



Liability for COVID-19 Infections & Insurance Considerations for Re-Opening

With the pandemic entering its second year, vaccinations ramping-up, and spring approaching, BRI members are all optimistic for a return to “normal”: condos, co-ops, HOAs and apartment landlords are considering opening their pools, fitness centers, playgrounds, and social rooms. Contractors, suppliers, managing agents, and service providers, that have allowed work-from-home, are thinking about how and when to bring employees back to work.

Consideration of all of these back-to-normal re-opening activities raises two common questions: 1) is there liability if someone contracts COVID; and, 2) if there is liability, is there insurance coverage?

Before we explore these questions, consider this: whether you are an employer, or responsible for running a property, facility, or office, liability for COVID infections can be reduced by:

- Following all federal, state, and local safety protocol guidelines (e.g. requiring masks, distancing, limiting capacity, etc.);
- Taking “extra steps,” such as hiring monitors to enforce safety protocols, requiring reservations/appointments/sign-in, prohibiting guests at pools, etc.
- Where applicable: utilizing carefully drafted COVID liability waivers.

All of these efforts may further reduce the potential for COVID-related legal liability, BUT they will NOT completely eliminate it.

There are many possible liability cases relating to someone contracting COVID. An employee could allege infection during work. A condo unit-owner, co-op shareholder, or apartment tenant (or a guest) could allege infection while using a pool or fitness center. A customer could allege infection from visiting a bank branch or material supply store. These liability scenarios are more easily considered by dividing them into two groups: 1) employee COVID infections scenarios, and 2) COVID infections of “others” (who are not employees); “others” could include a (non-employee) user of a pool or fitness center, or visitor to an office or retail place of business.

EMPLOYEES: An employer is usually liable if it can be proven that an employee contracted a sickness (such as COVID infection) while at work; however, a) it’s very difficult for most employees to prove that infection occurred while at work (think about it... unless working at a hospital, nursing home, etc., how does one prove the infection occurred at work, as opposed to at the grocery store the night before, or the barber shop three days ago?); and b) IF work/infection causation can be proved, then the employer’s liability is usually limited to insurance benefits available through workers compensation.



OTHERS: A lawsuit could arise from COVID infection alleged to have occurred by a non-employee while: using a pool, fitness center, or community room; or visiting an office, or retail place of business. Similar to with employees, it's difficult (but not impossible) to prove the infection was definitively caused by being present at the facility or business.

If there is legal liability (even if remote) to someone alleging COVID infection while visiting your facility or place of business, then will your facility or business liability insurance respond? Probably NOT. Your

insurance broker can help interpret the language of your liability policy (or policies), and the insurance carrier has the final word on whether or not a claim is covered. But, in many cases, the answer is simple: most General Liability policies include an exclusion for sickness due to "virus" and/or communicable disease. (If your current liability policy does not have this exclusion, it may be added to your renewal policy.) Even if your General Liability policy does not have this exclusion, there are other exclusions which may apply. If your General Liability policy does not cover a claim, your umbrella policy will not respond, either.

Environmental Impairment/Pollution policies may offer the possibility for coverage (if there is no virus exclusion); but, these types of policies have varying coverage/exclusion language, and the question of whether a "virus" constitutes a "pollutant" is not definite.

In short: the possibility of your facility or business being liable for someone contracting COVID may be low, but it is not "zero"; and, insurance coverage for a COVID liability claim is possible, but not probable. If you choose to re-open your pool, fitness center, community room, office, or store, the more liability-reducing steps (outlined above) that you take, the less likely someone will have a viable legal claim against your organization or company.

Read the entire IMPACT Newsletter here:

<https://www.buildersinstitute.org/wp-content/uploads/2021/04/IMPACT-ABSOLUTE-FINAL-FEB-MAR-2021.pdf>

If you have questions about your organization's or company's insurance, and COVID claims, contact your insurance broker, or Levitt-Fuirst at (914)457-4200 or Jason Schiciano at jschiciano@levittfuirst.com.