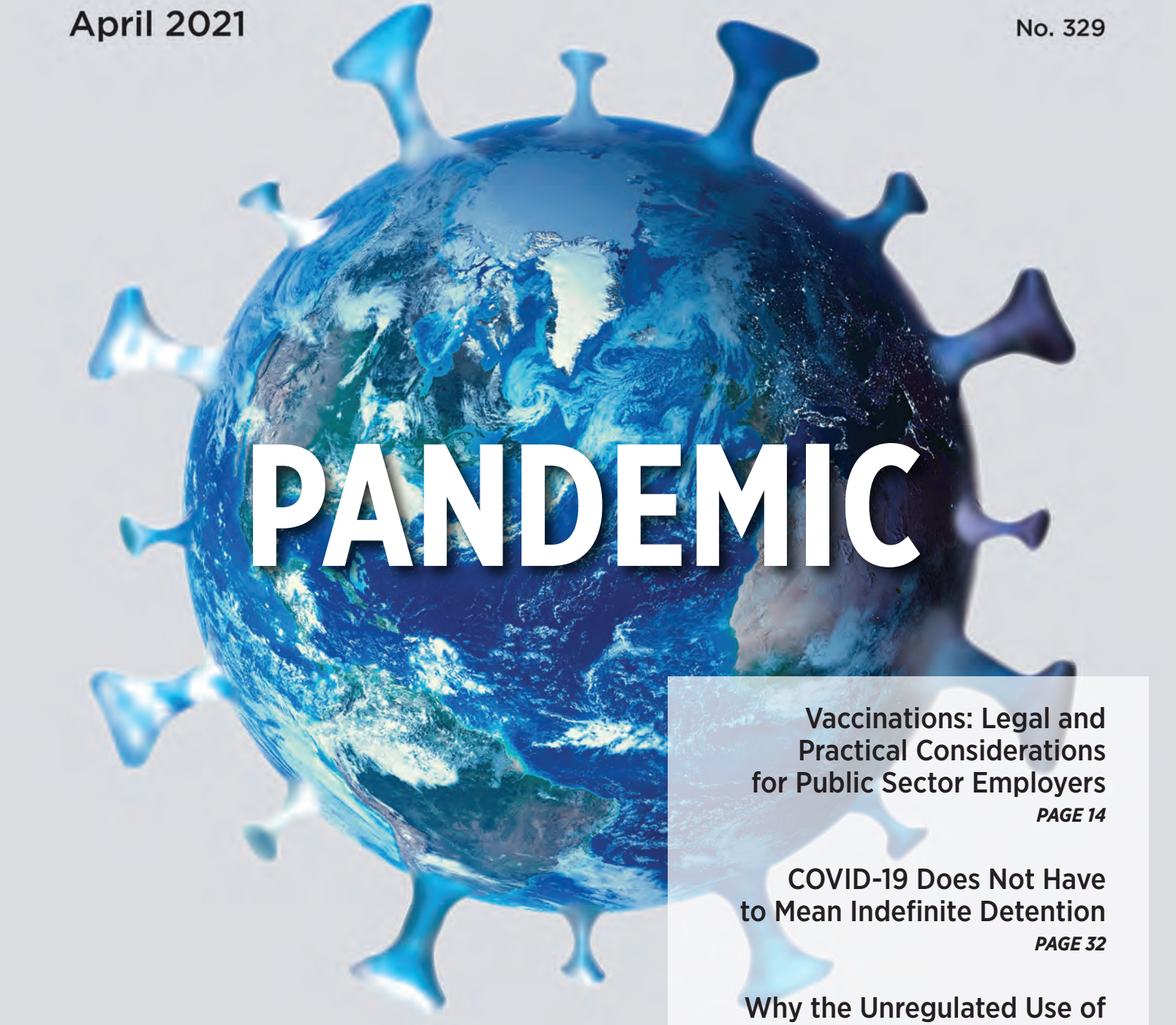
NEW JERSEY LAWYER

April 2021

No. 329



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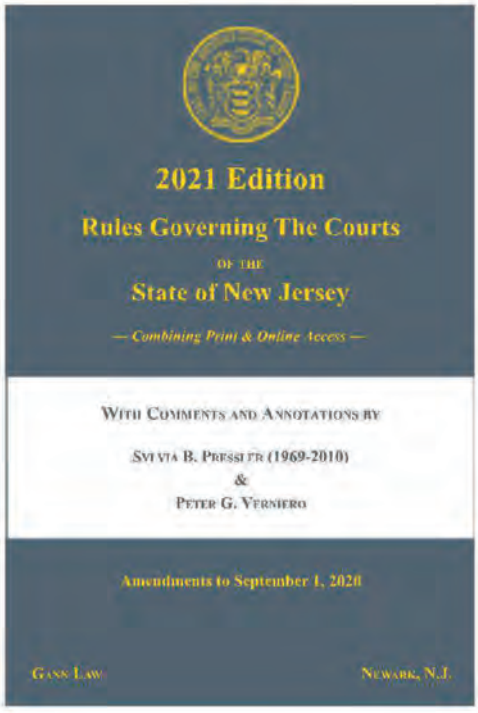

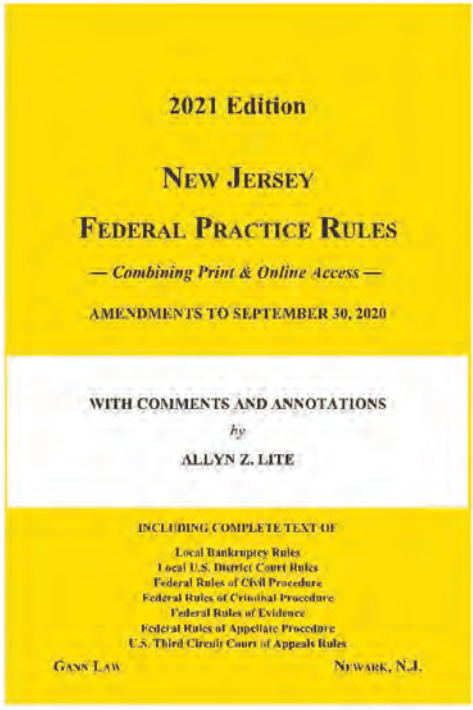

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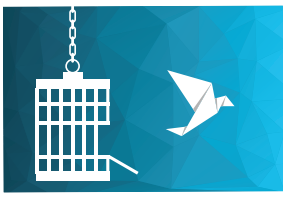

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DEPARTMENTS

KIMBERLY A. YONTA

Now More Than Ever, New Jersey Urgently Needs a Full Bench to Ease Case Backlog

The New Jersey justice system is facing a crisis.

It is one that threatens our system to its very core and the consequences will be felt most acutely by the residents of our great state. The NJSBA urges the governor and Senate to take action now to fulfill the promise of justice for all.

There are currently a significant number of judicial vacancies, compared to prior years, and at a time when the courts are more critical than ever. Simply put: there are too few jurists facing enormous pressures to keep up with a deluge of cases from people suffering as a result of the COVID-19 pandemic.

Even as many courthouses operate with few people physically in the buildings, the work of the courts has been vigorous. Since the pandemic struck, our judges have conducted more than 150,000 remote court events involving more than 1.5 million participants, according to Judiciary statistics.

And a flood of additional matters will soon slam the courts in landlord/tenant and criminal matters—cases that speak to the fundamental rights of liberty and housing—when full in-person proceedings resume. The backlog of landlord/tenant cases are expected to top 100,000 statewide once the eviction moratorium is lifted. Normally that docket has around 13,000 cases. These citizens need to have their cases heard—they may be landlords who require the rent money to pay for the mortgage each month and they may be tenants who need their security deposits back to pay for other bills.

And the picture is equally dire in the criminal courts where nearly 5,000 defendants are being held as they await trial. News reports indicate that roughly half of those people have languished in jail for over six months wherein normally, speedy trial rules require that defendants must be indicted within 90 days and go to trial within 180 days. I have seen it first-hand. One of my clients, who has no criminal record, has been jailed awaiting trial for over a year and her mental health is deteriorating with no plans in sight for any evaluations or proceedings. I know I am not alone in seeing the devastating effect this has had on clients who remain jailed.

To be crystal clear, the existing bench will not be sufficient to handle the crush of cases that are coming. And to complicate the situation, diverting the necessary judicial energy to address that caseload will almost certainly affect how justice is delivered in all other areas of the court.

To be crystal clear, the existing bench will not be sufficient to handle the crush of cases that are coming….diverting the necessary judicial energy to address that caseload will almost certainly affect how justice is delivered in all other areas of the court.

A persistent shortage of judges jeopardizes access to the court system, which is an independent and co-equal branch of government.

The repercussions of these vacancies on the citizens of New Jersey, who rely on the court system for the fair and impartial administration of justice to resolve disputes—ranging from foreclosure and contract disputes to divorce, child custody and domestic violence matters, to seeking damages for an injury—should take utmost priority.

A full bench is the only solution. The residents of our state expect and deserve nothing less.

The NJSBA urges the governor and Senate to take prompt action to fill these judicial vacancies. ⚖

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FROM THE SPECIAL EDITORS

Applying the Law in a Society Changed by the COVID-19 pandemic

In January 2020, news began circulating in earnest about a yet unnamed, highly contagious respiratory virus, first identified in China. By March 2020, borders throughout the world had been shut down as the swelling numbers of patients suffering from the raging COVID-19 pandemic overwhelmed first responders and medical providers. Millions found themselves out of work, worried about where money for their mounting bills would come from, whether "shelter in place" orders would allow for trips to the supermarket, whether they would be evicted, whether the stimulus packages were ransoming our future, etc.

We salute the first responders and medical providers that kept working and sacrificing themselves. We extend deep appreciation to the supermarket employees, the delivery and warehouse people, and government employees and officials that allowed for some basics of life to continue during those dark hours. And, to all the moms and dads that found themselves serving as teachers while feverishly working to stay employed, we understand the pressures we found ourselves facing. By the end of the year, we were a bit wiser on how to combat the pandemic as a society, though still unsettled.

As lawyers, we were at the forefront of the legal issues posed by the pandemic. This issue of *New Jersey Lawyer* seeks to arm our readers on how to advise their

ASAAD K. SIDDIQI, *vice chair of the editorial board of* New Jersey Lawyer *and board member since 2011, is a partner at McCusker, Anselmi, Rosen & Carvelli, P.C., and advises clients on myriad issues, including commercial and complex litigation and non-profit law. He serves on the Civil Practice and the Model Civil Jury Instruction Committees of the New Jersey Supreme Court, and is a member of the board of trustees for the Association of the Federal Bar of New Jersey (chairing its diversity committee) and the Bergen County Bar Association (co-chairing its Federal Practice Committee).*

DARREN M. GELBER *is a shareholder at Wilentz, Goldman & Spitzer, where he chairs the firm's White Collar Criminal Defense practice group. Darren represents clients in federal and state courts, and before administrative agencies, in connection with fraud, theft, complex white-collar crimes and other matters. His practice extends into the health care field, where he represents physicians, dentists, pharmacists and other licensed professionals in criminal matters, administrative and licensing hearings, audits, and regulatory litigation, including Medicaid/Medicare fraud investigations, and administration actions involving discipline and licensing of professionals*

clients on myriad issues of employment, criminal justice, government powers, and landlord/tenant as well as thorny constitutional issues, as we seek to steady ourselves in a world where the words "pandemic," "coronavirus" and "COVID-19" have become ubiquitous and no longer limited films to on a silver screen.

The first article in this issue deals with advising employers and employees—especially in the public sector—on what vaccine requirements employers can implement. John L. Shahdanian, II and Valentina M. Scirica offer an overview of established law and its application to COVID-19. The second article discusses employment leave and liability litigation in a post-pandemic world. Laura A. Siclari and Allison N. Zsamba examine some recent New Jersey cases relating to employee leave during the pandemic, including eligibility under the Families First Coronavirus Response Act.

The discussion on employment considerations continues with Joseph H. Tringali's article on wage and hour requirements. Federal and state law continue to be relevant during the pandemic, with adjustments made for telework and cases considered for time spent on COVID-19 protocols for non-remote workers.

