

The Emerging Legal Landscape of the COVID Era

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OBJECTIVES:

1. Explore important legal trends and developments arising out of the pandemic.
2. Discuss the status and outlook for the proposed HEALS and HEROES federal legislation.

INTERESTING LITIGATION TRENDS IN A WORLD WITH COVID-19

- ❖ No way to overstate the impact of COVID-19 on all aspects of life, including legal market and trends
- ❖ Litigation is no exception—new litigation and familiar claims with COVID-19 as the focal point
- ❖ Three big areas we will focus on today:
 - ❖ Employee safety
 - ❖ Whistleblower
 - ❖ Negligence

COVID-19 LITIGATION TRENDS: Employee Safety

- ❖ Large variety of employers facing suits from employees
- ❖ Concentration on employers that stayed open or are reopening:
 - ❖ Meat packing
 - ❖ Health care providers
 - ❖ Schools
 - ❖ Stores selling essentials

COVID-19 LITIGATION TRENDS: Employee Safety (cont'd)

- ❖ Suits seeking different relief:
 - ❖ Injunctions
 - ❖ Damages
 - ❖ Changes in policy
 - ❖ Further safety protections
- ❖ Example #1: *McKinley County Federation of United School Employees Local 3313 v. Gallup-McKinley County Public Schools* ([link](#) to news story)

COVID-19 LITIGATION TRENDS: Employee Safety (cont'd)

- ❖ Focus of lawsuit is State's order to allow employees to work from home where possible
- ❖ Court issued preliminary injunction and TRO on August 7 and parties are litigating permanent injunction
- ❖ **Risks**: State issues pandemic orders, instructions leave some room for interpretation, employer makes policies, and is at new risk of suits.

COVID-19 LITIGATION TRENDS: Employee Safety (cont'd)

- ❖ *William Camarota v. Rehoboth McKinely Christian Health Care Services, Inc.* (D-1113-CV-2020-00353)
- ❖ Employee claims that defendant employer provider revealed his positive COVID-19 test in violation of his rights to confidentiality
- ❖ Employee claims he disclosed positive test to CEO and Executive Director but that others learned of positive test against his wishes

COVID-19 LITIGATION TRENDS: Employee Safety (cont'd)

- ❖ *William Camarota v. Rehoboth McKinely Christian Health Care Services, Inc.* (D-1113-CV-2020-00353)
- ❖ Made complaint for HIPAA violations and confidentiality breach
- ❖ Alleges other employees made complaints against him in retaliation
- ❖ **Risks**: employer learns of positive test, at risk of lawsuit for addressing with C-Suite

COVID-19 LITIGATION TRENDS: Employee Safety (cont'd)

- ❖ *William Camarota v. Rehoboth McKinely Christian Health Care Services, Inc.* (D-1113-CV-2020-00353)
- ❖ Made complaint for HIPAA violations and confidentiality breach
- ❖ Alleges other employees made complaints against him in retaliation, then was fired
- ❖ **Risks**: employer learns of positive test, at risk of lawsuit for addressing with C-Suite

COVID-19 LITIGATION TRENDS: Employee Safety (cont'd)

- ❖ *Isabell Madrid v. Liberty Finance Co.* (D-307-CV-2020-01206)
- ❖ Madrid informed of COVID-19 exposure, begins to quarantine
- ❖ Employer asked Madrid to come back to work, Madrid declined
- ❖ Madrid ultimately fired 2 weeks later
- ❖ **Risk**: Employee quarantines, perhaps doesn't come back to work, fired, then employer sued

COVID-19 LITIGATION TRENDS: Whistleblower Claims (cont'd)

- ❖ *Lisabeth Reglewski v. Landmark of DesPlaines Rehabilitation and Nursing LLC* (Cook County, Illinois)
- ❖ Employee (DON) claims she was fired for reporting accurate number of infected residents
- ❖ Chicago Tribune: *More than 140 dead from COVID-19 at local long-term care facilities: Illinois health department* ([link](#))
- ❖ <https://btlaw.com/insights/publications/covid-19-related-workplace-litigation-tracker#Whistleblower>

