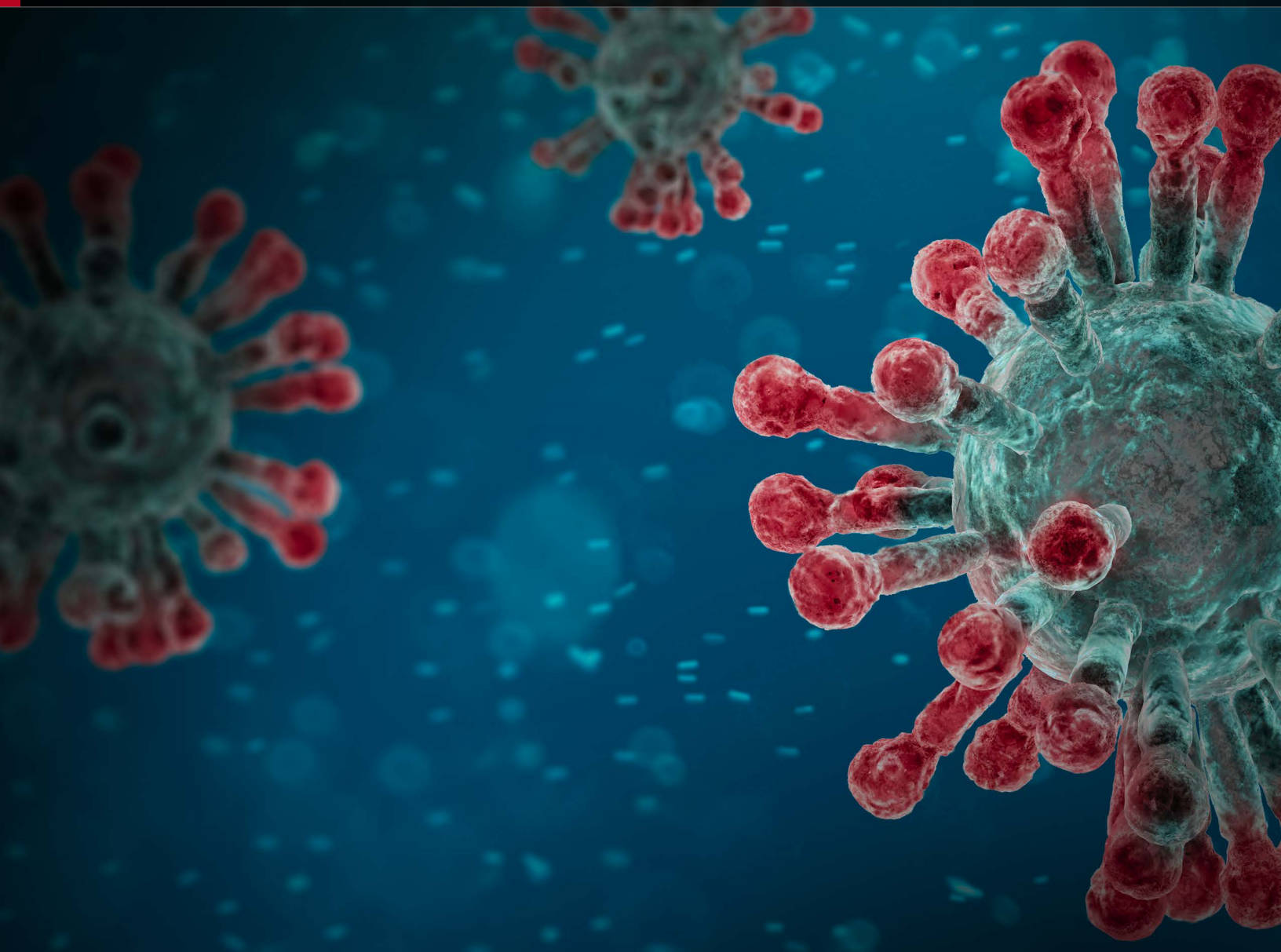
Will there be exponential growth in Texas work injury lawsuits alleging COVID-19 coronavirus exposure?

Perhaps, but employees who file COVID-19 lawsuits against their employers will face an uphill battle.



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Executive Summary

As the world grapples with the COVID-19 coronavirus pandemic, employers face a number of challenges. One of these challenges is keeping employees and customers safe. This is a daunting task, particularly in light of everchanging guidelines from federal, state and local governmental agencies. As the Trump administration issues new guidelines for opening up America, businesses of all shapes and sizes are trying to figure out how to safely operate in this "new normal" and what to expect in the months ahead.

COVID-19 is sure to bring a wave of future litigation on a variety of topics, including contract disputes, insurance coverage, landlord-tenant issues, medical malpractice, labor issues, etc. For Texas employers who do not have workers' compensation, there is a legitimate concern that work injury lawsuits alleging COVID-19 exposure will spike. More than 3,000 complaints have reportedly been filed with the Occupational Safety & Health Administration (OSHA) alleging workers were exposed to COVID-19 in the workplace. This article addresses the risk of future COVID-19 work injury litigation and evaluates the types of legal claims employers are likely to face and the potential viability of such claims under Texas law. At the end of the article, there is a checklist for employers to consider that may reduce their potential liability exposure.

According to recent media reports, a Lowe's employee in Texas died from complications caused by COVID-19 after testing positive for the disease on March 24, 2020. Likewise, an Amazon warehouse employee in California reportedly died from COVID-19 complications. In Illinois, a civil lawsuit was filed against Walmart on April 6, 2020 alleging an employee died after contracting COVID-19 in the workplace. The estate of the deceased employee alleges Walmart was grossly negligent in allegedly failing to properly clean the workplace and provide adequate personal protective equipment (PPE) to workers. Whether the allegations in this lawsuit have any merit remains to be seen. What is clear is employers across the nation are likely to face similar lawsuits in the months ahead as more employees contract COVID-19.

