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CLASS ACTION TRENDS REPORT

COVID-19: A litigation update

As we settle into the second half of the third year of the COVID-19 pandemic, there is reason for optimism. But, unfortunately, the outbreak of COVID-19-related litigation is still in its infancy.

COVID-19-related class action filings persist, largely in the form of wage and hour claims. Pandemic-induced layoffs have prompted lawsuits under the Worker Adjustment and Retraining Notification (WARN) Act. Negligence lawsuits have been filed by employees alleging to have contracted COVID-19 at the workplace or contending a family member fell ill because the employee brought the virus home from work.

Of late, the greatest source of new cases challenge the steps taken to stem the COVID-19 tide, in the form of vaccine mandates. The number of such lawsuits has surpassed 1,200. Many of these complaints opposed governmental mandates at all levels, Biden Administration efforts to implement mandatory vaccinations upon large swaths of the U.S. workforce often being the targets. Overall, however, approximately 70 percent of these lawsuits have been filed against individual employers that have adopted policies requiring vaccination as a condition of employment.

Although many employers have discontinued their vaccination policies as the COVID-19 pandemic has waned, the legal fallout is ongoing: August 2022 saw a record for vaccine mandate filings, with 116 *new* complaints challenging employer vaccine mandates.

In this issue of the *Class Action Trends Report*, Jackson Lewis attorneys discuss the current state of COVID-19 litigation at this late stage of the global pandemic, and survey the landscape in the coming months and beyond.

A WORD FROM MIA, DAVID AND ERIC



MIA FARBER

When the World Health Organization on March 11, 2020, declared the novel coronavirus (COVID-19) a global pandemic, Jackson Lewis attorneys quickly conducted risk analysis, identifying the myriad business and legal issues that employers would be facing in the coming months and providing frequent guidance on how to navigate the unprecedented situation. The firm also began to track the litigation that promptly ensued. In fact, the first complaints recorded — a pair of class actions brought in California — were filed on March 12.



DAVID GOLDER

COVID-19 reordered our lives and our workplaces. Yet, few had predicted it would continue to do so nearly three years later. In the interim, employers have faced more than 5,000 COVID-19-related lawsuits, hundreds of which were brought as putative class or collective



ERIC MAGNUS

actions. New COVID-19 lawsuits continue to be filed nearly every day.

This issue of the *Class Action Trends Report* looks at the current state of class action litigation and other significant COVID-19-related cases in this third year of the pandemic. We look at how the nature of the claims and the law have evolved, the outcome of several significant lawsuits, and key issues still pending.

While the acute stage of the COVID-19 pandemic is behind us, ongoing challenges remain. We've emerged from the crisis with new ways of working, a changed business climate, and greater resilience. We hope that your business and your employees have successfully weathered the storm, and that the guidance we provide in this issue will be useful as your organization transitions to a "new normal."

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About the *Class Action Trends Report*

The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Legal & Regulatory *Labor and Employment Law Daily*, the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

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Vaccine mandate litigation

The wave of litigation against employers that have implemented COVID-19 vaccination requirements shows no sign of ebbing. As of September 1, 2022, more than 700 lawsuits have been filed challenging vaccine mandates imposed by employers, both public and private. The number has risen steadily since. Roughly 10 percent of these cases are putative class actions, and another 25 percent are multi-plaintiff cases, many of which are complex litigations involving large numbers of plaintiffs. These multi-plaintiff cases carry the risk of class action-size liability. In many cases, newly launched advocacy groups have joined these lawsuits, or are leading the charge. Labor unions are filing suit on behalf of union-represented employees. In a few instances, state attorneys general have filed suit against private employers pursuant to new state laws prohibiting such vaccine mandates.

Thousands of administrative agency charges challenging employers' vaccination policies (or adverse actions taken pursuant to those policies) are making their way into the courts. Recently, a federal court revoked a nationwide injunction barring enforcement of the Biden Administration's mandate for federal contractors. This development will bring uncertainty and perhaps more litigation. The rollout of another booster, continually revised Centers for Disease Control and Prevention (CDC) guidance, and a likely seasonal surge in cases may shift the ground further. Therefore, we anticipate a steady stream of these lawsuits for the foreseeable future.

Government mandates

In 2021, the federal government issued COVID-19 vaccine requirements directed at federal employees (EO 14043), federal contractors (EO 14042), certain Medicare providers and suppliers (CMS), military and civilian employees (DOD), federally funded Head Start programs, and private employers with 100 or more employees (OSHA ETS). These requirements have been hotly contested, with considerable success.

State and local governments also enacted vaccine mandates in their capacity as regulators. Some mandates applied specifically to healthcare employees (public and private) or faculty and staff of universities and K-12 schools. These measures likewise faced a flurry of legal challenges.

Muddying the waters even more, a number of states, through legislative or executive action, have *curtailed* private employer mandates. These measures typically require that private employers provide exemptions for religious, disability, and other reasons. Many of these states limit the effectiveness of any employer mandate, and some provide statutory protections from discharge based on vaccination status.

Employer mandates

The large majority of vaccine mandate cases filed, however, have been brought against employers. (In all, 70 percent of vaccine mandate cases filed are challenges to employer-imposed mandates.) Plaintiffs have challenged employers' vaccination mandates on their face (contending the policy itself is unlawful) and, more commonly, as applied (including the failure to grant accommodations or exemptions to the vaccination requirement and adverse actions taken by the employer in enforcing the mandates).

Snapshot. As of September 1, 2022, 718 legal challenges to employer-imposed vaccine mandates have been filed. New York employers have been sued the most, with 127 cases filed in the state. California follows, with 121 cases. Trailing these states are Illinois and Minnesota (40 suits filed in each) and Ohio (31 cases).

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Vaccine mandate litigation by the numbers

Much COVID-19-related labor and employment litigation centers on vaccine mandates. The Jackson Lewis **Vaccine Mandate Litigation Tracker** provides a snapshot of these cases, including a look at where complaints are filed, the types of claims asserted, and the industries targeted.

See the latest numbers here:

Jackson Lewis Vaccine Mandate Litigation Tracker

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Which employers are being sued? The chart below shows which industries are hardest hit:

Healthcare (incl. Assisted Living)	31%
City/county (other than police/fire).....	13%
Education (K-12 and higher ed).....	10%
Police/fire	9%
State government employer.....	7%
Manufacturing.....	6%
Medical/pharma	5%
Professional services.....	4%
Transportation	4%
Arts and recreation.....	4%
Other.....	7%

Sixty percent of complaints are brought against private (as opposed to public) employers. (The numbers are starkly different in front-runner New York, though, where only 35 percent of vaccine mandate suits target private employers.)

