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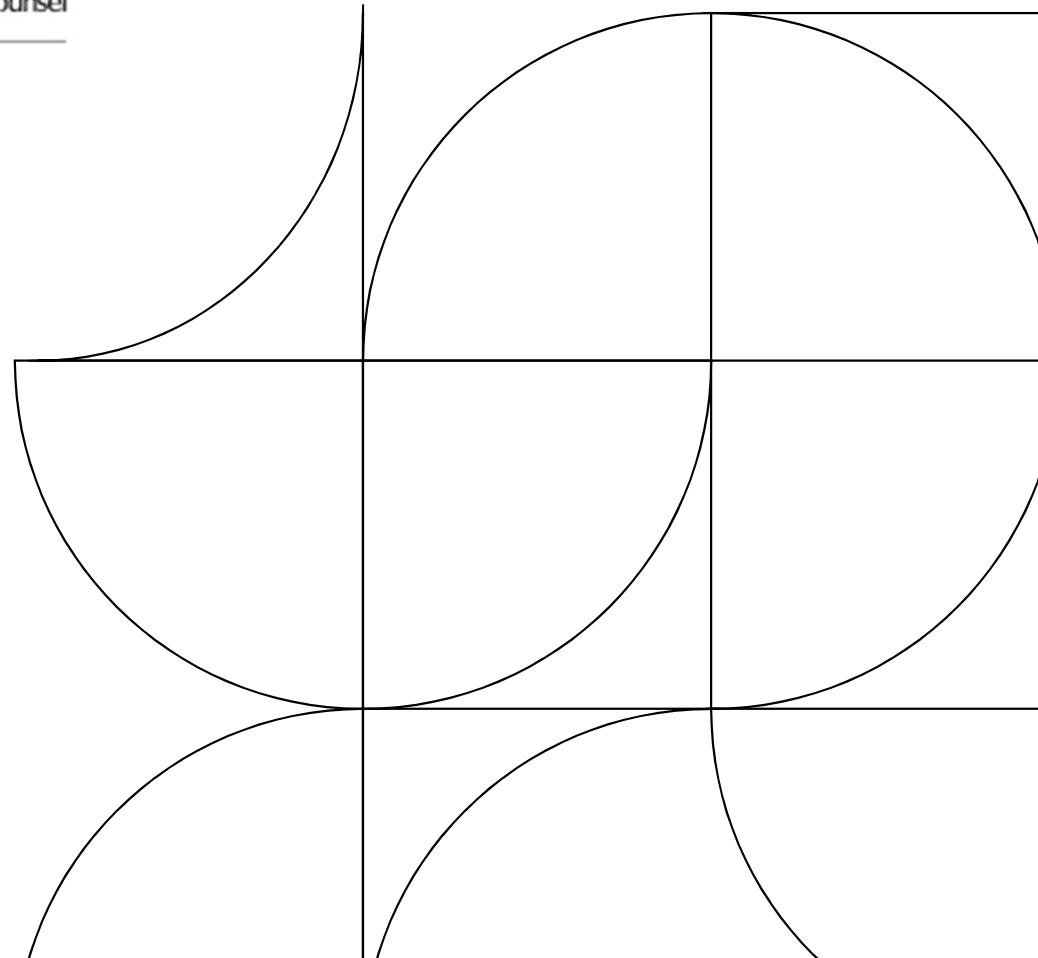


# Issue Spotting: Litigation Trends in the Post COVID-19 World

April 24, 2020

**Seyfarth Shaw LLP**

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# Agenda

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- 01** Welcome Remarks
- 02** Commercial Litigation
- 03** Whistleblower Claims
- 04** OSHA Claims
- 05** Employment Litigation

