STATE OF CALIFORNIA
GENERAL LIABILITY
COVID-19 QUICK GUIDE

Prepared by
Adam M. Winokur
Murchison & Cumming
801 S. Grand Ave Ninth Floor
Los Angeles, CA 90017
213.630.1041
awinokur@murchisonlaw.com
murchisonlaw.com/attorneys/adam-winokur
1. **Statute of Limitations**: The Statute of Limitations for personal injury in California is two years from the date of the injury, or one year from the date that the injury was discovered. Medical Malpractice cases must be brought within the lesser of three years from the injury or one year from the date of discovery of the injury. Tort claims against state agencies generally must be brought within six months of the injury.

2. **Negligence**: The California Supreme Court has stated that negligently transmitting a disease is akin to negligently striking another with a car. The Court has declared that constructive knowledge (e.g. symptoms) is sufficient to impute tort liability upon a defendant who transmits a communicable disease. *John B. v. Superior Court*, 38 Cal.4th 1177, 1188-1190 (2006)(discussing in the context of AIDS).

3. **Standard of Care**: The standard of care for negligent transmission of a disease is constructive knowledge – if a person has reason to believe that he or she is infected, and it is foreseeable that his or her actions would transmit the disease to the Plaintiff, then liability can attach to those actions.

4. **Causation**: This will be very fact-dependent inquiry. Because of the latency between acquiring the disease and displaying symptoms/testing positive, proving causation will be of varying difficulty from case to case; however, such an inquiry is only subject to a preponderance of the evidence standard.

5. **Premises Liability**: The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence. *Brooks v. Eugene Burger Management Corp.*, 215 Cal.App.3d 1611, 1619 (1989). In addition to owners, those who possess or control property may also be held liable. *Alcaraz v. Vece* 14 Cal.4th1149, 1162 (1997). While there may be no duty to warn of an open and obvious condition, there may nonetheless be a duty to protect against it. *Osborn v. Mission Ready Mix*, 224 Cal.App.3d 104, 116, 121-122 (1990). Constructive knowledge of a dangerous condition may be imputed to a premises liability defendant if the defendant had sufficient time to discover the dangerous condition via reasonable inspections (at reasonable intervals) and sufficient time to repair the condition, protect against its harm, or adequately warn of the condition.

   Businesses should seek to warn customers of the possibility of COVID exposure, and businesses should proactively seek to protect their customers against exposure including via social distancing mechanisms (e.g. spacing register queues, specifying isles as 1-way) and via sanitation and cleaning at least as thorough as indicated the most strict guidance available, either local or national. Note, California has guidance specific to industries and specific to counties on its covid19.ca.gov page.

6. **Violation of Statute/Executive Orders as Evidence of Negligence**: “Although compliance with the law does not prove the absence of negligence, violation of the law does raise a presumption that the violator was negligent. The presumption of negligence arises if (1) the defendant violated a statute; (2) the violation proximately caused the plaintiff’s injury; (3) the injury resulted from the kind of occurrence the statute was designed to prevent; and (4) the plaintiff was one of the class of
persons the statute was intended to protect. The first two elements are normally questions for the trier of fact. In California, an individual may bring an action based upon a statute “embodying a public policy” even if the statute does not contain a specific civil remedy provided the individual is an injured member of the public for whose benefit the statute was enacted. *Michael R. v. Jeffrey B.*, 158 Cal.App.3d 1059 (1984). There appears to be an open question as to whether executive orders qualify as statutes.

The California Legislature passed the Emergency Services Act (Cal Gov. Code § 8550 et seq) which empowers the governor to declare states of emergency during which it is a crime to refuse or willfully neglect to obey emergency orders or regulations. Governor Newsom has issued a number of executive orders in connection with the COVID-19 outbreak, available here: https://www.gov.ca.gov/category/executive-orders/. Violation of these orders likely may be the basis for a negligence per se cause of action.

7. **Contributory Negligence:** California recognizes comparative negligence in which a trier of fact is permitted to consider all relevant criteria in equitably apportioning liability. *Li v. Yellow Cab Co.*, 13 Cal.3d 804, 808 (1975); *Pfeifer v. John Crane, Inc.* 220 Cal.App.4th1270, 1285 (2013).

