



STATE OF INDIANA GENERAL LIABILITY COVID-19 QUICK GUIDE

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1. **Statute of Limitations:** Two years for negligence actions. Ind. Code § 34-11-2-4
2. **Negligence:** "Negligence" is the failure to exercise that degree of care that a person of ordinary prudence would exercise under like circumstances, or, alternatively, conduct that creates an undue risk of harm to others. See *Southern Ry. Co. v. Harpe*, 58 N.E.2d 346 (Ind. 1944).
3. **Standard of Care:** Indiana law requires every person to exercise due care to avoid injury to others. This duty generally arises as a matter of law based on the relationship between the parties, or where one is placed in such a position that it is obvious that an injury to another's person or property will arise if he or she does not use ordinary care. See *Henshilwood v. Hendricks County*, 653 N.E.2d 1062 (Ind. Ct. App. 1995). It is likely that CDC guidelines would be viewed as establishing the basic level of care individuals and businesses are required to follow.
4. **Causation:** Plaintiffs will face significant challenges proving the causal connection for an alleged COVID-19 case. The public has been told that coronavirus has an incubation period of approximately 2 weeks. In order for a claimant to successfully argue that he or she contracted COVID-19 as a result of another's conduct, that claimant would have to credibly prove that he or she was exposed by the defendant and not somewhere elsewhere during the relevant time period. Expert testimony would almost certainly be required to establish exactly how, when, and where any claimant contracted the virus. However, note that Indiana follows an unusual standard for summary judgment that may make dismissal of such claims difficult on summary judgment, even if they would be highly defensible at trial or on directed verdict. See *Jarboe v. Landmark Comm. Newspapers*, 644 N.E.2d 118 (Ind. 1994). Please contact the author with any questions.
5. **Premises Liability:** Under Indiana law, a landowner's duty to an entrant depends on the entrant's status on the land as an invitee, licensee, or trespasser. Indiana has adopted the Restatement (Second) of Torts, which only subjects a landowner to liability for an injury to an invitee if the landowner knows or by exercise of reasonable care would discover a condition on the premises that poses an unreasonable risk of harm to invitees and fails to exercise reasonable care for their protection. See *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991). However, in recent years, a new line of cases has greatly expanded the role of "foreseeability" in premises liability cases. See *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 28 N.E.3d 310 (Ind. 2015). Under this new line of cases, Indiana courts would closely analyze how foreseeable any COVID-19 transmission on the premises was at the time of alleged exposure. Please contact the author with any questions.
6. **Violation of Statute/Executive Orders as Evidence of Negligence:** Generally, the unexcused or unjustified violation of a duty proscribed by a statute or ordinance constitutes "negligence per se" if the statute or ordinance is intended to protect the class of persons in which the plaintiff is included and to protect against the risk of the type of harm that occurred as a result of its violation. However, negligence per se does not mean liability per se. Liability can only be predicated upon the violation of a statutory duty only where the statutory violation is the proximate cause of the injury. Again, causation will be a focal point in any COVID-19 liability defense.

- 7. Contributory Negligence:** Indiana follows a modified comparative fault regime governed by the Indiana Comparative Fault Act, Ind. Code 34-51-2-1. Indiana juries are called to allocate fault proportionally among the plaintiff, the defendant(s), and any properly pled non-parties, with the total fault adding up to 100%. If the plaintiff is more than 50% at fault, recovery is barred. If the plaintiff is less than 50% at fault, his or her recovery is diminished proportionally based on his or her own fault. A plaintiff's foreknowledge of risk is not a complete defense pursuant to the Comparative Fault Act and is not determinative of whether the defendant owed the plaintiff a duty.
- 8. Assumption of the Risk:** Indiana recognizes the defense of incurred risk. However, it is not enough that the plaintiff has merely a general awareness of the potential for injury. The defense of assumed or incurred risk requires an analysis focusing on the plaintiff's actual knowledge and appreciation of the specific risk and voluntary acceptance of that risk. The defense of incurred risk requires a mental state of venturousness and a conscious, deliberate, and intentional embarkation upon the course of conduct with knowledge of the circumstances. That is, the plaintiff must accept a specific risk of which the plaintiff has actual knowledge.
- 9. Statutory Cap on Non-Economic Damages:** There is no statutory cap on non-economic damages in Indiana unless the claim is brought against the state.
- 10. Death Cases:** The Indiana wrongful death statute (General Wrongful Death Statute) creates a cause of action for the wrongful death of persons generally, while a separate statute provides for the maintenance of an action for the wrongful death of a child (Child Wrongful Death Statute). Lastly, the Adult Wrongful Death Statute provides a recovery for adults who have left no dependents, which provides for a cap of damages. *See* Ind. Code 34-23-1-1 et seq.
- 11. Punitive Damages:** Punitive damages may be awarded only if there is clear and convincing evidence that the defendant acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error of judgment, overzealousness, mere negligence, or other human failing. An award of punitive damages is discretionary; there is no entitlement to punitive damages, even if the facts support them. Punitive damages cannot exist on their own; they require actual damages. In Indiana, a punitive damage award may not be more than the greater of three times the amount of compensatory damages awarded in the action, or \$50,000. *See* Ind. Code 34-51-3-4.

FAQs

Can a plaintiff recover for fear of exposure to COVID-19? Under Indiana law, plaintiffs cannot be compensated for negligent infliction of emotional distress unless such distress is accompanied by a direct physical impact to the plaintiff.

Will Commercial General Liability Insurance apply to COVID-19 claims? Possibly. The legal determination of whether insurance coverage is available depends on the language of the insurance policy and is dictated by principals of contract and statutory interpretation. Insurance policies that include broad coverage for

wide ranging risks will be most likely to provide coverage. Any ambiguity in an insurance policy is to be construed in favor of finding coverage.

Is there immunity from COVID-19 claims? Facilities and individuals providing healthcare services in response to a declared disaster emergency, such as the one declared because of COVID-19, may not be held civilly liable for care provided in response to that emergency event unless the care resulted from gross negligence or willful misconduct. Indiana Code 34-30-13.5 sets forth the details of this immunity.

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.
- Require waivers be signed by any visitors.
- Require that visitors sign documentation of current health status.

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](#)
- [World Health Organization COVID-19 Updates](#)
- [Indiana State Department of Health resources](#)
- [SmithAmundsen COVID-19 Resource Page](#)

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