




COVID-19 Impact on Liability

Special Guests:
Laura Davis and Chad Mitchell, of Summit Law Group

January 21, 2021

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PLEASE NOTE:

- Use the **Q&A** feature to submit questions on this topic
- Use the **Chat** feature for technical difficulties
- This is not being recorded – materials will be linked on WCRP's County Connection page
- Quick survey at the end!



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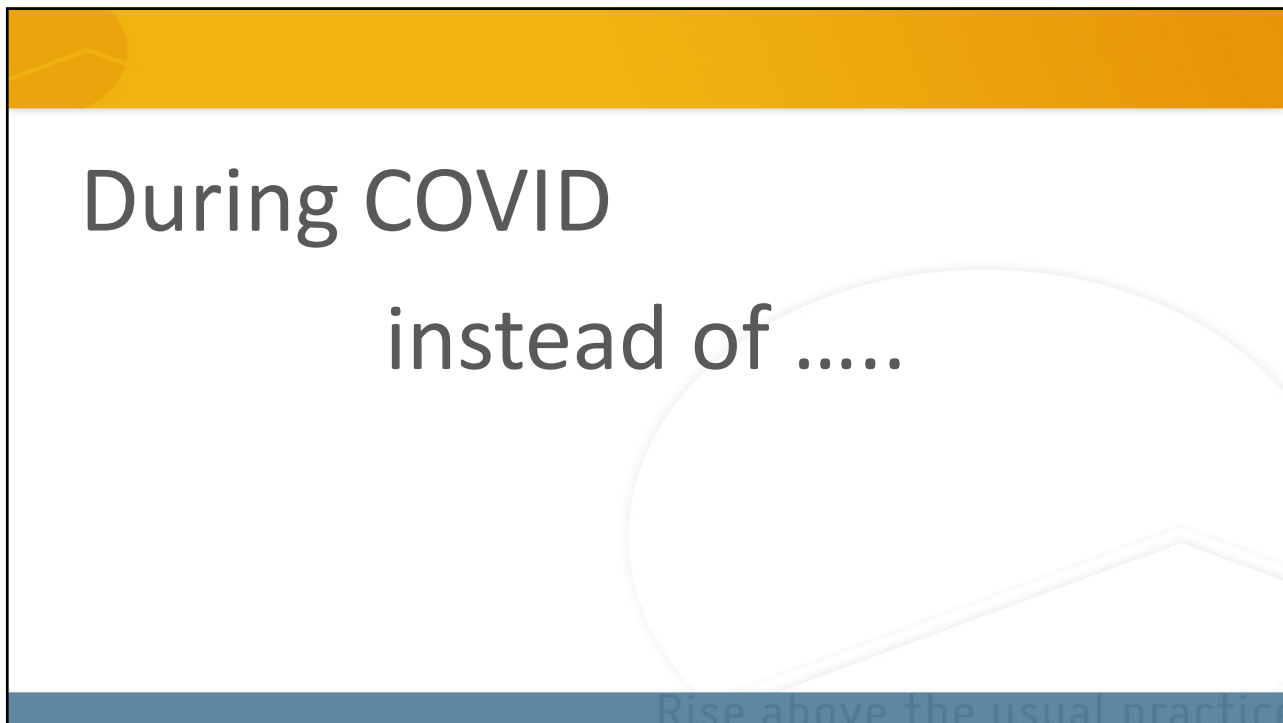


SUMMIT
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J. Chad Mitchell and Laura Davis, Attorneys
Presentation for Washington Counties Risk Pool - January 21, 2021

COVID-19: General Liability, Employment Liability, and Vaccines

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During COVID instead of

Rise above the usual practice

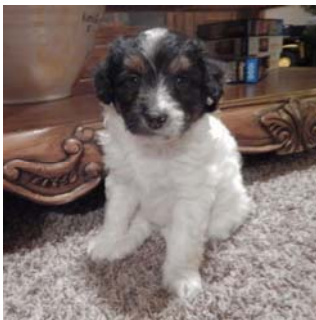
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watching Tiger King ...



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Puppies!



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We bought some boats ...



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that work great for social distancing.



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We received encouraging notes!



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COVID-related lawsuits

Employers Confronted COVID-19 Litigation In 2020

Law firms keeping tabs of COVID-19-related employment cases reported that over a thousand such suits have been filed since the World Health Organization declared a global pandemic in March 2020.



