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DEPARTMENT OF JUSTICE**

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ATTORNEY GENERAL OPINION NO. 2020-02

May 22, 2020

Taylor Caswell, Commissioner
Economic Re-Opening Task Force
Department of Business and Economic Affairs
100 North Main Street, Suite 100
Concord, NH 03301

RE: Request for Attorney General's Opinion

Dear Commissioner Caswell:

The Economic Re-Opening Task Force was launched on April 21, 2020, and charged with developing a plan and overseeing state and private-sector actions needed to reopen New Hampshire's economy while minimizing the adverse impact on public health. In soliciting input from the various business sectors, the Task Force learned that businesses are concerned about their exposure to liability from employees who contract COVID-19. In order to evaluate whether to make recommendations related to employer liability to assist in reopening New Hampshire's economy, the Task Force inquired about the current state of the law in New Hampshire.

The Attorney General's duties include advising "any state board, commission, agent or officer as to questions of law relating to the performance of their official duties, and he shall, under the direction of the governor and council, exercise a general supervision over the state departments, commissions, boards, bureaus, and officers, to the end that they perform their duties according to law." RSA 7:8. In situations where requests for legal advice are significant to the operation of the state board, commission, or agency and are likely to be of continuing importance, the advice may be issued by an official Attorney General Opinion. In such situations, the questions posed are researched and an opinion drafted by a group of attorneys. The draft opinion is also subject to multiple layers of review, including by the Associate Attorney General for the Division of Legal Counsel and the Solicitor General. The Attorney General provides a final review and approval.

The Economic Re-Opening Task Force requested that this office issue an official Attorney General Opinion concerning the questions related to the scope of an employer's

liability. Where these questions are significant to the operation and mission of the Task Force and are likely to be of continuing importance to its ability to fulfill its charge, I am providing an official Attorney General Opinion set forth below.

QUESTIONS PRESENTED

Does State law provide liability protection for employers from employee personal injury claims?

Does State law limit an employee's ability to seek workers' compensation benefits for illnesses, like COVID-19?

CONCLUSION

Yes, New Hampshire's Workers' Compensation law, RSA 281-A, precludes employees, or employees' beneficiaries, from bringing certain actions, including personal injury claims, against their employers.

Yes, workers' compensation benefits are limited to instances when an employee determinatively demonstrates that the illness resulted from the risks of employment.

BACKGROUND

The outbreak of the novel coronavirus disease 2019 has created a public health crisis without any modern precedent. On Friday, March 13, 2020, the President of the United States declared a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak. That same day, Governor Sununu issued Executive Order 2020-04, an order declaring a state of emergency due to the Novel Coronavirus (COVID-19).

Since that time, the Governor has issued three additional Executive Orders 2020-05, 2020-08 and 2020-09, each extending the state of emergency an additional 21 days. In addition, as of this writing, the Governor has issued 45 Emergency Orders that, among other things, require public K-12 schools to transition to remote instruction and support; prohibit scheduled gatherings of 10 or more and require restaurants and bars to transition to take-out and delivery only; close non-essential businesses and mandate that Granite Staters stay home with limited exceptions; and restrict hotels and other lodging providers to vulnerable populations and essential workers.

On April 21, 2020, the Governor launched the Governor's Economic Re-Opening Task Force, composed of bipartisan legislators, private-sector leaders, and state officials, charged with developing a plan and overseeing state and private-sector actions needed to reopen New Hampshire's economy while minimizing the adverse impact on public health. On May 1, 2020, after receiving initial recommendations from the Task Force, the Governor announced "Stay at Home 2.0" and issued Emergency Order 40, which began the phased reopening of businesses.

The Governor also issued broadly applicable universal guidelines for all employers and employees and industry-specific guidelines for operating and opening businesses, including: campgrounds, manufacturing, state parks, hospitals, dentists, barber shops and hair salons, drive-in theaters, golf, retail, and restaurants. The guidelines include restrictions on types of activities that can be conducted, limits on the number of customers served, and requirements for maintaining social distancing and cleanliness.

The Task Force continues to meet to develop additional recommendations for the reopening of business in New Hampshire. In soliciting input from the various business sectors, the Task Force learned that businesses are concerned about their exposure to liability from employees who contract COVID-19. In order to evaluate whether to make recommendations related to employer liability to assist in reopening New Hampshire's economy, the Task Force inquired about the current state of the law in New Hampshire.

ANALYSIS

Workers' Compensation as the Exclusive Remedy for Workplace Injuries or Illnesses

New Hampshire's Workers' Compensation law was designed to "address the employee's loss of earning power and medical costs regardless of legal fault, thereby protecting the employee and any dependents who actually relied upon the now lost wages." *Alonzi v. Northeast Generation Services Co.*, 156 N.H. 656, 664 (2008). At the same time, workers' compensation is the exclusive avenue through which employees, or employees' beneficiaries, can seek redress from their employer related to workplace injuries or illnesses. RSA 281-A:8. The statute specifically provides:

- I. An employee of an employer subject to this chapter shall be conclusively presumed to have accepted the provisions of this chapter and, on behalf of the employee or the employee's personal or legal representatives, to have waived all rights of action whether at common law or by statute or provided under the laws of any other state or otherwise:
 - (a) Against the employer or the employer's insurance carrier or an association or group providing self-insurance to a number of employers; and
 - (b) Except for intentional torts, against any officer, director, agent, servant or employee acting on behalf of the employer or the employer's insurance carrier or an association or group providing self-insurance to a number of employers.

- II. The spouse of an employee entitled to benefits under this chapter, or any other person who might otherwise be entitled to recover damages on account of the employee's personal injury or death, shall have no direct action, either at common law or by statute or otherwise, to recover for such damages against any person identified in subparagraph I(a) or (b).

