

[Latham & Watkins Complex Commercial Litigation Practice](#)

May 7, 2020 | Number 2728

Visit Latham's [COVID-19 Resources page](#) for additional insights and analysis to help navigate the legal and business issues arising from the global pandemic.

COVID-19: Personal Injury Liability Considerations and Protections for Property Owners and Operators

Companies planning to open to the public during the pandemic should review potential claims related to COVID-19 and take preemptive measures.

The ongoing COVID-19 pandemic raises many questions about safety and liability in public and private spaces. Scientific understanding of the novel coronavirus, including methods of transmission and preventive strategies, is rapidly evolving — presenting unique challenges to companies seeking to open their doors to visitors, including customers, guests, vendors, and delivery people (*i.e.*, anyone entering the premises who is not an employee), during the pandemic. A wide variety of businesses are raising concerns about increased liability from visitors claiming to have contracted COVID-19 by exposure to the novel coronavirus while on their premises, and are seeking guidance on how best to tailor their operations to minimize those risks. Although Congress and various states have discussed passing legislation to limit liability in this context, it is unclear whether that will be accomplished and, if so, the scope and extent of the protections such legislation would afford.

This guidance is intended to provide a general overview of potential theories of liability for visitors claiming novel coronavirus exposure and preemptive measures. Analysis of specific claims and best practices to limit potential liability is highly fact-dependent. A company making plans to open to the public during the pandemic should seek tailored guidance from in-house and outside consultants and attorneys to develop a comprehensive and industry-specific plan.

Overview of Potential Claims Related to COVID-19

Exact sources of liability will vary by jurisdiction, with tort law the most likely source of potential liability to visitors claiming COVID-19-related injury. State consumer protection statutes may also provide causes of action, but such laws typically focus on financial harm to consumers and require a jurisdiction-specific analysis.

Most personal injury cases are based on a theory of negligence, which creates legal liability when a party had a duty of care to an individual, failed to reasonably exercise that care, and that failure of care caused an injury. Premises liability is a legal concept rooted in negligence when an injury is claimed to have been caused by an unsafe or defective condition on someone's property that the property owner knew or

should have known presented a risk of injury to visitors. Generally, a property owner owes a duty of care to all visitors on its property. The level of care an owner is legally required to undertake depends on a variety of factors, including the type of visitor. Visitors with permission to be on the property fall into two general categories: *licensees*, whose presence confers financial gain on the owner (e.g., diners, paying guests, shoppers, clients), and *invitees*, whose presence is not expected to confer a financial gain on the owner (e.g., friend, party guest, delivery person). A property owner also owes a duty of care to persons present illegally (*trespassers*), but this guidance is focused on legal visitors with permission to be present on the property. A property owner owes the highest duty of care to licensees; specific standards applicable to each category of visitor will vary by jurisdiction.

To succeed on a premises liability claim, a visitor would typically need to show:

- *The property owner had a duty of care to the visitor.*
 - While a property owner need not guarantee a visitor’s safety, it has a duty to exercise reasonable care to keep the premises in reasonably safe condition. The evolving nature of the COVID-19 pandemic presents unique challenges to keeping premises safe, particularly in light of the evolving scientific understanding of the virus and modes of transmission.
- *The property owner or someone acting on its behalf breached that duty of care to the visitor.*
 - Whether there is a breach of duty turns on whether the property owner had notice of the risk, and if so, whether it failed to take reasonable steps to make the premises safe. Given the widespread disruption and media coverage of the pandemic, notice of the risks of novel coronavirus transmission is a given in this context. Assessing alleged failure to take reasonable steps to protect visitors will be highly fact-specific.
- *The breach of duty of care to the visitor caused an injury to the visitor.*
 - This breach of duty must have been a substantial contributing factor in causing the supposed injury. Further, in many jurisdictions, a visitor might have to prove that additional safety measures would, more likely than not, have avoided the injury. “Injury” in the COVID-19 context could take many forms: the physical effects of the illness, costs associated with medical care or other financial damages, or even the emotional distress experienced by an individual who feared contracting the novel coronavirus.

