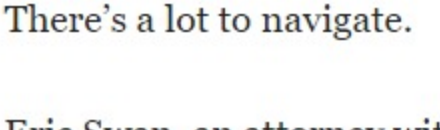


What businesses should do to prepare for lawsuits over coronavirus

Here's what natural products companies need to consider when reopening for business during the COVID-19 pandemic.

Dawn Reiss | Jun 11, 2020



As coronavirus infections increase nationwide, many owners are still grappling with how to operate their businesses, keep their workers safe and comply with federal, state and local laws.

There's a lot to navigate.

Eric Swan, an attorney with Lathrop GPM in Kansas City, Missouri, who handles civil litigation for personal injury defense claims for Fortune 500 companies, says businesses need to start preparing for more employee and third-party claims against their businesses.

"For the most part it's a hodge-podge list of city, county or state ordinances telling employers what they should do, some of which are based on industry or type of business," says David Barron, a Houston-based labor and employment attorney at Cozen O'Connor.

Establish a COVID-19 preparedness and response plan

If done so already, businesses need to review the CDC's guidelines and create a [COVID-19 Preparedness and Response Plan](#), says Sarah Brew, partner at Faegre Drinker LLP in Minneapolis.

"You need to follow this guidance and prepare a plan," Brew says. "It's not a get-out-of-jail free card. If you get sued it shows you did what a reasonable employer would do, you met the industry standard of care."

Look at your workforce, Brew says. Do you have customers or vendors coming in? Identify sources of where the virus and access your risk, including nonoccupational factors such as people's homes and community.

This plan should articulate how the business will implement:

- Infection prevention measures.
- Prompt identification and isolation of sick people.
- Developing, implementing and communicating workplace flexibilities and protections.
- Engineering and administrative controls for social distancing.
- Cleaning, disinfecting, decontamination and ventilation.
- Communication and training of managers and workers to implement the plan.
- Creating the necessary management and supervision to ensure effective ongoing implementation of the plan.

Businesses can also review Minnesota's [COVID-19 Preparedness Plan template](#) that offers a checklist of suggestions coupled with verbiage.

What laws matter and why

Employers should review the [Families First Coronavirus Response Act \(FFCRA\)](#), a law that went into effect on April 1 and stays in effect until Dec. 31, 2020 that gives up to two weeks (80 hours) of paid sick leave or expanded family and medical leave for COVID-19 related reasons. [According to the U.S. Department of Labor](#), paid leave provisions only apply to businesses with few than 500 employees and there are exemptions for companies with fewer than 50 employees if "doing so would jeopardize the viability" of your business.

Natural food companies should also review the FDA's [temporary food labeling relaxed requirements](#) and understand how federal oversight has evolved.

When the pandemic first began, Centers for Disease Control and Prevention (CDC) and Occupational Safety and Health Administration (OSHA) gave nonbinding guidance to food businesses as state and local health departments began applying their own COVID-19 prevention standards to food facilities, sometimes requiring shutdowns.

That changed, Brew says, when President Trump issued an [executive order](#) in April under the Defense Production Act (DPA) of 1950, giving U.S. Department of Agriculture Secretary Sonny Perdue the power to determine meat and poultry production as critical infrastructure, outweighing potential worker risk that should be regulated on a federal level, not by state and local agencies.

In May, the USDA and FDA created a Memorandum of Understanding (MOU) extending the USDA's DPA authority over facilities that manufacture, process, pack, grow, harvest or hold foods, including fruits and vegetables, so they continue operations despite disruptions caused by COVID-19.

"We're telling all food companies to follow what CDC and OSHA is saying," Brew says, adding that the guidance is evolving with the FDA or USDA stepping in with more specific guidance.

Track government updates via a [U.S. Coronavirus Legal Mapping Tool](#) that breaks down executive orders and legislative actions on a federal, state and local level.

Review procedures

Every employer should ask: "Are you incentivizing your employees to come to work or are you incentivizing your employees to stay home if they are sick," Barron says.

Review procedures and policies to see if they are aligned with safety.

At a minimum, Barron says employers should follow all legislative orders, including workplace rules for social distancing and wearing masks, and review employee policies such as sick pay, medical screening and work-from-home options to add protections and incentives for sick employees to stay out of the workplace.

Release information but protect privacy

Create a plan for how information will be released in case someone tests positive for COVID-19.

"You need to have a way to let people know someone at the company knows without revealing who it was," Swan says, so you're still keeping medical information private.

Avoid including too much identifying information, Swan says, with general statements that can be tailored to where someone works. He suggests saying, "Somebody in our office tested positive and you may have been exposed. We're going to implement some new procedures as a result of that."

Workers' compensation is still a gray area

Don't assume workers' compensation will cover COVID-19. Right now, it's a gray area.

"Typically if you're injured at work, you can't bring a personal injury claim, you have to bring a worker's compensation claim," says Swan. "There's some question right now about whether it would or would not be covered by workers' comp."

Because workers' compensation is a patchwork of 50 state laws, legislation varies drastically between states. Workers' compensation has a long history of exceptions—carve outs—where some state statutes limit "ordinary diseases of life" from workers' compensation. States such as Minnesota, Iowa and Nebraska distinguish between "occupational diseases" and "ordinary diseases of life," whereas states like Wisconsin and South Dakota only look at particular job activities, says [SFM](#), a mutual insurance company that insures employers in the Midwest.

Trying to figure out what is happening in your state? Review the [COVID-19 Resource Center](#) on National Council on Compensation Insurance's [COVID-19 Resource Center](#).

"If it's not covered by worker's comp, then workers have the right to sue you in the tort system and those lawsuits are potentially more dangerous," Swan says. The reason: Payouts can be astronomical for "personal pain and suffering," compared to workers' compensation claims, which are limited and include caps on how big a payout can be to an employee.

If you are sued, Swans says you need documentation showing that you were doing things reasonably and following the letter of the law.

Save all COVID correspondence

If sued, companies will want to be able to reconstruct the timeline of when policies and procedures were implemented and the thought process behind every decision the company makes.

Whoever sues is going to "Monday morning quarterback every decision you made," Swan says. "The idea is you want to be able to have some tracking of what you did and why."

Employers should save emails and other forms of direct communication from local and state governments about COVID-19 rules and regulations to give context about the timing of policies and procedures. Save them in a place where they won't get deleted in case you are sued, Swans says, since a personal injury lawsuit typically is filed one to four years after the incident.

Burden of proof is switching for workers' compensation

Even if a lawsuit falls under worker's compensation, usually the burden of proof is on the employee to prove something happened that shouldn't have happened at work. But that's switching.

The presumption is being flipped to make employers prove their employees didn't contract COVID-19 at work, Barron says. That's especially true in states like California where Gov. Gavin Newsom signed an executive order to make it easier for essential workers who contract coronavirus to access workers' compensation benefits.

Talk to your workers' comp broker or benefits broker to keep up to date, Barron says.

The one thing employers don't want: having a cluster of people getting sick at work. "If one person gets sick, it's really hard to presume or prove they got it at work," Barron says. "If you have 10 people at work who are sick, now it starts to look like they are getting it at work because there is the obvious connection there."

Talk to concerned employees

A lot of employers are asking: "What should businesses do about concerned or scared employees? Barron's suggestion: Engage in a dialogue with the employee.

"Is it just they are afraid or is there an underlying health issue," he says. "All of the CDC guidelines for vulnerable individuals, which includes people who are over age 65 or have underlying health conditions should take extra precautions."

"If you have an employee who falls into that category, they have a reasonable basis to ask for accommodations or staying at home," Barron says.

