



STATE OF NEW MEXICO GENERAL LIABILITY COVID-19 QUICK GUIDE

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1. **Statute of Limitations:** New Mexico has a three-year statute of limitations for negligence claims such as personal injury, wrongful death, and infliction of emotional distress. N.M.S.A. 1978, § 37-1-8. A plaintiff who becomes ill with COVID-19 may bring one of these causes of action.
2. **Negligence:** A plaintiff who contracted COVID-19 and then sues under negligence must meet all of the traditional elements of negligence in New Mexico. The four elements are: (1) the existence of a duty from a defendant to a plaintiff; (2) breach of that duty based upon a standard of reasonable care; (3) injury to the plaintiff; and (4) the breach being a proximate cause and cause-in-fact of the plaintiff's injury. *Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 29, 335 P.3d 1243.
3. **Standard of Care:** In New Mexico, persons whose conduct may expose others to an infectious disease must exercise reasonable care. *Madrid v. Lincoln Cty. Med. Center*, 1996-NMSC-049, ¶ 29, 31, 122 N.M. 269, 923 P.2d 1154. Under New Mexico precedent, a defendant who adheres to all existing standards is evidence that the defendant acted with due care under the circumstances. *Hines v. St. Joseph's Hosp.*, 1974-NMCA-110, ¶ 18, 86 N.M. 763, 527 P.2d 1075 (finding that a defendant blood bank that infected the plaintiff with Hepatitis B exercised reasonable care because it complied with all existing federal regulations, accreditation standards, and internal regulations). Consequently, what constitutes reasonable care during the COVID-19 pandemic is likely to depend on guidelines and mandates from the CDC, federal, state, and local government, health officials, and industry standards.
4. **Causation:** Due to the myriad ways in which a plaintiff could be exposed to coronavirus, and the relatively broad time window in which a plaintiff may begin to show symptoms of COVID-19, any litigation concerning coronavirus will require intensive testimony by of experts to identify the causative link between the defendant and a plaintiff's infection. The plaintiff bears the burden to demonstrate causation. Tracing causation to a particular defendant is likely to be extremely difficult in circumstances of extensive community spread. Brett F. Clements & Jeffrey D. Skinner, *Expert Strategies: Battling Causation in COVID-19 Tort Cases*, (May 28, 2020), <https://www.productliabilityandmasstorts.com/2020/05/expert-strategies-battling-causation-in-covid-19-tort-cases/>.
5. **Premises Liability:** Owners or operators of premises owe a duty of ordinary care to maintain the premises in a safe condition for the use of business invitees. If a dangerous condition exists on the owner or operator's premises, caused by the defendant or its employees, or if the defendant has actual knowledge of such a condition, then the owner or operator has a duty to exercise ordinary care in eliminating the danger or warning invitees of the presence of the condition. *Holguin v. Smiths' Food King Properties, Inc.*, 1987-NMCA-060, ¶ 12, 105 N.M. 737, 737 P.2d 96. Additionally, the owner or operator of premises has a duty to protect invitees from the foreseeable conduct and foreseeable harm of a third party. *Romero v. Giant Stop-N-Go of New Mexico, Inc.*, 2009-NMCA-059, 146 N.M. 520, 212 P.3d 408. Knowing that an owner, employee, or third party may foreseeably introduce the danger of COVID-19 infection during a pandemic, premise owners and operators should fully follow all cleaning and sanitation guidance from the CDC and federal and state government. Premise owners and operators should follow all guidelines requiring masks and social

distancing as well. Finally, premise owners and operators would be wise to post warnings about the potential for exposure to COVID-19.

- 6. Violation of Statute/Executive Orders as Evidence of Negligence:** In New Mexico, violation of a statute enacted for the benefit of the public is negligence per se. *Equitable General Ins. Co. v. Silva*, 1983-NMCA-002, ¶ 6, 99 N.M. 37, 658 P.2d 446. To prove negligence per se requires four elements: (1) there must be a statute or regulation that forbids certain actions or specifies a standard of conduct either explicitly or implicitly; (2) the defendant must violate the statute or regulation; (3) the plaintiff must be in the class of persons sought to be protected by the statute; and (4) the harm or injury to the plaintiff must generally be of the type the legislature sought to prevent through the statute. *Cobb v. Gammon*, 2017-NMCA-022, ¶ 43, 389 P.3d 1058. To support a finding of negligence per se, the defendant must have violated a statute or a regulation that specifies a duty distinguishable from the ordinary standard of care, rather than impose general duties. *Oakey, Estate of Lucero v. May Maple Pharmacy, Inc.*, 2017-NMCA-054, ¶ 21, 399 P.3d 939. A government statute or regulation that requires conduct to protect the public from COVID-19 infection could be the basis for proving negligence per se if a defendant violates public health statutes or regulations.
- 7. Contributory Negligence:** New Mexico eliminated the doctrine of contributory negligence in favor of adopting a pure comparative negligence regime. *Scott v. Rizzo*, 1981-NMSC-021, ¶ 15, 17, 96 N.M. 682, 634 P.2d 1234 *overruled on other grounds by Herrera v. Quality Pontiac*, 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181. Accordingly, a plaintiff's recovery in total damages can be reduced by the percentage a jury finds a plaintiff was at fault for their own injury. *Barth v. Coleman*, 1994-NMSC-067, ¶ 11, 118 N.M. 1, 878 P.2d 319. A plaintiff who fails to abide by health guidelines or who contributed fault in contracting COVID-19 would receive reduced damages in proportion to the fault the jury assigns to the Plaintiff.
- 8. Assumption of the Risk:** New Mexico does not recognize assumption of risk as a complete defense because New Mexico courts adopted a comparative negligence regime. *Yount v. Johnson*, 1996-NMCA-046, ¶ 18, 121 N.M. 585, 915 P.2d 341. A plaintiff's state of mind, awareness of danger, or knowing and voluntary participation in a dangerous activity could factor into a jury's finding that the plaintiff's own negligence merits a percentage reduction in damages. *Id.* A New Mexico court would likely allow such apportionment of fault in a case involving contraction of COVID-19 where the plaintiff participated in risky behavior.
- 9. Statutory Cap on Non-Economic Damages:** New Mexico does not generally limit non-economic damages in personal injury cases **but** limits non-economic damages to \$600,000 in medical malpractice cases. *See Salopek v. Friedman*, 2013-NMCA-087, ¶¶ 49-50, 308 P.3d 139; N.M.S.A. 1978, § 41-5-6.
- 10. Death Cases:** New Mexico allows claims for wrongful death when brought by the personal representative of the deceased person's estate. Damages awarded after a wrongful death claim must be held by the estate for the deceased's surviving beneficiaries. *See Spencer v. Barber*, 2013-NMSC-010, 299 P.3d 388. When an injured plaintiff dies within one year before the expiration of the