Other potential claims related to COVID-19 may include negligent infliction of emotional distress (NIED) or negligence *per se*. NIED claims may allege that a visitor was negligently exposed to the novel coronavirus on the premises, resulting in the visitor suffering emotional distress (regardless of whether they contracted COVID-19 or became physically ill). Although the elements of NIED vary by jurisdiction, in general, these claims allege that a company knew or should have known of the risk of virus exposure and failed to take sufficient action to prevent its transmission to others. In addition to proving negligence, a visitor would need to prove that: (1) they suffered from emotional distress corroborated by objective evidence (e.g., fear resulting in anxiety, depression, loss of sleep), and (2) a reasonable person under the same circumstances would have suffered emotional distress. Several lawsuits have already been filed against a prominent cruise line claiming passengers suffered emotional distress and trauma stemming from the fear they would develop COVID-19.

A negligence *per se* claim could allege that a company violated legislative and agency regulatory standards governing COVID-19 — a majority of courts in the US hold that such a lack of compliance is

conclusive proof of negligence on the part of a defendant. Thus, it is essential for companies to stay abreast of the changing landscape of industry- and jurisdiction-specific regulatory guidance related to COVID-19.

Defenses to COVID-19 Tort Claims

There are a variety of substantive defenses to premises liability and related tort claims, including that a business exercised reasonable care to prevent a visitor's injury, the visitor failed to prove that the injury was caused by a company's negligence, and a business provided the visitor adequate warnings of the risk of injury and the visitor voluntarily assumed those risks. Specific defenses, both legal and factual, depend on a thorough and context-specific inquiry.

Whether a business has exercised reasonable care depends on numerous factors, including the information available to the business *at the time* — a plaintiff in this context does not gain the benefit of hindsight. Thus, it is essential that a business document the current bases of information when designing and implementing policies to protect visitors against virus transmission. Staying abreast of key developments in prevention strategies and periodically updating company policies to reflect current guidance is highly recommended.

Causation is expected to be a difficult element to prove for most plaintiffs seeking to prove COVID-19 claims. Typically, the legal standard for tort claims based on negligence is whether the injury was more likely than not caused by the alleged breach of duty. The lengthy incubation period for the novel coronavirus provides a significant hurdle for a plaintiff in this context: they would need to prove that it is more likely that they contracted COVID-19 by exposure to the virus on the business's premises than some other way and that additional reasonable safety measures would have made a difference (*i.e.*, with additional, more stringent measures, the plaintiff more likely would *not* have contracted COVID-19). Given that a person infected by the novel coronavirus begins to show symptoms between two and 14 days after coming into contact with the virus, it would be extraordinarily difficult for a claimant to prove that they contracted the disease through exposure to the virus at a particular location or from a specific individual. Further, because individuals with no symptoms can infect others, it is very difficult to know when and where a person was exposed to the virus. Even if universal, reliable testing becomes available, causation will be a difficult burden of proof for plaintiffs.

Forward-Looking Steps to Limit Potential Liability

Reasonable steps to insulate against liability are necessarily industry-, jurisdiction-, and premises-specific, but may include the following:

- **Monitor the current state of information**, including the risks of the novel coronavirus, the modes of transmission, preventive recommendations and guidance from government sources (federal, state, and local), and industry-specific guidance. Best practice includes documenting the evolving state of information at periodic intervals, the company's corresponding safety measures, and any knowledge the company has about employees or visitors to the premises already diagnosed or suspected to have COVID-19. A key factual component of defending these claims is demonstrating that a company's actions were reasonable based on the knowledge of risks *at the time of the alleged disease transmission* — which is particularly important considering the scientific state of knowledge is rapidly evolving.
- **Implement reasonable safety protocols**, which may include checking employees and guests for symptoms (in a manner consistent with privacy concerns), required or suggested personal protective

equipment (masks, gloves), routinely disinfecting surfaces, access to hand sanitizer, posted warnings of novel coronavirus risks, signs encouraging hand washing and other recommended preventive measures, encouraging physical distancing (e.g., floor stickers to demonstrate recommended 6-foot distance between patrons).

