

## West Virginia General Liability COVID-19 Quick Guide



- 1. Statute of Limitations:** Two years is the statute of limitations for negligence actions, malpractice actions, product liability actions, and wrongful death actions.
- 2. Negligence:** A person can be held liable if he/she negligently exposes people to coronavirus, resulting in personal injury or death. A person who spreads the illness is not negligent unless they had symptoms or had reason to believe they had been in contact with someone else who did. In West Virginia, to establish a cause of action for negligence, the plaintiff must prove that: (1) the defendant owed a duty of reasonable care to the plaintiff; (2) the defendant breached his or her duty of care; (3) there was a proximate causal relationship between the defendant's breach of the standard of care and the plaintiff's injuries; and (4) the plaintiff suffered damages.
- 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.
- 4. Causation:** With COVID-19 having a five to 14-day latency period, it will be extremely difficult for a claimant to say exactly where and when they were exposed. It is anticipated that expert testimony will be required to establish the particular point in time when exposure occurred.
- 5. Statutory Cap on Non-Economic Damages:** Generally, there is no statutory cap on non-economic damages in most actions; however, medical negligence actions are subject to a \$250,000.00 cap, which can be increased to \$500,000.00 if certain elements are met.
- 6. Premises Liability:** When an owner or operator of a premises knows or should know of a dangerous condition, it owes a duty of reasonable care to others to warn of or correct the condition. That duty does not generally apply to open and obvious conditions. Businesses should at least meet or exceed all sanitation and cleaning guidance issued by governmental authorities, the CDC, and industry standards. Displaying signage to warn invitees of the potential for exposure to COVID-19 and of CDC social distancing guidelines should be considered.
- 7. Violation of Statute/Executive Orders as Evidence of Negligence:** Violation of a statute may be evidence or prima facie evidence of negligence, although it does not constitute negligence per se. Pursuant to statute, the governor may issue executive orders to perform and exercise other functions, powers, and duties that are necessary to promote and secure the safety and protection of the civilian population during a State of Emergency. It is anticipated that courts will apply those orders like any other statute.

Furthermore, pursuant to statute, the state director of health is empowered to establish and strictly maintain quarantine at such places as he may deem proper and forbid and prevent the assembling of the people in any place, when the state director of health or any county or municipal health officer deems that the public health and safety so demand, and the state board of health may adopt rules and regulations to obstruct and prevent the introduction or spread of smallpox or other communicable or infectious diseases into or within the state, and the state director of health shall have the power to enforce these regulations by detention and arrest, if necessary.

A person can be charged with a misdemeanor for violating an order to quarantine. West Virginia Code provides that, “[e]very person who shall fail or refuse to comply with any order made by such board under this section, and every person summoned as such guard who shall, without a lawful excuse, fail or refuse to obey the orders and directions of such board in enforcing said quarantine, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than \$25 nor more than \$200.”

**8. Contributory Negligence:** West Virginia is a “modified comparative negligence” state. A plaintiff can recover as long as the plaintiff’s own negligence does not equal or exceed the combined negligence of the other parties involved in the accident. Violations of CDC guidelines for personal safety precautions may be used as an affirmative defense to COVID-19 claims.

**9. Assumption of the Risk:** This defense has been subsumed into the modified comparative negligence rule.

**10. Death Cases:** West Virginia recognizes wrongful death actions brought by a personal representative. There are no caps on damages.

**11. Punitive Damages:** Plaintiff must show, by “a preponderance of the evidence” that a wrongful act was done maliciously, wantonly, mischievously, or with criminal indifference to civil obligations affecting the rights of others. The amount of punitive damages that may be awarded in a civil action may not exceed the greater of four times the amount of compensatory damages or \$500,000, whichever is greater.

#### **FAQS:**

**1. Can a plaintiff recover for fear of exposure to COVID-19?** Possibly. A plaintiff may recover for negligent infliction of emotional distress based upon the fear of contracting a disease, if the plaintiff proves: (1) that he or she was actually exposed to the disease by the negligent conduct of the defendant, (2) that his or her serious emotional distress was reasonably foreseeable, (3) and that he or she actually suffered serious emotional distress as a direct result of the exposure.

Before a person can recover for emotional distress damages due to fear of contracting a disease, there must first be exposure to the disease. If there is no exposure, then emotional distress damages will be denied.

**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 principals 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.” Some governors have issued executive orders purporting to provide liability protection for health care providers and other essential entities. The extent and efficacy of any grant of immunity from civil claims will certainly be litigated in the future. As of May 9, 2020, there is no immunity from civil claims under West Virginia 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](#)

[EEOC’s COVID-19 Page](#)

[OSHA’s COVID-19 Page](#)

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

[West Virginia COVID-19 Executive Orders](#)

[West Virginia Department of Health & Human Resources](#)

[West Virginia Development Resources – Coronavirus \(COVID-19\) Business Relief Resources and Information](#)

[West Virginia Workers’ Compensation Commission](#)

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