

# CRAIN'S DETROIT BUSINESS

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## On the hook for COVID? Following protocols is best defense against employee liabilities

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Special to Crain's Detroit Business

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Employers battling through everything from supply chain issues to communication challenges face another COVID-19-related worry: the legal risk of bringing workers back to the office.

Brian Smith

Can employees — or guests, such as contractors and customers — hold a company accountable if they believe they were infected with coronavirus at a company location?

"A lot of employers are pretty concerned," said Brian Smith, a member with law firm Dykema's Bloomfield Hills office. "A lot of plaintiffs' attorneys are very opportunistic, and they look for a way to create liability — if you don't follow the protocols."

Those procedures, created by the U.S. Centers for Disease Control and Prevention, and in Michigan, by Gov. Gretchen Whitmer's office through executive orders, represent the playbook for companies hoping to avoid lawsuits or fines as laws to offer protection wind their way through the legislative process.

"That's really going to be (companies') best line of defense," said Scott Eldridge, senior principal and managing director with law firm Miller Canfield in Detroit. "If a business is substantially complying with those, they're going to be in a relatively safe position to defend against any claim of COVID exposure by anybody."

The Michigan Occupational Safety and Health Administration recently [cited and fined](#) 19 businesses for failure to uphold COVID-19 safety and health guidelines in the workplace.

Fines ranged from \$400-\$7,000. That followed a first batch of [six businesses cited](#) for similar violations.

Many of the requirements for Michigan businesses are spelled out in [Executive Order 2020-175](#), which requires them to develop a COVID-19 preparedness and response plan and train workers to follow safety rules. Training must cover:

- workplace infection control procedures
- use of personal protection equipment
- notification procedures for suspected COVID-19 cases
- social distancing requirements
- daily screening protocols
- business travel restrictions

"In my law firm, we've implemented stations at every door where there is hand sanitizer," Smith said, providing one example of ways businesses can combat the coronavirus and liability.

Companies also have been doing temperature screenings and handing out personal protection equipment including masks and gloves. Some employers are asking workers to fill out forms stating whether they've been in contact with known COVID-19 patients.

Businesses seeking to protect themselves also should engage in at least minimal contact tracing with infected employees, Smith said. The idea is to establish whether an employee or visitor picked up the virus at a company site vs. somewhere else, such as a grocery store.

"Ask them where else they've been," he suggested. "Ask them if they've flown or traveled. It's incumbent on employers to screen and do some tracing."

Workers trying to sue an employer for coronavirus exposure would face an uphill battle, attorneys say. But that doesn't mean people won't try.

Workers' compensation claims are the mechanism by which employees typically address injury complaints against employers. Mounting workers' comp claims bring added expense to businesses.

"Insurance premiums are driven by claims," said Mike Burns, executive vice president of the Livonia-based American Society of Employers, which represents 750 members, primarily in

Michigan. "It's not something employers can step around."

In terms of litigation exposure, visitors seem to be a source of greater concern, he said. Contractors, for example, can't make workers' compensation claims. "(Companies) have guests, visitors and customers that — if they haven't already invited — are going to be coming in, and (those employers) need to be responsible," Burns said.

Mike Burns

"Employers better be prepared — I'm sure there will be more activity to come," said Burns, adding that none of his members have mentioned regulator inspections. "Our members are very on top of this."

One potential problem for employers is employees ignoring company safety rules, he said. Workers might, for example, refuse to wear masks when meeting with customers. In that case, employers likely would face legal exposure only if they didn't make a reasonable attempt to correct that behavior, Eldridge said.

"The executive orders require you to enforce them," he said.

One thing working in businesses' favor would be the difficulty plaintiffs would face in proving they contracted the coronavirus at a work site.

"In all likelihood, that person is probably exposed to others, going to the grocery store and the pharmacy," Eldridge said.

Another wrinkle: Employers implementing COVID-19 protocols in the office need to avoid creation of hardships for workers with disabilities, Eldridge said. Companies still must comply with the Americans with Disabilities Act.

Scott Eldridge

"We're going to see an uptick, I think, in disability claims," he said. "Employers are going to have to consider accommodating workers."

Workers who can't wear masks because of breathing difficulty, for example, may need dispensation, he said. An employee considered critical for on-site availability may need to work remotely anyway.

"Once an employer identifies a health condition, I'm advising employers to have a conversation with that employee," said Daniel Villaire, an attorney with Howard & Howard in Royal Oak. "Accommodations can include leave from work. They may be asking for additional time off or, sometimes, we're looking at remote work."

Villaire recalled one case in which an employer allowed a critical worker with disabilities to work on-site during off hours, when other workers weren't around.

"Is there something we can do to modify the workspace, adjust schedules?" he asked. "It could be a shield, moving people around, altering work schedules."

Villaire said he sees a shift in the mindsets of laid-off employees, who had been collecting extra unemployment dollars under the federal stimulus act before its expiration.

"Now that the extra unemployment has run out, employees are much more motivated to come back to work," he said.

In one case, an employee who tested positive for COVID and then recovered hoped to return to work, he said. The worker's employer wouldn't allow it, because that person still was testing positive.

"Are we putting our other employees at risk when this employee is still testing positive?" he asked.

State and federal government officials have proposed legal reforms to give employers added protection from COVID-related liability.

"It sounds like there's a lot of bills being proposed, a lot of discussion, but it doesn't seem to be going anywhere," Villaire said. "The governor's position has been: Existing laws protect employers."

Two Michigan bills — HB 6031 and HB 6101 — would amend the Michigan Occupational Safety and Health Act to establish immunity for employers if COVID exposure occurred while they were acting within state and federal health guidelines. Both [passed the House last week](#) and will likely be taken up in the Senate this week.

Republicans in Washington, D.C., including President Donald Trump, have been trying to tie liability protections to the next stimulus bill. Republicans and Democrats have so far been unable to reach a deal.

Those potential protections aren't weighing heavily on companies' decisions about whether to return to the office, Villaire and Eldridge said.

"Most of the clients I work with are back and operating as they were — with modifications — or may have modified to remote working," Villaire said.

Added Eldridge: "I hear from clients they are hesitant to open in earnest, because complying with the executive orders and OSHA is a lot of work. I've had some clients say, 'We're just not reopening. We'll continue to work from home.' There's a lot of trepidation because things change so fast."

Burns said employers, many now struggling to survive, need added legal protections.

"We think something has to be done," he said. "Employers are doing the best they can. This is unprecedented, and there needs to be relief."

Inline Play

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