Sources: Fisher Phillips, Hunton Andrews Kurth, Jackson Lewis, Littler Mendelson



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COVID-related lawsuits in Washington State

COVID-19 lawsuits we have seen in Washington:

- Insurance coverage
- Challenging stay-at-home orders
- Challenging shut-down orders to open businesses
- Challenging shut-down orders to open schools
- Inmates challenging DOC's response to COVID
- Employment-related claims (per Barnes & Thornburg LLP):
 - Breach of Contract: 1
 - Failure-to-Pay Claims: 1
 - FMLA: 1
 - Wrongful Termination: 12
- Washington State suing gyms for opening
- Force majeure clauses

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COVID + general liability in Washington State

Liability to non-employees:

1. Duty
2. Breach
3. Causation
4. Injury

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Liability to non-employees

1. Duty

Generally, a business owes a reasonable duty of care to its customers to protect them (e.g., warnings or protective measures) from foreseeable harm.

If this is the duty, who are the potential plaintiffs? Examples:

- Take home claims. *Iniguez v. Aurora Packing Co.*, 20-L-000372 (Circuit Court Kane County, Illinois August 5, 2020).
- Customers who come to your business and are exposed to COVID. See *Weissberger v. Princess Cruise Lines, Ltd.*, 2020 WL 1151023 (C.D. Cal. Mar. 9, 2020) (no screening protocols in place prior to boarding the passengers on plaintiffs' voyage and not warning of risk).

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Liability to non-employees

2. Breach

- Failing to follow federal, state or local COVID guidelines. RCW 5.40.050 (violation of a statute or ordinance may be considered as evidence of negligence).
- Failing to use more stringent safety measures, which are not legally required, but have become industry standard.

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Liability to non-employees

Liability to non-employees:
3. Causation

Plaintiff has burden to prove that it contracted COVID from business, as opposed to host of other potential sources.

COVID has a genetic sequence that can be used like a fingerprint.



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COVID + general liability



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COVID + general liability



"I'll have an ounce of prevention."

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Ounce of prevention

1. Put safety first.
2. Stay up-to-date on safety standards.
3. How are your internal complaint procedures?
4. Workers' compensation is your friend.

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Employment Law Updates



EMPLOYMENT

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Families First Coronavirus Response Act (FFCRA)

- Provided Public Health Emergency Leave and emergency paid sick leave for eligible employees.
- Expired on December 31, 2020.
- No extensions for leave-related provisions were granted.
- Public employers are *not* eligible for the tax credit that was extended to March 2021.



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Areas of Employment Liability

Areas of risk/litigation:

- Discrimination/retaliation
- Employment contracts
- Wrongful termination
- Labor issues



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Return to Work Issues

When can we get back to normal??



Not yet...

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Return to Work Issues

Healthy Washington - Roadmap to Recovery

Activities	Phase 1	Phase 2
Social and At-Home Gathering Size — Indoor	Prohibited	Max of 5 people from outside your household, limit 2 households.
Social and At-Home Gathering Size — Outdoor	Max of 10 people from outside your household, limit 2 households	Max of 15 people from outside your household, limit 2 households
Worship Services	Indoor maximum 25% capacity	Indoor maximum 25% capacity
Retail Stores <small>(includes farmers markets, grocery and convenience stores, pharmacies)</small>	Maximum 25% of capacity, encourage curbside pick-up	Maximum 25% of capacity, encourage curbside pick-up
Professional Services	Remote work strongly encouraged, 25% capacity otherwise.	Remote work strongly encouraged, 25% capacity otherwise.
Personal Services	Indoor maximum 25% capacity.	Indoor maximum 25% capacity.
Eating and Drinking Establishments <small>(establishments only serving individuals 21+ and no food remain closed)</small>	Indoor dining prohibited. Outdoor dining, 11 PM close, maximum 6 per table, limit 2 households per table	Indoor dining available 25% capacity, 11 PM close. Outdoor dining available, maximum 6 per table, limit 2 households per table
Weddings and Funerals	Ceremonies are limited to a total of no more than 30 people. Indoor receptions, wakes, or similar gatherings in conjunction with such ceremonies are prohibited.	Ceremonies and indoor receptions, wakes, or similar gatherings in conjunction with such ceremonies are permitted and must follow the appropriate venue requirements. If food or drinks are served, eating and drinking requirements apply. Dancing is prohibited.
Indoor Recreation and Fitness Establishments <small>(includes gyms, fitness organizations, indoor recreational sports, outdoor pools, indoor 8-12 sports, indoor sports, indoor personal training, indoor dance, no-contact martial arts, gymnastics, climbing)</small>	Low risk sports (including dance, no-contact martial arts, gymnastics, and climbing) permitted for practice and training only in stable groups of no more than 5 athletes. Appointment based fitness/training: 45-minute max session, no more than 1 customer/athlete per room or per 500/sq. ft. for large facilities.	Low and moderate risk sports competitions permitted (no tournaments). Fitness and training maximum 25% capacity.
Outdoor Sports and Fitness Establishments <small>(outdoor fitness organizations, outdoor recreational sports, outdoor pools, outdoor parks and hiking trails, outdoor activities, outdoor 8-12 sports, outdoor sports, outdoor personal training, outdoor dance, outdoor motorsports)</small>	Low and moderate risk sports permitted for practice and training only (no tournaments). Outdoor guided activities, hunting, fishing, motorsports, parks, camping, hiking, biking, running, snow sports, permitted.	Low, moderate, and high-risk sports competitions allowed (no tournaments), maximum 200 including spectators.
Indoor Entertainment Establishments <small>(includes arenas, indoor theaters, indoor arenas, indoor concert halls, indoor gyms, indoor museums, indoor bowling, indoor simulators, indoor arenas, indoor cardrooms, indoor entertainment activities of any kind, indoor event spaces)</small>	Private rentals/rooms for individual households of no more than 6 people permitted. General admission prohibited.	Maximum 25% capacity. If food or drinks are served, eating and drinking requirements apply.
Outdoor Entertainment Establishments <small>(includes fairs, outdoor gardens, outdoor aquariums, outdoor theaters, outdoor stadiums, outdoor event spaces, outdoor arenas, outdoor concert venues, fairs)</small>	Ticketed events only: Groups of 10, limit 2 households, timed ticketing required.	Groups of 15, limit 2 households per group, maximum 200 including spectators.

