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Jill Snitcher McQuain, Esq.
Executive Director
jill@cbalaw.org

EDUCATION & EVENTS

2020 Summer Associate Legal Research Seminar
Friday, June 15 • 8 a.m. – 12:30 p.m.

Live Webinar: Introduction to the Ohio Mechanics' Lien Law
Wednesday, June 10 • 12 – 1:30 p.m.
1.5 NLT/CLE Hours

All classes listed are offered at the Columbus Bar Associations offices, 175 S. Third St. Ste. 1100. To register, call 614-221-4112 or enroll online at **www.cbalaw.org.**

WORKPLACE EXPOSURE LAWSUITS: THE NEXT MAJOR COVID-19 BUSINESS THREAT

As COVID-19 cases continue to mount nationwide, so have COVID-19-related lawsuits. On April 6, in one of the first lawsuits of its kind, the estate of an Illinois Walmart employee sued Walmart in Illinois state court for wrongful death. The case is Toney Evans v. Walmart, Inc.

BRODIE BUTLAND
Porter Wright Morris & Arthur LLP

The complaint alleges that at least one other employee died of COVID-19, that management knew "several other employees" exhibited symptoms of COVID-19 but did nothing, and that Walmart did not adequately protect its employees.

More employee exposure lawsuits will likely follow Evans as COVID-19 cases increase nationwide. While such suits will present different facts, they will share certain significant legal issues.

First, is the exposure covered by workers' compensation? In Illinois, workers' compensation provides benefits to employees who are injured "arising out of and in the course of [their] employment," even if their employer did nothing wrong. In turn, workers' compensation is the employees' exclusive remedy, aside from narrow exceptions (such as if the employer committed an intentional tort). Many states, including Ohio, have similar provisions. Plaintiffs seeking to avoid workers' compensation exclusivity will, like the Evans plaintiff, plead intentionally tortious conduct by their employers.

Second, was the employee infected at work? COVID-19 is highly contagious, and the nature of its transmission (especially asymptomatic transmission) creates numerous opportunities to show alternate causation. Where employer fault must also be established, the challenge of proving how an employee was infected will be compounded by the difficulty in proving what particular shortcoming by the employer caused his infection and what prophylactic measures could have prevented it.

Finally, did the employer breach a duty? If Evans or other workplace exposure claims belong in court, the employee will need to show that his employer's breach of duty caused his COVID-19 infection. Defining that duty and its breach may be difficult under these unprecedented circumstances. For example:

- Some employers, like Walmart, are essential businesses, and closure or overly restrictive operations may not have been realistic.
- Governmental directives and recommendations have evolved and sometimes been inconsistent.
- Infection rates differ nationwide, and reasonable protective measures may vary with location.
- Some protective measures—such as PPE or testing—may be prohibitively difficult due to supply shortages.
- Spread by asymptomatic individuals complicates identifying infected employees and customers and preventing transmission.

The Evans case illustrates the significant legal questions COVID-19 exposure cases pose for employers. Businesses therefore would be wise to synthesize information from public health authorities and similarly-situated employers, take reasonable precautions in a COVID-19 world, and document those efforts. The Illinois court hearing Evans has set the matter for a case management conference for June 3. Stay tuned—this is a case worth watching.

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EMPLOYEE PRONOUNS: TWO KEY (AND DEVELOPING) LEGAL ISSUES

More employers are calling with questions about a team member's chosen pronouns. These situations typically raise two legal issues.

BILL NOLAN
Barnes & Thornburg LLP

Failure to respect pronoun choice could create an unlawful hostile environment.

Assume for a moment that discrimination on the basis of gender identity or expression is unlawful. Think creepy boss sexual harassment as an analogy. If sufficiently severe, that is gender discrimination in the terms and conditions of employment. The same could be true of a persistent refusal to respect pronoun choices.

About that assumption though: Discrimination on the basis of gender expression or identity is not always prohibited. The U.S. Supreme Court any day will issue decisions answering that question under Title VII. Almost half of the states (not Ohio) and many municipalities (including Columbus) prohibit such discrimination.

Also, it seems clear that refusal to respect pronoun choice will need to be "severe and pervasive" in order to be actionable. This has proven to be a high standard for harassment claims. Milo v. Cybercore Technologies illustrates the severe and pervasive point in a case brought by a transitioning employee.

The employer may need to reasonably accommodate other employees' religious beliefs.

Under Title VII, employers must "reasonably accommodate" an employee's religious beliefs. A colleague may maintain that respecting a pronoun choice will violate their religious beliefs.

It is unlikely Title VII would give this employee a complete pass – especially in a jurisdiction where doing so subjects the employer to a hostile environment claim.

However, the employer should not summarily dismiss such concerns. In Brennan v. Deluxe Corp., the Court allowed a religious accommodation claim to proceed where the company seemingly did not take such concerns seriously and discuss a possible accommodation.

Lawyers need to keep a close eye on courts and legislatures as this develops.