Nearly 60 percent of cases involve individual plaintiffs. The remainder are multi-plaintiff cases, suits brought by labor unions, and class actions.

Claims alleged

Complaints challenging employer vaccine mandates typically assert multiple claims. The following tables show the percentage of cases in which the following causes of action are alleged.

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Agency charges

One way employees are challenging employer-imposed vaccine mandates is to allege the employer has failed to accommodate a disability or religious belief that they claim conflicts with a vaccination requirement. These complaints against private employers generally arise under Title VII of the Civil Right Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and/or attendant state laws. Both Title VII and the ADA require that such complaints first be filed with the Equal Employment Opportunity Commission (EEOC) or state agency counterparts.

Only after exhausting their administrative remedies are employees supposed to file suit in court. Many vaccine mandate claimants headed directly to court, seeking emergency injunctive relief to bar enforcement of an employer mandate. Those cases are reflected in court filings in prior months. The recent spike in court filings, however, can be attributed in large measure to employees who pursued agency charges and recently received their EEOC “right to sue” letters.

Nearly 10 percent of lawsuits challenging public employer vaccine mandates have been brought by labor unions, as

lone plaintiffs, or as one of several named plaintiffs in a class action suit. Such cases allege the employer failed to negotiate with the union, as required under the operative collective bargaining agreement (CBA), before implementing a mandatory vaccination requirement. Other lawsuits allege that employers disciplined union-represented employees for failing to comply with an employer vaccine mandate, but did so without following the prescribed disciplinary procedures as agreed to in the CBA.

Union legal challenges against *private* employer mandates are brought as charges before the National Labor Relations Board (NLRB). (Union vaccine mandate challenges also are brought against employers, public and private, through the grievance arbitration procedures in the parties’ bargaining agreements.) It is difficult to know how many complaints have been asserted at the NLRB, and how they will fare. A clearer picture will emerge as unresolved complaints are decided by NLRB administrative law judges, who will issue decisions that a Board panel may adopt, reject, or modify on review. It will be some time before a precedential NLRB decision will be issued in a vaccine mandate case.

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All complaints

Religious discrimination/accommodation	63%
Wrongful discharge/retaliation	55%
Constitutional violations	36%
Disability discrimination/accommodation	28%
Common law/breach of contract.....	24%
Other statutory claims.....	21%
Privacy	14%
Labor dispute/violation of union contract.....	12%
Misc. claims	4%

Class action complaints

Religious discrimination/accommodation	60%
Wrongful discharge/retaliation	33%
Constitutional violations	71%
Disability discrimination/accommodation	23%
Common law/breach of contract	19%
Other statutory claims	13%
Privacy	19%
Labor dispute/violation of union contract	4%
Misc. claims	6%

When isolating those employer vaccine mandate cases brought as class actions, a few sharp differences emerge as to the types of claims asserted. For one, notably fewer class actions include claims for wrongful discharge or retaliation (these claims tend to be raised by single plaintiffs who have faced an adverse employment action). In addition, there are significantly more constitutional violations alleged in that portion of cases brought as class actions.

Finally, constitutional challenges are just as prevalent against private employers as public employers. These constitutional challenges generally have not fared well, particularly against private employers. In many cases, they appear to have been made as a creative way for plaintiffs to try to argue irreparable harm needed for injunctive relief or to argue a basis for a class, but the courts have largely seen through this.

Religious discrimination/failure to accommodate.

Claims of religious discrimination or failure to accommodate religious beliefs are most common. A key issue in suits alleging an employer’s mandatory vaccine practices fail to accommodate individual or multiple employees’ religion is what constitutes a *sincerely held* religious

belief. Although the EEOC cautions that the religious nature of a belief and the sincerity with which it is held should normally be presumed, not everything asserted by an employee constitutes a protected religious belief under the law.

A federal district court in Massachusetts, for example, rejected a request for preliminary injunctive relief from employees who contended their employer’s vaccination requirement violated their statutory and constitutional rights under federal and state law, including their rights to religious worship and free exercise, freedom from religious discrimination, privacy, personal autonomy, and personal identity. In the court’s view, the record indicated their “opposition to receiving the COVID-19 vaccine is based primarily on ‘philosophical, medical, or scientific beliefs, or personal fears or anxieties’ rather than bona fide religious practices.” Therefore, their claims failed.

On August 26, 2022, a Pennsylvania federal court dismissed Title VII religious discrimination claims of healthcare workers who lost their jobs after refusing to comply with a vaccine mandate. The court concluded the lead plaintiff’s affidavit statement in the putative class action, which centered on her free will and belief that COVID-19 vaccines and tests are harmful and unnecessary, failed to establish a sincere religious opposition. In the court’s view, the employee’s evidence consists “of nothing more than a collection of distorted statements and anti-vaccine hocus-pocus.”

Disability discrimination/failure to accommodate.

Disability discrimination and failure to accommodate claims are alleged in more than a quarter of vaccine mandate suits. Plaintiffs typically assert that the employer refused to grant a medical exemption for various medical conditions or to grant an exemption to employees who already contracted COVID-19 and thus, they allege, have natural immunity. Employees also have asserted claims under the ADA’s “regarded as” prong, contending that their employer regarded them as disabled — as having a contagious disease — due to their refusal to be vaccinated.

In August 2022, a federal court in North Carolina granted an employer’s motion to dismiss the ADA disability discrimination claims of an employee who was fired after she refused to comply with her employer’s COVID-19 vaccination

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mandate. She had argued that the employer made a “record of” her alleged disability by “misclassifying her as having an impairment” and she was “regarded as” having a disability. The court rejected this contention. It was not a plausible inference, the court said, that requiring employees to become vaccinated or seek an exemption meant that an employer considered all its employees to have an “impairment.”

Constitutional claims. Nearly 40 percent of vaccine mandate complaints — and more than 70 percent of class actions — allege violations of the federal or state constitutions. Such claims are actionable against

government employers. However, many plaintiffs have asserted constitutional claims against their *private* employers. Their contention: the employer is acting “under color of law” or as “an arm of government” when it requires its employees to be vaccinated. Some, though certainly not all, of such claims arise when a government entity, in its regulatory capacity, has imposed a vaccine requirement on certain industries (and the defendant employer falls within the targeted group).

Plaintiffs have alleged due process and equal protection claims, violations of their right to free speech and free

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Injunctive relief against private employers disfavored

Courts have been reluctant to enjoin employer vaccine mandates, largely rejecting plaintiffs’ requests for temporary restraining orders or preliminary injunctions to prevent an employer from implementing a mandate *before* the court rules on the underlying merits of the claims, explains Patricia Pryor, Leader of the Jackson Lewis Vaccine Mandate Litigation Group. Even courts that have expressed doubt that the employer ultimately will succeed on the merits have found that the high bar for granting an injunction was not satisfied, as plaintiffs have not demonstrated the type of “irreparable harm” necessary to warrant preliminary relief.

