

## COVID-19 LITIGATION REPORT

August 10—21, 2020

### TRENDS THAT WE ARE SEEING:

- A 30% increase in whistleblower complaints filed with OSHA, with approximately 40% of those listing specific COVID-related grievances.
- Retaliation, discrimination and/or unlawful termination lawsuits are on the rise based on improper consideration of an employee's situation during the pandemic.
- Heightened focus on workplace schedules, request for accommodations, and leave requests related to Fall childcare and school reopening decisions. Employers are quickly assessing FFCRA emergency leave obligations while attempting to maintain continuity of business operations.

### PRACTICAL CONSIDERATIONS:

1. For terminations involving a large number of employees, consider the applicability of notice requirements under the federal Worker Adjustment and Retraining Notification Act. Under the WARN Act, group layoffs of 50 or more employees may trigger a 60-day notice requirement. Under certain circumstances, an employer may forego the notice requirement if there is a "unexpected" condition outside of the employer's control. State "mini-WARN" laws may not allow for this exception. While there is not yet specific case law on enforcement of WARN resulting from the COVID-19 pandemic, ongoing high numbers of unemployment and continued compliance adjustments signal that lawsuits under the WARN Act will increase. And, as the pandemic continues, employers are unlikely to successfully cite the pandemic as an "unexpected" condition excusing them from the WARN Act's notice requirements.
2. To avoid unsafe workplace claims, be transparent with employees, customers, and clients regarding precautions taken in response to COVID and impact of pandemic on the operation of your business.
3. Consider all potential COVID-related arguments that will be made by employees when contemplating any termination decision; carefully consider requests for employee accommodations, and properly document business decisions.

### LEGISLATIVE HIGHLIGHT:

Nevada passed a law this month that provides a greater level of protection to businesses from lawsuits during the pandemic (beginning March 2020 through 2023) but also required that specific detailed regulations be enacted relating to workplace safety and COVID testing:

- **Nevada:** Nevada businesses, government entities, and non-profit organizations are protected from liability from personal injury and wrongful death claims relating to COVID exposures. To obtain the protection of this law, businesses must "substantially comply" with all controlling COVID health standards at all governmental levels. Businesses that are "grossly negligent" in violating these standards cannot benefit from this immunity and risk suspension of business licenses.

In addition, the law mandates that public accommodation facilities (hotels, casinos, and other rental spaces) provide greater protections to workers and customers. These facilities must, among other things, adopt protocols to encourage workers and guests to remain six feet apart and to create and implement an extensive cleaning and

disinfecting program. In addition, hospitality workers must be tested for COVID-19 before coming to work, and hotels and casinos must notify employees within 24 hours if they were in contact with someone who tested positive for the virus.

Other states have passed similar immunity laws relating to business and premises liability. Several states—Iowa, Georgia, Louisiana, North Carolina, Oklahoma, Utah, and Wyoming—have sought to protect public-facing businesses from claims alleging that customers contracted COVID-19 while on the premises. However, the scope of these laws vary widely by state. For instance, in Georgia, businesses receive immunity from COVID-claims unless the claimant can show the business was grossly negligent or had engaged in any other intentional, reckless, or willful conduct (and a business receives rebuttable presumption of immunity if a customer receives a receipt when entering the premises disclaiming civil liability or the business has posted a very specific warning sign disclaiming civil liability). In North Carolina, the grant of immunity extends only to healthcare facilities and other essential businesses (like grocery stores and restaurants). Other states, like Massachusetts, have granted immunity only to health care workers in a variety of fields (like hospitals, clinics and nursing homes).

None of these state’s immunity protections extend to conduct rising to the level of gross negligence, fraud, or willful misconduct, but that is generally all that these laws have in common. Instead, each state’s immunity law is significantly different, with varying covered businesses, potential safe harbors, applicable time periods, as well as possible other warnings or carve-outs. Unless the federal government were to enact a law at that level (and Congress had been debating such a law this summer, without any consensus however), businesses should ensure to understand the landscape for any potential immunity in each state they operate.

Subject Matter	Case Details
<p><b>Workplace Claims</b></p>	<ul style="list-style-type: none"> <li>• <b>Social distancing</b> (California): City seeks to close gym that remained open despite orders closing gyms and fitness centers due to the COVID-19 pandemic.</li> <li>• <b>Wrongful death</b> (Illinois): Estate of man who worked in meat packing plant sues company for failing to socially distance workers.</li> <li>• <b>Reopening</b> (North Carolina): Decision to reopen on-site campus operations to students in the University of North Carolina system during the COVID-19 pandemic unreasonably exposes university system employees to the dangerous virus and deprives them of their constitutional right to work and earn a livelihood.</li> <li>• <b>Discrimination</b>: Medical device company fired elderly employee as part of an alleged reduction in force and claimed it could not afford his position because of complications from the COVID-19 pandemic, but then posted similar positions on its website less than a month after the layoffs. The employee not allowed to apply for the position he had just been fired from, and defendant hired individuals under the age of 40 for the positions it eliminated during layoffs (Ohio).</li> <li>• <b>Retaliation claims</b>:             <ul style="list-style-type: none"> <li>○ Montessori school wrongfully terminated employee after she raised concerns about defendant's failure to close during the COVID-19 pandemic (Arizona).</li> <li>○ Worker was fired from cardiovascular clinic after voicing concerns about working during the COVID-19 pandemic because of his and his elderly wife's medical conditions (California).</li> <li>○ Healthcare staffing company fired employee after she reported failure of defendants to provide N95 mask during COVID-19 pandemic (Hawaii).</li> </ul> </li> </ul>

