

Employer Liability for “Take-Home” COVID-19

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Abstract: Workplace exposure to SARS-CoV-2 has sickened workers and, subsequently, their family members. Family members might be able to recover from the employer in a negligence action using “take-home” liability theory.

The coronavirus pandemic has exacted a devastating toll from Americans in death, illness, economic hardship, and intangible damage to our social fabric and quality of life. As with other aspects of contemporary life, however, suffering caused by the pandemic has not been distributed equally across society. People with preexisting health conditions, older people, members of racial and ethnic minorities, and those with hazardous jobs have borne a disproportionate share of the burden.

One broad class of employees, “essential workers,” includes those who work in emergency services, health care, meat and poultry processing, agriculture and food service, utilities, energy, and transportation. These employees are often low-paid, unable to work from home, inadequately protected against workplace hazards, and among the most devastated by the pandemic. For example, as of January 2021, more than 45,000 workers in meatpacking plants had tested positive for COVID-19, and at least 239 had died.¹ As of February 2021, 405,302 hospital and nursing

home staff had been infected at work, with 1420 deaths.²

The highly transmissible nature of SARS-CoV-2, including the infectiousness of asymptomatic³ and presymptomatic⁴ individuals, means that family members of infected workers are also at risk. According to one estimate, between 56.7 and 74.3 million adults at an increased health risk for COVID-19 (based on CDC criteria) lived with or were themselves essential workers.⁵ According to another estimate, between 7% and 9% of the first 200,000 deaths from COVID-19 resulted when an individual became infected on the job and then transmitted the virus to a family member.⁶

Workers who become infected in the course of their work are eligible for workers’ compensation benefits if they can establish the employment-based source of their illness and other key elements of a workers’ compensation claim. However, they are generally barred from recovery in personal injury cases because workers’ compensation laws in every state are the “exclusive remedy” of employees who become ill or injured on the job.⁷ Family members later infected by workers are not eligible for workers’ compensation because they were not harmed in the course of employment, but they may not be barred from proceeding with a common law personal injury case. We are aware of only one pending case involving COVID-19 filed by a family member of a worker exposed on the job,⁸ and there is no established legal precedent on whether recovery is possible in such a case. Nevertheless, infected family members of workers desperately needing income replacement for living and medical expenses during the pandemic are likely to seek compen-

About This Column

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sation from the employers of their family members.⁹

Take-Home Liability

Lawsuits by family members who become ill after their family member is exposed on the job are known as “take-home” liability cases. The paradigmatic application of this theory is liability for take-home exposure to asbestos.¹⁰ Employees who worked with asbestos in manufacturing, construction, shipbuilding, automotive, and other industries have worn their asbestos-contaminated clothing home where their spouses, children, and other family members were exposed during laundering of the clothing or in other ways, such as by wearing the contaminated clothing while playing with their children.¹¹ The take-home theory was developed to provide a remedy for the deaths and significant illnesses caused by this secondary exposure to workplace asbestos.

Among the most important reasons for recognizing take-home liability for asbestos exposure are the following: (1) asbestos has been widely used in numerous workplaces, and it has resulted in hundreds of thousands of deaths;¹² (2) asbestosis and mesothelioma are serious respiratory diseases caused solely by asbestos exposure,¹³ thereby making it easier to prove causation; (3) an OSHA standard in effect since 1972 explicitly recognizes the risk of take-home exposure and requires employers with certain asbestos exposures to provide protective clothing and change rooms to prevent employees from wearing home and laundering their asbestos-contaminated clothing;¹⁴ and (4) asbestos is a product, which permits family members or their estates to sue using strict products liability law rather than having to prove the negligence of the employer.¹⁵

Personal injury litigation based on asbestos exposure has been ongoing for decades and take-home cases use a novel legal theory to provide a remedy for individuals otherwise unable to obtain compensation for their illness. Unsurprisingly, the states differ on whether to permit these actions. As of 2021, 16 states hold that a

duty exists,¹⁶ or potentially exists,¹⁷ running from the employer to their employees’ family members, thereby permitting a legal action based on negligence. In contrast, 13 states hold that no duty exists because the harm is not foreseeable¹⁸ or there is no significant relationship between the exposed family member and the employer.¹⁹ Two states have enacted legislation barring take-home actions,²⁰ and the remaining 19 states have not yet addressed the issue.²¹

Legal Theories for COVID-19 Liability

Unlike exposure to asbestos, products liability is not a viable legal theory for take-home exposure to SARS-

