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COVID-19 TASK FORCE

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Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 9

Welcome to this ninth issue of the 2021 edition of *Unprecedented*. A New York Times [article](#) from this morning reports that experts now believe that reaching herd immunity in the United States is unlikely. This is due in part to mutations in the virus and in part to vaccine hesitancy by a significant portion of the population. The consequence may be a future in which we are managing the virus through early inoculations and isolation, with the result being to reduce the virus's severity rather than eliminate it outright. If these predictions are true, they could have broad implications for society, but also for litigation. It could mean that some of the cases we discuss in these issues are not relegated to history as one-time anomalies, but rather become part of the framework for an enduring jurisprudence. So join us as we discuss new developments in COVID-19 litigation ranging from entitlement to leave under the Families First Coronavirus Response Act to the effect of "risky behavior" on family visitation rights.

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

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Pa. Meat Processor Hit with Suits Over Denied Virus Leave

"Two former employees said a Pennsylvania food company wrongfully denied them leave to care for their children during the early days of the COVID-19 pandemic, then terminated them in retaliation for taking time off, according to lawsuits filed in federal court."

Why this is important: The plaintiffs in this case faced a problem in the early days of the COVID-19 pandemic that was common to many Americans: the inability to arrange child care after schools closed. The Families First Coronavirus Response Act ("FFCRA") was intended to provide some measure of relief for these Americans by requiring employers to provide paid leave for employees facing these difficulties. But, there were some notable exceptions: the FFCRA did not apply to certain public employers or to private employers with more than 500 employees. Small businesses (50 employees or less) also could seek an exemption to the provisions based on school closure if it would jeopardize the business's viability as an ongoing concern. What is interesting here is that the plaintiffs allege that their employer attempted to avoid its obligations under the FFCRA by first omitting reference to the provisions based on school closure and then inflating its employment numbers above the 500-employee threshold. Just as interesting is that the case is only now being filed, about one year after the conduct occurred. That's a sign that we're nowhere near the end of COVID-19 litigation. --- [Joseph V. Schaeffer](#)

UO and Peer Universities Face Lawsuit Demanding Tuition Paid During Pandemic

"Students are suing the University of Oregon, alleging a breach of contract, and are seeking repayment for tuition and fees charged after UO shifted to remote operations due to COVID-19."

Why this is important: Universities across the country are likely watching the class action lawsuit against the University of Oregon ("UO") with great interest. The UO is among a growing number of universities haled into court by their students over tuition payments. The students are claiming that "the cost of instruction has decreased since [learning] has become remote" and therefore they should be entitled to a reimbursement of a portion of their tuition money. At least 20 other universities, including the University of Miami, Brown, and Boston University, have had lawsuits filed against them by the same firm representing the students in the UO case. What makes it even more concerning for these universities is that a judge already has ruled against the University of Washington in a similar case. While not binding precedent on the other courts, it could be used to persuade the various courts of the merits of the students' claims. Even further, if the majority of these 21 lawsuits are decided in the students' favor, it is likely there will be many more of these lawsuits in the days to come. --- [Kellen M. Shearin](#)

University of Pittsburgh Seeks Dismissal of Student Refund Claims for Tuition, Fees Over COVID-19

"The Penn case is the first COVID-19 tuition refund decision under Pennsylvania law."

Why this is important: When COVID-19 first led to a shutdown in the spring of 2020, colleges and universities, like many other organizations, had to quickly adapt to the changing times. One of the most visible adaptations was the use of online and virtual classes for all enrolled students. "More than 4,000 universities and colleges in the United States [] closed their campuses and switched to online learning formats in response to the virus, affecting at least 25 million students." Students were no longer on campus, living in dorms, eating in the cafeteria, etc. Yet many higher education institutions had received payments from students that included fees for room and board, health services, computer labs, etc. despite the students being "sent home" for the semester in mid-March 2020. As a result, more than 70 class action lawsuits were filed challenging higher education institutions that refused to refund fees to students and challenging the value of the online educational experience. Two such lawsuits were filed against the University of Pennsylvania ("Penn") and the University of Pittsburgh ("Pitt"). On April 21, 2021, a federal judge "dismissed the breach-of-contract claims for tuition, but did let Penn students continue pursuing a claim over on-campus services such as computer labs and student health services" fees and charges. The students had argued that online classes were not the "educational experience" promised by Penn, but the court found no contractual document providing such agreement between the parties. Pitt is urging a second federal court to adopt the rationale in the Penn case and dismiss similar claims. Given the sheer number of pending cases, litigators and higher education institutions should pay close attention to rulings and potential circuit splits as decisions in these cases are made throughout the court system. --- [Angela L. Beblo](#)

