IMPACT OF COVID 19 ON NEW YORK LABOR LAW

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Authors:

Stuart G. Glass – Partner

Brian J. Divney

As metropolitan construction is a "growth industry" so with it is the evolution and expansion of New York Labor Law litigation. Labor Law claims and their progeny are continuously changing with the advent of technological advances, societal changes and environmental hazards, from the early use of a rickety A-frame ladder elevated upon two free standing buckets to the use of multi level mechanical scaffolds, the constant changes in Labor Law have never been more prevalent than in the current COVID 19 pandemic. As likely it is that plaintiffs will attempt to litigate Labor Law claims based on COVID 19 exposure, the likelihood of success remains to be determined as does the theories of defense.

This is not the first time that pandemics have impacted the construction field. The 1900s showed outbreaks of the Spanish Flu, Asian flu and Hong Kong flu that resulted in the millions of deaths worldwide. The 2000s were notable for the spread of the H5N1 influenza that provided the preamble for construction during today's pandemic. Moreover, environmental hazards spawned an entire cottage industry devoted to asbestos claims.

It is vital to understand the safeguards and requirements already in place that evolve as each day passes. Prior to pandemics impacting workplaces, OSHA was the standard bearer in worker personal protection to environmental hazards, but now reconciling the prior standards with new requirements, as set forth by the CDC, as well as the Federal and State government, have becomes the "new normal" in evaluating potential claims under Labor Law Sections 200 and 241(6). In 2006, the National Strategy for Pandemic Influenza - implementation plan was disseminated by the CDC.[1] Then and now the safety plans focused on preparation, preparation and preparation followed by industry specific implementation.[2] The 2006 standards ring true today as the focus then and now are placed upon transmission, social distancing, face masks, proper hygiene and disinfection.

New York Labor Law standards supply the predicate necessary for establishing a prima facia case in the absence of a properly developed and implanted safety plan. Labor Law Section 200 is a codification of the common law, duty of an owner or a contractor to provide a safe workplace to a worker by imposing a negligence standard upon owners or contractors.[3] There are two categories of cases that are evaluated under Labor Law Section 200, means and methods of the work and the condition of the premises. When an accident arises from the means and methods of construction work, liability will not be imposed unless the owners or contractors have notice of a dangerous condition and supervise and/or control the work.[4]

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[1] https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-implementation.pdf

[2] See generally id. At pg. 175.

[3] See Russin v. Louis N. Picciano & Son, 54 N.Y.2d 311, 317-319, 429 N.E.2d 805, 445 N.Y.S.2d 127 (1981).

[4] See Comes v. New York State Electrical and Gas, 82 N.Y.2d 876, 609 N.Y.S.2d 168 (1993).

Additionally, Labor Law § 241(6) imposes a non-delegable duty on owners and contractors to provide reasonable and adequate protection to workers and renders the owner/general contractor liable for injuries that are a proximately caused by the alleged violations.[5] This section only applies to violations of standards/rules promulgated under the New York Code of Rules and Regulations (Industrial Code portion) and only to those standard/rules, which contain *specific* requirements, rather than general site safety standards.[6]

On March 20, 2020, Governor Cuomo announced the PAUSE executive order that required the closing of all non-essential in-office personnel functions as of Sunday, March 22, 2020 at 8 pm. Essential businesses included skilled trades such as electricians, plumbers, and other related construction firms and professionals for essential infrastructure or for emergency repair and safety purposes.[7]

On March 28, 2020, Executive Order 202.6 was modified to clarify that only construction which was an essential service was not subject to the in-person work restrictions.[8]

Essential construction includes:

- construction for, or your business provides necessary support for construction projects involving, roads, bridges, transit facilities, utilities, hospitals or healthcare facilities, homeless shelters, or public or private schools;
- construction for affordable housing, as defined as construction work where either (i) a minimum of 20% of the residential units are or will be deemed affordable and are or will be subject to a regulatory agreement and/or a declaration from a local, state, or federal government agency or (ii) where the project is being undertaken by, or on behalf of, a public housing authority;
- construction necessary to protect the health and safety of occupants of a structure;
- construction necessary to continue a project if allowing the project to remain undone would be unsafe, provided that the construction must be shut down when it is safe to do so;
- construction for existing (i.e. currently underway) projects of an essential business; or
- construction work that is being completed by a single worker who is the sole employee/worker on the job site.

The order stated, "All continuing construction projects shall utilize best practices to avoid transmission of COVID-19."[9]

Owners and Contractors must remain vigilant in preemptively addressing the pitfalls that are at the forefront of society. However, the concept of "best practices" is a constantly changing standard that has placed a significant onus on employers and owners. As each day brings new discoveries concerning the COVID pandemic so changes the industry guidelines concerning workplace safety.

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[5] See St. Louis v. Town of N. Elba, 16 N.Y.3d 411, 947 N.E.2d 1169, 923 N.Y.S.2d 391 (2011).

[6] See Misicki v. Caradonna, 12 N.Y.3d 511, 909 N.E.2d 1213, 882 N.Y.S.2d 375 (2009).

[7] https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order

[8] https://esd.ny.gov/guidance-executive-order-2026

[9] Id.

It is doubtful that the contracting of the virus could be based on a condition created by an owner or contractor particularly prior to the lock down. The most comparable case law revolves around contagions that resulted from the 9/11 crashes. In Kagan *v. BFP One Liberty Plaza*, plaintiff was involved in the cleaning of an office building after 9/11 and was adversely affected by airborne toxins.[10] The Court dismissed the Labor Law 200 claim stating, "[t]he dust and debris that accumulated in the office building in which plaintiff performed fine cleaning resulted not from any act or omission of defendants but from the terrorist attacks that caused the Twin Towers of the World Trade Center to collapse."[11] As such, there was no basis to allow for a finding of constructive or actual notice.[12] Prior rulings, albeit scarce, concerning employees infected with HIV or Swine Flu will likely be relied upon.[13] Here, unless there is a showing that the owner or contractor was aware of a COVID positive worker on site allows for the application of multiple defenses to Labor Law liability claims. Again as the science changes so will the standard of liability as present theories suggest COVID is not transmitted from secondary contact of surfaces.

