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COVID-19 and Unprecedented: Litigation Insights, Issue 31

This 31st edition of *Unprecedented*, our weekly update on COVID-19-related litigation, follows upon two significant developments: the prospect of a Biden administration and the crossing of the 10-million-case threshold. Why highlight these developments among the many others of the past few weeks? The Biden administration seems poised to take a more hands-on approach to the COVID-19 pandemic than the Trump administration, which means the potential for increased legal obligations at the same time that cases are increasingly sharply all across the country. All that is to say that the legal risks for American businesses are set to increase as we enter the eighth month of the pandemic.

We hope you enjoy reading.

[COVID-19 Task Force](#)



Federal Judge Dismisses Amazon N.Y. Warehouse Workers' COVID-19 Lawsuit

"A federal judge dismissed New York warehouse workers' lawsuit against Amazon, ruling that their allegations about the company's handling of the COVID-19 pandemic should have been brought to the Occupational Safety and Health Administration instead."

Why this is important: As the COVID-19 pandemic continues, many workers are challenging their company's handling of the pandemic. Here, a New York warehouse worker accused Amazon of telling employees to "work at dizzying speeds, even if doing so prevents them from socially distancing, washing their hands, and sanitizing their work spaces," thereby creating a public nuisance by exacerbating COVID-19 risks. A federal judge dismissed the case ruling that the Occupational Safety and Health Administration is better situated to strike a balance between maintaining some level of operations in conjunction with some level of protective measures given the courts' lack of expertise on workplace safety and public risk. This ruling has occurred amidst growing concern and criticism of OSHA's failure to adopt mandatory COVID-19 safety standards for workplaces under the Trump administration. While it is unclear whether OSHA will require COVID safety standards in the future, it is interesting to think about who is in the best position to strike the balance between business operations and protective measures: OSHA, state legislatures, employers or the courts? --- [Victoria L. Creta](#)

[Judge Rules to Limit California Governor Powers Amid Pandemic](#)

"Sutter County Superior Court Judge Sarah Heckman issued a preliminary order for Newsom to stop making executive orders that could contradict state laws after determining one of his orders was 'an unconstitutional exercise of legislative power.'"

Why this is important: With COVID-19 cases showing no significant slowdown, we are unlikely to see a decrease in executive orders. Just last week, a judge ruled that California Governor Gavin Newsom's executive order requiring that election officials make hundreds of polling locations available on election day was unconstitutional. Although lawmakers ultimately approved the mandate, Judge Sarah Heckman ruled that Gov. Newsom's order usurped the role of the Legislature by attempting to amend or make new statutes. Judge Heckman found that the California Emergency Services Act is, indeed, constitutional, but that Gov. Newsom nevertheless overstepped his authority. As many states enter the colder months, we may begin to see an uptick in cases of COVID-19 and actions by state governors to control the spread of the virus, and we will continue to monitor the challenges that follow. --- [Megan W. Mullins](#)

[Sex Worker Lawsuit Says COVID-19 Shutdown of Nevada Brothels is Arbitrary and Harmful](#)

"Alice Little, a sex worker at the Moonlite Bunny Ranch in Lyon County, Nevada, and others are unable to earn an income since Gov. Steve Sisolak ordered brothels to close in March, according to the lawsuit."

Why this is important: A lawsuit filed by a legal sex worker in Nevada is challenging Governor Steve Sisolak's closure of brothels, arguing that since "similarly situated businesses," such as massage parlors, tattoo shops, and hair and nail salons, have been allowed to reopen, the continued closure of brothels is unfair to sex workers and their clients. The lawsuit argues that the aforementioned businesses also involve close contact between individuals, and that brothels are capable of following COVID-19 precautions. While the office of Gov. Sisolak has not commented on the lawsuit, he suggested in an unrelated October interview that reopening brothels will be considered eventually, but not in the immediate future. --- [Megan W. Mullins](#)

[McHenry Co. Judge Denies Lawsuit Seeking Restraining Order Against Illinois Indoor Dining Ban; Restaurants Across State Sue IL Over COVID-19 Restrictions](#)

"After Gov. JB Pritzker put more restrictions in place this week due to increasing COVID-19 cases across the state, lawsuits have been filed on behalf of several restaurants, but the largest suit is coming from McHenry County."