# Speakers

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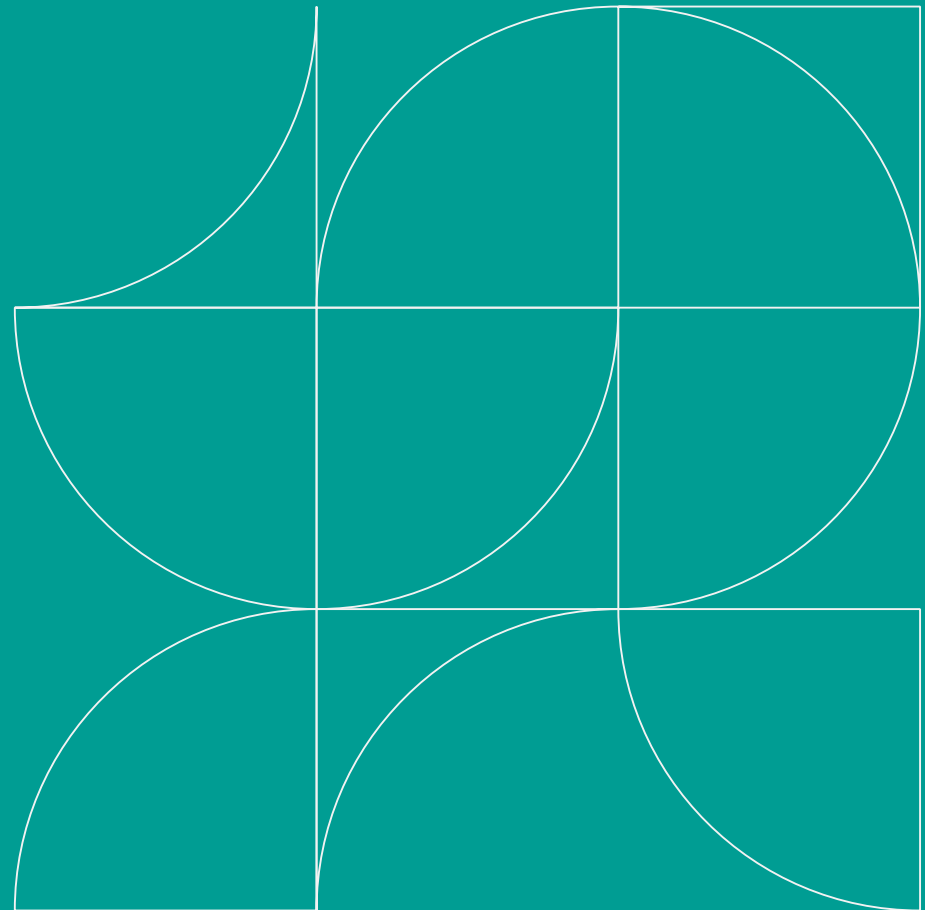


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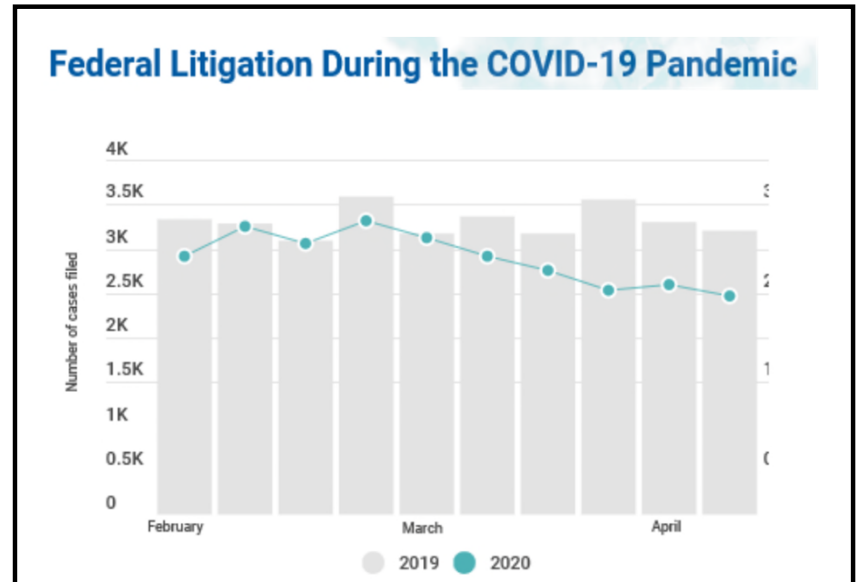
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# Issue Spotting: Commercial Litigation