Courts are unlikely to apply strict liability to COVID-19, even though it is a deadly and highly contagious disease. In the leading case of *Doe v. Johnson*,²³ the plaintiff alleged that the defendant wrongfully transmitted HIV to her through consensual sexual intercourse. The district court judge, applying Michigan law, held that there was no precedent for extending strict liability to this case. The court’s opinion emphasized that Michigan cases limited strict liability to such hazards as blasting and storing inflammable liquids, the risks of a sexually transmitted infection could be reduced by the exercise of reasonable care, and sexual activity is not an inherently dangerous activity.²⁴

Unlike exposure to asbestos, products liability is not a viable legal theory for take-home exposure to SARS-CoV-2 because the coronavirus is not a “product.” Nevertheless, personal injury actions based on strict liability or, more likely, negligence are possible for harms caused by take-home exposure.

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Strict Liability

Strict liability is imposed without regard to a defendant’s negligence or intent to cause harm when the actions of the defendant cause physical harm to the plaintiff. Strict liability only applies to “abnormally dangerous activities” involving a foreseeable and highly significant risk of physical harm even when reasonable care is exercised, and the activity is not one of common usage.²² Strict liability has been imposed for blasting, wild or abnormally dangerous animals, storage of hazardous waste, radioactive emissions, and similar dangerous activities.

Negligence

Plaintiffs bringing lawsuits for negligence are required to prove that the defendant breached a duty to the plaintiff, which caused the plaintiff to suffer damages. Each of these four traditional elements: duty, breach, causation, and damages, raises distinct issues in the context of take-home exposure cases against employers for COVID-19.

Duty. The essence of a personal injury lawsuit based on negligence is that the defendant breached a duty to the plaintiff by failing to exercise reasonable care under all the circumstances.²⁵ In take-home exposure cases, the defendant-employer is alleged to have breached a duty to their employee’s family member -- an individual without an employment relationship with the employer, in a setting beyond the workplace, and involving a person whose identity or

even existence might not have been known to the defendant. Thus, the initial question is whether an employee's family member is a foreseeable plaintiff to whom the employer owed a legal duty.

In the leading case of *Kesner v. Superior Court*,²⁶ Johnny Blaine Kesner, Jr.'s uncle, George Kesner, an employee of Pneumo Abex, LLC, was exposed to high levels of asbestos in the course of his work. Johnny Kesner stayed at his uncle's home about three days per week for six years and alleged that he was exposed to asbestos through dust on his uncle's clothing, and that this exposure caused him to contract peritoneal mesothelioma, from which he died.²⁷ The Supreme Court of California held that employers have a duty to prevent the secondary exposure to asbestos of their employees' family members, and take-home exposure via the employees' bodies and clothing was foreseeable.

In the context of COVID-19, the plaintiff would have to prove that inadequate protections in the workplace and the transmissibility of SARS-CoV-2 made it foreseeable that employees exposed on the job would infect their family members. Because SARS-CoV-2 could be spread to numerous other potential plaintiffs besides family members, defendants would likely raise the possibility of unlimited liability as a reason to reject any take-home liability. The court in *Kesner* specifically addressed this issue by holding that an employer's duty only extends to the members of a worker's household. "By drawing the line at members of a household, we limit potential plaintiffs to an identifiable category of persons who, as a class, are most likely to have suffered a legitimate, compensable harm."²⁸

Breach. The next step is to determine whether the defendant breached the applicable standard of care. Testimonial and documentary evidence of OSHA violations established through enforcement or adjudication are inadmissible in a personal injury case as evidence of the employer's negligence,²⁹ but applicable OSHA

standards are generally admissible as evidence of the standard of care.³⁰ OSHA standards may be admissible even where the plaintiff was not an employee, such as the driver of an automobile, a visitor touring the workplace, or a safety inspector.³¹ Thus, OSHA standards, including those requiring employers to supply necessary personal protective equipment, would seem to be admissible in take-home liability cases to prove the duty owed to the employee and the employee's foreseeable family members. There are no cases on whether OSHA guidance documents are admissible, and this issue is important because during the Trump Administration there were no federal OSHA standards promulgated for COVID-19, only non-mandatory guidance documents.³²

