

## This Week's Feature

# Employment and Tenancy Litigation Due to COVID-19, and Legislative Responses

By Denis F. Alia and Brian D. Fishman



Over the past several months, a wave of lawsuits has been filed against employers and/or landlords as a result of the coronavirus. Below, we discuss some of these lawsuits, as well as some of the legislative responses to COVID-19 litigation.

## Employment Discrimination

Allegations of employment discrimination during the pandemic have generally taken one of two forms: either plaintiffs claim that they were terminated because they contracted COVID-19, in violation of disability discrimination prohibitions, or the employee claims that he or she was terminated for a discriminatory reason, but COVID-19 was used as a pretext to conceal the real reason for such termination.

In one case, a plaintiff took a one-month leave of absence due to contracting COVID-19. After testing negative and planning to return to work, she was terminated due to concerns that she could still be infectious. The plaintiff claimed she was terminated illegally because of her disability, *i.e.*, the contraction of COVID-19. *Worthy Tihara v. Wellington Estates LLC*, C.A. No. OCNL001409-20, June 15, 2020, Ocean County, New Jersey. In a recent case in Pennsylvania, an African-American plaintiff who was the only non-white employee in her department brought suit on the basis of discrimination, claiming that while she was told she had been laid off due to the pandemic, she was the only department member eliminated, while two new, white employees had been hired in the prior month. *Chynelle D. Branch v. Korman Communities*, 2:20-cv-03754-JP, August 2, 2020, E.D. Penn. In Ohio, an African-American plaintiff claimed that she had been harassed due to her race, but when she lodged complaints about her company's handling of COVID-19, she was terminated for poor work performance. She filed suit against her employer, alleging the reasons given for her termination were pretext to conceal race discrimination. *Shatila Bell v. Solon Pointe at Emerald*

*Ridge, LLC, et. al.*, CV-20-937087, September 11, 2020, Cuyahoga County, Ohio.

The Equal Employment Opportunity Commission (EEOC) has issued guidance on the interplay between the Americans with Disabilities Act and COVID-19, including outlining specific restrictions on what employers can require of their employees. To avoid claims that any termination is due to a COVID-19 related disability, or that termination during the pandemic is a pretext for an illegal firing, employers should closely follow the EEOC guidelines and use due care to ensure fair, equal treatment of all workers, especially while employees work remotely, or take leaves of absence deemed necessary under newly issued protocols.

## Wrongful Death

Employers are rarely found liable for employee injuries in the workplace, as workers' compensation systems usually restrict the extent of an employer's liability toward its employee for injuries tied to the workplace. The coronavirus pandemic may change this trend. The notion behind some of the early lawsuits is that employers failed to adhere to state and federal guidance for preventing the spread of the virus, including use of face masks and physical distancing. Plaintiffs allege that because of such failures, any workers' compensation bar does not apply, and the employer is not immune from employee lawsuits. For instance, the widow of a Safeway employee in California who died of COVID-19 sued her husband's employer, alleging that it allowed employees to work while they were sick, and also posted a memo that stated, "a mask will not protect you from the respiratory drops an infected person coughs out." Walmart and Tyson have faced similar lawsuits from employees alleging that their employers put them at risk by not following state and federal guidelines. *The First Wave of COVID-19 Workplace Lawsuits Is Here*, Advisory Board, August. 3, 2020, <https://www.advisory.com>. As companies scramble to adapt to the fluid circumstances and evolving protocols, the recommended approach is to err on the side of caution and temporarily

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prohibit employees who exhibit symptoms from returning to work.

### Housing

The federal government has taken steps to minimize the impact of the crisis in an effort to ease the burden on homeowners and tenants during the pandemic. Such steps include placing moratoriums on evictions, prohibiting shutting off utilities due to non-payment, and prohibiting late fees. On September 1, 2020, the Center for Disease Control and Prevention issued the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 order, which prevented landlords from evicting certain groups of residential tenants through December 31, 2020 ([subsequently extended through January 31, 2021](#)). Among the protected groups are tenants unable to pay rent due to loss of income, and who would become homeless or have to move into a shared living setting if evicted, and who have a qualifying level of income. *Emergency Bans on Eviction and Other Tenant Protections Related to Coronavirus*, September 28, 2020, <https://www.nolo.com>.

States have varied in their approaches towards protecting tenants. For instance, in Massachusetts, the court denied a preliminary request to block state officials from enforcing the eviction moratorium, holding that access to stable housing is a “crucial component” of containing COVID-19 in the state, and that the economic risk to the public and state outweighs the financial burden landlords face in the short term. In fact, state officials had predicted 20,000 eviction cases would flood the court system if the moratorium were to expire. *In Massachusetts, Superior Court Judge Won't Block State's Eviction Moratorium; Plaintiff's Plan to Appeal*, MassLive, August 26, 2020, <https://www.masslive.com>.

### Legislative Action

Senate Republicans proposed a bill to shield employers from liability arising out of claims related to coronavirus, as long as the businesses took “reasonable efforts” to comply with government guidelines, and tied passage of such a bill to further economic relief. Jeff Stein and Erica Werner, *White House willing to cut a stimulus deal without 'liability shield,' breaking with McConnell*, Washington Post, July 31, 2020, <https://www.washingtonpost.com>. Concerns have been raised that the bill may reduce the incentive for employers to create the safest possible workplaces and

could endanger more workers. Other legislative proposals include funneling lawsuits to federal courts (which are perceived as more favorable to defendants), capping punitive damages, allowing employers to countersue for “meritless” claims, and allowing the Department of Justice to sue attorneys who exhibit a “pattern” of coronavirus lawsuits.

As federal coronavirus liability protections remain uncertain, some states have already acted to limit COVID-related liability on the local level. State legislatures in Georgia, Nevada, North Carolina, Utah, Wyoming, Mississippi, Oklahoma, Louisiana, Kansas, and Tennessee have enacted liability protections, and in other states, including Arkansas and Alabama, executive orders have afforded similar relief. Patrick Gleason, *COVID Liability Protection Enacted In Nine States, With Tennessee Set To Be Number 10*, Forbes, August 13, 2020, <https://www.forbes.com>. In Tennessee, a party will not be liable for loss, damage, injury, or death that arises from COVID-19 unless the claimant proves that the party caused the injury by an act or omission constituting gross negligence or willful misconduct. Employers in states that offer these protections should continue to be mindful that state-level protections will not stave off suits based on breaches of federal law, unless and until the federal government acts.

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