Generally speaking, workers compensation insurance does not cover communicable diseases like COVID-19, unless the worker can demonstrate the virus was contracted during the performance of their job duties. In most cases, it will be very difficult for an employee to prove they contracted COVID-19 at work, particularly in light of the incubation period of the virus and increase in community spread. In Texas, for example, the Department of Health and Human Services has confirmed there "is community spread in Texas" according to a March 19, 2020 disaster declaration. More details on the number of reported, county-by-county Texas COVID-19 cases is available on their website.

There is growing recognition that healthcare workers treating COVID-19 patients and first responders are in a higher risk category and should be covered, in some way, in the event they contract COVID-19 during the performance of their job duties. State legislatures across the country are discussing the issue. Several have already proposed legislation that seeks to clarify and, in some cases, expand coverage for healthcare workers, first responders and potentially other high risk employees. The U.S. Department of Labor has promulgated new procedures and guidelines for federal employees alleging work-related COVID-19 exposure and contraction.

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But, what about the millions of employees who work for other essential businesses that are not healthcare-related or first responders? For example, what about employees of grocery stores, gas stations, home improvement stores, retail stores, transportation & logistics companies, automotive shops, and restaurants, to name a few? Many employers in these industries and others do not subscribe to workers compensation in Texas. Instead, they maintain injury benefit programs, many of which are designated by QCARE.org as a responsible alternative to workers' compensation. These employers operate across a broad spectrum of industries, including healthcare. What should they expect in the coming weeks and months as COVID-19 claims increase and lawsuits are filed? What is their potential civil liability exposure in Texas? Should they expect to see a flurry of lawsuits, like the recent Walmart lawsuit in Illinois, filed by employees alleging they contracted COVID-19 in the workplace? And if so, do these claims have any merit?

First, it is important to distinguish between compensability versus liability in the state of Texas. If an employee in Texas alleges he or she contracted COVID-19 in the course and scope of employment, whether the claim is "compensable" under a nonsubscribing employer's injury benefit program will depend, primarily, on the terms of the employer's program documents. Employers should consult with their legal advisors to answer this question. For example, since COVID-19 appears to be a "disease of life" to which the general public is exposed, the employee would likely need to show they were at a much greater risk due to their employment and provide evidence they contracted COVID-19 in the performance of their job duties.

As some states race to cover COVID-19 as a compensable work injury for high risk workers, the distinction between compensability and liability is important to reiterate. Texas employers who do not subscribe to workers compensation may want to carefully consider whether to provide wage and healthcare benefits under their injury benefit plans to "Very High" and "High" exposure risk (discussed below) employees who contract COVID-19, regardless of potential liability exposure. In fact, doing so may result in fewer lawsuits, as employees who are provided medical treatment and wage replacement benefits are, generally speaking, less litigious. Alternatively, employers and employees may be better served by implementing separate, temporary leave and benefit policies designed specifically for the COVID-19 pandemic. After all, neither the workers' compensation system nor private injury benefit programs were designed for pandemics. Assuming an employer implements temporary policies to provide broad benefits to its entire workforce, it could then properly limit "compensable" work injury claims to those claims where there is clear evidence of causation--i.e., that COVID-19 was contracted in the course and scope of employment.

Regarding liability, in Texas, employers who do not maintain workers compensation insurance are subject to civil lawsuits in the event the employer's negligence proximately caused the employee's injury. By statute, the employer is barred from asserting common law defenses of comparative or contributory negligence, assumption of the risk or co-worker negligence. To prevail in a Texas state-law nonsubscriber case, a plaintiff must prove negligence.[1] A plaintiff must prove a defendant owed the plaintiff a duty, the defendant breached the duty, and the breach proximately caused the plaintiff's damages.[2] In other words, to assert a viable COVID-19 negligence claim, a plaintiff would need to prove his or her employer breached a recognized duty and the plaintiff's resulting damages were proximately caused by such breach.

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1 *See e.g., Werner v. Colwell*, 909 S.W.2d 866, 869 (Tex. 1995).
2 *See Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009).

What duties do Texas employers owe to employees to prevent COVID-19 coronavirus exposure in the workplace?

Under Texas law, employers have a legal duty to provide a safe workplace. In some ways, this duty is similar to the duty a premises owner has to its invitees, such as store customers. An employer also owes additional duties to its workforce to provide safe equipment, proper training and/or adequate assistance, if these things are needed to safely perform the job. Based on our law firm's extensive experience defending work injury claims in Texas, we anticipate plaintiffs will focus primarily on the following two arguments in alleging their employer is liable for their contraction of COVID-19 in the course and scope of their employment:

- The employer failed to provide necessary instrumentalities (i.e., equipment) and/or related training for the employee to safely perform their job duties; and/or
- The employer failed to maintain a safe workplace (i.e., premises) by not correcting an unreasonably dangerous condition or adequately warning the plaintiff about it.

