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COVID-19 LITIGATION:
How to prepare for COVID-19 claims from employees and customers

As you know, FHMS has been closely monitoring the evolving COVID-19 pandemic and the various orders and guidance issued by our local, state and federal governments. In this article, we discuss potential claims of COVID-19 exposure from employees and customers, how to prepare for same, and efforts to obtain immunity.

In the past 30 days, we quickly went from social distancing rules, to closure of non-essential businesses, to "stay-at-home" orders, to mask-wearing mandates. We confronted changing guidance on not only the types of businesses that were allowed to remain open, but also the protocols for cleaning and maintaining a safe environment. This situation continues to evolve as we obtain new information about this novel virus and how it spreads.

While many businesses were forced to close, our supermarkets, retail stores, restaurants, hotels, delivery services, property managers, trash haulers, transportation companies, and other life-sustaining businesses remained open. The employees of those businesses have bravely supported the needs of their communities by, among many things, providing food and drink, filling medications, stocking shelves, transporting goods, hauling refuse, and making deliveries. Those companies, small and large, have been forced to adapt to the quickly changing environment.

In the wake of the COVID-19 pandemic, we anticipate that there may be employees and customers who will claim that they were exposed to, and contracted, COVID-19 due to improper or inadequate safety and cleaning protocols. There could also be exposure-related claims against a non-essential business that did not close when recommended to do so, or did not enact policies and procedures to enforce social distancing guidelines. Many businesses have operated with a reduced staff or by quickly onboarding a host of new employees.

In addition to this new way of living, we will likely have to navigate a new area of tort law involving COVID-19 exposure claims and other related claims. We anticipate that the scope of the businesses and industries impacted by these potential claims will expand as closure orders are lifted. One thing for certain, is that we will see these claims. It has been widely reported that the plaintiff's firms are gearing up for COVID-19 lawsuits and there has already been a flurry of class action lawsuits related to COVID-19.

In fact, a plaintiff has already filed a lawsuit in Illinois, claiming that Walmart and the landlord were responsible for the decedent's death from COVID-19 complications. Similarly, passengers have already sued cruise lines claiming that the cruise line exposed them to an unreasonable risk of harm, failed to have proper screening protocols when boarding passengers, and failing to adequately warn passengers about potential exposures.

The following is a discussion on the potential COVID-19 claims by employees and customers in Pennsylvania and legislative efforts to obtain immunity for those claims.

I. Potential COVID-19 Claims by Employees

Almost every state has a workers' compensation statute that provides a level of immunity to employers whose employees sustain injuries or illnesses during the course of their employment. These laws make a workers' compensation claim the exclusive remedy for such harms. There are, of course, exceptions to this rule that vary by state. This section explores the potential claims an employee can pursue for COVID-19.

A. Can employees pursue workers' compensation claims for COVID-19 exposure?

Whether and how an employee can pursue a workers' compensation claim for COVID-19 exposure will vary by state. In Pennsylvania, there are two ways that an employee can pursue a workers' compensation claim for COVID-19. First, the employee can file a "disease-as-injury" claim. To succeed on that claim, the employee must present credible medical evidence that he or she was exposed to COVID-19 in the workplace or at a location where the employee was required to perform assigned work duties. The employer can defend that claim by presenting evidence that the employee could have contracted COVID-19 from a source other than the workplace.

Second, the employee may file an "occupational disease" claim. To proceed on that claim, the employee must show that they were exposed to COVID-19 by reason of employment, the exposure was causally related to the industry or occupation, and the incidence of exposure was substantially greater in that industry or occupation than the general population. If the employee shows that COVID-19 occurs more in the employee's industry or occupation than in the general population, then there is a rebuttable presumption that the exposure was related to the employee's work and the burden shifts to the employer. Healthcare employees will likely be able to trigger this presumption and shift the burden. It is too early to determine if other industries will have a similar incidence rate.

By contrast, guidance from the New Jersey Department of Labor & Industry suggests that an employee may be entitled to workers' compensation benefits if the employee is directed to self-quarantine by either his employer or a public health official due to a known exposure to COVID-19 in the course of his or her work. Absent that possible exception, the employee would need to prove that COVID-19 was more probably than not contracted at work.