This issue of *New Jersey Lawyer* also includes articles related to criminal trials and incarceration. Adalgiza A. Núñez examines the urgent need to help criminal defendants sitting in county jails awaiting their literal day in court, given that COVID-19 has significantly delayed trials. Matthew S. Adams and Marissa Koblitz Kingman explore the nuts and bolts of compassionate release applications for federal inmates.

Fruqan Mouzon and Bradford Meisel discuss constitutional law and how people's rights to freedom have been impacted by pandemic-related government restrictions. Meanwhile, "business as usual" has taken on a new meaning amid the COVID-19 crisis, and Jhanice V. Domingo examines how this has impacted the area of family law. Then, Theo Cheng analyzes the benefits of compelling parties to participate in remote arbitration hearings.

This edition wraps up with a discussion of how the pandemic has affected landlord-tenant practices. Bruce Gudin takes a look at the Coronavirus Aid, Relief, and Economic Security Act and the state of eviction cases. And Izik Gutkin discusses how the unregulated use of gyms and common areas of apartment complexes could cause issues for landlords.

Our hope with this issue of the magazine is that it assists our readers by providing knowledge and tools to manage the current COVID-19 pandemic. The legal issues presented by it are still developing in real time. The world that we live in today is very different than the one we lived in just a few months back. Hopefully, we have identified some issues that can provide utility to our readers as well issues that can be further improved should there be a prolonging of the current pandemic or if there is one in the future. Our thanks go to the authors, all of whom have generously committed their time and expertise to educating practitioners.

In closing, we would be remiss if we did not mention how, during the pandemic, we were reminded of the continuing struggle for social justice and equality through the tragedies of Breonna Taylor, Ahmaud Arbery, and George Floyd. One issue of a legal periodical cannot change the arc of history on such a weighty matter. It can, however, serve as a portent of good intentions and of things we want to see in real life. Even if we fall short, we still strive to get up and reach higher.

To that end, maybe this issue can cause a ripple that furthers the topic of diversity and gender equality in the legal profession. The authors and special editors of this issue reflect a small slice of the diversity that exists in our legal profession. It is not hard for law firms to follow suit and implement changes that guarantee equal pay and opportunity for all attorneys—and truly walk the walk. And diverse lawyers should be applauded when they take a stand to receive what they have earned. ⚖

PRACTICE TIPS

WORKING WELL

Tips on Mindful Practice

By Anthony Murgatroyd
Murgatroyd Law Group, L.L.C.

When faced with a stressful situation such as a trial or deposition, or even when you receive a phone call from a hostile adversary, consider taking some time to practice mindfulness in one or more of the following ways:

1. **Pay attention to your breathing.** Is it fast, slow, comfortable? If you sense you are stressed, take a few moments to practice diaphragmatic (deep lower stomach) breathing. This allows you to regulate and bring your breathing to a comfortable level.
2. **Consider what you're hearing.** Close your eyes and verbally describe the sounds you hear, including your own internal noisy chatter. Identify the thoughts going through your head.
3. **Identify the impact.** Mentally scan each body part, and identify where the stress has settled in. The process can have a calming effect and take your mind off the negative thoughts and feelings.
4. **Know your triggers.** Try to identify the trigger areas in your environment. These are locations or events where you are prone to experience adverse physical and mental reactions, such as the office phone, the mail bin, or the car. I put a sticker of an owl and a "STOPP" card in these areas. STOPP stands for **S**top, **T**ake a breath, **P**ull back for some perspective, and **P**roceed. When I see a call come in on the caller ID from a dreaded adversary, or I detect a motion for summary judgment in the mail, or I'm sitting in bumper to bumper traffic, the owl and STOPP card remind me to take a moment to pause, breathe in and out, and notice the emotions I am experiencing at the moment. Taking the time to pause and reflect like this gives me the space to reduce my reactivity and re-wire myself for a new and better response.
5. **Labeling the thought.** A perfect example of this is a moment where you are experiencing anger. By labeling the emotion, you can divorce yourself from it by simply thinking, "there's another angry thought again." Additionally, I sometimes find it helpful to visualize the word "anger" hovering above me on a cloud and floating away until it disappears.

WRITER'S CORNER

Effective Communication and How Not to Write Like A Lawyer

By Robert B. Hille
Greenbaum, Rowe, Smith & Davis LLP

Remember the first year of law school and seeking to join the ranks of legal scholars on *Law Review.* If you were like me, you searched the greatest opinions by the greatest legal minds. Trying to copy their style, I crafted sentences so immense and selected words so lethal that surely my tidal wave of English language

would leave no reader a path to escape my logic, reasoning, and skills of persuasion.

Though unsuccessful in my *Law Review* quest, I was undeterred. I continued to deploy these tactics as a young lawyer seeking to overwhelm my adversaries and persuade courts. Yet, my writing seemed no less nor more compelling than my adversaries' and I began to wonder why.

My epiphany came when I ran what I thought was an especially brilliant piece by my spouse. I expected confirmation of my self-impressed opinion. Instead, she responded in an underwhelmed tone that she supposed I knew what I was trying to say. I realized then that the only one I was impressing was myself.

I began to wonder whether legal writing an oxymoron. Did law school teach us only to write to impress ourselves? Was legal scholarship literary scholarship? Was it the most effective way to persuade? Really, how many of those legal scholars won a Pulitzer prize or made a *New York Times* bestseller list? In the end, why is a court different from any other audience?

In these questions, I began to consider whether I should unlearn to be like Learned Hand. And so, I turned my focus away from legal scholarship to journalism as a guidepost.

For journalists, no sentence structures exist that befuddle the mind. There is no use of five words when one suffices. And they use no cascade of adjectives to describe someone.

Instead, the facts placed in cold, logical, and precise fashion lead the reader to the point of the article or reinforce that point. Each sentence rewards the reader for the effort to read more. Significantly, journalists state the point once, while redundancy in legal writing seems to be a stylistic rule.

These observations lead me to believe that good writing is simply effective communication. It is placing your objective in the mind of the reader, whether it is to question, to dream or persuade. There should be no difference whether the forum is a court and the subject legal.

Unfortunately, sometimes "legal writing" is an excuse for poor writing or obtuse communication because of a belief that the legal subject matter requires this.

Take statutes. Designed for breadth and flexibility they may necessarily convert the English language into an indecipherable maze. However, lawyers often recreate that maze when explaining why the statute is the basis for what the court must do. Frequently under-utilized in the effort to explain are the tools of simplification, clarification, and relevancy.

While my writing remains a work in progress, my focus and approach have changed. Because of the improved response those changes have brought, I wish to share them here.

I believe the ABCs of effective communication are Audience, Brevity and Clarity.

Focus on your audience. Education is important. Do not assume it is familiar with the subject matter or the point you are trying to make.

Condense the point and make it clear. Take the guesswork out of what you are trying to say. Remember, you are trying to make a point so make it.

To persuade, lead the reader to where you want them to go. Give comfort to them in the support you provide for reaching your "correct" destination. Command of the facts, a good outline and editing are essential in achieving these goals.

Write as you speak and not as you would speak as a lawyer. What is easier for the reader, the question: Did you have the occasion to view the other vehicle prior to the happening of the occurrence? Or: Did you see the other car before the accident? A lawyer may love the former, the reader will appreciate the latter.

Finally, run what you wrote by someone who is not a lawyer and knows nothing about the subject. Find out what they do not get and rework it until they do.

Remember, it is about the audience. Seek empathy to connect with them and have sympathy for what you ask them to endure.

ETHICS AND PROFESSIONAL RESPONSIBILITY

Exhibits, eCourts, and Ethics

By Ryan J. Gaffney
District VI Ethics Committee member, Of counsel to Chasan Lamparello Mallon & Cappuzzo, PC

Last year forced us all to expand our work-from-home skills. ECourts filings increasingly fell not to assistants and associates but to the senior attorneys that drafted them. The basic rules on these filings have not changed since the pandemic, but attorneys of any experience level should be familiar with what they are communicating to the Court.

Several system-generated certifications are required in every electronic submission through the civil and criminal eCourts systems. One such certification included not once—but twice—is that the filing attorney has redacted certain confidential information. Specifically, the *New Jersey Court Rules* require the redaction of "confidential personal identifiers" in all court filings [*R.* 1:38-7(a)]. The account and identification numbers subject to redaction include social security, driver's license, insurance policy, license plate, and active financial or credit card information. Military status is also a protected identifier.

Something as obvious as a social security number may jump out as requiring removal, but exhibits with other information deemed confidential under the *Rules* are commonly used in motions and other applications to the court. A motor vehicle accident report, for example, includes the driver's license number, insurance policy number, and license plate number for all drivers involved. Employment records and routine billing documents also usually contain financial account information that can be overlooked.

If an unredacted confidential identifier is filed on eCourts, it cannot be removed with a simple call to the court [*R.* 1:38-7(g)(3)]. Indeed, the *Court Rules* mandate that a request to redact confidential information come by motion or order to show cause [*R.* 1:38-7(g)(1)]. The time and expense associated with such an application, not to mention the multiple certifications discussed above, underline the court's view on the importance of protecting this information.

While the *Court Rules* prohibit filing of **all** confidential personal identifiers [*R.* 1:38-7(b)], its purpose recalls a related standard—limited only to a client's information—under the *Rules of Professional Conduct* [*R.P.C.* 1.6.]. A lawyer must make "reasonable efforts" to prevent disclosure of, and must "act competently" to safeguard, confidential information including electronically stored information [Official Comment to *R.P.C.* 1.6(f)]. With the greater experience in electronic filing by most attorneys, the standard for "reasonableness" in preventing disclosure of confidential information is unquestionably higher than it was at the start of the pandemic.

PRACTICE PERFECT

Microsoft 365: Understanding the Benefits and Busting the Myths

By Jennifer Ramovs
Affinity Consulting Group

The applications included in Microsoft Office—Word, Outlook, Excel, even PowerPoint—are must-haves for a law firm. Historically, people bought these programs when they bought a computer and often bundled the purchase of the software with the purchase of the computer. More recently, firms have been uncovering the option to instead subscribe to "Microsoft 365."

Microsoft 365 refers to a suite of subscription plans that include access to Office applications that are enabled over the internet (i.e., cloud services). Microsoft 365 plans for business also include additional productivity services such as: (1) Skype for Business, which provides web conferencing; (2) Exchange Online, which provides hosted email; and (3) additional online storage with OneDrive for Business.

One of the biggest misconceptions is that by using Microsoft 365, everything is in the "cloud." The truth is, many Microsoft 365 plans also include the desktop version of the latest Office applications, which users can install across multiple computers and devices. When you have an active Microsoft 365 subscription that includes the desktop version of Office, you always have the most up-to-date version of the applications. This is superior to the more traditional way of purchasing, where you must pay for the updates as they are released. The problem is, firms often find that different users installed the Office software at different times, and by the end of a five-year time period, for instance, they could have people running three different versions of the products they rely on every day to produce work and serve their clients. This is a recipe for incompatibility, unforeseen technology costs, and user frustration.

Building on the "that means I am in the cloud" misconception, people often think that with Microsoft 365, they can't access their programs or their documents without an internet connection. But you can use Microsoft 365 offline (without internet access) if you download and install the desktop version of Office with your plan. You have to connect to the internet every 30 days to maintain your subscription and Microsoft 365 tells you when it's time to connect.

In addition to always having the most recent versions of the software you use to run your law firm world, Microsoft Exchange is included in some of the Microsoft 365 plans. This feature alone is worth the price of admission. Microsoft Exchange is a program that, among other things, allows Outlook users to back up their data (email, contacts, calendars, tasks, etc.) on a server. However, there are much bigger benefits:

- **Share data.** Exchange allows users to share information in Outlook—most notably, calendar and contacts.
- **Smartphone and tablet sync.** Exchange will wirelessly sync with any smartphone or tablet running Android, iOS, Blackberry OS, or Windows Phone.
- **Anywhere email access.** Exchange also allows users to gain access to office email while out of the office. Outlook Web Access gives you browser-based access to email no matter what device you are using, as long as you have access to an internet connection.
- **Full back up.** Everything in Outlook is backed up in Exchange (email, contacts, calendar, and tasks).
- **Operating system agnostic.** Exchange and Outlook will work with both Windows and Mac computers.

For a great comparison chart of Microsoft 365's features that we put together for Practice HQ, visit accellis.com/isba-office-365.

