

**Employment Litigation
After COVID-19**



COVID-19

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Ed Bardelli

- Employment and commercial litigator
- Represents manufacturers, utility companies, banks and more
- Defends against employment disputes that include race, sex, age, FMLA and disability discrimination claims and harassment, retaliation and whistleblower claims

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Amanda Fielder

- Employment and commercial litigator
- Represents manufacturers, hospitals, schools and more
- Successfully defends employers against discrimination, harassment, retaliation, wrongful discharge, and wage and hour claims

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OVERVIEW

- Employment litigation involving COVID-19 and current pending cases
- Guidance on mitigating risk

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The Tsunami of Employment-Related Litigation



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Potential Employment Litigation After COVID-19


- FMLA/FFCRA
- ADA
- ADEA
- Title VII
- FLSA
- Workers' Compensation
- WARN
- Whistleblower Protection Act/Public Policy
- Class Actions



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Family Medical Leave Act (FMLA)

- FMLA provides for 12 weeks of unpaid medical leave for serious health condition
- No interference
- No retaliation
- Families First Coronavirus Response Act
 - Expanded FMLA leave
 - Paid
 - Less than 500 employees



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American with Disabilities Act (ADA)


- ADA protects workers from discrimination because of a disability
 - COVID
 - Regarded as disabled
 - Mental Health issues
- ADA also gives workers a right to request a "reasonable accommodation" that allows them to do their job
 - Telework
 - Time off
- No retaliation



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University of Michigan (Michigan)

- Action filed by former employee of University of Michigan
- Asserts claims under PWDORA
- Contends that University of Michigan terminated her employment after she missed work for multiple days while waiting for COVID-19 results



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Age Discrimination in Employment Act (ADEA)

- 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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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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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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Uber and Lyft (Massachusetts)

- Lawsuits filed by Uber and Lyft drivers
- Seek declaratory judgment that employees
- Allege that employees entitled to reimbursement of expenses, overtime pay, and sick pay. Contend that drivers are forced to work even if symptoms of COVID-19 because do not receive sick pay



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Ratner Companies (New Jersey)

- Class action lawsuit filed by hair dressers
- Asserting claims under the FLSA and New Jersey state law
- Contend that employer failed to pay them for hours worked before pandemic
- Defendants contended they were waiting for federal funds

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Workers' Compensation Act

- Employee who contracts COVID-19 at the workplace is covered under Michigan's Workers' Compensation Act
- Burden of proof
- Wage loss and reasonable and necessary medical treatment
- Exclusive remedy provision



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OSHA

- OSHA general duty clause requires employers to furnish “employment and a place of employment . . . Free from recognized hazards”
- OSHA Guidance on COVID
- Regulatory complaint

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Walmart (Illinois)

- Cause of action brought by relative of employee who died from COVID-19
- Claims of wrongful death, wrongful death by negligence, willful wanton misconduct and other claims against Walmart
- Alleges that management knew of other individuals with symptoms of COVID-19 and violated its duty to employee

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Celebrity Cruises (Florida)

- Suit by employees of cruise line who contracted COVID
- Claims of Negligence, Failure to Provide Maintenance and Cure, and Failure to Provide Adequate Medical Care
- Alleges that despite having notice of COVID-19, employer failed to follow basic safety precautions, such as quarantine and social distancing



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Worker Adjustment and Retraining Notification

- WARN Act requires most employers with 100 or more employees to provide 60 day advance notice of plant closings or mass layoffs
- There are exceptions
 - Natural disaster exception
 - Unforeseeable business circumstances exception



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Hooters (Florida)

- Employees of hooters filed claim against employer
- Assert claim for violation of the Worker Adjustment and Retraining Notification Act (WARN)
- Contend that Hooters terminated plaintiffs and other class members without providing the required advance notice

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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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Detroit Medical Center (Michigan)

- Employee nurse of Sinai Grace Hospital filed action in Wayne County Circuit Court against Detroit Medical Center
- Asserting claim of retaliation under Michigan's Whistleblower Protection Act and wrongful discharge
- Plaintiff asserts that she had multiple discussions with management warning of insufficient nursing staffing levels and PPE and that she indicated that she would report such concerns to MIOSHA. She expressed these same concerns on social media and TV. Detroit Medical Center subsequently terminated her employment.