Plaintiffs will almost certainly allege a much longer list of purported negligence claims and attempt, for example, to list COVID-19 guidelines published by the Centers for Disease Control (CDC), OSHA and other agencies and then argue failure to comply with any or all of these guidelines constitutes negligence. According to media reports, the U.S. Department of Labor has so far resisted efforts to mandate CDC or OSHA guidelines. In fact, OSHA issued new guidance on April 16, 2020 that permits compliance officers to consider whether an employer made a "good faith effort" to comply with OSHA standards in light of the COVID-19 pandemic. Keep in mind, however, that while such guidelines - and even formal OSHA regulations - may constitute some evidence of the industry standard of care, they do not presumptively equate to negligence under Texas common law, as discussed in more detail below.

In most cases, the question of whether an employer in Texas can be held civilly liable for an employee contracting COVID-19 at the workplace will turn on one of the two primary theories noted above: (1) failure to provide proper equipment, and/or (2) failure to maintain a safe workplace. We will discuss each of these theories below and give a few examples of how a judge or arbitrator might analyze these issues.

Does an employer's duty to provide necessary equipment include PPE, like face masks or respirators, to protect against COVID-19 exposure?

Nonsubscriber employers have a duty to provide equipment that is reasonably necessary for the safe performance of their employees' jobs.[3] However, employers do not have a duty to provide equipment or assistance that is unnecessary to the job's safe performance.[4] The question of whether a duty exists is a question of law for the court to decide, which means it will not be answered by juries, but rather, by judges and arbitrators.[5]

With regard to a potential COVID-19 work injury lawsuit, a threshold question will be whether the workplace or work duties put the employee at a significantly greater risk of exposure than the general public and, if so, is personal protective equipment now required to safely perform the job duties? For example, relevant questions may include:

- Has there been a known case of COVID-19 in the workplace?
- Is there evidence of significant community spread near the workplace?
- If so, do members of the general public frequently enter the workplace?
- Or, do employees otherwise regularly interact closely with the general public (e.g., by making deliveries)?

In short, a threshold question will be whether personal protective equipment is needed at all. In a workplace that has no known cases of COVID-19 and no community spread of COVID-19, the answer is likely no additional PPE is needed to safely perform one's job duties. The burden will be on the employee to prove equipment is actually needed and, if so, precisely what type of equipment should have been provided.

We anticipate plaintiffs, and employers for that matter, will look to the CDC, OSHA and other regulatory agencies for guidance on what PPE is recommended. For example, OSHA has published Guidance on Preparing Workplaces for COVID-19 which addresses numerous issues, including risk levels for employees based on the nature of their employment and, based on risk level, what PPE may be recommended. It is important to note this document expressly states it "is not a standard or regulation, and it creates no new legal obligations" nor does it alter any existing employer obligations created by OSHA standards. Rather, the guidelines are advisory in nature and intended to assist employers in providing a safe workplace. That is an important distinction, particularly as it relates to potential negligence *per se* claims. Also, it is worth mentioning that many guidelines continue to be updated and changed as this pandemic progresses and expert guidance shifts to new data and advice concerning how to mitigate the spread of this novel coronavirus. In fact, as this article was being drafted, OSHA released new guidance for retailers in OSHA 3996-04 2020 titled

3 *Austin v. Kroger Texas, L.P.*, 465 S.W.3d 193, 215-216 (Tex. 2015).

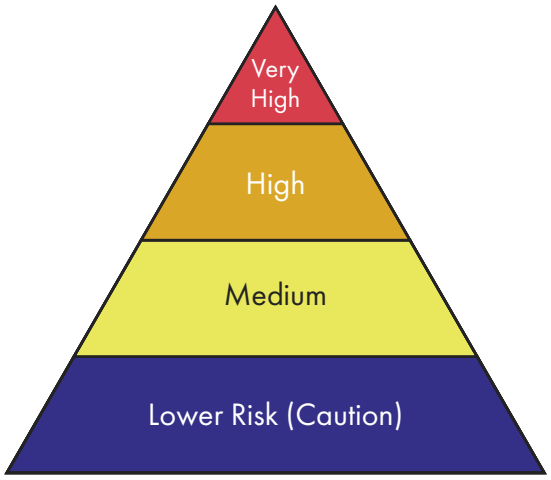
4 *See e.g., The Kroger Co. v. Elwood*, 197 S.W.3d 793, 795 (Tex. 2006); *Allsup's Convenience Stores, Inc. v. Warren*, 934 S.W.2d 433, 438 (Tex. App.—Amarillo 1996, writ denied).

5 *Advance Tire and Wheels, LLC v. Enshikar*, 527 S.W.3d 476, 480 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

"COVID-19 Guidance for Retail Workers" and issued an Interim Enforcement Response Plan that provides instructions and guidance to OSHA compliance officers for handling COVID-19-related complaints. Employers should also monitor orders by state governors, as well as state legislatures, as many are issuing guidelines on a weekly basis and some are purportedly mandating workplace safety protocols.

The OSHA publications linked above should be a resource for all employers as they consider ways to protect their workforce from potential COVID-19 exposure. As it relates to a potential liability claim, the discussion of risk categories, referred to by OSHA as the Occupational Risk Pyramid, depicted below, is interesting. According to OSHA, "[m]ost American workers will likely fall in the lower exposure risk (caution) or medium exposure risk levels."

Occupational Risk Pyramid for COVID-19



Occupational Safety and Health Administration

For specific details on the various exposure risk levels, see OSHA publication 3990-03 2020. In general, the "Very High" and "High" exposure risk level include healthcare workers, medical transport, lab workers and morgue workers exposed to known or suspected COVID-19 patients. The difference between "Very High" and "High" turns on the nature and duration of such exposure.