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Written by: Kenneth A. Vercammen, Esq.

This informative handbook will provide you with guidance on how to handle everything pertaining to the drug and DWI defense - from the initial contact with the client, to walking into the courthouse, and managing the steps that follow. It is a "how to" manual that you and your staff can follow with checklists and forms.

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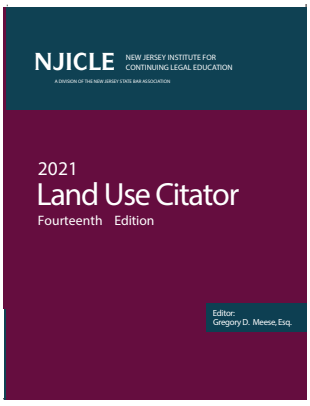

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2021 Land Use Citator (2021, 14th Edition)

Written by: Gregory D. Meese, Esq.

The 2021 edition of this valuable practice tool is designed to keep land use practitioners up to date with new developments in this ever-changing field of law. Replacing the annual soft-covered seminar handbooks, the Citator is a detailed and carefully ordered compendium of important cases, both reported and unreported, that allows you to read summaries of all significant cases and access them directly from your PC.

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COVID-19 Vaccinations

The Legal and Practical Considerations for New Jersey's Public Sector Employers

By John Shahdanian and Valentina Scirica

On Dec. 14, 2020, COVID-19 vaccine shots were administered across the country as a sign of hope amid the pandemic that had killed more than 300,000 people nationwide at the time.[1] On Dec. 15, 2020, New Jersey began administering the COVID-19 vaccine.[2] Public health experts predict that employers will play an important role in vaccinating enough people to reach herd immunity.[3] As a result, many employers are now considering mandatory vaccination requirements for their employees, which would potentially aide in creating a safer workplace and allow for greater efficiency without the threat of a COVID-19 outbreak in the workplace. While laudable goals, employers, especially those in the public sector, should consider the legality of a potential COVID-19 vaccine requirement and the effect and implications of such a requirement.

Established Law and Application to COVID-19

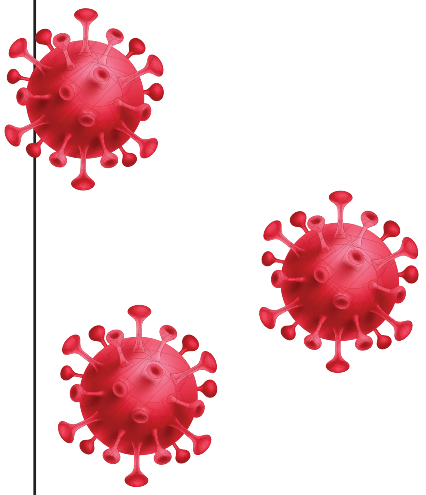
Nothing prohibits a New Jersey public employer from requiring some or all of its employees to be vaccinated against a particular illness, including COVID-19. A public sector employer is subject to the requirements of the U.S. Constitution and precedent from the United States Supreme Court, which allow for mandatory vaccinations in public health emergencies, so long as such vaccinations do not run afoul of the Constitution. In addition, a public employer may require all of its employees to be vaccinated as a condition of employment, subject to medical exceptions required by the Americans with Disabilities Act and religious exemptions required by Title VII of the Civil Rights Act of 1964. The New Jersey Supreme Court has made clear that, in the area of civil rights and employment law, it often takes guidance from and gives deference to the ADA, Title VII, and the Equal Employment Opportunity Commission. Therefore, New Jersey employers should take heed of the federal decisional law and guidance when considering potential vaccine requirements for employees. Any employer who intends to require vaccination of employees must consider the potential medical and religious exemptions and accommodations which must be made for qualified employees. Public employers, specifically, are also required to give deference to the New Jersey Civil Rights Act and Section 1983 of the federal Civil Rights Act especially when there is no reasonable accommodation for an employee who is unable to receive an employer-mandated vaccination.

Legal Considerations for Public Employers

1. U.S. Constitution

Public sector employers often face stricter restrictions than private employers because they are directly subject to the requirements of the Constitution. In *Jacobson v. Massachusetts,* which is a foundational public health law case that remains long standing precedent, the United States Supreme Court held that mandatory vaccinations in a public health emergency do not violate the Constitution.[4] The Court in *Jacobson* upheld a Massachusetts law that permitted municipalities to mandate smallpox vaccination of all residents during the smallpox epidemic, finding that there was no violation of the Fourteenth Amendment. The Court held that during a public health emergency, the government's police power allows the government to restrain a citizen's rights in order to promote a common good so long as the restraints are not imposed in an "arbitrary, unreasonable manner," and do not "go so far beyond what was reasonably required for the safety of the public."[5] The Court also determined that other courts would be obligated to find an exception to the mandatory vaccination regulation for a person who had a condition that could result in serious injury to health or death from the vaccination—in other words, a medical exception.[6] The Court also acknowledged that state and local governments are authorized to enact reasonable laws or regulations to protect public health and safety.[7]

Since the decision in *Jacobson*, states and local governments have lawfully required vaccinations in relation to school or day care attendance as well as pursuant to employment in specific health care settings.[8] In New Jersey, this was most recently exemplified through Gov. Phil Murphy's enaction of *N.J.S.A.* § 26:2H-18.79 on Jan. 13, 2020, mandating annual flu shots to health care facility workers.[9] Under the statute, an employee of a health care facility may not decline to receive a flu shot unless they have a medical exemption or there is a shortage of flu shots for that



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According to the CDC, health care providers should ask certain questions before administering a vaccine, which could fall under the ADA's regulations. However, the EEOC has set a standard, that if met, would allow an employer or a contractor on the employer's behalf to ask such "disability-related" screening questions prior to administering a vaccination without violating the ADA.

year.[10] The statute does not provide for a religious exemption, and refusal to abide by the statute is ground for termination of the employee.[11]

2. Equal Employment Opportunity Commission

The EEOC, which enforces the ADA and Title VII, recently issued guidance regarding vaccination mandates and COVID-19 in its online publication of *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*.[12] First, the EEO laws do not interfere with or prevent employers from following CDC or other federal, state, and local public health authorities' guidelines and suggestions.[13] The EEOC has made clear that since a vaccination is not a medical examination, it is not subject to the ADA's regulation of medical examinations of employees. On this issue, the EEO law states:

> "The vaccination itself is not a medical examination. As the Commission explained in guidance on disability-related inquiries and medical examinations, a medical examination is 'a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health.' Examples include 'vision tests; blood, urine and breath analysis; breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures such as x-rays, CAT scans, and MRI's.' If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status, and therefore, is not a medical examination.[14]

According to the CDC, health care providers should ask certain questions before administering a vaccine, which could fall under the ADA's regulations. However, the EEOC has set a standard, that if met, would allow an employer or a contractor on the employer's behalf to ask such "disability-related" screening questions prior to administering a vaccination without violating the ADA. The standard is as follows:

> "If the employer requires an employee to receive a vaccination, administered by the employer, the employer must show that these disability-related screening inquiries are 'job-related and consistent with business necessity.' To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others."[15]

The EEOC has expressly recognized that COVID-19 satisfies the direct threat standard.[16] Therefore, even when the employer is administering the vaccination itself (or directing the administration) and asking pre-vaccination questions, there is no violation of the ADA.

The EEOC has also answered the question as to whether asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is considered a disability-related inquiry under the ADA. Pursuant to EEOC guidance,

> "Simply requesting proof of receipt of a COVID-19 vaccination is *not likely* to elicit information about a disability, and therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be 'job-related and consistent with business necessity.*" Emphasis added.*[17]

3. Exemptions Applicable to a Vaccine Requirement

Medical/Disability Exemption

If an employer requires an employee to become vaccinated and an employee has a disability that prevents them from doing so, the employer must make a reasonable accommodation for that employee pursuant to ADA regulations[18] and the Supreme Court's ruling in *Jacobson v. Massachusetts*.[19] Employers and employees are required to engage in the interactive process to identify workplace accommodation options that do not pose an undue hardship (significant difficulty or expense) on the employer. One of the most important undue hardship considerations regarding COVID-19 is whether the individual employee will pose a direct threat if they remain in the workplace without being vaccinated. The prevalence of other employees

who are vaccinated in the workplace would help determine if the unvaccinated employee would pose a direct threat, thus causing an undue hardship on the employer.[20] In the local government context, the answer to the former question would most likely be "yes," considering that local government positions may require employees to work in a local government building with other employees present. Consequently, unvaccinated employees could pose a direct threat to other employees potentially creating an undue hardship for the local government employer. This analysis is applicable to local law enforcement, local health department employees, local department of public works employees, and more.

There are some instances where an employer will be able to accommodate an employee who is unable to be vaccinated due to a medical exemption. An example is to permit the employee to perform remote work. However, it is difficult, and often impossible, for public sector employees to perform remote work. Public sector employees, such as police officers or firefighters, are required to interact with the community and, more often than not, cannot work from home. Many other public sector and local governmental jobs also require an in-person work environment. These public sector employees cannot perform the essential functions of their job while working remotely, and thus, cannot be reasonably accommodated if they do not vaccinate.[21]

Religious Exemptions

If an employee is unable to get vaccinated for COVID-19 due to a sincerely held religious belief, practice, or observance, the employer must provide a reasonable accommodation for that purpose unless it would pose an undue hardship on the employer under Title VII. The courts have defined an undue hardship under Title VII as having more than a *de minimis* cost or burden on the employer. As compared to the undue hardship standard under the ADA, the Title VII standard may be easier for an employer to meet. If an employer has an "objective basis" for questioning the religious nature or the sincerity of a particular belief, the employer would be justified in requesting additional supporting documentation. Nonetheless, an employer will likely apply the same analysis to an employee's religious accommodation from a COVID-19 vaccination request as would be applied to an employee's ADA request for accommodation.[22]

What if the employer cannot accommodate an exemption?

If an employee cannot get vaccinated for COVID-19 because of a disability or a sincerely held religious belief, practice, or observance, then it would be lawful for an employer to exclude that employee from the workplace. However, this does not mean that an employer is automatically allowed to terminate the employee. Employers will need to determine if any other rights apply under EEO laws or other federal, state, and local authorities.[23]

Public sector employees, specifically, are granted certain protections under the United States and New Jersey Constitutions, which should be considered by employers if an employee is unable to receive the COVID-19 vaccine. Both New Jersey and federal law prohibit public sector employers from taking actions that deprive employees of their constitutional rights under the New Jersey Civil Rights Act and Section 1983 of the federal Civil Rights Act.[24] The two most applicable protections that public employees are afforded under those laws are:

- Substantive Due Process: Substantive due process protects employees against arbitrary action by their public sector employer by the exercise of his power without any reasonable justification that the employer is pursuing a legitimate governmental objective. In order for an employee to have substantive due process rights, the employee must have a property interest in their job.[25]
- Procedural Due Process: Procedural due process restricts governmental decisions which deprive individuals, such as public sector employees, of their liberty or property interests. Essentially, procedural due process requires that a public sector employee be given notice and afforded the opportunity of a hearing before they are deprived of their job.[26]

Taking into consideration a public employee's protections under substantive due process and procedural due process, prior to an employee's termination of their job, a public employer must provide the employee with a continuing expectation of employment notice of the termination, which includes the reasons for termination and an informal hearing prior to the termination. The Supreme Court uses the test applied in *Mathews v. Eldridge*, which balances the employee's interest in keeping their job; the risk of deprivation of interests through the procedures used and the probable value of additional procedural safeguards; and the government's interest, including the administrative and fiscal burdens that the additional or substitute procedural requirement would entail.[27]

The Court in *Cleveland Board of Education v. Loudermill* determined that "some kind of hearing" was required before the discharge of an employee who has a constitutionally protected property interest in their employment.[28] The notice that an employer is required to give an employee prior to dismissal must provide the reasons for termination in enough detail as to provide a sufficient explanation of why the employee is being terminated.[29] In addition, a public employer

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must provide a public employee who has a property interest in their continued employment with a post-termination hearing.[30] With regard to property interest, public employment can constitute a "property interest" subject to substantive and procedural due process protections, when through statute, ordinance, contract, collective bargaining agreement, employee handbook, a personnel or civil service code, or an employer promise, an employee has a reasonable expectation of continued employment or some other benefit of which they claim a deprivation. If such reasonable expectation exists, an employer must provide that employee with due process as discussed *supra*, before it can discipline or terminate the employee.[31]

It is clear that, when making the decision to terminate employment, a public employer must take into consideration an employee's substantive and procedural due process rights and protections. This includes any decisions regarding a public employees' inability to receive the COVID-19 vaccine even where no reasonable accommodation exists. Failure of a public employer to afford employees their due process rights will likely result in violations of the New Jersey Civil Rights Act and/or Section 1983 of the federal Civil Rights Act.