Why this is important: A second wave of COVID-19 means a second wave of lawsuits filed by businesses forced to shut their doors due to restrictions imposed by state governors. In Illinois, 37 restaurants are challenging the Governor's order calling for an indoor dining ban, claiming that his emergency powers only lasted for 30 days, and as a result, this order is void. A McHenry County judge has denied a temporary restraining order on the enforcement of the ban, meaning that it will remain in effect for at least a while longer. This denial means little for the case at this point. In order to issue a restraining order, a judge must find that a party will suffer an irreparable injury if the subject of the restraining order is not immediately stopped. While the judge may not have found that the restaurants will suffer an irreparable harm, it does not mean that they could not win when this goes to trial. In fact, the restaurants' emergency powers argument was successful in another lawsuit involving a restaurant not named in this suit and the Illinois Department of Public Health. If the restaurants'

argument is successful, it will be interesting to see if it is used in other states with time limitations on a governor's emergency powers. --- [Kellen M. Shearin](#)

Paxton Joins Lawsuit Over El Paso Coronavirus Restrictions

"Recommendations must not be confused with requirements, especially those that unlawfully burden private citizens and businesses."

Why this is important: Several months ago (or years as measured in COVID-19 time), Atlanta Mayor Keisha Bottoms and Georgia Governor Brian Kemp found themselves in a dispute over municipalities' ability to impose COVID-19-related restrictions that went beyond, or even contradicted, those imposed by the state. At issue was preemption, a legal principle that can prevent local governments from taking action in areas where the state has already spoken--particularly if the local governmental action would be inconsistent with the statewide scheme. Now this same dispute is playing out in Texas, with the same principle of preemption at the bottom of things. Texas Attorney General Paxton has taken the position that an El Paso County Judge's order conflicts with statewide rules, whereas the El Paso County Judge has presented his order as a supplement. Whether or not this dispute ends up in litigation, as did the dispute between Mayor Bottoms and Governor Kemp, it highlights the tension between different levels of government when it comes to how government should intervene in the COVID-19 pandemic. --- [Joseph V. Schaeffer](#)

Saugerties' Diamond Mills, Other Wedding Venues, Lose Lawsuit Seeking to Ease Covid Restrictions on Capacity

"A couple could have their wedding in a private house, and invite 200 people, Struzziere noted, but they could not have that large a wedding in a banquet hall."

Why this is important: A group of wedding venues in New York State have had their constitutional class action suit against New York Governor Andrew Cuomo and several New York agencies dismissed. The suit, in seeking to have a rule limiting weddings to 50 people vacated, alleged that the rules as promulgated creates a discriminatory effect based on the use of a space, specifically a space that can accommodate many people for dining service but would be limited to 50 people for weddings and other non-essential gatherings. U.S. District Court Judge Scullin, in making his ruling, noted the oddity of the rule applying differently depending on the type of service provided in a space and agreed that the promulgated rules could have been done in a more equitable way. But he ruled that under the legal standard applicable, whether the rule was arbitrary and unrelated to the public health crisis, the rule stands. The Constitution grants significant power to state officials who are politically accountable to their constituents to regulate matters of health and safety. Federal Courts, presided over by judges enjoying lifetime appointments, are loathe to disturb the judgment of state agencies to replace rules with their own notions of what is scientifically and medically sound policy. Further, Judge Scullin explained that there are differences between a wedding party, where guests are likely to mingle and remain present for hours, and a restaurant, where people eat in small groups and leave relatively faster. With both the number of people involved and the time of the interaction known to contribute to the spread of COVID-19, there is a reasonable basis for the allegedly discriminatory policy. While not binding on other District Courts handling similar cases, the analysis suggests that the federal judiciary will be an unlikely source for relief to businesses whose practices are impacted by the pandemic. --- [Risa S. Katz-Albert](#)

NJ Transit Train Conductor Died from COVID-19 Due to Lack of Safety Measures, His Widow Says in Suit

"The lawsuit accuses NJ Transit of failing to comply with state and federal guidelines on 'social distancing, the use of gloves, masks and other preventative measures' during the pandemic."