For example, an advocacy group formed by eight employees of a healthcare entity sued their employer, which operates 14 hospitals and has more than 90,000 employees, in a multi-plaintiff action challenging the defendant’s mandatory COVID-19 vaccination policy. The U.S. Court of Appeals for the First Circuit held a district court properly refused to issue a preliminary injunction halting implementation of the employer’s policy. It concluded the employees failed to demonstrate they would suffer irreparable harm if the policy went into effect because they had adequate remedies at law. The employees’ assertion that they would suffer the loss of income and benefits was insufficient to meet their burden since those harms were “external factors common to most discharged employees.”

In another putative class action alleging religious

discrimination in violation of Title VII, the U.S. Court of Appeals for the Seventh Circuit affirmed a lower court’s denial of a preliminary injunction halting implementation of a hospital’s vaccine mandate and reinstating a doctor who was suspended after refusing to vaccinate on religious grounds. In particular, the Seventh Circuit found that Title VII provided enough adequate remedies to render preliminary injunction unwarranted. The appeals court also rejected the doctor’s argument that court-ordered reinstatement was the only way to avoid deterioration of his skills, concluding that the alleged harm was simply too speculative to warrant preliminary injunctive relief.

However, in an anomaly, a divided three-member panel of the U.S. Court of Appeals for the Fifth Circuit, in a nonprecedential ruling, reversed a district court’s denial of a preliminary injunction in a Title VII suit brought by several airline employees who were placed on indefinite unpaid leave after failing to comply with a vaccine mandate. The appeals court concluded that, unlike cases where the employees were terminated, the employees in this case were subjected to ongoing coercion based on their religious beliefs that could not be remedied later. Reversing on the narrow irreparable harm ground, the court remanded for further consideration of the other preliminary injunction factors. On August 18, 2022, the full Fifth Circuit denied the airline’s petition for rehearing *en banc*.

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exercise, and bodily integrity, among other causes of action. In one putative class action brought by former employees of a medical clinic, the complainant asserted that the employer's vaccine requirement violated the Fourteenth Amendment's Equal Protection Clause because it treated vaccinated and unvaccinated employees differently. She also claimed the mandate violated the Due Process clauses of both the U.S. and Pennsylvania Constitutions. However, on August 30, 2022, a federal court in Pennsylvania dismissed the action, explaining the plaintiff failed to allege any facts showing that the private employer was a "state actor." Among other arguments, the plaintiff said her former employer "acted in concert with federal officials by implementing the vaccine mandate as a result of the CDC's recommendations and the recommendations of other federal officials such as Dr. Anthony Fauci." Rejecting her contention, the court said, "Action taken by private entities with the mere approval or acquiescence of the State is not state action."

Privacy claims. Plaintiffs suing employers over vaccine mandates also have asserted privacy-based constitutional claims, contending, for example, that forced disclosure of one's vaccination status violates free speech guarantees or amounts to unreasonable search and seizure. Another class action complaint against a healthcare employer claimed that "compelling unwanted 'medical treatment' violates Kansas's fundamental right to privacy and citizens' constitutional right to refuse unwanted medical treatments."

Plaintiffs also raise privacy-based claims under statutory and common law, both federal and state. A class action suit brought by employees of a Wyoming medical center alleged their employer failed to maintain confidentiality of their health information by "openly tagging each employee and patient vaccine status for all to see," in violation of the Health Insurance Portability and Accountability Act (HIPAA).

Claims brought under the federal Genetic Information Nondiscrimination Act (GINA), which prohibits discrimination based on genetic information, also implicate privacy concerns. "The vaccines are not vaccines in the traditional sense, they are instead, gene therapy," according to one class action complaint challenging an airline's mandatory vaccination policy. "As such, those

who have been injected with a Covid vaccine necessarily possess different genetic material or genetic information than those who do not." The plaintiffs alleged their employer's policies "discriminate or provide unequal opportunities based on an employee's Covid vaccine status [and thus] is violative of GINA."

Termination claims. Of course, many employees who refused to comply with an employer's mandatory vaccination policy have faced discharge or been placed on unpaid leave for failing to comply. They often allege they have been retaliated against for exercising rights protected under Title VII, the ADA, or other statutes. Many claimants assert "stand-alone" wrongful discharge claims as well, alleging their termination violated the public policy of their state as articulated in specific statutes, such as state "right of conscience" acts, or as a matter of state common law. Moreover, several states have enacted specific measures protecting employees from being discharged by private employers based on their vaccination status, creating another cause of action for employees who refuse to follow an employer's vaccine policy.

However, for private-sector employers, the principles of at-will employment often control the outcome of such claims. For example, in a lawsuit filed by 39 employees against a Louisiana medical center that terminated them for failing to comply with the vaccination policy, a state court dismissed the plaintiffs' claims on the pleadings and rejected their motion for preliminary relief. A state appeals court reversed, noting an "important constitutional issue" was at stake that warranted a hearing. The Supreme Court of Louisiana reversed the appellate court in a January 7, 2022, decision, finding "no exception to this state's at-will employment doctrine," which meant the employer was entitled to discharge the employees who failed to comply with its vaccine mandate.

Likewise, in an unpublished June 13, 2022, opinion, the Fifth Circuit upheld a district court decision rejecting wrongful discharge claims brought by a group of former hospital workers who opposed the hospital's mandatory vaccination requirement. The federal appeals court agreed with the lower court that forcing employees to obtain the vaccine or qualify for an exemption did not violate public policy or qualify as an exception to the at-will employment rule. The exception is meant for situations where employees are

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forced to perform an illegal act; despite the employees' contention, an employer requirement that employees be vaccinated with an "experimental vaccine" did not fit the bill.

Revoking a vaccine mandate

Many employers that adopted vaccine mandates at the height of the pandemic have changed course. In some instances, employers revoked vaccination requirements once the Biden Administration withdrew the OSHA ETS after the U.S. Supreme Court issued a temporary stay. Other employers rescinded their policies as the number and severity of COVID-19 cases fell substantially.