Additional Considerations

Distribution

Even though the COVID-19 vaccine is now available, its availability is limited. New Jersey, along with other states, has created a phased approach which will be used to ensure that the vaccine is distributed in a fair and equitable manner until larger quantities of the vaccine become readily available.[32] The New Jersey approach is as follows:

- Phase 1: Limited Doses Available. To be administered to health care workers who may have contact with infected patients or infectious materials; other essential workers; and people at higher risk of severe COVID-19 illness.
- Phase 2: Large Amount Available. To be administered to the remainder of those in Phase 1; critical populations; and general population.
- Phase 3: Sufficient Supply, Slowing Demand. To be administered to the remainder of those from Phase 2; critical populations; and general population.

Within the phases the categories of critical populations differ. For example, health care workers include hospital, long term care, home care, urgent care, clinics, dialysis centers, dental offices, funeral homes, pharmacies, public health, group homes, and EMS. Whereas essential workers include: first responders, food and agriculture, transportation, education/child care, energy, water/sanitation, law enforcement, and government.[33] The categories clearly include a number of local government positions in both public safety departments and in local health departments. If a local government or public sector employer were to mandate COVID-19 vaccination, not all populations or employees will be able to receive the vaccination simultaneously. Although this is not a complete and exhaustive list of those eligible for priority vaccination and only highlights those categories most relevant for public employers and employees, it is important for local governments and public sector employers to consider the categories of critical populations in regard to the COVID-19 vaccine.

Collective Bargaining Agreements

If employers who employ unionized employees wish to mandate COVID-19 vaccination, employers may need to consider union positions pursuant to the National Labor Relations Act. In a unionized setting, mandating a vaccine may be a subject for collective bargaining and such bargaining may need to be completed prior to implementing such a requirement. First, it would need to be determined whether the bargaining agreement permits or prohibits the employer from implementing a vaccination mandate for its covered employees. If the employer is able to implement such policy, absent a special circumstance where the employer is able to implement such a policy unilaterally, the employer is likely required to bargain with the union over the implementation of such policy. By way of example, in 2011, the National Labor Relations Board held that a hospital's implementation of a flu prevention policy for its unionized nurses, which included a requirement that nurses

receive a specific anti-viral medication, was a subject of bargaining under the NLRA.[34] Therefore, public employers should expect that a COVID-19 vaccination requirement may be found to be subject to mandatory bargaining under the NLRA.

Workers' Compensation and Employer Liability

On Sept. 14, 2020, New Jersey Gov. Phil Murphy signed into law Senate Bill 2380, which creates a rebuttable presumption of workers' compensation coverage that the contraction of COVID-19 by an "essential employee" is work-related.[35] The term "essential employee" refers to public safety workers and first responders such as fire, police or other emergency responders, whom are all considered public employees. In addition to the influx of workers' compensation claims that may ensue from the above-mentioned presumption, if an employer were to require a vaccine and an employee were to suffer an adverse reaction, workers' compensation claims or even lawsuits could potentially result against employers. Inversely, if an employer were not to require a vaccine and employee infections arise, there could also be potential liability against the employer. It is likely that workers' compensation laws would preempt and limit claims against the employer in connection with a mandated vaccination policy; however, workers' compensation claims may substantially rise.

Role of Local Government/ Municipalities

Local governments and municipalities are called upon to help facilitate administration of the COVID-19 vaccine. First, local government officials and municipalities will most likely be required to allocate and prepare vaccination centers that are equipped to administer the vaccine to the public, along with finding qualified individuals to administer the vaccine. In addition, storing the vaccine may be left up to local municipalities. Cities, towns, and other municipalities need to be able to properly and safely handle the vaccines, otherwise they may be wasted, or ineffective because of improper storage or contamination. Local municipalities may also be held responsible for keeping records of and ensuring that individuals receive both doses of the vaccine. States, counties, and cities will face challenges relating to the following: supply chain and distribution; program and project management; governance under uncertainty; technology and data; communication and confidence; equity and inclusion; and financial management and funding.[36]

Nonetheless, public entities in New Jersey have many statutory protections when acting for the public benefit. Specifically, the New Jersey Tort Claims Act applies to tort actions against public entities and their employees. Pursuant to the TCA, a public entity is defined as: the state, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the state.[37] Pursuant to the TCA, public entities are only liable for their negligence within the limitations of the act and in accordance with the fair and uniform principals established within the TCA.[38] The TCA provides for protection of a public employee from liability for injury "resulting from the exercise of judgment or discretion vested in him."[39] Public employees and thus, public employers, are not exonerated from liability if it is established that the conduct is outrageous conduct, willful misconduct, or reckless conduct.[40] Therefore, it is likely that pursuant to the TCA, public employers can be exonerated from potential liability that arises out of a vaccination mandate absent outrageous conduct, willful misconduct, or reckless conduct. Furthermore, pursuant to U.S. Code and Public Readiness and Emergency Preparedness Act, liability immunity is provided to certain individuals and entities against any claim of loss caused by, arising out of, relating to or resulting from the manufacture, distribution, administration or use of medical countermeasures, except for claims involving "willful misconduct" as defined in PREP.[41] State or local governments, along with persons employed by the state or local government, are immune from liability with respect to administration, dispensing, distribution, provision, or use of covered countermeasures.[42] Therefore, local governments and municipalities are most likely to be immune from liability claims related to the COVID-19 vaccine.

Conclusion

Recent surveys indicated that seven out of 10 Americans said that they would "definitely or probably" take the COVID-19 vaccine.[43] Because of their inherent relationship to the administration of such vaccines and the public nature of their work force, many local employers will consider a mandatory vaccination policy. However, before such a policy is implemented, the employer must consider the limitations, implications and potential liability that could come along with mandating or requiring a COVID-19 vaccination. Employers, including public sector employers, should consult with counsel and local health departments for further assistance and guidance before enforcing any such requirements. ⚖

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Employment Litigation Considerations in a Post-Pandemic World: Leave and Liability

By Laura A. Siclari and Allison N. Zsamba

Over the past year, employers across the country have faced, and continue to face, unique and unprecedented challenges in responding to workforce issues created by the COVID-19 global pandemic. Employers have had to quickly adapt to a myriad of new state and federal laws and create new company policies. A key goal of implementing any new law or policy is avoiding future litigation and having the legal support to effectively respond to litigation if and when it arises. In this article, we examine employee leave under new federal law, the Families First Coronavirus Response Act, and discuss the new frontier of COVID-19-related employment litigation, along with employer best practices in compiling the supporting documentation to properly implement the new leave laws and defend against possible future employee leave-related claims.

Leave Eligibility under the Families First Coronavirus Response Act

In response to the COVID-19 pandemic, Congress passed, effective April 1, 2020, the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act—both under the umbrella of the FFCRA. Through these laws, the FFCRA created a new and temporary category of employee leave (which expired on Dec. 31, 2020), requiring certain categories of employers to provide employees with emergency paid sick leave and/or family leave in order to assist working families facing public health emergencies arising out of the COVID-19 pandemic.[1] The Department of Labor's Wage and Hour Division simultaneously promulgated regulations to implement and administer these new statutes.[2] The FFCRA applied to certain public entity employers as well as private employers with fewer than 500 employees.[3] Most federal government employees were not covered by FFCRA; however, federal employees covered by Title II of the Family and Medical Leave Act were covered by the paid sick leave provisions.[4] Small businesses with fewer than 50 employees may have qualified for an exemption from the requirement to provide leave due to school closings or childcare unavailability, if the leave requirements would have jeopardized the viability of their business as a going concern.[5]

A qualified employee was eligible for up to two weeks of paid sick leave under the EPSLA if the employee was unable to work or telework because the qualified employee:

(1) was subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
(2) had been advised by a health care provider to self-quarantine related to COVID-19;
(3) was experiencing COVID-19 symptoms and was seeking a medical diagnosis;
(4) was caring for an individual subject to an order described in (1) or self-quarantining as described in (2);
(5) was caring for a child whose school or childcare facility was closed (or the provider was unavailable) for reasons related to COVID-19; or
(6) was experiencing any other substantially similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.[6]

A qualified full-time employee was eligible for up to two weeks (80 hours) of paid sick leave, and a qualified part-time employee was eligible for the number of hours of leave that the employee worked on average over a two-week period.[7] For paid sick leave pursuant to reasons (1) through (3), the employee taking leave was entitled to the regular rate or the applicable minimum wage, whichever was higher, up to $511 per day and $5,110 in the aggregate.[8] For paid sick leave pursuant to reasons (4) through (6), the employee was entitled to pay at their regular rate or the applicable minimum wage, whichever was higher, up to $200 per day and $2,000 in the aggregate.[9]

A qualified employee was eligible for expanded family leave of up to 12 weeks under the EFMLEA if the employee was caring for a child whose school or place of care was closed (or the provider was unavailable) for reasons related to COVID-19.[10] Expanded family leave was paid at the employee's regular rate or the applicable minimum wage, whichever was higher, up to $200 per day and $12,00 in the aggregate over a 12-week period. This expanded leave did have limitations, with the first two weeks being unpaid and with the leave only being available to qualified employees who had not already taken 12 weeks of FMLA leave earlier in the calendar year.[11] Of note is that employees eligible for both emergency paid sick leave and expanded family medical leave could stack their leave benefits, such that an employee could opt to have their first two weeks of unpaid family leave overlap with the two weeks of paid emergency sick leave.

Although the leave provisions of the FFCRA were mandatory for eligible employers to follow, the FFCRA did include funding to support these businesses in the form of tax credits to cover certain costs of providing employees with paid sick leave and expanded family and medical leave for reasons related to COVID-19. Eligible employers entitled to claim the refundable tax credits are businesses and tax-exempt organizations that: (1) have fewer than 500

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employees, and (2) pay "qualified sick leave wages" and/or "qualified family leave wages" under the EPSLA and/or the EFMLEA. Federal and state governments and their agencies are not eligible employers and are not entitled to receive tax credits for providing paid leave wages under the FFCRA.[12]

Although the mandatory leave requirements expired on Dec. 31, 2020, on Dec. 28, 2020, the FFCRA was amended to permit eligible employers to voluntarily continue to provide FFCRA leave to qualified employees through March 31, 2021, while continuing to be eligible for FFCRA tax credits.[13] The amendment did not change the qualifying reasons for which qualified employees may take leave, the caps on the amount of pay, or the FFCRA's document requirements.[14]

A New Landscape of COVID-19 Employment Litigation

Long before the COVID-19 pandemic, employment lawsuits have always been diverse and plentiful. However, the pandemic has provided yet another opportunity for potential employer liability for violations of employee rights. COVID-19-related employment litigation has already begun to crop up nationwide under various employment law theories. Following is a sampling of employment litigation related to COVID-19 currently pending in New Jersey:

- ***Family Medical Leave Act.*** Plaintiff-employee alleges that, in March 2020, prior to FFCRA's effective date, she had notified her supervisor and manager of anticipated child care needs as a result of the COVID-19 pandemic and would likely need to apply for traditional family medical leave. She then took a vacation day on March 27 and, while out of office, her supervisor texted her and asked if she planned to take family medical leave. Plaintiff claims that, the next day, she was terminated and told by the defendant-employer that it would be better for her to collect unemployment than to take family medical leave.[15]
- ***New Jersey Conscientious Employee Protection Act.*** Plaintiff-employee claims he was engaged in whistleblowing activities when he complained to his supervisor about the lack of proper personal protective equipment (PPE) in the workplace. Plaintiff alleges that he contracted COVID-19 at work due to the lack of proper PPE and his required close interaction with other employees. Plaintiff claims he was forced to use vacation time while recovering from COVID-19 and was thereafter furloughed for nearly five months, despite his position remaining active and another employee continuing to perform his duties.[16]
- ***Worker's Compensation.*** Plaintiff-employee claims his employer failed to comply with Gov. Phil Murphy's executive orders by failing to provide PPE to the plaintiff and other employees and failing to shut down production and/or quarantine its employees when required. The plaintiff alleges that, as a result of these breaches, he contracted COVID-19 and "suffered pain and damages."[17]
- ***New Jersey Law Against Discrimination.*** Plaintiff, a valet for a car dealership, claims that he was wrongfully terminated in retaliation for his need to self-quarantine due to potential exposure to COVID-19 following a valet trip to JFK International Airport. Plaintiff alleges the dealership's Executive Manager no longer wanted the plaintiff working at the dealership because he did not want to risk exposure to the dealership. Plaintiff alleges the defendant-employer failed to engage in an interactive process to discuss a reasonable accommodation with respect to his perceived disability related to potentially contracting COVID-19.[18]
- ***Breach of Contract.*** Plaintiff-employee alleges that his former employer breached his employment contract and the covenant of good faith and fair dealing when the defendant-employer furloughed and terminated the plaintiff in response to COVID-19. More specifically, Plaintiff alleges his five-year contract required that he be terminated for cause and that the COVID-19 pandemic had nothing to do with his performance under the contract.[19]

Both in New Jersey and across the country, employers are seeing COVID-19 employment lawsuits in nearly every area of law, including those listed above, as well as employer claims relating to wrongful death, WARN Act violations, wage and hour disputes, workplace safety, privacy violations, non-compete agreement breaches, worker misclassifications, retaliation, discrimination, and Americans with Disabilities Act violations, just to name a few.