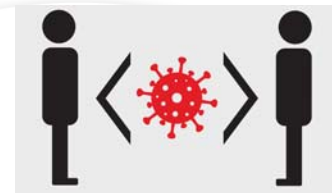
NOTE: Live entertainment is no longer prohibited but must follow guidance above for the appropriate venue. Long-term Care facilities, professional and collegiate sports remain governed by their current guidance/proclamations separate from this plan.

Source: <https://coronavirus.wa.gov/what-you-need-know/safe-start/whats-open>

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Return to Work Issues

- Covid-19 continues to be a threat to our communities.
- Until further notice, continue to abide by the CDC and state guidance.
- If you have employees who are currently able to work remotely, continue to do so.
- If you have employees who have to come to work, continue to implement safety measures: masks, social distancing, symptom screening at the onset of a shift, decreasing in-person contact as much as possible, regularly disinfecting the office environment, and providing access to handwashing/hand sanitizer, etc.
- Continue to postpone non-essential work travel.
- If you have employees who are subject to the governor's high-risk proclamation, continue to accommodate them.



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Layoff and Furlough Recall



- Check any and all applicable collective bargaining agreements and work with the union.
- Look at your employment policies.
- Have a plan.
- Consider the order in which you will recall employees, and keep it consistent. Based on job? Seniority?
- Determine whether there are any updates to your documentation that need to be made.
- Consider reporting requirements.
- Make sure that issues related to high-risk employees are considered.
- Accommodate as necessary.

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COVID-19 Employment Resources

- Washington State Coronavirus Response page:
<https://coronavirus.wa.gov/what-you-need-know/safe-start>
- Washington State Department of Health:
<https://www.doh.wa.gov/Emergencies/COVID19/ResourcesandRecommendations>
- Washington Department of Labor & Industries:
<https://www.lni.wa.gov/claims/for-employers/help-your-employee-return-to-work>
- Employment Security Department:
<https://esd.wa.gov/newsroom/covid-19>
- Municipal Research and Services Center (MRSC):
<http://mrsc.org/Home/Explore-Topics/Public-Safety/Emergency-Services/Public-Health-Emergencies.aspx>

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Vaccines!



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Vaccines: Employment Considerations



- Mandatory vs. non-mandatory?
- Wait-and-see approach
- Logistics
- Considerations with vaccine policies (especially mandatory ones):
 - Disability and religious accommodations
 - FLSA considerations
 - Labor considerations
 - Workers' compensation

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Vaccines: Public Readiness and Emergency Preparedness Act

- PREP Act – what is it?
- What does liability immunity mean?
- Washington State’s response
- Countermeasures Injury Compensation Program
- What are the exceptions to the Act?
 - Willful misconduct
 - Claims outside the scope of the Act
 - Situations unrelated to the vaccine
 - Claims that are filed outside the U.S., based on foreign law
 - Claims not involving the type of liability protected by the Act, or claims that are based on violations of civil rights laws
 - Failure to administer a vaccine—maybe, but not likely



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Vaccine Administration: Some Practical Considerations



- Continue to take precautions and exercise risk management.
- Provide information on the CICP to vaccine recipients.
- Contracts with third parties? Consider adding PREP Act language to any contracts.

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Summit Resources



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Please visit www.summitlaw.com/covid-19-resources for information on COVID-19, including checklists, webinars, and updates.

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THANK YOU

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Special Guests:

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Discussion

*A copy of the presentation will be made available on
WCRP's County Connection webpage.*



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COVID-19 Impact on Liability

Thank you!

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