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Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 14

Welcome to the 14th issue of the 2021 edition of *Unprecedented*. Predictions of an end to the COVID-19 pandemic from even a few months ago have been called into question by the highly contagious Delta variant, with some communities responding by requiring face coverings for all residents—even the vaccinated. Litigation over COVID-19-related issues likewise has not come to an end. So join us this week as we review the latest trends in COVID-19 litigation.

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

[COVID-19 Task Force](#)



States Braced for a Wave of COVID Lawsuits. It Never Arrived.

"But critics say the actions have created a solution in search of a problem, because most employees who sue do so under existing workplace safety regulations, such as those enforced by the federal Occupational Safety and Health Administration, or under union rules."

Why this is important: Late last year and into this year, many states instituted liability protections for businesses from COVID-19 related lawsuits. So far, that litigation has not materialized. The liability protection laws provide immunity to businesses that made good faith efforts to comply with COVID-19 regulations. Many believe that COVID-19 liability cases are hard to prove in that an individual with

COVID-19 will have a hard time proving the cause of the virus. Another reason is existing laws of workers' compensation that allow compensation without fault. Some predict that despite the liability limitations, lawsuits may gain momentum, and plaintiffs may challenge the liability limitations. --- [Bryan S. Neft](#)

N.Y. First to Mandate All Employers Set Infectious Disease Plans

"Within 30 days every employer in the state is required to have established one of the model plans or their own unique program, and they must educate workers on the specifics by September."

Why this is important: New York, once seen as the epicenter of the COVID-19 pandemic in the United States, has become the first state in the nation to mandate employers across all industries to adopt infectious disease plans. (California has had an infectious disease plan requirement for health care employers since 2009). New York also is requiring employers with 10 or more workers to cooperate with workers who want to set up a safety committee—provided, that is, that the employer does not already have a safety committee of its own. Details on how to comply with the new law are currently scarce, although minimum requirements for the infectious disease plans include consideration of PPE, face coverings, hygiene, social distancing, disinfecting, and environmental controls. What is clear, however, is that New York has created an incentive for workers to enforce the law—with employers that fail to come into compliance after pre-suit notice potentially on the hook for litigation costs and up to \$20,000 in damages. That should be incentive enough for most New York employers to come into compliance. --- [Joseph V. Schaeffer](#)

Parents Take Aim at D.C. Law that Allows Minors to Get Vaccinated Without Parental Permission

"Four parents of students at several public schools — both traditional and charter — said giving children the autonomy to get immunized on their own violates parents' rights and religious freedom."

Why this is important: Generation Z parents are suing D.C. city officials over a new law, the Minor Consent for Vaccinations Amendment Act of 2020. The Act was amended to permit minors, 11 years of age or older, to consent to vaccines without permission from parents if they meet the informed consent standard. A minor will meet the informed consent standard if the minor is able to comprehend the need for, the nature of, and any significant risks ordinarily inherent in the medical care. The law also requires health care providers to send immunization records directly to schools and forbids insurance companies from sending an Explanation of Benefits for services to parents. D.C. parents allege that they have a right to be directly involved in medical decision-making about their children and this law is a violation of parental rights and religious freedom. D.C. Councilmember Mary Cheh argues that a child has his or her own agency in their body and their health and their lives. Interestingly, the Act was not amended to permit minors to consent to sterilization, although it permits minors of any age to consent to health services in relation to pregnancy, abortion, substance abuse, mental or emotional conditions, and sexually transmitted diseases. It will be interesting to see if the Minor Consent for Vaccinations Amendment Act of 2020 will be upheld or if the D.C. federal court will find that parental involvement in their child's medical decisions trumps the push to increase vaccinations in the wake of the Delta COVID-19 variant. --- [Victoria L. Creta](#)

Film, TV Productions Hobbled by Lack of COVID-19 Insurance

"Insurers are claiming those provisions are now the 'normal' cost of doing business and should be paid for by the TV and film companies."

Why this is important: This is another example of the impact the COVID-19 pandemic has had on a particular industry, in this instance film and television production. While many businesses that were able to survive the pandemic are beginning to turn the corner with the loosening of COVID-19 restrictions, it is reported that the film and television industry seems to be "hobbled" by safety restrictions put into place by the Screen Actors Guild and the Producers Guild of America. The article purports that "some insurers are denying pandemic coverage", when the reality is that instances of insurance coverage for these types of losses are the exception to the rule. Typically, in the absence of a physical loss of property, there is no insurance coverage for these COVID-19 losses. As one insurance professional quoted in the article states, "policies are meant to cover unexpected and unforeseen events, but most

have an exclusion for COVID." It is understandable that there are costs of doing business to remain in compliance with COVID-19 safety restrictions. These costs must be absorbed into the production budget and may hinder smaller productions from moving forward. However, for an attorney to assert within the article, against the weight of Court decisions in this country, that "[w]e may never see any of these projects get off the ground if insurers wrongfully deny coverage []", is simply disingenuous. In an industry that can bring us such movies as Outbreak, Contagion, I Am Legend, and The Andromeda Strain, no one appears to have had the ability to fully appreciate the financial impact of this pandemic on the television and movie industry, or the ability to procure insurance that may have covered such a loss. --- [Glen A. Murphy](#)