Moreover, employers are facing litigation and enforcement actions based upon the new FFCRA as well. FFCRA provides private rights of action for discrimination, retaliation, interfering with or denying FFCRA Leave, or failure to pay proper wages in accordance with FFCRA, including the ability to assert a collective action. An employer who violates the paid sick leave requirements, for example, is considered to have failed to pay the minimum wage under the Fair Labor Standards Act.[20] Of note, however, employees will not have a private right of action under the FFCRA for denied family leave if the employee did not meet the coverage requirement of traditional FMLA (*i.e.*, employed by an employer with 50 or more employees).[21] The **statute of limitations** for claims under the FFCRA is two years from the date of the alleged violation (or three

years in cases involving alleged willful violations).

FFCRA also contains an enforcement mechanism that authorizes the Department of Labor to bring enforcement actions against any public or private employer for violations of FFCRA. The department announced that it would not bring enforcement actions against FFCRA-covered employers for violations occurring within 30 days of the enactment of the FFCRA, provided the covered employer made a reasonable, good faith effort to comply with the Act. Nonetheless, the department reserved its right to retroactively enforce violations back to the effective date of April 1, 2020, for covered employers who willfully violated FFCRA, failed to provide a written commitment to future compliance with the FFCRA, or failed to remedy a violation upon notification by the department.

COVID-19 Documentation Best Practices for Employers

An employer seeking to prevent an FFCRA Leave claim or other COVID-19-related employee claim should ensure that its leave determinations are being made consistently in a non-discriminatory or retaliatory manner across employee groups in accordance with the employer's leave policy and applicable leave laws (such as the ADA and FMLA), and that the employer engages in any required interactive processes as required by law. Arguably equally as important, though, all leave decisions should be ground in supporting documentation, which the employer should maintain as protection in the event of a future claim.

Indeed, paramount to defending any employee claim is documentation that supports the employer's leave decision, and which demonstrates that violations of law did not occur. The department and IRS have set forth guidelines on the type of documentation needed for employers to grant FFCRA leave and request tax credits, which is also instructive to employers in determining what documentation should be compiled and maintained in the event of a future employee leave-related claim.[22] As a matter of best practices, these same categories of documents should be compiled and maintained by employers for non-FFCRA leave requests as well – i.e. leave under traditional FMLA or the ADA. Under the DOL and IRS guidelines, employers are required to document: (1) the name of the employee requesting FFCRA leave; (2) the dates for which FFCRA leave was requested; (3) the reasons for FFCRA leave; and (4) a statement from the employee that they are unable to work because of the reason.[23]

Best Practice Tip: This documentation should be maintained in the employer's files for at least three years from the date of the employer's leave decision to ensure that the statute of limitations has expired for any potential FFCRA-related employee claim, along with related federal or New Jersey state claims under the ADA, FMLA, NJLAD or CEPA, which each have the same or shorter statutes of limitations.

Applying this documentation to categories of leave under the FFCRA, if an employee sought leave because they were subject to a quarantine or isolation order or to care for an individual subject to such an order, the employer should document the government entity or agency that issued the order.[24] If an employee requested FFCRA leave to self-quarantine based on the advice of a medical professional or to care for an individual who is self-quarantining based on such advice, then the employee should be required to provide documentation on the name of the medical professional who gave that advice and a copy of the professional's written advice and/or medical note.[25] If an employee requests FFCRA leave to care for a child whose school or child care facility is closed or unavailable due to COVID-19, then employers should document: the name of the child being cared for; the name of the school, child care facility, child care provider that is closed or unavailable; and a statement from the employee that no other suitable person is available to care for the child.[26] Additionally, all traditional FMLA requirements still apply to leave taken to care for the employee or a family member with a COVID-19 medical condition that rises to the level of a serious health condition, and employee and employers must meet the FMLA's medical certification requirements.[27]

In addition to maintaining documentation to support an employer's leave decision, an eligible employer seeking tax credits under the FFCRA must also maintain relevant documentation.

Instructive on this issue are IRS guidelines that recommend specific additional documentation to substantiate an eligible employer's FFCRA leave tax credit reimbursement request.[28] Specifically, the IRS guidelines include:

1. Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave;
2. Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages;
3. Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS; and
4. Copies of the completed Forms 941, Employer's Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third-party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer's entitlement to the credit claimed on Form 941).[29]

The IRS guidance further states that employers should keep all records of employment taxes for at least four years after the date the tax becomes due or is paid, whichever comes later.[30]

Conclusion

While the FFCRA was implemented as a temporary category of employee leave designed to address employer and employee leave issues created by the COVID-19 global pandemic, which has now expired under its own terms, employers can expect to continue to feel the effects of COVID-19-related employee issues into the foreseeable future. Employer leave decisions made in 2020 will remain subject to agency or court review until the statute of limitations expires. Furthermore, as COVID-19 lingers into 2021, employees will continue to face child care and emergency health issues related to the virus, which may necessitate leave from work. Pre-pandemic employee leave laws and employer policies will need to be applied to address these employee leave issues as they arise. An employer's continued diligence in correctly and consistently applying law and policy to its employee leave decisions and in supporting its decisions with appropriate documentation will help the employer to mitigate against, and insulate itself from, the ongoing storm of potential COVID-19-related employee leave liability. ⚖

Endnotes

1. *See* Pub. L. No. 116-127; 29 U.S.C. §§ 2612(a)(1)(F) – 2620.
2. *See* 29 CFR § 826.10, *et al.*
3. 29 U.S.C. §§ 2611(4)(B) and 2620(a)(1)(B); FFCRA, Division E, § 5110(2) (Pub. L. No. 116-127).
4. FFCRA, Division C, § 3102(b) (Pub. L. No. 116-127); 29 C.F.R. § 286.40(c); dol.gov/agencies/whd/pandemic/ffcra-questions.
5. FFCRA, Division C, § 3102(b) (Pub. L. No. 116-127); FFCRA, Division E, § 5111(2) (Pub. L. No. 116-127); 29 C.F.R. § 826.40.
6. FFCRA, § 5102(a)(1) to (6); 29 C.F.R. § 826.20; 29 C.F.R. § 826(a)(3)-(4), (10); 85 Fed. Reg. at 57678.
7. FFRCA, Division E, § 5102(b) (Pub. L. No. 116-127); 29 C.F.R. § 826.21.
8. FFCRA, Division E, § 5110(5) (Pub. L. No. 116-127); CARES Act, § 3601 (Pub. L. No. 116-136); 29 C.F.R. § 826.22(c)
9. *Id.*
10. 29 U.S.C. § 2612(a)(1)(F).
11. 29 U.S.C. § 2620(b).
12. *See* irs.gov/newsroom/covid-19-related-tax-credits-basic-faqs.
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14. *Id.*
15. *Rosario v. Barclay Brand Corporation, et al.*, MID-L-006398-20 (Sep. 4, 2020, N.J. Super.).
16. *Joseph Pennisi v. MT Operating of New Jersey, LLC, et al.*, MER-L-001931-20 (Oct. 30, 2020, N.J. Super.).
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18. *Restrepo v. Fette Ford, Inc., et al.*, PAS-L-003765-20 (Dec. 4, 2020, N.J. Super.).
19. *Mullally v. RCS Logistics, Inc.*, HUD-L-004333-20 (Nov. 24, 2020, N.J. Super.).
20. *See* 29 CFR § 826.150(b).
21. *See* 29 CFR § 826.151(b).
22. *See* IRS: COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs: Question 44; 29 C.F.R. § 826.100, as amended; dol.gov/agencies/whd/pandemic/ffcra-questions.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. IRS: COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs: Question 44-46.
29. *Id.*
30. *Id.*

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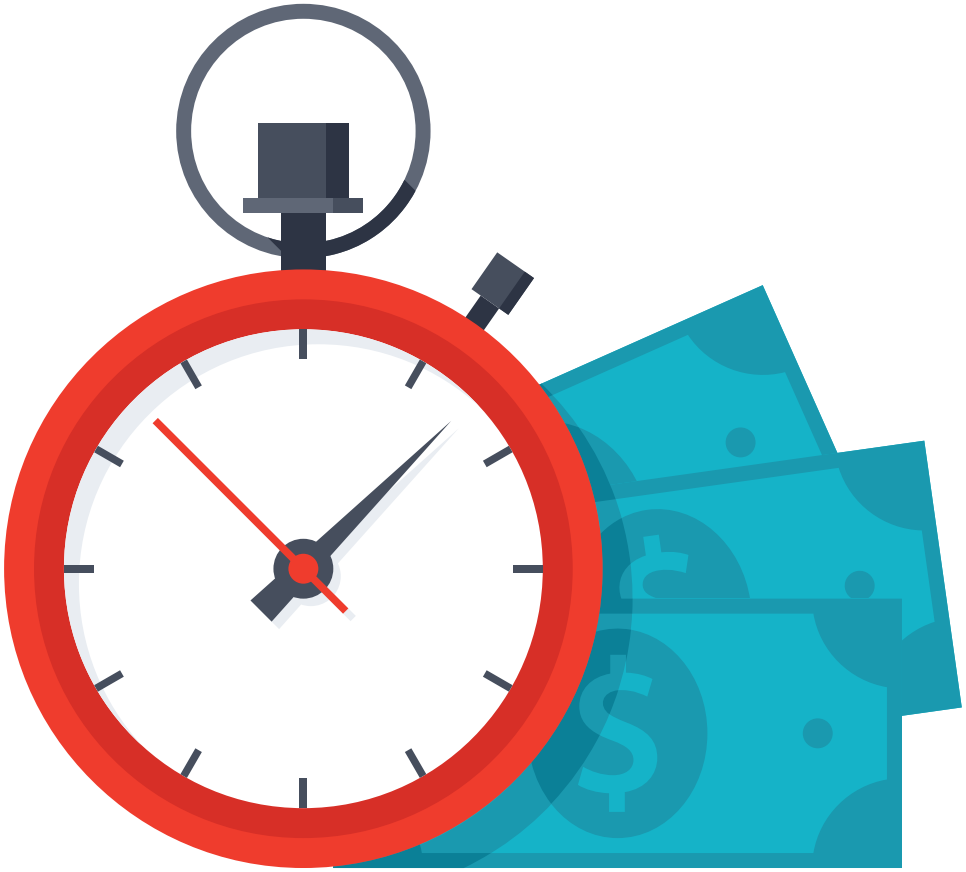

Wage and Hour Requirements Do Not Shut Down During a Pandemic

By Joseph H. Tringali

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As we rang in the new year in 2020, who could have imagined that it was going to become commonplace for lawyers to be making court appearances and taking depositions on the laptop in the living room, with dogs barking in the background and kids learning math in the kitchen?

