

COVID-19 TASK FORCE

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**Expect
Insights**

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COVID-19 and Unprecedented: Litigation Insights, Issue 22

In our 22nd edition of *Unprecedented*, our weekly update on COVID-19-related litigation, we see cases against employers continue to rise, and offer insight for employers to keep employees safe and simultaneously avoid lawsuits. In another notable update -- again for employers and business owners -- the Supreme Court of Virginia dismissed a case challenging the Governor's restrictions on businesses amid the pandemic. Finally, we look at two recently filed cases -- one similar to those we have seen before, and one we have not. Yet another tuition refund case filed against Lindenwood University in Missouri alleges that students should receive refunds due to the University going fully remote, as online classes are typically cheaper than those attended in-person. We also discuss a new COVID-19-related case brought as a trademark infringement claim against Facebook, Inc.

We hope you enjoy reading.

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VA Supreme Court Dismisses Lawsuit Challenging Governor's COVID Restrictions

"The Supreme Court of Virginia dismissed the joint case of a restaurant owner in Fredericksburg and an event venue owner in Loudon County who sued Gov. Ralph Northam over his COVID-19 restrictions."

Why this is important: Attorney General Mark Herring has again successfully defended the Commonwealth's COVID-19-related restrictions in court. The lawsuit, filed by a restaurant owner and an event venue owner, alleged that Governor Northam's COVID-19-related restrictions hinder their business operations and are an unconstitutional overstep of executive authority. This represents the 15th challenge to Virginia's COVID-19-related restrictions that Attorney General Herring has defeated. Thus, the landscape remains unforgiving for litigants seeking to challenge Virginia's COVID-19-related restrictions in court. --- [Wesley A. Shumway](#)

Conservative Group Files Lawsuit Against Tony Evers' Second COVID-19 Emergency Order, Mask Mandate

"The lawsuit from the Wisconsin Institute for Law and Liberty (WILL) was filed on behalf of three Wisconsin residents - two residents of Polk County and one resident of St. Croix County - in Polk County Circuit Court and sets up the latest legal battle over the governor's attempts to minimize the spread of

the coronavirus."

Why this is important: Government responses to the COVID-19 pandemic have opened a new front in the debate over government power. Lawsuits have been filed across the country challenging everything from eviction moratoria and business closures to face-covering requirements and mass-gathering restrictions. In few places has the debate been more strident than in Wisconsin, where the state Supreme Court struck down a stay-at-home order in response to a lawsuit filed by the Republican Legislature. Now, a conservative group is bringing a similar challenge to Wisconsin Governor Evers' face-covering requirement, alleging that the Governor is violating Wisconsin law limiting the duration of his emergency powers. Whatever the lawsuit's merits, it highlights the risks executive branch officials have faced when adapting their emergency powers to an unprecedented pandemic. --- [Joseph V. Schaeffer](#)

COVID-19 and Wrongful Death Lawsuits - The Wave is Rising

Employers are beginning to see a wave of COVID-19-related wrongful death lawsuits. Despite the general rule that workers' compensation provides the exclusive remedy for an employee injured at work, employers in a variety of industries across the nation are being served with wrongful death lawsuits for allegedly failing to protect workers from contracting the coronavirus at work. Although the legal landscape is still developing, the central question in many of these cases is whether the employer took reasonable measures, based upon the then-available information, to prevent the spread of COVID-19 in its workplace. As such, in order to protect employees and avoid litigation, employers should follow the CDC's Interim Guidance for Businesses, consult OSHA's most recent guidelines, educate employees about what precautions are being taken, and inform employees of confirmed COVID-19 cases in the workplace. As new guidelines and best practices develop, employers will need to change and adapt their workplace policies. --- [Joseph A. Ford](#)