# The Good News and The Bad News

- **The good news:** Civil filings in federal court down 22% for the four week period ended April 12, 2020 down 22% from filings during the same period last year
- **The bad news:** “I don’t want to say a tsunami, but do I think there will be a lot of litigation that comes out of all of this? Yes, without doubt there will be. Later this year, litigators will be busier than ever.” -- *Randy Mastro, Gibson Dunn litigation co-chair*
- Supply chain and cash flow disruptions will put pressure on businesses and could lead to **significant commercial litigation**, and unique challenges presented by response to COVID-19 pandemic also will lead to significant litigation



Source: Ben Hancock, *Amid COVID-19 Pandemic, a Slump in Federal Commercial Litigation*, Apr. 23, 2020, Law.com

# ***Force Majeure, Impossibility, and Battle of the Forms***

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- Remember these from law school? **Supply chain and cash flow disruptions** will bring all of these to the fore in coming months as suppliers and debtors seek to excuse performance and customers and creditors seek performance
- **Force majeure clauses** – Contractual allocation of risk often (but not always) included in contracts in the event of “acts of God” or other specified events that are beyond the control of parties
- **Impossibility** – also referred to as “impracticability” or “frustration of purpose” – common law doctrine excusing or delaying performance because of occurrence events that make performance impossible and for which no party is at fault
- **Battle of the Forms** – in sale of goods, UCC § 2-207(2) resolves conflicts between a purchase order and acknowledgment; additional or different terms are proposals for addition to contract and between merchants become part of the contract unless: “(a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.”

## Recent Litigation Trends Arising From COVID-19

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- State laws and regulations excusing performance of certain contract obligations (**like paying rent**); prohibiting certain activities (**like collecting debts**); and requiring insurers to cover COVID-19 claims under property insurance policies raise significant constitutional issues; lawsuits challenging these state actions have already been filed and will increase over time
- Class action lawsuits have already been filed against **airlines** (refusing to refund airfares for flights that do not fly); **health clubs** (charging fees for memberships that customers cannot use); and **banks** (refusing to give SBA loans to borrowers who were not already customers)
- State AGs are pursuing aggressively complaints about “**price gouging**” under state laws and regulations that prohibits significant price increases during times of emergency; private plaintiffs following suit with class action complaints against Amazon and others (see, e.g., California egg case)