The year 2020 has taught us to be problem solvers, quick to adapt to ever-changing court rules and regulations. While many things have changed because of COVID-19, the federal and state wage and hour requirements imposed upon employers have remained.

Federal and State Wage and Hour Requirements

COVID-19 has not changed the fact that private sector and federal, state and local employers are required to comply with minimum wage, overtime, time keeping and record keeping requirements set forth in the Fair Labor Standards Act and New Jersey wage and hour laws and regulations. Federal minimum wage remains at $7.25 per hour,[1] and New Jersey set minimum wage at $11 per hour for 2020, with an increase to $12 per hour for 2021.[2] Under federal and New Jersey law, unless an employee is exempt, employers must pay an employee a wage that is equal to or above the foregoing minimum wages for up to 40 hours worked in a week. After employees work 40 hours, they must be paid overtime.[3] Federal and New Jersey laws require employers to pay employees at a rate not less than time and one-half of their regular rates of pay for hours worked above 40 hours in a given workweek.[4]

While the foregoing seems simple, employers frequently fail to meet wage and hour compliance standards because they do not have adequate time keeping and record keeping processes in place. Employers are required to track employee hours to ensure that employees are being paid minimum wage and overtime, where applicable, and they must maintain adequate background information about their employees.

United States Department of Labor guidelines provide that employers "may use a time clock, have a timekeeper keep track of employee's work hours, or tell their workers to write their own times on the records. Any timekeeping plan is acceptable as long as it is complete and accurate."[5] The Department of Labor recognizes that many employees work on fixed schedules and do not punch a clock as they enter and exit the workplace. With respect to employees with fixed schedules, employers "may keep a record showing the exact schedule of daily and weekly hours and merely indicate that the worker did follow the schedule."[6] However, "when a worker is on a job for a longer or shorter period of time than the schedule shows, the employer must record the number of hours the worker actually worked, on an exception basis."[7]

The Department of Labor requires employers to comply with general record keeping requirements and maintain basic information about their employees including: the employee's full name and social security number, address, including zip code, birth date (if younger than 19), sex and occupation, time and day of week when employee's workweek begins, hours worked each day, total hours worked each workweek, basis on which employee's wages are paid, regular hourly pay rate, total daily or weekly straight-time earnings, total overtime earnings for the workweek, all additions to or deductions from the employee's wages, total wages paid each pay period and date of payment and the pay period covered by the payment.[8]

Similarly, under New Jersey law, "every employer shall keep records which contain the name and address of each employee, the birth date if under the age of 18, the total hours worked each day and each workweek, earnings, including the regular hourly wage, gross to net amounts with itemized deductions, and the basis on which wages are paid."[9] The employer may use any system of general record and time keeping so long as the records are complete, true and accurate.[10]

Teleworking Considerations

Unfortunately for employers, wage and hour laws do not forgive non-compliance with minimum wage, overtime or time keeping requirements, even if employees are working from home in their pajamas as a result of COVID-19. The Department of Labor has confirmed that, even while employees work through a pandemic, "work performed away from the primary worksite, including at the employee's home, is treated the same as work performed at the primary worksite for purposes of compensability."[11] Employers "must compensate [employees] for all hours of telework actually performed away from the primary worksite, including overtime work, in accordance with the FLSA, provided [the employer] knew or had reason to believe the work was performed."[12]

In consideration of the pandemic and impact of COVID-19 on employers and employees, the Department of Labor did provide temporary flexibility with respect to the definition of a "workday" for those teleworking for COVID-19 reasons.[13] In April 2020, the Department of Labor published a temporary rule which stated that the "Department's continuous workday guidance generally provide[s] that all time between performance of the first and last principal activities is compensable work time. . . Applying this guidance to employers with employees who are teleworking for COVID–19 related reasons would disincentivize and undermine the very flexibility in teleworking arrangements critical to the [Families First Coronavirus Response Act] framework Congress created within the broader national response to COVID–19."[14] In effect, the Department of Labor determined that an employer with fewer than 500 employees that gives an employee workday flexibility "during the COVID–19 pandemic shall not be required to count as hours worked all

time between the first and last principal activity performed by an employee teleworking for COVID–19 related reasons as hours worked."[15]

In 2020, the Department of Labor temporarily relaxed the rigidity of a "workday" for certain employees teleworking for reasons related to COVID-19. However, the Department of Labor did not change the definition of a continuous workday for employees working from home for reasons unrelated to the pandemic.[16] Employers and employees should continue to monitor further publications from the Department of Labor to determine if the temporary rules promulgated in 2020 will be continued or if new rules will be issued.

COVID-19 Wage and Hour Lawsuits

As law firms and other businesses reacted to the unwelcome presence of COVID-19 and figured out ways to maintain an income stream to pay employees, apply for government loans, and maintain business operations, wage and hour lawsuits were being decided and new lawsuits were being filed.

For example, in the matter *Vaccaro v. Amazon.com.dedc, LLC*, plaintiff identified herself as a warehouse worker who was subject to unpaid post-shift security screenings by the defendant in violation of the New Jersey Wage and Hour Law.[17] Plaintiff argued that she should have been paid for post-shift screenings as well as time spent undergoing screenings when she went on lunch breaks.[18] By way of motion made pursuant to Federal Rule of Civil Procedure 12(c), Amazon argued that post-shift security screenings were noncompensable because the Supreme Court held in the matter *Integrity Staffing Solutions, Inc. v. Busk (Busk I)*, 574 U.S. 27 (2014), that the same post-shift security screenings at issue in the case were noncompensable "postliminary" activities under the FLSA, as amended by the Portal-to-Portal Act, 29 U.S.C. § 251 et seq. and further argued that the same FLSA standard should be applied to claims made under New Jersey law because New Jersey law was "patterned" on the FLSA.[19] In the opinion entered on June 29, 2020, the District Court held that "(1) time spent undergoing mandatory security screenings at the end of the workday must be counted as "hours worked" when calculating wages under the NJWHL; (2) the NJWHL does not incorporate the federal Portal-to-Portal Act, such that mandatory post-shift security screenings are not excluded as "postliminary" activities; and (3) time spent on meal breaks during the course of the workday is not required to be counted as "hours worked" under the NJWHL."[20]

Plaintiffs' counsel made a motion to amend the complaint to allege wage and hour violations directly related to COVID-19 pre-shift screenings, which is still pending as this article is being written.[21] Specifically, in a proposed Second Amended Individual and Class Action Complaint, plaintiffs allege that "Defendant required/requires Named Plaintiff [] and COVID-19 Class Plaintiffs to submit to COVID-19 screenings on Defendant's premises prior to clocking in."[22] The proposed complaint states that the "COVID-19 screening includes but is not limited to taking Named Plaintiff['s] and COVID-19 Class Plaintiffs' temperature and asking them questions, including but not limited to whether they have been in contact with any person infected by COVID-19."[23] The complaint further alleges that defendant did not and does not compensate employees for time that it took and that it still takes to make it through the COVID-19 screening process in violation of New Jersey's wage and hour law.[24] Practitioners should continue to monitor this case as it could impact the way businesses compensate certain employees.

In *Haro v. Kaiser Foundation Hospitals, et al.*, which was removed from the California state court to the United States District Court, Central District of California, the defendant, in response to the pandemic, "began requiring some [of] its hourly employees to arrive at least 15 minutes prior to the start of their shift so that they could undergo medical screenings before being allowed into their worksites. The employees were not compensated for this time."[25] The District Court remanded the matter and held that the "issue to be decided [under California law] is whether the putative class members are subject to Kaiser's control during these 15 minutes. If the answer is yes, then they are entitled to compensation for that time."[26]

Impact of Non-Compliance

Despite other pressures that may exist, employers must remain vigilant in communicating with employees about hours, compensation and time keeping, monitoring Department of Labor and State laws and guidance and ensuring compliance with wage and hour obligations. The cases cited above are illustrative of the fact that lawsuits never stop, even during a pandemic.

Failure to comply with wage and hour requirements comes with significant consequences, particularly in New Jersey. Under the Wage Theft Act which was enacted in 2019, New Jersey enhanced the consequences associated with wage and hour violations. The WTA, among other things, extended the statute of limitations for alleged violations to six years, and employees were given an express right to sue employers for up to 200% in liquidated damages as well as counsel fees to be imposed in addition to any unpaid wages that are recovered. Employers could also face criminal charges associated with their non-compliance.

The only thing worse than receiving a complaint from a current or former employee, or a letter from the Department of Labor or the State of New Jersey, alleging wage and hour violations is not

being prepared for same. The pandemic has taught us that despite uncertain times in our personal and professional lives, we must remain cognizant of the laws and regulations that impact our firms, businesses and clients. Employers cannot let their guard down as businesses adapt to this pandemic, or whatever 2021 has in store. ⚖

Endnotes

1. United States Department of Labor, Wage and Hour Division, Minimum Wage Overview, (December 11, 2020), dol.gov/agencies/whd/minimum-wage.
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14. *Id.*
15. *Id.* at 19329.
16. *Id.*
17. *Vaccaro v. Amazon.com.dedc, LLC*, 2020 WL 3496973 (D.N.J. June 29, 2020)
18. *Id.* at *1.
19. *Id.* at *2.
20. *Id.* at *7.
21. Mot. To Amend/Correct Complaint, *Vaccaro v. Amazon.com.dedc, LLC*, 3:18-cv-11852, Docket No. 47-3 (D.N.J. Oct. 29, 2020)
22. *Id.*
23. *Id.*
24. *Id.*
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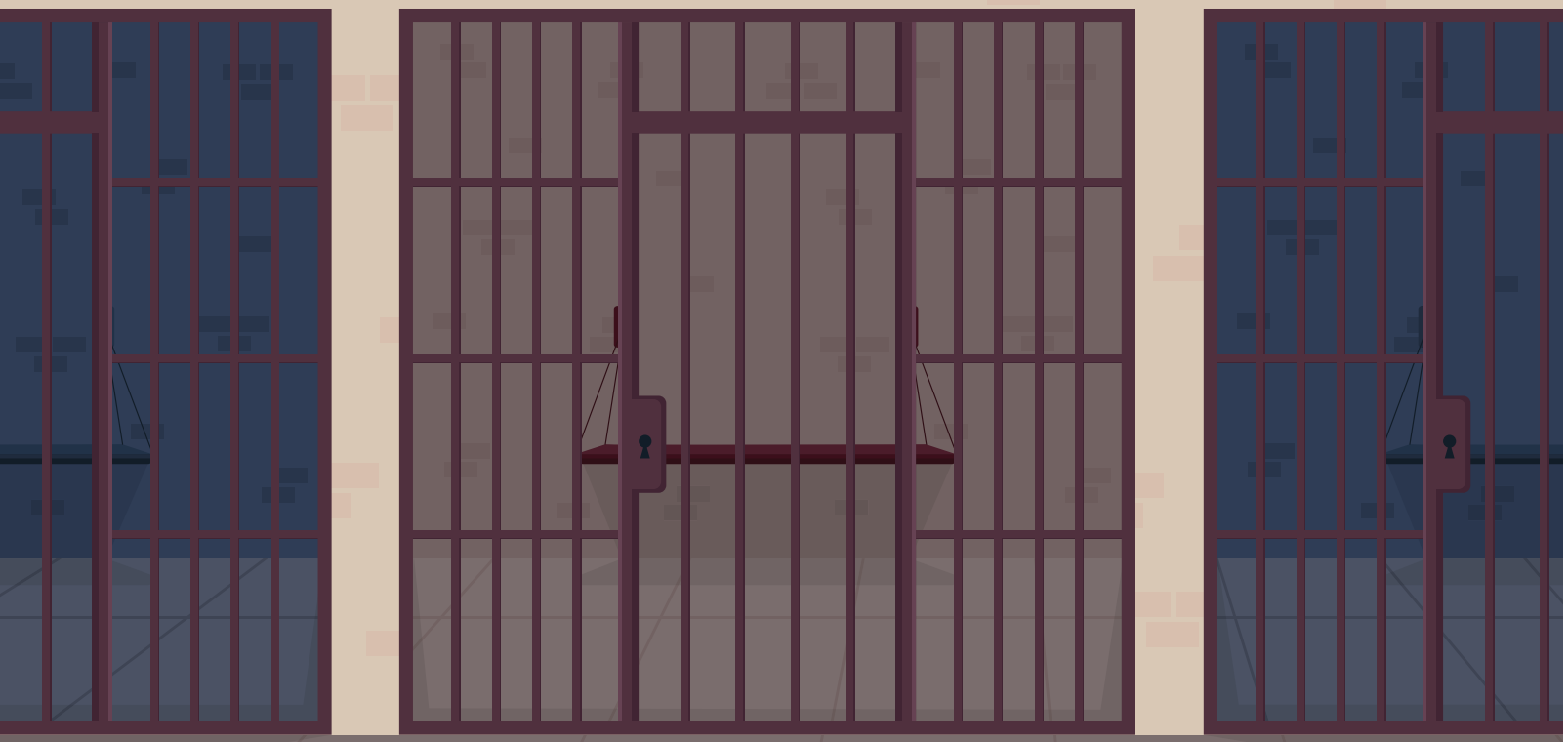
COVID-19 Does Not Have to Mean Indefinite Detention



