

# COVID-19 TASK FORCE

## Expect Insights

December 14, 2020

### COVID-19 and Unprecedented: Litigation Insights, Issue 35

This 35th edition of *Unprecedented*, our weekly update on COVID-19-related litigation, sees us discussing yet more shutdown challenges, nursing home wrongful-death cases, landlord-tenant disputes, and tuition-refund claims. Not discussed, but no less important, is that this issue also coincides with the administration of the first COVID-19 vaccinations across the United States. Though it will take months for the vaccination process to be finished, and though impossible to predict its precise meaning for litigation, we hope that it marks the beginning of the end of both the pandemic and the claims that have come out of it.

We also invite you join us for our **free webinar - Get Keen on the Vaccine: Considerations for Employers Considering a Mandatory COVID-19 Vaccine** - on Thursday, December 17, 2020 from 12:00 PM to 1:00 PM EST. With the release of a new COVID-19 vaccine comes hopes of a return to "normalcy" and new concerns for how to protect your workforce. Can you make vaccines mandatory for your employees? If so, what considerations must you take into account as you craft your policies? In this webinar, Spilman attorneys Carrie Grundmann, Megan Mullins and Eric Kinder will walk you through how to manage this transition while ensuring you stay compliant with existing labor and employment laws.

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### Stimulus Deal Could Block Lawsuits Over COVID-19 Deaths of Workers

*"Business groups contend that without such protections, unscrupulous lawyers would wipe out already struggling small businesses that are doing their best to follow a patchwork set of rules intended to protect workers."*

**Why this is important:** For months, stimulus talks have been held up by disagreements over liability protections for businesses, on the one hand, and the amount (if any) of direct financial assistance to

Americans, on the other hand. Now Senate Majority Leader McConnell believes that there is an agreement in principle on liability protections as part of the most recent \$908 billion stimulus proposal. Interestingly, however, he also appears willing to abandon liability protections if they prove to be an obstacle for this round of stimulus, potentially leaving the issue for the new year. Either way, with businesses urgently seeking these protections, and consumer groups likely to challenge them, the issue is far from settled. --- [Joseph V. Schaeffer](#)

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## **Michigan Restaurant Group Loses Lawsuit Against State Over COVID-19 Indoor Dining Restrictions**

*"The trade group and business owners alleged that restaurants and bars were being unfairly and unconstitutionally targeted."*

**Why this is important:** On December 2, 2020, U.S. District Court Judge Paul Maloney in the Western District of Michigan issued an order denying The Michigan Restaurant & Lodging Association's Motion for a Preliminary Injunction preventing the Michigan Department of Health and Human Services from enforcing a November 15, 2020 Emergency Order. The Emergency Order effectively closed all Michigan bars and restaurants for indoor, in-person dining services for three weeks to curtail the increasing spread of COVID-19. The five-count complaint by the Association alleges a series of constitutional issues with the Emergency Order. Finding that the plaintiff-Association failed to demonstrate a high likelihood of success on the merits, one prong of the analysis for a preliminary injunction, and declining to opine of state law issues before the Supreme Court of Michigan has the chance to weigh in, the Judge denied the Motion for the Preliminary Injunction. However, the Judge did propose certifying questions to the Supreme Court of Michigan regarding the statutory basis granting the defendants' authority to make such an order. While this order tables the matter for the moment, Michigan (and other states) will likely continue to see litigation based pushback against governmental regulation of business during the remaining months of the pandemic. With a vaccine campaign in sight and no additional federal aid on the horizon, business owners will continue to struggle with balancing their financial hardships against government imposed limitations aimed at saving lives. --- [Risa S. Katz-Albert](#)

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## **Boca Clothing Store Says Rent Collection During COVID Is Unfair, Sues Landlord**

*"But now, Planet Blue is suing Crocker, saying - and we paraphrase here - that it's unfair for Crocker to expect Planet Blue to pay rent when the City of Boca Raton ordered businesses closed."*

**Why this is important:** A clothing store in Boca Raton, Florida is being sued by its landlord for failure to pay rent since the onset of the COVID-19 shutdown. The clothing store, called Planet Blue, alleges that it is unfair for its landlord, Crocker Downtown Development Group, to demand payment of back rent when the Florida government has mandated business closures. This storyline is certain to become a common theme among landlords and tenants in the months and years to come. It is unlikely that we will see many suits like this while businesses are still closed. However, once businesses reopen after the pandemic subsides or a vaccine is widely distributed, landlords are more likely to crack down on their tenants. The number of workout plans for repayment and bankruptcy cases is also likely to increase for those unfortunate business owners who are not able to recover. --- [P. Corey Bonasso](#)

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## **Class-Action Lawsuit Against MSU Dismissed from Federal Court, Refiled in State Court**

*"The class-action lawsuit, which was originally filed in the U.S. District Court in September, was filed on behalf of students who paid tuition at MSU for in-person learning but received online learning for the spring semester due to the COVID-19 pandemic."*

