

PODCAST

Power of the Workplace

Employer Liability & COVID

Join us as we kick off the first Power of the Workplace podcast. SpacelQ's James Franklin discusses legal liabilities facing employers amidst COVID-19 with John Hutchins of BakerHostetler Law.

James: Hello everyone and welcome to our very first episode of Power of the Workplace. I'm James Franklin, Chief Customer Officer for SpacelQ and it's a great honor for me to kick off our monthly conversations on trends issues and topics that are impacting today's workplaces.

When we talk about impact, of course that means COVID-19. And when the coronavirus hit early this year (2020), the shift was immediate and global across all sectors and regions. Offices around the world were shutting down and working from a home became the standard for most office employees. Then in the summer, businesses started to develop their plans for reopening workplaces. But many of these plans were either delayed or dropped as spikes in cases appeared in many regions.

But employers tasked to provide a safe productive workplace for employees hasn't changed. So, what happens if someone catches COVID-19 at work? Are business owners liable and open to repercussions from sick workers and their colleagues?

To help answer these questions and explore the considerations, we're joined today by John Hutchins, a partner with the very prestigious law firm BakerHostetler, which is a law firm with over a thousand employees across 17 U.S. offices. John is a veteran trial and technology lawyer with 30 years of litigation experience and his broad experience encompasses not only commercial complex litigation but also trial, work privacy, and data security matters as well as compliance and strategic counseling on technology matters and transactions.

So, turning to John and opening up our conversation. First of all, thank you very much for being here John. We really appreciate you taking the time out to explore these topics with us.

John: Happy to be here James. Thank you.

James: So, COVID-19 has certainly thrown a workplace a curveball for all businesses. We've seen economic impacts like never before and businesses have had to adapt in very extreme ways in order to survive and some of those adaptations impact workplaces.

So, all businesses right away are thinking about as I go back to the workplace and bring employees back to the workplaces, am I liable as a business if someone contracts COVID-19 in the workplace?

John: Yeah, and so the answer to that is not an easy thing to answer. It's a complex issue and you sort of have to start by thinking about there are three ways that laws get made in this country. There are legislators that pass statutes. There are lawsuits that develop case law that can give us an idea what the law is, or a regulatory body can pass a regulation.

So, none of that has happened with respect to this issue. No legislature has said if you invite somebody back to work and they come and get COVID, you're liable. There aren't that many cases yet, as far as I know, where a court has said that. So, then you have to just look at what laws are already on the books and how would you apply those laws to this set of facts. It's going to be very fact specific depending on the workplace and there are a lot of different factors that would go in to determining whether or not an employer was, for instance, negligent in having employees come back to work and then somebody contracted COVID.

James: So, I went to a restaurant – outside of course – and socially distanced between tables and there was a sign when we went in and it said you assume all responsibility and liability if you come in and eat. Is a sign like that necessary? Helpful?

John: Well, it depends on what state you're in, what the law is in that state with regard to negligence. If it's a restaurant, there's also an issue about whether or not you're what the law considers an invitee, which means you have a higher duty to an invitee. In most states now, you have something called comparative negligence, which looks at not just the negligence of the allegedly offending party but also the level of negligence or assumption of the risk by the party who is making the claim.

So, I would say a sign like that in a restaurant probably doesn't have a lot of value, but it's not something that's going to protect you in all circumstances. If the restaurant has a sign like that but doesn't make people spread out at their tables so that people can be socially distanced, the restaurant workers don't have masks on or anything like that to protect the customers, COVID really is no different from any other problem a restaurant might have if the restaurant, say, was not practicing food safety. They could be liable for things like that if they had a spill and nobody mopped it up and somebody slipped and fell. Then the restaurant might be liable. The one difference is that with regard to food safety, there are regulations and laws that govern what restaurants need to do and if you're compliant with the law then you have a really good defense to a negligence claim.

With regard to COVID, you don't have that. People are just sort of making it up as they go along.