In a number of cases filed in recent months, plaintiffs who were discharged or placed on unpaid leave for refusing to obtain the vaccine point to their employer's subsequent policy change as evidence that the vaccine mandate was unnecessary and their termination unjustified. This argument, however, is fallacy. An employer's decision to alter its vaccination requirement in response to changing circumstances in no way signals that the mandate was not appropriate at the time it was issued, Patricia Pryor emphasizes. Pryor is Leader of the Jackson Lewis Vaccine Mandate Litigation Group and COVID-19 Taskforce and Managing Principal of the firm's Cincinnati and Dayton, Ohio and Louisville, Kentucky offices. The fact that employers have made policy changes demonstrates they are doing exactly what they should be doing, Pryor notes: determining the best course of action for their workforce in accordance with the circumstances with which they are faced.

Recently, New York City Mayor Eric Adams recognized employers' ability to do just that — announcing the city will discontinue its vaccination mandate for private-sector employers effective November 1, 2022, at which point the city's private employers will decide whether to require employees to be vaccinated against COVID-19 in order to report to work. Adams and the commissioner of the city's Department of Health and Hygiene encouraged employers, however, to maintain vaccine policies once the city mandate is lifted.

"As with everything related to the vaccine," said Pryor, "employers should be aware of the liability risks that can arise when making changes to their vaccination programs, including challenges to their decisions about which employees to reinstate."

Vaccine mandate cases: where are they now?

Seventy-five percent of employer vaccine mandate cases filed are still in litigation. Included among the active cases are plaintiffs' appeals of rulings in employers' favor, including rulings on the merits of the claims and as to denials of requests for injunctive relief. Employer motions for dismissal, demurrer, or summary judgment are pending in nearly 20 percent of active cases.

The good news for employers is that, of the quarter of employer vaccine mandate cases that have been resolved, only a handful have resulted in a court judgment for plaintiffs; each involved public employer defendants, and the cases turned on whether the public entity had legal authority to issue a vaccine mandate or whether the defendant followed proper procedural mechanisms when doing so. In contrast, 36 percent of cases already have ended in favorable decisions for employers. Many of these cases were voluntarily dismissed.

As with any litigation, many cases result in settlements, which themselves can come at considerable cost to employers. For example, on August 5, 2022, a federal court in Illinois granted preliminary approval of a proposed \$10,337,500 settlement to resolve a class action suit involving more than 500 healthcare employees who alleged that a hospital system's vaccine policy violated Title VII and the Illinois Health Care Right of Conscience Act. The hospital also agreed to revise its vaccine policy and to provide religious accommodations in every position across its numerous facilities. Moreover, under the settlement, employees who were terminated because of their religious-based refusal to get vaccinated will be eligible for rehire under certain conditions and to retain their previous seniority level.

It remains to be seen how long the litigation barrage will continue against employers that implemented vaccine requirements for their workforce. Many such legal challenges will likely be premised on claims of discrimination and other theories that require exhaustion of administrative remedies. How many such charges are currently pending at the EEOC? How many potential litigants have yet to file charges — and are still in the 300-day window in which to do so? What does seem clear, however, is that COVID-19 vaccine mandates carry the risk of employer liability for the foreseeable future. ■

Challenges to testing, screening

Employees also have challenged employers' COVID-19 screening and testing practices. These complaints assert ADA violations, constitutional claims, or causes of action under a variety of privacy statutes and theories. Some complaints allege discrimination based on an employer's policy of requiring testing *only* for non-vaccinated employees.

GINA claims

In some cases, employees have brought claims under the GINA or state-law counterparts. They claim that COVID-19 vaccines are "Virus-Based Gene Therapies" and involve "injecting genetic information into a person and changing or manipulating the person's genetic information."

While the EEOC guidance still allows for mandatory screening measures, an employer now must demonstrate on its own that it meets the "job-related and consistent with business necessity" standard.

According to one multi-plaintiff complaint filed by approximately 150 employees when an employer asks employees about their vaccination status, it is "asking for their genetic information given the vaccines are gene therapies in violation of GINA." As such, disparate treatment of unvaccinated employees, according to plaintiffs, amounts to genetic discrimination. Moreover, according to the plaintiffs, Polymerase Chain Reaction (PCR) tests are genetic tests in that they "are used to amplify small segments of DNA which is genetic material." Therefore, mandatory COVID testing implicates GINA concerns.

The above case was voluntarily dismissed in July 2022. Another multi-plaintiff suit brought previously against the same employer raised substantially similar allegations; a federal court denied the plaintiffs' petition for a temporary restraining order and dismissed the case.

However, the EEOC in July 2022 announced a conciliation agreement with an employer that allegedly violated genetic information laws by requiring employees to submit the results of *family members'* COVID-19 tests. The employer agreed to cease collecting employees'

family members' COVID-19 testing results, among other relief.

Changing guidance on testing

Yet, the bulk of legal claims arising from testing and screening requirements allege that such mandates are unlawful under the ADA's medical examination provisions, which require that any such testing be "job-related and consistent with business necessity." At the outset of the pandemic, the EEOC advised that employers conducting COVID-19 testing met the standard for conducting medical examinations under the ADA. The agency's approach during the first two

years of the pandemic was to treat the virus as a "direct threat" and as such, to advise that employers could require COVID-19 testing, Pryor explained. Recognizing that the country is now moving out of

the "emergency" phase of the pandemic, however, the guidance has shifted.

In July 2022, the EEOC updated several of its technical assistance questions and answers, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," including its answer to the question of whether, under the ADA, an employer may administer a COVID-19 viral test as a mandatory screening measure when determining whether an employee could be present in the workplace. With its latest guidance, the agency explained that going forward, employers will need to assess whether current circumstances justify such testing to prevent workplace transmission of the virus. While the EEOC guidance still allows for mandatory screening measures, an employer now must demonstrate on its own that it meets the "job-related and consistent with business necessity" standard.

Moreover, in August, the CDC issued new guidance that did not address the EEOC's revised guidance but stated that "when implemented, screening and testing strategies should include all persons, irrespective of vaccination status."

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CHALLENGES TO TESTING, SCREENING continued from page 9

What does this mean for employers?

“The EEOC’s change in the guidance on COVID-19 testing as a screening tool is a game changer,” Pryor said. Employers should reevaluate with counsel their existing policies regarding COVID-19 testing. The proper course of action in light of the shift in the EEOC’s position will depend largely on the employer’s unique work environment, applicable local or state laws, and current

transmission, hospitalization, and death rates, among other factors. For instance, a healthcare employer may have an easier time showing that testing is a business necessity than an employer whose employees generally work in isolation or do not interact with at-risk individuals.

Companywide policies that impact employees across the board are always subject to scrutiny by class action plaintiff’s lawyers, and this area of the law, like the pandemic itself, continues to evolve. ■

Wage and hour claims

Aside from vaccine mandate litigation, about 70 percent of COVID-19-related class action suits against employers are wage and hour claims. These include complaints brought under the Fair Labor Standards Act (FLSA) or state wage and hour laws seeking pay for pre-shift time spent undergoing COVID-19 screening, reimbursement for home office expenses arising from pandemic-necessitated remote work, claims for allegedly promised COVID premium pay including failure to include such pay in the “regular rate,” and other allegations commonly asserted on a classwide basis.