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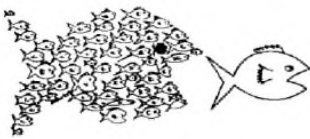
Trader Joe's (Kentucky)

- Lawsuit filed by a former employee
- Asserting claims for wrongful discharge
- Alleges that Trader Joe's failed to take specific steps to protect healthy and safety of its workers regarding the spread of COVID-10, including following CDC guidance and state directives. Employee also posted about his concerns on Facebook and raised his concerns with management. Employee was later terminated.

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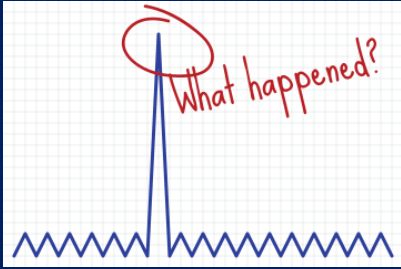
Class Action Lawsuits

CLASS ACTION



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Mitigate Risk



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Mitigate Risk

- Keep in mind . . .
 - Mild concern v. hysteria
 - Rapidly evolving situation
 - Unknown length
 - Unknown impact

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Mitigate - Plan

- Conduct safety hazard study
- Develop return to work procedures
 - Protocols
 - Preparedness Plan
 - CDC Guidance
 - Response Plan
 - Review existing policies
 - Complaint Investigation Plan



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Mitigate Risk - Communicate

- Disseminate current resources and information to your workforce
- Transparency
- Identify responsible individual to receive complaints/concerns

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Mitigate Risk - Telework

- Assess whether telework is appropriate
- Liberally grant requests
- Compliance and security protocols
 - Timekeeping
 - Employee oversight
 - Trade secret

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Mitigate Risk – Leave and Accommodation

- Job-protected leave
 - Eligibility
 - Paid v. Unpaid
- What if not job-protected leave?
- Loss or exhaustion of pay or accrued leave

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Mitigate Risk – Decision making

- Base employment decisions on non-discriminatory and non-retaliatory reason
- Avoid any bias or perception that certain workers are more likely to be exposed or infected with COVID-19
- Determine policy to pay employees for time spent during screening or cleaning of PPE



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Mitigate Risk - Document

- Document interactive process
- Document decisions
- Document reductions
- Document policies
- Document training
- Document overtime



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Mitigate Risk - Enforcement

- Enforce policies
- Repeat risk assessment
- Be vigilant
- Administer effective complaint procedures
- Continue to monitor



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Questions



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Question and Answer


Q: If you throw "specific skills" out the window, would seniority with the company be the best way to call employees back to work?



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Question and Answer


Q: We have a PPP loan. If we reopen in May, and staff choose to not return to work due to fear, can we stop payment?



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Question and Answer


Q: Can we terminate an individual who abandons the job during COVID without a valid reason (i.e., no symptoms, no exposure, not caring for another)?



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Question and Answer

Q: If we need to fill a position a couple months after eliminating the job, what issues are we creating for our company legally?




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Question and Answer

Q: What is the likelihood of legislation being passed to provide some COVID liability immunity to employers who follow safety measures?



FOLLOW THE RULES



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Question and Answer

Q: We have employees who were furloughed in late March and we intend to call them back to work. But they may refuse to do so because they are making more money on unemployment. What can I do as the employer?



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Question and Answer

Q: How do employers address the issue of employees who cannot return to work because they have day care issues due to schools being closed?

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Question and Answer

Q: We are requiring our employees to wear masks. What do we do with an employee who refuses to wear a mask because they have asthma?



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Question and Answer

Q: How do you handle employees that live with medical personnel that are working on the front lines? Can employee return to work?

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Warner Updates

Visit WNJ COVID-19 Resource Center



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Upcoming Warner Webinars


May 7: COVID-19 Strategies for Reducing Your Legal Spend

May 12: Gaining Access to Government Data During COVID-19 with FOIA and OMA

Email covid@wnj.com to receive eAlert and webinar notices.


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Conclusion



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