The "Medium" exposure risk level includes jobs that require frequent and/or "close contact" (i.e., within 6 feet of) with people who may be infected (but are not known/suspected COVID-19 patients) or the general public in areas with ongoing community transmission (a.k.a community spread). For areas with community spread, this appears to include workers who have frequent and/or close contact with the general public in schools, high density work environments, and some high-volume retail settings, according to OSHA.

The "Low" exposure risk level includes jobs that do not require contact with people known to be, or suspected of being, infected nor frequent close contact with the general public.

According to OSHA, "[a]dditional PPE is not recommended for workers in the lower exposure risk group. Workers should continue to use the PPE, if any, that they would ordinarily use for other job tasks."

Notably, at this point federal agencies have not categorized with precision what essential businesses or industries fall into which risk categories. For some, such as healthcare workers, it is a bit more clear. For others, it may depend on whether there has been a confirmed COVID-19 case in the workplace, whether there is community spread, and/or whether the employees' job duties require frequent and/or close contact with others.

Many non-healthcare essential businesses likely fall into the Medium exposure risk category. For this category, OSHA recommends installing physical barriers, such as clear plastic sneeze guards, where feasible and further recommends considering offering face masks to ill employees and ill customers to contain respiratory secretions until they can leave the workplace. The guidance on face masks continues to evolve and, most recently, state and local officials across the nation have started requiring face masks in public.

According to OSHA, some workers in the Medium risk category may need to wear some combination of gloves, a gown, a face mask and/or face shield or goggles. Per OSHA, the type of PPE ensembles needed for Medium risk employees will vary by task, the results of employer hazard assessments and the types of exposures these workers have on the job. According to OSHA, the use of respirators for Medium exposure risk employees would be "rare." (Note: in the event an employer decides to issue respirators, it should strive to implement a comprehensive respiratory protection program in accordance with OSHA Respiratory Protection standards.) Physical distancing measures should also be utilized, as much as possible, to keep employees and customers at least six feet apart (which if implemented and enforced, would arguably put employees in the Low risk category).

For Texas employers considering potential liability exposure, OSHA's risk assessment levels should be considered and analyzed, as different safety guidelines are recommended at each risk level. That said, the guidelines are not entirely clear on precisely what should be done by all essential businesses. According to media reports, companies are implementing varying safety measures to protect workers (and customers) from COVID-19 exposure, see, *e.g.*, "Companies are making their own safety rules as the federal government stands aside." Certainly, many of the nation's leading companies are actively taking steps to protect their employees and customers, including for example Albertsons Companies, Amazon, Home Depot, Lowes, and Walmart. Many of these companies and others are implementing a variety of enhanced safety precautions, including but not limited to:

- physical (a.k.a. social) distancing,
- increased disinfection and sanitization efforts,
- limiting store hours,
- limiting store capacity (i.e., shoppers inside),
- installing "sneeze guard" barriers,
- implementing temperature checks,
- providing disposable masks and gloves, and/or
- implementing one-way aisles.

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Various media reports speculate some of these new safety measures may become the new normal for U.S. retailers. One employer is reportedly testing wristbands that vibrate if physical distancing guidelines are violated and employees come within six feet of each other.

For healthcare employers and others in the Very High or High Risk categories, the recommended safety precautions are more extensive and include numerous engineering controls (e.g., air-handling guidelines, isolation rooms), administrative controls (e.g., enhanced medical monitoring of staff, job-specific COVID-19 training, immediate symptom reporting, etc.) and extensive PPE recommendations. Workers in these risk categories "likely need" to be supplied with gloves, a gown, a face shield or goggles, and either a face mask or respirator (e.g., N-95) depending on their job tasks and related exposure risks. See OSHA publication 3990-03 2020, p. 25. Employees who work closely with actual or suspected COVID-19 should wear respirators. In addition to providing PPE to these workers, other employees who dispose of such PPE (e.g. janitorial staff) should be properly trained and protected. The CDC's website contains additional recommendations for healthcare employers, including a PPE burn rate calculator. The CDC has also promulgated guidelines for what may be higher-risk healthcare facilities, such as long-term care facilities and nursing homes. In light of the shortage of PPE, all employers should be diligent in implementing strategies to optimize PPE use.

In the absence of statutory requirements, industry standards can be very important in establishing what a Texas employer should be providing to its workforce to keep them safe. It is not yet clear whether there is a consensus by industry on what PPE standards and other safety precautions and guidelines should be implemented to protect employees from COVID-19 in the workplace. Of course, all of these guidelines from OSHA and CDC are just that - guidelines. They are helpful in analyzing what personal protective equipment should be considered for Texas employers, but they are not required by law nor should a judge or arbitrator find negligence solely based on an employer's failure to implement one of these guidelines.

Texas law is clear that although an employer has a duty to furnish its employees with safe equipment and instrumentalities to perform their jobs, an employer is not an insurer of its employees' safety. An employer has no duty to provide equipment or assistance that is unnecessary to the job's safe performance. Accordingly, a threshold issue will be whether the equipment was necessary for the job's safe performance. In other words, did the employer owe the employee a duty to provide the equipment? As it relates to COVID-19, the guidelines discussed above, as well as developing industry standards, will provide some indication as to what equipment is reasonably needed to safely perform the task at hand.

We anticipate the question of whether an employer owes a duty to provide certain PPE to protect against COVID-19 exposure will require expert testimony. A key question will be whether there is evidence that a reasonable employer in the industry should have provided

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the PPE at issue.[6] Experts will likely need to analyze and address numerous issues, including efficacy of the PPE, availability of the PPE (at the time of exposure), and whether use of the PPE could have other harmful effects such as providing a false sense of security[7] or an increase to potential exposure (e.g., by increasing face touching). There is no doubt the question of "duty" will be hotly contested in these cases and will vary greatly depending on the industry at issue, task at issue, and the related risk of exposure to the employee. Adequate training on the use of PPE and other equipment (e.g., cleaning materials/chemicals) used to combat COVID-19 will also be an important topic.