The admissibility of an OSHA standard in personal injury litigation depends on the state common law used in negligence cases. In 33 states, an employer's failure to comply with an applicable OSHA standard constitutes "some evidence" of negligence.³³ The evidentiary effect of "some evidence" of negligence within these jurisdictions varies. The evidence may give rise to an inference of negligence, establish prima facie negligence, or create a rebuttable presumption of negligence.³⁴ In 14 states and the District of Columbia, non-compliance with an applicable OSHA standard establishes negligence per se.³⁵ The effect of negligence per se is to establish a breach of the relevant duty, but a plaintiff is still required to prove causation and damages, and the defendant may assert any defenses.³⁶ OSHA standards are generally inadmissible in three states,³⁷ but they might be admissible under certain circumstances.³⁸

Causation. For liability to be imposed, the negligent conduct of the defendant must be a factual cause of the harm sustained by the plaintiff.³⁹ With take-home exposure cases there are two parts to causation. First, the negligence of the employer must be a cause of the employee's infection. Because SARS-CoV-2 is so prevalent in the community it might be

asserted that the employee could have been infected in other ways, such as in public places, on public transportation, or at public or private gatherings. Second, the family member's infection must have been caused by exposure to the infected employee. Here again, the family member also could have been infected by exposure to other individuals.

Causation is more problematic for take-home COVID-19 than asbestos disease because coronavirus exposures are more common, and in more settings, than asbestos exposures. Nevertheless, the law does not require the plaintiff to prove the exact sequence of the parties' exposures.⁴⁰ "And whether the defendant's negligence consists of the violation of some statutory safety regulation, or the breach of a plain common law duty of care, the court can scarcely overlook the fact that the injury which has in fact occurred is precisely the sort of thing that proper care on the part of the defendant would be intended to prevent, and accordingly allow a certain liberality to the jury in drawing its conclusion."⁴¹ Public policy concerns, including "moral blame, preventing future harm, burden, and availability of insurance"⁴² also might be considered in deciding whether causation will be satisfied.

Damages. The final element of a plaintiff's take-home exposure case is the least difficult conceptually. The plaintiff must prove that the defendant's negligence resulted in a legally recognized harm. In take-home asbestos cases courts have applied traditional principles of tort damages, although many of the appellate cases have been decided on the issue of whether the jurisdiction recognizes the actionability of such claims rather than the permissible damages.⁴³ Take-home COVID-19 cases almost certainly would be brought by employees' family members who became seriously ill or their estates in the event of death. Successful plaintiffs should be able to recover a range of compensatory damages, including lost income, medical expenses, and pain and suffering. Punitive damages also might be recoverable under

state common law if the employer's conduct was willful, wanton, or evidenced a reckless disregard for the rights of the employees or their family members.⁴⁴

Policy Issues

In considering the viability of take-home exposure cases it is essential to consider the broader issues of OSHA enforcement efforts to prevent COVID-19, workers' compensation cases brought by infected workers, and legislation at the state or federal level to immunize employers from liability for COVID-19. On all three issues, workers — many of whom have been deemed essential — have been left to bear an outsized burden of illness and financial ruin caused by the pandemic.

OSHA Protections

By any measure, the federal Occupational Safety and Health Administration (OSHA) failed in its efforts to protect workers during the first year of the pandemic.⁴⁵ Six months into the pandemic, despite receiving nearly 10,000 complaints from employees,⁴⁶ OSHA had cited only 85 employers with a total of \$1.2 million in penalties.⁴⁷ For example, OSHA assessed civil penalties of merely \$15,615 to meatpackers JBS Foods, Inc., of Greeley, Colorado, and \$13,494 to Smithfield Packaged Meats of Sioux Falls, South Dakota, after a total of 1,000 workers at those facilities contracted COVID-19, resulting in 94 hospitalizations and 10 deaths.⁴⁸ It is unlikely that these paltry penalties assessed by OSHA, which are being contested by the companies, will have a deterrent effect because both meatpackers are multi-billion dollar enterprises.⁴⁹

Although the prompt issuance of an emergency OSHA standard prescribing employer duties to prevent exposure to SARS-CoV-2 likely would have reduced viral transmission,⁵⁰ during the Trump Administration, OSHA declined to promulgate such a standard.⁵¹ The guidance documents for employers issued by OSHA⁵² and the CDC⁵³ during this time were mere suggestions or recommendations. Among other things, employers were

advised to “encourage” sick employees to stay home, “consider” conducting daily health checks, and “encourage” workers to wear a cloth face covering. There was no requirement that employers adopt these policies nor require their employees to follow them. Only OSHA has the regulatory authority to mandate compliance, and despite thousands of deaths from COVID-19 attributable to workplace exposures, OSHA failed to undertake emergency rulemaking or vigorous enforcement.⁵⁴

