

# COVID-19 TASK FORCE

**Expect  
Insights**

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## COVID-19 and Unprecedented: Litigation Insights, Issue 33

Litigators often refer to so-called "bad facts," which are the facts that have the potential to sink a case with a jury. This 33rd issue of *Unprecedented* discusses a case with perhaps the worst alleged set of "bad facts" that we've seen so far -- a management betting pool on how many workers would contract COVID-19. This highlights one of the biggest risks that companies face: even the best policies and procedures can be undermined if the people responsible for implementing them do not buy in. Read further to learn about this case and other COVID-19-related issues ranging from shutdown litigation to liability protection.

We hope you enjoy reading.

[COVID-19 Task Force](#)



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## **Furniture Store Employee Fired After Positive COVID-19 Test, California Lawsuit Says**

*"When she returned to work, the lawsuit says, her boss 'began giving her the runaround' and 'told her to file for unemployment benefits.'"*

**Why this is important:** In this California lawsuit, the employee alleges that she experienced disability discrimination after testing positive for COVID-19. She further alleges her employer terminated her employment because the company had to reorganize due to COVID-19. The employee claims the employer's reason for terminating her employment was a pretext for discrimination because they continued to hire new employees and give raises to workers. As employers continue to make difficult decisions regarding staffing during the pandemic, they should continue to follow best practices regarding decisions that result in an employee's discharge. These best practices will be particularly important as litigation regarding allegations of disability discrimination on the basis of COVID-19 arise. As always, employers must follow strict confidentiality protocols when communicating about an employee's health and follow EEOC guidance concerning disability-related inquiries. When disciplining or discharging employees, the reasons for all decisions should be well-documented. If those reasons are inconsistent with prior decisions, there should be a clear explanation for the inconsistency. In the event of a restructuring, document the reasons that certain positions are no longer needed or practical

for the business. Although employers are being forced to make many difficult decisions this year, it is important that these and other best practices regarding employment decisions do not fall by the wayside. They will help employers who face discrimination claims ensure they have the documentation needed to support their legitimate business decisions. --- [Sarah E. Kowalkowski](#)

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## **[Putnam County Restaurant Seeks Emergency Ruling Following Justice's Latest Mask Mandate Order](#)**

*"Outrageously, the governor, in the absence of any state law supporting his claim, is forcing business owners to involuntarily invite law enforcement into their business premises, for the purposes of investigating and enforcing alleged criminal violations occurring therein, under threat of arrest of the business owner,' the memorandum states."*

**Why this is important:** Owners of Bridge Caf  & Bistro in Hurricane, West Virginia are seeking a preliminary injunction and a temporary restraining order against Governor Justice's mandate requiring people to wear masks when in public indoor spaces. The owners had filed a lawsuit in September challenging Justice's original mask mandate, but it was his November 13th Executive Order and subsequent press conference that prompted them to seek a preliminary injunction. During this press conference, Justice suggested that business owners should call the police on patrons who did not comply with the mask mandate and that business owners could be charged with obstruction of justice for not enforcing the mask mandate. The Bridge Caf  owners are alleging that if a preliminary injunction is not granted, they will suffer an irreparable harm to their First Amendment rights. Under First Amendment jurisprudence, the government cannot compel a person to speak. In *Rumsfeld v. Forum for Academic and Institutional Rights*, Chief Justice Roberts said, "[s]ome of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." Forcing people to call the police, lest they be arrested, would seem to fall squarely within this prohibition. However, under the "government speech" doctrine, the government may use private individuals to advance its message. Supreme Court jurisprudence on the government speech doctrine focuses more on compelled speech that is non-verbal, i.e., advertisements and license plates. Requiring business owners to call the police would seem to broaden the scope of government speech to an all-new level. Whether or not this is government speech, the mandate could still be upheld if the government can prove that it is narrowly tailored to serve a compelling governmental interest. This is a big hurdle for the government to overcome, but it is hard to argue that public safety is not a compelling governmental interest. This will likely turn on whether it is narrowly tailored to serve that interest. A hearing has been tentatively scheduled for today and it will be interesting to see if the judge is convinced that the owner's First Amendment rights will be irreparably harmed and whether the owners are likely to win at the trial, thus making a preliminary injunction an appropriate remedy.

