

# COVID-19 TASK FORCE

**Expect  
Insights**

September 14, 2020

## COVID-19 and Unprecedented: Litigation Insights, Issue 23

This 23rd edition of *Unprecedented*, our weekly update on COVID-19-related litigation, sees us returning from a brief Labor Day break. The spate of lawsuits raising issues around COVID-19, however, took no such break. This edition has updates on personal injury claims against cruise liners and nursing homes, contract claims against colleges and universities, and constitutional claims against government shutdown orders. Also discussed are insurance coverage disputes, price-gouging claims, and emerging trends in employment retaliation and safety claims.

We hope you enjoy reading.

[COVID-19 Task Force](#)



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## Princess Cruises Wants Out of Suit Over COVID-19 Outbreak

*"The motion to dismiss lead plaintiff Kathleen O'Neill's suit asserts that she fails to state a claim because she hasn't alleged 'concrete, harmful symptoms' of the virus and can't establish intentional infliction of emotional distress."*

**Why this is important:** Princess Cruises is facing a California class action lawsuit resulting from a COVID-19 outbreak on the Coral Princess that claimed two lives and caused guests to be trapped in their cabins for days. The cruise line is attempting dismissal from the suit by arguing the passenger plaintiff seeking to represent a class of fellow passengers on the Coral Princess cannot show her physical symptoms were related to the coronavirus. Princess Cruises relies on a prior United States Supreme Court decision, *Metro-North Commuter RR. Co. v. Buckley*, which held plaintiffs must experience serious symptoms from a disease in order to recover damages. The passenger plaintiff experienced a dry cough, 102-degree fever, chills, a sore throat, and other symptoms days after returning home from a Princess Cruise and testing positive for coronavirus. Princess Cruises argues the plaintiff passenger has failed to state a claim because she has not alleged she suffered concrete, harmful symptoms. If Princess Cruises is dismissed, it may be more difficult for cruise line passengers to recover damages for coronavirus unless they suffered serious illness leading to professional medical treatment and/or hospitalization. --- [Charity K. Lawrence](#)

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## U.S. CDC Issues Sweeping Halt on Residential Evictions to

## **Combat Virus**

*"The National Apartment Association said the CDC order risked further harm to the economy and would amplify the housing affordability crisis and destroy the rental housing industry."*

**Why this is important:** The CDC made waves earlier this September when it announced a nationwide eviction moratorium through December 31, 2020. To qualify for the moratorium's protections, covered persons must submit a sworn declaration affirming that they have used best efforts to obtain government assistance for rent or housing, they meet the financial requirements (which for most will be expected income of less than \$99,000 as an individual, or \$198,000 as a household), they are currently unable to make rent or housing payments because of reductions in income or extraordinary out-of-pocket medical expenses, and they would likely transition to homelessness or shared housing if evicted. The moratorium does not suspend the obligation to make rental or housing payments, however. Covered persons also must declare their willingness to make partial payments as they are able, as well as their understanding that they remain responsible for any missed payments that accrue. Whatever the public health benefits, the CDC's moratorium is certain to be welcomed by those facing the threat of eviction. Landlords, however, have reacted far less positively, arguing that the CDC moratorium upends contractual agreements and unfairly shifts the burden of public health and welfare onto them. And already, a landlord has sued the CDC over its moratorium in a case that tests the limits of the agency's power, as well as landlord's entitlement to compensation for any harm. --- [Joseph V. Schaeffer](#)

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## **Waiter Claims Restaurant Owner Fired Him for Catching COVID-19**

*"Prada claims he was refused 'legally required sick leave compensation' during quarantine and fired after being interrogated 'regarding the origin of his illness.'"*

