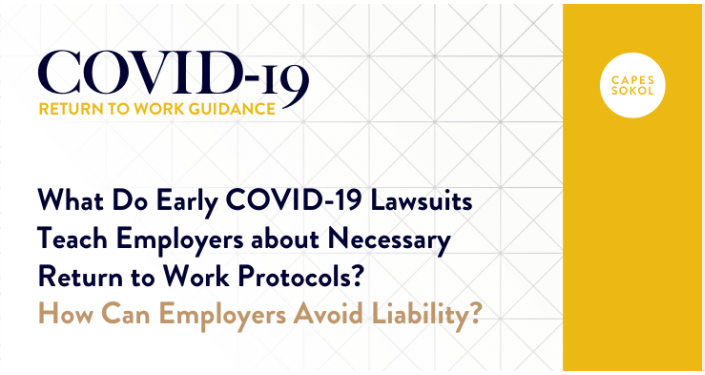
WHAT DO EARLY COVID-19 LAWSUITS TEACH EMPLOYERS ABOUT NECESSARY RETURN TO WORK PROTOCOLS? HOW CAN EMPLOYERS AVOID LIABILITY?

Posted on May 29, 2020 by Traci Dale Pupillo



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It is widely predicted that COVID-19 related lawsuits will flood the court systems in the coming two to three years and that those cases may continue to be litigated over the next decade. Indeed, depending on the source, it appears that almost 1,000 COVID-19 related cases have already been filed in state and federal courts. Claims have been filed against colleges and universities, hospitals and senior-living facilities, insurance companies, cruise lines, and entertainment venues to name just a few. Included in this first wave of lawsuits are a number of cases against employers.

These cases assert claims for:

- failure to adequately protect employees from dangerous conditions,
- violations related to leaves of absence,
- failure to compensate employees for COVID-19 related overtime, and
- discrimination/retaliation against employees for complaining about dangerous working conditions.

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As businesses in Missouri and across the country begin to reopen, the number of lawsuits against employers will likely rise exponentially as employers attempt to navigate issues related to returning to work. **Employers face potential liability not just from employees, but also from governmental entities that enforce the various reopening orders issued by state and local municipalities.** While it will take years to fully resolve the novel issues raised in lawsuits spawned by the COVID-19 pandemic, there are some lessons to be learned from early rulings in these cases.

A number of cases have already been filed asking courts to intervene and dictate what safety measures employers must follow to protect employees. Because employees are seeking emergency relief, courts have already made preliminary rulings on this issue.

Courts may defer to regulatory agencies to enforce workplace safety issues when employees file suit BUT employers should be prepared to show that they are taking meaningful steps to protect employees.

Employees' Ability to Challenge Employers' Return-to-Work Protocol in Court

Rural Community Workers Alliance and Jane Doe v. Smithfield Foods, Inc. **On April 23, 2020**, a group of employees of Smithfield Foods Inc., the world's largest pork processor, filed a legal action against their employer in the United States District Court for the Western District of Missouri. Their lawsuit alleged that despite COVID-19 related health concerns, Smithfield failed to provide employees with adequate personal protective equipment and forced them to work in unsafe and unhygienic conditions.

On May 5, 2020, Judge David Gregory Kays dismissed the case:

> *"After carefully reviewing the motions and the existing record, the Court holds that it should decline to hear this matter pursuant to the primary-jurisdiction doctrine to allow the Occupational Health and Safety Administration ("OSHA") to consider the issues raised by this case."*

Opinion by Judge Kays, May 5, 2020 The Court noted OSHA is "better positioned" to evaluate the employees' complaints, and the Court's consideration could lead to inconsistent regulation within the industry.

Although the Court's ruling on the primary-jurisdiction issue was dispositive, Judge Kays went on to find that even if it were not, *plaintiffs had not met their burden to establish entitlement to preliminary injunctive relief.* In analyzing the factors that must be met for an award of injunctive relief, the Court noted Smithfield's inability to completely eliminate the risk of contracting COVID-19, but stated that it is "important that employers make meaningful, good faith attempts to reduce the risk." Key to the Court finding that preliminary injunctive relief was not warranted was the fact that Smithfield had demonstrated that it had taken "significant measures … to protect its essential workers from COVID-19."

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Thus, employers who wish to minimize the risk of liability associated with employees' return-to-work should ensure that they are complying with all applicable governmental orders and guidance and document the steps that they are taking to do so.

Further, Judge Kays' opinion in the Smithfield lawsuit suggests the Western District and other federal courts may continue to defer to OSHA to evaluate similar employee complaints regarding employers' back-to-work safety precautions.

OSHA Recommendations for Employers

OSHA has released non-binding recommendations to prepare workplaces for COVID-19. These guidelines emphasize the same general COVID-19 response measures as the CDC and other governing bodies, including social distancing, frequent hand-washing, and encouraging sick employees to stay home. **OSHA clarified that these guidelines create no new legal obligations for employers.**

However, OSHA has asserted the General Duty Clause, which requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm," applies to preventing occupational exposure to COVID-19. OSHA has acknowledged that it will be difficult to establish whether a particular COVID-19 case is work-related, "especially when an employee has experienced potential exposure in and out of the workplace." But OSHA requires employers to conduct an analysis and make a reasonable determination.

House of Pain Lawsuit and Local Government Enforcement of Public Health Orders

Courts appear more amenable to stepping in when it is a state or local government that files suit to enforce COVID-19 related orders and guidance.