UPDATE: Brad McElhinny of WV MetroNews reports that, following a hearing, United States District Court Judge Robert C. Chambers denied the plaintiffs' request for a preliminary injunction and temporary restraining order. A link to his reporting on Twitter is available [here](#). --- [Kellen M. Shearin](#)

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## **[Court Dismisses Lawsuit Against Maryland Gov. Larry Hogan Arguing COVID-19 Orders are Unconstitutional](#)**

*"U.S. District Judge Catherine Blake granted the state's motion to dismiss the case, writing that 'based on the allegations in the plaintiffs' amended complaint, the court cannot conclude that Governor Hogan's measures are arbitrary or unreasonable, or that they plainly violate any of the plaintiffs' constitutional rights.'"*

**Why this is important:** This case against the Hogan administration, brought by an Antietam-area campground and other plaintiffs, was one of the first challenges to so-called shutdown orders that we covered in *Unprecedented*. Now it has been dismissed, with the federal district court judge relying on

*Jacobson v. Commonwealth of Massachusetts*, a 1905 Supreme Court decision that governments have argued gives them broad discretion for emergency action taken in response to a deadly pandemic like COVID-19. This case more than any other has served as a marker for how a court is likely to rule on these challenges, with courts choosing to follow *Jacobson* generally upholding the restrictions, and courts rejecting *Jacobson* in favor of a more modern framework more frequently striking them down. It seems increasingly likely that the Supreme Court will be asked to weigh in, especially when Justice Alito in particular has expressed his skepticism of the *Jacobson* approach. In the meantime, though, these cases and others will continue to work their way through the courts. --- [Joseph V. Schaeffer](#)

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## **Ohio Spent Nearly \$1 Million in Outside Legal Fees Fighting Challenges to COVID-19 Orders**

*"A total of 25 lawsuits have been filed against the state, Ohio's health director and local health departments by bars, restaurants, fitness centers, gyms, amusement parks, water parks and others."*

**Why this is important:** At a time when state governments are struggling financially to provide the same level of services with reduced tax revenues, a stagnant economy and higher unemployment, governors have a new drain on the government coffers -- legal expenses. Ohio's recent announcement that it has spent approximately \$1M of the \$1.44M that the AG's office budgeted for legal work is not uncommon. Since the onset of the pandemic in the U.S., states have struggled on how to strike the right balance between restricting personal contact in order to stop the spread of the virus on the one hand, while preserving personal liberties and businesses to operate on the other. The product of that balancing act has been legal actions challenging governors for overstepping their authority by public health orders and restrictions on business operations. In six of the actions brought in Ohio, judges sided with businesses who challenged the restrictions. And with the virus spiking and a new round of restrictions taking effect, litigation and the financial drain on public resources to fund them will continue. --- [Lori D. Thompson](#)

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## **Tyson Foods Managers had a 'Winner-Take-All' Bet on How Many Workers Would Get Covid-19, Lawsuit Alleges**

*"More than 1,000 employees eventually tested positive amid the outbreak, which eventually shut down the meat-processing plant and spurred harsh condemnations from local officials who said the company had failed to provide the necessary protections for its workforce."*

**Why this is important:** Meat processing plants, and the employees who work there, have been hit hard by the coronavirus. Earlier in the pandemic, several facilities faced coronavirus outbreaks, leaving thousands of employees infected. Now, many of those facilities are facing legal challenges to their response. For example, a Tyson Foods pork processing plant in Waterloo, Iowa has been sued by the estate of an employee who died from the coronavirus. The plaintiff alleges that in addition to failing to prevent the spread of coronavirus through proper personal protective equipment and social distancing, managers "organized a cash buy-in, winner-take-all betting pool for supervisors and managers to wager how many employees would test positive for COVID-19." If proven, the manager's betting scheme may expose Tyson Foods to potential punitive damages at trial. --- [Joseph A. \(Jay\) Ford](#)

