

Delaware General Liability COVID-19 Quick Guide



1. Statute of Limitations: Two years from the date an injured person knew or should have known they were infected with coronavirus for negligence actions.

2. Negligence: For a person to be found negligent for transmission of an infectious disease, actual or constructive knowledge of the underlying condition is required. A person who knows they are infected has a duty to take reasonable precautions-whether by warning others or by avoiding contact-to avoid transmitting the disease.

3. Standard of Care: The standard of care to be applied in COVID-19 claims will play a major role in their outcome. CDC guidelines will likely be adopted as a basic level of care individuals and businesses are required to follow. Delaware has adopted and is following the CDC guidelines in instituting a State of Emergency.

4. Causation: With the coronavirus having a five to 14 day latency period according to the CDC, it will be very difficult for a person to say exactly where and when exposure to a contagion occurred. In the United States, and more specifically, Delaware, where the majority of exposure is through community contacts, it is not known how long or where community exposure had been occurring before it was declared an epidemic, and Delaware declared a State of Emergency to control continued spread. In reviewing voluminous amounts of information from infectious disease experts and epidemiologists, it would appear difficult for even an expert to opine credibility as to when an exposure occurred.

5. Premises Liability: An owner or operator of a business would owe a duty to patrons to provide a safe environment and take steps to prevent exposure that it knows or should know about. Businesses should at least meet or exceed all sanitation and cleaning guidance issued by governmental authorities, the CDC, and industry standards. Signage to warn invitees of the potential for exposure to COVID-19 and CDC social distancing guidelines should be displayed. The guidance provided for businesses is evolving, but minimally would require the use of face masks, gloves that are frequently changed between interaction with customers, and regular sanitation of the premises.

6. Violation of Statute/Executive Orders as Evidence of Negligence: No statutes have been enacted in Delaware specifically addressing coronavirus. However, emergency orders have been promulgated by the Governor, which would be expected to be used by courts to establish duties to be adhered to since businesses must show compliance with the orders to operate, and people must abide by them while out and about in public. It is anticipated that courts will apply those orders as they would a statute.

7. Comparative Negligence: Delaware is a modified comparative negligence state. If a plaintiff's negligence is not greater than the negligence of the defendant, the plaintiff will be entitled to recover. To the extent found contributorily negligent, the plaintiff's recovery will be reduced by the percentage of his own negligence. Violations of CDC guidelines for personal safety precautions may be used as an affirmative defense to COVID-19 claims.

8. Assumption of the Risk: There are three requirements that a defendant must prove to establish the defense of assumption of the risk: (1) the plaintiff had knowledge of the risk of the danger; (2) the plaintiff appreciated that risk; and (3) the plaintiff voluntarily confronted the risk of danger. Assumption of the Risk defense may be raised if the plaintiff failed to follow CDC guidelines.

9. Statutory Cap on Non-Economic Damages: There is no statutory cap on non-economic damages in Delaware.

10. Death Cases: Delaware recognizes separate survival (by the estate) and wrongful death (by eligible beneficiaries) actions.

11. Punitive Damages: Plaintiff must show, by “clear and convincing evidence”, “actual malice” (i.e., a subjective intent to harm). Such damages are rarely sought in Delaware negligence actions.

FAQS:

1. Can a plaintiff recover for fear of exposure to COVID-19? Unlikely. A plaintiff may recover emotional distress damages for fear of contracting a latent disease if the plaintiff proves: (1) actual exposure to an infectious disease due to the defendant's tortious conduct; (2) which led to fear, objectively and reasonably, that they would contract the disease; and (3) as a result of that fear, they manifested a physical injury capable of objective determination.

2. Will Commercial General Liability Insurance apply to COVID-19 claims? Possibly. Insureds and insurance companies will both need to carefully review the terms of their policies. The legal determination of whether insurance coverage is available involves principles of contract and statutory interpretation. Self-insured entities and excess carriers will also want to carefully review the terms of any excess or umbrella policies.

3. Is there immunity from COVID-19 claims? Governmental intervention may provide immunity from COVID-19 claims to individuals and business entities. The Secretary of the Department of Health and Human Services issued a declaration providing liability immunity to some against certain claims relating to the manufacture, distribution, administration, or use of medical countermeasures, except for claims involving “willful misconduct.” There is no immunity from civil claims under Delaware law.

Best Practices for Avoiding/Reducing Future Liability for COVID-19 Claims

- Follow or exceed industry and CDC standards for hygiene, sanitization, and safety.
- Follow or exceed local, state, and federal prevention guidelines and recommendations.
- Follow or exceed OSHA’s recommended procedures for workplace safety.
- Adopt, implement, and enforce practices that limit person-to-person interaction and promote social distancing (i.e., mobile order, curbside pickup).
- Develop and execute procedures for monitoring the health and well-being of employees.
- Educate employees about prevention and safe practices.
- Display signs/warnings encouraging customers to follow CDC guidelines.
- Prohibit persons who do not comply with CDC guidelines from entering premises.
- Develop policies for communication with local and/or state health department representatives to ensure your business stays current on all guidelines, recommendations, and regulations.
- Develop and implement an incident investigation procedure for all potential COVID-19 related claims (i.e., workers’ compensation, liability).
- Retain documents reflecting all precautions, policies, procedures, and the daily implementation of the same.

Helpful Links:

[CDC Workplace Guidance](#)

[Centers for Disease Control and Prevention – COVID-19](#)

[Delaware Business Express – Coronavirus \(COVID-19\) Information for Businesses](#)

[Delaware COVID-19 Executive Orders:](#)

[Delaware Department of Health](#)

[Delaware Workers’ Compensation Commission](#)

[EEOC’s COVID-19 Page](#)

[OSHA’s COVID-19 Page](#)

[OSHA’s Guidance on Preparing Workplaces for COVID-19](#)

[World Health Organization COVID-19 Updates](#)