B. Does an employer have immunity for COVID-19 third-party claims by employees?

As mentioned above, a lawsuit was filed in Illinois on behalf of an employee against his former employer and the landlord, claiming that the defendants were responsible for the employee's COVID-19 exposure and resulting death.[1] The lawsuit contained a cause of action in negligence, a survival action, and a claim for wrongful death expense against both defendants, as well as a claim for willful and wanton misconduct against the employer, Walmart. Let us know if you would like a copy of the complaint in that case.

Unlike Illinois, Pennsylvania does not carve out an exception for negligent, willful, or wanton misconduct of the employer. One exception in Pennsylvania is when the illness or injury manifests outside of the 300-week period allowed by the Workers' Compensation Act (WCA). Another exception is the personal animus rule, which usually occurs in the context of employees assaulting one another.

The Pennsylvania exception that COVID-19 claimants may try to use is known as the *Martin* exception.[2] In *Martin*, the employer deliberately concealed the results of the employee's lead level tests. The employee did not seek medical attention, because he did not know he had high levels of lead in his blood. As a result, he developed a more severe disease than if he had immediate treatment. The Pennsylvania Supreme Court created an exception that permitted employees to sue employers who take steps to cover up a health condition and cause it to worsen.

[1] *Evans v. Walmart, Inc.*, Docket No. 2020-L-003938, Cook County Circuit Court (April 6, 2020).
[2] *Martin v. Lancaster Battery Co.*, 606 A.2d 444 (Pa. 1992).

In 2012, the Pennsylvania Superior Court clarified the *Martin* exception by requiring plaintiffs to prove (1) fraudulent misrepresentation on the part of the employer; and (2) a causal connection between the misrepresentation and the aggravation of the employee's pre-existing condition. The Third Circuit has upheld the narrow construction of the *Martin* exception, stating that even showing "flagrant misconduct" or "bad faith" are not enough to warrant an exception to the exclusive remedy of the WCA in Pennsylvania.

Based on the clarified *Martin* test, it may be possible for an employee in Pennsylvania to succeed on a claim against their employer for contracting COVID-19 if the employee can show that their employer fraudulently misrepresented something about the employee's health and that misrepresentation led the employee to delay seeking treatment. Employers who take the temperatures of their employees could be subject to a claim under the *Martin* exception. Those employers should make sure that they are accurately and consistently documenting the process by which the temperature is taken, including the date and time of the test, the person administering the test, the results, and all of the information associated with notifying the employee of those results, i.e. when, where, what and how the results were communicated.

Absent a claim falling under the *Martin* exception, it is unlikely that an employee will prevail on a civil claim against his or her employer for failing to maintain a safe working environment or for not following CDC or OSHA guidelines.

C. Potential COVID-19 Claims by "Employees"

The immunity afforded by the WCA applies to employers *only*. If a workers' compensation claim is denied, or in addition to that claim, an employee may try to pursue a third-party claim against an entity that is related to the employer but not covered by the WCA. This is not a new tactic; plaintiffs frequently try to sue related entities that are not the *de facto* employer in an attempt to circumvent the WCA immunity.

One common tactic is to sue a parent corporation or a related company that owns or leases the store or facility at issue. When there is a parent-subsidiary relationship, Pennsylvania employs the classic common law test for determining which entity is the employer: control or the right to control the work and the manner of doing it. *Kiehl v. Action Mfg. Co.*, 535 A.2d 571, 573 (Pa. 1987) (citing *Mohan v. Cont'l Distilling Co.*, 222 A.2d 876, 879 (Pa. 1987)). A claim will be permitted against the entity that is not considered to be the "employer" under that test.

II. Potential COVID-19 Claims by Customers

A. Negligence

We anticipate that the COVID-19 exposure claims will be based in negligence, which requires proof of the following:

(a) A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks;
(b) A failure on his part to conform to the standard required;
(c) A reasonably close causal connection between the conduct and the resulting injury; and
(d) Actual loss or damage resulting to the interests of another.

