

COVID-19 TASK FORCE

Expect Insights

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Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 2

Welcome to the second issue of the 2021 edition of *Unprecedented*. The first week of the Biden administration already has represented a shift to the federal government's approach to the COVID-19 pandemic. In addition to announcing plans for a nationwide vaccine distribution strategy, as well as requiring face coverings on federal property, President Biden has authorized the use of the Defense Production Act to ramp up production of personal protective equipment and vaccines. Many states, however, are struggling to distribute and administer even their current supply. West Virginia is leading the way with 83 percent of its doses having been administered, but California and Rhode Island have used just 45 percent of available doses. And solving the distribution problems will not immediately end the COVID-19 pandemic. Dr. Fauci estimates that normal life will not return for most Americans until fall 2021 even with high rates of vaccination by summer's end. It seems, then, that COVID-19 and its related litigation will remain with us for months to come, if not longer. So join us for this issue's review of new developments in litigation over executive orders, employment litigation, insurance coverage, and tuition reimbursements.

[Joseph V. Schaeffer](#), Editor of *Unprecedented*

[COVID-19 Task Force](#)



Lawsuit Tests Limits of COVID-Related Employment Litigation

"Plaintiffs' counsel believes his representation of Kristen Paltz in her federal wrongful-termination lawsuit against Alliance HealthCare Services Inc. is just the tip of the iceberg when it comes to some employers using COVID-19 to get rid of employees who have complained about management."

Why this is important: Employees who wish to complain about their employers may want to keep those complaints to themselves until the pandemic is over. The term "recessionary discrimination" was coined during the 2008 recession to describe a situation in which employers use economic crises to mask discriminatory layoffs and firings. According to Kristen Paltz, COVID-19 is providing similar opportunities for employers looking to free themselves of troublesome employees. "Managers sense an opportunity, and think they have cover to terminate people because of COVID." Ms. Paltz was allegedly terminated due to her repeated complaints to management at Alliance Healthcare. Whether or not Ms.

Paltz wins her lawsuit, this likely will open the door to many other lawsuits by employees claiming that they were laid off under the pretext of downsizing due to COVID-19. --- [Kellen M. Shearin](#)

Lawsuit Claims New York's COVID-19 Indoor Dining Restrictions Threaten Lives

"According to data collected by the state, bars and restaurants are responsible for roughly 1.4 percent of new coronavirus infections."

Why this is important: A restaurant owner in New York City filed an injunction against New York Governor Andrew Cuomo arguing that the recently ordered cessation of indoor dining is an unjust taking as well as potentially harmful to the public. Indeed, according to data collected by the various restaurant and bar owners, indoor dining only accounts for 1.4 percent of coronavirus infections while small private gatherings account for 74 percent. Indoor dining, with its mandatory masking, social distancing, ventilated spaces, and UVC lighting, may well save lives argues the owner of the South Street Seaport House in New York City. At a hearing held on January 21, the Temporary Restraining Order requested by Seaport House was denied, though discovery was ordered, including the deposition of the director of the New York State Health Department. --- [Alexander Macia](#)

County Sues 18 Businesses for Defying COVID-19 Public Health Orders

"The restaurants said they were ready to fight for their livelihood and stand against what they called an overreaching government."

Why this is important: Even as government restrictions have taken an unprecedented toll on small businesses, most have complied. For that reason, as well as a reluctance to sue already-struggling businesses, enforcement actions have been rare. But as this report from Ventura County, California, shows, governments will step in to enforce compliance with their pandemic-related restrictions. Beside discouraging other businesses considering non-compliance, however, the near-term effect is likely to open up another avenue for the litigation of the underlying restrictions' constitutionality. --- [Joseph V. Schaeffer](#)

Major Coronavirus Outbreak in Canby Senior Rehab Preceded by Disregard for Safety, Lawsuit Claims

"Former worker Erica Moreno's lawsuit, filed in Multnomah County Circuit Court, alleges that the facility's local and corporate managers repeatedly failed to take action to prevent the potential spread of disease, then punished Moreno for trying to get them to act."

Why this is important: A former employee at a senior care facility in Oregon alleges that she was forced to resign in retaliation for complaining about her employer's failure to take adequate precautions to prevent the spread of COVID-19 among employees and seniors at the facility. Employers in the health care industry should be aware of state laws that prohibit discrimination or retaliation against employees who complain about matters affecting patient safety. In West Virginia, the Patient Safety Act prohibits discrimination or retaliation against health care workers who make a good faith report of wrongdoing or waste or advocate on behalf of a patient with respect to the care or services provided by a health care entity. North Carolina and Virginia also provide certain protections for employees who report patient safety concerns. If a health care entity's employee makes a complaint related to the employer's COVID-19 precautions, it may be considered protected conduct that cannot form the basis for any discipline or other adverse action against the employee. This Oregon lawsuit also alleges that employees with COVID-19 symptoms were not always treated the same way by management.