For now, employers should remain diligent in monitoring safety guidelines for their respective industries and, to the extent possible, implementing those guidelines and related training as quickly and effectively as possible. Employers should clearly document these efforts, including any unsuccessful efforts to implement guidelines due to a shortage or unavailability of equipment or materials. Employers who are diligent and take reasonable responsive measures to keep their employees and customers safe, including generally following OSHA and CDC guidelines, will be well positioned to defend any negligence lawsuits filed against them.

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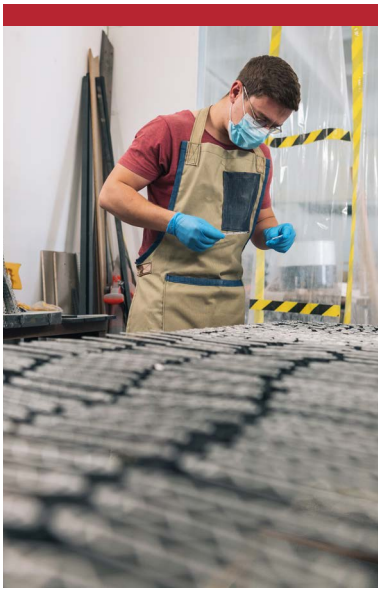
6 While the existence of a duty is a question of law, the plaintiff has an evidentiary burden of proving the facts at issue give rise to a duty. *See, e.g., Allsup's Convenience Stores, Inc. v. Warren*, 934 S.W.2d 433, 438 (Tex. App.—Amarillo 1996, writ denied) (affirming summary judgment because there was no evidence that reasonable employers owed a duty to provide a back belt). Put another way, a plaintiff has the burden to adduce evidence of what a reasonable employer would do in the context of his claims. Warren, 934 S.W.2d. at 438. Before the plaintiff can try to prove breach, he or she must first show facts that give rise to a legal duty. *See also The Kroger Co.*, 197 S.W.3d at 795 (noting there was no evidence to suggest the defendant had or breached its duties to the plaintiff); *Espinoza v. Universal City Animal Hospital*, Cause No. 04-05-00561-CV, 2006 WL 1080253, at *3 (Tex. App.—San Antonio Apr. 26, 2006, no pet.) (noting the plaintiff did not provide sufficient evidence of the factual details showing a duty, breach of that duty, proximate cause, and damages).

7 For example, this issue was previously debated and litigated in connection with the use of back belts and whether they prevent lifting injuries. After years of debate, the National Institute of Occupational Safety and Health ("NIOSH"), a federal body associated with the Centers for Disease Control, ultimately reached the conclusion there was insufficient evidence to recommend the use of back belts as a back injury prevention measure. In fact, NIOSH went on to state that it was "concerned with the potentially harmful effects associated with a false sense of security that may accompany back belt use."

Does an employer's failure to provide PPE mean the employer is liable if an employee contracts COVID-19?



Even if a plaintiff who contracted COVID-19 is able to establish that his or her employer owed a duty to provide proper equipment to protect against COVID-19, that is not the end of the inquiry, not by a long shot. Rather, the employee will need competent proof that the alleged breach of that duty is causally connected to the employee's damages. In other words, the employee will need to prove that if the equipment had been provided, it would have prevented their contraction of COVID-19. This "but/for" causation element will be extremely difficult for most plaintiffs to prove, particularly in areas with community spread. This will require expert witness testimony.[8] As a result, these types of lawsuits will be expensive for plaintiffs to pursue, likely requiring expert opinions on both liability and medical causation, discussed more below. In the context of potential COVID-19 PPE claims, employees will need competent, expert testimony that:

- The employee contracted COVID-19 in the course and scope of their employment;
- A reasonable employer in the industry would have provided specific PPE to protect against COVID-19; and
- To a reasonable degree of medical probability, the employer's failure to provide the PPE proximately caused the employee to contract COVID-19 while in the course and scope of employment.

This is a very high burden and will limit the number of viable COVID-19 work injury lawsuits in Texas. The second element will likely require testimony from a competent workplace safety expert (discussed above in the "duty" analysis). The first and third element will likely require testimony from a competent medical expert.

Proximate cause, in particular, requires cause in fact and foreseeability.[9] The element of foreseeability cannot be established by conjecture, guess, or speculation.[10] Experts will not be permitted to guess about an employee's exposure to COVID-19 or that certain PPE, if provided, would have prevented contraction of the virus. One case that provides some insight as to how the Texas Supreme Court might analyze the causation element of a COVID-19 virus-related claim is *Schaefer v. Texas Emp. Ins. Ass'n*.[11] In *Schaefer*, a plumber alleged that he contracted a rare and often fatal lung disease[12] in the course and scope of

8 *Leitch v. Hornsby*, 935 S.W.2d 114, 118-19 (Tex. 1996) (holding that expert testimony was required showing that back belt would have prevented the plaintiff's injury); *Sanders v. Home Depot U.S.A., Inc.*, Cause No. 2-04-196-CV, 2005 WL 1119803, at *2-3 (Tex. App.—Fort Worth May 12, 2005, no pet.) (affirming no-evidence summary judgment in an alleged lifting injury case where plaintiff did not supply evidence that assistance would have prevented plaintiff's lifting injury); *Lewis v. Randall's Food & Drug, L.P.*, Cause No. 14-03-00626-CV, 2004 WL 1834290, at *3 (Tex. App.—Houston [14th Dist.] Aug. 17, 2004, no pet.) (same); *see also Aleman v. Keith Co.*, 227 S.W.3d 304, 311-13 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (affirming a no-evidence summary judgment for the defendant in a slip-and-fall case because the plaintiff produced no evidence that the defendant's negligence caused the plaintiff to slip and fall); *Sanchez v. Marine Sports*, Cause No. 14-03-00962-CV, 2005 WL 3369506, at *3 (Tex. App.—Fort Worth May 12, 2005, no pet.) (affirming a directed verdict for same).

