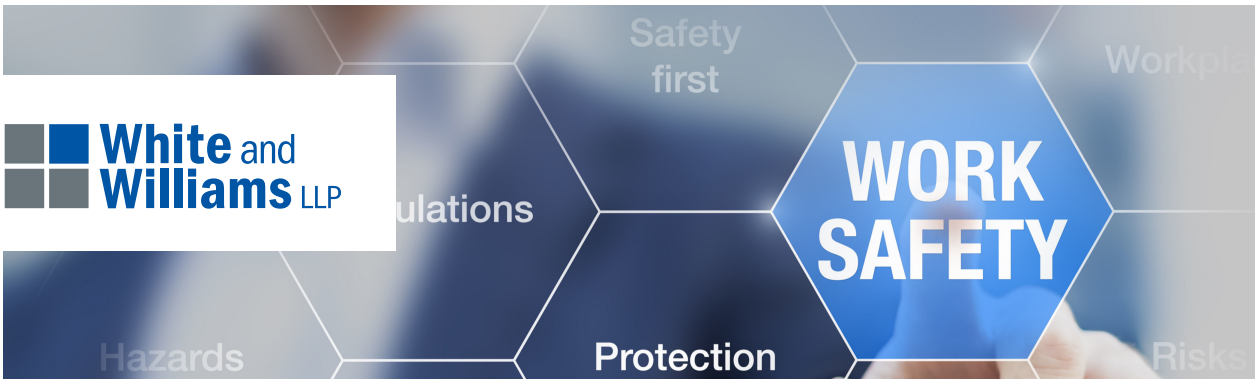

Workers Compensation Act Exclusivity Likely Bars Most Employee COVID-19 Claims

Workers' Compensation Alert **| May 1, 2020**

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In the coming weeks, workers are expected to return to the workforce, consequentially, with an increased potential for COVID-19 exposure. Infections manifesting with symptoms *after* the employee returns to work will likely result in the employee seeking workers compensation benefits, as well as in certain circumstances, a third-party claim for personal injury. Workers' compensation acts in most states include exclusivity provisions which typically apply to bar the third-party claim unless an exception attaches. As claims brought by workers or invitees related to COVID-19 bodily injury claims are brought, the courts (and potentially state legislatures) must determine the scope of these limited exceptions, typically for intentional acts of the employer, to permit the third-party claim to go forward.

Workers experiencing a COVID-19-type injury have an avenue available under the various workers' compensation act schemes applicable in most states to collect a scheduled benefit upon a showing that the virus exposure was work-related. In fact, states are already contemplating reducing or eliminating the need for the employee to prove causation, essentially any nexus between the exposure in the workforce and the COVID-19 illness. Precisely because workers' compensation act schemes typically schedule benefits, oftentimes at a level below what the employee could potentially recover in a third-party liability action, the exceptions to the exclusivity provision of the workers compensation act will likely be fertile ground for the attempt to recover damages at a level beyond the scheduled benefit.

The workers compensation scheme affords the employee a certain benefit with a relaxed standard of proof necessary to collect a wage reimbursement and medical benefit for work-related injuries. The "bargain" is that the employee receives a certain defined benefit in an insurance system outside the litigation arena. In exchange for being compelled to pay legislatively mandated workers compensation benefits, the employer is immune from suit, subject to limited exceptions. The pandemic will test the threshold of the "intentional act" exception to immunity. Some states already have statutory exceptions for certain deleterious agents, like asbestos, which shows some legislatures and courts have an appetite to reduce the strength of the bar.

Most recently filed COVID-19-based lawsuits filed by supply-chain and other service-industry employees directed against their employers have attempted to shoehorn themselves into the intentional-act exception to the employer's immunity. However, the workers compensation exclusivity rule is still likely to bar most employee COVID-19 claims against employers so long as employers protect against any of their field practices being considered reckless or intentional.

Typically a creature of state law, there are variations between the states with respect to the interpretation of the intentional-act exception, if it exists at all. Pennsylvania, for example, has a narrow intentional act exception, and it is truly a high bar. Case law recognizing the application of the intentional act exception in Pennsylvania demonstrates that the act of the employer must effectively not be work-related and rise truly to the level of an intentional wrong, such as a

fraudulent misrepresentation or an intentional physical assault for personal reasons. See *Martin v. Lancaster Battery Co.*, 606 A.2d 444, 448 (Pa. 1992) (recognizing exception where employee was seeking compensation from employer not for work-related injury but for "aggravation" of work-related injury caused by employer's intentional misrepresentation of blood test results); *Kohler v. McCrory Stores*, 615 A.2d 27, 31 (Pa. 1992) ("[I]n order to set forth a valid cause of action against an employer, an employee must assert that his injuries are not work-related because he was injured by a co-worker for purely personal reasons."); and *Poyser v. Newman & Co.*, 522 A.2d 548, 551 (Pa. 1987) (declining to recognize a broad intentional-act exception).

In New York, the exception is also narrow, requiring that the employer fully intended to cause the injury that is sued upon. For example, in *Martinkowski v. Carborundum Company/Electro-Minerals Division*, 437 N.Y.S.2d 237, 238 (Sup. Ct. 1981), the employer willfully violated OSHA regulations requiring the installation of carbon-monoxide detectors and an employee died of carbon-monoxide asphyxiation. The court held that the employer was nonetheless immune from a civil suit because there was no support for "the proposition that their failure was designed with the purpose of causing plaintiff's decedent injuries or with knowledge to substantial certainty that such injuries would ensue." Id. By contrast, in *De Coigne v. Ludlum Steel Company*, 297 N.Y.S. 636, 641 (N.Y. App. Div. 3rd Dept. 1937), there was no bar to suit. There, the employee fell ill after his employer poisoned the employee's food. Id. The court found the act to be a willful and intentional wrong that was not an accident covered by the workers compensation scheme. Id. Obviously, that sort of willful misconduct is not a likely scenario for most employers.

