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Potential Liability for Re-Starting Activities after COVID-19 and How to Mitigate Risks

After months of quarantine, we are beginning to see some states slowly reopen. Additionally, some sports leagues like the German Bundesliga, the South Korean Baseball league, and the PGA Tour have also announced dates to return to action in the near future. The landscape for sports and other activities in the wake of COVID-19 remains uncertain, but it is important for all clubs, teams, organizations, and groups to understand the possible liability they face when they do return and how to put procedures in place to mitigate that liability and to keep people safe.

General Liability

If an organization reopens its activities and somebody gets sick, it could potentially leave itself open to a negligence claim and be liable for medical costs, lost wages, pain and suffering, and other damages. This could be for negligently failing to cancel an activity or event, negligently failing to take proper safety precautions, or negligently reopening a facility.

In order to succeed in a claim, a person will first have to prove that the organization owed a duty to the person. This could be as an athlete that plays for the organization, a spectator, a coach, or a vendor. There are varying levels of duties that an organization will owe to different groups of people. For instance, a local sports club will owe a greater duty to a registered player, then to a spectator. However, organizations should be wary of groups that are more susceptible to the coronavirus, such as the elderly, people with immunodeficiency disorders, and children. Organizations will have to think about how to protect all possible groups that could be affected and make reasonable efforts to do so.

The person will next have to prove that the organization breached its duty. There will be numerous factors in determining a breach. The federal government, in addition to each state, and local governments are constantly issuing their own guidelines and rules. An organization's failure to comply with the rules and guidance of the local government, state government, or federal government will cut against it if they decide to reopen. Another factor will be whether local school districts have reopened. If they have not, then it might not be prudent to reopen other facilities or continue with sports practices. Another important factor is whether the organization's governing body has provided any guidance. Most sports organizations are part of a state or regional group, which controls travel leagues, tournaments, and other competitions. These governing bodies should provide their own guidance both on whether to reopen facilities and begin practices, and on what safety precautions to take once they do reopen. An organization should at a minimum comply with this guidance. Those governing bodies must also make sure that its guidance complies with other authorities or else possibly face liability. Finally, the organization should consult with other authorities such as the CDC, the World Health Organization, State Health Departments, or licensed medical

professionals on whether it is safe to reopen and begin activities, and on how to do so safely. The more preparation and consultation that the organization takes, the more reasonable their decisions are likely to be, if done in accordance with the expert advice.

If the person has proven that there was a duty and that the duty was breached, it must then prove that the breach was the proximate cause of the sickness. In order to show that the sickness was proximately caused by the breach, the person will need to show that they likely got to sickness from the facility or activity. To do this, they will have to show that they did not have the virus before and that they were exposed to the virus at the activity or facility. This could be very difficult because the incubation period for the coronavirus is approximately 14 days, however, just because they are the only person that gets sick at the activity does not mean they are precluded from recovering. Yes, it is possible that they were exposed elsewhere, but if they can show that they were likely exposed at the activity due to the number of people there from many different locations, then they might still be able to recover. It is extremely difficult to prove exposure to the virus, and this issue will likely require expert testimony, but showing proper social distancing, and taking the necessary precautions except for attending this activity may be enough to suggest proximate causation.

Can a person really recover for getting sick from the coronavirus even though everybody knows the risks and dangers of exposure to other people? There certainly is a defense that a person assumes the risk of sickness, including the coronavirus, when they enter the public domain. This defense might not be enough however, especially if the organization owes a duty to the person and has paid money to the organization.

Insurance Coverage

Any organization that has insurance coverage should check to see if litigation due to infectious diseases or pandemics is covered. Most general liability insurance policies will likely cover this, but some may deny coverage because this pandemic has become more than simply an occurrence and more of a normal part of life. Coverage may also be denied because of a specific exclusion related to communicable diseases or pandemics. Companies should also look for specific exclusions for COVID-19 when renewing their insurance coverage. There are currently proposals to limit liability based on COVID-19, however that will be a state by state issue.

Procedures and Policies

As mentioned above, one claim against an organization could be its failure to adequately provide and implement procedures once activities reopen. Sports governing bodies should provide guidance on procedures and policies that all of its members should implement. Individual teams and clubs should also have their own policies in place and should make sure that they are at least as stringent as their governing body's policies.

These policies and procedures should be written and distributed to all members including parents, coaches, staff, vendors, and any outside people that could come into contact with members during the activities such as opposing teams, other spectators, and other customers. Notices should be placed at all facilities so that they are visible.

Specific policies and procedures have to be tailored to the individual organization. It is no use copying a general boilerplate policy that does not contemplate the business you are in with all the varying factors. Below are some concerns to keep in mind while drafting policies and procedures, however, this list is by no means exhaustive.

It is unlikely that whenever we do return to sports and activities, that we will be able to immediately return to normal. There will likely be a slow phasing of activities with increasing contact and closeness as time goes on until eventually, hopefully, we will be able to get back to normal. This should be considered while drafting procedures and every sport or activity will need to have different phases based on the number of people involved and the level of contact generally needed.

In addition to the different phases, some thought should be given to using masks,

gloves, and other PPE. This might only be necessary for coaches and staff, but in some cases might be necessary for other people as well. How much space will be given between players and between coaches should also be considered, along with how many groups are in a particular area at one time. Specific consideration should be given to the attendance of members in the more susceptible groups. Once again, guidance should be sought from governments, governing bodies, and other medical professionals.

Different sports and activities require different amounts of equipment, and equipment is an important factor to consider. An effective policy will address each type of equipment needed, how often it will be cleaned, by whom, and whether it will be used only for one person or for numerous people. This should include items such as water bottles, towels and benches, in addition to the equipment needed for the sport or activity.

Common areas will likely be a problem area and each policy should address how this will be handled. General spacing requirements should be provided for spectators, restroom occupancy should be limited, carparks should be spaced out, and pick-ups and drop-offs should be supervised. Again, specific consideration will be needed for people in the more susceptible groups.

Finally, potentially unforeseen situations should be considered. While it is impossible to account for everything, a good policy will address some possibilities. For instance, what to do if somebody gets injured unrelated to the virus. Are there protocols in place if any of the policies are violated? Will there be any testing done at the site, or required prior to participation? What is the reporting procedure if somebody has symptoms of the virus? The ultimate goal is to keep everybody safe and put people at ease so that they can return and participate in sports and activities. While there is always the chance of injuries, sickness, and accidents, a clear understanding of the potential liability and a comprehensive policy can save an organization the expense and aggravation of a lawsuit, and keep people safe and healthy.

For any questions, concerns, or help with creating a policy for your organization, please feel free to contact akanji@mdmc-law.com.

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