Editor's Note: The federal judge overseeing the litigation against Pitt dismissed the case late last week, ruling that the plaintiffs had failed to state claims. Though sympathetic to the students, whose college experience was not as expected, he ruled that Pitt could not be held responsible for adapting to the unforeseen circumstances arising from the COVID-19 pandemic and subsequent emergency orders.

Washington Ag Groups Win Lawsuit Against Restrictive State COVID Rules

"The state has been unwilling to make adjustments to the regulations even after farm workers have been vaccinated to help put farmers on a path to economic recovery."

Why this is important: One of the clear trends from the last several months is that government orders addressed to the COVID-19 pandemic are increasingly failing to survive judicial scrutiny. It's probably too early to add this case out of Washington to the list, given that the relief was granted in the form of a preliminary, rather than permanent, injunction. But it is nonetheless notable that a court would even temporarily stop the state from enforcing certain rules for farm workers, most notably twice-daily visits from medical staff to isolated workers, immediate access to emergency treatment and ventilation, and open access to visitors. What's also notable is that the industry groups behind the legal challenge relied in part on the increasing vaccination rates to make the case that these rules were unreasonable and no longer necessary. For those groups, the ruling could not be better-timed, as they expect more than 20,000 guest workers to arrive in the next several weeks. --- [Joseph V. Schaeffer](#)

Father's Visitation Rights with Children Suspended Due to Risky Covid-Denying Behavior

"This court must have zero tolerance for any parent who intentionally and/or recklessly exposes a child to greater COVID-19 risk."

Why this is important: The consequences of risky behavior in the time of COVID-19 can go beyond one's own health outcomes. In a court ruling from Ontario, Canada, a judge had no hesitancy in curtailing a father's access to his children based on his refusal to wear a mask and comply with COVID-19 restrictions and his stated belief that the pandemic is a hoax. (Of course, being at heart a domestic case, the situation carried quite a bit of baggage in addition to the COVID-19 issues, including assault, cannabis use, and other "fractious" litigation between the father and mother.) The mother had filed a motion seeking to have the court award temporary custody of the two children to her based upon the father's risky COVID behavior. The father had been quite vocal on social media about his views on the pandemic and, in particular, mask wearing, resulting in the judge's noting that his behavior was dictated by his "world view" and that "everything else is subordinate to that view, including, but not limited to, his love of his children." The court entered an order awarding temporary sole custody of the children to the mother, to better shield them from contact with a father who ignored mask requirements and social distancing and to allow for medical decisions for the children to be made by someone other than a pandemic denier. The court allowed for visitation for the father at the Supervised Access Centre, on condition that the father abide by all COVID-related requirements imposed there. But, zero tolerance was the underlying principle when it came to the well-being of the children. --- [Rayford K. \(Trip\) Adams III](#)

Google is Facing a Lawsuit After a Privacy Flaw in Its Contact Tracing Tech Exposed Android Users' Data to Third-Party Apps

"The lawsuit, filed by two users affected in a US district court in California, is demanding that Google fix the security problem and be held accountable for 'damages and restitution.'"

Why this is important: During the early days of the COVID-19 pandemic, Apple and Google worked to embed a contact tracing mechanism into their smartphone operating systems. The idea was that users enabling the feature could receive anonymous alerts about potential exposure, while also alerting others if they themselves tested positive. This lawsuit, however, alleges that Google's implementation was not as anonymous as promised and that exposure logs were made accessible to third-party apps installed on users' Android devices. Assuming the plaintiffs can prove that allegation, what will be very interesting is to see how they allege to have been harmed. If nothing else, a substantial damages claim could convince Google and other tech companies to stay out of contact tracing efforts in the future. --- [Joseph V. Schaeffer](#)



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