Casey v. Geiger, 499 A.2d 606 (Pa. Super. 1985). An occupier of land owes the highest duty of care to business invitees. *Treadway v. Ebert Motor, Co.*, 436 A.2d 994, 999 (1981). However, the occupier of land is not an insurer and is under no obligation to protect business invitees from known or obvious hazards. *Moultrey v. Great A & P Tea Co.*, 422 A.2d 593 (Pa. Super. 1980). Pennsylvania courts have adopted the Restatement (Second) of Torts § 343, which sets forth the principles for ascertaining the existence and extent of the duty that a possessor of property owes to invitees. *Id.* at 595. Under § 343, a possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, *and*
(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, *and*
(c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965). Thus, a duty is owed only when a possessor of land "knows or by the exercise of reasonable care would discovery the condition, and should realize that it involves an unreasonable risk of harm to invitees." *Id.*

The threshold of establishing this breach of duty is proving that the possessor of land created the harmful condition, or had actual or constructive notice of such condition. *Estate of Swift v. Ne. Hosp. of Phila.*, 690 A.2d 719, 722 (Pa. Super. 1997). A variety of factors are used to establish constructive notice, including the number of persons using the premises, the frequency of such use, the nature of the defect, its location on the premises, its probable cause, and the opportunity which a reasonably prudent person had to remedy it. Thus, to impose liability, the invitee must present "evidence that tends to prove that the possessor deviated in some particular way from his duty of reasonable care under the existing circumstances. Logically the invitee must have evidence which tends to prove either that the proprietor knew, or in the exercise of reasonable care ought to have known, of the existence of the harm-causing condition." *Moultrey*, 422 A.2d at 596.

Although much of the guidance from OSHA and the CDC is not the law in Pennsylvania, that guidance will be used by plaintiffs as evidence of what was "reasonable care under the existing circumstances." *See Kovacevich v. Crown Equip. Corp.*, 2016 Phila. Ct. Com. Pl. LEXIS 325, at *11 (Aug. 22, 2016) (emphasis added), *aff'd*, 172 A.3d 80 (Pa. Super. 2017) (holding that OSHA regulation do *not* set the standard of care under Pennsylvania law but "may be introduced as evidence of the standard of care, the violation of which *may* be negligence."). Thus, while the recommendations are not the law, it would be prudent to treat them as such given how they can be used to establish negligence claims. For those reasons, it will be important for businesses to be cognizant of that guidance and to implement same to prevent and defend COVID-19 exposure claims.

As discussed in more detail below, we anticipate that COVID-19 exposure claims from customers will involve allegations that the store failed to close or restrict access when it knew or should have known that there was a high probability of exposure; that the store failed to implement proper policies and procedures for cleaning and safety; that the store failed to comply with CDC, OSHA, and/or local government recommendations. Examples of such policies would include social distancing and screening employees for symptoms of the virus. The third-party claims will likely include, like the *Evans* suit, allegations of negligence against landlords of commercial spaces, especially retail stores that remain open as life-sustaining businesses.

B. Negligence per se

It is well-settled that a violation of a statute can constitute negligence per se. *Cabiroy v. Scipioni*, 767 A.2d 1078, 1079 (Pa. Super. 2001). "The concept of negligence per se establishes both duty and the required breach of duty where an individual violates an applicable statute, ordinance or regulation designed to prevent a public harm." *Id.* Statutes "grounded upon public health and safety" as those *setting the standard of care*, the violation of which would constitute negligence per se. *Warren City Lines, Inc. v. United Refining Co.*, 287 A.2d 149, 153 n.4 (Pa. Super. 1971). The statute or regulation must be sufficiently specific to create a standard of care. It cannot be used to establish negligence for the harm that it was not designed to protect against.

As discussed above, the OSHA and CDC guidance are not statutory law in Pennsylvania; however, be mindful of any COVID-19 regulations that may become the law in Pennsylvania as same may be used to form the basis of a claim for negligence per se.

C. Causation will be Difficult to Prove

Given the nature of this virus, many infected people shed the virus and expose others before they have any symptoms. Also, the virus quickly spreads through areas and exponentially increases the number of people infected over a short amount of time. Finally, many of the symptoms are not unique and could be caused by other conditions, such as allergies, a cold virus, or the flu. Notably, there is a high percentage of COVID-19 tests with negative results. Therefore, it will be *very* difficult, if not impossible, for the plaintiff to establish that they were exposed at a specific location. However, we know from history that causation issues will not deter plaintiff's attorneys from bringing lawsuits. We suspect that, like asbestos cases, they will sue every possible commercial business the plaintiff came into contact with during the possible exposure period and make the defendants prove the plaintiff's case by blaming each other.

