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April 5, 2021

## Unprecedented: COVID-19 Litigation Insights, Volume 2, Issue 7

Welcome to this seventh issue of the 2021 edition of *Unprecedented*. There is a lot of good news around the COVID-19 pandemic. Easter weekend saw the United States mark another vaccination milestone, with 4 million doses administered in a single day. State and local governments are rolling back restrictions on businesses, unemployment numbers are returning to normal, and the CDC has said that fully vaccinated individuals can gather and travel with minimal risk. Not all of the news is good, though. Some parts of the United States are experiencing upticks in the infection rate, prompting concerns about another wave, and most other countries are lagging behind the United States in vaccination rate. Meanwhile, we continue to see developments in COVID-19 litigation in areas ranging from employment to insurance coverage. Join us as we review those developments and more.

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

[COVID-19 Task Force](#)



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### **Universal TV Faces Lawsuit for Allegedly Replacing Employee Who Got COVID-19**

*"An electrical technician who worked in the TV industry says he was fired while in the hospital right before Christmas."*

**Why this is important:** A chief rigging technician working on two comedy shows filed a complaint against his former employer, Universal, for disability discrimination and wrongful termination. Technician William Pavlu became infected with COVID-19 in early December 2020 and took a leave of absence to recover. His condition worsened and then required hospitalization. He alleges that, while hospitalized, one of his managers notified him that he was being terminated, although he alleges the manager assured him he would not be fired when he took his leave of absence. Universal has not yet responded to the complaint or commented. However, Mr. Pavlu's lawsuit is one of the first of COVID-related employment suits legal experts have predicted would arise from the pandemic. Not only will the outcome be a bellwether for other COVID-related suits, but it underscores the need for legislation to clarify what responsibilities, limitations, and rights an employer has in dealing with the pandemic. --- [Dennise R. Smith](#)

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## **King County Judge Allows Lawsuit Over Gig Worker Hazard Pay to Move Forward**

*"Seattle enacted extra pay for drivers delivery food and groceries last June, but Instacart filed legal action to reverse the rule."*

**Why this is important:** Last year, Seattle, Washington city council voted to pass hazard pay legislation to enable drivers for food delivery apps to receive extra money during the COVID-19 pandemic. In response to the legislation, Instacart and the Washington Food Industry Association filed a lawsuit against the city of Seattle challenging the legislation. The legislation entitles drivers for third-party delivery services to receive an extra \$2.50 per order for as long as Seattle's civil emergency lasts and prohibits the services from passing the added cost on to customers or changing the existing compensation for their drivers. On March 26, 2021, the court entered an order allowing the lawsuit to proceed. Up to this point, Seattle's efforts at instituting hazard pay during the pandemic have held up in court. Time will tell as to whether the lawsuit will succeed and whether similar lawsuits will be filed. --- [Kayla I. Russell](#)

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## **First Case Against Mandatory Vaccination Filed in New Mexico**

*"A detention center officer in New Mexico filed a lawsuit over a workplace requirement to receive the coronavirus vaccine, the first lawsuit against mandatory COVID-19 vaccination in the U.S."*

**Why this is important:** Historically, employers have had to be careful with mandating that employees be vaccinated; the requirement needs to be job-related and consistent with business necessity – plus the employer must accommodate employee medical or religious issues if reasonable and without undue burden. The EEOC has said that during the pandemic the risk of COVID-19 creates a direct threat to the health of employees and the public, so all employers may require vaccines (so long as they make the necessary accommodation). The New Mexico lawsuit challenges the mandatory vaccines from a medical perspective, saying that it is illegal to mandate vaccines that have only been approved for emergency use, such as the COVID-19 vaccine. While most employers are going the route of "strongly encouraging" the vaccine – which would still be permitted under the New Mexico lawsuit – this medical challenge will require those employers who have opted to mandate vaccines to give deeper consideration to potential legal risks of their policy. --- [Eric E. Kinder](#)

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## **Bill Would Protect Employees Who Refuse to Get COVID-19 Vaccine**

*"Employers would also be protected from lawsuits from employees who get sick."*

**Why this is important:** The COVID-19 vaccine is under emergency use authorization and scientific trials for Pfizer, Moderna, and Johnson & Johnson are not expected to be completed until the end of 2022 or the beginning of 2023. Until then, many employees are hesitant to receive the vaccine and employers are concerned about the consequences from not mandating the vaccine. A proposed bill in Maryland seeks to protect both employees and employers until trials are complete. The Maryland Employee Protection Plan for Vaccine Refusal bill would ban employer mandates for vaccination until trials are complete, and would protect employers from lawsuits if an unvaccinated employee gets COVID-19 on the job. Employees concerned with the new vaccines would be temporarily relieved from forced vaccination, but at their own risk. --- [Victoria L. Creta](#)

