While the “right” time to open the economy is hotly debated, many states have made the decision that it is time to get back to business. That means that businesses will be opening while there is still a continuing risk of COVID-19 exposure. As long as the risk of exposure remains, businesses face potential liability when they allow customers, vendors, and other parties to enter their premises and engage with their employees.

Unfortunately, this increased risk of liability is unavoidable and will be assumed at a time when the filing of lawsuits is at an all-time high. And yet, the risk of not opening, given the attendant economic hardship, may be an even greater than the risk of a lawsuit. Because of this economic reality, there is no doubt that most businesses will accept the liability risk as a cost of doing business. While
politicians are mulling over the possibility of granting business owners immunity from COVID-19 claims, business owners should, in the meantime, understand the types of claims that might be asserted and be aware of steps that can be taken to reduce the potential liability.

**Potential Claims by Customers, Vendors, and Other Third Parties:**

1. **Premise Liability Statutes**

Most states have premises liability statutes that create liability for the owners or those in possession of real property. Duties under premises liability statues differ based on the reason someone is present on the property, with the greatest duties being owed to “invitees” which includes customers. Premises liability statutes can create duties to make your property reasonably safe for customers, vendors and others who you allow to enter your business. These statutes may also create duties to warn about hazardous conditions and duties to inspect for hidden dangers. In the context of COVID-19, premises liability claims could be asserted if business owners fail to properly protect their visitors from COVID-19 exposure, fail to properly warn about risks such as those created if an employee has been infected, or fail to take steps to identify those who might have contracted COVID-19 who pose a risk to other visitors.

2. **Negligence-based Claims**

Negligence claims can also be asserted when a business owner owes a duty and breaches the standard of care. Negligence claims can arise where a business owner puts a visitor at risk or fails to act reasonably when the risk of harm was reasonably foreseeable. There are also claims for negligent hiring if a business owner hires an individual who poses a risk to another person. Also, a business owner can be subject to claims for negligent infliction of emotional distress if someone suffers a physical injury or threat of harm and was in what the law calls the “zone of danger.” These negligence-based claims could be asserted if a customer comes in contact with an infected employee or if a business owner fails to take reasonable steps to protect visitors from exposure to COVID-19.

3. **Medical Monitoring**

In situations where people are exposed to toxic substances or pathogens, claims can be asserted for the expense of future medical monitoring to determine if such exposure results in physical harm down the road. Claims seeking funds for future medical monitoring might be asserted by persons who allege that they were exposed to COVID-19 as a result of visiting a business if it is later determined that one or more of the employees was infected with COVID-19. Medical monitoring claims are difficult to assert and the fact that COVID-19 has a short incubation period may raise questions about their viability, but the still unknown long-term impact could be enough for the claim to proceed.

4. **State Consumer Protections Acts and Claims for Misleading Advertising**
Many businesses are already advertising the steps that they are taking to keep their customers safe and reduce the risk of exposure to COVID-19 while customers are on the premises. These advertisements open business owners up to potential claims for misleading, incomplete, imprecise, and false advertising claims. Claims can be made not only if the advertising is factually inaccurate, but if the advertising makes implications that are untrue. Thus, if a business is advertising that it is taking certain precautions to protect customers, care must be taken to be factually accurate as to what steps will occur, but also avoid assertions that the advertising implies a guaranty that there is no risk of exposure.

5. Misrepresentation Claims

Common law claims for misrepresentation can also be asserted where a business makes statements verbally or in writing that are inaccurate and upon which others rely. Misrepresentation claims can be based on advertisements, posted signs, verbal communications, contractual agreements, and other statement made in the course of conducting business. Misrepresentation claims could arise from statements made by businesses about the steps being taken to reduce the risk of exposure to COVID-19, statements regarding the risk associated with interacting with the business, or statements about the risk of exposure from a business’ products.

Steps that Business Owners Should Take to Minimize the Liability Risk:

- **Know the scope of your insurance coverage.** For your business interruption claim you were largely focused on your property policy. Now you need to be focused on your liability policies as those are the policies that would respond if a claim is filed against you by a customer or others who visit your business. Liability policies may have virus exclusions or other limitations on coverage such as exclusions for intentional conduct, injury that is expected or intended, or liability that is assumed by contract. Most liability policies have coverage that is titled “personal and advertising injury,” but that coverage is generally quite limited and even in the absence of a virus exclusion, it is difficult to get meaningful coverage for liability related to advertising or claims under consumer protection laws.

- **Follow guidance.** Be sure that you are following Federal, State, County, and City guidance on conducting business during this time. Many government orders are requiring social distancing, opening at reduced capacity, and taking steps to identify and track infected employees. The government rules will likely be evidence of the standard of care required and will set a floor for the steps that business owners should follow to avoid liability. Further, violation of government regulations can result in citations which, not surprisingly, are often use as evidence in subsequent lawsuits. Also, be sure that you are following applicable guidelines from the CDC and OSHA for minimizing the risk of exposure. Like government orders, this regulatory guidance may be used to establish the minimum standard of care for business owners.

- **Training is important.** Be sure that any employees who interact with
customers are trained about your COVID-19 policies and procedures, how to respond to questions asked by those who visit your business, and know when questions should be escalated to management. The training that you provide to your employees can become an issue if a claim is filed against. Also, prior to the filing of a claim, there is often a point when the visitor will ask questions of your employees. The answers to those questions are often documented and can be important. Responding well to customer complaints can assist you in the defense of a lawsuit and providing inaccurate information can increase liability.

- **Don’t oversell.** Do not overstate the steps you are taking in your advertisements, in your social media posts, or in posted signs and be sure that your employees accurately answer questions about what you are doing to limit the risk of COVID-19 exposure. Statements of fact – those that can be proven to be true or false – provide greater clarity to customers but also pose a higher risk in misrepresentation and false advertising claims. When in doubt, use more aspirational or qualified statements.

- **Follow through.** Actually do what you say you are going to do, do it consistently, and do it accurately. For example, if you state that your employees will be wearing gloves, you must be sure that your employees do in fact wear gloves. And if you advise that you are limiting the number of people who can enter your business be sure that you have a method to assure compliance with that representation.

- **Review indemnification obligations and understand if those obligations are insured.** Be sure to review key contracts and liability obligations that third parties, such as vendors, testing companies, cleaners, and marketing agencies, have to you. Understand your third-party partners’ insurance as well. If you are relying on them to indemnify you for potential claims, you need to be sure that they have the appropriate coverage for the risks. Also, be sure to review the liability and indemnification obligations you have to others such as those to whom you supply products. Be aware that companies with whom you conduct business may increase those obligations in the wake of COVID-19. Be on the look-out for changed contractual agreements, purchase orders, or terms of service. If you have indemnification obligations make sure that you have the appropriate coverage for that risk. Often times, the coverage provided for indemnification obligations is less than the coverage that you have if a claim is asserted directly against you.

While there has been discussion at the Federal level about granting immunity to businesses for claims that they exposed someone to COVID-19, at this time there is disagreement regarding the scope of any such immunity which could minimize the impact or delay enactment. As a result, businesses looking at re-opening now must proceed with thoughtful, educated caution in an effort to mitigate risk.

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