James: Have you seen a lot of companies coalescing around certain norms and standards? If we're all making it up as we go along and you're evaluated based upon what everybody else is doing, how do you figure out what everybody else is doing?

John: In terms of what people are doing, I think a lot of people are just looking to things like the CDC guidelines or the health guidelines from their state officials. There are some things that have just in the six months where we've adopted as common practice in terms of the necessity to keep surfaces clean with the right kind of disinfectant, to provide hand sanitizer, to encourage employees to wash their hands regularly, to have maybe some signage that talks to people about how to wash their hands and you know that you need to do it for 20 seconds, to adopt a mask-wearing policy.

But, you know, other than those sort of bright lines that we've all come to sort of speak about in the last six months, there could be a lot of variation in there. You could have a policy that says you have to wear a mask when you're in the common areas in your office, but you don't have to wear a mask if you're in your own office with nobody else. But if somebody comes into your office you have to put a mask on. Where's the line? I mean, nobody knows that yet. In terms of things like telling people that they can't eat in the common areas where you might have an office that's designed with a dining room in it or a place for workers to eat to tell people they can't eat there but they have to eat at their desk, or they have to go outside to eat or you know things like that. What's reasonable again depends on the circumstances.

Then you've got the whole other issue of really, you know, for somebody to be liable for anything. First of all, they've got to have a duty to protect the person who's making the claim. They have to breach that duty. In other words, they have to violate that duty in some in some way and then the person in order to have a viable claim, they have to be able to show that they've been harmed by the breach of duty.

So, you have to determine if you invite workers back to an office environment and you have whatever protocols you decide on that are set up for your office environment, there are issues of did everybody follow the protocols? Did the employer know that there were people who weren't following the protocols and do nothing about it? Then if you got COVID, how do you prove that you got COVID at work as opposed to when you went to buy your groceries?

That issue of causation, I think, is going to be a big issue and I imagine people will litigate over this. When people do start litigating, it's very hard to prove that you got COVID from a particular source, especially you know in a work environment, where I have a child who got COVID from his girlfriend. It's pretty easy to figure that out. But work is a little bit different from that. Then, you've got the issue of what do you do when you know somebody in the office that has COVID. What's the appropriate protocol in response to that? Do you require them to quarantine at home for 14 days? Is that enough?

What do you do in terms of having them get tested and get a clean test before they come back? What's the reliability of the tests?

I mean they're just all kinds of issues that that play into, you know, whether or not somebody can be held liable if their employee gets COVID allegedly from the workplace.

James: We're hearing a lot more stories now about people that say they've tested positive for COVID but still are being required to go to work. And it seems common sense that that would be a pretty big liability. What's the legal ramifications of requiring someone to come to work, somebody who's tested positive or claims they've tested positive or whatever the case may be?

John: I mean, again if the standard that you're that you're evaluating that on is the employer liable for some sort of negligence claim it's really no different from somebody having some other infectious disease. If the employer knows that there's an employee who's at work with an infectious disease and that they're coming in contact with other employees and they do nothing about it, then they may have some liability if somebody else gets sick and can prove that they got sick because that employee transmitted that infectious disease to them. Again, it doesn't change because it's COVID. It's the same sort of set of analysis that you would go through with regard to any other sort of dangerous situation that an employee creates at work.

James: And, you know, putting aside common sense and morality and whatnot, focusing on the legal aspects you know like you said regardless of the possibility for causation, you have to establish clear causation.

John: Right. A claimant would have to be able to prove in a civil case by a preponderance of the evidence, which is just a fancy way of saying by more than 50%, the cause of their injury. With an infectious disease it's harder. If somebody brings explosives into the office and the explosives go off and you're close enough to be injured by the explosives, proving that's what caused your injuries is not that hard.

But an infectious disease is different, especially one that's widely spread and there are all kinds of places where you could be picking it up at this point other than work. You could be getting it from your family members. If you have teenagers in your house as I do, who thinks a small crowd is 35 people, He's now back at school and we're sort of glad because while he was here this summer, there were all kinds of kids in and out of our house. You could pick it up that way. You could pick it up when you go to the grocery store.