D. Plaintiff's Comparative Negligence and Assumption of the Risk

The media has extensively reported on the dangers associated with COVID-19 and how to prevent and avoid exposure. State and local governments have imposed social distancing and "stay-at-home" orders. There have been recommendations and orders related to wearing a mask. Businesses can take all possible precautions, but the plaintiffs also have a duty to follow those precautions. Similar to the way the guidelines will be used against businesses to establish the standard of care, we can use those guidelines to show that the plaintiff's actions in failing to follow the CDC's guidelines were not reasonable. If a plaintiff's negligence exceeds the negligence of the defendants, then the Comparative Negligence Act bars recovery to plaintiff. *See* 42 Pa.C.S. § 7102.

A defendant is relieved of its duty where the plaintiff has voluntarily and deliberately proceeded to face a known and obvious risk. *Barrett v. Fredavid Builders, Inc.*, 685 A.2d 129, 130 (Pa. Super. 1996). Under those circumstances, the plaintiff is considered to have assumed liability for his own injuries. To establish the assumption of the risk defense, a party must prove "that the party [1] consciously appreciated the risk that attended a certain endeavor, [2] assumed the risk of injury by engaging in the endeavor despite the appreciation of the risk involved, and [3] that the injury sustained was, in fact, the same risk of injury that was appreciated and assumed." *Bullman v. Giuntoli*, 761 A.2d 566, 573 (Pa. Super. 2000). Please note that Pennsylvania Courts have found that the assumption of the risk defense does not apply where the plaintiff encountered the risk during the course and scope of employment.

III. Laws Against Frivolous Claims

We anticipate that a lot of these claims will be difficult to the plaintiff to prove, frivolous, or some combination of both. In Pennsylvania, plaintiffs are not permitted to misuse the civil process to pursue frivolous lawsuits. There are procedural rules that prohibit allegations that are not based in fact or law, are without merit, and will not have evidentiary support after discovery. If the plaintiff's continued litigation of these claims is only to harass the defendant and make them incur needless and unnecessary expenses defending the matter, then the defendant may initiate an action to recover attorneys' fees and punitive damages, commonly referred to as a *Dragonetti* action. *See* 42 Pa.C.S.A. §§ 8351-55; *see also* Pa.R.C.P. No. 1023.1, *et seq.* In practice, judges apply a high standard to these claims and tend to give the plaintiff the benefit of the doubt, especially in plaintiff-friendly jurisdictions.

Finally, in addition to criminal sanctions, a court has authority to dismiss a case for a litigant's misconduct based on the court's inherent authority or its power to do equity. *See Belmont Labs, Inc. v. Heist*, 151 A. 15, 19 (Pa. 1930) (noting that a court of equity may refuse to render judgment in favor of a party who commits willful misconduct during the litigation); *Derzack v. County of Allegheny*, 173 F.R.D. 400, 412 (W.D. Pa. 1996) ("Because the Derzacks' misconduct clearly constitutes a 'fraud on the court' . . . , the Court holds, as have most federal courts faced with similar abuse, that plaintiffs' misconduct most directly implicates the inherent power of the court to curb such excesses and, just as clearly, warrants invocation of that power to sanction the responsible parties.").

A fraud on the court occurs where a party has intentionally set forth in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a mater by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense. *See Hull v. Municipality of San Juan*, 356 F.3d 98, 102 (1st Cir. 2004). In *Derzack*, the plaintiffs lied during their depositions and submitted false evidence in discovery, conduct so egregious that it was sanctioned by dismissal of their lawsuit. Derzack, 173 F.R.D. at 412. Similarly, in *Hull*, the court dismissed a plaintiff's case because he had lied about, and failed to disclose, prior injuries, treatments, and lawsuits. *See also Martin v. DaimlerChrysler Corp.*, 251 F.3d 691 (8th Cir. 2001) (affirming dismissal of employment-discrimination claim where plaintiff lied about prior lawsuits and psychological treatment).

