



**Managing Your COVID-19
Litigation Risk**



COVID-19

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Andrea Bernard

- Labor and employment litigator who represents employers in various employment disputes, such as age, gender and race discrimination, retaliation disputes, harassment, FMLA and disability claims
- Serves as Warner's General Counsel

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Amanda Fielder

- Employment and commercial litigator
- Successfully defends employers against discrimination, harassment, retaliation, wrongful discharge, and wage and hour claims
- Member of WNJ's Core COVID Team

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Ryan Grondzik

- Labor and employment litigator who represents employers in human resources matters, discrimination and retaliation claims, criminal defense concerns and Title IX issues
- Internal investigation guru

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Employment Litigation

1,086

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Employment Litigation in Federal Courts

- New York, Michigan, Florida, New Jersey, Pennsylvania and Illinois
- Healthcare, manufacturing, transportation and hospitality industries
- 309 employment cases
 - 228 retaliation
 - 142 FMLA
 - 129 FLSA

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Employment Litigation in Federal Courts

- 12% decrease in federal employment law cases since 2019 (16% compared to average filings from 2010-2019)
- Significant decreases in some areas
 - Harassment claims are down 22%
 - ADA claims are down 20%
 - Discrimination claims are down 17%



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Employment Litigation in State Courts

- 650+ cases
- State court increased activity
- Similar list to federal cases – California, New Jersey, Florida, Michigan, New York, Texas, and Ohio
- Significant increase since Labor Day



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What is out there?

- Claims
 - FMLA/FFCRA
 - ADA/PWDCRA
 - FLSA
 - Whistleblower Claims
 - Class Actions
 - Negligence
- By looking at the litigation trends, we can anticipate potential areas of risk and concern



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FMLA and FFCRA

- Family Medical Leave Act (FMLA)
 - Provides for 12 weeks of unpaid medical leave for serious health condition
 - No interference
 - No retaliation
- Families First Coronavirus Response Act (FFCRA)
 - Expanded FMLA leave
 - Paid
 - Less than 500 employees



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FMLA/FFCRA Case Study: *Milman v. Fieger & Fieger, P.C. et al.*

- Filed August 2020 (Oakland County, Michigan).
- Attorney at law firm was notified by her son's day care that it was shutting down due to President Trump's state of emergency declaration.
 - Attorney's son was in a high risk category for COVID
- Attorney informed law firm that she would need to work remotely in order to care for her son; law firm refused to accommodate her.
- Attorney instead took PTO to care for her son.
- One day after FFCRA was passed, managing partner of law firm terminated employee; MP explicitly referenced her use of PTO and time off in her termination letter.

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FMLA/FFCRA Case Study: *Barcalow v. Wellspring Lutheran Services*

- Filed June 2020 (Saginaw, Michigan)
- Employee claims that employer fired her while she was on FMLA leave recovering from COVID.
- Employee began experiencing COVID symptoms in late March, and tested positive for COVID in early April.
- From mid-April through early May, employer repeatedly asked employee to provide additional medical documentation for continuing to miss work, and instructed employee to come in to get tested for COVID. Employee failed to do so.
- Employer terminated employee in mid-May, after a determination that she had "voluntarily resigned" by refusing to provide additional documentation regarding her COVID status.

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ADA and PWDORA

- Americans with Disabilities Act (ADA) and Persons With Disabilities Civil Rights Act (PWDORA) protect workers from discrimination because of a disability
 - COVID
 - "Regarded as" disabled
 - Mental Health issues
- ADA/PWDORA also gives workers a right to request a "reasonable accommodation" that allows them to do their job
 - One potential accommodation: telework
- No retaliation

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ADA/PWDORA Case Study: *Benavides v. University of Michigan*

- Filed April 2020 (Ann Arbor, Michigan)
- Supervisor noticed that employee "looked pale" and sent employee home to get COVID test on March 17
- Medical professionals advised employee not to return to work pending results of test
- While awaiting test results, employee stayed in regular contact with employer, advising them that she was awaiting results
- Employee was fired for "unscheduled absences" before COVID test came back negative
- Employee alleges that she was terminated based on her employer's ultimately perception of her having contracted COVID

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Fair Labor Standards Act

- FLSA and state equivalents outline employer requirements regarding overtime pay, minimum wage, exempt v. non exempt employee classification and record keeping
 - Telework
 - Misclassification
 - Reimbursement
- No retaliation



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**FLSA Case Study:
Peralta v. Eton Street Restaurant Inc.**

- Filed July 2020 (Birmingham, Michigan)
- Employer, a restaurant, was forced to close down during Governor Whitmer's "Stay Home, Stay Safe" order
- Restaurant allegedly encouraged employees to stay home and collect unemployment while continuing to perform unpaid work for restaurant
- Restaurant manager refused to perform unpaid work while on unemployment
- When restaurant reopened, manager and other employees who refused to perform unpaid work while on unemployment were not reinstated

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Whistleblower Protection Act (WPA)

- It is illegal for employers to discharge, threaten or otherwise discriminate against employee regarding compensation, terms, conditions, location or privileges of employment because reports or is about to report a violation or a suspected violation of federal, state or local laws, rules or regulations to a public body
- Complaints of safety violations
- Public Policy/Wrongful Discharge