statute of limitations for any cause of action, the representatives of the deceased plaintiff will have one year after the death to commence the action. N.M.S.A. 1978, § 37-1-11.

11. Punitive Damages: A New Mexico court may grant punitive damages when a defendant intentionally or knowingly commits a wrong, but may also impose punitive damages when a defendant acts recklessly, wantonly, or in utter indifference to a plaintiff's rights—even if a defendant does not know their conduct will violate those rights. *Yedidag v. Roswell Clinic Corp.*, 2015-NMSC-012, ¶ 58, 346 P.3d 1136. Defendants must be careful to abide by all guidelines and health recommendations or risk punitive damages if they even appear to behave intentionally, recklessly, or indifferently to public health.

FAQs

Can a plaintiff recover for fear of exposure to COVID-19? Possibly. The New Mexico Supreme Court in *Madrid v. Lincoln Cty. Med. Center* decided that a defendant might be liable for negligent infliction of emotional distress when a plaintiff fears that the defendant's negligence caused the plaintiff to contract a disease through a "medically sound channel of transmission." *Madrid v. Lincoln Cty. Med. Center*, 1996-NMSC-049, ¶ 24, 122 N.M. 269, 923 P.2d 1154. Such a cause of action does not require that there be evidence that the disease was actually present in the channel of transmission. *Id.* at ¶ 31. Consequently, a New Mexico plaintiff may be able to bring a claim for negligent infliction of emotional distress if they believe they were exposed to COVID-19 through one of the scientifically accepted means by which COVID-19 is transmitted. Such a claim may be valid even if no trace of the coronavirus can be found where the plaintiff alleges they were exposed. Note however, that other New Mexico courts have interpreted the *Madrid* holding to apply only to cases involving fear of HIV infection. *See Castillo v. City of Las Vegas*, 2008-NMCA-141, ¶ 23, 145 N.M. 205, 195 P.3d 870; *Arnold v. Johnson*, 2009 WL 10701191 (D.N.M. 2009).

Will Commercial General Liability Insurance apply to COVID-19 claims? Possibly. Whether commercial general liability insurance covers contraction of COVID-19 will largely depend on the language and contractual construction of the policy. Much will ride on whether contracting COVID-19 qualifies as an "occurrence" under a commercial general liability policy. Under most policies, an "occurrence" is an "accident" that excludes expected or intended injuries. *See West Am. Ins. Co. v. Atyani*, 366 F. Supp. 3d 1270, 1274–75 (D.N.M. 2019). At this point in the pandemic, a court would likely find exposure and contraction of COVID-19 as an accident, especially if a general liability policy allows an occurrence to include the continuous or repeated expose to substantially the same general harmful conditions. *Id.* It would be difficult to argue that any defendant expected or intended that a plaintiff contract COVID-19.

Is there immunity from COVID-19 claims? As of July 28, 2020, New Mexico is not among the states that granted immunity from civil claims related to COVID-19. The Federal Department of Health and Human Services provided liability immunity against claims of loss "caused by, arising out of, relating to, or resulting from the manufacture, distribution, administration, or use of medical countermeasures" against COVID-19. It does not cover willful misconduct. Dep't of Health & Human Services Office of the Sec'y, Notice of Declaration under the Public Readiness and Emergency Preparedness Act for medical countermeasures against COVID-19 (2020), <https://www.phe.gov/Preparedness/legal/prepact/Pages/COVID19.aspx>. Future state or federal protections may be forthcoming.

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.

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](#)
- [Modrall Sperling COVID-19 Task Force Update](#)
- [New Mexico COVID-19 Public Health Orders and Executive Orders](#)
- [New Mexico Department of Health \(NMDOH\) COVID-19 Updates](#)
- [New Mexico Officer of the Governor Executive Orders](#)
- [New Mexico State Government COVID-19 Updates](#)

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.