

# COVID-19 TASK FORCE

## Expect Insights

September 21, 2020

### COVID-19 and Unprecedented: Litigation Insights, Issue 24

This 24th edition of *Unprecedented*, our weekly update on COVID-19-related litigation, sees a flurry of activity around government restrictions on mass gatherings and business operations -- including a significant ruling from a federal district court in Pennsylvania striking down several of the Wolf administration's orders directed at limiting COVID-19's spread.

We also discuss claims against institutions of higher education and nursing homes, as well as a first-in-the-nation OSHA citation for insufficient COVID-19 precautions.

We hope you enjoy reading.

[COVID-19 Task Force](#)



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### [Pa. Gov.'s COVID-19 Closure, Crowd Limit Rules Struck Down](#)

*"U.S. District Judge William Stickman IV sided with a group of businesses, as well as a handful of GOP lawmakers, who filed suit in May alleging that Wolf's restrictions violated freedom of assembly and due process protections under the First Amendment and Fourteenth Amendment."*

**Why this is important:** Judge Stickman sent shockwaves through the legal community when he declared that the Wolf administration's restrictions on mass gatherings, travel, and business operations violated protections under the U.S. Constitution. As [our case-specific update](#) on this decision notes, it is difficult to judge precisely its effect because several of the restrictions have been suspended or superseded. Even so, one of the counties that had attempted to join in the lawsuit announced that it would be removing mass gathering restrictions for high school football games following the Court's ruling. What will be most interesting is whether Judge Stickman's order will survive an appeal to the Third Circuit, and whether other judges across the country will be persuaded by his reasoning to strike down similar restrictions in other states. --- [Joseph V. Schaeffer](#)

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### [Ohio Law Gives Legal Immunity to Schools, Health Care, Businesses](#)

*"Ohio Gov. Mike DeWine signed House Bill 606 into law, which shields individuals, schools, health care providers, businesses and other entities from civil lawsuits so long as they were not acting recklessly or showing intentional misconduct."*

**Why this is important:** Ohio has followed the lead of other states in moving to protect individuals, schools, health care providers, businesses and other entities from civil lawsuits involving exposure to and contraction of COVID-19. However, this immunity will not apply if they acted recklessly or showed intentional misconduct. Make no mistake -- this does not mean these businesses and professionals will not be sued by plaintiffs, but it does provide another defense and protection that can be utilized in litigation. There will undoubtedly be challenges to this law in the judicial system, so it would be prudent to keep a close eye on how the Appellate Courts both in Ohio and nationally rule on the constitutionality of these types of immunity shields. --- [Matthew W. Georgitis](#)

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## **Student's Class-Action Lawsuit Against University of Washington Demands Reimbursement for Tuition**

*"Alexander Barry said he paid UW for 'opportunities and services that he did not receive, including on-campus education, facilities, services, and activities'."*

**Why this is important:** A University of Washington student has filed a proposed class-action lawsuit asserting claims for breach of contract in connection with the university's COVID-19-related campus closures. The student claims that he paid the university for "opportunities and services that he did not receive, including on-campus education, facilities, services, and activities." The university has said that moving to online instruction has increased its investment in instruction costs and that it was clear with students and their families that the spring and fall 2020 semesters would largely be online. As students and schools continue to learn and adjust to the educational challenges posed by COVID-19, colleges and universities across the country are likely to see similar lawsuits in the future. --- [Joseph A. \(Jay\) Ford](#)

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## **U.S. Issues First Covid-19 Fine to Meatpacking Plant Totaling \$13,500**

*"The Occupational Safety and Health Administration issued its first Covid-19-related citation at a meatpacking plant by proposing a \$13,494 penalty on Smithfield Packaged Meats Corp. in Sioux Falls, S.D."*

**Why this is important:** The meat processing industry has found itself as an unlikely (and certainly unwelcome) target of scrutiny over worker protections during the COVID-19 pandemic. Employees and their families alleged that meat processing facilities were not doing enough to protect their workers from exposure, and a few even filed wrongful death lawsuits. Now, the meat processing industry is the first industry to be fined by OSHA over its measures to protect employees. What is interesting is that OSHA has relied on its general duty clause, which obligates employers to provide a workplace free from recognized hazards that can cause death or serious harm. This further emphasizes the need for employees to stay abreast of, and respond to, new understandings of how COVID-19 spreads -- lest they become the next target of an OSHA enforcement action. --- [Joseph V. Schaeffer](#)

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## **Restaurants and Bars Serving Up Lawsuits Over Coronavirus Shutdowns**

*"Across the country, restaurants and bars are serving up lawsuits to states where governors ordered public health directives that restrict their ability to do business."*

**Why this is important:** This summer's explosion of outdoor dining provided a much-needed revenue source to restaurants and bars struggling to stay afloat during the COVID-19 pandemic. Now, though, as temperatures begin to cool and winter approaches, many establishments worry they won't be able to stay in business if indoor dining cannot be resumed (or resumed at larger capacities than currently allowed).

