

First Employee Lawsuit Filed Seeking to Avoid the Workers' Compensation Exclusivity Bar for COVID-19-Related Injuries

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Among the many issues employers are struggling with in the midst of the current COVID-19 crisis is the risk of harm to an essential employee who is compelled to report to work. While, of course, most employers are proactively taking measures to minimize an employee's risk of contracting the virus, there is a risk of exposure and illness inherent in coming to work.

In a potential preview of future litigation, on April 6, one of the nation's first wrongful death actions arising from COVID-19 was filed in Cook County, Illinois. In *Toney Evans, Special Administrator of the Estate of Wando Evans v. Walmart, Inc., et al.*, No. 2020L003938, the estate of a deceased Walmart employee has alleged that the decedent contracted COVID-19 while working for defendant Walmart and that Walmart committed "willful and wanton misconduct" by failing to implement proper workplace safety measures in response to the pandemic. Among other things, the estate alleges that Walmart owed all of its employees a duty of reasonable care "in keeping the store in a safe and healthy environment" and that Walmart should have taken all of the preventive measures recommended by the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA), including more frequent store cleanings and sterilizations, strict social distancing guidelines, and the provision of personal protective equipment (PPE) such as masks,

gloves, and hand sanitizer. According to the plaintiff, "As a direct and proximate cause of [Walmart's alleged failure to take those steps], the decedent was infected by COVID-19 and ultimately died"

Ordinarily, when an employee is injured on the job, his or her claim for damages is funneled through the workers' compensation system. That system, the nuances of which vary from state to state, functions on a quid pro quo of sorts; it guarantees the employee (or his or her estate) some manner of recovery for the injury while at the same time precluding the employee from bringing a direct claim for damages against the employer. The preclusive effect of the workers' compensation system is sometimes referred to as the "exclusivity bar," and it generally establishes the workers' compensation system as an employee's sole source of recovery. Unsurprisingly, however, there are exceptions. When satisfied, those exceptions will allow the employee (or the estate) to pursue both a claim for workers' compensation and a direct claim for damages against the employer.

In the recent Illinois litigation, the deceased Walmart employee's estate is attempting to avoid the exclusivity bar by alleging that Walmart acted willfully, wantonly, and recklessly by failing to implement proper health and safety measures. Although it is not explicit in the face of the complaint, this appears to be designed to

invoke a classic exception to the exclusivity bar: the intentional-wrong exception. The standard for meeting that exception varies by state.

In New Jersey, for example, the New Jersey Supreme Court held that the intentional-wrong exception requires an employee to satisfy a two-part conduct and context test. The employee must first establish that there was a "substantial certainty" that injury or death would occur as a result of the employer's conduct, and the employee must then establish that the circumstances under which the injury or death arose were not an ordinary fact of industrial life, i.e., they were "plainly beyond anything the legislature could have contemplated as entitling the employee to recover under only the [Workers'] Compensation Act." *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 177-79 (1985). In New York, on the other hand, the test turns more on the employer's actual intent to harm, requiring the employee to demonstrate conduct "engaged in with the desire to bring about the consequences of the act." *Acevedo v. Consolidated Edison Co. of N.Y., Inc.*, 596 N.Y.S. 2d 68, 70-71 (First Dep't 1993). Thus, in *Acevedo*, for instance, where an employee was injured after being dispatched without protective gear to a site containing asbestos, his direct claim against the employer was dismissed because "[w]hile the conduct alleged might rise to the level of gross negligence, it cannot be said to meet the necessary threshold of willful intent to harm the particular employee . . ." *Id.* at 71 (citing *Ross v. State of N.Y.*, 187 N.Y.S. 2d 13 (Third Dep't 1959)).

It remains to be seen whether the estate of the Walmart employee will be successful in advancing this argument. Undoubtedly, however, the Illinois litigation is the first of many lawsuits likely to be filed for injuries or deaths caused by COVID-19. For other essential businesses, there may be proactive steps to take to try to stem the tide and, more importantly, to protect their employees as much as possible.

For example, employers may consider regular screening of all employees, particularly of any potential new hires. On the less-onerous end, such screenings could involve employee questionnaires concerning any symptoms the employee is experiencing, with whom the employee has been in contact, whether any contacts have experienced symptoms or have themselves been in contact with someone

who has contracted COVID-19, etc. On the more-protective end, the Equal Employment Opportunity Commission and the CDC have authorized daily readings of employees' temperatures before they enter the workplace. Rigorous daily cleaning and sterilization routines also should be implemented, employees should be trained on social distancing guidelines and personal hygiene, acrylic shields should be installed to distance cashiers from customers, and employees should be required to wear PPE, including face masks and gloves. Finally, if it becomes apparent that any employee has contracted COVID-19 (or even has been in contact with someone who has contracted COVID-19), immediate steps should be taken to remove that employee from the workplace.

This list of suggested measures is not intended to be exhaustive, and the information distributed by governmental authorities such as the CDC and OSHA should be consulted regularly. Nevertheless, under the extraordinary circumstances posed by this pandemic, if employers take these steps and any other reasonable and necessary measures designed to protect their employees, they can minimize their risk of a direct claim for damages such as the lawsuit recently filed against Walmart in Illinois.

To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/ COVID-19: Facts, Insights & Resources page of our website by clicking [here](#).

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