

# Virginia General Liability COVID-19 Quick Guide



**1. Statute of Limitations:** Two years for negligence actions.

**2. Negligence:** Virginia does not recognize a stand alone tort for negligence transmission of an infectious disease. Thus, a claimant would have to assert a general cause of action for negligence. Negligence is defined as a failure to use ordinary care. Ordinary care is that which a “reasonable person” would use under the given circumstances. If this breach of ordinary care is found to be the proximate cause of damage to the plaintiff, the plaintiff may recover.

**3. Standard of Care:** The standard of care to be applied in COVID-19 claims will play a major role in their outcome. CDC guidelines will likely be adopted as a basic level of care individuals and businesses are required to follow. Moreover, executive orders from the governor are also likely to play a role in the level of care individuals and businesses are required to follow during these times.

**4. Causation:** With COVID-19 having a five to 14-day latency period, it will be extremely difficult for a claimant to say exactly where and when they were exposed. It is anticipated that expert testimony will be required to establish the particular point in time when exposure occurred.

**5. Premises Liability:** A property owner owes a duty to invitees to maintain the premises in a reasonably safe condition for the invitees visit. The duty does not extend beyond the invitation and those places to which the invitee is not reasonably expected to go. In the event that an invitee sustains injury, there can be no recovery from the owner unless the invitee can show that the owner was negligent, that such negligence proximately caused a foreseeable injury to the invitee, and that the defect was not open and obvious. Businesses should at least meet or exceed all sanitation and cleaning guidance issued by governmental authorities, the CDC, and industry standards. Displaying signage to warn invitees of the potential for exposure to COVID-19 and of CDC social distancing guidelines should be strongly considered.

**6. Violation of Statute/Executive Orders as Evidence of Negligence:** Violation of a statute may give rise to a negligence per se cause of action. A plaintiff must establish the following elements to successfully make a case for negligence per se: (1) the plaintiff must prove that the defendant violated a statute enacted for public safety; (2) the plaintiff must belong to the class of persons for whose benefit the statute was enacted, and demonstrate that the harm that occurred was of the type against which the statute was designed to protect; and (3) the statutory violation must be a proximate cause of plaintiff's injury. Pursuant to statute, the governor “shall take such action from time to time as is necessary for the adequate promotion and coordination of state and local emergency services activities relating to the safety and welfare of the Commonwealth in time of disasters.” Moreover, “[e]xecutive orders, to include those declaring a state of emergency and directing evacuation, shall have the force and effect of law and the violation thereof shall be punishable as a Class 1 misdemeanor in every case where the executive order declares that its violation shall have such force and effect.” It is anticipated that courts will apply those orders like any other statute, especially since the current executive orders issued by the governor are safety orders.

**7. Contributory Negligence:** Virginia is a “contributory negligence” jurisdiction. Therefore, a lack of reasonable care on the part of the plaintiff, however slight, even one percent, is a complete bar to recovery if such negligence contributes to the plaintiff's injury. In other words, a negligent plaintiff may recover only if his negligence was a remote rather than a proximate cause of the accident. See *Williams v. Harrison*, 255 Va. 272, 497 S.E.2d 467 (1998). Violations of CDC guidelines or guidelines imposed by the Commonwealth of Virginia for personal safety precautions may be used as an affirmative defense to COVID-19 claims.

**8. Assumption of the Risk:** A plaintiff is completely barred from recovery if he or she assumes the risk of injury when, with full knowledge and understanding of an obvious danger, he or she voluntarily exposes himself or herself to that risk of injury. The doctrine of assumption of risk requires showing: (1) that the nature and extent of the risk are fully appreciated; and (2) that the risk is voluntarily incurred. Assumption of the Risk defense may be raised if the plaintiff failed to follow CDC guidelines or guidelines imposed by the Commonwealth of Virginia.

**9. Statutory Cap on Non-Economic Damages:** In Virginia, there is no cap on non-economic damages in personal injury actions.

**10. Death Cases:** Virginia recognizes separate survival (by the estate) and wrongful death (by eligible beneficiaries) actions.

**11. Punitive Damages:** Punitive damages must be specifically requested by a plaintiff and they are capped at \$350,000. See Va Code § 8.01-38.1. That is, the total punitive award against all defendants shall not exceed \$350,000. Punitive damages, also known as exemplary damages, are available for willful, wanton, and malicious conduct or conduct so reckless as to evince a conscious disregard for others' rights. See *Bowers v. Westvaco Corp.*, 244 Va. 139, 419 S.E.2d 66 (1992).

#### **FAQS:**

**1. Can a plaintiff recover for fear of exposure to COVID-19?** Possibly. Intentional infliction of emotional distress applies under only most compelling circumstances, requiring a plaintiff to prove by clear and convincing evidence that: (1) the wrongdoer's conduct is intentional or reckless; (2) the conduct is outrageous and intolerable; (3) the wrongful conduct and the emotional distress are causally connected; and (4) the resulting distress is severe. Virginia does not recognize a claim for negligent infliction of emotional distress, so a plaintiff would have to overcome the very high burden in proving intention infliction of emotional distress.

**2. Will Commercial General Liability Insurance apply to COVID-19 claims?** Possibly. Insureds and insurance companies will both need to carefully review the terms of their policies. The legal determination of whether insurance coverage is available involves principals of contract and statutory interpretation. However, some policies specifically exclude coverage for pandemic related injuries such as viruses and bacteria. Self-insured entities and excess carriers will also want to carefully review the terms of any excess or umbrella policies.

**3. Is there immunity from COVID-19 claims?** Virginia's governor issued an executive order providing healthcare providers with immunity from liability in response to COVID-19. The extent and efficacy of any grant of immunity from civil claims will certainly be litigated in the future. To date, there is no immunity from civil claims under Virginia law.

#### **Best Practices for Avoiding/Reducing Future Liability for COVID-19 Claims:**

- Follow or exceed industry and CDC standards for hygiene, sanitization, and safety.
- Follow or exceed local, state, and federal prevention guidelines and recommendations.
- Follow or exceed OSHA's recommended procedures for workplace safety.
- Follow or exceed any executive order issued by the governor concerning COVID-19.
- Adopt, implement, and enforce practices that limit person-to-person interaction and promote social distancing (i.e., mobile order, curbside pickup).
- Develop and execute procedures for monitoring the health and well-being of employees.
- Educate employees about prevention and safe practices.
- Display signs/warnings encouraging customers to follow CDC guidelines.
- Prohibit persons who do not comply with CDC guidelines and executive orders from the Governor from entering the premises.
- Develop policies for communication with local and/or state health department representatives to ensure your business stays current on all guidelines, recommendations, and regulations.
- Develop and implement an incident investigation procedure for all potential COVID-19 related claims (i.e., workers' compensation, liability).
- Retain documents reflecting all precautions, policies, procedures, and the daily implementation of the same.

#### **Helpful Links:**

[CDC Workplace Guidance](#)

[Centers for Disease Control and Prevention – COVID-19](#)

[EEOC's COVID-19 Page](#)

[OSHA's COVID-19 Page](#)

[OSHA's Guidance on Preparing Workplaces for COVID-19](#)

[Virginia COVID-19 Executive Orders](#)

[Virginia Department of Health](#)

[Virginia Government's Announcements – Coronavirus \(COVID-19\) Information](#)

[Virginia Workers' Compensation Commission](#)

[World Health Organization COVID-19 Updates](#)