Faced with this bleak future, restaurants and bars in several states have filed lawsuits against state and local governments seeking to have indoor dining bans lifted and attempting to recover compensatory damages for the business losses they have suffered to-date. These lawsuits face a difficult road ahead, as the plaintiffs will have to show the indoor dining shutdowns were arbitrary and capricious, lacking any rational basis in fact -- a difficult standard to satisfy, given the exigencies of the pandemic, the public interest in reduced infection rates, and concerns that indoor dining may create a resurgence in cases. Nevertheless, these restaurants and bars will certainly be able to present sympathetic cases to the courts, which may struggle balancing the equities between the needs of the public and the needs of the individual business owner. --- [James E. Simon](#)

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## **[Putnam County, W.Va. Restaurant Owners Challenge State's Stay At Home Order, Mask Mandate](#)**

*"We believe it's unconstitutional under the First Amendment, as the mask debate has become just that - political speech. We also believe they are in violation of the Fourteenth Amendment due process clause because they're an arbitrary deprivation of my clients' property interests wholly without due process of law."*

**Why this is important:** Local West Virginia restaurant owners of Dinner's Ready Inc. doing business as Bridge Caf   & Bistro in Putnam County joined the COVID-related litigation challenging the Governor's authority to enact laws, and the enforcement thereof, during a State of Emergency. Chapter 15, Article 5, Section 6 of the Code of West Virginia authorizes the Governor to, among other things, control ingress and egress to and from a disaster area or an area where large-scale threat exists, the movement of persons within the area, and the occupancy of premises therein, and to perform and exercise other functions, powers, and duties that are necessary to promote and secure the safety and protection of the civilian population. However, the owners of Bridge Caf   & Bistro allege that the local enforcement of the Governor's "Stay at Home Order" and "Statewide Indoor Face Covering Requirement" have violated their First Amendment rights and deprived them of their property rights without due process of law given that so few COVID-related deaths have occurred in Putnam County. The owners of Bridge Caf   & Bistro seek a similar ruling to the Western District of Pennsylvania's holding that the Governor's pandemic restrictions are unconstitutional. If the Southern District of West Virginia finds this precedent persuasive, West Virginia businesses may seek monetary relief from counties that attempt to enforce unconstitutional and unenforceable executive orders issued by the Governor. --- [Victoria L. Creta](#)

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## **[Lawsuit Over Coronavirus Testing for Michigan Farmworkers is Dismissed](#)**

*"The move ends the legal dispute between farm owners and the state of Michigan over a state order that required farms, meat plants and migrant camps to test all workers, many of whom are Latino immigrants."*

**Why this is important:** An August 3, 2020 Order from the Michigan Department of Health and Human Services requires all employers of migrant or seasonal workers with more than 20 full-time employees on site to test all employees under a number of circumstances. Camps housing migrant workers similarly must engage in testing. A group of farms and their employees, with the backing of the Michigan Farm Bureau, filed a civil rights lawsuit, including a request for a temporary order restraining the state from requiring the testing, which was denied on August 14. Recently, the plaintiffs have voluntarily dismissed the case, at least tacitly acknowledging that COVID-19 testing for migrant workers who live in close quarters may be necessary to help protect their safety. Of interest is the fact that other groups who live in close quarters, including colleges and universities, have not been subject to such testing requirements. The lack of a cohesive plan at the federal level has been criticized for creating confusion around necessary precautions for the pandemic, but this suit indicates that a similar issue may be present within individual states as industries regulated by differed departments may also experience widely divergent requirements for compliance. --- [Risa S. Katz-Albert](#)

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## [15 Families File Lawsuit Against Farmington Nursing Home for COVID-19 Deaths](#)

*"An attorney representing 20 families who had loved ones at the Life Care Center of Farmington says the facility downplayed the severity of the virus."*

**Why this is important:** The trend of lawsuits challenging the alleged insufficiency of protective measures in nursing homes continues, as 20 families who had loved ones in the facility filed suit against a New Mexico nursing home. There are currently 15 lawsuits filed against the nursing home and another five lawsuits pending. The plaintiffs allege that employees were instructed not to wear masks and were allowed or forced to work with symptoms of COVID-19. The plaintiffs connect this to the deaths of 50 percent of the nursing home's residents. As regulations and guidelines continue to evolve, it is critical for nursing homes and long-term care facilities to stay aware of these guidelines to limit their risk of future liability. --- [Kayla I. Russell](#)

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## [A 'Tidal Wave' of Covid-Related Workplace Lawsuits Could be on the Way](#)

*"As the coronavirus continues its assault on the United States, throwing all aspects of everyday life into upheaval, the courts offer a lens into how treacherous things have gotten in one of those arenas -- the American workplace."*

**Why this is important:** COVID-19 has disrupted the American workplace in an unprecedented way, which provides us with no historical basis for comparison. Employers must balance protecting their workers against keeping their doors open. Employees are forced to choose between their health and their livelihoods. The interplay between these choices has led to hundreds of labor and employment lawsuits being filed nationwide, which will likely "grow exponentially over the next six months to one year." The cause of action in these suits ranges from wrongful death to retaliation and discrimination. While legislators are attempting to protect businesses from an onslaught of COVID-19-related lawsuits, the efforts so far have really only focused on combatting employee claims of employer negligence in exposing them to the virus. This is a promising step, but it does nothing for the myriad of other causes of action that employers are facing and will continue to face. --- [Kellen M. Shearin](#)

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## [Shawnee Tribe Loses Suit Claiming Unfair Virus Funding](#)

*"Treasury Secretary Steven Mnuchin's allocation of \$8 billion under Title V of the Coronavirus Aid, Relief and Economic Security Act is not reviewable under the Administrative Procedure Act, U.S. District Judge Amit P. Mehta ruled, echoing his reasoning in an Aug. 19 order denying the tribe's bid for preliminary injunction."*

**Why this is important:** It might seem like a decade since Congress passed the CARES Act, with the intent to provide relief to Americans from COVID-19-related financial impacts, but it's only been a few months, and disputes over the Act's administration are still working their way through the courts. This particular decision, which dismisses the Shawnee Tribe's dispute over how its share of the funds were allocated, is based in dry administrative law and was preordained by a similarly negative decision in an earlier lawsuit brought by the Prairie Band Potawatomi Nation. The takeaway here, however, is less the underlying legal principle and more the fact that the CARES Act (and other governmental programs) have spawned lawsuits that will likely outlast their implementation. --- [Joseph V. Schaeffer](#)

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