

What is “Duty of Care” and Why Does it Matter?

By Laura Davis-Taylor

“Duty of Care

The responsibility of a person or organization to take all reasonable measures necessary to prevent activities that could result in harm to other individuals and/or their property.”

So what, exactly, does this mean for businesses that are reopening in the midst of a pandemic? Not surprisingly, it's a factor that may come into play when a lawsuit alleging negligence or breach of duty is being considered.

The question becomes: What is the duty of a business?

What is the obligation to an individual that enters the business? Is a business responsible for ensuring that someone doesn't get sick in their business environment? While declaring something impossible isn't exactly realistic, safe screening protocols fall well within the realm of reality.

Gary Kibel, at Davis & Gilbert LLP, explains that in the absence of law, the legal claim that an individual could make to a business owner is likely to be a negligence claim. Which brings up the very important question: “What was the obligation?”

The Challenge for Businesses

The difficulty here, of course, is that there's no existing standard. And while Congress is working on addressing the issue, there's some debate about how to handle it. Some lawmakers feel that individuals shouldn't be able to sue, as it's too difficult for a business to control COVID exposure.

There have also been proposals for a waiver to help shield businesses from liability associated with these types of lawsuits. The counter-argument is that a waiver that relieves businesses from liability for any kind of health safety measures will result in businesses doing nothing to put precautions into place.

The middle ground? That's the tough territory that Congress is currently debating.

What's a Business to Do?

Kibel notes that judges tend to be very practical, and feels that when faced with this type of lawsuit, they'll look at the standard of care a business has put in place — and whether it was reasonable in light of the circumstances. And while he notes that the efforts don't have to be perfect, a business must do something. In other words, doing nothing is not an option.

In this situation, there is no one-size-fits-all approach, and reasonable efforts will differ based on the industry that you're in. Depending on your business, approaches may include masks, pre-screenings and/or taking people's temperatures. If you're running a daycare, for example, temperature screenings are a reasonable step to take. But doing the same at a subway station with thousands of people passing through? Not as realistic.

To determine “reasonable” steps to take, consider these factors: the type of business, how it's set up, the traffic flow, the purpose of the business, and how people interact with your business. Then ask yourself what makes sense for both the business and your patrons? As Kibel explains, “This is how a judge is going to look at it, so the business should make their determinations accordingly.”

Additional Considerations

Businesses should also consider any local government mandates. Consider the guidance that both your state and city have set up. While state and city mandates may be conflicting, basing your actions on this guidance can be the basis for a good argument.

It's also crucial to do your due diligence to understand if your employees and patrons expect more and respond accordingly. After all, perception is reality, and if you know what they need from you to feel safe, you can bolster your protocols to mitigate risks for everyone involved.

Kibel recommends speaking with legal counsel before implementing a plan and stresses that it's imperative to regularly review and update it. “We're in an environment where things are changing quickly,” he says, “and you need to be on top of the latest information and guidance.” Kibel's firm has a free COVID Legal Resource Center to help you do so available here: <https://bit.ly/35jwui9>

Our Learning Center is committed to sharing important guidance to help the industry navigate the complexities of the ever-evolving Safe Space landscape. The information shared is informed by experience working with client stakeholders, as well as independent research.

For more on how our Safe Space Solutions can help return confidence to your enterprise Please connect with either Beth Warren [beth.warren@cri.com] Laura Davis Taylor [ldt@inreality.com] for strategy and use cases.