Covid Vaccine Makers Are 'Tempting Targets' for Investor Suits

"Shareholder lawsuits over the contamination of millions of Covid-19 vaccine doses mark the latest in a shifting landscape for corporate accountability as the private sector treads through challenges wrought by the pandemic."

Why this is important: *Unprecedented* has covered several investor lawsuits over its short history, and this most recent lawsuit against vaccine maker Emergent Biosolutions Inc. is just the latest. What makes this interesting though, is the point made by Bloomberg reporter Ian Lopez: "Companies in the COVID-19 solutions space may be at a heightened risk of shareholder suits given pressure for executives to publicly remark on developing vaccines, treatments, and other innovations while struggling to bring their efforts to market." These statements can offer reputational and financial benefits, but they can also expose companies to lawsuits if results fail to match promises. That's why it is so critical for publicly traded companies to consult with counsel before making public statements about company performance. --- [Joseph V. Schaeffer](#)

Vaccine Mandates More Likely Once FDA Grants Full Approvals, Health Experts Say

"The regulatory signoff would remove a significant legal and public relations barrier to requirements, former government officials said."

Why this is important: As the pace of vaccinations lags and concerns about the Delta variant increase, questions arise concerning COVID-19 vaccination mandates. Some institutions and colleges have already put vaccine requirements in place, but have faced lawsuits and resistance because the statute creating the emergency use authorization indicates that people should have the option to refuse a treatment. The Biden administration has so far resisted any vaccine requirements, and health officials believe vaccine mandates will not be put in place until the FDA grants full approval for the COVID-19 vaccine, which is expected to occur by January 2022. These mandates likely will apply to federal employees in close contact with the public. State and local vaccination mandates will be a separate issue, and at least 20 state legislatures already have passed bills that would ban businesses and state and local governments from placing restrictions on unvaccinated people. It will be interesting to see what mandates are put in place if the FDA grants full approval for the COVID-19 vaccines, but until then, it seems Biden's administration and state and local governments cannot go further than offering incentives to increase vaccinations. --- [Victoria L. Creta](#)

Have Clouds of Uncertainty Dissipated? Covid-19's Impact on Medical Professional Liability

"Though only a small percentage of these lawsuits are estimated to be health and medicine related, the MPL cases that have been filed need to be viewed through the lens of both federal and state immunity."

Why this is important: A medical malpractice tsunami has yet to materialize despite an ongoing pandemic that has continued on for a year and a half. To date, there have been more than 10,000 lawsuits filed relating to the pandemic against prisons, hospitals, long-term care facilities, medical providers, airlines, cruise lines and governmental entities. However, only a small number of these relate to medical care. The Public Readiness and Emergency Preparedness Act has provided some relief in the form of immunity for those working to eliminate the pandemic. Nonetheless, the full extent of COVID-19-related malpractice suits may not yet be realized. --- [Bryan S. Neft](#)

Supreme Court Allows CDC's Eviction Moratorium to Stand—for Now

"In a 5–4 order in Alabama Association of Realtors v. Department of Health and Human Services, Justice Brett Kavanaugh wrote that he agreed with the realtors and district court that the CDC 'exceeded its existing statutory authority by issuing a nationwide eviction moratorium' during the COVID-19 pandemic."

Why this is important: The Supreme Court's shadow docket has emerged into the spotlight this past year as the Justices resolve many disputed issues over pandemic-related government powers on motions for stay. The latest case to receive the shadow docket treatment is a challenge to the CDC's eviction moratorium brought by a group of Alabama real estate agents. The Justices upheld the moratorium by a 5-4 margin, but this was a hollow victory for the CDC and the renters who might hope for an extension. Justice Kavanaugh, concurring in the decision to uphold the moratorium, indicated that he had joined the majority primarily out of practicality. Though viewing the moratorium as exceeding the CDC's powers, Justice Kavanaugh thought it better to allow for the orderly distribution of congressionally appointed rental assistance funds given the moratorium's planned expiration on July 31. The clear signal is that Justice Kavanaugh, and at least four other members of the Supreme Court, are not inclined to uphold an extension absent some clear congressional authorization. --- [Joseph V. Schaeffer](#)



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