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## **COVID-19 Cost Carilion Clinic More than \$150 Million, Lawsuit Says**

*"In the face of one of the worst public health and economic catastrophes in the past century, American Guarantee and Liability Insurance Co. 'turned its back on Carilion' by declining to fulfill its obligations under a property insurance policy, the lawsuit states."*

**Why this is important:** Having wondered aloud how and why hospitals have been scheduling non-emergency procedures when the news keeps showing shortages of medical staff and issues of healthcare provider burnout from working nonstop, this piece of the puzzle sheds some light on things. Carilion Clinic, one of the largest healthcare systems in Virginia, filed suit in U.S. District Court in the Western District of Virginia this week alleging that the COVID-19 virus contaminated its facilities much as asbestos might have, causing physical loss or damage to the property that resulted in more than \$150 million in losses. As proof, Carilion offers up evidence that over 1,300 of its workers (about 10 percent of its workforce) became ill with COVID-19, demonstrating how the virus infected the hospital to cause property loss. Despite making a claim under their insurance policy last spring, the carrier Zurich, and its subsidiary American Guarantee, never investigated the claim, nor did it issue an actual denial. It did, however, issue a reservation of rights to deny coverage. Of note, in December of 2019, Zurich filed a regulatory request to modify the language in its policies to exclude viruses, indicating an implied acknowledgement that before that change, these damages would be covered, and that Zurich suspected that it might receive many claims if the pandemic played out the way we now see it has. While cases of a similar nature have been filed across the country, this one appears unique in the allegations that the insurer sought to close a loophole present upon the discovery of the virus in China in late 2019. --- [Risa S. Katz-Albert](#)

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## **Lawyers' Group Sues Lloyd's Over Claim Denial**

*"The largest association of plaintiffs' lawyers in the US is suing its insurer."*

**Why this is important:** The American Association for Justice (formally known as the Association of Trial Lawyers) filed suit against its insurer, Lloyd's of London, over the denial of coverage resulting from cancellation of the Association's 2020 annual conference in Washington, D.C. This lawsuit joins others nationally as policyholders and insurers debate whether or not COVID-19 and its resulting impact upon commerce are insured events. In this instance, the Association specifically procured event cancellation coverage with Lloyd's in advance of its annual conference. Subsequently, the convention center in Washington, D.C., was converted into a medical facility to treat COVID-19 patients, thus making it unavailable for use for the Association's annual conference. Lloyd's denied coverage for the cancelled event, asserting a "communicable disease" exclusion under its policy. The Association asserted the cancellation was not directly related to a "communicable disease" (COVID-19), but rather the local government's appropriation of the facility. This is not the typical business interruption claim we have been seeing, which overwhelmingly are being resolved in favor of the insurers. The court will have to examine the specifics of the Lloyd's policy language to determine if the application of the "communicable disease" exclusion encompasses the governmental appropriation of the convention center so as to preclude coverage. The Association's complaint is 70 pages, and while originally filed in the D.C. Circuit Court, the matter has since been removed to the USDC, District of Columbia (CA No. 1:21-cv-00847-JDB). --- [Glen A. Murphy](#)

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## **No Injunction Against Restaurant Defying COVID Restrictions**

*"The judge said that the state had failed to show that it would suffer irreparable harm without an injunction or that an injunction was in the public interest."*

**Why this is important:** One of the recurring themes of our *Unprecedented* updates has been the deference that courts typically have shown to state and local government efforts to stop the spread of COVID-19. But as the COVID-19 pandemic enters its second year and as progress of vaccinations suggests a coming return to normality, some courts have been taking a harder look. Case in point is the Commonwealth of Virginia's failed effort to obtain an injunction closing down a Spotsylvania County restaurant that had remained open in defiance of orders suspending its food and alcohol licenses for COVID-19 violations. The court held that the Commonwealth had failed to prove irreparable harm or public interest—a remarkable conclusion when about a dozen Virginians are still dying from COVID-19 each day. The question now is what effect the court's order will have on broader compliance with the Commonwealth's COVID-19 mandates. --- [Joseph V. Schaeffer](#)

