

Employer not liable for take-home COVID-19

By Dan Eaton

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Is an employer liable where an employee catches COVID-19 at work due to employer negligence and infects a household member? In *Kuciemba v. Victory Woodworks, Inc.*, the California Supreme Court recently answered that question no because a different answer would have placed an intolerable burden on employers and society.

Background

In May 2020, Robert Kuciemba started working at a construction site in San Francisco for Victory Woodworks. Kuciemba claimed he became infected with COVID-19 when he was exposed to workers Victory Woodworks had transferred from another site at which Victory Woodworks had not taken the precautions mandated by San Francisco's health order. Kuciemba's wife, Corby, allegedly contracted COVID-19 through Robert's clothes and personal effects.

Corby Kuciemba sued Victory Woodworks, alleging the company's negligent failure to take county-mandated steps to prevent the spread of the coronavirus at Robert's workplace caused her to contract COVID-19. Victory Woodworks asserted its duty to provide a safe workplace did not include protecting nonemployees who contracted COVID-19 away from the jobsite.

The employer's duty of care

The California Supreme Court acknowledged that California law generally imposes a duty to take "ordinary care and skill" in the management of one's property and thereby extends liability to those injured by failure to discharge that duty. But that duty may be excused for compelling public policy reasons. "[A]lthough the transmission of COVID-19 to household members is a foreseeable consequence of an employer's failure to take adequate precautions against the virus in the workplace, policy considerations ultimately require an exception to the general duty of care in this context."

The court applied five public policy factors to determine whether to impose a duty on employers to their employees' household members to prevent the transmission of the coronavirus in the workplace and thereby impose liability on employers when they fail to do so.

Why an employer isn't liable for spread of workplace-contracted COVID-19 to household members

The most important public policy factor was the extent of the burden recognizing such a duty of care would impose on the employer and on the community. That factor, said the court, weighed decisively against making employers liable to employees' household members for COVID-19 infections allegedly due to employers' failure to follow COVID-19 prevention mandates.



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“While employers may already be required to implement health and safety protocols to protect their employees from COVID-19 infections, concluding they owe a duty to the household members of employees has the potential to alter employers’ behavior in ways that are harmful to society. Because it is impossible to eliminate the risk of infection, even with perfect implementation of best practices, the prospect of liability for infections outside the workplace could encourage employers to adopt precautions that slow the delivery of essential services to the public.”

The court contrasted this case with its 2016 ruling authorizing plaintiffs who contracted mesothelioma due to their family members’ work with asbestos to sue their family members’ employers.

Liability for take-home asbestos exposure, said the court, potentially extended only to companies that used asbestos in the workplace. The duty potentially extended only to household members exposed to asbestos from an employee’s clothing who then developed mesothelioma, a rare disease even in those exposed to asbestos.

By contrast, all California employers could be liable for inadequate safeguards against the spread of the coronavirus, with a pool of plaintiffs, even limiting it to employees’ household members, numbering millions of Californians. The court quoted a recent Wisconsin federal court ruling: “Ultimately, the limited transmissibility of asbestos provides a natural curb on the pool of potential plaintiffs. With COVID-19, by contrast, the pool of potential plaintiffs isn’t a pool at all – it’s an ocean.”

Inevitably, said the court, imposing a duty on employers to prevent COVID-19 in household members would trigger a “litigation explosion,” which would significantly burden the courts and ultimately the community.

Employers that disregard COVID-19 safety rules face fines, workers’ comp claims

Employers must nonetheless remain vigilant. Employers face hefty fines if they violate Cal-OSHA COVID-19 prevention rules in effect until February 3, 2025. And, until January 1, 2024, employees who contract COVID-19 while working at a workplace that has a COVID-19 outbreak for an employer with at least five employees are rebuttably presumed to have contracted the illness at work for workers’ compensation purposes.

There has been a recent uptick in COVID-19 cases. We’re all still in this together.

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