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Hospitals Bracing for Litigation from Infected ED Providers

Hospitals expect plenty of litigation from emergency department (ED) providers who have contracted COVID-19, often while working without adequate personal protective equipment (PPE).[1]

Undoubtedly, some EDs will see more claims than others. "Most litigation arises from an emotional place. If there's a perception that the hospital was doing everything they could, there will be fewer claims," says **Domenique Camacho Moran**, JD, a partner at Farrell Fritz in Uniondale, NY.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act offers liability protections for malpractice claims made by patients.[2] "However, there are no protections in the CARES Act as it relates to potential claims brought by employees against their employers," says **David E. Renner**, JD, an attorney who works on employment and employee relations for Post & Schell in Pittsburgh.

If hospitals can prove they followed generally accepted standards in the community and complied with federal, state, and local guidance, says Renner, "that should go a long way to help defend against these types of claims."

The following are some claims that ED nurses, ED staff, or emergency physicians (EPs) may bring against hospitals:

• Workers' compensation claims filed by employees who say they were infected with COVID-19 at work. One big hurdle for ED providers is that a workers' compensation claimant generally needs evidence of a work-related exposure. "The question will be, 'How do we know where they were infected?'" Moran explains.

Hospitals can counter that the virus is not just in their ED, it is everywhere in the community. "But this may not be an issue for many healthcare workers who are working directly with patients sick with the virus, because it may be clear that they contracted the virus at work," says **Sloane Ackerman**, JD, counsel in the New York office of O'Melveny & Myers and a member of the firm's labor and employment practice.

In addition, some states are making it easier for healthcare workers to apply for workers' compensation by creating a presumption that the employee contracted the virus on the job.[3,4] "It remains to be seen whether these laws will be enforced," says Ackerman.

Trade groups are fighting the expansions, arguing they will cause higher insurance premiums. The Illinois Workers' Compensation Commission repealed its "presumptive" rule, after a judge issued a temporary restraining order blocking the rule in response to a lawsuit filed by multiple business associations.[5,6]

Some EDs are seeing far more cases than the infection rate in the community at large. That kind of data could be used to support an employee's claim. "The more they can show that the infection happened at work and not at home or in the community, the higher the likelihood of the employees' success," says **Jonathan Sumrell**, JD, an attorney in the Richmond, VA, office of Hancock, Daniel & Johnson.

• Private personal injury lawsuits brought by ED staff. "Many of these cases will likely include a battle about the appropriate forum for these types of claims," Sumrell predicts.

After contracting Ebola while caring for an infected patient in 2014, an intensive care unit nurse sued the hospital. The lawsuit alleged the hospital provided inadequate guidance and training on what kind of PPE to wear, and failed to have appropriate policies, procedures, and equipment in place.[7]

Eventually, the case was settled, but whether the case could be tried in the courts (or whether workers' compensation was the only recovery possible) became an issue during litigation.

"The case is instructive in part because it shows where battle lines might be drawn in COVID-19 cases," Sumrell notes.

Certain ED staff may try to assert claims in court. Hospitals are going to argue that the claims should go through the workers' compensation system instead. "Healthcare workers may assert wrongful death or other tort lawsuits if they are exposed to COVID-19 while at work," Ackerman says.

The biggest hurdle is that in nearly all states, workers' compensation insurance is the only remedy for work-related illnesses.

"There are some narrow exemptions in certain states, such as if the employer engaged in an intentional wrongful act," Ackerman notes.

There are states that could allow claims to be brought in the courts if a hospital's conduct was particularly egregious. "An employee would have an uphill battle to successfully bring these claims in court," Sumrell observes.

ED providers would have to show the hospital's gross negligence resulted in their infection. "When confronted with claims of gross negligence, this is really going to be splitting hairs," Moran says.

One of the challenges is that guidance has shifted so dramatically. "What was right on March 10 might be somewhat different than April 20," Moran cautions.

Establishing exactly what policies the hospital was operating under on a particular date, or what supplies were available (or not) on that date could prove to be tricky. For instance, if an ED nurse alleges an infected co-worker was allowed to come back to work too soon, the outcome of the claim will hinge on what the guidance was at that point. For the hospital to defend itself, says Moran, "it is really important that someone is downloading guidance on a daily basis."

• Anonymous complaints filed by employees regarding workplace hazards. Under the general duty clause of the Occupational Safety and Health Act (OSHA), employers generally are required to provide "a place of employment ... free from recognized hazards ... likely to cause death or serious physical harm."[8]

"As such, if there are claims of inadequate PPE being provided by hospitals, those hospitals could be facing an OSHA investigation," Renner warns.

• "Failure to accommodate" claims under the Americans with Disabilities Act. These claims can come up if an ED provider with a physical impairment asked for special PPE, but the hospital never provided it.

"Employers are required to accommodate their employees' disabilities. That includes making accommodations in the use of PPE," Renner explains.

• Claims under the Families First Coronavirus Response Act. This contains anti-retaliation protections for employees who use allowable paid sick leave. If an ED provider is terminated or disciplined for doing so, says Renner, hospitals could face claims.

• Liability for violating employees' rights under the National Labor Relations Act (NLRA). Employers are prohibited from taking adverse actions against employees for engaging in protected "concerted activity."

Nationwide, ED nurses have protested being forced to work with inadequate PPE.[9] If an ED nurse was disciplined or terminated for taking part, says Renner, "the hospital could be facing liability for violating their rights under the NLRA." ■

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Enforcement Action Likely if Hospital Retaliates Against ED Staff

Some emergency department (ED) doctors and nurses allege they were disciplined or fired after complaining about inadequate personal protective equipment (PPE), or for refusing to treat COVID-19 patients without N95 masks.[1,2] "Depending on who the complaint was made to, and the specific complaint made, the hospital could have retaliation claims under OSHA [Occupational Safety and Health Administration] or state whistleblower protection laws," says **David E. Renner**, JD, an attorney who works on employment and employee relations issues for the law firm of Post & Schell in Pittsburgh.