

# Liability For Employees' COVID-19 Exposure Is Hard To Gauge

By **Brodie Butland**

As COVID-19 cases continue to mount nationwide, so have lawsuits relating to fallout from the virus. On April 6, in one of the first COVID-19-related lawsuits of its kind, the estate of an Illinois Walmart Supercenter employee sued Wal-Mart Stores Inc. and the premises owner for wrongful death in *Toney Evans v. Walmart Inc. et al.*, in the Circuit Court of Cook County, Illinois.

Between the historic COVID-19 pandemic and the highly fact-specific issues involved in the Evans case and similar cases expected to follow, COVID-19 workplace exposure cases represent a perfect storm — raising legal issues that are easy to describe, but difficult to apply.

Among other things, the courts will wrestle with how to define an employer's duty in the first place; how to determine if an employer violates that duty; how an employee can prove that he contracted COVID-19 at his workplace (as opposed to anywhere else); and whether workers' compensation statutes prohibit these types of lawsuits to begin with.



Brodie Butland

## The Case Background

Wando Evans, who worked at a Walmart Supercenter in Evergreen Park, Illinois, died on March 25 from complications of COVID-19. The complaint alleges that at least one other employee of the same Walmart died four days after Evans, and that management knew that several other employees exhibited signs and symptoms of COVID-19 prior to Evans' and his co-worker's deaths.

The plaintiff sued both Walmart and the owner of the retail shopping center, alleging that Walmart acted negligently and willfully and wantonly by:

- Ignoring employees who notified management that they suffered COVID-19 symptoms, and allowing them to continue working without warning Evans and other employees;
- Not disinfecting the store or providing employees with masks, latex gloves and other personal protective equipment;
- Not implementing or enforcing federal or state government social distancing guidelines;
- Failing to evaluate employees for signs and symptoms of COVID-19, and hiring new employees without evaluating whether they exhibited symptoms of COVID-19; and

- Not following recommendations by the U.S. Center for Disease Control and Prevention, such as developing a disease response plan, implementing infection prevention measures, providing employees with antibacterial soaps and wipes, or developing procedures for prompt identification and isolation of sick people.

The plaintiff also alleged negligence by the owner of the shopping center for:

- Not closing the Walmart Supercenter and adjacent businesses, where it should have known that the high volume retail facility would greatly increase the risk of infection;
- Not inspecting, cleaning or sterilizing the interior or exterior of the Walmart building;
- Failing to impose procedures or guidelines on Walmart and its customers to prevent the spread of COVID-19;
- Not implementing or enforcing federal or state government social distancing guidelines; and
- Failing to follow CDC regulations and guidelines to prevent COVID-19 infection at commercial buildings and premises.

### **The Legal Issues**

Needless to say, the validity of the lawsuit cannot be predicted at this early stage. But it is clear that the case raises significant legal issues, including:

#### ***Is COVID-19 infection covered by the Illinois Workers' Compensation Act?***

One of the initial questions in workplace COVID-19 cases will be whether the plaintiff can bring a lawsuit against his employer in the first place. Illinois, like nearly all states, has established a workers' compensation system that compensates employees for "accidental injuries sustained ... arising out of and in the course of [his] employment."<sup>[1]</sup>

In turn, workers' compensation preempts all common law and statutory claims against the employer aside from narrow exceptions.<sup>[2]</sup> Thus, if an employee suffers accidental injury arising out of and in the course of his employment, the Illinois Workers' Compensation Act is his exclusive remedy.

Because employers can limit their exposure and litigation expenses in workers' compensation proceedings, workers' compensation preemption is likely to become a major issue in COVID-19 workplace exposure cases. As an initial matter, courts must determine whether COVID-19 infection is an injury "arising out of and in the course of employment."

In this case, the plaintiff alleges that Evans contracted COVID-19 while at work, which would seem to bring the claim squarely within the act. That said, disease infection is the result of outside forces, and is not the type of injury normally associated with working at a retail store. Whether COVID-19 infection is sufficiently related to employment to fall under a state's workers' compensation law may be resolved differently among the states.

The plaintiff may be able to proceed with the lawsuit if Evans' death was within the scope of employment and was not accidental. Employees normally have to clear a high bar to show that workplace injuries are not accidental, and the inquiry is highly fact-specific.

In Illinois, for example, a workplace injury is not accidental if an employer directed or authorized it to occur, and willful and wanton actions are generally deemed accidental.[3] Ohio similarly holds that its workers' compensation statutes preempt torts unless an employer acts with a specific intent to cause injury.[4]

To avoid workers' compensation preemption in this case, the plaintiff pleaded that Walmart acted negligently, and also willfully and wantonly. But whether that will be enough is yet to be seen.

### ***How can the plaintiff establish causation?***

COVID-19 is highly contagious, and the nature of COVID-19 transmission (especially asymptomatic transmission) will likely complicate the plaintiff's ability to prove that Evans contracted COVID-19 while working at Walmart, as a result of Walmart's breach of duty.

The challenge of establishing how Evans was infected will be compounded by the difficulty in proving what particular shortcoming by Walmart (or the landlord) caused his infection, and what prophylactic measures could have prevented it.

### ***What is reasonable care in the context of the COVID-19 pandemic?***

Negligence is an absence of reasonable care, and a defendant acts negligently when it fails to act as the reasonable, prudent person would under similar circumstances. Defining "reasonable care" and determining whether it is breached will be difficult under the unprecedented circumstances posed by workplace COVID-19 infections. As just a few examples of complicating factors in this case:

- Walmart, like many other large retailers that sell food and other necessary goods, is an essential business, and closure or overly restrictive operations may not be realistic or socially desirable.
- Federal, state and local directives and recommendations have changed and sometimes have been inconsistent. Further, individuals may have contracted COVID-19 before those directives and recommendations were announced.
- Infection rates differ across the country, and reasonable protective measures for a store may vary with location.
- Some protective measures — such as personal protective equipment — may be prohibitively difficult to procure, in light of supply shortages and greater needs elsewhere, and testing also has been difficult to obtain.
- Spread by asymptomatic individuals complicates defining reasonableness in identifying infected employees and customers and preventing transmission.
- In this case, the plaintiff sued both the landlord and the tenant (Walmart) — but it is unclear where, precisely, the duties of Walmart end and the duties of the landlord begin vis-à-vis a third party.

In short, COVID-19 exposure cases may involve unprecedented difficulties in defining a duty under state law, and in determining whether a business has violated that duty.

## **Conclusion**

The evolving nature of information about COVID-19, and the fact-specific determinations for each workplace, will complicate exposure lawsuits. Businesses would be wise to synthesize information from public health authorities and similarly-situated employers to take reasonable steps to reduce the risk of COVID-19 to their employees and customers.

Although there are no practical magic bullets to prevent all spread of COVID-19, it is safe to assume that businesses defending future exposure lawsuits will be called upon to show that they took the threat seriously and implemented reasonable measures to protect their employees and customers.

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*Brodie Butland is a partner at Porter Wright Morris & Arthur LLP.*

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[1] 820 ILCS 305/11.

[2] 820 ILCS 305/5(a), 305/11.

[3] *Meerbrey v. Marshall Field Co.*, 139 Ill.2d 455, 463-64 (1990); *Lannom v. Kosco*, 158 Ill.2d 535, 541 (1994).

[4] *Houdek v. ThyssenKrupp Mat'ls NA Inc.*, 134 Ohio St.3d 491, 497 (2012).