

COVID-19 TASK FORCE **Expect Insights**

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Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 1

Welcome to the first 2021 edition of *Unprecedented*. Although a new year brings new hopes for vaccinations and a swift end to the COVID-19 pandemic, a sober assessment of the state of affairs suggests we are months out, at least, from resuming normal life. And even then, we will continue to experience the litigation fall out from COVID-19 for years to come. So join us as we review new developments in litigation over executive orders, wrongful death, insurance coverage, and even securities regulations.

We hope you enjoy reading.

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

[COVID-19 Task Force](#)



[Tucson Bars File Lawsuit to Overturn Pima County COVID-19 Curfew](#)

"A group of Tucson bars filed a state lawsuit seeking to overturn Pima County's mandatory 10 p.m. curfew order as unconstitutional, discriminatory and ineffective at combating the spread of COVID-19."

Why this is important: Curfews have been a little-utilized approach to stopping the spread of COVID-19. And if a group of Tucson bars has its way, curfews will lose their place in Arizona. The bars allege that the 10:00 p.m. curfew is unconstitutional since, among other things, the government cannot establish that face covering, social distancing, and occupancy requirements are any less effective at 10:30 p.m. than at 9:30 p.m. Even more interesting, however, is a point made at the end of the article: Pima County's curfew conflicts with a statewide executive order issued by Arizona Governor Doug Ducey. If true, the curfews could fall under standard preemption analysis rather than constitutional objection. But the broader point here is that bars, which have seen revenue reduced to mere fractions of pre-pandemic levels, are continuing to drive these challenges to government regulation. --- [Joseph V. Schaeffer](#)

[Restaurants in Rochester Join Lawsuit Against Cuomo Over COVID Restrictions](#)

"The lawsuit is being filed over what some restaurants are calling 'severe and unequal' restrictions being enforced on their businesses located in orange zones imposed by the state."

Why this is important: The implementation of New York's Cluster Action Initiative has motivated Rochester restaurants to join the fight against Gov. Cuomo's dining restrictions. Specifically, 20 Rochester restaurants challenge the restrictions on restaurants located in an "orange zone." An orange zone is a geographic area that has a 4 percent positivity rate (7-day average) over the last 10 days and is located in a region that has reached 85 percent hospital capacity. Alternatively, a geographic area is an orange zone if the State Department of Health determines the region's rate of hospital admissions is unacceptably high and a zone designation is appropriate to control the rate of growth. Restaurants located in an orange zone are limited to delivery, takeout, or outdoor dining with a 4 person maximum capacity per table. Bars and restaurants must also close at 1:00 p.m. for on-premises consumption. The lawsuit alleges these restrictions are severe and unequal and mirrors the unconstitutional claims made in similar cases. Although it is unclear whether these restrictions will be held unconstitutional, it will be interesting to see if courts follow the lead of New York State Supreme Court Justice Henry J. Nowak who recently mandated that the state compromise with bars and restaurants or provide scientific evidence to support the COVID-19 restrictions on the businesses. --- [Victoria L. Creta](#)

['Staggering' Losses Reported by Restaurants Suing Over Covid-19 Safety Precautions](#)

"But the losses in the tens and hundreds of thousands of dollars are every much as crushing to the smaller restaurants better known in their own locales."

Why this is important: The COVID-19 pandemic has caused the courts, in a very short period of time, to develop a robust body of case law on the constitutionality of executive orders. Often lost in the discussion of those legal principles, however, are the reasons for the existence of the lawsuits in the first place. This article personalizes it, noting that two dozen restaurants from Buffalo, New York, have alone experienced more than \$10 million in financial losses and cut 856 jobs. These numbers are staggering for small business and explain why lawsuits against government shutdowns are unlikely to cease until lifted, and why lawsuits against insurance carriers are likely to continue well after the pandemic. --- [Joseph V. Schaeffer](#)

[Lawsuit Accuses Bloomington Facility of 'Gross Negligence' in COVID-19 Death](#)

"Bloomington Rehab and Health endured a COVID-19 outbreak in May 2020 that ended with 11 residents dead."

