

COVID-19: Challenges and Considerations for Coronavirus-Related Litigation

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The outbreak of the novel coronavirus (COVID-19) has affected nearly all individuals and businesses in the United States. With over 350,000 cases confirmed worldwide, including over 30,000 cases in the United States, federal, state, and local governments are implementing a variety of measures to protect citizens and prevent the spread of the virus.

The federal government has issued a series of orders, recommendations, and guidance concerning COVID-19. However, the majority of existing legal requirements have been issued by state and local governments to address the situation as it evolves in their communities. Businesses therefore are subject to different, and occasionally conflicting, orders across the jurisdictions in which they operate. These orders, though important and well-intentioned, may have at times unintended consequences. While social solidarity and public-private partnership are critical in this time of national crisis, businesses may, in some circumstances, find that litigation is necessary to protect not just their own private interests but also the broader public interest where the unintended consequences of emergency government actions could needlessly inflict economic harm or even harm the public health. The decision to litigate is always one to be carefully considered. But during extraordinary times like these where important public health concerns are at stake, any potential litigation—and especially litigation against the government—must be closely examined and presents practical and strategic challenges and considerations. This alert addresses some of those challenges and considerations.

I. Current COVID-19-Related Litigation

Thus far, COVID-19-related litigation has largely involved private disputes. For example, purported class actions have been filed against Inovio Pharmaceuticals and Norwegian Cruise Lines, alleging violations of federal securities law based on statements relating to coronavirus. *McDermid v. Inovio Pharmaceuticals, Inc. et al.*, No. 2:20-cv-1402-GJP (E.D. Pa.); *Douglas v. Norwegian Cruise Lines et al.*, No. 1:20-cv-21107-RNS (S.D. Fl.). And passengers of the Diamond Princess and Grand Princess cruise ships have sued Princess Cruises for negligence, alleging that Princess Cruises exposed them to COVID-19. *Austin et al. v. Princess Cruise Lines Ltd.*, No. 2:20-cv-02531-DSF-RAO (C.D. Cal.); *Dalton et al. v. Princess Cruise Line, Ltd.*, No. 2:20-cv-02458-GW-PJW (C.D. Cal.).

The few government-facing lawsuits that have been filed to-date concern election or detention issues, such as litigation seeking voting accommodations for residents of Florida impacted by coronavirus, and litigation seeking the release of individuals in ICE detention who are at high risk of serious illness or death in the event of COVID-19 infection. *See, e.g., Williams et al. v. Desantis et al.*, No. 1:20-cv-00067-RH-GRJ (N.D. Fl.); *Dawson et al. v. Asher et al.*, No. 2:20-cv-00409-JLR-MAT (W.D. Wash.).

Despite the lack of current government-facing litigation related COVID-19, it seems likely that as States and localities impose increasingly significant restrictions, litigation will follow.

II. Potential Litigation Concerning Laws, Rules, and Regulations Addressing COVID-19

Businesses grappling with a cascade of emergency orders from local, state, and federal governments will generally find it more appropriate and expedient to raise concerns and resolve issues directly with policymakers. But under certain circumstances, litigation may prove necessary as a last resort. Well-meaning government regulations may exceed the scope of government authority and generate unintended consequences that could in some circumstances require judicial resolution. Businesses may face conflicting obligations from neighboring or overlapping jurisdictions; emergency orders may exacerbate public health problems; or government-imposed restrictions may unintentionally impede critical activities, such as the manufacture or transportation of vital goods.

A. Federal Authority To Address The COVID-19 Outbreak

The federal government's authority to respond to an outbreak of contagious disease in large measure derives from the Constitution's Commerce Clause. The Public Health Service Act, enacted pursuant to Congress's Commerce Power, delegates to the Secretary of the Department of Health and Human Services (HHS) the responsibility to prevent the introduction, transmission, and spread of communicable diseases in the United States, including authority to issue regulations in furtherance of that goal. *See generally* 42 U.S.C. §§264-272.

Regulations promulgated pursuant to this authority broadly empower the Centers for Disease Control and Prevention (CDC) (a component of HHS) to take such measures as are reasonably necessary to prevent the spread of disease if it is determined that state measures are insufficient. In particular, the CDC has regulatory authority to detain, medically examine, and release persons arriving into the U.S. or traveling between states who are suspected of carrying certain communicable diseases. *See generally* 42 C.F.R. Parts 70 (interstate quarantine) and 71 (foreign quarantine).

Despite this authority, few federal entities thus far have issued binding regulations or orders mandating or prohibiting specific behavior within the United States in response to COVID-19.