Proving that another employee was the cause of the infection that you contracted is a really hard thing to do. You would have to be able to eliminate all the other potential causes to some reasonable degree,

I mean you would have to prove based on all the other circumstances of my life at the time it's more likely than not that I got it from my co-worker.

James: I want to make sure I understand one point and that's you're evaluated versus what the norm is in your industry or type of business or whatever. If everybody else is doing CDC guidelines and you're not doing those much less, then your risk would obviously increase.

John: Sure. So, the standard is what would a reasonable person do: If the reasonable person standard – and it's an objective reasonable person; it's not a subjective reasonable person. If a jury is looking at the situation and says, taking everything into account, the protections that this employer put in place were not reasonable, then they could find liability based on that.

James: We're also getting a lot of questions about CDC guidelines and there's two things in the CDC guidelines that I would say the typical employer isn't sure how to execute. One is assessing an employee's health status, whether it's self-assessment or whatever the mechanism is. Then, the other one is contact tracing. On the first one, what should be the considerations when an employer is trying to follow CDC guidelines and say if you're sick don't come to work.

John: I've wondered about this a lot myself. Again, I've got another child in college and they are requiring the students to do a self-assessment every day before they go to class. One of the things they did was they distributed 30,000 digital thermometers so that every student would have one. Does that lower the risk of transmission? I don't know. It's sort of hard for me to believe that it does, right? I mean you're talking about college students.

So, I think it depends on your workforce. What is the likelihood? There's so many things. I mean they just pop in my mind. First of all, what's the likelihood that your workforce is actually going to self-assess? That could depend on the makeup of your workforce. If your is mostly teenagers working at a counter service restaurant, I think you could probably say there's less likelihood that that they are going to self-assess than people working on Wall Street.

But who really knows, right? The other issue is what are the consequences of not coming to work based on your own self-assessment? If you report to your employer that you had a 100-degree fever when you woke up this morning, I think for the employer to actually offer some protection to the employer as a protocol, that have to say in every case don't come to work. It can't be graded on a scale.

The other thing about self-assessment that just sort of pops in my mind is what is a low-grade fever? That sort of depends on who the person is. My normal temperature is about two degrees below what is normal. So, if I have a 99-degree temperature do I have a low-grade fever or is it just within my normal range? How does an employer assess that? I have no idea. I don't really know what the CDC guidelines

are in terms of what is considered a temperature so that somebody should not come into the office. Maybe there's something in the self-assessment guidelines about that. But I think it's going to vary depending on the person. Then what does the employer do about that and what do they do with that information? I think just going to change from circumstance to circumstance.

James: Do employers need to be extraordinarily cautious about the answer to those questions as data, meaning you make sure you don't save personal health information? What kind of considerations exist there?

John: In terms of the privacy of the information, it's not really protected health information unless the employer is a covered entity and governed by HIPAA. It might be medical information which is sensitive information under various state statutes but at the same time if the reason you're collecting the data is so that if you get sued you can show that you collected the data. Then, purging the data is not the right course. So, again, you know there are no case law on what an employer ought to do with the data they collect from all these self-assessments. I don't really think anybody's thought about that very much at all.

James: Is that the same with contact tracing? An individual is sick and were in contact with others. Is that kind of new territory or is there existing laws and cases on that?

John: There's no existing laws. I think within the workplace it's not very risky to do contact tracing if you report to your employer that you have been diagnosed with COVID and the employer wants to know who over the last 14 days have you had contact within the office. I think as your employer, they've got the right to seek out that information and they've got the right to seek it out from others in the office. I mean employers have a lot of flexibility in terms of what information they collect from employees. To be on the safe side, they ought to give you some advance warning that they're going to be collecting that kind of information. If you're going to do contact tracing within the workplace you ought to let your employees know that if they report that they have a positive COVID test, you're going to try to figure out who they've been in contact within the office. You probably would be better off to let them know that in advance.

