

Restaurant Litigation - Is This A Trend

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Porzio Client Alert

McDonald's employees in Chicago and Los Angeles have sued over unsafe, COVID-19-related working conditions, claiming the burger giant failed to mandate OSHA/CDC social distancing guidelines and advise employees when their coworkers were diagnosed with the virus. The Chicago-area employees filed a state-court class action and sought an injunction requiring McDonald's to mandate face coverings for customers, enforce social distancing, and inform employees if a coworker becomes infected. In California, workers filed an administrative action with California Division of Occupational Safety and Health (Cal OSHA), and then a private attorney's general lawsuit claiming Cal OSHA failed to address the health and safety concerns. McDonald's denied the allegations and argued it had ample masks and safety procedures in place for all franchise and corporate-owned locations.

These lawsuits follow a wrongful death lawsuit filed by a Wal-Mart employee's family claiming the company's deficient COVID-19 safety precautions caused the family member to contract the virus and die. Similar lawsuits have been filed across the country by employees of food-production companies. These lawsuits may signal a trend for future lawsuits as the country slowly comes out of the pandemic and restaurants reopen for in-person dining.

A company can take every precaution and still get sued, especially by employees. For the restaurant industry, preparation is key to prevent these suits and defend them, if necessary. With states allowing restaurants to open outside and inside dining, restaurants need to welcome workers and diners safely and take steps to prepare for these lawsuits.

The primary risk is employee safety. Workers will be nervous about returning to work, despite the economic necessity, and hypersensitive to any shortcoming—real or imagined—in a company's return-to-work procedures. The McDonald's lawsuits indicate that employees will aggressively challenge perceived inadequate COVID-19 safety measures. Typically, employees filing these claims would need to prove proximate cause and resulting damages. However, leading restaurants are forced to spend legal fees to defend and/or settle claims absent physical injury (as distinguished from the Wal-Mart wrongful death suit) and despite corporate compliance with OSHA/CDC guidelines.

How can employers, including restaurants, create a work environment that protects both the employer and employee? Below are some suggested guidelines:

- Place New Jersey's "One Jersey Pledge" and its accompanying workplace poster in a visible location.
<https://covid19.nj.gov/faqs/nj-information/general-public/how-can-businesses-organizations-and-residents-support-new-jerseys-restart-and-recovery-what-is-the-one-jersey-pledge#direct-link>
- Draft, distribute to, and educate employees on COVID-19 safe worksite practice policies ("best practices"). Use CDC and OSHA Guidelines and state and local government orders to draft these documents and have your employees acknowledge they have reviewed each policy, understand the importance of compliance and consent to receiving each policy. Retain all signed acknowledgements and signed receipts of documents regarding these best practices in each employee's file.
- Determine risk in retaining employees who do not follow best practices and document their employee file.

- Conduct random spot checks of worksites to ensure compliance with “safe-distancing” practices and PPE requirements.
- Communicate daily to employees the need to follow and comply with best practices by email or other written format.
- Place signs around the restaurant and on the front door notifying of social distancing requirements and that the location follows CDC guidelines.
- Question employees daily about temperatures, coughing, shortness of breath, and potential exposure to others who have shown symptoms and maintain a log which is signed-off by the employee with time and date of entry.
- Prevent customers/vendors from entering your premises without a mask. Post signs at all entrances and do not deviate from it.

Like any personal injury or wrongful death lawsuit, COVID-19 exposure lawsuits will be fact sensitive. Documentary evidence will be a key component to defending against COVID-19 related lawsuits. As a defendant, restaurants will have to prove to a court or OSHA that it reviewed CDC, OSHA, and other safety guidelines, developed best practices, and implemented and communicated them to employees. Remember to:

- Document all COVID-19 practices implemented, education meetings, spot checks, and other compliance efforts;
- Locate insurance policies and broker information. If you receive a Complaint, insurance carriers must be placed on notice immediately, and
- Retain all COVID-19 related documents to demonstrate compliance to local authorities and as proof in potential COVID-related personal injury and wrongful death suits.

Restaurant owners and operators should be prepared to be sued. If a complaint is filed and served on you, immediately call two people: your lawyer and your insurance broker. Your lawyer can instruct on first steps to take to collect and preserve documents and interview key witnesses. Your insurance broker can help place workers' compensation insurance carriers and other insurance carriers on notice of the lawsuits for which insurance coverage might exist.

Having served as both in-house and outside general counsel for several corporations and having represented food-service industry companies throughout the U.S, our approach is to first identify the risk, develop a plan, effectively communicate the plan to employees and confirm the employees understand the plan and endorse its implementation. Corporate compliance with OSHA and CDC guidelines and engaging in best practices to implement these guidelines may not prevent lawsuits but provide some defense to claiming these lawsuits are without merit.

To create the best protection for your restaurant and its staff and to minimize the risk of potential COVID-19 related lawsuits, follow these guidelines and contact us for any assistance: Eric L. Probst (ELProbst@pbnlaw.com) and Pamela M. Kapsimalis (PMKapsimalis@pbnlaw.com). You can also stay updated through Porzio's COVID-19 website at <https://porziocovid19resources.com/>.