9 *West Invs., Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005) (emphasis added).

10 *See West Invs., Inc.*, 162 S.W.3d at 551.

11 *Schaefer v. Texas Emp. Ins. Ass'n*, 612 S.W.2d 199 (Tex. 1980).

12 A rare Group III mycobacterium intracellularis, sometimes called atypical tuberculosis.

employment and that it should have been considered an occupational disease for purposes of workers' compensation. The disease apparently had multiple strains, two of which were avian strains.

The plumber alleged he was routinely required to crawl underneath houses to perform plumbing tasks and was forced to work in soil contaminated with the feces of birds, other fowl, sheep, goats, dogs, cats, and humans. The jury agreed with the plumber and found the condition was work-related, but the court of appeals reversed and rendered judgment against the plumber. The Texas Supreme Court affirmed the court of appeals. In doing so, it analyzed the record and noted that testing had not confirmed whether the bacteria present in the plumber's saliva and mucus was of an avian or non-avian strain of the virus. Additionally, the organism from which the plumber suffered had not been "isolated in any of the environments where he worked or lived."[13]

One of the questions before the Texas Supreme Court was whether the testimony of the plumber's expert witness was sufficient to support the jury's finding that the plumber contracted the disease in the course and scope of his employment. The plumber's expert testified it was his opinion the plumber's lung disease resulted from his employment. The Texas Supreme Court found this was not sufficient, stating:

> The basis for his opinion is that persons engaged in "dirty" occupations, such as farmers, tend to have a greater exposure to the bacteria; that [the plumber] frequently worked in soil contaminated by bird droppings; that [the plumber] suffers from one of the serotypes of m. intracellularis; and, therefore, he has an occupational disease. Notwithstanding Dr. Anderson's opinion, there is a crucial deficiency in the proof of causation. The evidence fails to establish that any bacteria was present in the soil where [the plumber] worked.[14]

The court further explained that the expert's opinions were based on a number of assumptions:

> Dr. Anderson *assumes* that [the plumber] is infected with an avian serotype m. intracellularis pathogenic to fowl. He further *assumes* that this serotype was present in bird droppings where [the plumber] worked... It is also admitted that the manner in which the disease was transmitted to [the plumber] is unknown. It is further admitted that there is no evidence that the bacteria is present in the soil where [the plumber] worked, or even in Nueces County.[15]

Accordingly, the Texas Supreme Court stated that after reviewing the expert's testimony, "it does no more than suggest a possibility as to how or when [the plumber] was exposed to or contracted the disease. We hold that his opinion is not based upon reasonable medical probability but relies on mere possibility, speculation, and surmise."[16]

Like *Schaefer*, a plaintiff asserting a COVID-19 lawsuit against his or her employer may find that proving exposure to the disease is an uphill battle. Proof of causation may be

> Even if a plaintiff who contracted COVID-19 is able to establish that his or her employer owed a duty to provide proper equipment to protect against COVID-19, that is not the end of the inquiry, not by a long shot.

13 *Id.* at 201.
14 *Id.* at 203.
15 *Id.* at 204.
16 *Id.*

inherently difficult to obtain and, in *Schaefer*, the court did not lower this high hurdle, stating "[t]he fact that proof of causation is difficult does not provide a plaintiff with an excuse to avoid introducing some evidence of causation."[17] The use of the magic words "reasonable probability" by an expert, standing alone, is not enough to prove causation.[18] The court went on to discuss whether the plumber's condition was caused by an "ordinary disease of life to which the general public is exposed outside of employment," which would likely mean it was not compensable under workers' compensation.[19] The court stated the disease at issue had not been found to be an occupational disease and that, generally speaking, ordinary diseases of life are compensable only when incident to an occupational disease or injury.[20]

Though *Schaefer* was a workers' compensation case rather than a nonsubscriber negligence lawsuit, the court's analysis in *Schaefer* on the need for competent expert testimony on causation and the requirements of such testimony is instructive.[21] The Texas Supreme Court has reaffirmed *Schaefer* on multiple occasions and reiterated that "[a]n expert's opinion that disease was contracted through working conditions, or that a spray caused frostbite, or that a medication caused birth defects, even if admitted without objection, is not probative evidence if the testimony shows that the opinion lacks any substantial basis."[22] In short, a plaintiff asserting a PPE negligence claim will need expert testimony and supporting evidence that COVID-19 existed in the workplace, they contracted the virus in the workplace, a reasonable employer would have provided the PPE to protect against COVID-19 exposure and, the employer's failure to provide the PPE proximately caused the plaintiff to contract the virus while in the course and scope of employment.