New Jersey courts, on the other hand, have broadened the intentional wrong exception. While the statute itself speaks of an "intentional wrong," N.J.S.A. 34:15-8, on the part of the employer to sidestep the immunity, the Supreme Court of New Jersey allows the employee to demonstrate through circumstantial evidence a "substantial certainty" of injury. Such will rise to the level of an "intentional wrong." Case law developing this exception has largely been in the factory and construction setting, such as where the employer removes guards on equipment to enhance production or fails to provide safety equipment specific to recognized risks, for example, shoring up trenching.

In *Laidlow v. Hariton Machine Company*, 790 A.2d 884, 887 (N.J. 2002), the employee's hand was severely injured upon being caught in a rolling mill without a safety guard. The record revealed prior complaints about the missing guard and similar close calls in which gloves were pulled into the machine. Id. at 897. More importantly, the employer had systematically and deliberately deceived government safety inspectors by installing the safety guard while inspectors were onsite, but removing it otherwise to speed production. Id. at 897-98. The court held that the intentional-wrong exception applied because the totality of the facts could support a jury finding that "it was substantially certain that the removal of the safety guard would result eventually in injury." Id at 898.

By contrast, in *Van Dunk v. Reckson Associates Realty*, 45 A.3d 965, 967-68 (N.J. 2012), in a moment of frustration, a supervisor told an employee to go into a twenty-foot trench without a protective system to prevent cave-ins for a quick job, and the trench wall soon collapsed on the employee. The employee argued that the employer deliberately disregarded OSHA regulations regarding protective systems. Id. at 970. However, the court concluded that even under this fact pattern, the employer was shielded by the workers-compensation immunity because there was no "objectively reasonable basis for concluding that the violation of safety protocol was substantially certain to lead to injury or death during the few minutes." Id. at 979. The "possibility" of a cave-in was not enough. Id.

COVID-19 employee suits have asserted a variety of claims in an effort to come within the intentional act exception. Employees have alleged intentional failure to follow and enforce CDC guidelines regarding social distancing, customer headcount, symptomatic employees and hygiene protocols. The latter includes use of antibacterial soap, frequent hand washing and use of masks or other personal protective equipment (PPE), such as face masks. OSHA has published back-to-work guidelines which will likely be the standards, if allegedly violated, to set the table for an intentional act exception argument.

It remains to be seen whether courts will continue to apply the relatively high bar to come within the intentional-act exception as demonstrated by the above fact patterns. Employers are well-advised to maintain a policy consistent with OSHA back-to-work guidelines. Employers are well-advised to maintain a strict COVID-19 response policy to maintain a safe workplace and to adhere to the OSHA back-to-work guidelines. Employee counsel will certainly analogize the failure to provide PPE as akin to the failure to have a safety guard on a piece of industrial equipment in an effort, at least under New Jersey law, to create a triable issue of fact that the employer created a "substantial certainty" of harm. But, keep in mind that the employee must further prove that the employer's conduct was "so far outside the bounds of industrial life as never to be contemplated for inclusion in the Act's exclusivity bar." *Van Dunk*, 45 A.3d at 980.

The immunity and intentional act exception also apply to acts committed by co-employees, including actions by supervisors and managers. In other words, a co-employee, supervisor or manager that intentionally wrongs her co-worker or subordinate such as willfully failing to execute the employer's COVID-19 guidelines, loses the immunity otherwise afforded by workers' compensation acts. Absent management or supervisory participation, the employer is unlikely to lose its immunity. However, note that in New York, an employer can still be liable for contribution or indemnity where a third party, such as a co-employee or subcontractor, is sued for wrongdoing that causes "grave injury" to an employee, which could include a COVID-19 related death. N.Y. Workers' Comp. Law §11.

A scenario that may amount to an intentional wrong could be the employee appearing for work after testing positive for COVID-19, failing to inform his co-workers and infecting the workplace. If purposeful, this could rise to the level of an intentional act. Under such circumstances, the co-employee could very well be exposed to liability and not protected by the immunity afforded co-employees for workplace accidents.

As is often the case, a written employer policy providing for a safe workplace will provide some protection from COVID-19 liability. Such a policy will abide by CDC and other government guidelines, require documentation of workplace compliance through supervisor checks, and demand a swift response to any employee COVID-19-related inquiry or complaint.

It is suggested that employers be vigilant to keep up with circumstances in the workplace in conjunction with the relevant guidelines issued by the CDC, OSHA and state and local health authorities. Employers can enact reasonable safety practices and procedures in compliance with the most recently promulgated OSHA guidelines for COVID-19 workplace safety. Regardless, assuming the case law interpreting the various workers' compensation acts stays in place without judicial expansion, employers will have defenses available given the high bar to fit within the intentional act exception. While surely fact specific, at least in past application, most states courts do not allow many intentional act exception claims to survive.

If you have in any inquiries regarding the scope of workers-compensation immunity in connection with COVID-19 workplace safety, contact Robert Devine (deviner@whiteandwilliams.com; 856.317.3647), Sandra Niemotka (niemotkas@whiteandwilliams.com; 215.864.6338) or Douglas Weck (weckd@whiteandwilliams.com; 856.317.3665).

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.