Many Criminal Defendants are Sitting in Jails Awaiting Their Literal Day in Court—With No End in Sight

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By Adalgiza A. Núñez

The COVID-19 pandemic disrupted the New Jersey Judiciary from top to bottom, but few were more affected than criminal defendants under pretrial detention. After the initial rise of cases in New Jersey, the courts shut down in-person proceedings including grand and petit jury selection. This created a disruption in criminal cases and greatly contributed to increasing the backlog of criminal post-indictment cases by 82.8% and criminal/quasi-criminal matters by 2323.8% from June 2019 to June 2020.[1] This backlog has left many in jail who would have otherwise resolved their cases and been either released or sentenced, as is evident by the 49.7% drop in criminal post-indictment resolutions in trial courts from July 2020 to January 2021. Criminal defendants are sitting in county jails awaiting their literal day in court with no end in sight. The judiciary finds itself between a rock and a

hard place having to protect the health of litigants, judges, attorneys, court staff, and the public while also trying to adhere to constitutional mandates as well as the Criminal Justice Reform Act.[2] But have they done enough to protect defendants?

Some contend that continued detention violates the relatively new CJRA,[3] which requires that a defendant not remain detained for more than 90 days without an indictment, and not more than 180 days following the issuance of an indictment.[4] The act, however, allows for excludable time, meaning that not every calendar day is counted when determining how many days a person has been detained for purposes of the act. Chief Justice Stuart Rabner issued the Judiciary's first Omnibus Order on COVID-19 Issues on March 27, 2020, excluding the period of March 30 to April 26, 2020, in the computation of time limits for return of indictments and trials.[5] Subsequent orders have continued to extend excludable time.[6] On Nov. 16, 2020, the Court suspended grand jury sessions and selection for in-person jury trials pending further order. Virtual grand juries have resumed but no virtual criminal trials are permitted, only civil. In-person trials remain suspended.

Both public and private attorneys have been arguing that continued tolling of time violates the Due Process Clause of the Fifth Amendment of the United States Constitution and Article I of the New Jersey Constitution.[7] Detention without a trial date in sight, it has been argued, becomes punitive rather than regulatory, as pretrial detention is intended to be, and therefore violates due process. Likewise, criminal defense lawyers have asserted that speedy trial rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article I of the New Jersey Constitution may be violated with this arguably indefinite pretrial detention. However, those arguments have fallen flat before the courts as the Office of the Public Defender reports that only 33 of 550 motions filed seeking release of defendants pretrial have been granted.[8] Anecdotal evidence suggests that the success rate among private attorneys is similar or worse.

There is also concern that lengthened detention due to the pandemic is increasing the racial and economic disparities existent in the New Jersey criminal justice system. Prior to the pandemic, the New Jersey Courts recognized the unequal treatment of persons of color in our policing, courts, and jails even after the CJRA.[9] Although 15% of New Jersey's population identifies as Black,[10] Black individuals represent 55% of New Jersey's jail population.[11] They receive a disproportionate number of complaint-warrants (versus complaint-summons)[12] compared to their white counterparts and are more likely to spend more time in jail waiting for a disposition of their charges.[13] Communities of color also show higher levels of COVID-19 illness and deaths.[14] We have yet to see how these inequalities have affected illness and health care within the jail population, but one can deduce that if Black defendants are disproportionately represented in the jail population, additional delays and detentions will increase the disparities.

The OPD and the American Civil Liberties Union presented the constitutional and CJRA arguments before the New Jersey Supreme Court. Jointly, they filed a request for an Order to Show Cause seeking the release of certain defendants who had been detained for six months or longer. The request was limited to those whose most serious pending charge was a second-degree offense or lower. If the requested relief were granted, eligible defendants would have been released on conditions unless the County Prosecutor or Attorney General objected and demonstrated beyond a reasonable double that no set of conditions could assure the defendant's appearance in court and protect others or the community. The Office of the Attorney General essentially replied that judges and prosecutors are already accounting for COVID-19 during detention hearings and that the OTSC would be a wholesale rewriting of the CJRA.[15]

On Feb. 11, 2021, the New Jersey Supreme Court granted the request in part and denied it in part.[16] The Court dismissed the proposed categorical approach to release but determined that under the current framework, relief could be available on an individual basis. Under N.J.S.A. 2A:162-19(f), a detention hearing may be reopened if the court finds the existence of information that was not known to the parties at the time of the hearing and which has a material bearing on the defendant's continued appearance in court, the protection of others, or obstruction of the criminal justice process. For months, defense attorneys had been unsuccessfully arguing that the duration of the pandemic and continued detention without the prospect of speedy trials constituted new information that necessitated the reopening of detention hearings. The Court agreed that the pandemic and its consequences presented new information within the meaning of N.J.S.A. 2A:162-19(f) but declared that trial judges had to determine materiality on an individual basis. The Administrative Office of the Courts issued a directive emphasizing the Court's instruction that these matters must be handled on an expedited basis.[17]

Neither the Supreme Court's rule clarification nor the eventual resumption of criminal jury trials will immediately solve the disruptions caused by COVID-19. Prior to 2020, the Court was already experiencing a backlog of cases.[18] Add to that the fact that practically no criminal trials have taken place since March 2020 and we will continue to see delays for the foreseeable future

even after in-person jury trials resume. So, what is a criminal defense practitioner to do?

Do not take procedural safeguards for granted. It is important to maintain the record and preserve the client's rights. When evaluating speedy trial claims, one of the factors examined is whether the defendant asserted the right to a speedy trial.[19] One should not just assume that everyone knows that the defendant wants a trial as soon as available. It needs to be placed on the record and repeated as often as possible. Consents to excludable time should not be de rigueur but should be withheld when the outcome is unknown. Trial judges may question a defense attorney's refusal to consent to a finding of excludable time for speedy trial purposes, but disagreements can be placed on the record with an acknowledgement of awareness of the rule or order when the rule or order is prejudicial to the client. In these times of uncertainty and ever evolving orders, consent to excludable time due to COVID-19 may be viewed as a waiver of speedy trial and due process rights in the future, so let courts decide but do not consent.

Continued motion practice is essential. The recent New Jersey Supreme Court opinion allowing for the re-opening of detention hearings in appropriate circumstances provides ample justification for criminal defense lawyers to seek release of eligible defendants. In addition, Rule 3:4-7(a) requires preindictment hearings of eligible defendants as a COVID-19 interim measure. The rule forces the production of discovery and can serve to move a matter forward. Further, the CJRA sets a limit of two years for pretrial detention excluding any time attributable to the defendant.[20] Motions should be made on all matters with this approaching deadline.

Criminal practitioners should not be discouraged and must remain zealous advocates even when motion after motion is denied. It is difficult to remain optimistic and push forward when you add COVID-19 fatigue to the already exhausting task of being a criminal defense practitioner. But all is not doom and gloom in criminal practice. Although, 517 of the OPD's motions for release were denied, 33 were granted. Those are 33 individuals that would not have been released had those motions not been filed.

Most importantly, practitioners are well advised to use this time as an opportunity for the court to know your client's case and your client. Although status conferences are often yielding nothing more than a new status date, they can be used to remind your client that they are not forgotten and to remind the courts that these rules and orders affect real people with families and friends who are waiting for them on the outside. ⚖

Endnotes

1. New Jersey Trial Courts Backlog found at njcourts.gov/public/backlogcourt.html.
2. NJSA 2A:162-15 et al.
3. JSA 2A:162-15 et al.
4. NJSA 2A:162-22
5. njcourts.gov/notices/2020/n200327a.pdf?c=OD9
6. Ten subsequent Omnibus Orders were issued with the last dated February 17, 2021 found at njcourts.gov/public/covid19.html.
7. See *In the Matter of the Request to Release Certain Pretrial Detainees*, M-550-20 (N.J. Feb. 11, 2021).
8. OPD Br., IMO Request to Release Certain Pretrial Detainees and Grant New Detention Hearings to Other Detainees, Docket No. 085186 at 15 (N.J. 2021).
9. See Glenn A. Grant, J.A.D., Administrative Office of the Courts, Report to the Governor and the Legislature, Jan. 1–Dec. 31, 2019, found at njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=S0V.
10. census.gov/quickfacts/NJ
11. See Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019.
12. Complaint-warrants require that the defendant be taken into immediate custody and transported to the county jail to await a court's determination concerning release, while a complaint-summons instructs the defendant to appear in court at a future date. R. 3:3-1, 3:3-2.
13. See Report to the Governor and the Legislature, Jan. 1 – Dec. 31, 2019.
14. Anna Flagg and Damini Sharma, *We knew communities of color in N.J. were hit hard by coronavirus deaths. New data shows how bad*, Aug. 22, 2020, at nj.com/coronavirus/2020/08/we-knew-communities-of-color-in-nj-were-hit-hard-by-coronavirus-deaths-new-data-shows-how-bad.html;
15. AG Br., IMO Request to Release Certain Pretrial Detainees and Grant New Detention Hearings to Other Detainees, Docket No. 085186 at 3 (N.J. 2021).
16. *In the Matter of the Request to Release Certain Pretrial Detainees*, M-550-20 (N.J. Feb. 11, 2021).
17. Directive #05-21—Motions to Reopen Pretrial Detention Hearings —In the Matter of the Request to Release Certain Pretrial Detainees (__ N.J. __ (2021)) found at njcourts.gov/notices/2021/n210212a.pdf?c=AOk.
18. In 2019, the backlog was 5,795 for criminal post-indictment matters, found at njcourts.gov/public/backlogcourt.html.
19. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).
20. N.J.S.A. 2A:162-22(a)(2)(a).

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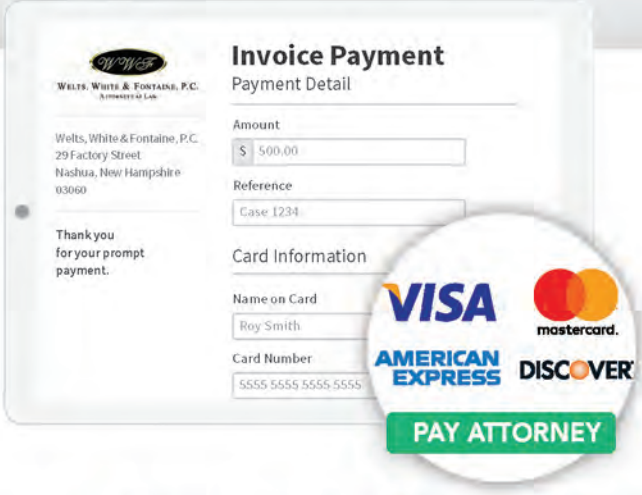

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The Nuts and Bolts of Compassionate Release Applications for Federal Inmates

By Matthew S. Adams
and Marissa Koblitz Kingman

Is Your Client Entitled to Compassionate Release?

Since the pandemic began, courts have been inundated with Compassionate Release applications from attorneys seeking the immediate or early release of clients in custody, as well as motions seeking a delay or modification of sentence for clients that have not yet surrendered. Compassionate Release can be an achievable option for some people who are incarcerated or about to surrender to a federal prison, but is often an uphill battle. Because Compassionate Release is a worthwhile opportunity, it is extremely important that attorneys have at their disposal some key practice points necessary to assist their clients during the process.