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17 *Id.* at 205.
18 *Id.*
19 *Id.*
20 *Id.*
21 *See also Abraham v. Union Pacific R. Co.*, 233 S.W.3d 13, 17-18 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (in negligence case involving exposure to toxic chemical, existence of causal connection between the exposure and disease required specialized expert knowledge and testimony); *Pilgrim's Pride Corp. v. Smoak*, 134 S.W.3d 880, 889 (Tex. App.—Texarkana 2004, pet. denied) (expert testimony required when scientific principles are needed to establish the causal relationship).
22 *Maritime Overseas Corp. v. Ellis*, 971 S.W. 2d 402, 421 (Tex. 1998).

What is an employer's duty to provide a safe workplace with respect to COVID-19?

Texas law treats a nonsubscriber employer's duty to provide a reasonably safe workplace the same way as it would any other "premises liability" claim.[23] To prevail, a plaintiff must show: (1) an unreasonably dangerous condition; (2) knowledge of the condition by the employer; (3) a failure to warn about or fix the condition; and (4) the condition caused the plaintiff's damages.[24] Proving a premises liability claim in the COVID-19 context could prove quite challenging.

Assuming for argument's sake COVID-19 constitutes an "unreasonably dangerous condition," proving its existence in a given workplace will depend on the context and facts. If the employer is a healthcare provider actively treating COVID-19 patients, it might be more obvious. However, proving COVID-19 existed in a retail store or other environment at a particular point in time could be considerably more difficult. Even establishing that a co-worker or customer had COVID-19 while inside the workplace might not be sufficient, unless the plaintiff-employee was directly exposed to the infected individual. As with many other COVID-19 issues, plaintiffs will likely need competent expert testimony to prove this element.

Proving the second element—knowledge on the part of the employer—could be even more challenging. In general, to prove knowledge a plaintiff must show actual knowledge of the unreasonably dangerous condition or that the condition was present for so long the employer should have known about it. Usually, it is insufficient to merely show awareness of a risk of an unreasonably dangerous condition. The evidence has to be tied directly to the specific condition at issue. Just because an employer is generally aware that its employees might be exposed to COVID-19 does not necessarily mean the employer knows or should know COVID-19 is actually present in its workplace.

Further, a nonsubscriber employer in Texas can satisfy its premises liability duty by (a) exercising reasonable care to correct it, or (b) by warning of the condition.[25] A warning alone is generally sufficient and there is no duty to warn about dangers that are already known to an employee.[26] In the COVID-19 context, it could be next to impossible for a plaintiff to establish there was a duty to warn and if there was, the employer could potentially avoid liability on a premises theory by simply posting a warning.

In *Austin v. Kroger*, for example, a maintenance employee was directed to clean up an "oily liquid" spill in a restroom using a bucket and mop and the employee slipped and fell on the substance.[27] The Texas Supreme Court held that because the employee knew of the spill, his nonsubscriber employer possessed "no duty" and was not liable on a premises lia-

23 *Austin v. Kroger, Tex., L.P.*, 465 S.W.3d 193, 202 (Tex. 2015).
24 *See e.g., Fort Brown Villas III Condo Association v. Gillenwater*, 285 S.W.3d 879, 883 (Tex. 2009).
25 *Austin v. Kroger, Tex., L.P.*, 465 S.W.3d 193, 202-203 (Tex. 2015).
26 *Id.* at 202-208. Note the "no duty" general rule has exceptions, one of which is the "necessary-use" exception. That exception applies when it is "necessary" for the plaintiff to use the dangerous premises and the owner "should have anticipated that the [plaintiff] was unable to avoid [it]." However, the fact that an employee must face a known danger as part of his or her job duties does not count, however, and is not an exception to the "no duty" general rule. *Id.* at 214.
27 *Id.* at 198-99.

bility theory.[28] Equally as important in the COVID-19 context, the injured employee argued "that it was reasonable for him to undertake the risk of slipping in the oily liquid because, although he was aware of the risk, he undertook it at the instruction of his employer rather than by purely voluntary choice."[29] The court rejected this argument, in part because the plaintiff's decision to proceed with cleaning the restroom was "voluntary" even though it was a part of his job duties because "an employee always has the option to decline to perform an assigned task and incur the consequences of that decision."[30] By the same token, an employee who has knowledge of the risk of exposure to COVID-19 and opts to perform his job duties in spite of that risk, should not be able to prevail in a premises liability lawsuit against his or her employer.

Another major hurdle for a plaintiff will be proving their employer's negligence pertaining to COVID-19 in the workplace is what proximately caused the plaintiff to contract COVID-19, as discussed above. This will become even harder to prove as the pandemic spreads and employees are potentially exposed to COVID-19 from a variety of sources outside the workplace.

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28 *Austin v. Kroger, Tex., L.P.*, 465 S.W.3d 193, 217 (Tex. 2015). The court left open the possibility that the plaintiff's employer might still be found liable on the theory that it did not provide him with "necessary instrumentalities" or equipment that were needed for him to safely perform his job. *Id.* at 215-217.

29 *Austin v. Kroger, Tex., L.P.*, 465 S.W.3d 193, 213 (Tex. 2015).

30 *Id.* at 213-214.

Could an employer be liable under a theory of negligence *per se* if it fails to adhere to all of the CDC and OSHA guidelines?