IV. Recommended Investigation

A. Keep a detailed history and timeline of the events.

It can be hard to recall what happened yesterday, let alone having to recall the specific local and federal government recommendations and orders that were in place at a certain time, on a certain day, in a specific area. This will become even more difficult to do as time passes and the pandemic continues to evolve.

The timing of events will be very important in these cases. The first cases of COVID-19 were reported in Pennsylvania on March 6, 2020, and OSHA published its recommendations for preparing workplaces for COVID-19 on March 9, 2020. Pennsylvania Governor Tom Wolf ordered the shut-down of all non-essential businesses on March 19, 2020, and began implementing stay-at-home orders on March 23, 2020. State and federal recommendations and orders will likely form the basis for any tests of reasonableness.

To evaluate and defend a claim based on improper or inadequate safety or cleaning protocols, it will be vital to establish what was known about the virus and what recommendations and/or mandates were in place at that time. In determining negligence, the guidance published by the government will be used by the plaintiffs as evidence of the standard of care. As we know, that guidance has already changed several times.

As an example, if a customer claims that she contracted COVID-19 at a supermarket because she was exposed to an infected employee that did not wear a mask, it will be important to know whether masks were recommended or required to be worn by such employees at that specific date and time. In the beginning of this pandemic, masks were only required for the healthcare industry. The availability of, and access to, masks is also an evolving issue. This information will be important to have when evaluating a claim. If you hire a cleaning contractor, make sure to retain documentation of the activities the contractor performed in the store.

We have been monitoring and tracking the various orders and guidance; we are happy to assist you in identifying what was in place at a specific date, time, and location.

B. Policies and Procedures

Consider what, if any, policies and procedures were implemented, when, and by whom. In uncertain and fast moving environments, it can be difficult to document changes in policies and procedures. For example, new or enhanced cleaning protocols should be documented so that we will know what actions were taken when the claims are brought several years from now. If a store is not able to get masks or other PPE, efforts to obtain same should be documented, as well as efforts to find an alternative solution. If the employer conducted health screens of its workers, the results of the tests should be obtained and documented. In addition, it will be helpful to know whether any other employees exhibited symptoms of COVID-19, whether there are any confirmed cases of COVID-19 among employees or members of their households, the dates and times those employees reported to work, and what the employee did during that time period.

C. Video Surveillance

If possible, preserve all video and documents showing the plaintiff's activities in the store. The less time the plaintiff was in the store, the more likely they were not exposed in the store. Also, the video can help to determine if the plaintiff was taking proper precautions and following the social distancing mandates.

D. Investigation of Plaintiff

It will be vital to discover and preserve information about the plaintiffs, such as the plaintiff's travel history and activities during the potential exposure period. This can be done by doing a social media search on the plaintiff, by interviewing the plaintiff and possibly neighbors or friends, or by obtaining a recorded statement from the plaintiff. Efforts should be made to determine who the plaintiff came into contact with and the locations visited during the two weeks prior to the COVID-19 symptoms in order to provide a plausible alternative source of infection.

V. Know the Applicable Regulations and Guidance

Most workers outside of the healthcare professions will fall under a Medium Exposure Risk category. According to the CDC, these jobs include those that require frequent and/or close contact with (i.e., within 6 feet of) people who may have COVID-19, but are not known or suspected COVID-19 patients. In areas where there is ongoing community transmission of the virus, workers in these jobs may have contact with the general public, including at schools, high-population-density work environments, and some high-volume retail settings. Below are the recommendations for these employers, regardless of whether employees are exhibiting symptoms of, or have tested positive for, the virus.

- Know where to find local information on COVID-19
- Know the signs and symptoms of COVID-19 and what to do if an employee becomes symptomatic at the workplace
- Review, update, or develop workplace plans to include:
    - Liberal leave and telework policies
    - Consider 7-day leave policies for people with COVID-19 symptoms
    - Consider alternative team approaches for work schedules
- Encourage employees to stay home and notify administrators when sick
- Provide non-punitive sick leave options to allow staff to stay home when ill
- Encourage personal protective measures among staff, such as:
    - Stay home when sick
    - Frequent handwashing with soap and water for at least 20 seconds or alcohol-based sanitizer with at least 60% alcohol
    - Avoid touching eyes, nose and mouth
    - Respiratory etiquette – cover your cough or sneeze with a tissue, then throw the tissue in the trash and wash hands
- Clean and disinfect frequently touched surfaces daily
- Ensure hand hygiene supplies are readily available in the building
- Encourage staff to telework when feasible
- Implement social distancing measures
    - Increase physical space between workers at the worksite
    - Stagger work schedules
    - Decrease social contacts in the workplace
- Limit large work-related gatherings (staff meetings, after-work functions)
- Consider regular health checks (temperature and respiratory symptom screening) of staff and visitors entering building if feasible
- Implement extended telework arrangements when feasible
- Cancel non-essential travel and work-sponsored conferences