B. State and Local Responses To COVID-19

By contrast, States, counties, and cities have passed—and, in some cases, repeatedly amended—myriad laws and issued orders and regulations in response to COVID-19, including restrictions on

social gatherings, travel, and business operations. Others are expected imminently. While some of these regulations are voluntary, many are mandatory and carry penalties for noncompliance. Examples of State and local enactments regarding COVID-19 to-date include:

Shelter-in-place requirements: Several States and cities have issued shelter-in-place or stay-at-home orders with limited exceptions. For example, California's order generally requires all individuals living in California to stay at home or at their place of residence except as needed to maintain continuity of operation of the sixteen infrastructure sectors designated as critical by the federal government.¹ Illinois and Ohio's orders include exceptions for health and safety, necessary supplies and services, outdoor activity, certain types of essential work, and care for others.

Limits on social gatherings: Numerous States, including Florida, Indiana, Louisiana, Michigan, New Jersey, New York, Ohio, and Louisiana, have issued restrictions on the size of social and other gatherings in an effort to promote social distancing. Cities and counties have issued similar restrictions.

Limits on travel: Some States have imposed limits on travel. For example, Illinois and Ohio have prohibited all travel except for essential travel and travel for essential activities.

Quarantines: Several counties and States have placed specific categories of individuals under mandatory quarantines. For example, Hawaii has ordered a mandatory 14-day quarantine for everyone arriving in the State, including tourists and returning residents.

Closing or Limiting Businesses Operations: Several States, counties, and cities have required that certain businesses (generally including non-profits) shut down or that most or all of their employees work from home.

For example, [New York](#) has ordered businesses to keep their workforce at home, with exceptions for "essential businesses" such as certain health care operations, infrastructure, manufacturing, and "services related to financial markets"; non-essential businesses can only have limited essential staff on-site to accommodate telework by other staff. [New Jersey's](#) order directs certain recreational, entertainment and nonessential retail businesses to close their premises to the public. Other businesses and nonprofits can remain open, although with a reduced on-site workforce. Connecticut's order requires all non-essential businesses to implement work-from-home procedures "to the maximum extent possible," though it does not apply to "essential" businesses, including critical infrastructure sectors identified by the U.S. Department of Homeland Security.

Pennsylvania has ordered "non-life-sustaining businesses" to close or face citations, fines, and license suspensions. Illinois and Nevada have mandated that all "non-essential" business and operations must cease. Ohio has ordered non-essential businesses to cease all activities within the state except "minimum basic operations," which include the minimum necessary activities to maintain the value of the business's inventory and preserve the condition of the business's physical plant and equipment.

Commandeering of business facilities: California, for example, has authorized the California

Health and Human Services Agency and Office of Emergency Services to make hotels and other places of temporary residence available for other uses, including through the exercise of the State's asserted power to commandeer property.

Waiver of fees on financial services: New York, for example, has asked the Department of Financial Services to instruct state-chartered banks to waive ATM fees, late fees, overdraft fees, and credit card fees.

Restrictions on debt collection, foreclosure, and eviction: States and cities have restricted debt collection, foreclosure, and eviction. For example, New York issued an order imposing a 90-day moratorium on commercial and residential evictions or foreclosures, and will issue emergency regulations requiring mortgage servicers to grant forbearance for mortgage payments for borrowers facing financial difficulty. Michigan issued an order temporarily suspending evictions. Los Angeles issued an order prohibiting landlords from evicting residential tenants in the city if the tenant is able to show an inability to pay rent due to circumstances relating to the COVID-19 pandemic.

The legal landscape is rapidly evolving, and state and local governments are promulgating new regulations on a near-daily basis.

C. Theories For Private Litigation

While companies and business organizations will likely find it preferable, in the first instance, to raise concerns about regulations directly with government entities, litigation may become necessary in certain circumstances. Companies or their trade associations could potentially challenge local actions or directives in response to COVID-19 as preempted as a matter of state law to the extent they impede the State's interest in containing the virus. Localities' authority typically derives entirely from the State, *see, e.g., Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016), and local law may conflict with State law and therefore be preempted when the effectuation of the local interest would "materially impede or destroy" a State interest, *see, e.g., Board of Cnty. Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045, 1059 (Colo. 1992). Companies could also potentially challenge emergency orders on federal constitutional grounds to the extent that such orders violate the Takings Clause, the Contracts Clause, the Due Process Clause, the Dormant Commerce Clause, or the First Amendment. Companies may also be able to raise statutory or regulatory claims, if the government body that enacted the restriction did not have the authority to do so or did not follow the proper process. In addition, if the federal government were to impose national restrictions on individuals and businesses similar to the restrictions imposed by State and local governments, any State or local regulation conflicting with the federal regulation could be preempted and therefore unenforceable.

The unintended consequences of well-intentioned regulations may have tremendous effects not only on regulated businesses but also on the public at large.

