

## **Class Action Trends Report, Fall 2021: Ongoing Pandemic Brings New Class Action Risks**

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### **Ongoing pandemic brings new class action risks**

The availability of vaccines and corresponding decrease in transmission rates, hospitalizations, and fatalities gave reason for hope that the end of the COVID-19 pandemic was imminent. However, the emergence of the Delta variant and ongoing national discord over measures to subdue the crisis has diminished the collective sense of optimism. Federal, state, and local governments have loosened restrictions, but have since grappled with difficult questions around whether to reinstate pandemic protocols, at least in part. Likewise, many employers have considered whether to slow their return-to-work plans, have adopted transitional “hybrid” on-site/remote work models, and have implemented other policies and procedures designed to promote the health, safety, and well-being of their employees, including mandatory vaccination and testing programs.

Even so, most employers have begun, at minimum, to plan for bringing employees back to the office and to contemplate how the workplace will be different in the post-COVID-19 “normal.” The return-to-work stage brings new risks of legal exposure. Allegations regarding off-the-clock work — a perennial source of wage and hour class and collective actions — have surfaced in new, COVID-19-related contexts. Difficult decisions regarding which employees to bring back from furlough post-pandemic can spur systemic discrimination claims. Employers also are grappling with unanswered questions regarding the compensability of vaccination testing time, as well as state laws potentially requiring reimbursement of associated costs. And, for certain employers in a growing number of jurisdictions, recall decisions must factor in state and local right-to-return laws.

Post-COVID-19, disputes that were typically one-off matters involving individual employees may impact a broad segment of employees, turning a typical single-plaintiff claim into a potential class action. As COVID-19 has prompted employers to enact more formal rules and systematic approaches to such matters as remote work, for example, employers can anticipate that challenges to companywide policies will increasingly be brought on a classwide basis.

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In this issue, attorneys in the Jackson Lewis Class Actions and Complex Litigation Practice Group discuss the liability risks arising from the latest phase of the pandemic. This issue also looks at the current status of COVID-19 class and collective actions, and what employers might expect in the way of new filings.

## **COVID-19 screening (no good deed...)**

Since the onset of the pandemic, many employers have been requiring pre-shift temperature checks or other COVID-19-screening procedures, such as questionnaires regarding potential symptoms, prior to entering the worksite. These practices raise wage and hour liability risks and may run afoul of biometric privacy laws and other employee protections.

**Is it compensable time?** Failure to pay nonexempt employees for time spent undergoing temperature checks, waiting in line for such checks, waiting for test results (in instances where employers utilize rapid COVID-19 tests, for example), or undergoing other screening procedures before clocking in for work may give rise to class actions under state wage and hour laws, particularly in states with wage and hour statutes that do not adopt the Portal-to-Portal Act amendments to the FLSA. Indeed, a number of class action complaints already have been filed. For example, one \$5 million class action brought in Arizona alleges that a national retailer required employees to arrive 10-to-15 minutes early for their shifts in order to undergo mandatory COVID-19 screening and did not pay them for that time.

These types of cases are just beginning to be litigated, and courts will grapple with the question of whether temperature checks and health questionnaires are “integral and indispensable” to the performance of employees’ work such that employees cannot perform their work without also performing these duties. The answer may depend on the type of workplace, as for certain occupations (such as healthcare and education) a stronger argument might be made that screening is “integral and indispensable” to an employee’s principal activity. Whether COVID-19 screenings are required by law, either due to the industry in which the employee works or because of state or local statutes, may also be relevant to the inquiry.

**Case in point:** A May 2021 complaint filed in a California federal court against an online retailer asserts that employees were required to wait in line on company premises to undergo a mandatory two-stage screening process before they were allowed to clock in. (The employer utilizes electronic clocking-in technology, but the feature is not accessible to employees until after screening is completed.) The employer required the screening, according to the plaintiffs, for the purpose of ensuring workplace safety and preventing a mass breakout of the virus infecting the facilities, products, or customers, and to ensure that COVID-19 did not disrupt the company’s business operations or employees’ ability to safely serve its customers. However, the employer countered (in a motion to dismiss filed June 3, 2021) that the COVID-19 screenings are required of *everyone* entering the facility — not just employees; are conducted in compliance with government regulations; and are not primarily for the company’s benefit, but for the benefit of the public at large. The employer also noted that the plaintiffs had conflated waiting time (which is non-compensable) with screening time.

