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Outbreak Of COVID-19 Public Nuisance Cases Continues

August 7, 2020 | [Employee Health Issues, Labor And Employment](#)



Mark Wallin
Partner



Anthony K. Glenn
Of Counsel

With this week's update, the Barnes & Thornburg LLP Wage & Hour Practice Group's [COVID-19 related workplace litigation tracker](#) has now summarized 240 complaints filed across the country, in twelve different categories. This week's spotlight is on an emerging category of COVID-19 related workplace complaints: the public nuisance class action litigation.

This case, filed in the Eastern District of California, alleges that a meat packing plant's failure to take appropriate action to protect its employees from the COVID-19 virus resulted in an extensive outbreak among the employee population. The plaintiff alleges that this outbreak resulted from the employer's intentional efforts to hide positive cases, and threats of termination if employees did not show up for work, for any reason. While the allegations in this case are (hopefully) extreme, we expect such public nuisance class action complaints to increase in popularity as the pandemic staggers on.

In *Ornelas et al. v. Central Valley Meat Co., Inc.*, the plaintiff brought a class action against her employer alleging a number of violations of California state law, as well as the FMLA, due to the employer's alleged failure to take appropriate actions and adopt recommended precautions against the spread of the COVID-19 virus. The defendant is a meat packing plant that, by mid-April, allegedly had at least nine known cases of COVID-19 in its workforce. The plaintiff claims that the defendant did nothing to arrest the

spread of the virus in its plant, and in fact took action that made it worse. The defendant allegedly:

- did not tell the employees that there had been positive COVID-19 tests among the workforce
- allowed employees that tested positive to return to work within days of testing positive
- failed to send employees home who were experiencing symptoms of the virus
- pressured employees who were experiencing symptoms to come to work anyway, threatening them with discipline under its no-fault attendance policy
- failed to implement preventative measures recommended by the CDC and OSHA, such as social distancing and encouraging extra breaks for employees to wash their hands

According to the plaintiff, employees only discovered that several coworkers had tested positive for COVID-19 by talking with one another on Facebook. By early May, the defendant purportedly had 161 reported positive COVID-19 cases in the plant. The plaintiff learned from a co-worker that another employee—with whom she worked in close proximity—had tested positive for COVID-19, but was permitted to come in and work without any precautions being taken. When she approached management with her concerns, the plaintiff was told that the other employee's positive test was "only a rumor." However, the plaintiff herself began experiencing symptoms of COVID-19 days later, and when she informed the defendant, she was reminded of the employer's "no-fault" attendance policy. Additionally, the defendant refused to pay for a COVID-19 test, forcing the plaintiff to pay for the test out of her own pocket. The test confirmed that the plaintiff had the novel coronavirus. The plaintiff claims that even after she tested positive for COVID-19, she was pressured to come to work, as statements had been made to her to the effect that the defendant was not sure it could hold her job open. The plaintiff brings her claim on behalf of a class of employees, and alleges a number of violations of California state law, such as negligence, wanton and reckless misconduct, and violations of the California Family Rights Act, as well as a violation of federal law under the FMLA. In support of her public nuisance claim, the plaintiff alleges that the defendant's failure to act to protect its employees was the direct cause of the disproportionately high number of COVID-19 cases in the community and county where the defendant operates, as compared to neighboring counties.

We have seen several complaints alleging public nuisance claims based upon an employer's supposed failure to heed public health orders, and as states continue to reopen more businesses, we expect that more will be filed as the pandemic continues. Indeed, depending on the success of this and other similar public nuisance class action complaints filed across the country, we may well see a significant bump in the plaintiff's bar pursuing these potentially lucrative cases. Mindful employers would do well to keep a close eye on the public health guidance coming out at the local, state, and federal levels, and continue to follow such orders and directives. Contributors to the COVID-19 Related Workplace Litigation Tracker will continue to present on the trends we are seeing in our monthly webinar, with the next one scheduled

for Aug. 26. We will continue to track these trends as they unfold, and will continue to update the tracker each week. As always, stay tuned.

