

## ***FHMS COVID-19 Resource Center:*** **PA and NJ Guidance for Supermarkets in Defending Customer Exposure Claims**

In a few months, the sudden acute respiratory syndrome coronavirus-2 (SARS-CoV-2 or “coronavirus”), which causes the COVID-19 disease, spread throughout the country. During this time, supermarkets and their employees have courageously continued to provide essential services to their communities. We [previously](#) discussed the potential for COVID-19 exposure claims against the life-sustaining businesses that remained open during the pandemic. This article provides a more in-depth look at the federal and state guidance applicable to supermarkets in Pennsylvania and New Jersey, how a third-party exposure claim may arise, relevant legislative actions, and recommendations to assist stores in defending these claims.

### **I. Administrative Guidance and Governors’ Orders**

#### **A. Guidance from OSHA**

The Occupational Safety and Health Administration (“OSHA”) published ["Guidance on Preparing Workplaces for COVID-19" \(OSHA 3990-03 2020\)](#) to assist employers in providing a safe workplace. The guidance recommends that employers have good hygiene and infection control practices for its employees. Employers should explore whether they can establish policies and practices, such as flexible worksites (e.g. telecommuting) and flexible work hours (e.g. staggered shifts), to increase the physical distance between employees and others. Social distancing strategies that keep employees at least six (6) feet from other employees and customers should be implemented where possible. Employees in close contact (i.e. within 6 feet) with a sick person or in prolonged, repeated contact with such persons should be protected by additional engineering and administrative controls, safe work practices, and personal protective equipment (“PPE”).

OSHA provided a list of recommended engineering and administrative controls, as well as PPE protocols and procedures. Engineering controls, where appropriate, reduce exposure to hazards without relying on employee behavior, and include: installing high-efficiency air filters; increasing ventilation rates in the work environment; installing physical barriers, such as clear plastic sneeze guards; and installing a window for drive-through customer service. Administrative controls include: encouraging those who are sick to stay home; minimizing contact among employees and customers if possible; and providing employees with up-to-date education and training on COVID-19 risk factors and protective behaviors (e.g. cough etiquette and care of PPE). Other recommendations include developing policies and procedures for prompt identification and isolation of sick individuals where appropriate, including a way for employees to inform employers when they are sick.

With respect to supermarkets, OSHA provided additional guidance for retail workers in its ["COVID-19 Guidance for Retail Workers" \(OSHA 3996-04 2020\)](#).

## B. CDC Guidance

The Centers for Disease Control and Prevention (“CDC”) published guidance that is similar to OSHA’s publications. With respect to supermarkets, the CDC published [“What Grocery and Food Retail Workers Need to Know about COVID-19”](#) (last updated April 13, 2020). For grocery and food retail employers, the CDC recommends that businesses develop a COVID-19 health and safety plan that is consistent with the CDC’s [Interim Guidance for Business and Employers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\), May 2020](#). The CDC recommends that this plan be shared with employees.

## C. Pennsylvania and New Jersey Governors’ Orders and Other State Action

As discussed herein, Pennsylvania and New Jersey have issued orders requiring, among other things, mandatory social distancing practices, installation of physical barriers, face masks to be worn by both employees and customers, and sanitation materials for both employees and customers. The safety measures required by each state can be found at the links below. It is imperative that supermarkets implement these mandatory safety measures to protect the health of their employees and customers and to limit the potential for third party exposure claims.

### 1. Pennsylvania

Due to COVID-19 being declared a “public health emergency of international concern,” Pennsylvania Governor Tom Wolf issued an [Order](#) on March 19, 2020, prohibiting the operation of businesses that are not a life sustaining business. Pursuant to said Order, “[l]ife sustaining businesses may remain open, but they must follow, at a minimum, the social distancing practices and other mitigation measures defined by the Centers for Disease Control to protect workers and patrons.” (emphasis added). In addition to Governor Wolf’s Orders, the Pennsylvania Department of Agriculture issued [COVID-19 GUIDANCE: Retail Grocery Stores, Restaurants & Bars](#) on March 19, 2020. On April 5, 2020, Pennsylvania’s Health Secretary issued an [Order](#) providing building safety measures against COVID-19.

