

PENNSYLVANIA

EMPLOYMENT LAW LETTER

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Edited by: Dena Calo, Jessica Meller, and Lisa Koblin of Saul Ewing Arnstein & Lehr LLP

PA meatpackers sue to compel OSHA to intervene in COVID-19 workplace concerns

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by Erik Pramschufer, Saul Ewing Arnstein & Lehr LLP**

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by Erik Pramschufer, Saul Ewing Arnstein & Lehr LLP

COVID-19 has raised an unprecedented number of new concerns for the Occupational Safety and Health Administration (OSHA) and the employers required to follow its guidance. On July 22, employees at a Pennsylvania meatpacking plant filed a lawsuit against OSHA claiming the agency has been derelict in ensuring the plant implemented proper safety measures to address the spread of COVID-19. The suit asks the agency to inspect the plant immediately and abate the current safety threats. Employers across all industries can look to the suit as a representative example of what might be expected by failing to follow coronavirus-related safety guidelines.

Allegations

The Maid-Rite Specialty Foods meatpacking plant in Dunmore, Pennsylvania, packages meat to be frozen and sold for mass production at schools, nursing homes, and military bases. The complaint filed by its employees (as well as the advocacy group Friends of Farmworkers) claims the plant hasn't enacted adequate procedures to protect workers from contracting COVID-19 and specifically alleges they haven't been given adequate hand-washing breaks, aren't provided masks (except on three occasions), and are "incentivized" to report to work when they're sick.

Further, the suit contends the plant has increased the risk of spreading COVID-19 by rotating in workers from other facilities. The employees claim the plant's failure to act has resulted in nearly half of the workforce contracting the coronavirus since March.

The suit also calls notable attention to the configuration of the conveyor belt line where employees stand and alleges the plant hasn't enacted proper social-distancing requirements. The workers allege they are required to work within six feet of one another (sometimes shoulder-to-shoulder) and that the company hasn't installed any type of physical barriers between them.

As a result, the employees claim, the employer is in direct violation of industry guidance published by OSHA in May that requires workers to be spaced six feet apart in all directions. They say they would be able to distance themselves properly if the plant slowed down the belt or placed less meat on it. In an effort to sustain pre-COVID-19 production levels, however, the plant has required more employees to be present on the line than would allow them to maintain a proper distance from one another.

OSH Act's general duty requirements

OSHA enforces the Occupation Safety and Health Act (OSH Act) and has established baseline safety standards for a multitude of industries, including meatpacking. As of the date of this article, the agency hasn't enacted any specific standards addressing transmission of the COVID-19 virus.

The OSH Act's "general duty" clause, however, requires all employers to "furnish to each of [their] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." The agency has consistently maintained a position throughout the COVID-19 emergency that employers' obligations under the clause include taking appropriate action, when feasible, to combat the virus' spread.

The general duty clause, as the name implies, leaves a fair degree of discretion to employers to combat workplace safety risks. To fill the gap during the COVID-19 emergency, OSHA and the U.S. Centers for Disease Control and Prevention (CDC) have published guidance for various industries on how to mitigate the risk of employees contracting the virus at work. The guidelines are detailed but don't carry the same weight and authority as various other government regulations.

Employees are allowed to submit complaints directly to OSHA about potential workplace safety issues, and the agency's COVID-19 guidance indicates it is focusing its enforcement efforts on industries and employers based on multiple factors, including industry risk, location, and the number of complaints received. In this analysis, industries are "ranked" based on the risk of transmitting the disease:

- Hospitals and healthcare workers are considered to be at "very high" or "high risk";
- Other public-facing jobs such as schools and high-volume retail facilities are viewed as "medium risk"; and
- Nonpublic-facing jobs are ranked as "lower risk."

Meat processors are considered medium risk, according to OSHA's guidance.

OSHA's failure to respond

The Maid-Rite workers allege that since March they have repeatedly complained to their bosses about the working conditions and have filed at least two formal complaints with OSHA asking for the agency to intervene, including one "Imminent Danger Complaint." They claim the agency has entirely ignored their complaints.

The lawsuit notes one of the only actions OSHA took in response to the complaints was to ask the plant itself to investigate the concerns and report back. The workers allege the plant's responses were inadequate and that nothing has changed.

Suit is relevant for all employers

Although the plant workers' case is the most recent coronavirus-related OSH Act lawsuit, it certainly won't be the last, and it should be a call to action for *all* employers. While the allegations may concern some of the specific inherent dangers of the meatpacking industry, they mirror some of the same concerns other employers are grappling with preparing their workplaces for employees' return (e.g., requiring masks, altering workspaces to allow physical distancing, and structuring sick leave policies).

OSHA has published guidance for many different industries, including employers in retail and other high-customer-volume environments. Although the guidelines themselves don't carry the weight of law, employers that fail to follow them face certain risks.

Traditionally, the greatest risk in failing to follow OSHA protocols was possible exposure to the agency's enforcement (which itself can be costly). The meatpackers' suit demonstrates, however, that even if an employer can avoid OSHA enforcement because the agency's resources may be focused elsewhere, employees and advocacy groups may still raise the issues in court and seek to compel it to take action. Accordingly, employers in all industries should be aware of all guidance applying to their industry and be attentive to employees' concerns as they come up.

At the time of this writing, OSHA's response to the suit and the request for emergency relief was due to the court on July 28, and an emergency hearing is scheduled for July 31. The government's position about the agency's obligations to investigate the workers' complaints will be telling, and we will provide an update once the court makes a determination (assuming the case isn't resolved before then).

Erik S. Pramschufer is an attorney with Saul Ewing Arnstein & Lehr LLP. If you have questions about the case or other coronavirus-related OSHA concerns, you can reach him at erik.pramschufer@saul.com.