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## **Students Sue Oregon Colleges Over Cost of Remote Learning During Pandemic**

*"Both lawsuits claim that even though students were sent home and campuses were closed, the schools continued to charge for tuition, and/or fees as if nothing changed, continuing to reap the financial benefit of millions of dollars from students."*

**Why this is important:** Colleges and universities across the country continue to face litigation relating to their transition to remote learning during the pandemic. Last month, two putative class action lawsuits were filed against the University of Oregon and Oregon State University. The plaintiffs are former students seeking reimbursement of tuition and fees because the schools transitioned to remote learning and did not provide the "comprehensive on-campus academic experience" for which the students paid. In response, the University of Oregon issued a statement claiming that the school's costs have increased during the pandemic due to investments in new technology and infrastructure and because of safety measures taken to protect the community's health. The school further stated that it has refunded students for a number of services and amenities students were unable to access due to health directives. It seems likely that we will continue to see similar claims brought against institutions of higher learning over the coming months. --- [Joseph A. \(Jay\) Ford](#)

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## **DeSantis Signs FL COVID-19 Liability Protections Into Law**

*"The legislation makes it harder for people to sue grocery stores, churches, schools, hospitals and nursing homes for failing to follow health and safety guidelines."*

**Why this is important:** Florida Governor Ron DeSantis signed into law one of the most aggressive COVID-19 liability bills in the country and one likely to almost eliminate COVID-19 lawsuits in that state. Now, in order to sue, a plaintiff must show that the business, government, or healthcare provider deliberately ignored COVID-19 guidelines. The law sets a one-year deadline to file the claim. Also, prior to filing, the plaintiff must provide a physician's affidavit stating with reasonable certainty that plaintiff's injury or the decedent's death was caused by COVID-19 and the result of defendant's action, a hurdle that will be difficult to overcome given the nature of the disease. The law takes effect immediately and applies retroactively to the beginning of the pandemic. --- [Dennise R. Smith](#)

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## **West Virginia Enacts COVID Liability Protections for Employers, Health Care Providers**

*"But suits could be filed if there is evidence a person or entity acted with intent to hurt, kill or cause other damage."*

**Why this is important:** West Virginia's Governor Jim Justice has signed into law a bill protecting employers, health care providers, and others from COVID-19 lawsuits even if the employers ignored public health guidelines. Lawsuits may only be filed if there is evidence of intention to hurt, kill, or cause other damage. This law will prevent an onslaught of lawsuits against businesses from those who believe they contracted COVID-19 at work or while visiting a doctor's office. It will be extremely difficult, if not impossible, to prove an employer or health care provider intended to harm or kill its employees or patients by exposing them to COVID-19. --- [Charity K. Lawrence](#)

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## **Wisconsin Supreme Court Strikes Down Governor's Mask Mandate**

*"The conservative-leaning court ruled 4-3 that Evers violated state law by unilaterally issuing multiple emergency orders to extend the mandate for months."*

**Why this is important:** One of the key issues that the COVID-19 pandemic has brought to the forefront is the balance between legislative and executive power. A number of lawsuits across the country have challenged executive orders as exceeding the authority permitted under the statute or even the authority permissibly delegated by the legislature. Those lawsuits have met with mixed success, with

some surviving and others failing (most notably in Michigan). Observers can now add Wisconsin Governor Evers' executive orders to the list of those that failed scrutiny. The Wisconsin Supreme Court held that Wisconsin law only authorized Governor Evers to declare the public health emergency underlying his executive orders for a period of 60 days, unless extended by a joint resolution of the Legislature. No joint resolution was ever adopted, and the Legislature in fact took steps to revoke Governor Evers' emergency declarations. Governor Evers had attempted to work around both the absence of a joint resolution and the revocation by re-declaring public health emergencies and reissuing his executive orders. But, the Wisconsin Supreme Court held that these efforts were unlawful attempts to avoid the Legislature's statutory role in determining whether to continue public health emergencies. Beyond the immediate effect of this decision, which is to strike down Wisconsin's statewide face covering requirement, what is really interesting is how the litigants and courts reflect the partisan polarization attached to this issue. Governor Evers is a Democrat, whereas the person challenging his executive orders has donated hundreds of thousands of dollars to Republican candidates for office. The decision of the Wisconsin Supreme Court likewise was split 4-3 among narrow party lines. --- [Joseph V. Schaeffer](#)

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