Following this initial guidance, Governor Wolf and Pennsylvania’s Health Secretary, issued an [Order](#) containing mandatory safety directives for employees and visitors of life-sustaining businesses that was effective April 19, 2020. Similarly, the Pennsylvania Department of Agriculture published additional instructions in [COVID-19 FOOD INDUSTRY GUIDANCE: Public Health Safety Measures for Life Sustaining Food Businesses Permitted to Maintain Operations](#) (updated April 20, 2020) and specific recommendations and mandatory provisions for grocery and convenience store employees in [COVID-19 GUIDANCE: Grocery & Convenience Store Employees](#) (updated April 20, 2020).

### 2. New Jersey

New Jersey Governor Phil Murphy issued several executive orders in response to the COVID-19 pandemic. These executive orders have mandatory guidelines, violations of which are punishable by law. [Executive Order 107](#), effective March 21, 2020, mandates that all grocery stores, wherever practicable, provide pick up services outside or adjacent to their stores for goods ordered in advance. Additionally, this Order requires all grocery stores to follow social distancing practices to the extent applicable and to make reasonable efforts to frequently sanitize products on common services. A violation of this order will result in penalties pursuant to N.J.S.A. § A:9-49 and -50. Additional and more extensive requirements for grocery stores were mandated in [Executive Order 122](#), effective April 10, 2020.

## II. Third-Party Negligence Claims

We anticipate that COVID-19 exposure claims will be based in negligence. For negligence claims in both Pennsylvania and New Jersey, a plaintiff must show that: (1) the defendant owed the plaintiff a duty or obligation recognized by law; (2) the defendant breached that duty; (3) a causal connection existed between the defendant’s conduct and resulting injury; and (4) actual damages. *Grove v. Port. Auth.*, 218 A.3d 877 (Pa. 2019); *accord Townsend v. Pierre*, 221 N.J. 36 (2015).

## A. Common Law Standard of Care

For businesses such as grocery stores and supermarkets, an individual who is on the premises for business purposes is considered a business invitee and owed the highest duty of care. Pursuant to the Restatement (Second) of Torts § 343 (1965), which has been adopted in Pennsylvania and New Jersey, a possessor of land is subject to liability for physical harm caused to his or her invitees by a condition on the land if, but only if, he or she:

- (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.

*See Campisi v. Acme Mkts.*, 915 A.2d 117, 120 (Pa. Super. 2006) (quoting Restatement (Second) of Torts § 343 (1965)). Therefore, a duty is owed only when a possessor of land “[k]nows 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.*

Despite this high duty of care, Pennsylvania courts have made clear that “the mere existence of a harmful condition in a public place of business, or mere happening of an accident due to such a condition is neither, in and of itself, evidence of a breach of the proprietor’s duty of care to his invitees, nor raises presumption of negligence.” *Moultrely v. Great A & P Tea Co.*, 422 A.2d 593, 595-96 (Pa. Super. 1980). Stated differently, a harmful condition existing on the premises, by itself, is insufficient to prove negligence. A plaintiff must still demonstrate evidence that the possessor of land deviated from the duty of reasonable care under the existing circumstances. *Id.* Similarly, a business owner in New Jersey owes a duty of reasonable care to discover and eliminate dangerous conditions, to maintain the premises in a good condition, and to avoid creating conditions that would render the premises unsafe. *Nisivoccia v. Glass Gardens, Inc.*, 175 N.J. 559 (2003).

Regarding COVID-19 exposure claims, plaintiffs will need to demonstrate how a business has failed to exercise reasonable care to protect them against the danger. To do so, they will need to demonstrate that the possessors of land had actual or constructive notice of the exposure to COVID-19 in the premises and that they failed to timely remedy same. While OSHA and CDC guidance does not set the standard of care under Pennsylvania and New Jersey law, it may be used as evidence of the standard of care, the violation of which may be negligence. *See e.g., Kovacevich v. Reg’l Produce Coop. Corp.*, 172 A.3d 80, 86 (Pa. Super. 2017) (stating “[g]enerally, federal agency guidance documents do not determine rights or obligations or cause legal consequences, because, by its very nature, “guidance” is not supposed to have a binding legal effect”); *see also Kane v. Hartz Mt. Indus.*, 143 N.J. 141 (1996) (stating that compliance or non-compliance with an OSHA regulation does not in and of itself, preclude or conclusively prove a finding of negligence).

It is imperative to follow the OSHA and CDC guidance as the plaintiffs will likely use those guidelines as evidence of the standard of care. The guidelines recommend social distancing, capacity limitations, masks, screening employees for fevers and/or potentially customers, and more. Implementing the local, state, and federal guidelines will not only serve to protect employees and customers, but also limit or prevent COVID-19 exposure claims.