Not surprisingly, employers with operations in California have been hardest hit. California employers also must contend with representative actions brought under the state’s Private Attorneys General Act (PAGA).

COVID-19 screening

Employers face class claims by nonexempt employees alleging they are entitled to compensation for pre-shift time spent in daily COVID-19 screening, such as temperature checks (and waiting in line to have their temperatures taken) and completing symptom questionnaires. The cases arise in a myriad of settings, but a significant number have been brought in the healthcare, hospitality, manufacturing, food production and retail industries, many of which face additional COVID-19-related risks given the large percentage of public-facing employees.

These suits typically are brought under state law, and mostly in states that have not interpreted their state

laws regarding compensability of pre- and post-shift time consistently with the federal Portal-to-Portal Act, which narrowly defines compensability for such time. In some cases, plaintiffs also assert common-law claims, such as unjust enrichment, as an alternative theory of liability.

For example, hourly employees of a large retailer filed suit contending they were required to undergo mandatory COVID-19 screening prior to clocking in. According to their complaint, workers had to arrive before their scheduled shift to complete a questionnaire, screening, and body temperature scan. Only after completing this protocol — which allegedly took 10-15 minutes, on average — could employees enter the store and walk to the back to clock in for the day. In addition to statutory claims under the Arizona Wage Law, the employees alleged unjust enrichment, saying that the pre-shift screening time inured to the company’s benefit (and also were essential to perform their principal duties of serving customers amidst a pandemic).

A putative class action against a meatpacking company in Pennsylvania alleged that, in addition to pre-shift screening, production employees were required to undergo another screening before returning from their lunch breaks; as a result, they say they seldom were able to take their full 30-minute lunch breaks. Meatpacking was deemed an essential industry early in the pandemic, and meatpacking workers were particularly vulnerable to COVID-19 in its initial stages.

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WAGE AND HOUR CLAIMS continued from page 10

Courts are split

Thus far, courts to have ruled on pre-shift screening cases have been split. In the Arizona unjust enrichment suit, the court rejected the retailer's motion to dismiss. The employer argued that the employees failed to show that the employer was enriched at the employees' expense because the COVID-19 screenings benefitted employer and employees alike. The court disagreed. "Although Plaintiffs may have obtained a benefit in a general sense by being screened for COVID-19 before being allowed to work, they lost valuable time each day at the direction of their employer for which they were not compensated," the court said. The class action suit, filed in March 2021, is ongoing.

A federal court in California allowed nonexempt employees of a major online retailer to proceed with their putative class action wage and overtime claims asserting the employer violated the FLSA and California state law by failing to pay them for time spent undergoing pre-shift COVID-19 screenings. Because the required screenings took place on company property and were enforced through disciplinary measures, they constituted compensable hours worked. In addition, the screenings were compensable as "work" because the employer controlled and benefitted from them, they were an "integral and indispensable" duty where eliminating them would substantially impair workplace safety, and the time involved was not *de minimis* where the screenings allegedly took 10-15 minutes per shift.

In contrast, another California federal court dismissed a putative class action asserting violations of the FLSA and California Labor Code based on its failure to compensate employees for time spent participating in daily COVID-19 screenings. The court ruled that the pre-shift COVID-19 temperature check and short questions regarding exposure did not share the required nexus with the employee's duties (retrieving automotive parts and delivering them to auto parts stores) to make the screening a compensable activity that was integral and indispensable to those activities. Moreover, the court concluded that the screenings were not indispensable to the employees' duties because the employer could

eliminate them completely without hindering their ability to perform their duties.

A Missouri federal court rejected unjust enrichment claims brought by a putative class of a nationwide retailer's Missouri-based employees. According to the complaint, employees conferred a benefit on the company "by adhering to the screenings which enabled defendants to remain in operation during the pandemic giving it a competitive edge." While the court acknowledged that the pre-shift screenings allowed the stores to stay open, there was no unjust enrichment to the defendant because the parties incurred a mutual benefit: "the benefits of a healthy and safe working environment have been conferred on both parties." The plaintiffs' appeal is pending in the U.S. Court of Appeals for the Eighth Circuit.

Also in Michigan, in a putative collective action against a food manufacturer, a federal court in a September 14, 2022, decision granted summary judgment in the employer's favor on claims for pre-shift screening (among a myriad of wage and hour claims). The court ruled that COVID-19 screenings were excluded from hours worked, rejecting the employees' assertion that the screenings were integral and indispensable to producing uncontaminated goods in a "sanitary plant." As the court explained, the employees had conflated the goal of the employer's operations with the workers' specific duties (which they did not describe). Thus, a factfinder would need to speculate whether the absence of COVID-19 symptoms was integral and indispensable to their work.

Meanwhile, new COVID-19 screening suits continue to be filed. A class action against the same retailer was brought in July 2022 in Colorado, asserting similar factual allegations and, in addition to statutory causes of action, claims of "civil theft."

Expense reimbursement claims

In another subset of COVID-19-related wage and hour suits, plaintiffs allege that employers failed to reimburse work-related expenses — mostly, home office expenses incurred by employees who worked remotely as a result of the pandemic. These claims, as well, arise under state

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wage statutes, primarily under the California Labor Code, and frequently as representative actions under the PAGA. Like California, Illinois also has a broad statutory reimbursement requirement under the Illinois Wage Payment and Collection Act.

For example, a complaint against a financial services company was brought on behalf of a proposed class of current and former employees who worked for the employer “in California in any exempt or nonexempt capacity, who incurred business expenses as a result of their performance of duties for Defendant while working from home during the coronavirus crisis, at any time beginning March 1, 2020 through the date notice is mailed to the Class.” The case was filed in July 2021; the operative (third amended) complaint was filed in March 2022. The litigation, including an anticipated motion for class certification, is stayed pending private mediation.

One suit filed against a major accounting firm alleged that California-based employees were denied compensation for business expenses incurred while working from home after the state’s COVID-19 shelter-in-place order took effect. The employer had issued \$1,000 “work from home” payments to employees in November 2020, but the plaintiffs asserted this was an understatement of expenses actually incurred and that the under-reimbursement was nearly \$1 million. In May 2022, a state court judge granted final approval of a \$900,000 settlement resolving PAGA claims and claims on behalf of a class of 5,618 individuals employed by the company in California between March 15, 2020, and July 12, 2021.

