



ACC ST. LOUIS CLE  
**Litigation Landmines  
When Returning to Work**

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# Presenters

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# Topics

- False Advertising Risks
- Anti-Price Gouging Laws and Emergencies
- False Claims Act Actions and COVID-19
- Force Majeure Clauses in Contracts
- Other Key Contractual Terms to Watch
- Bankruptcy
- Face Coverings in the Workplace
- Collecting Employee Data
- Wage and Hour Concerns
- Beware of...
- Employee Liability Waivers
- Update on Recent Claims, Lawsuits, Risks

# False Advertising Risks

- **Be wary of referencing COVID-19 in marketing products or conducting consumer outreach.**
  - This is a particular issue for products or services intended to address virus-related challenges.
- **Does a statement amount to “unfair or deceptive acts or practices in or affecting commerce”? Is a statement “untrue or misleading” to consumers?**
- **Sources of risk:**
  - Government enforcement actions.
    - Federal Trade Commission (FTC); Lanham Act; Food & Drug Administration (FDA); State Attorney General offices.
  - Consumer lawsuits.
  - Competitor lawsuits.
- **Signs point to government actors adopting an aggressive stance in the wake of the pandemic.**

# Anti-Price Gouging Laws and Emergencies

- **Patchwork of state anti-price gouging laws.**
  - Problematic for many retailers, service providers and producers operating in multiple states.
- **Main components of most state laws:**
  - What is the triggering event?
  - What are the covered goods and services?
  - What constitutes an impermissible price increase?
  - What are the penalties?
- **Some states clearly define the above components and others remain more discretionary.**
  - Missouri, for example, is relatively broad/vague.
- **No corresponding federal law.**
  - BUT, the FTC does have authority to investigate price gouging in emergencies.
  - AND in a March 24, 2020, memorandum, Attorney General Barr referenced the creation of a price gouging task force.
- **Price management is important as is taking stock of operations that involve the multistate sale or provision of goods or services.**

# False Claims Act Actions and COVID-19

- **FCA provides for treble damages and civil penalties against parties who submit materially false claims for payment to the government.**
  - Whether knowingly, in deliberate ignorance, or reckless disregard of a claim's falsity.
- **Enforcement often ratchets up after crises.**
  - Intensified search by authorities for fraud.
  - Enhanced interest by private parties to capitalize on qui tam relator's "bounty."
- **Complexity of CARES Act likely to amplify this pattern.**
- **Minimize FCA exposure by:**
  - Reviewing rules and requirements of relevant program (CARES Act, FAR, etc.) closely and strictly complying.
  - Documenting your understanding of the rules and communicating that understanding to the government.
  - Evaluating existing compliance programs and adherence to best practices.

# Force Majeure Clauses

- **What are your rights/what is your exposure vis-à-vis suppliers, vendors, and/or customers.**
  - Wide variance in terms that attempt to address the risk of unforeseen events outside the reasonable control of a party.
- **If an event falls within the scope of your contract's force majeure term, a party's obligations under an agreement may be excused or modified.**
- **Will COVID-19 amount to a force majeure event?**
  - Express terms of the contract will govern.
    - No uniform formulation of events covered by these types of clauses.
    - Be aware of ambiguity arguments.
- **Be mindful to what degree performance is excused.**
- **Exercise caution before invoking; confirm non-performance is compliant and does not result in breach.**

# Other Key Contractual Terms to Watch...

## ...other than force majeure:

- Payment obligations and penalties
- Events constituting default
- Renewal procedure
- Termination rights
- Business continuity
- Exclusivity
- Extraordinary events (other than force majeure)
- Dispute resolution mechanisms
- Insurance requirements
- Notice provisions
- Health and safety requirements
- Reporting obligations

Consider creative/collaborative ways mitigate and reallocate risk as strict enforcement of contractual terms and remedies may not always be best approach.



# Bankruptcy Primer

- Anticipated surge in Chapter 11 filings.
- Goal to reorganize to keep business alive and pay creditors over time.
- When a customer or supplier files, business as usual?
  - Particularly complex assessment when you are talking about a customer (ex. getting paid for post-bankruptcy sales).
- International companies and Chapter 15.
  - Mechanism by which a representative of a corporate bankruptcy outside the U.S. can obtain access to U.S. courts.

# Face Coverings in the Workplace

- **Cloth masks, bandanas, or other face coverings.**
  - Mitigates the risk of exposure and provides a defense to claims by employees and visitors.
    - Be prepared to discipline employees who refuse to comply and take appropriate action in line with established policy.
  - But understand that some employees may request ADA accommodations.
    - If an employee cannot wear a mask due to a medical condition, be ready to engage in the interactive process and come up with creative solutions.
    - Other employees may want to know why someone is absent, not wearing a mask, or receiving a accommodation. Remember that you must maintain confidentiality.

# Collecting Employee Data

- **Heat scanners, temperature screening and contact tracing devices.**
  - Establish a written policy.
  - Ensure compliance with state biometric privacy laws, like the Biometric Information Privacy Act (BIPA).
  - Maintain employee medical information in a medical file separately from personnel records.
- **Failure to do so can result in a myriad of issues.**
  - Claims based on state and local privacy laws.
  - Data breach notification.
  - ADA claims.