Why this is important: Another lawsuit has been filed alleging gross negligence against a long-term care facility in Illinois after a COVID-19 outbreak. The family of a resident who died from COVID-19 sued the facility alleging gross negligence for failing to prevent a COVID-19 outbreak that led to 11 deaths in the facility. The lawsuit alleges that the facility disregarded public safety protocols by failing to increase the number of beds, properly employ PPE, conduct widespread testing of residents or employees, and provide medical care to patients who contracted COVID-19. While many states have passed COVID-19 civil liability statutes or issued COVID-19 civil liability executive orders, claims of gross negligence are not covered by the statutes/executive orders. Thus, the long-term care facility industry should continue to monitor these lawsuits as courts rule on the gross negligence claims. Facilities should continue to follow and adhere to state and federal COVID-19 regulations and guidelines. --- [Kayla I. Russell](#)

[See's Candies Worker Sues Over Husband's COVID-19 Death](#)

"A See's Candies worker has sued the candy maker in Los Angeles Superior Court over claims she contracted COVID-19 on the job due to negligent safety standards and infected her husband, who later died due to complications from the virus."

Why this is important: Lawsuits against employers over COVID-19 safety and workplace rules are popping up more frequently. In this action, an employee stretches the limits of causation, as she is suing her employer after she allegedly contracted COVID-19 through workplace exposure and then transmitted it to her husband during stay-at-home compliance. She alleges those actions caused her husband's death from COVID-19. Plaintiff will face an uphill challenge on causation, and the outcome of this case will test public policy for employers who are doing the right thing by enacting workplace rules and safeguards for workers. --- [Heather Heiskell Jones](#)

[Federal Judge: Order Keeping Meatpackers Open Can't Shield Tyson Foods in Lawsuit](#)

"More than 1,000 Tyson workers were sickened in a mass outbreak in the spring, and five died."

Why this is important: In response to some states closing meat and poultry processing facilities that experienced outbreaks of coronavirus, on April 28, 2020, President Trump issued an Executive Order pursuant to the Defense Production Act directing the Secretary of Agriculture to issue orders and adopt rules and regulations, consistent with the CDC and OSHA guidance, in order to ensure that meat and poultry processors continue operations during the pandemic. Relying upon that Executive Order, Tyson Foods removed to federal court a wrongful death action brought in Iowa state court by the family of Isidro Fernandez, a poultry plant employee who died of COVID-19 that he allegedly contracted at the Tyson Foods' Waterloo, Iowa plant. Tyson Foods sought to dismiss the lawsuit on the grounds that it was acting pursuant to the directive of a federal official when it continued to operate during the pandemic and is therefore shielded from negligent wrongful death claims where it was operating consistent with that federal directive. Judge Linda Reade of the United States District Court for the Northern District of Iowa remanded the case back to state court. In her opinion, Judge Reade noted that Isidro Fernandez passed away two days before the Executive Order was issued, but that even if the Executive Order was in place prior to his passing, it does not provide a shield to operating in a negligent manner without providing personal protective equipment, imposing adequate safety measures such as social distancing, and in making "fraudulent misrepresentations to employees."

This complaint is one of several lawsuits brought by Tyson Foods employees or their families alleging that Tyson Foods failed to take appropriate action to protect its employees during the pandemic. In May 2020, more than 1,000 of its 2,800 employees at the Waterloo plant tested positive for COVID-19. In response to the outbreak and complaints by employees, Tyson Foods brought in former U.S. Attorney General Eric Holder to conduct an internal investigation. One of the results of that investigation was the termination of eight plant managers who were found to be conducting an office pool, betting on how many employees would test positive for the virus. Among the claims alleged in the Fernandez' complaint is that Tyson Foods supervisors lied to language interpreters who assist its refugee and immigrant employees who understand little English, about the positive test results and instructed USDA food inspectors in April not to wear masks inside the poultry plant because it would "send the wrong message" to its employees about the safety of coming to work.

The ruling is significant because it reflects that being an "essential business" that is permitted or even ordered to operate during the pandemic may not shield the business from potential liability if an employer acts negligently or fraudulently in protecting its employees. It is critically important that all employers operating during the pandemic follow applicable CDC, health department and industry-specific guidance. To that end, employers should adopt and routinely enforce safety procedures and protocols consistent with that guidance and thoroughly document its actions in doing so. --- [Lori D. Thompson](#)

[Brighton Rehab & Wellness Center Claims They're Immune from Lawsuits](#)

"They say they are shielded by what's called the 'Public Readiness and Emergency Preparedness Act' - better known as PREP."

