 Cal. Rptr. 3d 846, 404 P.3d 1196 (Cal. 2017); see also Miller & Starr California Real Estate 4th § 19:42 (2020).

[29]*Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 676, 25 Cal. Rptr. 2d 137, 863 P.2d 207 (1993) (disapproved of on other grounds by, *Reid v. Google, Inc.*, 50 Cal. 4th 512, 113 Cal. Rptr. 3d 327, 235 P.3d 988 (2010)).

[30]*Sakai v. Massco Investments, LLC*, 20 Cal. App. 5th 1178, 1188, 229 Cal. Rptr. 3d 775 (2d Dist. 2018).

[31]*Vasilenko v. Grace Family Church*, 3 Cal. 5th 1077, 1092, 224 Cal. Rptr. 3d 846, 404 P.3d 1196 (Cal. 2017).

[32]*Seaber v. Hotel Del Coronado*, 1 Cal. App. 4th 481, 488, 2 Cal. Rptr. 2d 405 (4th Dist. 1991).

[33]*Seo v. All-Makes Overhead Doors*, 97 Cal. App. 4th 1193, 1202-1203, 119 Cal. Rptr. 2d 160 (2d Dist. 2002).

[34]*Nola M. v. University of Southern California*, 16 Cal. App. 4th 421, 427, 20 Cal. Rptr. 2d 97, 83 Ed. Law Rep. 316 (2d Dist. 1993).

[35]*Saelzler v. Advanced Group 400*, 25 Cal. 4th 763, 775, 107 Cal. Rptr. 2d 617, 23 P.3d 1143 (2001).

[36]Civ. Code, § 1714(a).

[37]*Alcaraz v. Vece*, 14 Cal. 4th 1149, 1162, 60 Cal. Rptr. 2d 448, 929 P.2d 1239 (1997); see also Miller & Starr California Real Estate 4th § 19:56.

 © 2020 Thomson Reuters

[38]*Johnston v. De La Guerra Properties*, 28 Cal. 2d 394, 400-401, 170 P.2d 5 (1946); see also Miller & Starr California Real Estate 4th § 19:50.

[39]*Bisetti v. United Refrigeration Corp.*, 174 Cal. App. 3d 643, 648, 220 Cal. Rptr. 209 (2d Dist. 1985).

© 2020 Thomson Reuters