

Employer Resources from May 27, 2020 webinar *Leading Through COVID-19*



Laura Salerno Owens, President and Shareholder

laurasalerno@markowitzherbold.com

We discussed whether employers can require employees to sign waivers before returning to work, with the goal that the employee cannot sue the employer if the employee contracts COVID-19 in the workplace. Asking an employee to sign an advance waiver related to COVID-19 is likely a violation of Oregon's public policy concerning releases, given the uneven bargaining dynamic between employers and employees.

If the legislature chooses not to shield employers from COVID-19 liability, this type of waiver could violate public policy. That is because, "Oregon does not enforce contracts that are unconscionable or otherwise violate public policy[.]" *Trinity v. Apex Directional Drilling LLC*, 363 Or. 257, 261 (2018). Under Oregon law, "courts determine whether a contract is illegal by determining whether it violates public policy as expressed in relevant constitutional and statutory provisions and in case law, and by considering whether it is unconscionable." *Bagley v. Mt. Bachelor, Inc.*, 356 Or. 543, 552-53 (2014) (internal citation omitted).

As we discussed in previous webinars, the employee's recourse for contracting COVID-19 at work is likely through a workers' compensation claim. If the employer has workers' compensation insurance, then the waiver should not be necessary. When a worker gets hurt on the job, the worker generally may recover only under the Workers' Compensation Law, ORS chapter 656, specifically ORS 656.018. Because workers' compensation is a statutory right, an employee waiving such right at the direction of their employer would likely be viewed as unconscionable.

The employer should do what they can to protect themselves through the social distancing and cleaning procedures we suggested, and have employees sign an acknowledgment of those procedures. Moreover, an employer can have an employee sign an agreement to comply with essential policies. This helps establish a contributory negligence defense if a party is injured because of that party's own failure to comply with an essential rule.

Feel free to contact me with any questions.

IMPORTANT NOTICES

This material is provided for informational purposes only and does not represent a complete analysis of the topics. Readers should consult with legal counsel to conduct their own appropriate legal research. The information presented does not represent legal advice and no attorney-client relationship was formed or exists. Additionally, by providing links to potential resources, Markowitz Herbold is not in any way endorsing those resources.