COVID-19 LITIGATION TRENDS: Whistleblower Claims (cont'd)

- ❖ *Gonzalez v. Carrillo Surgery Center, Inc.* (Santa Barbara Superior Court, California)
- ❖ Nurse claims she was fired for making complaints about inadequate precautions and safety measures around COVID-19
- ❖ <https://btlaw.com/insights/publications/covid-19-related-workplace-litigation-tracker#Constructive%20Termination>

COVID-19 LITIGATION TRENDS: Whistleblower Claims (cont'd)

- ❖ *Ornelas et al. v. Central Valley Meat Co., Inc.* (Federal Eastern District of California)
- ❖ Unsafe working conditions, employees with positive tests allowed to return to work, failed to inform workers of positive tests, pressured employees to return to work. Potentially 160 positive tests.
- ❖ <https://www.natlawreview.com/article/outbreak-covid-19-public-nuisance-cases-continues>

COVID-19 LITIGATION TRENDS: Negligence Cases

- ❖ *Lopez, as P.R. of the Estate of Helen Begay, et al. v. Life Care Center of Farmington, et al.*
- ❖ Seven newly-filed wrongful death cases against Life Care Center of Farmington
- ❖ Claims Life Care Center first learned of presence of COVID-19 in facilities—in *Washington*—in March, 2020
- ❖ Claims staff told not to wear masks because it could cause residents to be afraid

COVID-19 LITIGATION TRENDS: Negligence Cases (cont'd)

- ❖ Claims all Executive Director ordered all employee tests be destroyed without being tested
- ❖ Claims other poor safety precautions such as re-used masks, lack of sterilization of equipment, staff required to continue working despite showing symptoms of COVID-19, staff working COVID-19 unit and other units
- ❖ Claims staff requested additional resources for staffing from “corporate” which were denied

COVID-19 LITIGATION TRENDS: Negligence Cases (cont'd)

- ❖ All seven cases allege essentially the same things, only dates of residents' admission, contracting of COVID-19 and death differ among complaints
- ❖ All infections and deaths were allegedly in April and May, 2020
- ❖ Cases follow familiar negligence case pattern of suits against nursing facilities, just with facility's alleged failures to properly deal with a massive pandemic as the alleged cause of death

COVID-19 LITIGATION TRENDS:

Summary

- ❖ Pandemic creates new risks to everyone
- ❖ Healthcare providers, as employers, service providers, and businesses, face many new challenges and risks:
 - ❖ Changing business practices to protect employees, customers, etc. from COVID-19, which costs money and hurts revenue
 - ❖ Uncertainty and shifting understanding of COVID-19
 - ❖ Minor, inadvertent failures can lead to litigation

State and Federal Legislation Providing for Limited Liability in COVID- Related Lawsuits

Traditional negligence law

1. Elements:

- Defendant owed the plaintiff a duty
- Defendant breached the duty to the plaintiff
- The defendant's breach caused the plaintiff's injury
- The plaintiff suffered damages

2. Primarily state common law

3. Burden of proof: preponderance of the evidence

4. Damages: compensatory damages, punitive damages for certain conduct

Nevada's Senate Bill 4

- Signed into law on August 11, 2020
- Key components:
 1. Limited immunity from COVID-related lawsuits
 2. Enhanced cleaning requirements for casinos and hotels
 3. Protections for hospitality workers
 4. Includes government entities, but does not include healthcare facilities and providers

Michigan's Senate Bill 899

- Passed the State House and Senate, but vetoed by Governor Whitmer on August 10
- Key components of Bill:
 - Expand Emergency Management Act to include immunity for front-line healthcare workers engaged in the State's response to COVID.
 - Immunity from all acts or omissions resulting in injury or death, except for willful misconduct or gross negligence.
 - Would apply to events from 3/10/20-1/1/21.