- US Centers for Disease Control and Prevention (CDC) guidance does not have the force of law but provides a helpful benchmark of reasonable safety precautions — closely following CDC guidance would present a strong defense to liability. Similarly, many states and local authorities have or are in the process of issuing guidance, and best practice would be to follow whichever applicable guidance has the most stringent terms.
- **Warn visitors of the risks of virus transmission on the premises and the seriousness of COVID-19**, via a comprehensive customer communications strategy that may include on-site warnings and digital communications to openly communicate with visitors. Such communications should detail the precautions in place and stress that there is no guarantee that a visitor will not be infected by coming into proximity with other individuals also present on the premises or contact with surfaces.
- **Consider obtaining written waivers acknowledging and assuming risks** in exchange for gaining access to premises. While written waivers provide a layer of protection, including proof that a visitor was made aware of certain risks, waivers do not guarantee airtight protection against liability in this context. Whether a written waiver is enforceable depends on multiple analyses, including:
 - *Enforceable as a matter of contract law?* Most US jurisdictions enforce liability waivers insulating a party from liability for negligence if the waiver is clear, unambiguous, and fairly bargained. Waivers are strictly construed against the drafting party.
 - *Enforceable as a matter of public policy?* Waivers that are contrary to public policy are void and unenforceable, even if they would otherwise be permissible under standard contract law principles. Examples of industries sometimes limited in their ability to enforce liability waivers on public policy grounds include healthcare providers such as hospitals (because of the importance to society of providing medical care), caregivers who assume a duty of care (e.g., daycares or nursing homes), and public carriers.
 - Some states, like California, provide specific factors for a court to consider when determining whether a liability waiver is unenforceable on public policy grounds. It is accordingly important to evaluate jurisdiction-specific law regarding waivers. Although a written waiver may not provide an absolute bar to liability, having visitors sign one can be an important additional step to document notice of the risks of exposure to the novel coronavirus on the premises.
- **Consider developing and implementing a system to disseminate information to visitors during and after visits** if the company becomes aware that others on the premises have been diagnosed with or are suspected to have COVID-19 or were in contact with individuals who were (e.g., alert system, contact tracing).

Conclusion

An assessment of potential liability for visitors claiming injury from exposure to the novel coronavirus during (and after) the COVID-19 pandemic is highly fact-specific and will depend on many factors, including a company's industry, location, and type of premises they operate. Any business preparing to

re-open properties to the public should conduct a thorough analysis of industry-specific guidance on best practices and the applicable law in the relevant jurisdiction(s) to avoid potential pitfalls and identify precautions to limit their exposure to future claims.

To receive the latest COVID-19-related insights and analysis in your inbox, [subscribe to Latham's COVID-19 Resources mailing list](#).

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

[Gwyn Williams](#)

gwyn.williams@lw.com
+1.617.880.4512
Boston

[Allison Lukas Turner](#)

allison.turner@lw.com
+1.617.880.4522
Boston

You Might Also Be Interested In

[COVID-19: Resources for Responding to Business and Legal Issues](#)

[CARES Act: What Businesses Should Know \(Webcast\)](#)

[New York's "New York State on PAUSE" Order: What Businesses Need to Know](#)

[Massachusetts' Stay-at-Home Order: What Businesses Need to Know](#)

Client Alert is published by Latham & Watkins as a news reporting service to clients and other friends. The information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the lawyer with whom you normally consult. The invitation to contact is not a solicitation for legal work under the laws of any jurisdiction in which Latham lawyers are not authorized to practice. A complete list of Latham's *Client Alerts* can be found at www.lw.com. If you wish to update your contact details or customize the information you receive from Latham & Watkins, visit <https://www.sites.lwcommunicate.com/5/178/forms-english/subscribe.asp> to subscribe to the firm's global client mailings program.