

COVID-19 TASK FORCE

Expect Insights

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COVID-19 and Unprecedented: Litigation Insights, Issue 34

In addition to the familiar lawsuits that we have been seeing since the pandemic started this spring, there have been new developments with the Pennsylvania Legislature, the Supreme Court of the United States, a major sports association suing their insurers, businesses being accused of proactively encouraging employees to not use protective equipment and ignoring safety procedures, and the impact of deciding to try cases during COVID-19 and all of the safety protocols involved with such an undertaking. Our COVID-19 Task Force breaks down some of these developments in this 34th issue of *Unprecedented*.

We also invite you join us for our **free webinar - Get Keen on the Vaccine: Considerations for Employers Considering a Mandatory COVID-19 Vaccine** - on Thursday, December 17, 2020 from 12:00 PM to 1:00 PM EST. With the release of a new COVID-19 vaccine comes hopes of a return to "normalcy" and new concerns for how to protect your workforce. Can you make vaccines mandatory for your employees? If so, what considerations must you take into account as you craft your policies? In this webinar, Spilman attorneys Carrie Grundmann and Megan Mullins will walk you through how to manage this transition while ensuring you stay compliant with existing labor and employment laws.

[Register now!](#)

[COVID-19 Task Force](#)



[Pennsylvania Governor Vetoes Bill Limiting COVID-19 Liability](#)

"Under the bill, anyone involved with the manufacturing, distributing, labeling or donating of personal protective gear would not be liable for any property damage or personal injury related to COVID-19 exposure. Anyone providing business or government services would similarly not be liable for any property damage or personal injury related to COVID-19 exposure."

Why this is important: [HB1737](#) was amended to include COVID-19 liability protections for businesses, child care providers, health care providers, emergency medical services agencies, educational institutions, clinical laboratories, manufacturers of personal protective equipment and

individuals employed by those businesses absent clear and convincing evidence of recklessness, willful misconduct or intentional infliction of harm. Governor Wolf vetoed the legislation because he concluded that the protections were too broad in scope.

In his [veto message](#), Governor Wolf expressed support for the immunity provisions contained in his May 6, 2020 [executive order](#). This order provides immunity from civil liability for licensed, certified, registered health care professionals who are engaged in emergency services activities or disaster services related to the Commonwealth's COVID-19 response in certain facilities as defined in the order. The immunity does not extend to acts or omissions that constitute gross negligence or willful misconduct. The order also contains provisions related to the voluntary use of real estate for emergency purposes. The order does not provide immunity for the businesses addressed in HB 1737.

Although it was not mentioned in the veto message, on [November 27, 2020](#) Governor Wolf provided limited immunity for businesses, Commonwealth employees and authorized agents and health department personnel when they are enforcing the Pennsylvania Secretary of Health's Order requiring universal face coverings.

It is imperative that individuals and businesses stay abreast of the legislative and regulatory changes to assess any potential legal exposure. --- [Anmarie Kaiser](#)

[Splitting 5 to 4, Supreme Court Backs Religious Challenge to Cuomo's Virus Shutdown Order](#)

"Justice Amy Coney Barrett played a decisive role in the decision, which took the opposite approach of earlier court rulings related to coronavirus restrictions in California and Nevada."

Why this is important: It did not take long after her appointment for Justice Amy Coney Barrett to make her mark on the Supreme Court. In a narrow 5-4 ruling on the Court's so-called "shadow docket," the Justices granted an injunction pending appeal against the enforcement of New York State's occupancy limitations on religious gatherings. The injunction marks a reversal from earlier holdings denying injunctive relief in similar applications from religious groups in California and Nevada and prompted rare sniping among the Justices. And though questionable what effect it will have in New York, which had unsuccessfully argued that changes in its policies had rendered the case moot, it has already had an impact elsewhere. Just eight days after issuing an injunction in this case, the Court granted certiorari, vacated, and remanded in a similar California case that had come up through the 9th Circuit. This demonstrates not only the shift in the Court's thinking with the addition of Justice Barret but also the increasing importance that the shadow docket has taken on in just the last year alone. Indeed, while the Court could theoretically take a different approach in this case after a petition for writ of certiorari is filed, fully briefed, and argued, this interim decision likely represents for all practical purposes the Justices' thinking on the matter. Governments considering COVID-19-related restrictions against religious groups should thus take note. --- [Joseph V. Schaeffer](#)

['They Didn't Care' About COVID-19, Cuban Immigrant Says in Lawsuit Against Nebraska Meat Plant](#)

"Furthermore, the ACLU says the plant has become a public nuisance after an outbreak earlier this year caused infection in other members of the community."