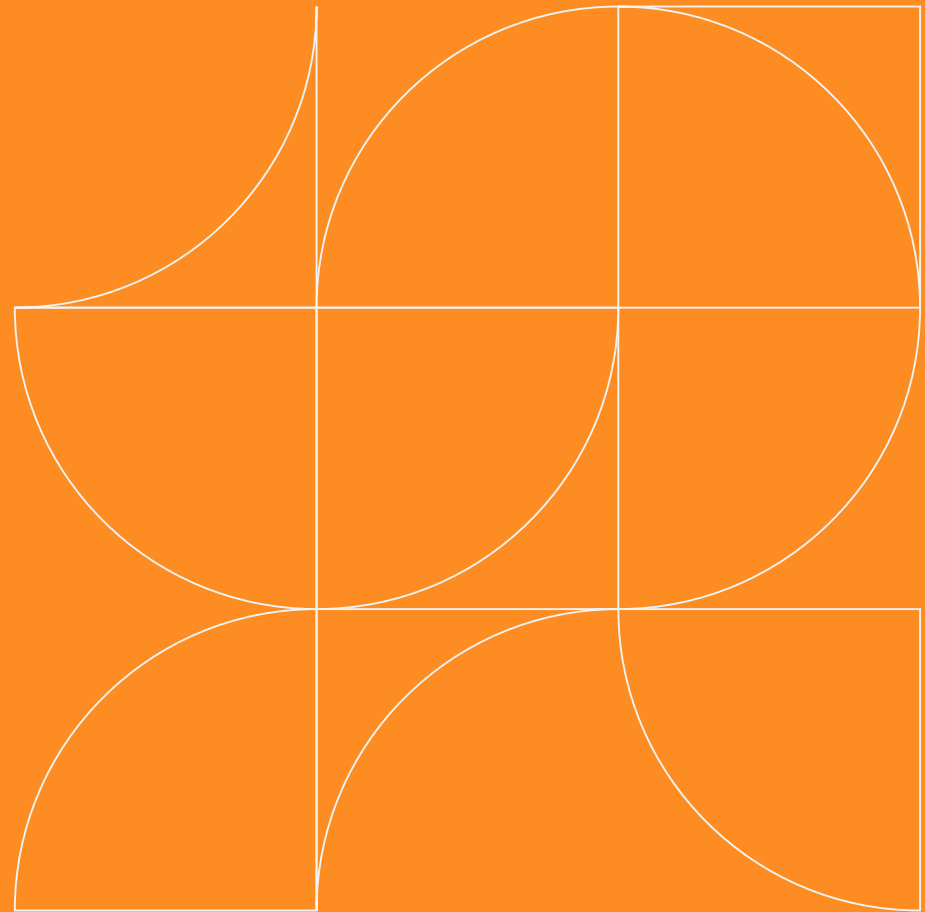


# Mitigating Commercial Litigation Risk In Uncertain Times

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- Read and re-read **insurance policies** (and engage outside counsel where needed) to determine whether your business has claims for COVID-19 related business disruption
- Read and re-read **contracts with suppliers and customers** (and engage outside counsel where needed) so your business knows its rights, obligations, and potential exposure arising from ambiguities
- **Engage with business team** to ensure they are using best practices when contracting and to identify potential sources of disruption arising from suppliers, customer, creditor, and debtor relationships
- **Is litigation avoidance the best response?** The ABA Business Law Section has published a form COVID-19 Model Standstill/Tolling Agreement available at <https://businesslawtoday.org/wp-content/uploads/2020/04/annotated-version.html>

# Issue Spotting: Whistleblower Claims



# Whistleblower Issues – COVID-19

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- Implicated Agencies and Statutes
  - **OSHA Workplace Safety**
    - Section 11(c) prohibits employers from retaliating against workers for raising concerns about safety and health conditions
    - Additionally, OSHA's Whistleblower Protection Program enforces the provisions of more than **20 industry-specific federal laws** protecting employees from retaliation for raising or reporting concerns about hazards or violations of various airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, securities, and tax laws

# Whistleblower Issues – COVID-19

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- **Department of Justice - False Claims Act (FCA)**

- CARES Act financial relief and loans are subject to the FCA
- In 2008, DOJ established a task force in connection with federally insured mortgage and lending programs
- Annual recoveries in excess of \$6 billion through the FCA
- COVID-19 related stimulus payments could exceed those during the 2008 financial crisis
- Basis of whistleblowing could be a false application for relief or a loan, or the misuse of funds once received
- Employees may be particularly sensitive to use of funds based on assumption that funds are intended for employee payroll and benefits
- Rewards to whistleblowers could be substantial, up to 30% of any recoveries by the government are paid to whistleblowers