Why this is important: Transportation workers come into contact with the public by the very nature of their job. A New Jersey widow is now arguing that NJ Transit didn't do enough to protect her husband, a train conductor, from the risks of COVID-19 transmission that those circumstances entailed. The allegations are by now familiar: a lack of social distancing and personal protective equipment creating the circumstances for infection. But, the theory is less common. The widow is seeking to impose liability under workplace safety requirements found in the Federal Employer's Liability Act, thus demonstrating an additional source of risk for employers whose employees are covered under that act. --- [Joseph V. Schaeffer](#)

Insurer Cincinnati Dodges Art Studio Co.'s Virus Loss Suit

"A West Virginia federal judge ruled that Cincinnati Insurance Co. does not have to cover an art class company's revenue loss during the pandemic, holding that COVID-19 can be cleaned from surfaces and causes no physical damage."

Why this is important: In agreement with numerous other judges around the country, Judge Irene Berger of the United States District Court for the Southern District of West Virginia ruled that there is no coverage under a Cincinnati Insurance Company's commercial general liability policy for the losses that an art class company, Uncork & Create, sustained as a result of COVID-19. Judge Berger found that COVID-19 and the resulting government shutdown orders did not constitute "physical loss or physical damage" as defined under the policy. Accordingly, there is no coverage for their losses.

In this case, Uncork & Create argued that coverage should be afforded under the Cincinnati policy because the Cincinnati policy did not contain an exclusion that specifically precluded coverage for SARS-type viruses as other policies of insurance have done. However, this argument did not persuade Judge Berger. Instead, she ruled that the definition of property damage was not met. Judge Berger wrote, "Even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant." She went on to state that, "There would be nothing for an insurer to cover." She also determined that there is nothing for the insured to repair in the way of property damage, and that the loss was purely an economic loss not covered by the insurance policy.

This ruling is important because it is most likely the first ruling in West Virginia on this issue. However, Judge Berger's reasoning is in line with the numerous other lawsuits that have been dismissed in the United States as a result of the COVID-19 loss not being the result of property damage. This ruling, along with the other countless rulings finding no coverage, is likely to dissuade others from filing lawsuits contending that they have sustained "property damage" as a result of COVID-19. --- [Laura E. Hayes](#)

Wake to Resume Jury Trials. How Will County Keep Courthouse Visitors Safe from COVID?

"Shutting down jury trials can have a bigger impact in larger counties like Wake, where such trials are typically held every week compared to Orange and Durham, which have them about once a month."

Why this is important: Criminal jury trials are resuming in Wake County, North Carolina this month. On September 30, 2020, Wake County released its Jury Trial Resumption Plan. Wake County is the most populated county in North Carolina, and jury trials are typically held every week. District attorneys predict that it could take one or two years to catch up on the backlog in the system due to COVID-19. The Wake County Clerk of Superior Court's Office is responsible for summoning people for jury duty. The Clerk's Office sent out roughly 2,000 jury summonses last month and has reported that more people are asking to be excused than before the pandemic. Reasons for deferrals now include

COVID-19 related reasons including someone being at a higher risk for COVID-19; living with someone who is at a higher risk for COVID-19; and having children who need help with remote learning. Part of the plan is for the District Attorney's office to choose which cases go forward first based on factors such as witnesses' risk factors and how long the trial will take. Other parts of the plan include: masks required in the courthouse at all times; jurors provided extra masks and other safety materials; jurors to sit at least six feet apart in the front rows of the courtroom; and the judge to decide whether there is enough space for a few family members and others to attend the trial. During this unprecedented time, it will be interesting to see how courts innovate to balance safety and justice. --- [Kayla I. Russell](#)

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