Several Illinois-based employers have been hit with class action suits seeking reimbursement for remote work expenses arising from the shift to telecommuting due to the COVID-19 pandemic. In one case, remote customer service representatives contended they were not adequately reimbursed for internet, cell phone, and other equipment costs sued alleging violations of the Illinois Wage Payment and Collection Act. According to their complaint, the employer began to provide a \$20 per month “telecommuting” stipend in April 2020; however, the

combined monthly costs of business-related expenses far exceeded this amount. In June 2022, a federal court in Illinois approved a confidential settlement resolving the class claims.

Another class action suit, brought against a hospital by an employee in its finance department, was filed on behalf of approximately 100 employees who shifted to remote work in March 2020. The employee sought reimbursement for expenses incurred in the scope of employment including internet, cell phone, printer, and printer paper costs. For its part, the hospital noted it complied with its expense reimbursement policy, but the named plaintiff had not sought reimbursement, in accordance with the policy, for any of the expenses alleged. The parties accepted the monetary terms of a judicially recommended settlement of claims brought under the FLSA and state law.

Even at this late stage of the pandemic, new expense reimbursement cases arise. As the end of statutory filing periods nears, we may see an upswing of new lawsuits related to alleged conduct going back to the initial transition to remote work.

Premium pay

Some employers, particularly those in critical industries whose employees were deemed essential workers, offered additional hazard or “premium” pay to employees working during the widespread shutdowns. A number of these employers have been sued by employees claiming the employer reneged on its promise of COVID-19-based premium pay. More commonly, though, employees allege the employer failed to factor the premium that it *did* reward employees into the “regular rate” of pay for purposes of calculating overtime.

Meatpacking companies, grocery chains, and healthcare/assisted living facilities have borne the brunt of these claims, with some employers facing multiple class actions in numerous jurisdictions. One employer gave employees a \$500 “responsibility bonus” in May 2020 for continuing to work and, for several months thereafter, gave employees extra hourly “responsibility pay” for the first 40 hours they worked per week. The company faced several class and collective actions alleging the bonus

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pay should have been factored into employees' overtime rates. In one case, involving a class of more than 30,000 employees, the parties reached a \$7.75 million settlement.

A major grocery chain faced similar claims in Massachusetts federal court arising from its decision to offer an additional \$2 per hour in "appreciation pay" at the onset of the pandemic. (The class action was resolved quickly, resulting in voluntary dismissal prior to extended litigation.) Skilled nursing and hospice care facilities have been sued for alleged failure to factor "hazard" pay or

"Covid shift differentials" when calculating overtime for staff working through the pandemic (and providing care to COVID-19-afflicted patients). The parties have negotiated a settlement resolving claims brought on behalf of several hundred current and former employees.

New complaints continue to be filed. For example, a putative class and collective action brought on behalf of an estimated hundreds of other current and former employees was filed in mid-September against a skilled nursing facility alleging violations of the FLSA and Illinois Minimum Wage Law. ■

Loss of outside sales exemption

Commissioned "outside sales" employees are exempt from the minimum wage and overtime provisions of the FLSA (and some state laws). For the FLSA exemption to apply, the sales employee must be "customarily and regularly engaged away from the employer's place or places of business" (i.e., calling upon customers outside the office). With the onset of the pandemic, many sales employees began performing their duties remotely from home and, pursuant to quarantine, calling on customers by phone or email rather than doing onsite visits. As such, employers ran the risk that their salesforce would lose the exemption for the period during which the home office was their regular "place of business" and they did not "customarily and regularly" work outside their home office.

In an ongoing class action against a nationwide floral delivery service, field sales managers and sales representatives claimed they were misclassified as exempt outside sales employees since March 2020, when they began to perform their sales duties remotely from their homes. Consequently, they allege, they were entitled to (but were not paid) compensation for overtime hours worked. (Plaintiffs asserted that after receiving a pre-suit

demand letter, the employer directed its sales reps to make site visits with existing customers.) A motion to dismiss and to compel arbitration is pending.

An insurance salesperson for a managed care company who had worked out of his home office in Louisiana since the start of the pandemic brought a putative nationwide class and collective action under the FLSA and the wage and hour laws of 43 states (and the District of Columbia). He alleged that he and similarly situated employees were misclassified as exempt outside salespersons and denied overtime, which they were forced to work in order to meet the employer's minimum productivity quotas. "The improper classification of salespersons continued despite pandemic-initiated state and local lockdowns," according to the complaint, despite that the employer was "well aware" its "outside salespersons could not have been engaged in 'outside sales.'" In addition to statutory claims, the plaintiff also asserted common-law claims of breach of contract, promissory fraud, negligent misrepresentation, and unjust enrichment on behalf of the class. In September 2022, a federal court in Missouri denied the employer's motion to dismiss the suit.

WARN Act litigation

Dozens of COVID-19-related lawsuits have been filed under the Worker Adjustment and Retraining Notification (WARN) Act and state counterparts, and new cases — primarily class actions — are being filed almost daily, according to Penny Ann Lieberman. Lieberman is a principal in the White Plains, New York office of Jackson Lewis and Co-Leader of the firm's Reductions-in-Force/WARN Act group. Even where new complaints do not refer to COVID-19 as the cause, the mass layoffs and plant closings at issue arose in the economic aftermath of the pandemic and related quarantine. Courts have issued several significant decisions in COVID-19-related WARN Act cases, including rulings that can shape the contours of WARN Act litigation beyond the pandemic.

The WARN Act requires employers to give written notice to affected employees, unions, the state dislocated worker unit and the chief elected official of local government at least 60 days before conducting a plant closing or mass layoff at a single site of employment. A "plant closing" is the permanent or temporary shutdown of a single site of employment or one or more facilities or operating units within a single site of employment where the shutdown results in an "employment loss" during any 30-day period for at least 50 full-time employees. A "mass layoff" is a reduction in force which is not a plant closing and results in an employment loss at a single site of employment during any 30-day period for at least 50 full-time employees who constitute at least 33 percent of the active full-time employees at that single site of employment or where 500 or more full-time employees at a single site of employment suffer employment losses during a 30-day period. The WARN Act regulations require aggregation of employment losses at a single site of employment during a rolling 90-day period, in essence extending the 30-day period discussed in the WARN statute to 90 days.

There are several exceptions to the notice requirements: the "natural disaster" exception; the "unforeseeable business circumstances" exception; and the "faltering company" exception. These exceptions, if applicable, may permit an employer to provide fewer than 60 days of advance written notice, but still require provision of written notices which must include an explanation as to why the employer seeks to rely on that exception and why it could not have provided the full 60 days of notice.