ADA and FMLA Employment Lawsuits are Now Paving the Way

An avalanche of cases addressing COVID-19 and the workplace have been burying courts all over the country. Many cases deal with whether employers adequately protected their employees, but an increasing body of claims focus instead on more established employment law: claims relating to whether employers adequately accommodated workers under the Americans with Disabilities Act ("ADA") and whether employers have run afoul of worker protections in the Family and Medical Leave Act ("FMLA"). These federal protections include requirements that employers make reasonable accommodations for employees with disabilities (ADA) and prevent retaliatory employment actions (like cutting back hours or terminating employees) for using certain protections such as job protected sick leave (FMLA). Not every worker will be entitled to the benefits of these laws, but for those who are, the protections can be significant. Much like other areas of case law rapidly developing in the face of such unprecedented times, the sheer magnitude of these cases makes their outcomes important. Courts will have to balance the interests of protecting workers, particularly those with disabilities, against the interests of keeping businesses running. It also is quite likely that these cases will end up being fact intensive, with courts carefully examining whether employers followed guidelines and took actions to put protections in place for employees. Never has there been a time where it is more important to have consulted qualified counsel about employment practices and implemented their suggestions than when a court begins such close scrutiny. --- [Risa S. Katz-Albert](#)

[Student Files Lawsuit Against Lindenwood After Classes Moved Online for COVID-19](#)

"The lawsuit states that during normal operations, Lindenwood charges less for online-only classes compared to in-person classes."

Why this is important: A recent lawsuit filed against Lindenwood University in Missouri joins the more than 70 other class action lawsuits brought against colleges and universities in the wake of the COVID-19 pandemic. When COVID-19 came to prominence, facilities of higher education closed campuses, limited

access to certain facilities, and/or switched to online instruction. For some, it was mandatory given state-level stay-at-home or quarantine orders, and, for others, it was based on social distancing guidelines provided by the CDC and federal/state/local governments. Overall, an estimated 4,000 colleges/universities closed live, on-campus classes in favor of some form of virtual education, affecting an estimated 25 million students. Now, students are initiating class action lawsuits seeking reimbursement for certain payments made to their colleges for the spring 2020 semester. Such lawsuits are levied against large and small establishments, both public and private. However, each lawsuit is a little different: some want full reimbursement for the semester, others for a partial period; some want tuition only, others want fees as well; and of course, each school had its own unique response to COVID-19 that affected students. The Lindenwood University lawsuit, like its predecessors, claims that online tuition is charged at a lesser rate than the live, on-campus classes students were charged for, with a difference of nearly \$300/credit hour. It additionally argues that the quality of on-line education is "subpar in every respect" given online education's lack of materials, facilities, and access to faculty. They also typically point to higher education's plentiful financial resources and endowments, compared to the average college student's low income/unemployment during the pandemic. Colleges and universities typically have responded by acknowledging the difficult change; few have voluntarily given refunds. It remains to be seen whether widespread refunds will be ordered by courts, and there is already some indication that certain legal arguments will fare better than others -- compare when a dining hall closes, and students can be refunded their meal plans (objective and quantifiable), against an online class that has "subpar" quality to its live counterpart, and tuition is refunded (more subjective).

These lawsuits are very important for two reasons: (1) millions of college students were affected, meaning there may be many lawsuits with untold numbers of litigants for courts to handle, and (2) the resulting verdicts or settlements likely will affect how higher education handles COVID-19 moving forward, as many are open (or opening soon) for the fall 2020 semester under similar restrictions/conditions. --- [Chelsea E. Thompson](#)

University Sues After COVID-19 Party Instagram Account Uses Trademarks

"According to the complaint, ASU seeks redress for the unauthorized use of its registered trademarks and trade dress because the account used its logos and school colors in posts, which allegedly spread 'dangerous misinformation about Covid-19 just as students are returning to ASU's campuses to begin classes on August 20, 2020.'"

Why this is important: This is but one of many unique lawsuits arising from the COVID-19 pandemic, this time presenting itself primarily as a trademark infringement claim. As students return to campus, employees return to work, and communities take action to prevent the spread of the virus, the internet remains a place where information can reach thousands -- and sometimes even millions -- of people in a matter of hours. This particular lawsuit alleges that the Instagram account at the center of the action, which promotes partying and denounces social distancing, harms ASU and will endanger the health of the university's community if it is not enjoined from use.

The lawsuit comes after ASU notified Instagram of the issue and asked to have the account removed. Instagram, however, has allowed the account to remain active. The complaint alleges several causes of action, including trademark infringement and dilution, false designation of origin, false advertising, and an unfair competition claim against the unknown account holder brought under state law. ASU also alleges that Facebook is responsible for contributory infringement. We will continue to provide updates as the case develops. --- [Megan W. Mullins](#)

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