Michigan's Senate Bill 899

- Governor's stated basis for veto:
 1. Existing liability protections for healthcare providers under Emergency Management Act were sufficient.
 2. "A person receiving treatment at a hospital or a resident in a nursing home would be powerless to seek relief when they are harmed in any but the most egregious cases."
 3. The liability protections would apply in every case of emergency or disaster, regardless of specific circumstances.

“SAFE TO WORK” Act

- Introduced by Senators John Cornyn (R-TX) and Mitch McConnell (R-KY) on 7/27/20.
- SAFE TO WORK = “Safeguarding America’s Frontline Employees To Offer Work Opportunities Required to Kickstart the Economy”
- Four main sections:
 1. Liability limitations for businesses
 2. Liability limitations for health care providers
 3. Relation to labor and employment laws
 4. Liability limitations for products

Federal involvement, preemption

“As applied to the present crisis, Congress can deploy its power over interstate commerce to promote a prudent reopening of businesses and other organizations that serve as the foundation and backbone of the national economy and of commerce among the States. These include small and large businesses, schools (which are substantial employers in their own right and provide necessary services to enable parents and other caregivers to return to work), colleges and universities . . . , religious, philanthropic and other nonprofit institutions . . . , and local government agencies.”

Liability Limitations for Business

The term “**coronavirus exposure action**” means a civil action—

- (i) brought by a person who suffered personal injury or is at risk of suffering personal injury, or a representative of a person who suffered personal injury or is at risk of suffering personal injury;
- (ii) brought against an individual or entity engaged in businesses, services, activities, or accommodations; and
- (iii) alleging that an actual, alleged, feared, or potential for exposure to coronavirus caused the personal injury or risk of personal injury, that—
 - (I) occurred in the course of the businesses, services, activities, or accommodations of the individual or entity; and
 - (II) occurred—
 - (aa) on or after December 1, 2019; and
 - (bb) before the later of—
 - (AA) October 1, 2024; or
 - (BB) the date on which there is no declaration by the Secretary . . .

Liability Limitations for Business

(a) Requirements For Liability For Exposure To Coronavirus.—Notwithstanding any other provision of law, and except as otherwise provided in this section, no individual or entity engaged in businesses, services, activities, or accommodations shall be liable in any coronavirus exposure action unless the plaintiff can prove **by clear and convincing evidence** that—

(1) in engaging in the businesses, services, activities, or accommodations, the individual or entity was not making **reasonable efforts in light of all the circumstances to comply** with the applicable government standards and guidance in effect at the time of the actual, alleged, feared, or potential for exposure to coronavirus;

(2) **the individual or entity engaged in gross negligence or willful misconduct** that caused an actual exposure to coronavirus; **and**

(3) **the actual exposure to coronavirus caused** the personal injury of the plaintiff.

Liability Limitations for Healthcare Providers

—Notwithstanding any other provision of law, and except as provided in subsection (b), no health care provider shall be liable in a coronavirus-related medical liability action unless the plaintiff can prove by **clear and convincing evidence**—

- (1) gross negligence or willful misconduct by the health care provider; and
- (2) that the alleged harm, damage, breach, or tort resulting in the personal injury was directly caused by the alleged gross negligence or willful misconduct.

(b) EXCEPTIONS.—For purposes of this section, acts, omissions, or decisions resulting from a **resource or staffing shortage** shall not be considered willful misconduct or gross negligence.

Liability Limitations for Healthcare Providers

(A) . . The term “coronavirus-related medical liability action” means a civil action—

(i) brought by a person who suffered personal injury, or a representative of a person who suffered personal injury;

(ii) brought against a health care provider; and

(iii) alleging any harm, damage, breach, or tort resulting in the personal injury alleged to have been caused by, be arising out of, or be related to a health care provider’s act or omission in the course of arranging for or providing **coronavirus-related health care services** that occurred— [12/1/19-10/24] . . .

