

COVID-19 and Contractor Liability

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

Jef Fagan, NECA General Counsel

Employee and workplace safety should be the top concern for contractors during the COVID-19 pandemic. However, every business has justifiable concerns with employer liability as it makes decisions for moving on with operations.

Any contractor can be sued for anything, by anyone, at any time. That statement was true before, is true during, and it will be true after the COVID-19 pandemic. But keep in mind that there must be some underlying fraud, negligence or wrongdoing to actually impose *liability* on a contractor. This alert details some best practices to avoid such liability.

Stay current and aligned with updated guidance and directives on COVID-19

- Make sure your business is compliant with federal, state and local directives on **essential** operations, stay at home orders and mandatory quarantines. Stay open for business only when authorized under the law.
- Stay updated on the best disease health and safety guidance from the World Health Organization (WHO), the Centers for Diseases Control (CDC) and the Occupational and Safety Health Act (OSHA).
- NECA's resource center is constantly updated with the latest guidance and directives for our contractors. We even have a state by state essential services chart for updates on closure orders.
- Compliance with the latest guidance and requirements will be your best defense in the face of claims for liability and damages.

Develop a COVID-19 safety and workplace policy

- It is critical for your company to have a temporary policy to address safety, telework, leave, and other workplace issues related to COVID-19. Written and consistent communication with your employees will provide some level of protection from liability for willful misconduct and negligence.
- Bargain over these matters with the union as required under the CBA, and consistent with your management rights, and always make sure that safety is in the front seat and driving the bus.

Insurance and contracts

- Establish frequent communications with your insurance representative(s). Develop an understanding of your general liability, workers' compensation and specialty coverages.
- Read your construction contracts and analyze gaps in your protections against exposure to claims.
- Comply with all insurance and contractual notice provisions as events require and unfold.

Workers' Compensation

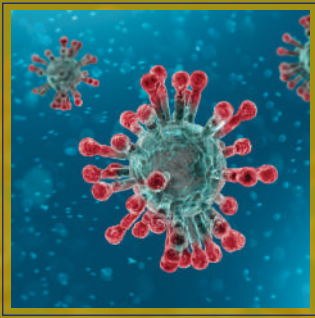
- Is coronavirus compensable under workers' compensation? The answer to that question is "maybe." While workers' compensation laws are state specific, they



3 Bethesda Metro Center
Suite 1100
Bethesda, MD 20814

301-657-3110 • www.necanet.org

published 4/7/2020



typically provide compensation for “occupational diseases” that arise out of and in the course of employment, but many state statutes exclude “ordinary diseases of life” (e.g., the common cold or flu). There are occupational groups that arguably would have a higher probability for exposure such as healthcare workers. The Department of Labor’s (DOL’s) statement on claims under the Federal Employee’s Compensation Act is instructive in this regard. DOL acknowledges that it is difficult to determine the precise moment and method of virus transmission. Therefore, when an employee claims FECA benefits due to COVID-19, federal workers who are required to have in-person and close proximity interactions with the public on a frequent basis - such as members of law enforcement, first responders, and front-line medical and public health personnel - will be considered to be in high-risk employment, thereby triggering the application of Chapter 2-0805-6 of the FECA Procedure Manual. In such cases, there is an implicit recognition that a higher likelihood exists of infection due to high-risk employment. Federal workers in such positions routinely encounter situations that may lead to infection by contact with sneezes, droplet infection, bodily secretions, and surfaces on which the COVID-19 virus may reside. Therefore, the employment-related incidence of COVID-19 is more likely to occur among members of law enforcement, first responders and front-line medical and public health personnel, and among those whose employment causes them to come into direct and frequent in-person and close proximity contact with the public.

- For liability outside of the workers’ compensation process for occupational diseases, there is a concept in workers’ compensation known as the “Comp Bar”, which means that workers’ compensation is typically the sole remedy for injuries that are deemed compensable and incident to the workplace in the absence of intentional conduct or gross negligence on the part of the employer. These determinations are made at the state level, so competent legal counsel should be involved.
- There are very limited exceptions to worker’s compensation exclusivity (the Comp Bar). For example, in California, if the employer engages in conduct that exceeds the inherent risk in the employment relationship or violates public policy, the employee may be able to sue the employer in a civil lawsuit. The behavior would likely have to be egregious to meet this standard.

OSHA Requirements and Guidance

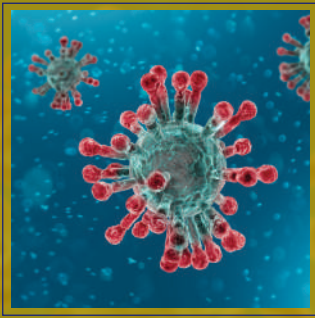
- The Occupational and Safety Health Act’s “general duty clause” requires employers to furnish “a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm.” In its guidance on coronavirus released last month, which is updated frequently, OSHA advises employers that existing OSHA standards apply to protecting workers from exposure and infection. The guidance also includes a number of steps employers should take to reduce employees’ risk of exposure to COVID-19, such as developing an infectious disease preparedness plan and policies and procedures for prompt identification and isolation of sick people. Presumably, OSHA would view failure to follow that guidance as a violation of the general duty clause. NECA links to the OSHA guidance on its resource center.
- According to current guidance, COVID-19 is a recordable illness (to OSHA) if the employee’s case (a) is a confirmed case; **(b) is work-related (the employee was infected as a result of performing their work-related duties)**; and (c) meets one of the recording criteria (death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness, or involves a significant injury or illness diagnosed by a healthcare provider). Most em-



3 Bethesda Metro Center
Suite 1100

Bethesda, MD 20814

301-657-3110 • www.necanet.org



ployers with 10 or fewer employees, or in low risk industries identified by OSHA, are exempt from these recordkeeping requirements, unless instructed otherwise by the government. All employers are required to report work-related deaths within eight hours, and work-related in-patient hospitalizations that involve care or treatment within 24 hours.

- » The construction trades are actively seeking clarification from OSHA on the recordable illness standard as it relates to COVID-19. It is practically impossible for a contractor to know where COVID-19 occurred and whether it is work-related. NECA will continue to monitor guidance on this issue.

If you receive a claim or a complaint related to COVID-19, immediately follow all notice requirements and consult local legal representation.

Stay safe.

This material is for informational purposes only. The material is general and is not intended to be legal advice. It should not be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, applicable CBAs, prime contracts, subcontracts, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.



3 Bethesda Metro Center
Suite 1100

Bethesda, MD 20814

301-657-3110 • www.necanet.org