Subject Matter	Case Details
	<ul style="list-style-type: none"> <li>○ Rehab facility changed employee’s hours after she went home with a respiratory infection and fired employee after she could not work new hours because she had to take care of her children, who were out of school due to the Covid-19 pandemic (Florida).</li> <li>○ Nursing home fired worker after she reported unlawful Medicare practices and insufficient personal protective equipment during the COVID-19 global pandemic (New York).</li> <li>○ Worker sued welding equipment company after reported concerns to Human Resources about a supervisor's possible exposure to COVID-19 coronavirus (South Carolina).</li> <li>○ A 56-year-old general manager brings retaliation claim after being fired by hotel because he chose to follow the County and City of San Diego Orders for the safety of its employees and patrons during the Covid-19 pandemic despite knowing it would cause a major financial blow to defendant and then hired a less experience person as a replacement (California).</li> <li>● <b>Employment:</b> <ul style="list-style-type: none"> <li>○ Workers sue hotel for failing to pay promised wage when schedule was reduced only slightly due to COVID-19 pandemic (Florida).</li> <li>○ Sunglass retailer laid worker off without pay, ostensibly due to the COVID-19 pandemic, then terminated him without cause (Ohio).</li> </ul> </li> <li>● <b>FMLA (Florida):</b> Hospice worker alleges hospice center interfered with FMLA benefits during COVID-19 pandemic.</li> <li>● <b>Wages (Ohio):</b> Tree services company deducted meal periods from the wages of their hourly tree technicians, even if the employees work through their breaks, miscalculated hourly rates of pay on prevailing wage jobs, and violated the Families First Coronavirus Response Act by refusing to pay workers for time off that was necessitated by the Covid-19 pandemic.</li> </ul>
<p><b>Class Actions</b></p>	<ul style="list-style-type: none"> <li>● <b>Tuition and fees for higher education</b> (California, Florida, Kansas, Kentucky, Missouri, New York &amp; Texas): Students bring class action cases against universities to refund payment for tuition and fees after COVID-19 pandemic cancels classes and campus activities.</li> <li>● <b>Contract:</b> <ul style="list-style-type: none"> <li>○ Event organizer refused to refund tickets bought to a Grand White Dinner after the event was cancelled due to the COVID-19 pandemic (Florida).</li> <li>○ Parents bring suit against insurance company who refused to provide coverage to those whose children were not able to attend summer camp due to the COVID -19 pandemic (New York).</li> <li>○ City refused to provide participants with a refund of registration fees after changing the 2020 Broad Street Run to a virtual event due to the COVID-19 pandemic and refusing to allow the transfer of registration fees to the 2021 Broad Street Run event (Pennsylvania).</li> </ul> </li> <li>● <b>Housing (Oregon):</b> Class action against property management company that refused to sanitize common areas in the apartment building where class members live.</li> </ul>