**Why this is important:** The Families First Coronavirus Response Act ("FFCRA") rules prohibit "discharging, disciplining, or discriminating against any Employee because such Employee took Paid Sick Leave under the [Emergency Paid Sick Leave Act]." An employer who discharges, disciplines, or discriminates against an employee because the employee took Paid Sick Leave is considered to have violated section 15(a)(3) of the Fair Labor Standards Act. As a result, employers subject to FFCRA must proceed with caution when considering any adverse employment actions against employees who have tested positive for COVID-19 and sought Paid Sick Leave under the Emergency Paid Sick Leave Act. However, the anti-retaliation rules prohibit an employer from taking adverse action against an employee "because" the employee took Paid Sick Leave. If the employer has a legitimate business reason for the adverse action unrelated to the employee's use of Paid Sick Leave (e.g., layoffs, closures, etc.), then the employee is not protected. Perhaps this was the defense the noodle bar was trying to establish when it allegedly told the employee, "For PR reasons it would be best for you not to come back to work." Cases like this one may provide more clarity on the meaning of "because such Employee took Paid Sick Leave under the [Emergency Paid Sick Leave Act]." For the noodle bar, its "PR reasons" -- which appear directly related to the employee's Paid Sick Leave -- likely will not help it avoid liability if the allegations are true. - -- [Mitchell J. Rhein](#)

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## **Brown Files to Dismiss Class Action Lawsuit Demanding Refund Over COVID-19 Closure**

*"Teaching and learning for the final weeks of the semester took a different form - as it had to - but that change does not give rise to cognizable legal claims," the University's dismissal motion states."*

**Why this is important:** Students of Brown University, an Ivy League college, have sought damages for the diminished value of the education they received at the end of the spring 2020 semester resulting from the COVID-19 pandemic. The university has moved to dismiss the complaint, arguing that while the end of the semester looked different than usual, such differences give rise to no legal claims. The issue appears to be whether the online programming fell short of the promised high caliber education, and whether students are entitled to a refund as a result. This suit is one of many (evidently one of more than

a dozen filed by the same law firm), so outcomes in the earliest decided cases likely will have a significant downstream impact. Additionally of interest is the expectation that a second volley of similar suits will begin to roll in following the revolving door of higher education this fall, as campuses all over the country opened for in-person classes only to shutter their doors and send students home within weeks. The question of whether schools can provide the same high value education to students as promised in person via an online platform with no meaningful campus interaction will need to be determined and could hinge on a case-by-case analysis of how each college or university managed the transitions. --- [Risa S. Katz-Albert](#)

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## [Utah Group Files Lawsuit to Nullify COVID-19 Restrictions](#)

*"It lists 29 ways Gov. Gary Herbert has deprived the group of their rights, including denying children of their right to education, depriving residents the right to worship freely and preventing citizens their rights to 'human contact and touch.'"*

**Why this is important:** The trend of lawsuits challenging COVID-19-related restrictions continues around the country, as a Utah group filed suit in Utah's Fourth Judicial District Court in Provo on September 3rd, seeking to nullify restrictions imposed by Governor Herbert. The plaintiffs allege that Governor Herbert's COVID-19-related restrictions infringe on their "most sacred and fundamental rights." The plaintiffs set forth numerous ways that Governor Herbert has allegedly deprived them of their rights, including such reasons as denying children their right to receive an education, denying the right to worship freely, and denying citizens their right to "human contact and touch." This case continues the trend around the country of plaintiffs filing lawsuits challenging governors' COVID-19-related restrictions - -- [Wesley A. Shumway](#)

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## [Family Members of COVID-19 Victim Sue Michigan Nursing Home that Didn't Allow Staff to Wear Masks](#)

*"Williams said he saw employees of the facility not wearing masks, gloves or other personal protective equipment during his through-the-window visits with his mother before she died."*

**Why this is important:** Nursing homes have been particularly hard hit by the pandemic: their residents are typically in high-risk groups, and they live in close proximity to one another. It's therefore no surprise that nursing homes have been a particular target for claims targeting the alleged insufficiency of protective measures against COVID-19. In this case, for instance, a Michigan nursing home has been sued by a former resident's family, as well as three former employees. The plaintiffs allege that employees were prohibited from wearing masks, and that they would be removed by the director of nursing if observed. The plaintiffs connect this alleged practice to the 63 cases of COVID-19 among residents and staff, as well as the 19 resident deaths. However the lawsuit is decided, it highlights the particular scrutiny that nursing homes and other long-term care facilities are receiving during the COVID-19 pandemic. These entities, even more so than others, must pay particular attention to evolving regulatory requirements and best practices in order to reduce their risk of lawsuits and future liability. --- [Kayla I. Russell](#)