The faltering company exception, applicable only to plant closings, may come into play where the pandemic resulted in businesses simply shutting down due to lack of funds or business. So far, the exceptions that have been addressed by courts in COVID-19-related WARN Act suits are the natural disaster and "unforeseeable business circumstances" exceptions.

Natural disasters, causation

In June 2022, the Fifth Circuit held the COVID-19 pandemic does *not* qualify as a natural disaster for purposes of the advance notice exception. Congress gave three examples of the types of events it had in mind under the "natural disaster" umbrella: events "such as" floods; earthquakes; and droughts, the appeals court reasoned. It declined to expand the meaning of "natural disaster" to include a pandemic, which it considered a materially different event. Therefore, a provider of fracking services for oil producers was not excused from giving 60 days' advance notice before implementing a mass layoff in March 2020, after oil prices plummeted and the company's customers shut down fracking work at well sites in Texas.

Natural disaster or no, the employees also argued the pandemic was not the *direct cause* of the layoffs. The WARN Act regulations instruct: "To qualify for this exception, an employer must be able to demonstrate that its plant closing or mass layoff is the direct result of the natural disaster." At issue on appeal in determining whether the natural disaster caused the employment losses was whether the natural disaster exception incorporates proximate causation or the looser "but-for" standard. Citing binding precedent that equates direct cause with proximate cause, the Fifth Circuit held the natural disaster exception incorporates proximate causation. The Department of Labor (DOL) filed an *amicus* brief in the case, seeking to preserve the stricter standard it had promulgated in its WARN Act regulations. The appeals court gave deference to the DOL's regulations.

In another case, a federal district court in Florida declined to dismiss a putative WARN Act class action. It ruled the employee plausibly alleged that the plant closings and/or mass layoffs at issue were not directly caused by the pandemic, but instead "were 'due to' the economic downturn

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[the company's] manufacturing business experienced," which in turn was due to government mandates and private-sector choices. "This isn't a situation where, for example, a factory was destroyed overnight by a massive flood — that would be a 'direct result' of a natural disaster," the court explained. "This is an indirect result — more akin to a factory that closes after nearby flooding depressed the local economy." The company filed an appeal with the U.S. Court of Appeals for the Eleventh Circuit. However, the parties reached a classwide settlement, and the Eleventh Circuit, relinquishing jurisdiction, did not decide the causation issue.

Even as COVID-19-related layoffs and the pandemic itself begin to recede, the Fifth Circuit's ruling may have implications beyond the pandemic in defining the parameters of the natural disaster exception — and the causation standard that attaches to it — particularly as severe weather and similar events are anticipated to occur with greater frequency.

Unforeseeable business circumstances

Many employers that conducted a mass layoff or plant closing during the pandemic also sought to rely on the WARN Act's unforeseeable business circumstances exception. This exception may apply in circumstances caused by a sudden, dramatic, unexpected action or condition beyond the employer's control. "We continue to see an uptick in WARN class actions, in many of which the employer will attempt to rely on the unforeseeable business circumstances exception, as a defense," Lieberman said.

In a WARN Act case brought by former employees of a national rental car company that implemented layoffs at several airport locations in Florida, the employer argued that both the natural disaster and unforeseeable business circumstances exception applied in light of "the unprecedented economic upheaval" unleashed by the pandemic. The district court denied the employer's early motion to dismiss. Even if the facts alleged may show the employer faced unforeseeable business circumstances, an employer must nonetheless "give as much notice as is practicable." There were no facts indicating the employer could *not* have given more notice. "Exactly when Defendants had to give notice will doubtless be a hotly contested factual issue," the court explained, "but at this stage, taking the allegations in the Complaint as true, Plaintiff has stated a claim for a WARN Act violation."

The WARN Act may not be implicated in cases of furloughs, or temporary layoffs, as long as the furlough does not extend beyond six months and the employer makes clear to employees that the furlough is temporary and that there is an intended definite date for employees to return to work. However, if changing business circumstances cause a furlough to extend beyond six months, or to become a permanent layoff, then WARN Act requirements would apply if an employment loss occurred and the employer did not provide the required notices — either at the time of the initial temporary layoff decision or, if the unforeseeable business exception applies, as soon as practicable.

For example, a Florida hotel and resort employer faced a putative class action brought on behalf of employees who, in April 2020, were placed on what was to be a temporary six-month furlough. Because the furlough was to be temporary, the employer did not provide WARN Act-mandated notices. However, the layoff period extended past six months, and the employees filed a WARN Act suit. The employer argued that the plaintiff was not entitled to damages because "the extension of the layoff period beyond six months was caused by business circumstances not reasonably foreseeable at the time of the initial layoff...and notice [was] given at the time it [became] reasonably foreseeable that the extension beyond six months [was] required." The employer maintained this position throughout the litigation. It ultimately opted to settle the matter. In August 2022, a court granted preliminary approval to the parties' proposed settlement, under which the employer agreed to pay \$2.3 million to resolve the claims of a 3,600-member class.

Remote employment and the "single site"

WARN Act notice requirements are triggered when an employer conducts a mass layoff involving 50 full-time employees at a "single site of employment" who constitute at least 33 percent of the active full-time workforce at that single site of employment. What is the "single site of employment" for employees who work from home? The question has become increasingly salient with the dramatic rise of remote work spurred by pandemic-driven quarantines — a trend that may well become a permanent fixture in the modern workplace.

Under the WARN Act's regulations, for employees who are "outstationed" (whose work takes them "from point to point" or "whose primary duties involve work outside

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any of the employer’s regular employment sites”), the single site of employment is the location “to which they are assigned as their home base, from which their work is assigned, or to which they report.” Courts are split on whether this provision applies only to mobile employees who travel regularly and do not customarily report to an office (e.g., truck drivers or salespersons) or also covers employees who telecommute. Assuming the provision applies to telecommuters, the WARN Act regulations’ treatment is difficult to apply in practice.

The U.S. Court of Appeals for the Third Circuit is the only federal appeals court to have ruled on the question. In a 1998 opinion, the Third Circuit held that a remote employee’s single site of employment turns on who assigns the employee’s work and from where. If the employee’s direct supervisor is the original source of work instruction and works at a location other than the employer’s main headquarters, then the supervisor’s worksite is the employee’s single site of employment (as the site from which the employee was given work assignments). However, if the direct supervisor is a “mere conduit” of the work instructions that come from elsewhere in the chain of command, then the location of the original source of that instruction is the single site of employment for WARN Act purposes.

“The degree of autonomy that an intervening supervisor must have to break the chain is a disputed question of law,” a bankruptcy court in Delaware explained in a June 2022 decision applying the Third Circuit precedent. Before the bankruptcy court was a class action against a company that filed for bankruptcy after its owner was indicted on fraud charges. The company’s main facility was in Las Vegas, but it had about 130 employees in four departments who worked remotely.