James: I'm sure responsible employers are doing just that, but you know like all of us we're all trying to figure out the best way to do it. What's the best way to communicate with employees? Keep them aware of plans especially as those plans may change. What about how concerned or thoughtful should employees be about "Here's our plan" and then something doesn't go according to plan and then they pivot. If they realize maybe an approach was not a good approach, is there any considerations as you say "We said do x but now we've decided y is better and safer?"

John: You mean like you shouldn't go out and buy a mask, and then sometime later everybody should wear a mask?

James: Yeah. More where you get the P95 mask with the filter, but now don't do that. Whatever the case.

John: I think what's driving employers to communicate their plans is two things. One, they want the protocols that they want employees to follow to be known and to be clear. You can't do that without communicating what those protocols are. And two, they want to engender in their employees a feeling that the workplace is safe and secure to return to. I don't think there's any real legal requirement on the part of employers to communicate the entire plan. But if you don't do that then you know your plan has less chance of working.

In terms of changing, you decided to do something and then you decided that that really wasn't working. So, you decided to do something different. It's not going to put you in a worse situation, particularly if you've discovered that the thing that you're pivoting away from was not, you know lacked efficacy. It wasn't effective or somebody got sick because of that. If you change, there's an idea in the law of product liability. If somebody's injured by a product, it's called remedial measures. If you change the product so that people won't be injured by that same thing, the evidence of the remedial measures is not admissible in evidence to prove that the product was dangerous in the first instance. It may come in for some other reason, but it's not admissible to try to prove that the product was dangerous to begin with.

That's because you want product manufacturers to switch from dangerous conditions to conditions that aren't dangerous. I would think that the same sort of idea would apply in this situation. If you were doing something that wasn't effective and it was causing people to get sick and you changed from that, the fact that somebody got sick by the way you were doing it to begin with that's not going to be excluded from evidence but the changes that you made to something new, that's probably going to be excluded from evidence at least for the purpose of trying to prove that what you were doing to begin with wasn't safe.

James: As you said before, the standard is common sense. So, if you've learned that something's a better approach, common sense says you should do so. It's good that's indeed the case. We could explore all these topics for a very long time and our whole goal was to make this you pretty short and concise. I have one more question and it's around requiring people back to work versus giving people the option to return to the workplace. We've seen a lot of different companies taking different approaches to it and it varies by sector quite a bit. Some companies are saying you need to come back and we're going to do half shifts. One part of the workforce or comes back for one week and then the

other one. Other industries are saying come back if you want and let us know and we'll work it that way. Are there legal considerations about that? Is there risk in telling people they need to come back versus you know making it discretionary?

John: Again, I think it depends on the business. Obviously, there's a difference between a meat packing plant and a law firm. You can't do meat packing remotely, so if you're going to do that work you have to be at the employer's location. I think certainly if people have the option and there's no real physical reason why they need to come back. One of the things that makes this different is now there's quite a bit of evidence that's building up as to how productive people can be working remotely and within any organization you would have quite a bit of data about how productive a particular worker has been working remotely. I think for an employer to require somebody to be in the office when there was no real physical reason for them to be there and they have some data that's built up over the last six months about how productive that person has been to require that person to come back to the office even if you put all the protocols in the world in place, I think it probably raises your risk if they get sick because they can always say there was no real reason for me to come back to the office, But again, what the evidence would be in any particular situation, how a jury might look at any particular situation, it's going to vary from case to case. It's certainly something that employers ought to think about. They ought to be thinking about the reasons for requiring people to come back into a physical space. If their workforce has options not to, they'll have really good reasons.

James: Attitudes about this are changing pretty dramatically as you would expect. So, what might be viewed as very good reasons six months ago are certainly being reconsidered now if for nothing else. Necessity.

John: Right.

James: Well John, I really appreciate your time. This has been fascinating and like you said we're going to see some cases on this, some litigation. It'll be interesting to see how this unfolds and I'm excited to hopefully get you back when we start learning more about this from a legal standpoint and exploring that more deeply, So, thank you once again for joining us