# Whistleblower Issues – COVID-19

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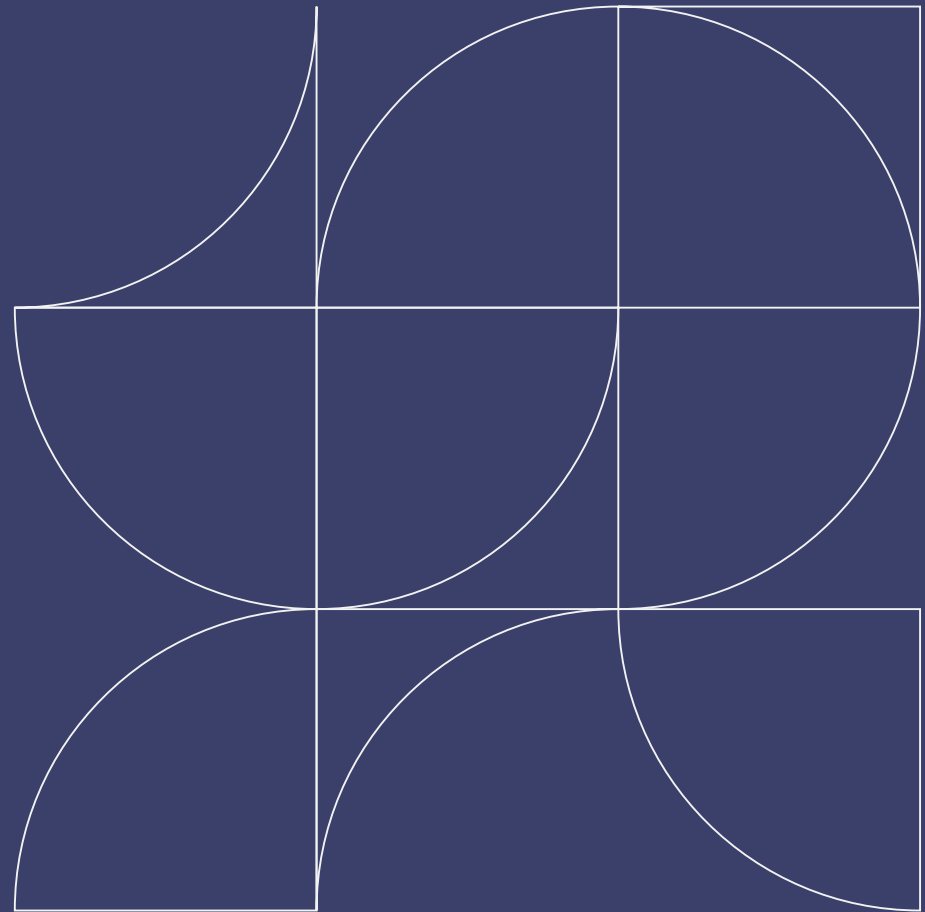
- **Best Practices** Regarding Whistleblowers
  - Strong company policies against fraud
  - Remind employees regarding the ability to report fraud or other concerns
  - Reinforce anti-retaliation policies regarding employee reporting
  - To the extent reports are made, promptly investigate any concerns
    - Employees are less likely to report externally if they feel the company is responding
  - To the extent improper conduct is found, discipline those responsible
    - DOJ takes into account internal policies, investigations and discipline in determining whether to give cooperation credit in FCA cases
  - Create detailed documentation regarding any whistleblower reports, including detailed documentation regarding the scope of the issues and investigation
  - Be aware of any whistleblower issues and liabilities in connection with broader employee actions, such as RIF's, pay cuts, furloughs or any other adverse actions

# Return to Work – Whistleblower Claims

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- Employees may be scared to stay or return to work
- **May want to remain remote**
  - Fear of COVID-19 may qualify as protected activity
  - Fear must be reasonable
    - If employer has taken safety measures consistent with CDC guidance and makes good faith efforts to comply with OSHA regulations or other safety protocols required in a state or local COVID-19, the employee would likely not be justified in their fear
    - If not, employee may have a reasonable fear sufficient to be protected activity

# Issue Spotting: OSHA Claims



# Return to Work – Health and Safety

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- Protect against **health and safety/tort claims**
  - Identify Risk Levels/Hazards – very high, high, medium, low
  - Identify Prevention Measures
    - Administrative/Engineering Controls
    - Washing hands, social distancing, keep people out of the workplace
  - Identify **Required/Recommended Protective Gear & PPE**
    - Provide PPE where required
    - Train and Educate Employees



# Return to Work – Health and Safety

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- Employee/Visitor Screenings and Assessments
  - **Establish Questionnaire** – confirmed COVID-19, exposure to COVID-19, travel
    - Provided by employer or self assessment?
  - **Temperature checks?**
  - **Testing?**
- Sick Worker Action Plan
  - Contact Tracing
  - Cleaning
- Determine when to bring sick/exposed employees back to work
  - **Test vs no-test strategies**
- Can you keep potentially exposed critical workers at work?
  - With precautions

