

Employers Beware: Take-Home COVID Cases are on the Rise (US)

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You've just been informed that an employee who apparently contracted COVID-19 from exposure in your workplace brought the virus home, and now his spouse, who is in a high-risk category, has contracted the virus and is in the hospital. Do you as the employer face potential liability for the spouse's illness?

More than two dozen so-called "take-home" COVID-19 lawsuits have been filed across the country, including against some of the largest employers in the US. This alarming pattern has prompted trade groups to warn employers of the potential for lawsuits stemming from COVID infections filed not only by workers' family and friends but by anyone infected by that circle of people, creating a seemingly endless chain of liability for employers. Some states have enacted laws shielding employers from such suits, but where that is not the case, the legal theories and procedural paths under which these suits have proceeded vary – including some being brought in state courts, some in federal courts, and others brought under claims within the worker's compensation system.

The issue is currently being tested in California, where the US Court of Appeals for the Ninth Circuit recently certified questions to the California Supreme Court seeking guidance on the state's laws. The case, [*Kuciemba v. Victory Woodworks, Inc.*](#), arose after Mr. Kuciemba allegedly was exposed to COVID-19 through his work at one of his employer's job sites. According to the Kuciembas, Victory knowingly transferred workers from an infected construction site to the job site where Mr. Kuciemba was assigned without following the safety procedures required by the San Francisco Health Order. He was forced to work in close contact with these employees, and soon developed COVID-19, which he brought back home. His wife is over 65 years old and was at high risk from COVID-19, and the family had been careful to limit their exposure to the virus, with the exception of Mr. Kuciemba going to work. Mrs. Kuciemba subsequently tested positive for the disease and was hospitalized for over a month after developing severe symptoms. The Kuciembas filed suit, alleging that Victory caused Mrs. Kuciemba's injuries by violating the Health Orders, and negligently allowed COVID-19 to spread from its worksite into their household.

The lower court dismissed the case, which was then appealed to the federal appeals court. After hearing the argument, the court asked the California Supreme Court to answer two questions of state

law. First, whether Mrs. Kuciemba's illness was an "injury" that was "derivative" of Mr. Kuciemba's work-related injury, and therefore, Mrs. Kuciemba's claims would be subject to the exclusive jurisdiction of the Worker's Compensation Act ("WCA"); and second, assuming that the WCA is not the exclusive remedy, whether the employer owed a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19. Neither question has been squarely answered by the California Supreme Court, although, as noted by the federal appeals court, in a somewhat analogous situation, California courts have allowed suits against employers who negligently allowed their employees to carry asbestos fibers home to their families.

While the *Kuciemba* case was pending, a California Court of Appeal in another case, [*See's Candies v. Superior Court*](#), ruled that the derivative injury doctrine does not bar third-party COVID-related claims. Under a similar fact pattern, the court allowed the negligence case to go forward while noting that the plaintiff would still need to prove that the employer owed a duty of care to non-employees infected with COVID-19 due to an employee contracting the virus at work. Acknowledging that an analysis of this duty "appear[s] worthy of exploration," the state appellate court said the analysis would include an assessment of "public policy concerns that might support excluding certain kinds of plaintiffs or injuries from relief." The California Supreme Court declined to review the *See's* case, meaning that it's holding still stands.

The California Supreme Court has not yet announced whether it will use its discretion to respond to the Ninth Circuit's certified questions in the Kuciembas' case. In the meantime, California employers cannot automatically rely on the exclusive remedial scheme provided under the worker's compensation system to cover these claims and are not necessarily shielded from COVID-19 lawsuits brought by employees' family members (and perhaps others). That said, even if employers owe their employees' families a duty of care, affected employees will still have to prove that it was the employer's negligence that caused the illness and that the virus was not contracted from another source – a tall order for a highly transmissible virus like COVID-19. In the meantime, however, it behooves all California employers to continue maintaining health and safety measures to prevent the spread of COVID-19, and react quickly and appropriately in the event of an outbreak of COVID-19 in the workplace.

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