The laid-off employees filed a motion for class certification and argued that “so long as corporate headquarters is playing any substantive role at all — as opposed to merely providing back-office support for the true decisionmakers who are in the field — the headquarters is the single site of employment.” Notably, the court declined to entertain that contention at the class certification stage, explaining that it went to the merits of the WARN Act claims. For its part, the defendant urged that if the court were to certify the class, a separate subclass of remote employees should be required. The court disagreed, and certified one class consisting of onsite and remote employees.

Foretelling the parties’ arguments at the merits stage, the court wrote: “plaintiffs will seek to meet their burden primarily by relying on evidence that the heads of the debtor’s engineering and sales departments, both of whom were physically located in the company’s Las Vegas headquarters, had sufficient substantive involvement that the headquarters should be treated as the site from which the employee’s work was assigned, while defendants will respond by arguing that for some number of members within the class, lower level employees, who were not located in Las Vegas, were sufficiently ‘autonomous’ such that those employees’ single site of employment was not Las Vegas.”

Although this recent decision did not involve COVID-19, it does reflect the impact the dramatic rise in telecommuting, fueled in no small measure by the pandemic, will have on WARN Act litigation going forward. “We predicted that the issue of where to count remote employees for WARN calculation purposes would be the ‘next big thing’ in WARN litigation,” said Lieberman. “We are beginning to see those cases. More significant, there isn’t a week that goes by where I don’t discuss with multiple clients the various permutations on where remote employees should or could be counted. There likely will be years of litigation on this issue.” ■

Workplace safety, tort claims

Despite measures they took to control the spread of COVID-19, employers have faced litigation arising from exposure to the virus on the job. Workplace safety violations fall within the jurisdiction of the Occupational Safety and Health Administration (OSHA). Numerous efforts to sidestep OSHA jurisdiction have been unsuccessful.

For example, in a class action filed just months into the pandemic, employees contended their manufacturing employer was contributing to the spread of COVID-19 by the way it was operating its plant. They alleged employees worked shoulder-to-shoulder, sick leave was discouraged,

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and there were limited opportunities during the workday for handwashing and sanitizing. The plaintiffs asked a federal court for an injunction ordering the employer to provide better COVID-19 protections. The court denied the motion, citing OSHA’s primary jurisdiction and pointing out that the agency had already begun a site inspection of the plant. Courts should not second-guess the agency’s determinations, said the court, particularly in the middle of a global pandemic, as courts lack “the background, competence and expertise to assess public health” and worker safety.

Many lawsuits have been filed by employees asserting tort claims like negligence and other causes of action under state common law. Here, too, though, the workers’ compensation regime forecloses most of these complaints. A retailer faced a lawsuit in Illinois arising from the death of an employee who allegedly contracted COVID-19 while working at its store. Several other employees also fell ill due to the store’s lack of proper sterilization and social distancing procedures and its failure to provide safety equipment to employees, such as masks and gloves, the suit alleged. However, a state court dismissed the action as barred by the state Workers’ Compensation Act and Occupational Diseases Act.

In a putative class action against another retailer in California, the plaintiff contended the employer maintained unsafe working conditions that exposed employees to a high risk of contracting the virus. In this instance, the employee framed the case as a “public nuisance” matter. The dispute was resolved on an individual basis, with the class and PAGA claims dismissed without prejudice. In a recently filed case, the former employee of a solar roofing company filed a PAGA representative action contending (among other claims) that the employer violated a California regulation requiring employers to maintain a written COVID-19 prevention program, pursuant to a state-law requirement that took effect in November 2020.

Negligence actions

Workplace COVID-19 exposure also can result in employer liability when non-employees contract the virus. Several lawsuits have been filed alleging that employees exposed a family member to COVID-19 after contracting the virus

at work. The most prominent of these “take-home COVID” lawsuits is pending in California and alleges the employer is liable under a public policy theory for negligently infecting an employee’s family members with COVID-19. At issue is whether under state common law, the derivative injury doctrine barred a wife’s claim that her husband’s employer was liable for her injuries resulting from contracting COVID-19 after her husband’s workplace exposure.

The U.S. Court of Appeals for the Ninth Circuit has certified two questions to the California Supreme Court:

- (1) If an employee contracts COVID-19 at his workplace and brings the virus home to his spouse, does California’s derivative injury doctrine bar the spouse’s claim against the employer?
- (2) Under California law, does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19?

Though the closely watched lawsuit is not a class action, the answer to these questions from the state high court may potentially invite classwide risk.

Takeaway

The worst of the COVID-19 pandemic appears to be behind us. However, COVID-19-related employment litigation, including class and multi-plaintiff actions, continues to be filed at a steady clip. Efforts to restore the workplace to the pre-COVID-19 status quo, including changing vaccination requirements and remote work policies, also carry lawsuit risks. In addition, sweeping workplace changes brought on by the pandemic may invite new and unforeseen legal challenges. Employers should not let down their guard. ■

Other developments

Visit our [Employment Class and Collective Actions](#) blog for news on important non-COVID-19 related class litigation.

On the JL docket

Upcoming Webinars

October 25, 2022	The Latest Updates on the NLRB and Union Organizing
October 27, 2022	Navigating ACGME Processes Through the Employment Lens (Healthcare Webinar Series)
November 2, 2022	The Tech Workplace: Day 1
November 3, 2022	The Tech Workplace: Day 2
November 17, 2022	Accessibility, Equity in Healthcare and Gender-Affirming Care (Healthcare Webinar Series)
December 7, 2022	What Academic Medical Centers Need to Know About Title IX (Healthcare Webinar Series)
December 13, 2022	Connecticut Sexual Harassment Prevention Training Program for Supervisors and Managers
December 15, 2022	Connecticut Sexual Harassment Prevention Training Program for Non-Managers
January 25, 2023	Marijuana and Drug Testing Issues in the Healthcare Workplace (Healthcare Webinar Series)

Upcoming Events

November 4, 2022	Colorado Employment Law Summit
November 17, 2022	2022 Government Contractor Employment Law Symposium
November 17, 2022	Long Island Breakfast Series: A Day in the Life of a Restrictive Covenant Attorney
December 15, 2022	Long Island Breakfast Series: A Day in the Life of a Disability Management Attorney
December 16, 2022	Surveying the Workplace Law Landscape
January 19, 2023	Long Island Breakfast Series: A Day in the Life of an Immigration Attorney

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NEXT UP

In the next issue of the *Class Action Trends Report*, we'll discuss the year's most significant employment-related class action developments.