# Wage and Hour Concerns

- **What is compensable time?**

- Under the FLSA, employee time is compensable if it is “integral” and “indispensable” to the employee’s “principal activity.”
  - Under the Portal to Portal Act, employees do not receive compensation for time spent “walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform” or for time spent in “activities which are preliminary to or postliminary to said principal activity or activities.”
  - But, courts have held that some pre and post activities may be compensable depending on the circumstances.
    - If the employee is performing an activity (1) which is required and for the employer’s benefit; (2) necessary perform principal activities; or (3) necessary to protect an employee against unusual workplace dangers, it is compensable.

- **There is no short answer.**

- Carefully consider whether the following are integral to your employees’ principal activities:
  - time waiting for a health assessment, temperature check; or
  - time spent putting on a face covering, or washing hands.
- Least risky approach is to consider these activities compensable time.
- Make sure to check the CBA if you have a unionized workforce.

# Beware of...

- **Concerted action by employees.**

- Employees have a right under the NLRA to engage in concerted and protected activity. Be on the lookout for employees who are complaining as a group. You should analyze and consider all risks before taking any adverse employment action, including termination.

- **Protected activity and whistleblower claims.**

- Individual employees also have a right to raise good faith complaints. Swiftly investigate any concerns pursuant to established policy and take corrective action if necessary.

- **ADA/ADEA issues.**

- Know what you can and can't ask employees regarding their health condition and understand some actions may be prohibited.
  - For instance, the EEOC recently issued guidance prohibiting employers from requiring employees submit to an antibody test before returning to work. Temperature checks and actual virus tests, however, are permitted.
  - The EEOC has continued to issue evolving guidance on these issues. In the last several months, it has also rescinded prior guidance.

# Employee Liability Waivers

- **Understand the limitations:**

- Most jurisdictions will not enforce waivers of gross negligence, recklessness, or intentional torts.
- Cannot prospectively waive workers' compensation claims.
- Cannot protect employers from OSHA complaints.

- **Bottom line:**

- Courts generally disfavor these types of agreements because employees have less bargaining power.
- These may be more effective for guests or customers.

# Update on Recent Claims, Lawsuits, Risks

- **Rural Community Workers Alliance, et al. v. Smithfield Foods, Inc., et al.**
  - Case filed in federal court in Missouri.
  - Defendants owned/operated a meat processing facility.
  - Plaintiffs filed an action for declaratory judgment asking the court to declare that Defendants' practices in the facility constituted a nuisance and that Defendants had breached their duties to provide a safe workplace in connection with COVID-19. Plaintiffs asked for a temporary restraining order and an injunction.
  - Defendants moved to dismiss/stay the action.
  - The court granted the motion to dismiss, deciding that OSHA should hear the matter under the primary-jurisdiction doctrine. Even if it did not apply this doctrine, the court held that Plaintiffs did not meet their burden of proof.
- **Key Takeaway: Develop, communicate, apply and enforce your workplace safety practices addressing COVID-19.**

# Update on Recent Claims, Lawsuits, Risks

- **Benjamin Csoka, et al. v. Royal Caribbean Cruises, Ltd.**
  - Class action case filed in federal court in Florida.
  - Employees of multiple cruise vessels alleged claims under admiralty law. They claimed that Royal Caribbean Cruises failed to identify the risks of COVID-19 in the spring of 2020 and then failed to appropriately quarantine, test and address associated risks after that.
  - Royal Caribbean Cruises moved to dismiss because the employees had not alleged any actual injuries or damages associated with COVID-19.
  - The employees amended their complaint to allege injuries and damages. The court denied the motion to dismiss as moot. No response has been filed to the amended complaint.
- **Key Takeaway: Identify and expeditiously comply with the latest guidance offered by applicable authorities.**



# Update on Recent Claims, Lawsuits, Risks

- **Magdiela Gonzalez, et al. v. Gojo Industries, Inc.**
  - Consumer class action case filed in federal court in New York.
  - Defendant makes a hand sanitizer product. Plaintiffs allege that Defendant misrepresented the efficacy of its product in combating COVID-19.
  - Plaintiffs filed actions for breach of warranty, fraud, negligent misrepresentation, unjust enrichment and violations of state consumer fraud statutes.
  - Plaintiffs linked their claims to a warning letter Defendant received from the Food and Drug Administration.
  - Defendant has not filed a response.
- **Key Takeaway: Coordinate with your regulatory counsel before making representations about your products and respond to agency actions or warnings quickly to create your record about your products.**

# Update on Recent Claims, Lawsuits, Risks

## ■ OSHA Complaint – Ohio Nurses Association

- The Ohio Nurses Association made a formal complaint to OSHA about safety practices at the Ohio State University Wexner Medical Center.
- The group complained that the medical center did not provide eyewear, masks or other personal protective equipment to nurses working with patients suffering from COVID-19, causing multiple nurses to contract COVID-19, or requiring them to quarantine.
- There is no record of action against the medical center.

- **Key Takeaway: Develop strong disease control policies. When you form teams to prepare policies to address safety concerns in the workplace, include an attorney on the team to cloak drafts of policies with the attorney-client privilege.**

# Update on Recent Claims, Lawsuits, Risks

## ■ Whistleblower Risks

- Complaints are common – assume you will face at least one complaint as you return to work.
  - OSHA is inundated with COVID-19-related complaints.
  - The EEOC has reported an increase in accommodation-denial charges.
  - Local governments have established hotlines to report numerous violations.

- **Key Takeaway: If you get a complaint from an employee, respond and describe in detail what you are doing to protect your workforce.**



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