If such screenings *are* compensable, the employer also must include the time spent in calculating the regular rate for overtime purposes. This may initially appear to be a minimal amount, but it quickly adds up in the class and collective context, particularly if an employer uses a rounding-up policy of clocking time worked. Employers should consult with counsel to determine whether, at least in certain jurisdictions, it may be best to implement a policy of paying employees for time spent in the pre-shift

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COVID-19 screening process. In addition, employers should identify practical ways to streamline the process at their facilities to reduce the (potentially) compensable time involved.

**Biometric technology.** Another landmine may lurk for employers that have adopted biometric technologies, such as thermal imaging, to check employee temperatures. Some technologies can run afoul of biometric privacy laws — a grave concern for employers with workers based in Illinois, which has a biometric privacy statute that allows individuals to bring claims for damages. Thousands of class actions have been brought under the Illinois Biometric Information Privacy Act (BIPA) in recent years. Plaintiffs can seek damages of \$1,000-\$5,000 per individual violation, *i.e.*, each instance an individual's biometric identifiers are recorded using such devices.

On-site COVID-19 screening already has spurred numerous class actions under BIPA against some of the nation's largest employers. These complaints allege that employees were required to undergo temperature scans and facial geometry scans, without prior consent, as required under BIPA when collecting biometric identifiers. One class action filed in July against the vendor of facial recognition technology claims that the device, used for detecting COVID-19 symptoms and whether the individual is wearing a mask, collects the biometric information from its customers' employees without the requisite notice and consent.

BIPA has tremendous reach, even beyond Illinois, along with the potential for massive damages for largely technical violations — as exemplified by a non-employment case in which a social media company agreed to settle a BIPA class action litigated in California (against a California-based defendant with Illinois consumers) for \$550 million. Moreover, insurers have been pushing back on covering these claims of late, heightening the risk of exposure for employers.

Several other states have enacted biometric privacy laws, and new measures similar to the Illinois statute are pending in a number of state legislatures. Moreover, BIPA-like legislation previously introduced at the federal level may resurface in the Democratic-majority Congress.

There are many benefits to using biometric technologies in both the ongoing and post-pandemic employment setting, including COVID-19 screening and contactless shift check-ins. However, to ensure that these benefits outweigh the liability risks, employers should work closely with counsel to ensure compliance with applicable notice and consent requirements. Employers not yet subject to biometric laws should consider adopting notice and consent practices as a best practice and in anticipation of future compliance requirements.

**Other privacy risks.** COVID-19 screenings also can trigger multi-plaintiff suits under the Americans with Disability Act (ADA) or Genetic Information Nondiscrimination Act (GINA), depending on the type of data being collected and who collects it. A number of statutes regulate the collection, sharing, and storage of data gleaned from screening of employees. Employers may measure employee temperatures, take a job applicant's temperature as part of a post-offer, preemployment medical exam, require employees to provide a doctor's note confirming they are COVID-19-free when returning to the workplace, or administer COVID-19 tests to employees before they can enter the worksite. However, employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA and adhere to other applicable privacy laws.

## **Return-to-work reluctance**

Employers that have begun returning employees to the workplace are facing resistance from employees who had been working remotely since the onset of the pandemic. Employees with

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disabilities may seek continued remote work privileges, asserting that the ability to work remotely during the height of the pandemic demonstrates that telework is a reasonable accommodation under the ADA and its state-law counterparts. Indeed, the question of whether telecommuting amounts to a reasonable accommodation (one of the most salient legal issues related to disability discrimination in recent years) has been made more complex by the speed and relative facility with which many organizations transitioned to remote work when the pandemic struck.

Employers have faced an influx of such accommodation requests from employees with disabilities. While failure-to-accommodate claims are typically single-plaintiff cases, enforcing a blanket return-to-work policy and more formal remote work rules may open the door to more class action challenges to companywide telecommuting policies.

