

# Litigation Trends in the COVID-19 Era

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# Litigating During a Pandemic...

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- Increase in case filings and investigations
  - Movement in the labor market
  - More employee complaints/whistleblower concerns
  - More discontent in the workplace

# Litigating During a Pandemic

- Remote depositions
- Remote mediations
- Civil trials postponed/delayed
- Different jury pool
- Less court hearings (or via Zoom)

# COVID-19 Transmission Cases

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- Employment wrongful death
- Customer wrongful death and class actions
- Nursing home wrongful death

# COVID-19 Transmission Cases

- *Tony Evans, Special Administrator of the Estate of Wando Evans, Deceased v. Wal-Mart, Inc., et al.*, Case No. 2020L003938, Circuit Court of Cook County, IL, April 6, 2020
  - Alleges that Wal-Mart and landlord failed to maintain a safe and healthy environment

# COVID-19 Transmission Cases

- *Blanca Esther Parra, as common law spouse and as next of friend to B.P. & L.P. (minors), et al. v. Quality Sausage Company, LLC., Case No. DC-20-06406, Circuit Court of Dallas County, May 1, 2020*
- *Rural Community Workers Alliance and Jane Doe v. Smithfield Foods, Inc. and Smithfield Fresh Meats Corp., Case No. 5:20-cv-06063, U.S. District Court, Western District of Missouri, April 23, 2020*



# COVID-19 Transmission Cases

- *Robert Archer et al. v. Carnival Corporation & PLC; Princess Cruise Lines Ltd.; and Fairline Shipping International Corporation, Ltd.*, Case No. 3:20-cv-02381, U.S. District Court, Northern District of California, April 8, 2020
  - Complaint alleges that the defendants “knew or should have known that cruise ships pose an especially severe risk of viral outbreak”

# COVID-19 Transmission Cases

- *Deborah De Los Angeles et al. v. Life Care Center, Case No. 20-2-07689-9*, King County Superior Court, April 10, 2020
  - A daughter sued the facility for her mother's wrongful death, bringing claims for: 1) Violation of the Abuse of Vulnerable Adults Act; 2) Negligence; and 3) Fraud, Fraudulent Concealment, and Negligent Representation

# What employment litigation are we seeing?

# Types of Cases

- Breach of contract
- Constitutional rights
- Failure-to-pay claims
- Family and Medical Leave Act
- Misclassification
- Non-compete

# Types of Cases

- WARN Act
- Whistleblower
- Workers' compensation
- Workplace safety
- Wrongful termination, discrimination,  
Failure to accommodate

# Wrongful Termination, Discrimination, Failure to Accommodate, and Workplace Safety

# Wrongful Termination

- *Rendon v. South Dade Chamber of Commerce, Inc.* (S.D. Fla. Nov. 2, 2020)
  - Plaintiff sued under EPSLA, FFCRA, and FLSA
  - Still pending

# Wrongful Term/Discrimination

- Pre-litigation demand letter
  - Plaintiff alleged age discrimination, disability discrimination, disability retaliation, and discrimination based on association with a person with disability, and failure to pay sick leave under EPSLA
  - Confidential settlement



# Workplace Safety

- Over 10,000 federal OSHA complaints
- *Palmer, et al. v. Amazon.com* (E.D.N.Y.)
  - Complaint filed by employees alleging claims of public nuisance, breach of duty to provide safe workplace, failure to pay COVID-19 leave, and injunctive relief
  - 11/2/2020 Order dismissing complaint

# Wrongful Term/Discrimination

- Most prevalent claims involve age and disability
  - Older/disabled workers more susceptible?
  - Plaintiff's attorneys arguing employers using pandemic as cover to push older workers out.
- What criteria are employers using to make staff cut decisions? Documentation?

# Discrimination

- No good deed goes unpunished
  - Some employers telling or urging older/disabled workers to work from home out of concerns about health
  - EEOC guidance: Employers are free to provide greater flexibility to older/disabled workers, but may NOT exclude them from workplace solely because of age/disability

# Failure to Accommodate

- Teleworking post-pandemic
  - Not automatic. Employer does not need to eliminate essential functions of job as an accommodation or if it causes undue hardship.
  - Fact-specific determinations.
  - BUT, as practical matter, employers will have tougher time justifying decisions not to allow employees to work from home

# Workplace Safety

- Providing adequate PPE, if necessary?
  - And training!
- Cleaning/sanitization efforts
- Social distancing/face covering protocols
- Preparedness plan in place?

# Wage & Hour, Failure to Pay

# Missing Payday

- It can only get worse
- Penalties and fees
- Litigation expenses and costs, liquidated damages, attorney fees and other relief

# Failure to Pay for Sick Time

- *Maria Duran and Jennifer Crouse v. West Maple Dental Specialists, P.C.*
- Bundling unrelated claims



# COVID-19 Screening

- FLSA mandates employers must pay for the principal activity or activities which an employee is employed to perform
- What about time spent in line for COVID screening?
- No court guidance yet

# Exempt vs. Non-Exempt

- Converting employees to exempt to avoid paying overtime – don't do this
- Remote working
  - Can blend with or lead to discrimination claims
  - Wage claims forthcoming?

# Other Non-Employment Issues

- Prevention by Government Order
- Force Majeure
- Frustration of purpose
- Impossibility

**What's to come in the next  
6-12 months?**

# Looking Ahead to Litigation...

- Vaccination policies
- Remote work accommodations
- Extension of FFCRA or new leave law
- Cybersecurity
- Trade secrets/non-compete litigation

# Presenters



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