Although employers are faced with many difficulties in applying their policies during this time of increased remote work and employee stress, it is as important as ever that employers apply their policies equitably. If policies regarding when employees must quarantine due to COVID-19 symptoms or exposure to COVID-19 are not applied uniformly, employers may face claims of disparate treatment. --- [Sarah E. Kowalkowski](#)

States Revive Push for Virus Liability Protections for Employers

"These state laws broadly shield all or most types of businesses from coronavirus-related liability lawsuits, unless a plaintiff can show the company was grossly negligent or guilty of intentional misconduct."

Why this is important: COVID-19 liability protection was a central issue for Republicans during negotiations over the previous federal coronavirus relief packages. Now that Democrats are in control in Washington, D.C., several states are attempting to enact state-level liability protection laws. More than a dozen states enacted liability shields in 2020, and many more have indicated their intention to do so in 2021. For example, Florida, Montana, and Wisconsin have already advanced bills providing liability protections, and similar bills have been introduced in Alabama, Alaska, Indiana, Missouri, and North Dakota. Significantly, these state-level liability protections do not apply to claims asserted under federal law, such as federal anti-discrimination or anti-retaliation laws. --- [Joseph A. Ford](#)

Calif. Barber's Lawsuit Cuts Into Governor's COVID-19 Orders

"California Gov. Gavin Newsom and other state leaders were hit with a proposed federal class action suit challenging the state's coronavirus regulations prohibiting barbering and cosmetology professionals from operating their businesses, likening them to a seizure of private property for public benefit without just compensation."

Why this is important: In what may be a sign heralding the onslaught of lawsuits challenging state-imposed COVID restrictions, a hair salon in California brought a proposed federal class action against Governor Newsom, the state attorney general, and the professional licensing board arguing that the forced closure of their business is a taking without just compensation under the 5th and 14th Amendments to the U.S. Constitution. It may well be that the inconsistent application of these closure orders, indeed restaurants, clothing stores, and strip clubs remain open in California, could encourage more of these lawsuits as governments struggle to fairly and consistently apply closure orders across business classes. --- [Alexander Macia](#)

COVID-19 Death of Original Philly Cheesesteak Supervisor Triggers a Lawsuit Against Meatpacking Giant

"It alleges that Tyson 'inexplicably failed to take proper safety precautions to protect workers.'"

Why this is important: The widow of a former employee of the Original Philly Cheesesteak Co. plant in Pennsylvania filed a wrongful death action against the plant alleging that it "inexplicably failed to take proper safety precautions to protect workers." The employee was allegedly handed an electronic thermometer and ordered to scan the temperatures of his fellow employees as they arrived for work. The employee was diagnosed with COVID-19 five days later and 16 days later he died from complications. The suit alleges that the plant was grossly negligent by ignoring federal guidance on workplace safety, not providing enough PPE, and misleading staff about the safety of the plant.

In Pennsylvania, legislators passed a COVID-19 corporate immunity bill in November; however, the bill was subsequently vetoed by the governor stating that it was "overly broad" and saying it would encourage "carelessness and a disregard for public safety." Even without the liability protections, there

are high hurdles for plaintiffs in COVID-19 wrongful death lawsuits. One hurdle is proving causation-- that the employee contracted the disease while at work. Also, in most states, workers' compensation is the exclusive remedy for workplace injury and death. Employers should continue to monitor the progress and outcome of these cases. --- [Kayla I. Russell](#)

Lawsuit Claims Rice University Didn't Provide Expected College Experience Due to Pandemic Restrictions

"The lawyers are seeking class-action status and claim damages exceed \$5 million."