A. Specific Guidelines for Retail Employees

- Frequently disinfect high-touch surfaces such as doorknobs, equipment handles, checkout counters, and shopping cart handles, etc.
- Frequently clean and disinfect floors, counters, and other facility access areas using approved disinfectants
- Discourage customers from bringing pets (except service animals) into stores or waiting areas
- Find ways to practice sensible social distancing by maintaining 6 feet between workers and customers where possible
    - Demarcate 6-foot distances with floor tape in checkout lines
    - Open only every other cash register
    - Temporarily move workstations
    - Install plexiglass partitions
    - Limit the number of customers permitted in the store at one time
    - Use a drive through window or curbside pickup

B. Specific Guidelines for Food Service Employees

- Use gloves to avoid direct contact between bare hands and ready-to-eat foods
- Wash, rinse, and sanitize food contact surfaces, dishware, utensils, food preparation surfaces, and beverage equipment after use
- Prepare and use sanitizers according to label instructions
- Discontinue operations such as salad bars, buffets, and beverage service stations that require customers to use common utensils or dispensers
- Verify that ware-washing machines are operating at the required temperatures and with the appropriate detergents and sanitizers
- Remember that hot water can be used in place of chemicals to sanitize equipment and utensils in manual ware-washing machines
- Observe established food safety practices for time and temperature control, preventing cross-contamination, cleaning hands, no sick workers, and storage of food, etc.
- Establish designated pickup zones for customers to help maintain social distancing
- Conduct an evaluation of your facility to identify and apply operational changes in order to maintain social distancing if offering take-out or carry-out options by maintaining a 6-foot distance from others whenever possible

C. Specific Guidelines for Delivery Drivers:

- Have employees wash or sanitize high-contact surfaces such as doorknobs and doorbells
- Increase the frequency of cleaning and disinfecting high-touch surfaces such as countertops, touch pads, and the inside of delivery vehicles
- Practice social distancing by offering “no touch” deliveries and sending texts or calling when deliveries have arrived
- Ensure that any wrapping and packaging used for food transport is done so that contamination of the food is prevented
- Routinely clean and sanitize coolers and insulated bags used to deliver food

D. Pennsylvania's April 15, 2020 Order

On April 15, 2020, the Secretary of the Pennsylvania Department of Health issued an order identifying additional COVID-19 prevention protocols for life-sustaining businesses in Pennsylvania. **Notably, employers are now required to provide masks for employees and require that they wear same. Businesses open to the public must require customers to wear masks, subject to limited exceptions.** Below are the highlights of same.

Protocols to help employees maintain a social distance during work:

- **Provide masks for employees and make wearing them a mandatory requirement while at the work site,** except to the extent an employee is using break time to eat or drink. Employers may approve masks obtained or made by employees in accordance with this guidance;

- Stagger work start and stop times for employees when practical to prevent gatherings of large groups entering or leaving the premises at the same time;

- Provide enough space for employees to have breaks and meals while maintaining a social distance of 6 feet, including limiting the number of employees in common areas and setting up seating to have employees facing away from each other;

- Conduct meetings and training virtually. If a meeting must be held in person, limit the meeting to the fewest number of employees possible, not to exceed 10 employees at one time and maintain a social distance of 6 feet.

- Ensure that the facility has enough personnel to control access, maintain order, and enforce social distancing of at least 6 feet;

- Prohibit non-essential visitors from entering the premises of the business; and

- Ensure that non-native English-speaking employees are aware of the procedures by communicating them in the employee's native or preferred language.