# Other Health and Safety Litigation Risks

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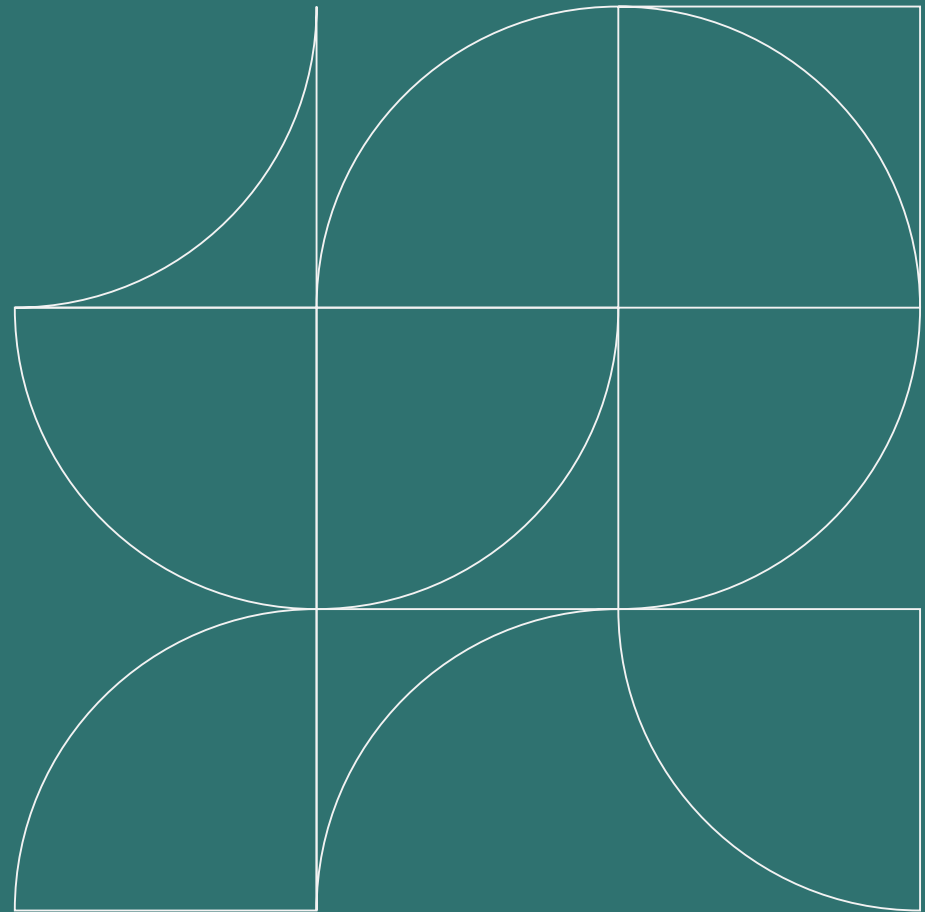
- **Recording or Reporting COVID-19 Cases**
  - Whether operating as essential or restarting operations
  - Difficult to determine if work-related
- **OSHA Complaints**
  - Require written response
  - Risk of inspection with no response
- **Agency questions regarding safety measures**
  - Are you following **local orders**?
- **Agencies questioning whether essential/able to be open**

# Workers' Compensation & COVID-19

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- Difficulty in determining whether COVID-19 case is work-related
  - Many claims being **denied** outright
- But is it better to accept claim to bar civil damages?
  - Civil damages can be multiples of Workers' Comp.
- States have amended statutes or enacted emergency rules to create rebuttable presumptions that COVID-19 case is work-related:
  - **Illinois** – broadest – all “essential” workers
  - **Missouri** – first responders
  - **Wisconsin** – first responders
  - **Minnesota** – first responders
  - **Kentucky** – adds grocery workers, Postal Service workers, child-care providers
  - **Texas, Maryland, Virginia, Tennessee** – under consideration

# Issue Spotting: Employment Litigation



# Issue Spotting: Employment Litigation

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- Discrimination & Harassment
- Retaliation
- Disability/Leave Issues
- Wage & Hour
- Class actions
- Implications for Trials in a Post COVID-19 world

# Discrimination & Harassment

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- **Issue spotting:**

- Disparate treatment claims but also disparate impact (careful in developing strategies for layoffs/furloughs and RTW)
- New EEOC, state and municipal guidelines/legislation
  - Claims are reportedly escalating – “fear and stigma around COVID-19” are fueling issues
  - EEOC Guidance issued yesterday addressing testing among other topics
  - Consistent warnings that perceptions or speculation cannot govern action
- Decisions on individual employees (furlough, layoff, RTW, accommodations) will be subject to challenge
- Age, gender, disability, race, pregnancy claims predicted to escalate
- Remember that employer may be liable for co-worker harassment

