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Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 12

Welcome to the twelfth issue of the 2021 edition of *Unprecedented*. Since the COVID-19 vaccines were approved, most employment lawyers agree employers can require employees to become vaccinated (although they are more divided on whether employers should). But that hasn't stopped employees from challenging vaccination mandates in courts across the country. A weekend ruling from a federal district judge in Texas, however, likely will give employers cover not just in that district but across the country. Referring to the employee plaintiffs' reliance on the Nuremberg Code as "reprehensible," the court made short work of their arguments before dismissing their claims. Though this should give comfort to employers that have imposed a vaccine mandate, it does nothing to address the practical considerations that have made that a difficult decision for so many.

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

[COVID-19 Task Force](#)



Lawsuit over couple's Covid-19 deaths challenges nursing homes' immunity

"The lawsuit alleges William F. Ames, 89, and Martha F. Ames, 88, contracted the virus at the Villages of Orleans Health and Rehabilitation Center because the nursing home lacked adequate preventative infectious control policies, sufficient staffing and enough personal protective equipment."

Why this is important: A backlash is brewing in the state of New York over laws passed during the height of the coronavirus pandemic that provided the state's nursing homes with immunity from lawsuits, except for reckless, willful or intentional behavior. The New York Attorney General investigated nursing home facilities and found that immunity has created an incentive for nursing homes to put residents at risk. Susan Fuller, whose parents died in a nursing home in Orleans, New York, is suing for their deaths, claiming the nursing home was improperly and understaffed. The AG's investigation found this nursing home failed to protect against the spread of the coronavirus, citing lack of precautions on the part of staff and lack of hygiene protocols. In total, 29 residents of the nursing home facility died from the virus. This lawsuit is typical of the claims being made against nursing homes nationwide due to pandemic treatment and care. It will be telling how far the courts will go to protect the rights of residents against the state-created immunity. --- [Bryan S. Neft](#)

Grad sues Keene State to have record expunged, \$100,000 and an apology for punishing him for violating COVID rules

"Keene State students were required to undergo weekly COVID-19 tests to attend in-person classes. In his lawsuit filed in Cheshire Superior Court, Cote writes that due to the stress of the academic year and other factors, he forgot to get tested one week."

Why this is important: Frustrations with COVID-19 restrictions have abounded for more than a year and continue to spill over into the courts. Even a student who admittedly did not follow his college's COVID protocols has gone to court to try to...what...turn the clock back and beg for some relief from the probation on his record and the glowering stares of his family over his stupidity? The recent Keene State graduate missed (forgot) his scheduled (and required) weekly COVID test, which he realized only after he could not get into the dining hall for want of the required wristband. He then returned to his dorm to "quarantine" himself over the weekend there, rather than in the designated quarantine dorm, also a violation of the rules. He raised some reasonable-sounding excuses for his lapse (stressed out; office coordinating the quarantine dorm was closed for the weekend). He wants \$100,000 and the expungement of the probation from his record, along with a letter of apology to his family (for what is not quite clear). The college has filed a motion to dismiss the *pro se* case, but the important take-away from this case is probably the seriousness with which colleges are treating the COVID pandemic and their COVID rules and protocols. Unlike some other rule violations that might lead to probation for a student and possibly a "workout" among the parties, COVID-related issues have real public health and safety ramifications reaching well beyond the individual students involved. Keene State, and probably many other schools, feel that they must take a strict zero-tolerance stance in this context, perhaps in part to protect against lawsuits from other students for not enforcing the rules and exposing them to pandemic dangers. --- [Rayford K. \(Trip\) Adams III](#)

Federal judge dismisses lawsuit from Texas hospital employees over COVID vaccine requirement

"U.S. district judge Lynn N. Hughes said in his ruling that claims that the vaccines are dangerous are 'false, and it is also irrelevant.' Hughes noted that Texas law 'only protects employees from being terminated for refusing to commit an act carrying criminal penalties to the worker,' and that receiving a COVID-19 vaccine 'is not an illegal act.'"

Why this is important: A large Houston-area hospital is making the news after it suspended 178 unvaccinated or partially vaccinated employees without pay for not becoming fully vaccinated by the hospital's self-imposed deadline. The suspended employees promptly responded with a federal lawsuit, and seem to be basing a large part of their case on the argument that because none of the vaccines have received full FDA approval, the hospital is essentially forcing them to either take part in a medical experiment or else lose their jobs. In return, the hospital promptly moved to dismiss the lawsuit, and it succeeded. Federal district judge Lynn Hughes was unpersuaded by any of the plaintiffs' arguments, noting that Texas only protects at-will employees from termination for refusing to commit a criminal act (clearly inapplicable here) and rejecting plaintiffs' alternative argument that the vaccine policy contravened the Nazi-era Nuremberg Code—a comparison that Judge Hughes called "reprehensible." Despite this harsh setback, the suspended employees have indicated that they intend to pursue appeal of this decision as well as parallel litigation on the state court level. As similar disputes spring up around the country, it will be interesting to see whether other judges dispose of similar claims as definitively as Judge Hughes, or whether contradictory decisions may indeed require resolution of these issues on the appellate level. --- [James E. Simon](#)

Do air purifiers protect against Covid? Lawsuit says company makes 'false' claims

"Aerospace giant Boeing tested two kinds of ionization technologies — like those widely adopted in schools hoping to combat Covid-19 — to determine how well each killed germs on surfaces and decided that neither was effective enough to install on its commercial planes. Boeing noted in its conclusion that 'air ionization has not shown significant disinfection effectiveness.'"