However, plaintiffs will still have to establish, with medical or scientific support, a causative link between a diagnosis of COVID 19 and the work site. In that regard HIPAA guidelines and protections will further muddy the waters insofar as current guidelines and protections require the reporting of a COVID diagnosis. While current standards require self reporting, owners and contractors will be well served in being vigilant in the condition of their workers. Yet, the issue remains as to what would constitute notice of COVID 19 – a cough, elevated temperature, contact with a person who tested positive for the virus. Plaintiffs in litigating claims, as well as owners and contractors in defending same, will have to rely on the veracity of the workers.

Liability could be assessed based on means and methods of the work performed where no precautions were taken, such as wearing personal protective equipment, after the extent of the virus was known and social distancing protocols were implemented. Each case would be fact specific as to what precautions and protocol were in place at point on the COVID timeline.

Liability should not attach if all precautions were taken. For example In *DeLeon v. State of New York*,[14] plaintiff, a construction worker, was struck by a drunk driver while performing work on an expressway. The Court found, "[w]ith regard to the claims sounding in common-law negligence and the violation of Labor Law § 200, the defendant satisfied its initial burden on the motion by submitting sufficient evidence demonstrating that the safeguards provided for the construction zone completely conformed to relevant industry standards and practices, and that the defendant was not otherwise negligent in failing to adequately safeguard the construction zone." As applied to COVID 19 issues, the issue becomes whether the CDC regulations will be deemed the new industry standard. The extent of the precautions utilized on construction sites will be determinative in creating a new industry standard of safety protocols. The questions that must be answered are the procedures and safeguards utilized on active worksites, such as designated temperature testing upon arrival, policies regarding sending workers home who display symptoms such as coughing or even prohibit entry to workers based on potential exposure to the virus, on or off the site. The potential impact of union contracts and collective bargaining agreements further complicate this analysis.

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[10] 62 A.D.3d 531, 879 N.Y.S.2d 119 (1st Dep't 2009)

[11] Id.

[12] Id.

[13] Wiener v. City of New York, 939 N.Y.S.2d 745 (Sup. Ct. Qns. Cty. 2011)

[14] 22 A.D.3d 786, 803 N.Y.S.2d 692, (2d Dep't 2005)

While comparative negligence is a defense to Section 200 and 241(6) claims, the same may hold true and liability would not attach where a worker did not avail him or herself of the available mandated protections or chose to continue working while knowing proper precautions were not being taken. "The duty imposed under Labor Law § 200 , which merely codifies the common-law duty to provide a safe place to work, does not extend to situations where the danger at issue is readily observable, bearing in mind the age, intelligence and experience of the worker."[15] However, plaintiffs will be quick to argue that it is the owner/employer's responsibility to ensure that all workers are abiding by the proper PPE requirements and any failure to do so would necessitate some affirmative action such as sending workers home who refuse to maintain social distancing and/or wear proper facial protection.

In *Drago v. New York City Transit Auth*.[16], plaintiff fell while trying to run away from an exploding electric cable in a subway tunnel.[17] In denying the plaintiff's summary judgment motion, the court held "[t]he injured plaintiff's knowing decision to continue with the installation of the new cable only a few feet from the live old cable creates a question of fact regarding the injured plaintiff's potential comparative negligence." In contrast, in *England v. Vacri Constr. Corp*., an inspector struck his head on low pipe extending across the doorway in the basement of building where defendant was performing construction work and bought 200 and 241(6) claims.[18] The Court denied the defendant's motion for summary judgment. "While it was undisputed that the allegedly dangerous condition of the pipe was readily observable and well known to plaintiff prior to the accident, these circumstances merely negated any duty that defendant owed plaintiff to warn of potentially dangerous conditions."

It appears that liability would not attach if a defendant can demonstrate that all safety protocols were followed and all reasonable precautions were taken. Alternatively, a failure to satisfy the CDC guidelines could conceivable result in a presumption of negligence.

A major obstacle would seem to be producing evidence that that exposure at the work site caused the subsequent illness since the virus is pervasive and difficult to track. In toxic tort cases, "It is well-established that an opinion on causation should set forth a plaintiff's exposure to a toxin, that the toxin is capable of causing the particular illness (general causation) and that plaintiff was exposed to sufficient levels of the toxin to cause the illness (specific causation)."[19]

Things are rapidly changing and there is no bright line in determining the legal impact of COVID 19 on existing Labor Law standards, which must now be evaluated based on these novel issues.

Fleischner Potash stands ready to assist and advise our clients in navigating these unprecedented times and address the impact of COVID 19 on coverage and defense matters. Please visit our COVID 19 section for additional information

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[15]Musillo v. Marist College, 306 A.D.2d 782, 762 N.Y.S.2d 663 (3d Dep't 2003)

[16] 227 A.D.2d 372 (2d Dept. 1996)

[17] Id.

[18] 24 A.D.3d 1122, 807 N.Y.S.2d 669 (3d Dep't, 2005)

[19] Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 857 N.E.2d 1114, 824 N.Y.S.2d 584 (2006); See also Cubas v Clifton & Classon Apt. Corp., 82 A.D.3d 695, 917 N.Y.S.2d 320 (2d Dep't 2011) [A plaintiff alleging injuries from a toxic chemical exposure must provide objective evidence that the exposure caused the injury.]