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## [Theater Operator Sues Insurers that Denied It Coronavirus Payments](#)

*"The theater company said that one of the insurance companies, Federal Insurance Company, denied it 'even a penny' of pandemic-related coverage, while the other company, Pacific Indemnity Company, paid it a fraction of what the Broadway operator believes it should be paid."*

**Why this is important:** At the start of the pandemic in the United States, businesses were forced to close down due to the fear that the coronavirus would spread. Due to this shutdown, numerous businesses across various industries lost revenue. Accordingly, these businesses sought coverage under their insurance policies for "business income" or "business interruption" coverage. Theaters and art

institutions in New York were among the businesses seeking this coverage. Under most standard property insurance policies, in order for "business interruption" coverage to be triggered, an insured has to sustain property damage in the form of a physical alteration of the property. Some businesses, like the plaintiff in this lawsuit, Jujamcyn Theaters, are arguing that the virus alters property because it can live on a surface for a long period of time. They also are arguing that because the government shut down the business, coverage is afforded. However, the defendants, Federal Insurance and Pacific Indemnity, have taken the position that coverage is not afforded because no tangible physical damage has occurred to Jujamcyn's property and the governmental orders did not prohibit the performers from accessing the theaters.

The decision in this case could have far-reaching implications because depending on the outcome, both insurers and insureds will use this decision as precedent to advance their position. Moreover, if the court decides that coverage is afforded, insurance companies might be forced to pay millions of dollars for pandemic business interruption coverage, which could cause a great deal of insurers to declare bankruptcy. For this reason, numerous judges throughout the country when faced with the same or similar situations are ruling that insurance coverage is not triggered. --- [Laura E. Hayes](#)

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## **Monroeville Nursing Home Fired Administrator for Whistleblowing False COVID-19 Numbers**

*"When Berlingo informed Hebden of the discrepancies, Lowden reprimanded him on multiple occasions for talking with the state without having the center's attorneys present, the complaint said."*

**Why this is important:** As an exception to at-will employment, most states prohibit employers from taking adverse action against employees when doing so would violate "public policy." These lawsuits often involve an employee who reports his or her employer's alleged wrongdoing to government agencies and is discharged or disciplined in response. The grounds for bringing these lawsuits are a moving target because the court may interpret a law that does not explicitly protect an employee from retaliation to protect an employee who reports wrongdoing under the law. The increased attention to public health and safety in the workplace and recent job losses means it's likely there will be numerous opportunities for courts to further expand the exceptions to at-will employment in the context of the COVID-19 pandemic. One defense to these lawsuits is that the employee participated in the wrongdoing he or she later reported to a government agency. Interestingly, most courts (but not all) have ruled that an employer may not discharge an employee who reports his or her own wrongdoing to a government agency if it would violate public policy. It is likely the nursing home will try this defense as its statement said "we believe it was the former administrator who gathered the numbers, logged in to the reporting portal, and reported the numbers to the state." --- [Mitchell J. Rhein](#)

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## **Judge Dismisses Lawsuit Challenging Gov. Walz's COVID-19 Executive Orders**

*"The Free Minnesota Small Business Coalition, which includes 13 Republican legislators and several business owners, filed the lawsuit, claiming the governor abused his power when he closed schools, issued a mask mandate and limited business operations amid the pandemic."*

**Why this is important:** Of the many lawsuits challenging government shutdown orders since March, very few have met with any success. The same was true here, in the case of a lawsuit filed by a coalition of Minnesota small businesses against school closures, face-covering mandates, and business and mass-gathering restrictions. Despite the low success rate for these lawsuits, however, they continue to be filed -- perhaps in hopes of following upon the few claims that have found success nationwide, or perhaps to drive the broader conversation about how to appropriately respond to a global pandemic like COVID-19. Either way, the result has been the development of significant precedent nationwide on the scope of governmental powers in response to public health emergencies. --- [Joseph V. Schaeffer](#)