- **Mitigation Strategies:**

- Stick to the basics – document, follow policy, make sure your business reason is supported/supportable
- Anti-discrimination and anti-harassment messages/policies need to be reinforced
- Caution against presumptions and stereotypes

# Retaliation

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- **Issue Spotting:**

- Often a component of discrimination cases; difficult to defend
- Likely to be a prevalent claim as workforces return – allegations of being retaliated against for raising concerns

- **Mitigation Strategies:**

- Ensure that complaint/grievance reporting mechanisms are fully operational
- Update policies and training
- Ensure that HR/ER is tied into personnel decisions

# Disability/Leaves

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- **Issue Spotting:**

- “Regarded as” claims increasing
- Complexity of FFCRA/FMLA
- Re-evaluation of accommodations (new ones needed and established ones still appropriate?)
- Is COVID-19 a disability? (answer may vary by state)
- What COVID-19 accommodations are needed and what is the standard?

- **Mitigation Strategies:**

- Education of HR/ER and front line managers
- Formalized process in place on accommodations
- Understanding of ADA/FMLA/FFCRA overlap



# What's Next in COVID-19 Wage & Hour Litigation

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- We expect to see the following individual claims and class actions as a result of the following COVID-related actions:
  - Exempt **misclassification** claims
    - Salary level – You reduce exempt employee's salary so low that it falls below the federal exemption level (\$35,568) or the various state levels (CA \$54,080)
    - Salary basis –
      - You reduce hourly requirements of an exempt employee and reduce salary by a commensurate level tied to hours worked- [i.e. 20% reduction in pay for 20% reduction in work]
      - Furloughs – You furlough an exempt employee but you:
        - Ask them to answer emails and texts during furloughed period;
        - Start their furlough in the middle of a work week (not Monday) but do not pay them for the entire week
  - **Duties dilution** – Changes in duties results in loss of exempt status—manager spends more than 50% of time doing non-exempt duties [sanitizing, working cash registers, etc.]

# What's Next in COVID-19 Wage & Hour Litigation

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- We also expect to see the following individual claims and class actions:
  - **Off-The-Clock or Hours-Worked claims**
    - Unrecorded time worked by remote workers
    - Time spent in activities directed by employer [not de minimis]
      - Screening/temperature taking/responding to questionnaires
      - Cleaning, sanitation, and sterilization activities
      - “Work” related to cleaning facemasks and other PPE
      - Learning new ways of working under COVID-19 restrictions

# What's Next in COVID-19 Wage & Hour Litigation (State Specific Traps)

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- Finally, we expect to see some class actions based on **various state specific traps**:
  - Meal/Rest Break – Failure to grant the breaks, breaks interrupted, or more time required due to COVID-19?
  - Commission/Incentive Plan Claims – Failure to pay earned monies
    - Did you make a unilateral change mid-year which had a profound effect on employee compensation?
  - Claims for failure to reimburse employees who have paid for data, cell phones computers, monitors and printers at home etc.

# Mitigation for Labor and Employment Issues

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- Pay attention to salary level duties and timing of furloughs for exempt employees. **Do not tie salary reductions to hours worked;**
- Make sure you are **recording and paying non-exempt employees** for all working time **and** all time preparing to work;
- Be mindful of what your commission plan promised to employees, and the effect on their compensation of unilateral changes [Example- Is commission earned when product is ordered or received by client? - that difference matters now!].

# Impact of COVID-19 on Jury Trials– Practically and Emotionally

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- Depositions, Mediations, Oral Arguments are all being done right now by **videoconference**—different skill set.
- How soon are we going to start having trials and what will they look like?  
**Sooner in Georgia than in MA!**
- **Jury Pool**
  - All will have been touched in some way by COVID-19;
  - Views on employers may vary due to **geography**—was business interruption necessary? Overblown?
  - Views on employers may vary due to **political leanings**—Did companies receive bailouts which should have gone to poor plaintiff and other individuals—we will reallocate now!
  - Views of employee rights may be impacted by whether they were an **essential employee** during the shut-down or working from home



**Questions?**

**Thank You!**

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