Workers' Compensation

Employees who become ill from occupational exposures are usually entitled to workers' compensation pursuant to state law. If the illness is an “ordinary disease of life,” however, then the employee must prove that the disease was caused by workplace exposures. In some jurisdictions, the courts are reluctant to award compensation for occupational illnesses, even though the general rule is that if employees develop diseases from a relatively sudden and unexpected exposure to germs, it is compensable.⁵⁵ Some employers have contested the workers' compensation claims for COVID-19, thereby adding financial insult to serious illness for vulnerable workers and their families.⁵⁶

To ease the burden of proof for employees sickened on the job by COVID-19, legislative enactments in eight states and executive orders and regulatory policies in nine others make it easier for workers to obtain compensation.⁵⁷ Although the state laws vary, they most commonly establish a rebuttable presumption that COVID-19 by a health care worker or first responder is the result of occupational exposure.

Immunity

Contrary to the laws making it easier for employees to obtain workers' compensation benefits for COVID-19, at least 13 states have enacted laws immunizing most or all businesses from personal injury liability for COVID-19 claims.⁵⁸ Similar proposals have been introduced in Congress, principally by Republicans in the United States Senate.⁵⁹ The rea-

soning behind the legislation is that many businesses have been so weakened financially by the pandemic that they could not afford to remain open or reopen if they were subject to liability for COVID-19 or had to purchase expensive liability insurance.

The liability issue promises to be debated vigorously in Congress and state legislatures for the foreseeable future. One possibility for balancing the interests of employees and employers is for liability protection to be available for only small employers (defined by business volume or number of employees). Claims brought against small employers would be paid by a government financed insurance system, thereby permitting timely compensation for the victims of COVID-19 without threatening the solvency of small employers.⁶⁰

Conclusion

Inadequately protected and underpaid essential workers and their families have suffered disproportionately in the pandemic. Their struggle to survive medically and financially often was overlooked by the public in the political wrangling over wearing masks and other public health measures versus asserted economic and personal liberty. CDC guidelines indicate that contact tracing, testing, and quarantine pending test results should be implemented for individuals with a total of 15 minutes exposure within six feet of all laboratory-confirmed or probable SARS-CoV-2-infected individuals.⁶¹ Based on these guidelines, it is foreseeable that many family members of workers exposed to SARS-CoV-2 have been placed at a high risk of infection.

Justice demands fair compensation for the health effects and financial consequences sustained by the family members of exposed workers. Equally important is the deterrent effect of potential tort liability on employers whose obligations to their workers were in the recent past — and possibly in the future — minimized by lax OSHA enforcement and limited workers' compensation awards. If concerns about the possibility of damage awards for their workers' ill or deceased family members moti-

vates some recalcitrant employers to improve working conditions, then take-home liability lawsuits will be responsible for saving lives.