Why this is important: Noah's Ark Processors, a meatpacking plant in Hastings, Nebraska, consists of predominantly Latino and Black essential workers. The American Civil Liberties Union ("ACLU"), along with other law firms, seeks racial justice after the plant management, in addition to state and federal officials, failed to protect these workers from the dangers of COVID-19. Specifically, the lawsuit claims the plant does not promptly replace workers' masks, forcing workers to leave part or all of their face uncovered, does not adhere to social distance rules, does not offer adequate sick leave to ensure

that sick workers can stay home, and does not provide any onsite testing. Despite complaints about working conditions during the pandemic, immigrant employees are unprotected and the ACLU turns to the court to ensure the safe work environment that's required by law. --- [Victoria L. Creta](#)

In New Allegation, Lawsuit Says Tyson Officials Lied to Interpreters About COVID-19 Dangers in Iowa Plant

"The amended suit, filed on behalf of the families of three Tyson workers who died of COVID-19, says plant manager Tom Hart and human resources director James Hook told interpreters that the building had 'no confirmed cases' and that Black Hawk County Health Department employees had 'cleared' the plant for operation."

Why this is important: Tyson Foods, a pork processing plant in Waterloo, Iowa, faces negligence claims filed on behalf of the families of three Tyson workers who died of COVID-19. The lawsuit states that Tyson employers took bets on how many employees would get sick from COVID-19, forced employees to work long hours in cramped conditions without personal protective equipment, and were told to ignore symptoms. Furthermore, the amended suit states Tyson Foods' senior managers lied to interpreters about the scope of coronavirus dangers at the facility. Specifically, there were, in fact, confirmed cases amongst Tyson Foods' employees and the County Health Department had not cleared the plant for operation. According to the suit, Tyson managers demanded interpreters mislead the public about COVID-19's impact on the plant, did not take the proper steps to try to slow the spread of the virus, and as a result, at least 10 employees have died. --- [Victoria L. Creta](#)

Feds Sue Airmont for Religious Discrimination Against Orthodox Jewish Residents

"As alleged in the complaint, Strauss said Airmont has violated the Religious Land Use and Institutionalized Persons Act by imposing land use and zoning provisions that, among other things, restrict Orthodox Jewish residents' ability to worship in private homes and prevent operation of a private religious school."

Why this is important: The Village of Airmont is once again being sued over alleged discriminatory behavior against its Jewish residents. U.S. Attorney for the Southern District of New York, Audrey Strauss, filed a lawsuit against Airmont on December 2, 2020 alleging violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). RLUIPA was written to prevent zoning and land use laws that substantially burden religion unless they are the least restrictive means of achieving a compelling government interest. According to Strauss, Airmont has imposed zoning and land use laws that "restrict Orthodox Jewish residents' ability to worship in private homes and prevent operation of a private religious school." This is not the first time that Airmont has been accused; in fact, they have been involved in several lawsuits alleging discrimination against the Jewish community since the 1990s. Airmont has never been found guilty of discrimination. Airmont settled one suit and a federal judge dismissed the other, but it illustrates an important point related to RLUIPA. The issue with RLUIPA is that it only provides for injunctive, and not monetary, relief. While these lawsuits can get expensive, they are unlikely to dissuade future discriminatory activity as a large monetary verdict would. Congress certainly had a reason for shielding governments from monetary liability, but perhaps something should be implemented to discourage subsequent violations. --- [Kellen M. Shearin](#)

Publix Failed to Protect Employee Who Died of COVID-19, Lawsuit Alleges

"As panicked shoppers went out in droves to grocery stores around the world, managers and supervisors at Publix were telling their employees not to wear masks, putting them at risk of

contracting the coronavirus, a wrongful death lawsuit alleges."