III. Nothing in this chapter shall derogate from any rights a former employee may have under common law or other statute to recover damages for wrongful termination of, or constructive discharge from, employment. However, if a former employee makes a claim under this chapter for compensation for injuries allegedly caused by such wrongful termination or constructive discharge, the employee shall be deemed to have elected the remedies of this chapter, and to have waived rights to recover damages for such wrongful termination or constructive discharge under common law or other statute. Similarly, if a former employee brings an action under common law or other statute to recover damages for such wrongful termination or constructive discharge, the employee shall be deemed to have waived claims under this chapter for compensation allegedly caused by such termination or discharge.

RSA 281-A:8. As set forth above, the workers' compensation system provides employees with lost wages and medical benefits without regard to individualized assessment of fault¹ in exchange for insulating employers from tortious actions. *See* RSA 281-A:8; *Alonzi*, 156 N.H. at 665. "Unlike tort actions, no damages or compensation are awarded under the act for pain and suffering, disfigurement as such, loss of consortium, and other elements of common law damages." *McKay v. NH Compensation Appeals Bd.*, 143 N.H. 722, 727 (1999). In sum, employees are precluded from bringing personal injury actions against employers. To the extent there is any liability for a workplace injury or illness or its effects that liability is wholly contained within the realm of benefits afforded through RSA 281-A.

Determination of Liability under RSA 281-A

Within the framework of New Hampshire's workers' compensation system, employers are liable for medical and indemnity benefits, which they provide through workers' compensation coverage, either through a carrier or self-insurance. RSA 281-A:5. These benefits, however, are only available for injuries or illness arising out of and in the course of their employees' employment. RSA 281-A:2, XI. The phrase "in the course of" employment refers to whether the injury "occurred within the boundaries of time and space created by the terms of employment" and "occurred in the performance of an activity related to employment." *Murphy v. Town of Atkinson*, 128 N.H. 641, 645 (1986). The phrase "arising out of" employment refers to the causal connection between the injury and risks of employment, and requires proof that the injury "resulted from a risk created by the employment." *Id.*; *In re Margeson*, 162 N.H. 273, 277 (2011). This is notable because in order to have liability attach in workers' compensation, the injury must actually result from the hazards of employment and "not merely from the bare existence of employment." *In re Margeson*, 162 N.H. at 285.

The New Hampshire Supreme Court, in determining whether the underlying risk is properly ascribed to employment, has defined four categories of injury-causing risks: (1) employment risks; (2) personal risks; (3) mixed risks; and (4) neutral risks. *Id.* at 277.

¹ RSA 281-A:14 does provide that in select cases of employee intoxication or willful misconduct fault is evaluated for possible exclusion of benefits.

Employment risks and personal risks are easily analyzed. Employment risks, such as a hand caught in a piece of industrial equipment, always occur in employment and are therefore always compensable resulting in employer liability through workers' compensation. *Id.* Conversely, personal risks, such as an employee fall caused by that employee's bad knee or epilepsy, are "so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment," *id.* and are never compensable.

In contrast to employment and personal risks, mixed risks and neutral risks involve heightened analysis relative to attribution of liability for a workplace injury. A "mixed risk" involves both direct employment and personal risks, such as an individual with a heart condition who works in an occupation that places strain of the heart. An employer is only liable for a mixed risk injury if the employment was a substantial contributing factor to the injury. *Id.*; *New Hampshire Supply Co. v. Steinberg*, 119 N.H. 223, 231 (1979). Lastly, a neutral risk is by definition not clearly personal or employment-related in nature, such as an unexplained fall that is not attributable to the employer or the employee. *In re Margeson*, 162 N.H. at 279. In the case of a neutral risk, the Court employs an increased-risk analysis through which workers' compensation liability is imputed in those instances where it can be demonstrated that the employment exposed the claimant to a risk greater than that to which the general public was exposed. *Id.* at 283.

Employer Workers' Compensation Liability for Employee's COVID-19

Every workers' compensation claim is determined on an individualized and fact intensive basis. In line with the risk analysis and resultant assignment of liability outlined above, an employer has workers' compensation liability to an employee who demonstrates that his or her condition arose out of and in the course of his or her employment. With regard to an employee contracting COVID-19, the inquiry will depend upon whether contracting the illness is an employment, personal, mixed, or neutral risk.

Given the pandemic nature of the current COVID-19 crisis, contraction of the virus would likely be viewed as a neutral risk because exposure and acquisition of a virus are not exclusive to employment. As a neutral risk, determination of an employer's liability for contraction of the virus would hinge on whether a claimant is able to demonstrate that his or her employment subjected them to a risk for contracting the virus greater than that to which the general public is exposed. *Id.*; see also *Lussier v. Sadler Brothers, Inc.* 12 Mass. Workers' Comp. Rep. 451 (1998) (noting the need to show a greater risk related to employment because otherwise "every bout of the flu contracted at work....would be [covered]."). Employers that demonstrate that, through efforts such as reasonable compliance with CDC, State or industry operational guidelines, the employment does not present a marked departure from conditions and characteristics encountered by the general public in their ordinary course of life will not be liable for workers' compensation. *In re Margeson*, 162 N.H. at 285; *Heinz v. Concord Union School Dist.*, 117 N.H. 214, 217 (1977).

For the reasons set forth above, in my opinion, an employer is protected from employee personal injury claims for contracting COVID-19 at the workplace because these claims are

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precluded by New Hampshire's workers' compensation law, RSA 281-A. In addition, it is only in instances where it can be demonstrated that the employment presents a greater hazard for contracting the illness that an employer would be subject to liability for workers compensation benefits.

Sincerely,



Gordon J. MacDonald
Attorney General

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