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Note

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9. *Id.*
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17. *Hoffman v. Ketchikan Pulp Co.*, 2019 WL 3937413 (Wash. Ct. App. 2019) (applying Alaska law); *Edwards v. ABB, Inc.*, 2019 WL 1422990 (Ark. Cir. Ct. 2019); *Mestas v. Air & Liquid Systems Corp.*, 2019 WL 1253683 (D. Colo. 2019); *Reed v. 3M Co.*, 2015 WL 4380102 (Conn. Super. Ct. 2015); *Heuvel v. Albany International Corp.*, 2014 WL 4654947 (Mo. Cir. Ct. 2014); *Nichols v. Allis Chalmers Product Liability Trust*, 2018 WL 1900256 (R.I. Super. 2018). These cases include lower state court decisions, denials of motions to dismiss, and dispositions other than a definitive statement from the state's highest court.
18. *Martin v. Cincinnati Gas & Electric Co.*, 561 F.3d 439 (6th Cir. 2009) (applying Ky. law); *Dube v. Pittsburgh Corning*, 870 F.2d 790 (5th Cir. 1989) (applying Maine law); *Carel v. Fibreboard Corp.*, 74 F.3d 1248 (10th Cir. 1996) (applying Okla. law); *Gillen v. Boeing Co.*, 40 F. Supp.3d 534 (E.D. Pa. 2014); *Exxon Mobil Corp. v. Altimore*, 256 S.W.3d 415 (Tex. Ct. App. 2008).
19. *Quiroz v. ALCOA, Inc.*, 416 P.3d 824 (Ariz. 2018); *Certainfeed Corp. v. Fletcher*, 794 S.E.2d 641 (Ga. 2016); *Simpkins v. CSX Transportation, Inc.*, 965 N.E.2d 1092 (Ill. 2012); *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Ia. 2009); *Georgia Pacific, LLC v. Farrar*, 69 A.3d 1028 (Md. 2013); *Miller v. Ford Motor Co.*, 740 N.W.2d 206 (Mich. 2007); *Holdampf v. A.C. & S., Inc.*, 840 N.E.2d 115 (N.Y. 2005); *Palmer v. Quebec, Inc.*, 874 N.W.2d 303 (N.D. 2016).
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25. *Id.* at § 3.
26. 384 P.3d 283 (Cal. 2016).
27. In a companion case, *Haver v. BNSF Railway Co.*, Lynn Haver's surviving children brought a wrongful death and survival action in which they alleged that her mesothelioma resulted from take-home exposures of her former husband.
28. *Kesner*, 384 P.3d at 301.
29. OSHA violations do not require the negligence of the employer and therefore cannot be evidence of negligence.
30. M.A. Rothstein, *supra* note 7, at 800-801.
31. *Id.* at 802.
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33. M.A. Rothstein, *supra* note 7, at 804-810.
34. *Id.* at 805.
35. *Id.* at 806-807.
36. American Law Institute, Restatement (Third) of the Law of Torts § 15 (2010).
37. M.A. Rothstein, *supra* note 7, at 810.
38. See, e.g., *Deyoe v. Clark Equipment Co.*, 655 P.2d 1333 (Ariz. Ct. App. 1982) (OSHA standard admissible by defendant in products liability action).
39. American Law Institute, Restatement (Third) of the Law of Torts § 26 (2010).

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42. *Kesner*, 384 P.3d at 292-293, citing *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).
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56. See J. Fortin, "Battle for Compensation with Colorado Meat Plant" *New York Times*, October 8, 2020, at A10 (describing employer opposition to workers' compensation claims filed by employees of meatpacking plants).
57. See Ogletree Deakins, *Orders and Other Authority or Guidance to Provide Workers' Compensation (WC) Coverage for COVID-19* (Nov. 23, 2020), available at <<https://ogletree.com/app/uploads/covid-19/COVID-19-Workers-Compensation-Coverage.pdf?Version=12>> (last visited Nov. 25, 2020).
58. Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Tennessee, Utah, and Wyoming. Other states have adopted more limited laws or executive orders, such as prohibiting liability claims against health care providers or suppliers of personal protective equipment. Governor Tom Wolf of Pennsylvania vetoed legislation. In his veto message he stated: "Shielding entities from liability in such a broad fashion as provided under this bill invites the potential for carelessness and disregard for public safety." See C. Marr, "Coronavirus Liability Shield Vetoed by Pennsylvania Governor," *Bloomberg Law News*, Nov. 30, 2020, available at <<https://www.bloomberglaw.com/exp/eyJjdHh0IjoiQ1ZOVyIsImklIjoiMDAwMDAxNzUtZDZmYy1kYzdkLWFmZjUtZmZmZmE4ZjkwMDAyIiwic2lnIjoiM-VgxK3J3cldvNzN2Rm5zQzlpZldlLk1JnPSIsInRpbWUiOiIxNjA1OD-k5OTIzIiwidXVpZCI6IjNXcEVwVWxpQmlKSzQ4eJlJS0dIdkE9PStoTUx-4OFZVUXBjRnB5MnZlYzAvdUE9P-SIsInYiOiIxIn0%3D&qid=7014858>> (last visited Dec. 1, 2020).
59. The Republican party has introduced tort reform legislation called the SAFE TO WORK Act into every Senate bill on COVID-19 relief, available at <<https://news.bloomberglaw.com/daily-labor-report/employers-get-major-protections-in-gop-liability-shield-bill>> (last visited Nov. 17, 2020). The bill would immunize employers from lawsuits if the employer made a "good faith effort" to follow government guidance to stop the spread of COVID-19. The liability shield is extremely broad, and Democrats have called the provisions a "non-starter." *Id.*
60. Workers and their families would not be worse off under a government-funded administrative payment system than a tort system because plaintiffs would be unlikely to obtain any recovery from insolvent small businesses.
61. Centers for Disease Control and Prevention, Contact Tracing for COVID-19 (revised Oct. 21, 2020), available at <<https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/contact-tracing.html>> (last visited Oct. 29, 2020).