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**WPA Case Study:
Brothers v. PetSmart, Inc.**

- Filed October 2020 (Midland, Michigan)
- Employee worked for employer in as an associate in retail store
- During pendency of "Stay Home, Stay Safe" order, associate noticed a customer without a mask in the store (and had a visible firearm)
- Associate called local police and had them remove the customer from the store
- Two days later, store fired associate for violating store policy
- Associate claims that customer's violation of the Governor's executive order was a violation of law, and he was accordingly fired for reporting a violation of law

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Negligence

- Employers may be found negligent when they fail to develop a COVID response plan, fail to take effective steps to combat the spread, and fail to protect workers and the public
- Both employees and customers are bringing these suits against entities
- Often brought as class actions, which can be especially messy

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**Negligence Case Study:
*Massey et al. v. McDonald's Corporation***

- Filed May 2020 (Cook County, Illinois)
- Employees of chain restaurant – and household members of those employees – filed a class action suit against restaurant alleging that restaurant took “plainly inadequate” steps to control spread of COVID
- Plaintiffs allege that facets of chain restaurant’s business – including “high customer volume” and “cramped, assembly-line style kitchen” – pose specifically higher risks of contracting COVID
- Plaintiffs further allege that restaurant failed to observe CDC guidelines for controlling spread of COVID
- Lawsuit further alleges that restaurant’s subpar cleanliness constitutes a “public nuisance”

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**Other Potential Claims:
A Balancing Act**



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A Balancing Act

- As more and more businesses reopen or partially reopen, employers will be exposed to potential claims
- A cohesive thought process that does not negatively impact specific protected classes will be important



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A Balancing Act: Potential Age Discrimination Claims

- ADEA protects certain applicants and employees 40 years of age and older from discrimination on the basis of age in hiring, promotion, discharge, compensation, or terms, conditions or privileges of employment
- Who to bring back to work?
- No retaliation

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A Balancing Act: Potential Title VII Discrimination Claims

- Title VII and state law equivalents protect employees from discrimination on the basis of race, color, religion, sex, national origin and other protected state-specific categories
- Who to bring back to work?
- No retaliation



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Minimizing Your Litigation Exposure



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Minimizing Your Litigation Exposure

**FOLLOW
THE
RULES**

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Minimizing Your Litigation Exposure



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Minimizing Your Litigation Exposure

COVID-19
MDHHS EPIDEMIC ORDER OCT. 29

MDHHS has issued orders under a law first enacted by the Michigan Legislature after the Spanish Flu of 1918 specifically to deal with epidemics. Note that the Supreme Court struck down a different, broader law.

Under MDHHS's epidemic order:

- 1 **Masks** must be worn near close and inside in gatherings of two or more people, including stores, offices, schools and events. Businesses can't admit people without masks, with few exceptions.
- 2 **Capacity** limits apply to indoor and outdoor gatherings, including business, social and recreational settings. *They're color-coded.*
- 3 **Restaurants and bars** must limit capacity for gatherings. They may limit the number of tables, only open tables to parties who are seated, and must keep tables six feet apart.
- 4 **Organized events** require masks (except for swimming) and have gathering limits.
- 5 **Employees** who can work from home must do so.
- 6 **Contact tracing:** Many businesses, including hair salons and spas, must collect phone numbers from their customers so they can be contacted in case they are exposed to someone who is ill.

All regions are in Phase 4 of reopening. The same rules now apply to all of Michigan.

To read the complete Michigan Oct. 29, 2020, Epidemic Order, visit [Michigan.gov/MDHHS](https://www.michigan.gov/MDHHS). Questions or concerns can be emailed to COVID19@mdhhs.michigan.gov.

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Minimizing Your Litigation Exposure

- Preparedness Plans
- Face Coverings
- Screening
- Contact tracing
- Facility Cleaning
- Remote work
- Gathering limitations



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Minimizing Your Litigation Exposure

DO NOT RETALIATE

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Minimizing Your Litigation Exposure


- **Keep in mind**
 - Caution v. hysteria
 - Evolving situation
 - Unknown length and impact
- **Plans**
 - Draft, Implement, Follow, Enforce
- **Communicate**
- **Decisions**
- **Document**



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Q&A



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Question

Q: How should employers (especially in manufacturing) handle employees calling in "sick" during this pandemic?

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Question

Q: What can we request from an employee to prove the need to stay home to care for the child is bona fide and no one else can do it?

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Question

Q: Employers are allegedly protected if we follow all federal, state and local rules. Are we really protected?

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Question

Q: What would be considered retaliation for using COVID sick leave?

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Question

Q: What really does “must” work from home mean? We have been mostly following this policy but it is taking its toll and continues to mount, especially onboarding new employees.

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December 1 Webinar: Data Solutions Planning for 2021

December 9 Webinar: ACA Reporting Requirements

Employee Remote Work Policy

Remote Work Policy and Determination Spreadsheet available for purchase for \$250 from your Warner attorney or ssprague@wnj.com

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Conclusion

COVID-19

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