Plaintiffs in nonsubscriber work injury lawsuits in Texas often cite OSHA regulations or guidelines and contend a defendant's violation of such regulations or guidelines is negligence *per se*. Plaintiffs asserting COVID-19 claims against their employers will almost certainly look to OSHA and CDC guidelines and take similar positions. Legally speaking, however, these arguments are fundamentally flawed. "[I]t is well-established that regulations promulgated under the OSHA statute neither create an implied cause of action nor establish negligence *per se*."[31] The same would logically be true of CDC guidelines. In short, violating or failing to implement such guidelines should not constitute an automatic finding of negligence (*i.e.*, negligence *per se*). In fact, as noted above, OSHA issued new guidance on April 16, 2020 that permits compliance officers to consider whether an employer made a "good faith effort" to comply with OSHA standards in light of the COVID-19 pandemic. This appears to be a recognition that companies should not be penalized for failing to meet OSHA standards in the face of a unprecedented pandemic, so long as they are making a reasonable, good faith effort to keep their workforce safe.

For example, in *Supreme Beef Packers Inc. v. Maddox*, a Texas court of appeals held it was not proper to instruct a jury that OSHA violations amounted to negligence *per se*.[32] The court discussed various OSHA regulations and observed they do not generally require certain specific conduct on the part of the employer, but rather that the employer behave reasonably.[33] Thus, the regulations at issue did not define negligence.[34] Specifically, in the context of providing PPE, the court quoted the pertinent OSHA regulation which states "'[t]he employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment.'"[35] In other words, the regulation does no more than direct the employer to be reasonable and does not define exactly what that means. The appellate court concluded the trial court had erred by instructing the jury that violation of the regulation was "negligence itself" because the employer had "judgment and discretion" in determining when to provide PPE and it was "left to the jury to decide if the employer acted reasonably." The same analysis should apply in the COVID-19 context with regard to the provision of PPE.

That is not to say, however, that OSHA and CDC guidelines should be ignored. As discussed above, pursuit of a nonsubscriber COVID-19 claim will almost certainly require expert testimony. A plaintiff's safety expert will definitely look to OSHA and CDC guidelines, as well as to the measures taken by other employers in the same industry, to support an expert opinion that an employer was negligent. Essentially, these guidelines and the conduct of other similar employers will serve as evidence of negligence, but do not amount to negligence standing alone.

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31 *Gonzalez v. VATR Constr. LLC*, 418 S.W.3d 777, 784 (Tex. App.—Dallas 2013, no pet.); *McClure v. Denham*, 162 S.W.3d 346, 353 (Tex. App.—Fort Worth 2005, no pet.) ("Texas courts have held that the common law duties imposed by state law are not expanded by OSHA regulations"); *Supreme Beef Packers, Inc. v. Maddox*, 67 S.W.3d 453, 455-459 (Tex. App.—Texarkana 2002, pet. denied) (holding that the trial court committed reversible error by instructing the jury that violations of various OSHA regulations constituted negligence *per se*).

32 *Supreme Beef Packers, Inc. v. Maddox*, 67 S.W.3d 453, 455-459 (Tex. App.—Texarkana 2002, pet. denied).

33 *Id.*

34 *Id.*

35 *Id.* at 457-458.

Conclusion

In sum, employees in Texas who contract COVID-19 and later file lawsuits against their employers alleging they contracted the virus in the course and scope of their employment are likely to face an uphill battle. Given the nature of the virus, incubation period and growing community spread, it will be exceedingly difficult for plaintiffs to prove they contracted COVID-19 due to the negligence of their employers in failing to provide PPE or by failing to provide a safe workplace. A checklist is provided below that provides some examples of steps Texas employers can take to ensure their workplaces are safe and, simultaneously, help mitigate against potential liability exposure.

Checklist for Employers (not exhaustive):

- ☐ Monitor and follow federal, state and local governmental guidelines as closely as possible (e.g., OSHA, CDC)
- ☐ Document safety guidance (e.g., PPE use) and training provided to employees in writing (emails, letters) and maintain copies of these records
- ☐ Document the use of warning signs, safety posters, etc. posted inside the workplace and also at the entrance
- ☐ Document enhanced workplace cleaning and sanitization efforts and maintain copies of these records
- ☐ Consider screening employees for COVID-19 through wellness and temperature checks
- ☐ Consider screening contractors and vendors who enter your workplace for COVID-19 through wellness and temperature checks
- ☐ Implement physical (a.k.a. "social") distancing requirements and clearly document these efforts (e.g., photograph examples of correct implementation)
- ☐ Consider industry standards and governmental guidance (e.g., OSHA, CDC) and provide PPE and related training to protect against COVID-19 exposure if necessary for the safe performance of job duties
- ☐ Consider workplace protocols that limit/restrict sharing between coworkers of equipment, computers, phones, etc. without proper sanitation processes in place
- ☐ Keep meticulous records of mitigation efforts, including unsuccessful efforts to obtain PPE or other equipment or materials
- ☐ For employers who do not have workers' compensation, make sure your company has a QCARE-designated injury benefit program to take care of employees who are injured in the course and scope of their employment.

If you have questions regarding this article or liability exposure for Texas employers related to the COVID-19 pandemic, please contact Karl Seelbach (karl@doyleseelbach.com) or Trek Doyle (trek@doyleseelbach.com) by email or phone (512.960.4890). Doyle & Seelbach PLLC is a Texas law firm with a strong reputation for defending personal injury lawsuits, including work injury claims. Karl Seelbach also serves as an Executive Committee member for the Association for Responsible Alternatives to Workers' Compensation (ARAWC).

Editor's note: This article is for informational purposes and is not meant to provide legal, regulatory, accounting, or tax advice. This article is primarily focused on analyzing potential liability exposure in connection with a lawsuit filed in Texas. This article in no way suggests or implies that employees should not receive adequate healthcare, wage and sick leave benefits or, for that matter, a safe workplace. Providing proper and adequate benefits to employees is not only the right thing to do, it should help reduce future litigation and liability exposure.

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