Why this is important: Rice University in Texas has joined the dozens of higher education institutions facing potential financial consequences for providing students with a different educational experience than expected at the start of the 2020 spring semester. A student has filed the beginnings of a class action lawsuit in federal court against Rice University, claiming they paid full tuition and did not receive the same college experience as they contracted for after the COVID-19 pandemic caused the university to alter its operations. The complaint alleges that students, including the named plaintiff, paid more than \$24,000 in tuition and fees for the spring 2020 semester, which was abruptly and dramatically altered in March 2020 by the closure of campus facilities and the transition to online only instruction. Because tuition is paid in advance, the plaintiff argues that she and other similarly situated students were denied the experience they had been promised in exchange for that price tag, thus establishing that Rice University breached its contract with the students. Many of these cases against colleges and universities have focused on the qualitative difference between online learning and in-person education, but this one frames the issue differently. Instead, this plaintiff focuses on the specific facilities and services that were paid for but not enjoyed, such as the university health center fee, which was charged, and not refunded, although the center was closed for half of the semester due to the pandemic. --- [Risa S. Katz-Albert](#)

ViacomCBS Files Lawsuit to Recover COVID-19 Losses from Insurer

"The entertainment giant says that Great Divide Insurance Company is denying tens of millions of dollars in coverage by reading insurance policies in an 'overly narrow and wrongful manner.'"

Why this is important: Since the beginning of this pandemic, a great deal of businesses have sustained significant losses due to the shutdown, including the entertainment industry. In order to remain in business, several companies have turned to their insurance policies to recoup their losses. Most insurers have been denying such claims for business interruption coverage due to the lack of physical damage to the policyholder's property and/or the language in the policy that excludes coverage for viruses.

This case is slightly different in that the policyholder, ViacomCBS, an entertainment giant is seeking insurance coverage under specific coverages applicable to the entertainment industry, which are not necessarily dependent on a "physical loss" for coverage to be afforded.

According to the complaint, ViacomCBS has a "Television Production Portfolio Policy," which provides \$30 million of cast coverage, \$10 million of extra expense coverage, another \$10 million for imminent peril coverage, \$1 million in civil authority coverage, and another \$1 million in ingress/egress coverage. The insurer, Great Divide Insurance Company, is taking the position that ViacomCBS can only collect on the civil authority coverage, meaning it would be limited to just \$1 million arising from how government authorities made it impossible to proceed on hundreds of productions. In addition, Great Divide has taken the position that the "imminent peril" coverage was not triggered because the claims did not present "certain, immediate and impending danger" to persons or property that "would be unreasonable or unconscionable to ignore." ViacomCBS disagrees, and the two parties have been at odds for the past year.

Also, Great Divide is attempting to modify the policy going forward to limit the scope of the insurance and include a specific exclusion in the policy for COVID-19 related losses. ViacomCBS disagrees with this action as well.

Interestingly, the way in which ViacomCBS has conducted its business is a factor in whether coverage exists. For instance, the Kids' Choice Awards was cancelled and then held virtually. Great Divide is arguing that because the show aired, albeit in a different format, no losses were incurred. ViacomCBS is contending that because it aired in a different format, the budget for the program was greatly increased causing ViacomCBS to sustain significant losses.

This case is important because given the wave of denials that insurance companies have issued in the entertainment industry, which have been upheld by a majority of the courts, this case could provide another path for policyholders in the entertainment industry to recoup some of their losses due to the pandemic. Because the pandemic has hit the entertainment industry hard, this might result in significant losses for the insurance industry. --- [Laura E. Hayes](#)

Arkansas Bar Owners File Lawsuit Over Regulations Due to COVID-19

"The lawsuit says the majority of business is between 10:30 and 1:45 a.m. and the operation during these hours is how the business can survive."

Why this is important: Recent weeks have seen government officials make recourse to curfews in their fight against the spread of COVID-19. Though theoretically applicable across all business sectors (see, for example, a broad curfew implemented by France), most have focused on bars and restaurants. A group of Arkansas bar owners is now arguing that the state has violated their due process and property rights by singling them out for closure starting at 11:00 p.m. each evening. The bar owners allege that this not only shuts them down during their peak revenue hours, but is unsupported by the state's own data showing that bars account for only a small amount of infections. These two factors--a singularly affected business sector and allegedly contradictory state data--make this case one to watch. --- [Joseph V. Schaeffer](#)

Business Owners Filing New Lawsuit Against State of Michigan and Governor Whitmer

"The lawsuit stems from state public health orders that required bowling centers, roller skating rinks, and other entertainment businesses to close due to the pandemic."

Why this is important: A federal lawsuit seeking just compensation for the taking of business is being threatened by the owners of five bowling centers in Michigan. Under present state orders, bowling competitions may be still held. However, the owners argue that such doesn't create sufficient business flow and that they have already lost the majority of their business as bowling is typically a fall-winter sport. Moreover, given the losses sustained to date, the owners predict that up to half of the state's bowling centers will be forced to close this spring whether or not they are allowed to open. --- [Alexander Macia](#)

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