## B. Negligence *Per Se*

Guidelines that are incorporated into statutes or executive orders, may be used to establish negligence *per se*. For that reason, Pennsylvania and New Jersey supermarkets should be cognizant of when certain guidelines became mandatory through the Orders issued in each state.

Negligence *per se* permits a plaintiff to establish the duty and breach elements of a negligence claim where there is a violation of a specific statute that is designed to prevent harm to a specific set of individuals. It does not apply where the purpose of the statute or regulation is to secure the individual's enjoyment of rights or privileges to which they are entitled only as members of the public. *Wagner v. Anzon, Inc.*, 684 A.2d 570 (Pa. Super. 1996) (a violation of the Philadelphia Air Management Code of 1969 does not constitute negligence *per se* because the purpose of the code was to protect the atmosphere over the city and its inhabitants); *see also Alloway v. Bradlees, Inc.*, 157 N.J. 221 (1997) (a negligence *per se* claim is supported by a violation of a statute or regulation when said statute or regulation 'serves to impose direct tort liability'). Additionally, "[t]he purpose of the statute must be, in part, to protect the interest of a group of individuals as opposed to the public generally, for negligence *per se* to apply." *See Wagner, supra*.

Unlike the OSHA and CDC guidance, the Governors' Executive Orders and the mandatory provisions therein may be used to serve as a basis for negligence *per se*. For example, a claim that arose in New Jersey with a date of loss prior to March 21, 2020 will likely have the traditional standard of care applied to the case since it pre-dates guidelines issued by the CDC or OSHA. However, Executive Order 107 may be used to establish negligence *per se* in a New Jersey claim with a date of loss that falls between March 21, 2020 and April 9, 2020. Similarly, Executive Order 122 may be used to establish the standard of care for New Jersey claims with a date of loss on or after April 10, 2020. Determining the applicable standard of care for Pennsylvania will involve a similar exercise of knowing what guidance was issued and what guidance was mandated at the time of the loss.

### **C. Causation**

Even if negligence *per se* or the duty and breach elements are established, plaintiffs must prove that the negligence is the proximate or legal cause of the injury. Causation will be the most contested and difficult element for plaintiffs to prove, given the difficulties in establishing how an individual contracted the virus.

The most recent information suggests that it will be very challenging to trace the source of the infection. COVID-19 is spread mainly from person-to-person contact with one another (within about 6 feet), through respiratory droplets produced when an infected person coughs or sneezes, and when those droplets land in the mouths or noses of people nearby – whether through the air or from surface contact. According to the CDC, symptoms may appear within two to fourteen days after exposure to the virus. While the CDC suggests that individuals are most contagious when they are symptomatic, it acknowledged that the virus has been detected in asymptomatic persons. Other studies and reports noted the possible exposure to COVID-19 through asymptomatic persons, the extent of which may not be known without widespread testing. There are also issue with false negative test results and questions as to whether the virus could be spread via aerosol droplets in closed confined spaces.

Due to the potential unknowing spread of COVID-19, the level of contagiousness of the virus, coupled with the large period of incubation, demonstrating that one contracted the virus while making a single trip to a grocery store will be very difficult. Despite these significant difficulties, it is expected that litigation will arise out of the potential exposure to COVID-19. Many people have limited their outside activities following the stay-at-home orders. From the defense perspective, part of the focus will be on identifying other sources that may have exposed the plaintiff to COVID-19. This may be done by identifying where the plaintiff had been during the incubation period and using "contract tracing" to show that the exposure occurred from some other source.

### **D. Damages**

Damages are the final element in a negligence claim. Damages for claims asserting COVID-19 exposure could range from pecuniary damages, medical expenses, pain and suffering, to death, resulting in wrongful death/survival actions. COVID-19 may also exacerbate underlying medical conditions, and cause a need for mental health treatment or medical monitoring. Given the complexities of COVID-19, and the fact that much of the long-term impact of exposure to the virus is still being understood, damages could vary widely.

### III. Legislative Action

Currently, there is no immunity from COVID-19 exposure claims for life-sustaining businesses in Pennsylvania and New Jersey. Although there have been discussions about providing immunity from these claims at the state and federal levels, no such bills have been proposed.