**Why this is important:** As of October 2020, around 200 lawsuits had been filed against colleges relating to their decisions to cancel in-person classes in favor of online learning amid the pandemic. One such lawsuit was a proposed class action against Montana State University, in which a student alleged that MSU breached its contracts with students by cancelling in-person classes during the spring 2020 semester, without offering any refund or reduction in fees or tuition. The case was originally filed in federal court, and MSU's counsel moved to dismiss on the basis that the Eleventh Amendment would not allow the suit. Earlier this month, the plaintiffs' counsel dismissed the federal court action and refiled in Montana state court. It remains to be seen whether the students' claims will ultimately be successful. --- [Joseph A. \(Jay\) Ford](#)

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## **State Adds Religious Ceremonies to Critical Services List, Exempting Them from COVID-19 Restrictions**

*"The move comes nearly two weeks after the U.S. Supreme Court sided with religious groups in a lawsuit over the limits New York was placing on people attending religious services."*

**Why this is important:** Amy Coney Barrett's confirmation to the U.S. Supreme Court yielded almost immediate dividends for religious organizations that had been challenging COVID-19-related restrictions that they alleged unlawfully discriminated against their religious worship. Whereas the pre-Coney Barrett Court had denied two requests for injunctions against those restrictions, the post-Coney Barrett Court granted a request for an injunction in a case involving New York State. As this article shows, other states have already started to take note. After having spent months defending challenges to its restrictions on religious organizations, for instance, Colorado has changed course and is treating them as "exempt." As more lawsuits are filed in reliance on the U.S. Supreme Court's order, expect other states to follow suit. --- [Joseph V. Schaeffer](#)

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## **Federal Judge in Florida Postpones All His Trials Until COVID-19 Cases Fall**

*"Saying he is acting 'out of an abundance of caution,' Chief U.S. District Judge Mark Walker said he is postponing all of his civil trials until the coronavirus pandemic is under control and the number of new COVID-19 cases and deaths in Florida has dropped."*

**Why this is important:** A federal judge in Florida has paused all activities on his civil docket until further notice. Judge Mark Walker says he is acting out of "an abundance of caution" amid the rapid increase in reported COVID-19 cases in Florida over the past several days. The judge was sure to emphasize that this was his decision alone, and it does not affect any other judges or proceedings that are not in his court. The judge has received criticism over his decision to halt all proceedings rather than continue virtually. The NRA has a significant case pending before the judge that was supposed to move forward in the coming weeks, but that has now been delayed indefinitely with this stoppage. As the COVID-19 pandemic continues, more judges may follow Judge Walker's lead and hold all proceedings until infection rates decrease and/or vaccines have been broadly administered. If so, the judicial process, which is already criticized for its slow progression, may slow even further as dockets around the nation may be backlogged for months or years to come. --- [P. Corey Bonasso](#)

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## **Supreme Judicial Court Upholds Gov. Baker's Emergency Orders in COVID-19 Pandemic**

*"The Supreme Judicial Court rejected a challenge brought on a behalf of a group including salon owners, pastors and the headmaster of a private school, who accused the Republican governor of exercising 'legislative police power' by declaring a state of emergency under the state's Civil Defense*

Act."

**Why this is important:** If many of our *Unprecedented* updates have discussed court decisions striking down COVID-19-related restrictions, this article should serve as a reminder that these remain the exception, rather than the rule. Courts have continued to be generally deferential to the executive branch in the exercise of their powers to respond to this public health crisis. And so, the Supreme Judicial Court (Massachusetts' highest court) has affirmed Governor Baker's authority to invoke the state's Civil Defense Act for his executive orders, holding that the law was not limited just to "foreign invasions, insurrections, and catastrophic events like hurricanes and fires." At least in Massachusetts, then, executive orders imposing COVID-19-related restrictions seem likely to last through the end of the pandemic. --- [Joseph V. Schaeffer](#)

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## **Milton Nursing Home Faces COVID-19 Wrongful Death Lawsuit**

*"A new medical liability lawsuit against Milton Nursing and Rehabilitation Facility alleges its top-level staff acted with 'gross negligence' and 'outrageous conduct leading to the death of a nursing home resident who died of COVID-19.'"*

**Why this is important:** The daughter of a former resident of the Milton Nursing and Rehabilitation Facility brought a wrongful death suit against the facility due to her father's COVID-19-related death in August 2020. The plaintiff claims that her father died as the result of the facility's failure "to establish and maintain an infection prevention and control program, adequate written policies and procedures, and failed to uphold standards set by state and federal regulations guiding the operation of nursing homes." The suit included a gross negligence claim against the facility based on the fact that an inspection by the Pennsylvania Department of Health found that the facility failed to take sufficient action to protect its employees and residents from COVID-19 infections, including failing to implement appropriate safety procedures to prevent the spread of COVID-19. As a result of the facility's failure to take necessary action in preventing the spread of COVID-19, 90 percent of the residents contracted the virus, and one-third of those residents, including the plaintiff's father, died due to COVID-19 complications. Notably, the plaintiff did not name any of the staff who cared for her father as defendants or lay any blame on the actions of the staff due to the fact that the facility was "chronically 'understaffed, improperly supervised and ill-equipped due to Defendants.'"