Why this is important: The Public Readiness and Emergency Preparedness ("PREP") Act is a 2005 federal law that creates limited immunity for liability from certain countermeasures taken in response to pandemics (among other things). The Department of Health and Human Services relied on the PREP Act to confer immunity for certain countermeasures taken in response to the COVID-19 pandemic, and has amended that declaration several times as the pandemic has continued. Now, a Pittsburgh-area residential facility is relying on the PREP Act to defend against multiple wrongful death lawsuits originating from a COVID-19 outbreak at its facility. The plaintiffs, however, have argued that the PREP Act does not apply because their claims predate the disaster declaration and, in any event, the facility did not take any countermeasures on which it could base immunity. Though limited to this single case, how this defense is resolved could determine the extent to which the PREP Act comes up in the many other COVID-19-related lawsuits against long-term care and residential facilities. --- [Joseph V. Schaeffer](#)

[The Next Wave of COVID-19 Securities Litigation is Building](#)

"After nine months of securities litigation that targeted the travel, pharmaceutical and other industries hardest-hit by COVID-19, the next wave of pandemic-tied filings is building as the economy pushes into a lean winter."

Why this is important: With the COVID vaccine beginning to be distributed, it is likely that the world should soon return to "normal." For corporations, a return to normalcy might not be as great as it sounds. Historically, securities litigation increases during periods of crisis and stock market volatility, and this time is expected to be no different. There likely will be two common themes in the majority of these cases: the securities issuer makes its required disclosures to investors and either hides the full extent of its losses "while touting 'unsustainable and unnecessarily rosy projections'" or claims losses that are "falsely attributed to the novel coronavirus." These disclosures would then bring the issuer within the scope of Rule 10b-5 of the Exchange Act because they are false or misleading statements. Additionally, it is likely there will be more shareholder derivative suits claiming that the board of directors violated its fiduciary duties in its response to COVID. With the economy already struggling, it will be interesting to see if Congress steps in to help corporations or if it leaves it to the courts to sort it out. --- [Kellen M. Shearn](#)

[W.Va. Judge Axes Restaurants' Virus Coverage Class Action](#)

"U.S. District Judge Joseph Goodwin said that Bluegrass LLC, which owns three restaurants in Charleston, West Virginia, was not able to allege that the restaurants experienced tangible physical alterations to trigger coverage, or that civil authority closure orders barred access to its properties."

Why this is important: Restaurants have been some of the hardest hit businesses during the pandemic. While many restaurants have been able to remain open on a limited or take-out only basis, such operations can only account for a fraction of their regular revenues. Bluegrass LLC, which owns Bluegrass Kitchen in Charleston, West Virginia, was dealt yet another blow recently when its proposed class action seeking insurance coverage for COVID-19-related losses was dismissed from federal court. Under the terms of the insurance policy, the restaurant was required to show that it experienced tangible physical alterations or that civil authority closure orders barred access to its properties in order to trigger coverage. The restaurant argued that the presence of COVID-19 in the restaurants created a physical loss by making its properties unusable. The court disagreed, finding that the presence of COVID-19 was insufficient to trigger coverage because COVID-19 can be cleaned with disinfectant. --- [Joseph A. Ford](#)

[COVID-19 Rulings - Mostly Insurer Wins - Moving to Appellate Courts](#)

"Only a small fraction of the 1,422 business-interruption lawsuits filed have been decided, but the initial rulings display the hurdle that policyholders must overcome."

Why this is important: We have finally reached the point in this pandemic that answers are trickling in to the questions piling up in the uncertainty following COVID-19's devastating impact. For months we've analyzed the cases filed and motions argued in courts across the country relating to insurance coverage and business losses, and there is finally critical mass of court resolutions to identify trends. As contract law depends heavily on the actual language of each contract, precedent in this type of litigation is less sweeping than one might think. But, the upshot seems to be that insurance companies are more likely to prevail on these claims than their policy holders. Among the most common issues is whether some physical damage to the business's facility is required to trigger coverage. Many policies list either "physical loss" or "physical damage," or both, as prerequisites for coverage, and whether those are two different concepts or if they both refer to actual destruction of equipment or infrastructure necessary for the policy holder to conduct business seems to be at the heart of many a litigants' dispute. As the losses suffered by policy holders do not include such physical destruction, business owners responding to government orders to shut down may not elicit coverage under their policy. This situation will continue to develop as cases continue to be appealed and decided, hopefully leading to more certainty for litigants in the next months. --- [Risa S. Katz-Albert](#)