First, conflicting obligations across the jurisdictions may prevent businesses from being able to provide essential services in any jurisdiction. For example, Jay Timmons, president of the National Association of Manufacturers, noted in an interview on March 18, 2020, that many State and local government ordinances fail to include exceptions for operation of manufacturing facilities, which

play a key role in ensuring that Americans have the goods and resources they need to survive. The absence of exceptions for manufacturing operations in some jurisdictions may make it impossible for manufacturers to continue operating even in jurisdictions that have exempted them from shut-down orders.

Second, some emergency orders may unintentionally exacerbate public-health problems. An order that requires all guests at short-term lodging units to vacate those premises, for example, could worsen, rather than improve, the current crisis by forcing evicted individuals to engage in social interaction.

Third, emergency orders may incidentally impede critical activities. The American Trucking Association, in a March 17, 2020 letter, asked the Trump administration to exempt trucking services for the delivery of essential goods, such as medicine, food, and mail, from any State and local restrictions. The group also asked for rest stops to be kept open, explaining that they are essential to drivers' managing fatigue as they transport essential items across the country.

D. Strategic and Practical Considerations

A decision to sue a government official or government agencies over COVID-19 related restrictions is not one that should be taken lightly. Faced with imperfect data, public officials are racing to contain the spread of a very serious disease. And courts will understandably be reluctant to second-guess those determinations during a time of crisis. For that reason, among others, litigation should be a last resort—and one that is pursued only after all available political or regulatory outreach has failed to remedy the unlawfulness or unintended consequences of a regulation. The political and reputational consequences of a lawsuit of this type will also need to be assessed thoughtfully.

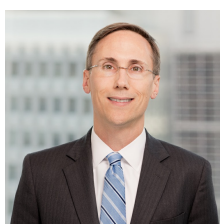
An additional consideration that should inform litigation strategy is whether COVID-19-related concerns will interfere with the ability practically to secure timely judicial relief. Many courts are imposing restrictions of various types on access. In normal times, requests for emergency relief—whether a temporary restraining order or preliminary injunction—already ask much of judges and court personnel. Requests for such relief now will also run up against unique resource constraints and other significant restrictions affecting the judiciary's ability to work. This counsels in favor of giving careful attention to at least three issues: (1) pursuing requests for expedited preliminary relief only in the event of a bona fide emergency where harm is truly irreparable; (2) where appropriate, explaining why emergency relief is necessary to address immediate public health or welfare concerns; and (3) if possible, selecting a judicial forum in a location where COVID-19-related restrictions are less likely to hinder the court's ability to grant preliminary relief.

Despite the challenges, even in these extraordinary times, the judiciary should remain available to enforce the rule of law, protect against unlawful irreparable harms, and enforce constitutional limitations on government power. More so than ever, however, pursuing litigation thoughtfully and strategically will be critical to success—especially litigation against the government.

III. Conclusion

As Americans and their governments continue to address the COVID-19 outbreak, businesses will be subject to a patchwork of differing and occasionally conflicting state and local regulations. These regulations are being promulgated and amended on a near-daily basis. Federal regulations and emergency actions may also emerge. Regulatory language may not clearly convey who is and is not affected by mandatory restrictions, and regulations may also have unintended consequences that impose unnecessary harms on people and businesses or even undermine the public health. WilmerHale has been tracking State and local regulations, advising on how to respond to such regulations and considering the limits of regulatory authority.

1. These sixteen sectors are the chemical sector, commercial facilities sector, communications sector, critical manufacturing sector, dams sector, defense industrial base sector, emergency services sector, energy sector, financial services sector, food and agriculture sector, government facilities sector, healthcare and public health sector, information technology sector, nuclear reactors, materials, and waste sector, transportation systems sector, and water and wastewater systems sector.



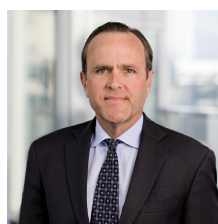
Brian M. Boynton

PARTNER

Chair, Government and
Regulatory Litigation Group

✉ brian.boynton@wilmerhale.com

☎ +1 202 663 6137



Kelly P. Dunbar

PARTNER

✉ kelly.dunbar@wilmerhale.com

☎ +1 202 663 6262



Ari Holtzblatt

PARTNER

✉ ari.holtzblatt@wilmerhale.com

☎ +1 202 663 6964



David W. Ogden

PARTNER

✉ david.ogden@wilmerhale.com

☎ +1 202 663 6440



Peggy Otum

PARTNER

Co-Chair, Energy, Environment
and Natural Resources Practice

✉ peggy.otum@wilmerhale.com

☎ +1 628 235 1161



Daniel S. Volchok

PARTNER

Vice Chair, Appellate and
Supreme Court Litigation
Practice

✉ daniel.volchok@wilmerhale.com

☎ +1 202 663 6103