The plaintiff's pleading of gross negligence is significant and is an example of a claim that will likely be included in all COVID-19 cases, especially in states that have passed COVID-19 civil liability immunity statutes, or where the governor has executed a COVID-19 civil liability immunity executive order. Suits against the immune entities and/or individuals are often barred unless there is a claim of gross negligence. Therefore, in an attempt to circumvent any statutory or executive immunity, plaintiffs are likely to bring gross negligence claims in order to avoid immediate dismissal of their claims on a Motion to Dismiss. While the Milton Nursing staff members are protected by executive immunity, the facility has no civil liability immunity. Pennsylvania Governor Tom Wolf signed an executive order that gave health care professionals working in medical facilities, including nursing homes and assisted living facilities, immunity from COVID-19-related suits in the absence of gross negligence. With no apparent evidence of gross negligence by the Milton Nursing and Rehabilitation Facility staff, the plaintiff likely did not name the individual staff members responsible for the plaintiff's father's care as defendants because those claims would have been immediately dismissed. However, Governor Wolf's executive order did not include civil liability immunity for nursing homes or assisted living facilities. In an attempt to remedy the lack of civil liability immunity for nursing homes and assisted living facilities, the Pennsylvania Legislature passed a bill in November 2020 giving medical facilities, including nursing homes and assisted living facilities, civil liability immunity. The bill eliminated liability for damages or personal injury related to COVID-19 unless gross negligence, recklessness, willful misconduct, or intentional harm could be shown "by clear and convincing evidence." Ultimately, Governor Wolf vetoed the bill, thereby leaving nursing homes and assisted living facilities without civil liability immunity against COVID-19-related claims. Therefore, a claim of gross negligence is not required in Pennsylvania to sustain a COVID-19-related suit against a nursing home or assisted living facility.

The nursing home/assisted living industry should expect a flood of claims related to COVID-19, and it will be important to track the appellate rulings that address challenges to civil immunity statutes/executive orders. Regardless of whether your state has given nursing homes and assisted living facilities civil liability immunity, a gross negligence claim is likely to be included in COVID-19-related suits in part as a basis for a claim of punitive damages. The best defense against these suits, and especially suits that include a gross negligence claim, is strict adherence by your facility to state and federal COVID-19 regulations, guidelines, and protocols. --- [Alexander L. Turner](#)

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## **Judge Hears Arguments in Guam COVID-19 Lawsuit**

*"The lawsuit filed in the District Court of Guam states that Leon Guerrero and San Agustin have taken Peinhopf's private property without just compensation, violating the Takings Clause of the Fifth Amendment; that no due process was afforded; and that restricting some businesses is arbitrary, violating the Equal Protection Clause of the Fourteenth Amendment."*

**Why this is important:** A federal judge in the District Court of Guam heard arguments in a case about whether government actions have been unconstitutional under the Takings clause of the Fifth Amendment, a lack of due process, and an arbitrary restriction on businesses in violation of the Fourteenth Amendment's Equal Protection Clause. A local bar owner sued the Governor and the DPHSS director in response to government guidance to close non-essential businesses to slow the spread of COVID-19. The suit seeks both an injunction against enforcement of the guidance and monetary relief for the costs of having complied. The judge heard arguments on the government's Motion to Dismiss and has taken the matter under advisement, promising to issue a decision soon. The outcome of a suit like this could potentially undermine government authority to order measures to slow the spread of COVID-19 in the final weeks before a vaccine campaign can be fully implemented, not to mention the potential expense that the Guam government might be forced to bear to compensate businesses for lost income. --- [Risa S. Katz-Albert](#)

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## **Local Church Re-Files Lawsuit Against Gov. Ralph Northam Over Pandemic Restrictions**

*"The lawsuit was dismissed in September when Northam made the wearing of face masks the lone requirement for church gatherings with less than 250 people."*

**Why this is important:** Governments have varied their COVID-19-related restrictions with the severity of cases, easing them in the summer and now tightening them again in the winter. This explains in part how this case, which was filed and settled earlier this year, was refiled this winter with Governor Northam's newest executive order. But this case is noteworthy not only for how it tracks the arc of government restrictions, but also for who brought it and why. Like many of the challenges to government restrictions, this one is brought by plaintiffs alleging infringements of their constitutional right to the free exercise of religion. And like nearly all challenges of this kind brought to date, the plaintiffs allege that it is arbitrary for Virginia Governor Northam to allow them to work as essential workers, on the one hand, but deny them the ability to congregate in similar numbers for religious worship. Though governments have so far defended these cases (with mixed success), it will be interesting here how the U.S. Supreme Court's criticism of New York's enforcement of restrictions on religious organizations will affect the Northam administration's strategy. It would not be at all surprising, for instance, to see efforts to moot this case by amending the challenged restrictions. --- [Joseph V. Schaeffer](#)

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