- **On March 23, 2020,** the St. Louis County ordered all non-essential businesses to cease activity.
- **On May 8, 2020,** the County issued new guidelines and began easing the restrictions on some businesses effective on May 18, 2020. However, due to the "very high risk of transmission of COVID-19", gyms and fitness centers were specifically prohibited by the new guidelines from operating or re-opening.
- **On May 11, 2020**, St. Louis County filed suit against House of Pain, a gym with locations in Chesterfield and Maryland Heights. The gym's owner had consistently maintained his intent to remain open despite the county's Public Health order.

St. Louis County asserted:

> *" is empowered by the Missouri Constitution, the Statutes of Missouri, and its County Charter with the police power to issue and enforce business restriction and closure orders for the protection of the health of St. Louis County residents."*

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- **On May 18, 2020,** House of Pain counter-sued the St. Louis County Executive, the acting director of the St. Louis County Department of Public Health, and the St. Louis County Counselor for Fourteenth Amendment violations.
- **On May 22, 2020**, Judge Ronnie L. White of the United States District Court for the Eastern District of Missouri denied House of Pain's motion to dismiss and temporarily enjoined the gym from operating at either location. In its Memorandum and Order denying House of Pain's motion to dismiss, the Judge White noted the Western District's application of the primary-jurisdiction doctrine in the *Smithfield* case.

However, the Eastern District held that the doctrine is:

> *"inapplicable to the present cause of action" because ", as with other courts, is certainly capable of rendering a decision regarding whether are engaged in a public nuisance – either under common law or under the County nuisance ordinance."*

Judge White held that the county's new guidelines are a valid exercise of the County's authority under the Missouri Constitution and apply to House of Pain. Further, the Court held that House of Pain's argument that the new guidelines and Stay-at-Home Order are unconstitutional are "not well taken."

In addition to forcing House of Pain to close, the Court ordered House of Pain to maintain a complete record of everyone who entered either of the gym's locations since it opened for public use on May 4, 2020. House of Pain will be sanctioned for any violations of the Court's order. The order will be in effect for 14 days or until the Court determines whether it will issue a permanent injunction.

While Judge White's ruling addressed whether House of Pain could operate given the business closure requirements issued by St. Louis County, his ruling that that the county's guidelines are a valid exercise of the county's authority under the Missouri Constitution would be similarly applicable should governmental entities seek court enforcement of orders and guidance on returning to work.

Return-to-Work Protocol and Missouri Employers' Potential for Liability

The state of Missouri implemented a statewide Reopening Order on May 4, 2020 which allows all businesses to reopen, with specific requirements for retailers and restaurants. The state has also recommended businesses minimize business travel, encourage telecommuting, develop an infectious disease preparedness plan that includes contact tracing, and monitor employees for symptoms. However, St. Louis County and St. Louis City followed with their own reopening guidelines, which are significantly stricter.

The County's new Public Health order requires businesses to disinfect surfaces, provide breaks for employees to wash hands, train employees on disinfection procedures, provide face masks, conduct daily screenings for symptoms of COVID-19, and encourage employees to quarantine or isolate if they believe they have COVID-19 or have been in contact with someone who has tested

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positive. Businesses that engage in direct contact with the public have additional restrictions.

Further, some businesses (such as House of Pain) continue to be prohibited from reopening. The county has asserted that businesses who fail to abide by Public Health orders will be subject to civil and criminal penalties. Furthermore, it maintains the Director of Public Health has the authority to force businesses to close.

In addition to the mandates of the Public Health Order mentioned above, St. Louis County has promulgated detailed recommendations for businesses who plan to reopen. These recommendations vary by the type of business. Some recommendations include implementing staggered shifts for essential employees and creating physical barriers between employees when possible. However, the county has stressed these recommendations are superseded by Public Health orders and other laws and regulations that apply to a business.

St. Louis City has recommended similar back-to-work precautions. The City will implement a phased reopening. Among other requirements, the City has ordered businesses to provide face masks to all employees or volunteers working within the business and to require employees to wear masks unless the employee is working alone or outside and maintaining proper social distance. Like the County, the City is still requiring some businesses, such as public pools and banquet halls, to remain closed.

St. Louis County has signaled it intends to zealously enforce its COVID-19 related restrictions and penalize businesses who flout the rules. In a letter to the St. Louis County Counselor Beth Orwick and in its countersuit, House of Pain, though its attorney W. Christopher McDonough, challenged the County's authority to restrict the business and maintained any legal action by the county against the business would be illegal.

But, as previously noted, the Eastern District did not find this argument persuasive. Any further challenges to the County's new guidelines are also likely to be unsuccessful. Businesses in the St. Louis metropolitan area should educate themselves on all relevant guidelines and follow them.

Takeaways

Employers who wish to minimize the risk of liability associated with employees' return-to-work should:

- Be prepared to show that they are taking meaningful steps to protect employees
- Ensure that they are complying with all applicable governmental orders and guidance
- Document the steps that they are taking to do follow orders and guidance

The guidelines and restrictions discussed are not exhaustive. Further guidelines can be found in the links below.

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Additional Resources

- OSHA's Guidance on Preparing Workplaces for COVID-19
- Missouri Statewide Reopening Order
- St. Louis County's Business and Individual Guidelines for Social Distancing and Re-Opening
- St. Louis County's COVID-19 Safe Operating Protocols
- St. Louis City Phase I Reopening Standards and Guidance
- CDC's Interim Guidance for Businesses and Employers Responding to Coronavirus Disease (COVID-19)

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