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## **Employment Suits to Watch 6 Months Into the Pandemic**

*"The pandemic has brought with it a wave of novel employment litigation, including lawsuits accusing businesses of not adequately protecting workers, denying disability accommodations and failing to notify workers before laying them off."*

**Why this is important:** As summer draws to end, employers are starting to see the types of litigation they are likely to face related to COVID-19. For example, Amazon and McDonald's are facing lawsuits from employees asserting that the businesses have failed to provide adequate PPE and other safeguards against the coronavirus, resulting in a public nuisance causing public harm. Similarly, a group of meatpackers have sued the Department of Labor seeking an OSHA citation for their employers' alleged failure to protect them from the coronavirus. Other notable litigation focuses on layoffs as a result of the pandemic. A proposed class of former Enterprise Rent-a-Car employees have sued the company for allegedly violating the Worker Adjustment and Retraining Notification Act when they were laid off with no notice in late April. In a similar vein, a former Eastern Airlines LLC executive has filed suit alleging that she was fired for requesting time off under the Families First Coronavirus Response Act. Finally, a former engineer for CGIT Systems Inc. has filed suit alleging disability discrimination resulting from his former employer denying his request to work remotely. It will be interesting to see how this early wave of cases develops, as employers across the country are likely to see similar suits in the coming months. --- [Joseph A. Ford](#)

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## **[Attorney General Sues Philadelphia Company, Alleges Price-Gouging on Hand Sanitizer](#)**

*"M&B Multi Services Inc. sold at least 83 bottles of 8-ounce Purell hand sanitizer for as much as \$75.80 through Amazon.com, Shapiro said in announcing the \$825,000 lawsuit."*

**Why this is important:** As the pandemic continues, prices for groceries, necessities, and other items have increased -- sometimes exponentially -- from pre-pandemic prices. While most of these price increases are legitimate based upon the increased costs associated with goods and services, businesses should always be mindful of laws and regulations concerning the pricing of products and services. Like many other states, Pennsylvania has laws prohibiting price gouging during an emergency. The Pennsylvania Attorney General has a special email address for consumers to submit price-gouging complaints. As of early June 2020, the Attorney General's office had issued 466 cease and desist letters to sellers, issued 200 subpoenas to further price-gouging investigations, and found 27 businesses that had actually engaged in price-gouging during the pandemic. The suit against an Amazon seller accused of impermissibly increasing the cost of hand sanitizer nearly 10 fold from pre-pandemic prices is indicative of how seriously the Attorney General's office takes these complaints. It is the first price-gouging suit filed by the Attorney General; but, given the number of ongoing investigations, it is likely the first in a line of cases that will be filed. Businesses should familiarize themselves with state laws and other regulations concerning the pricing of products and services to ensure compliance. --- [Angela L. Beblo](#)

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## **[Challenges to Maine's COVID-19 Restrictions Go to Federal Appeals Court](#)**

*"A church in Orrington and a campground in Scarborough argued that the state's limits on gatherings and out-of-state visitors violated constitutional rights to worship and travel."*

**Why this is important:** A trio of lawsuits challenging Maine's response to the COVID-19 pandemic highlights the diversity of the challenges, as well as the difficulties plaintiffs face in litigating them. One lawsuit alleges that quarantine measures for out-of-state visitors violate the Constitution's right to travel (as well as harm Maine's tourism industry), a second lawsuit alleges that mass-gathering restrictions violate the Constitution's right to free speech and the free exercise of religion, and a third lawsuit alleges restrictions on commercial activity violate the Constitution. All three lawsuits were rejected (either on preliminary injunction motions or on the merits) by the federal courts that heard them, and the first two have already reached the U.S. Court of Appeals for the First Circuit, which grappled with how to address the claims in light of intervening changes to Maine's emergency measures. This is the essential difficulty faced by persons challenging states' emergency measures: a difficult burden at the trial court level,

coupled with the possibility of intervening changes mooting their case before they can secure appellate review. --- [Joseph V. Schaeffer](#)

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