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Federal Court in California Sidesteps Employer Take-Home Liability for COVID-19 Exposure in Light of Workers' Compensation Exclusivity Rule

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The United States District Court for the Northern District of California has dismissed an employee's wife's attempt to hold her husband's employer liable for her contraction of COVID-19, in *Kuciemba et al v. Victory Woodworks, Inc.*, No. 3:20-cv-09355 (N.D. Cal. Feb. 22, 2021). Although the parties' briefing included argument regarding the applicability of the "take-home" liability doctrine to the wife's claims, the court declined to opine on the issue. Instead, the Court dismissed the wife's negligence causes of actions against the employer, based on the theory that California's workers' compensation statutes provide the exclusive remedy to the extent the employer may have any liability for her alleged harm.

Even though the *Kuciemba* holding did not directly address the applicability of the take-home liability doctrine, the holding still crucially limited potential employer liability resulting from the spread of an infectious disease between employees that may be traceable to the workplace. The *Kuciemba* ruling, accordingly, suggests that California law would not recognize a duty in tort for employers to prevent family members of employees from being exposed to COVID-19, and that the sole possible remedy lies in workers' compensation.

Take-Home Liability

The California Supreme Court's recognized the take-home liability doctrine in *Kesner v. Superior Court*, 384 P.3d 283 (Cal. 2016). *Kesner* determined that members of an employee's household could bring actions against employers for their own injuries allegedly resulting from hazardous substances the employee brought home on his body or clothing.

The *Kesner* action arose when Johnny Blaine Kesner, Jr. was diagnosed with mesothelioma after being exposed to asbestos fibers from work clothes belonging to his uncle, George Kesner. Johnny lived with his uncle three days a week. Johnny alleged that this exposure contributed to his contracting mesothelioma, which later led to his death.

The California Supreme Court determined that, even though Johnny never worked for or entered the premises of George's employer, George's employer could still be liable for the harm to Johnny. It found "the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers" where it is

reasonably foreseeable that their workers "will act as vectors carrying asbestos from the premises to household members."

In other words, the take-home liability doctrine extended an employer's liability for harm caused by hazardous substances that escape from the employer's property where the employer did not exercise reasonable care to keep the hazardous substances on-site. The *Kesner* Court, however, limited its holding to employees' household members.

Application of Take-Home Liability to COVID-19

The *Kuciemba* plaintiffs applied the *Kesner* logic. They argued it should be deemed foreseeable to an employer that an employee who becomes infected with COVID-19 in the course of their employment, and, as a result of an employer's failure to implement adequate safety precautions, would likewise go home to infect members of his household. Therefore, the *Kuciemba* plaintiffs asserted, employers can also be held liable for violating their duty to prevent their employees from contracting illnesses and infecting other members of their households with COVID-19 under a theory of take-home liability.

The defendant employer in *Kuciemba* countered that the take-home liability doctrine has never been applied to spreading an infectious disease endemic to the population where the employee happened to allegedly contract the disease at the jobsite. The defendant employer further argued that there are fundamental differences between an employee bringing home a hazardous substance that was part of its employer's commercial enterprise, where the employer could implement precautions to prevent the substance from leaving the jobsite (as in *Kesner*), and an employee going home while sick with an infectious disease that could have been contracted anywhere, and where an employer can do little to prevent transmission when the employee leaves the jobsite.

The *Kuciemba* Court, however, did not address these arguments in its holding. Instead, it dismissed the *Kuciemba* plaintiffs' claims on the basis that workers' compensation provided the exclusive remedy for harm in this instance.

Workers' Compensation Exclusivity Doctrine

In California, the Workers' Compensation Act is the sole remedy for injuries "arising out of and in the course of employment," and is referred to as the workers' compensation exclusivity doctrine. *See* Cal. Lab. Code § 3602. However, COVID-19 and its widespread community transmission complicates the causation analysis. To that end, numerous states have passed laws on this issue. For example, in California, SB 1159 was signed in September 2020, codifying the rebuttable presumption created by a prior executive order that, if an employee tests positive for COVID-19, it is presumed to be covered by workers' compensation where i) the employee tests positive for COVID-19 within 14 days of working at the place of employment (not at home) at the employer's direction, or ii) there is an "outbreak" of COVID-19 at the place of employment. This presumption is in place until January 1, 2023. Similarly, Illinois recognized a narrow rebuttable presumption limited to first responders and essential business operations through the end of 2020. When facing such a presumption, employers can rebut it with evidence that, for example, the employer was engaging in and applying safety efforts to the fullest extent possible (e.g., sanitation practices, social distancing, PPE, etc.), that the employee was exposed to COVID-19 by an alternative source, or the employee was working from home beyond the employer's control.

These laws still do not address the question raised in *Kuciemba*—specifically, whether injuries sustained by *another person* living in the employee's home are also covered by workers' compensation. However,

in California, for example, workers' compensation proceedings are also the exclusive remedy for third-party claims deemed "collateral to or derivative of the employee's injury," such as claims by an employee's spouse for loss of the employee's services or consortium and for emotional distress suffered by a spouse in witnessing the employee's injuries." *LeFiell Manufacturing Co. v. Superior Court*, 55 Cal.4th 275, 284-285 (2012)**.** Accordingly, while the California Legislature has not addressed whether spousal injury related to COVID-19 is covered by workers' compensation, this may be another avenue by which employees seek relief related to workplace injuries brought on by the pandemic.

Takeaways

While the Court's order dismissing the *Kuciemba* Complaint did not affirmatively weigh in on the parties' arguments on take-home liability, the *Kuciemba* decision nonetheless could make it less likely that California employers will be held liable under the theory of take-home liability, where an employee is alleged to have contracted COVID-19 in the workplace and, thereafter, infected his or her household members. That said, it is a district court decision which means further review is possible and could alter the result. Similarly, the issue has not been addressed by a California state court. *Kumciemba* is, however, a decision that employers should continue to closely watch.

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