Why this is important: Following Boeing's study that concluded air ionization technologies have "not shown significant disinfection effectiveness" on surfaces, Global Plasma Solutions—maker of the "needlepoint bipolar ionization" technology—now faces a proposed class action in Maryland and other litigation related to its alleged misleading and false claims about its products. School districts and consumers across the country purchased air ionization products to help combat the spread of COVID-19. Global Plasma Solutions moved to dismiss the Maryland class action, arguing that the complaint "is devoid of any concrete, specific allegations plausibly alleging that [Global Plasma Solutions] made even a single false or deceptive statement about its products." If the plaintiffs are able to pursue their claims, however, Global Plasma Solutions and similar manufacturers may face significant litigation from school districts and consumers. --- [Joseph A. \(Jay\) Ford](#)

Employee sues assisted living facility after she was fired for refusing to take COVID vaccine

"McCutcheon accuses Enlivant of retaliatory discharge. She seeks a declaration about whether a private employer in West Virginia can mandate 'the unapproved non-mandatory' COVID-19 vaccine for employees."

Why this is important: An assisted living facility employee has sued her employer for terminating her employment after she refused to take a COVID-19 vaccine. The employer implemented a mandatory vaccine policy to protect its patients, and the plaintiff employee was discharged for failing to conform to "the essential functions" of her job and the employer's requirements. The employee plaintiff claims it was a federal law violation to mandate the vaccine. She alleges retaliatory discharge, and she seeks a declaration whether a private employer in West Virginia can mandate "the unapproved non-mandatory" COVID-19 vaccine for employees. She seeks reinstatement to her position as well as compensatory damages, punitive damages, court costs and other relief. This case may encourage other employees throughout West Virginia to pursue legal action when employers implement mandatory vaccination policies. However, at this point, there have been no legal decisions in West Virginia on the issue of mandatory vaccination policies by employers. --- [Charity K. Lawrence](#)

Did COVID or the government force this strip club to close? Lawsuit hinges on the answer

"Stern allowed Atwells to pursue reimbursement for losses resulting from government shutdowns, despite exclusions in the insurance policy for any loss caused by a virus."

Why this is important: A superior Court judge in Providence, Rhode Island, has given the go-ahead to a strip club, Club Desire, to proceed with its lawsuit against its insurer, Scottsdale Insurance Co., for pandemic-related losses associated with its lost function as an adult entertainment venue due to government closure orders. This is apparently the first COVID-19 coverage lawsuit decided applying Rhode Island law. It is not fully clear if this was an early denial of a motion to dismiss by the insurer or a ruling upon a motion for summary judgment.

In this instance, the strip club did not assert that its losses or damages were caused by or resulted from a virus. Rather, the strip club asserted its losses were caused by state executive orders that suspended its operations due to a pandemic and the presence of COVID-19 throughout the state. In other words, the strip club asserted that its loss of income was due to orders issued by a civil authority. While not specifically contained within this article, other sources indicated that the Court stated "it [was] not convinced by Scottsdale's argument that the Virus Exclusion precludes Civil Authority coverage when [the

strip club] did not allege that its loss or damage was caused by the virus" but rather from government closure orders.

Interestingly, the Court noted that while the club was able to offer food take-out, it was insured as a nightclub instead of a restaurant. As such, the government closure orders made it impossible for the strip club to operate under its intended purpose. The Court found the policy's civil authority provision to be ambiguous, and thus interpreted it in favor of the insured.

The Court also noted while many courts around the country have ruled that a policyholder cannot get civil authority coverage if they cannot allege a specific neighborhood property with COVID-19's presence, Rhode Island law does not require this. Considering the implications of this ruling, an appeal to the Rhode Island Supreme Court of Appeals is anticipated. The case is styled *Atwell Realty Corp. v. Scottsdale Insurance Company*, CA No. 2020-04607, in the Providence County Superior Court of Rhode Island. --- [Glen A. Murphy](#)

Traveler sues Orlando airport, TSA for 'stranding' him in The Villages over mask mandate

"Wall is filing the lawsuit after the Transportation Security Administration refused to let him board a flight out of OIA last week for not wearing a mask even though he says he has a qualifying disability, court records show."

Why this is important: Lucas Wall is representing himself in the first lawsuit in the nation to challenge all aspects of the Federal Transportation Mask Mandate and the International Traveler Testing Requirement. Wall alleges that he was stranded at his mother's home in The Villages after Southwest airlines refused to allow him to board a flight back to Washington, D.C. when he declined to put on a face mask to comply with the federal mandate, despite being fully vaccinated. Wall alleges he has a general anxiety disorder and previous attempts of wearing a mask have caused symptoms of a panic attack, including hyperventilation and other breathing trouble. He applied to be exempt from the federal mask requirement but notified Southwest it was illegal under the Air Carrier Access Act to require him to provide a disability letter signed by a physician. Wall has named the Centers for Disease Control and Prevention, the Department of Health and Human Services, the Transportation Security Administration, the Department of Homeland Security, the Department of Transportation, and President Biden as defendants. He seeks to eliminate the federal mask mandate and testing requirements at airports and all costs and attorneys' fees, should he decide to retain an attorney to represent him in this lawsuit. --- [Victoria L. Creta](#)



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