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Public Nuisance Claims Emerge In COVID-19 Workplace Litigation Filings

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Mark Wallin
Partner



Kathleen M. Anderson
Partner
Wage and Hour
Co-Chair



Scott J. Witlin
Partner
Wage and Hour
Co-Chair

In addition to other trends Barnes & Thornburg's Wage and Hour Practice Group is monitoring, this week, we noted the filing of several somewhat novel [COVID-19 related workplace complaints](#) as we compiled cases in our tracker. There seems to be an emerging trend in which the employer's failure to implement COVID-19 safety guidelines gives rise to public nuisance claims. Perhaps not surprisingly, each of these cases arose in the state of California, and have a California Labor Code class action component as well. This is consistent with the observation we blogged about last week, that the COVID-19 pandemic appears to have acted as an [accelerant for wage and hour cases](#). This is another trend for employers to be mindful of, and one we continue to monitor.

As an example of this trend, in [Esco v. Dollar Tree Stores, Inc.](#), the plaintiff filed a class action alleging that she and the members of a putative class are victims of employment policies, practices, and procedures that violate California's Business and Professions, Civil and Labor Codes as well as the

Department of Industrial Relations, Industrial Welfare Commission, and Division of Occupational Safety and Health orders and standards. The plaintiff contends that throughout the COVID-19 pandemic the defendant failed to implement and maintain an effective illness and injury prevention program and to provide proper PPE, materials, policies, trainings and communication to the plaintiff and members of the class.

Specifically, she claims that the defendant failed to provide sufficient sanitary face coverings, failed to require customers, vendors and others entering the stores to wear face coverings, failed to endorse social distancing, failed to provide sufficient breaks to allow for hand washing stations, failed to provide sufficient hand sanitizer, failed to train employees on the use of protective gear such as the removal of gloves and masks, failed to implement an illness prevention program, failed to provide sufficient barriers and failed to provide sufficient disinfectants and cleaning agents. Based upon this conduct, the plaintiff alleges she and all non-exempt employees are entitled to relief because the defendant's conduct constitutes a public nuisance. The complaint follows a theory used in other COVID-related suits and cites a variety of state, local and federal regulations and guidelines. The plaintiff also claims that she and the class are entitled to injunctive relief to stop the defendant's alleged violations of state law.

This case appears to be another example of enterprising (and, frankly, creative) plaintiffs' counsel using the COVID-19 pandemic as the catalyst for new theories of liability, which are then supplemented with technical wage and hour violations. As a reminder, several of the contributors to the COVID-19 Related Workplace Litigation Tracker will be presenting on this and other [workplace litigation trends on July 1, 2020](#). We will continue to track these trends as they unfold, and will continue to update the tracker each week. As always, stay tuned.