Subject Matter	Case Details
	<ul style="list-style-type: none"> <li>• <b>Insurance</b> (Illinois): Insurance company has not provided fair and appropriate car insurance premium relief to its customers despite their liabilities changing due to the COVID-19 pandemic.</li> <li>• <b>Loans</b> (Virginia): Recipients of loans that are part of the COVID -19 relief package approved by Congress bring suit against credit reporting companies that were instructed to temporarily permit non-payment on loans in light of the pandemic but failed to updated records, causing loan recipients' credit report is being damaged.</li> <li>• <b>Price-fixing</b> (New York): Consumers bring class action against one of the country's largest egg suppliers, alleging it has doubled and even quadrupled its prices during the COVID-19 pandemic.</li> <li>• <b>Tickets</b> (Michigan): Class action against ticket fulfillment service for refusing to process cash refunds for concerts cancelled due to the COVID -19 pandemic. Ticket-buyers were only issued a voucher that would expire in one year.</li> <li>• <b>Travel</b> (New York &amp; Ohio): Travel insurance company arbitrarily refused to reimburse their travel insurance policyholders for trips that were cancelled due to the COVID -19 pandemic.</li> </ul>
<p><b>Breach of Contract Claims</b></p>	<ul style="list-style-type: none"> <li>• <b>California:</b> <ul style="list-style-type: none"> <li>○ Corporate services provider seeks to cancel the 5-year lease that was to start on May 1, 2020.</li> <li>○ Loan management company refused to extend home loan modification and did not provide homeowners with a single point of contact. Company refused to accept payments and instead issued a notice of trustee sale despite the negative impact of the COVID-19 pandemic.</li> </ul> </li> <li>• <b>District of Columbia:</b> Candle store seeks the right to terminate a lease on a retail premises because the COVID-19 pandemic has rendered the agreement impossible and commercially impracticable.</li> <li>• <b>Florida:</b> <ul style="list-style-type: none"> <li>○ Supplier did not deliver millions of gowns to help with the COVID-19 pandemic, which violated an agreement and has not returned a \$3.05 million deposit.</li> <li>○ University failed to pay hotel the liquidated damages for the cancellation of their contract for food and beverage services at hotel due to the COVID-19 pandemic.</li> </ul> </li> <li>• <b>Minnesota:</b> Insurance company has not reimbursed policyholders for their losses from the COVID-19 pandemic despite specific coverage limits in plaintiffs' policy for "interruption by communicable disease" and sought to retroactively add endorsements to the policy to qualify this coverage.</li> <li>• <b>New York:</b> Landlord is attempting to evict restaurant from space it rents in shopping mall.</li> <li>• <b>Ohio:</b> Outdoor furniture store agreed to sell buyers patio furniture and accepted an \$8,000 down payment, then closed for business due to the COVID-19 pandemic and failed to deliver the furniture or refund the down payment.</li> <li>• <b>Texas:</b> <ul style="list-style-type: none"> <li>○ Members of an alumni association sue board of association after national convention was canceled and moved to next year, along with the officer elections that would have been held.</li> </ul> </li> </ul>

Subject Matter	Case Details
	<ul style="list-style-type: none"> <li>○ Landlord sues data storage company that failed to pay rent owed under its lease and vacated the premises. Landlord says it has been unable to find a suitable replacement tenant because of the COVID-19 pandemic.</li> <li>○ Travel company failed to return money refunded by cruise line companies to buyers after the cruises were cancelled due to COVID-19 pandemic.</li> </ul>
<b>Weddings and Other Event Cancellations (Contract)</b>	<ul style="list-style-type: none"> <li>● Couple sues a ranch after paying deposit to host wedding on property with between 150 and 200 guests and being told they would either have to postpone the wedding or allow 50 or fewer guests (California).</li> <li>● Couple sues venue after they were told they had to take the "first available date" for their wedding, which was rescheduled due to the COVID-19 pandemic, even if that meant holding their wedding on a Monday (New Jersey).</li> <li>● Man seeks order that country club must return deposit after wedding was cancelled due to COVID-19 (New York).</li> <li>● Hotel failed to return \$120,625 meeting deposit after the company's trip to Philadelphia was canceled due to the COVID-19 pandemic (Pennsylvania).</li> <li>● Couples sue wedding venues that refused to provide refunds after weddings were canceled at venue due to the Covid-19 pandemic (New York &amp; Texas).</li> <li>● Caterer refused to refund money for a wedding reception that has been canceled as a result of the Covid-19 pandemic (Virginia).</li> </ul>
<b>Insurance Coverage</b>	<p>Several suits alleging business interruption and revenue/profit losses by a variety of businesses across the country. Notable cases:</p> <ul style="list-style-type: none"> <li>● <b>Mississippi:</b> Insurer seeks a declaration finding that it has no obligation under the policies to cover restaurant's claim for business income and food spoilage losses alleged to have occurred due to government shutdown orders in response to the COVID-19 pandemic.</li> <li>● <b>New Jersey:</b> Clothing retailer Ralph Lauren Corp. brings suit against insurer for refusing to cover business-interruption claims, which were filed due to the COVID-19 pandemic.</li> <li>● <b>New York:</b> Mario Badescu Skin Care sues insurer that excluded business losses incurred due to the COVID-19 pandemic, pursuant to the terms of an all-risks insurance policy.</li> </ul>

For additional information, please feel free to contact us at any time.



**Jayme L. Butcher**  
*Partner, Commercial Litigation*  
*Pittsburgh, PA*  
 412.932.2801  
 jbutcher@blankrome.com



**Brooke T. Iley**  
*Partner, Labor and Employment*  
*Washington, DC*  
 202.772.5816  
 iley@blankrome.com



**Stephanie Corson Chomentowski**  
*Partner, Commercial Litigation*  
*Philadelphia, PA*  
 215.569.5344  
 chomentowski@blankrome.com



**Deborah A. Skakel**  
*Partner, Corporate Litigation*  
*New York, NY*  
 212.885.5148  
 dskakel@blankrome.com