In addition, businesses that serve the public are ordered to implement the following, based on the size of the building and number of employees:

- **Require all customers to wear masks while on premises,** and deny entry to individuals not wearing masks, unless the business is providing medication, medical supplies, or food, in which case the business must provide alternative methods of pick-up or delivery of goods. Individuals who cannot wear a mask due to a medical condition (including children under age 2) may enter the premises without having to provide medical documentation;

- Conduct business with the public by appointment only if feasible, and if not, limit occupancy to no greater than 50 % of the number stated on their certificate of occupancy as necessary to reduce crowding in the business and at checkout and counter lines. Place signage throughout each site to mandate social distancing for both customers and employees;

- Alter hours of operation to allow enough time to clean or to restock or both;

- Install shields or other barriers at registers and checkout areas to physically separate cashiers and customers or take other measures to ensure social distancing of customers from checkout personnel. In businesses with multiple checkout lines, only use every other register, or fewer. Rotate customers and employees to the previously closed registers every hour. Clean the previously open registers and the surrounding area, including credit card machines, following each rotation;

- Encourage use of online ordering by providing delivery or outside pick-up;

- Designate a specific time for high-risk and elderly persons to use the business at least once every week if there is a continuing in-person customer-facing component;

- Schedule handwashing breaks for employees at least every hour; and

- Assign an employee to wipe down shopping carts and handbaskets before they become available to a new customer.

Upon discovery of an exposure to a person who is a probable or confirmed case of COVID-19, businesses are also ordered to do the following:

- Implement temperature screenings before employees enter the business and send home any employee who has a temperature of 100.4 degrees or higher.

- Sick employees should follow CDC-recommended steps and not return to work until the CDC criteria to discontinue home isolation are met, in consultation with healthcare providers and state and local health departments.

- Employers are encouraged to implement liberal paid time off for employees on home isolation.

- Close off and ventilate areas visited by that individual;

- Wait a minimum of 24 hours, or as long as practical, before beginning cleaning and disinfection;

- Clean and disinfect all spaces, especially commonly used rooms and shared electronic equipment; and

- Identify and notify employees who were in close contact with that individual (within about 6 feet for about 10 minutes).

Additional guidance on this order was published on April 18, 2020 and can be found here. **Compliance with the order will be enforced beginning Sunday, April 19, 2020 at 8:00 PM; failure to comply could result in citations, fines or license suspensions.**

VI. Efforts to Obtain Immunity through Legislation

As discussed below, there is an argument that, under certain fact-specific circumstances, there may be immunity from tort claims connected to the administration or use of countermeasure to COVID-19 under the Public Readiness and Emergency Preparedness Act (PREP Act) (42 U.S.C. 247d-6d). Most notably, common carriers, warehouses and retail pharmacies are defined as distributors under the Act, and a countermeasure can be a device determined to be a priority and necessary to prevent harm or adverse health consequences from COVID-19 or the treatment of same. Therefore, stores that have a retail pharmacy in them could obtain immunity from the PREP Act under certain circumstances. Likewise, a tractor trailer delivering COVID-19 countermeasures may have immunity from an accident that occurs during the transport.

The U.S. Chamber of Commerce and other groups are actively lobbying for immunity from COVID-19 exposure claims for essential businesses *that follow health and safety guidelines*, as well as other legal protections. States are creating specific immunity provisions for the health care industry through executive orders. We are actively monitoring for the development of immunity provisions in Pennsylvania, and below is an update on same.

Accordingly, and as a precaution, it will be important to consider asserting immunity and preemption defenses in responsive pleadings in Pennsylvania so that these potential defenses are not waived.

A. Immunity under the PREP Act

The Public Readiness and Emergency Preparedness Act (PREP Act) (42 U.S.C. 247d-6d) provides the legal authority for the Health and Human Services Secretary to issue a Declaration that provided immunity from liability (except for willful misconduct) for claims of loss **related to the "administration or use of countermeasures" to COVID-19** to entities and individuals involved in the development, manufacture, testing, distribution, administration, and use of such countermeasures. The scope of the immunity available depends on the terms of the Declaration. This federal law would preempt state tort law.