For employees who are disabled within the meaning of the ADA or state law, the standard reasonable accommodation and interactive process requirements apply. On the other hand, employees who object to returning to the office merely because they favor the flexibility of working from home likely have no legal recourse, unless the employer allows only certain employees to work remotely while requiring others to return to the worksite and does so in an unlawful discriminatory fashion.

Consider, however, that demographic data on remote work preferences show a sharp disparity by gender: Surveys on remote work attitudes indicate that female employees are 50 percent more likely to say they wish to work from home. Moreover, there is anecdotal evidence that remote employees are less likely to be promoted. Consequently, organizations also need to consider how their telecommuting policies align with their Diversity, Equity and Inclusion initiatives and to be cautious about a potential emergence of disparate impact discrimination claims as they weather the ongoing pandemic storm.

On the flip side, employers face potential exposure based on who they choose *not* to bring back to work. Employers must avoid making decisions about which employees to return from furlough based on presumptions about who remain the most vulnerable from the ongoing pandemic; such considerations invite class claims of age and disability discrimination.

## **Pandemic risks persist**

In addition to the challenge of complying with changing safety protocols, employers must be prepared to defend claims alleging these efforts were insufficient. Although a potential wage and hour compliance headache, COVID-19 screening is nonetheless an important tool for preventing the spread and employers that fail to take precautions when employees return to the worksite run the countervailing risk of classwide liability if segments of the on-site workforce fall ill.

Workplace safety and health is governed through agency inspections and enforcement by the federal Occupational Safety and Health Administration (OSHA) and corresponding state agencies in states with an OSHA state plan. However, since the onset of the pandemic, employers have faced a rash of private lawsuits claiming that employees are toiling in unsafe work conditions.

These lawsuits (often class actions) are usually brought under negligence or novel public nuisance theories (in part based on claims of “community spread” resulting from unsafe worksites) and other tort causes of action. In addition, plaintiffs in private negligence lawsuits can use evidence of an OSH Act violation as evidence of negligence (depending on the state, *per se* negligence). Typical allegations include:

- An employer did not sanitize full-body suits used by multiple workers each day and implemented work policies that made social distancing impossible. In another action against the employer, plaintiffs alleged managers pressured employees to make face-to-face deliveries and failed to provide sufficient personal protective equipment (PPE).
- A plant did not take safety precautions to prevent the spread of COVID-19 and did not provide on-site testing or sick leave that would allow infected workers to stay home.
- Gig workers were not provided with PPE, reimbursed for PPE purchases they were forced to make, or trained in its usage. They also were denied the opportunity for handwashing or social distancing despite their roles as essential workers.
- A fast-food restaurant did not make face masks mandatory. One department had sick employees exhibiting COVID-19 symptoms but they were not placed on medical leave.
- An employer forced sick employees to work and concealed outbreaks from coworkers. Another suit against the same employer alleged that 200 workers contracted the virus at its facility.

Some courts have been willing to entertain these suits; in other instances, courts have deferred to the jurisdiction of OSHA and dismissed the claims. In one case against a meat processing plant, for example, a federal court in Missouri held that OSHA was better positioned to determine whether the plant had created an unreasonably unsafe work environment and a public nuisance (as the plaintiffs alleged) and granted the employer's motion to dismiss. However, in another public nuisance action against a fast-food franchisee, an Illinois state court permanently enjoined an employer to enforce social distancing and mask policies and other protections for employees and patrons.

Given that private workplace health and safety suits are so often grounded in tort, it is not surprising they overwhelmingly are filed in state court. In fact there have been three times as many such lawsuits filed in state court than federal court since the pandemic began. Some states have enacted measures to protect employers from liability. In some states, workers' compensation laws provide the sole recourse. Elsewhere, though, a number of these class actions have survived dismissal or have ended in significant settlements. Most recently, a fast-food franchisee in Oakland settled a public nuisance case involving more than 25 employees who alleged they were not provided PPE and were told instead to wear dog diapers and coffee filters as masks. As part of the settlement, the employer agreed to adopt additional safety measures, such as providing sick leave and safety equipment and conducting contact tracing, and establish a worker safety committee. Weeks earlier, the national franchisor had settled a similar public nuisance claim at one of its Chicago restaurants, agreeing to implement protective measures to protect employees and minimize the "public nuisance."

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