Liability Limitations for Healthcare Providers

The term “coronavirus-related health care services” means services provided by a health care provider, regardless of the location where the services are provided, that relate to—

(A) the diagnosis, prevention, or treatment of coronavirus;

(B) the assessment or care of an individual with a **confirmed or suspected case of coronavirus**; or

(C) the care of **any individual** who is admitted to, presents to, receives services from, or resides at, a health care provider for any purpose during the period of a Federal emergency declaration concerning coronavirus, **if such provider’s decisions or activities with respect to such individual are impacted as a result of coronavirus.**

Products, and other provisions

1. Pandemic products and security countermeasures
2. Relation to federal labor and employment laws
3. Limitations on damages, punitives
4. Cause of action for frivolous demand letter, punitive damages, fee shifting
5. Statutes of limitation
6. Proportionate liability
7. Path to federal court
8. Heightened pleading requirement

MORE FEDERAL COVID RELIEF?

4 Major COVID Relief Acts Passed:

- ❖ 3/6--Coronavirus Preparedness & Response Supplemental Appropriations Act
- ❖ 3/18—Families First Coronavirus Response Act
- ❖ 3/27—CARES Act
- ❖ 4/24—Payroll Protection & Health Care Enhancement Act

MORE FEDERAL COVID RELIEF?

HEROES & HEALS:

HEROES Act:

- ❖ House of Representatives proposal
- ❖ First formal new emergency stimulus bill after CARES
- ❖ Passed by the House 5/15/2020

HEROES and HEALS (cont'd)

HEROES Act (cont'd):

- ❖ *\$1 trillion to state, local, and tribal governments*
- ❖ *\$200 billion heroes' fund to provide hazard pay for essential workers*
- ❖ *\$75 billion for testing, tracing & treatment*
- ❖ *Another round of \$1200 stimulus checks*

HEROES and HEALS (cont'd)

HEROES Act:

- ❖ Expanded payroll protection, worker safety requirements, support for small businesses & nonprofits
- ❖ Preserves health insurance coverage & extends unemployment benefits, housing assistance, & food security
- ❖ Resources for safe elections, accurate census and preserving the USPS

HEROES and HEALS (cont'd)

HEALS Act: Health, Economic Assistance, Liability Protection, and Schools Act.

- ❖ Senate proposal
- ❖ Introduced 7/27/2020
- ❖ 8 separate bills

HEROES and HEALS (cont'd)

HEALS Act (cont'd):

- ❖ *Safe to Work Act – liability protections*
- ❖ American Workers, Families, & Employers Assistance Act
 - \$200/week unemployment
 - Same \$1200 stimulus as CARES Act
 - Extends other CARES Act provisions
- ❖ Continuing Small Business Recovery & Paycheck Protection Program Act

HEROES and HEALS (cont'd)

HEALS Act (cont'd):

- ❖ *Safely Back to School & Back to Work Act*
- ❖ Trust Act – rescue committees to look into endangered federal trust funds
- ❖ *Restoring Critical Supply Chains & Intellectual Property Act*
- ❖ Supporting America's Restaurant Workers Act
- ❖ *Additional Emergency Appropriations*

HEROES and HEALS (cont'd)

Comparison (HEROES vs HEALS):

- ❖ >\$3T vs \$1T
- ❖ No Liability Protection vs Protection
- ❖ Testing, Tracing & Treatment vs. None

HEROES and HEALS (cont'd)

Status:

- ❖ Expected to be on President's desk by now
- ❖ Senate in recess until after Labor Day
- ❖ House recessed, but called back to address USPS issues
- ❖ No timeline

HEROES and HEALS (cont'd)

Examples of more information on HEROES & HEALS:

- ❖ <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/documents/Heroes%20Act%20One%20Pager.pdf>
- ❖ <https://www.rpc.senate.gov/policy-papers/update-on-the-coronavirus-response-heals-act>
- ❖ <https://www.arnoldporter.com/en/perspectives/publications/2020/07/coronavirus-legislative-update>

Questions?

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