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FHMS COVID-19 Resource Center:

PA'S FIRST LAWSUIT FOR WRONGFUL DEATH RELATED TO COVID-19 EXPOSURE

On May 7, 2020, a wrongful death lawsuit was filed in Philadelphia County, claiming that the decedent was exposed to COVID-19 while working at a meat processing plant and died from it shortly thereafter. This is the first COVID-19 exposure case in Pennsylvania. We previously reported on a similar case filed in Illinois for the death of a Walmart employee, and a case was recently filed in Texas by a worker in a meat producing plant. COVID-19 exposure cases have been filed against cruise lines and nursing homes. However, the Illinois, Texas, and now Philadelphia, cases are against the life-sustaining businesses that remained open during the pandemic.

The case in Philadelphia County was filed against the decedent's employer, JBS Souderton, Inc., a meat processor, along with four (4) purportedly related entities: JBS S.A.; JBS USA Food Company; JBS USA Holdings, Inc.; and Pilgrim's Pride Corporation. Although the facility was located in Montgomery County, the Complaint alleges that all of the defendants regularly conducted business in Philadelphia County. It further alleges that all defendants "owned, operated, managed, and otherwise controlled the meat packing plant". The decedent, a union steward alleged to be a "go-to-man" and "champion of the people", last worked on March 27, 2020. Thereafter, the facility closed for sanitation as several workers fell ill. He died on April 3, 2020, due to respiratory failure caused by COVID-19.

According to the 32-page, 194-paragraph complaint, filed by Saltz, Mongeluzzi & Bendesky, all defendants failed to provide sufficient personal protective equipment ("PPE"), required workers to work in close proximity, forced workers to used cramped and crowded areas, discouraged workers from taking sick leave and failed to provide testing. The complaint further claims that the defendants placed profits over safety by increasing production in March 2020 without taking proper precautions. The defendants allegedly refused to close the plant or limit the number of workers therein, and misrepresented to employees that workers who became sick had the flu, not COVID-19.

The lawsuit provides a detailed history of CDC and OSHA guidance, as well as the defendants' alleged response to same. For example, it was alleged that OSHA recommended that companies offer masks to their workers on March 9, 2020, but that defendants failed to provide masks until April 2, 2020 and did not require PPE until April 14, 2020. Referring to the spread of the H1N1 virus in 2009, the plaintiff alleged that meat processors were on notice of the dangerous conditions that facilitate spread of a virus to workers in close proximity.

Count I ("Negligence") alleges that the defendants' conduct was negligent, grossly negligent, and reckless in: ignoring the risk of COVID-19 infection to workers; failing to provide PPE; ignoring the fact that some workers were displaying symptoms of COVID-19; failing to provide equipment to prevent spread of COVD-19; failing to close the plant after learning that some workers had COVID-19; ignoring federal guidance from OSHA and the CDC; requiring workers to stand closer than 6 feet apart; failing to reduce the number of workers per shift and encouraging workers to work while sick; failing to properly sanitize the plant; and, failing to perform temperature checks.

Counts II ("Fraudulent Misrepresentation") and III ("Intentional Misrepresentation") may represent an attempt to avoid the employer's immunity under the Pennsylvania Worker's Compensation Act. Specifically, it is allege that the defendants misrepresented to workers that there was no risk of infection and/or that the workers were unlikely to become infected, and/or deliberately withheld their knowledge of the workers who became infected with COVID-19. The plaintiff further alleges that the misrepresentations were made to ensure that workers continued to show up for work, and that the workers justifiably relied on same.

In our article on how to prepare for COVID-19 exposure claims, we discussed the potential claims from employees and the limited exceptions to the employer immunity in PA. In discussing the "sole and exclusive remedy" provision of the Worker's Compensation Act, the courts of Pennsylvania have determined that this immunity is nearly absolute. Poyser v Newman & Co., Inc., 522 A.2d 548, 549 (Pa. 1987); see also Kline v Arden H. Verner Co., 469 A.2d 158 (Pa. 1983) (holding the Act "provides the exclusive means by which a covered employee can recover against an employer for injury in the course of his employment" and because of the exclusivity provision, a tort action for "any work related injury" by an employee against his employer was barred.)

In Poyser, the Pennsylvania Supreme Court found that the employer's immunity barred a civil action, even when the employee alleged: (1) he was injured by a machine made unsafe by his employer's willful disregard of its employees' safety and federal and state safety regulations; and (2) the employer had fraudulently misrepresented safety conditions to federal inspectors by concealing the defective machine from them at an inspection which occurred 11 days before the accident. However, in Martin, the employer intentionally concealed the results of blood tests from the employee and altered the results of those tests. Martin v Lancaster Battery Co., 606 A.2d 444 (Pa. 1992). The Pennsylvania Supreme Court held that the employer was not immunized from a common law claim for fraudulent misrepresentation.

Since Martin, the courts have narrowly construed this exception so that it only applies for aggravation of pre-existing conditions and not direct injury to the employee. See Kostryckyj v. Pentron Lab. Techs., LLC, 52 A.3d 333 (Pa. Super. 2012). In Kostryckyj the Pennsylvania Superior Court held that an employee failed to satisfy the Martin test where the employer did not adequately warn its employees of the dangers of beryllium, did not employ the most stringent safety measures, and OSHA violations. The court stated that the employee was required to demonstrate "(1) fraudulent misrepresentation, which (2) leads to the aggravation of an employee's pre-existing condition" in order for the Martin exception to apply. The court made clear that an employee's burden is exceptionally high. Id. (citing Wendler v. Design Decorators, Inc., 768 A.2d 1172 (Pa. Super. 2001) (finding summary judgment in favor of an employer, despite evidence that the employer willfully disobeyed OSHA warnings resulting in death of employee).

It is possible the defendants may raise challenges based on venue, jurisdiction, the relationship between the corporate entities, and causation. We continue to monitor the COVID-19 exposure claims, as well as the legislative efforts to provide immunity from them. As always, we are available to discuss any questions or concerns.

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