8. **Assumption of the Risk:** In California, Assumption of Risk is divided into Primary and Secondary assumptions of risk. Secondary assumption of risk arises when the defendant owes a duty of care, but the plaintiff knowingly encounters the risks attendant on the defendant’s breach of that duty. Secondary assumption of risk is thus merged into comparative fault. In contrast, primary assumption of risk is another way of saying no duty of care is owed as to risks inherent in an activity (usually applied in the context of sports and recreational activities). *Jimenez v. Roseville City School Dist.*, 247 Cal.App.4th 594, 601 (2016). “Whether a duty of care is owed in a particular context depends on considerations of public policy, viewed in light of the nature of the activity and the relationship of the parties to the activity.” *Gregory v. Cott*, 59 Cal.4th 996, 1001–1002 (2014). The plaintiff’s subjective appreciation or acceptance of the hazard involved is immaterial. *Moore v. William Jessup University*, 243 Cal.App.4th 427, 435 (2015). If the doctrine applies, then it is a complete bar to recovery. *Gregory v. Cott*, supra at p. 1001. However, while a defendant generally has no duty to eliminate risk inherent in an activity or to protect the plaintiff from such risk, a defendant does have a duty not to increase the risk over and above that inherent in an activity. *Harry v. Ring the Alarm, LLC*, 34 Cal.App.5th 749, 758 (2019).

An analysis in a COVID-19 context will depend on the activity during which COVID-19 was contracted. If the Plaintiff was engaging in an activity that carried an inherent risk of becoming infected (e.g. visiting an urgent care center) or which has relatively high odds of causing transmission (e.g. a crowded indoor area where proper ventilation is not possible), then primary assumption of the risk may prevent his or her recovery. However, if a defendant acted in such a way that increased the risk to the Plaintiff (e.g. by not wearing a mask or knowingly allowing infected people to come in contact with the Plaintiff) then the defendant may find themselves liable regardless.
9. **Statutory Cap on Non-Economic Damages:** California limits non-economic damages recovery for Medical Malpractice only. In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000). Cal. Civ. Code § 3333.2(b).


11. **Punitive Damages:** Punitive Damages are available in California to a Plaintiff who proves by clear and convincing evidence that the defendant has been guilty of:

   - oppression (despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights)
   - fraud (an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury), or
   - malice (conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others).

   Plaintiffs frequently pray for punitive damages in California. Conceivably, a Plaintiff could assert facts to plead any of the above bases for punitive damages in the context of a tort lawsuit under COVID-19.

**FAQs**

**Can a plaintiff recover for fear of exposure to COVID-19?**

Negligent Infliction of Emotional Distress in California is not a separate action from negligence generally. In the context of communicable diseases, AIDS cases provide a guide. There, in the absence of physical injury or illness, recovery for emotional distress may only be had where a plaintiff is exposed to the virus as a result of the defendant's negligent breach of a duty owed to the plaintiff, and the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not he or she will become infected (i.e. suffer from symptoms) at some point in the future. *Kerins v. Hartley* (27 Cal.App.4th 1062, 1074 (1994)).

The case of *Kerins v. Hartley, supra*, provides guidance. In the context of fear of transmission of AIDS during a surgical procedure, a surgeon with a communicable virus was found to not be liable for the Plaintiff's claimed damages for emotional distress where there was no dispute that the surgeon complied with then-current CDC guidelines governing performance of the procedure in question. The Court there cited the CDC guidelines for the use of barriers to prevent transmission and identified that surgeons were permitted to practice using appropriate barrier precautions. Analogously here, by following the most conservative guidance available in the jurisdiction, federal or local, one can ensure that all duties are being met, and any emotional distress will not result from negligence.

California recognizes a tort for intentional infliction of emotional distress where a defendant's conduct actually and proximately causes a plaintiff's suffering severe or extreme emotional distress, and that defendant's conduct was extreme and outrageous and done with the intention of causing, or reckless

**Will Commercial General Liability Insurance apply to COVID-19 claims?**
There is no apparent reason why General Liability insurance would not apply to COVID-19 claims, but such a determination will require a careful review of the contract terms and exact language used. Feasibly, coverage could be excluded in some circumstances under some provisions regarding communicable diseases, intentional acts, worker’s compensation, or others.

**Is there immunity from COVID-19 claims?**
Although some industries may be lobbying for immunity (e.g. Healthcare), apparently no immunity has yet been conferred by the legislature.

**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.
- 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 from entering 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.
- Monitor and maintain compliance with strictest guidance from among CDC, State, and local levels.

**HELPFUL LINKS**
- [CDC Workplace Guidance](https://www.cdc.gov/)
- [Centers for Disease Control and Prevention – COVID-19](https://www.cdc.gov/coronavirus/2019-ncov/)
- [EEOC’s COVID-19 Page](https://www.eeoc.gov/coronavirus)
- [OSHA’s COVID-19 Page](https://www.osha.gov/covid-19)
- [OSHA’s Guidance on Preparing Workplaces for COVID-19](https://www.osha.gov/SLTC/covid19/)
- [California State Information and Resources for COVID-19](https://coronavirus.ca.gov/)

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor, or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.