Why this is important: The family of a former Publix employee filed a lawsuit against the grocery chain alleging that it failed to protect the former employee from contracting COVID-19. The family alleges that Publix prohibited the former employee from wearing a mask, despite the fact that he wanted to wear one, because Publix thought it would scare customers. The complaint cites OSHA complaints from other Publix stores in an effort to demonstrate that this prohibition on employee masks was a company-wide policy. According to the complaint, a co-worker of the former employee exhibited symptoms of COVID-19, but Publix failed to send the individual home. Shortly thereafter, the former employee tested positive, was hospitalized, and died. While we have already seen a variety of COVID-19-related lawsuits against employers, the allegation that Publix prohibited an employee from wearing a mask seems to make this one a little different. We may begin seeing similar allegations in other COVID-19 litigation. --- [Joseph A. \(Jay\) Ford](#)

[Lawsuit Alleges Negligence in COVID Spread at Butte Long-Term Care Facility](#)

"A lawsuit alleges that negligence at Continental Care and Rehabilitation Center in Butte allowed COVID-19 to spread through the long-term care facility, taking at least 13 lives."

Why this is important: The wave of lawsuits against long-term care facilities continues. The families of two residents of a long-term care facility in Butte, Montana have filed a lawsuit against the facility, alleging that facility owners and administrators "ignored complaints, guidelines and agency recommendations and requirements, and allowed the unsafe conditions . . . to persist until nearly the entire population of residents" contracted COVID-19. The lawsuit cites a state health report from August saying that the long-term care facility was not in compliance with infection control regulations, did not have enough nursing staff, and failed to implement proper social distancing. The lawsuit further states that the facility failed to follow prevention guidelines issued by the agencies that regulate long-term care facilities. Long-term care facilities and other facilities that care for older adults should continue to monitor these lawsuit trends. --- [Kayla I. Russell](#)

[COVID-19's New Wave Could Bring the In-Person vs. Virtual Jury Trial Debate to a Full Boil](#)

"Litigators, judges and court administrators have been forced into a high-stakes game of 'Would You Rather?' featuring several equally unappealing options."

Why this is important: The familiar legal precept that "justice delayed is justice denied" has had new meaning for litigants since the onset of the pandemic in March. The ability to have your criminal charges or civil dispute decided timely by a jury of your peers is no longer simply hamstrung by heavy court dockets; it has become unfeasible due to safety concerns. Courts across the country that attempted to reopen with heightened safety protocols in September faced a difficult reality of finding enough jurors to seat as large numbers of prospective jurors defied summons to report for jury duty during a pandemic. Some courts reported that only 15 percent of those summonsed to jury duty responded to the call. With the dramatic spike in COVID-19 positive numbers since September, many of the courts who restarted jury trials are making the difficult decision to shut down jury trials yet again this month. And while delaying jury trials until spring is frustrating, it may still be the better option for many litigants. Many of the attorneys who conducted jury trials in that narrow time frame between September and December reported that the process was far from easy and provide insights into the challenges the pandemic poses. Even witnesses that are favorable to your cause may become reluctant witnesses who are adverse to being summoned to testify during a pandemic. Judges were forced to either delay trials or to restrict peremptory challenges of jurors due to the smaller-than-usual jury pools that showed up for court, creating appellate issues and thus uncertainty surrounding the validity of the outcomes on appeal. One jury trial conducted in the Eastern District of Texas resulted in

two jurors, five court staff and eight members of the legal teams testing positive by the end of the proceeding. And one seasoned attorney who conducted a jury trial last month shared that, while the court can add microphones to assist the jurors in hearing the evidence and arguments presented in masks, the inability for the attorneys to see the jurors' expressions behind their masks during the trial cannot be overcome. So while delaying justice until the pandemic ends is not an option those working in the justice system would favor, deciding to proceed with a jury trial in the midst of a pandemic requires a careful weighing of the pros and cons that we've learned from those who proceeded. --- [Lori D. Thompson](#)

MLB and All 30 Teams Sue Insurance Providers, Citing Billions in Losses Due to Covid-19

"Major League Baseball is suing its insurance providers, claiming insurers are refusing to cover the billions of dollars in losses the sport has suffered due to the coronavirus pandemic."

Why this is important: A few months after completing a COVID-19-shortened season, Major League Baseball has sued its insurers to force them to provide coverage for their losses. From a legal standpoint, the claims are unlikely to be significantly different than those raised by the restaurants and bars who led the first wave of this coverage litigation in March and April of this year. But they are significant from a practical standpoint, both in terms of the sheer scope of the claimed damages and the litigation activity that the plaintiffs and defendants are likely to bring to bear. What this signals then, more than anything else, is that big businesses are entering the fray and coverage litigation is far from over. --- [Joseph V. Schaeffer](#)

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