In New Jersey, proposed bill 2020 NJ A 3931 would require single use carry out bags to be used during the emergency and is currently pending before the Assembly Environment and Solid Waste Committee. Before that same committee is 2020 NJ S 2372, which sets forth the penalties for individuals and businesses violating the Executive and Administrative orders, and rules and regulations implemented to combat the pandemic. Updates on the proposed legislation can be found [here](#).

### IV. Recommendations in Anticipation of COVID-19 Third Party Negligence Claims

To defend against potential third-party COVID-19 exposure claims, supermarkets in Pennsylvania and New Jersey should comply with all safety measures mandated by the state and recommended in the applicable guidance. Documentation of efforts to implement, maintain, and enforce safety measures, both prior to and after mandatory safety measures, will be vital to defending these potential claims. By documenting these practices, stores will be able to show that their actions were reasonable under the circumstances and in compliance with then-existing guidance. As guidance continues to change over time, stores should be documenting their compliance with the most recent guidance. In addition to the aforementioned guidance, best practices may include:

- Documentation of the Preventative Measures Taken, including the following:
  - When and why preventative measures were implemented, including any changes to same (i.e., change in federal and/or state guidance);
  - The specific safety measures undertaken for employees and customers (e.g. Plexiglas, taped six (6) foot distance markers on floor; one-way traffic in aisles; masks/PPE for employees; limited/staggered shifts for employees; physical barriers);
  - COVID-19 health and safety plans and any revisions thereto;
  - Policies and protocols for employees/customers who become ill;
  - Mitigation efforts in the event of an exposure to COVID-19, including, but not limited to: methods/practices for cleaning, disinfection, ventilation;
  - Meetings with staff related to reducing the spread/risk of exposure to COVID-19;
  - Policies and protocols for cleaning, including scheduled times and checklists;
  - Access to handwashing and hand sanitizer and documentation showing use of same;
  - Recorded temperature checks for employees and documentation that temperatures checks are occurring for customers;
  - Testing of employees, including how employees are tested and how often they are tested;
  - Personal Protective Equipment, including whether employees being provided PPE or using their own, the quality and availability of PPE for employees and customers, inspection and approval of PPE supplied by employees.
  
- Cleaning of the Premises: Consideration should be given as to whether cleaning is performed in-house or by an outside vendor. If the cleaning is performed by a vendor, consider whether to revise cleaning contracts to include hold harmless and indemnification provisions to protect store's interests. Timing and methods of cleaning may need to be revised based on federal, state, and/or local guidance. The cleaning systems, intervals, and persons involved should be documented and audited for compliance.
  
- Contracts with Vendors: Consider investigating or establishing a vetting process for third party vendors before entering into contracts to ensure COVID-19 compliance. The investigation and/or vetting process should be documented.

- Notice to Employees and Customers: Consider whether the premises has sufficient and appropriate signage regarding mandatory safety measures, the location of such signage, as well as other potential recommendations for customers safety (e.g. encouraging customers not to place items back on the shelves after touching items).
- Video Surveillance: Consider preserving video showing the implementation of, and compliance with, preventative measures, and adding cameras in high traffic or close contact areas. Preservation of video will also aid the defense in tracing the claimant's movement throughout the premises. Document any such changes in video preservation policies and any related changes to the video system.
- Enforcement of Voluntary and Mandatory Safety Measures: Consider a process for auditing or ensuring that employees are properly and effectively implementing measures to protect against the exposure to COVID-19.
- Alternative Methods of Shopping/Payment: Consider expanding delivery or non-contact pick up options, if feasible. Additionally, non-contact payment methods should be explored, if possible.

The recommendations above are not an exhaustive list and supermarkets should pay special attention to future state and federal laws and recommendations for preventing the spread of the virus. New guidance continues to be published as information about the virus is discovered and closure orders are lifted. By complying with the most recent guidance, businesses will preemptively defend themselves from these potential third party claims.

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

## **Fowler Hirtzel McNulty & Spaulding, LLP**

*Casualty Department*

Joseph F. McNulty, Esquire  
[jmcnulty@fhmslaw.com](mailto:jmcnulty@fhmslaw.com)  
 484-408-0301

Lee H. Eckell, Esquire  
[leckell@fhmslaw.com](mailto:leckell@fhmslaw.com)  
 856-242-2131

John Randall Keiser, Jr., Esquire  
[jkeiser@fhmslaw.com](mailto:jkeiser@fhmslaw.com)  
 484-408-0011

Patrick J. Brennan, Esquire  
[pbrennan@fhmslaw.com](mailto:pbrennan@fhmslaw.com)  
 267-457-4901

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