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## **Nurse Sues Tallahassee Developmental Center, Blames It for Husband's Death from COVID-19**

*"The suit alleges that Deborah Phillips contracted the COVID-19 virus at TDC where she worked as a nurse, and then passed it on to her husband, who died from the disease."*

**Why this is important:** A nurse at Tallahassee Development Center, a residential home for adults

with developmental disabilities, has filed a wrongful death lawsuit against TDC. The lawsuit alleges that the nurse contracted COVID-19 while working at TDC, and that she passed it on to her husband, who subsequently died from the virus. The nurse further alleges that TDC ignored the March 18 order issued by the Agency for Health Care Administration, requiring all employees to wear masks to prevent the spread of COVID-19. Allegedly, TDC issued a notice ordering staff "not to wear face masks" unless they were told to by their supervisors.

This is not the only COVID-19-related lawsuit that has been filed against TDC. In May, the guardians of a man being cared for by TDC filed a lawsuit against TDC alleging that he contracted COVID-19 due to abuse and neglect while under the care of TDC staff. Further, the U.S. Department of Labor has fined TDC nearly \$36,000 for violating federal COVID-19 workplace guidance. These violations include failure to: implement a written respiratory protection program; provide a medical evaluation, respirator fit test, and training on how to use respirator and PPE; report an injury, illness, or fatality; record an injury or illness on OSHA recordkeeping forms; or comply with the "general duty" clause of the OSHA Act of 1970. Care facilities should continue to monitor lawsuit trends as well as OSHA and other regulatory guidance to ensure compliance. --- [Kayla I. Russell](#)

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## **Lawsuit Alleges State Courts are Ignoring Eviction Moratoriums**

*"Legal Aid of North Carolina filed the suit at the state court in Wake County on behalf of a Durham woman who is facing eviction and the tenant advocacy group Action NC."*

**Why this is important:** Legal Aid of North Carolina has sued in state court alleging that North Carolina courts are not consistently following either the CDC Eviction Moratorium or the order halting evictions from Governor Roy Cooper. Both prevent certain types of evictions of covered individuals before December 31, 2020 in efforts to prevent the spread of COVID-19. The crux of the complaint seems to focus on the uneven application of the moratorium and the order across the state. Some courts and sheriff's offices are applying the protections, while others are not.

The uncertainty of each jurisdictions' application of the policies isn't the only problem that North Carolina landlords and tenants face. The CDC Eviction Moratorium puts the responsibility on tenants to produce a CDC Declaration Form to their landlord to invoke the protections. Governor Cooper's Order flips that burden, requiring landlords to attest that they provided a blank copy of the CDC Declarations Form to tenants. Additionally, both the CDC Moratorium and the Governor's Order expire on December 31, 2020, at which point all unpaid rent from 2020 will be due. For tenants unable to pay during 2020 due to COVID-related work shortages, the idea that come January 1, 2021 they can pay it all back is almost comically absurd. While the uncertainty is a problem at the moment, there will be a wave of eviction actions in the New Year, and the CDC and North Carolina protections will no longer apply. --- [Risa S. Katz-Albert](#)

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## **Florida Legislators Could Limit COVID-19 Lawsuits**

*"In separate news conferences, Senate President Wilton Simpson, R-Trilby, and House Speaker Chris Sprowls, R-Palm Harbor, indicated support for legislation that would protect businesses from lawsuits related to COVID-19."*

**Why this is important:** Since a 2016 ruling by the Florida Supreme Court found strict caps on plaintiff's attorney fee awards in workers' compensation cases to be unconstitutional, business groups have lobbied unsuccessfully for the Florida state legislature to take up legislation with some restrictions on fees that might meet the constitutional bar. With the wave of lawsuits relating to the COVID-19 pandemic increasing, state legislatures' appetites for change may be expanding. The Florida legislature is expected to take up a COVID-19 lawsuit limitation in the 2021 legislative session. The primary issue for debate will be, not whether to impose limitations on litigation, but the scope of the limitations to be imposed. COVID-related legislation could have a lasting positive impact for businesses if it opens the door to reasonable limits on litigation. --- [Lori D. Thompson](#)

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