Consistent with the foregoing, the **HHS Secretary issued a Declaration effective February 4, 2020,** following the public health emergency declared on January 31, 2020. The immunity from liability for distribution of covered countermeasures begins February 4, 2020 and extends through October 1, 2024. The immunity for covered countermeasures administered and used begins February 4, 2020 and ends after the final day the emergency Declaration is in effect or October 1, 2024, whichever occurs first. Immunity is not available for claims based on activities that fall outside the scope of the applicable Declaration.

Essentially, the PREP Act provides immunity for any loss related to the design, development, testing, manufacture, labeling, **distribution,** formulation, labeling, packaging, marketing, promotion, **sale, purchase, donation**, **dispensing,** prescribing, administration, licensing or use **of a countermeasure** recommended in a Declaration. This includes, but is not limited to, claims for: death; physical, mental, or emotional injury or illness, including fear of same; the need for medical monitoring; and **property damage or loss, including business interruption loss**.

A **distributor** is defined as a person or entity engaged in the distribution of **drugs**, biologics, or **devices,** and specifically includes common carriers, brokers, warehouses, and **retail pharmacy**. Products covered by this Act include those products that diagnose, mitigate, **prevent**, **treat**, or cure COVID-19, or limit the harm of same. It also includes those products intended to diagnose, mitigate, prevent, treat, or cure a serious or life-threatening disease or condition caused by same, as well as those products intended to enhance the effect of the same. These products must have certain FDA approval or authorization for use.

A **countermeasure** is drug, biologic, **device** determined by the Health and Human Services Secretary to a priority and necessary countermeasure to protect public health and to treat, identify, or prevent harm or adverse health consequences from COVID-19 or the treatment of same. The countermeasure must have certain FDA approval or authorization for use.

Willful Misconduct Exception to Immunity: The immunity does not apply to death or serious physical injury caused by willful misconduct. Willful misconduct is defined as an act or failure to act that is taken: 1) intentionally to achieve a wrongful purpose; 2) knowingly without legal or factual justification; and 3) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit. This must be proven with **clear and convincing evidence**. There are a few exceptions, such as willful misconduct cannot be found against a manufacturer or **distributor** if Health and Human Services chooses not to take an enforcement action against them, or terminates or settles same without imposing a penalty.

Importantly, **administration** refers to the physical provision of a countermeasure to a recipient and to activities related to management and operation of programs and locations for providing same, such as decisions and actions involving security and queuing related to the countermeasure activities. This has been interpreted to prelude liability claims alleging negligence by a manufacturer in creating a vaccine, or negligence by a health care provider in prescribing the wrong dose, absent willful misconduct.

Likewise, the Act has been interpreted to preclude a liability claim relating to the management and operation of a countermeasure distribution program or site, such as a slip-and-fall injury or vehicle collision by a recipient receiving a countermeasure at a retail store serving as an administration or dispensing location that alleges, for example, lax security or chaotic crowd control. However, a liability claim alleging an injury occurring at the site that was not directly related to the countermeasure activities is not covered, such as a slip and fall with no direct connection to the countermeasure's administration or use. Whether immunity under the Act applies will depend on the particular facts and circumstances of the case.

B. Efforts to obtain Immunity Laws in PA

Pennsylvania's Chamber of Business and Industry advised that it is actively working on immunity language in Pennsylvania that would not only protect health care providers and facilities, but also manufacturers who have shifted operations to produce PPE and other entities that fall outside of the scope of the PREP Act and Declaration. We are hoping that there will be a law providing immunity to protect the life-sustaining businesses that have remained open so that their communities could have access to food, water, medications, shelter, and other life-sustaining needs. We are actively monitoring for those laws or executive orders to be proposed and will keep you apprised on same.

As always, we are available to discuss your questions or concerns. Please do not hesitate to contact us.

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At FHMS, we focus on moving each matter to resolution at the earliest practical opportunity, whether by risk transfer, trial, dispositive motion, ADR or direct negotiation with the opposition. Our approach is dependent on the facts of each case and the goals of our client. We view discovery as a toolbox and not a checklist. We find the issues in dispute and address them. Our team consists of 28 attorneys with offices in Philadelphia, Allentown, Lancaster, and New Jersey. We recognize that the best pre-trial resolutions are driven by firms with the capacity to try the most difficult cases. Our lawyers have shown that ability in catastrophic cases across Pennsylvania and New Jersey.