How Do Your Request Compassionate Release for Your Client?

Compassionate Release is a product of statute. The request is made by motion pursuant to 18 U.S.C. § 3582, which was amended by the First Step Act. The law allows a reduction of an inmate's term of imprisonment if the court finds that "extraordinary and compelling reasons" warrant a reduction in the person's prison sentence. The sentence modification must also be consistent with applicable policy statements of the Sentencing Commission. The Compassionate Release decision must also consider the sentencing factors set forth in 18 U.S.C. § 3353(a).

What are "Extraordinary and Compelling Reasons"?

The United States Sentencing Commission promulgated guidance that provide examples of "extraordinary and compelling reasons" capable of supporting a federal inmate's Compassionate Release. The examples generally fall into four categories based on a defendant's (1) terminal illness; (2) debilitating physical or mental health condition; (3) advanced age and deteriorating health in combination with the amount of time served; or, (4) compelling family circumstances.[1]

Since COVID-19, "extraordinary and compelling reasons" is usually demonstrated by having a medical illness that makes the defendant particularly vulnerable and susceptible to the serious side effects or death from contracting COVID-19 and if the inmate has completed a substantial portion of their sentence or was not sentenced to a significant term of federal prison in the first place. Some of the common co-morbidities include: cancer, type II diabetes, obesity, heart conditions and asthma. In addition to having a medical condition, a showing that COVID-19 cases in the prison are

A telling statistic on the COVID-19 conditions within a BOP facility is the number of staff infections. While the BOP will claim that the COVID-19 conditions within its facilities are under control, almost prophylactically, the number of staff infected has been widely recognized by reviewing courts as an indicator of a broad level of viral spread throughout the facility.

rising or likely to rise is important to demonstrate. Further, other factors, such as advanced age or compelling family circumstances, can also sometimes satisfy the "extraordinary and compelling" standard.

It is imperative that you check the Bureau of Prisons website to determine the full breakdown and additional details regarding COVID-19 in the particular prison where your client is being housed or where your client is expected to report.[2] The BOP website provides information including, but not limited to: Completed COVID-19 cases in each prison; Pending COVID-19 test in each prison; Positive Recovered COVID-19 cases for inmates and staff members; Recovered COVID-19 cases; Deaths due to COVID-19. The BOP claims that it updates the open COVID-19 confirmed positive test numbers, recoveries, and the number of COVID-19 related deaths on its website each weekday at 3 p.m.

A telling statistic on the COVID-19 conditions within a BOP facility is the number of staff infections. While the BOP will claim that the COVID-19 conditions within its facilities are under control, almost prophylactically, the number of staff infected has been widely recognized by reviewing courts as an indicator of a broad level of viral spread throughout the facility. While the government will almost surely suggest that spread among the inmate population has been contained through segregation and other mitigation efforts, viral spread among the prison staff members who are not restricted in their movements like locked down inmates can foreshadow a wholly unchecked outbreak.

The Sentencing Commission's Policy Statement

The Sentencing Commission's policy statement addressing the reduction of a sentence under 18 U.S.C. § 3582 provides that a defendant's physical and medical condition, age, and family circumstances may all serve as independent grounds for the existence of a compelling reason to reduce one's sentence. There is no question that the older, more frail the inmate, the more likely that a Compassionate Release application will be granted. However, with the pandemic's impact on schools and other family conditions, for example, the Sentencing Commission's policies can provide advocates with a wide array of compelling justifications for release beyond simply the vulnerability of the inmate.

The 3353(a) Sentencing Factors

The sentencing factors set forth in 18 U.S.C. § 3553(a) include, but are not limited to: (1) the nature and circumstances of the underlying offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed to reflect the seriousness of the underlying offense; (4) the need for the sentence to provide adequate deterrence; (5) the need to protect the public from further crimes of the defendant; and (6) the need to avoid unwarranted sentence disparities.

For Compassionate Release applications, courts look to weather the underlying offense was violent, if the defendant had a violent history or posed any threat to the community, and if the portion of the prison sentence completed, to date, was long enough and appropriately deterred the defendant's conduct.

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When Do You Request Compassionate Release for Your Client?

Exhaustion Requirement

Although the compassionate release statute previously permitted sentence reductions only upon motion of the Director of the BOP, Congress expanded the statute in the First Step Act of 2018.[3] As amended, 18 U.S.C. § 3582(c)(1)(A) now permits courts to consider motions filed by the defendant so long as "the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf," or after "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier[.]" Accordingly, as discussed in further detail below, prior to filing a Compassionate Release application with the trial court, a client should request Compassionate Release through the BOP.

The Third Circuit has held that defendants seeking Compassionate Release must comply with § 3582(c)(1)(A)'s exhaustion requirement. BOP must be given 30 days to consider the defendant's request to move for Compassionate Release on the defendant's behalf prior to the defendant making a request to a district court.[4]

Some courts, however, have waived the exhaustion requirement.[5] Other courts have permitted defendants to file Compassionate Release applications directly with the trial court if making the request to the BOP would be futile.[6]

Pre-Surrender Relief

While less courts have granted pre-surrender Compassionate Release, meaning that the defendant has not yet surrendered to the prison, it is possible to win such an application.[7] A defendant can request that the court, Warden and/or counsel for the BOP modify the defendant's sentence to time served and convert the unserved prison term to supervised release with the additional condition of home confinement even before the defendant has ever stepped foot inside a prison. While a person must satisfy all of the requirements outlined above for a pre-surrender Compassionate Release application, it is also important to show some kind of changed circumstance from the date of sentencing to the date of the Compassionate Release application.

Relief While Incarcerated

Inmates can file a Compassionate Release application at any time while incarcerated and after exhausting one's administrative remedies. The shorter the prison sentence, and the more time the defendant has served of that prison sentence, the higher the probability that the applicable sentencing factors will be weighed in the defendant's favor.

Who Should You Address Your Compassionate Release Request to?

The short answer is—everyone.

BOP Senior Counsel

There is a BOP senior counsel who is assigned to the different prisons and regions. It is important that a Compassionate Release application be sent to that person. It is also important to contact BOP counsel and discuss the defendant's specific circumstances. The BOP counsel can be a helpful ally throughout the Compassionate Release process, or at least assist in preparing preemptive attacks on the government's anticipated arguments.

Warden

In some jurisdictions, contacting the Warden prior to filing a Compassionate Release application is required. The Compassionate Release statute previously permitted sentence reductions only upon motion of the Director of the BOP. Currently, however, the statute permits courts to consider motions filed by the defendant as long as the defendant has exhausted all administrative rights. In order to exhaust one's administrative rights in the Compassionate Release context, one must make a Compassionate Release request to the Warden. Once the request is made to the Warden, and the Warden either denies the request or 30 days has passed, (whichever is earlier), the person may then file a Compassionate Release motion before the Court. The request to the Warden must contain specific language in order to begin the 30-day clock.

The Judge

The Compassionate Release Motion should be filed before the district court judge who sentenced the defendant.

The Government

While most Assistant United State Attorneys (AUSA) do not "consent" to a compassionate release application, an AUSA will occasionally "take no position" on the application—which is as good as it gets from the government. So, it is important that attorneys communicate with the AUSA assigned to the case and understand the government's position on a potential Compassionate Release application.

Does Your Client Have a Transition Plan?

In the application for Compassionate Release, you must include your client's release plan. This includes, but is not limited to: where the client will be living; who the client will be living with; and expected work proposal.

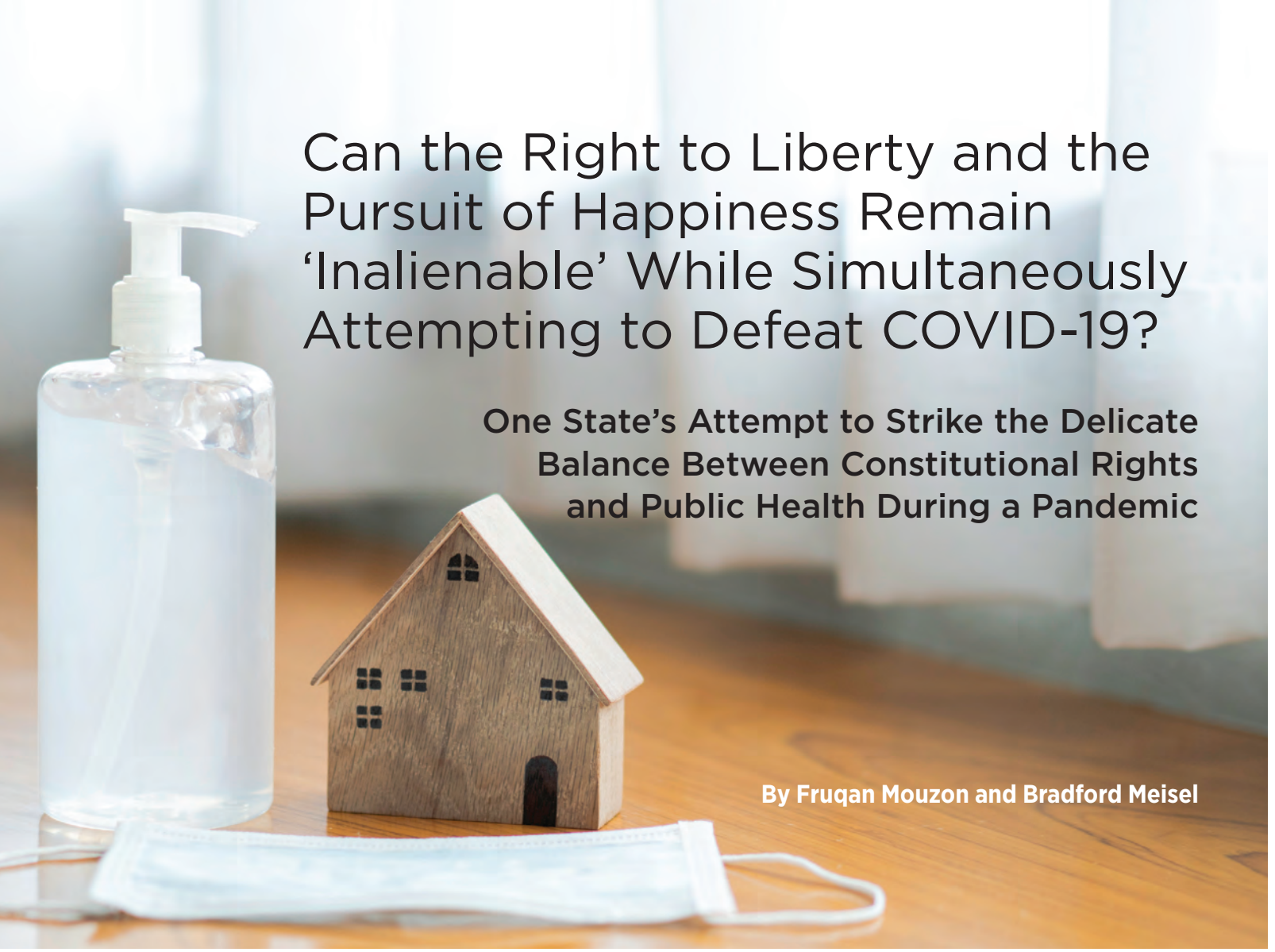
Conclusion

Courts around the country have granted Compassionate Release applications. Over 224 federal inmates in BOP custody and four BOP staff members have died due to COVID-19. Given how contagious COVID-19 is, there is a real danger that inmates will be exposed to

and contract COVID-19. In some prisons, COVID-19 cases have risen at a dramatic and alarming rate.[8] Often, Compassionate Release affords an attainable avenue to save your client's life. ⚖

Endnotes

1. U.S.S.G. § 1B1.13 cmt. 1(A)–(C).
2. bop.gov/coronavirus/
3. Pub. L. 115-391 § 603(b), 132 Stat. 5194, 5239 (Dec. 21, 2018).
4. *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020)
5. See e.g., *United States v. Gentille*, No. 19 Cr. 590 (KPF), 2020 WL 1814158 (S.D.N.Y. Apr. 9, 2020) (granting release where government agreed to waive exhaustion); *United States v. Park*, No. 16 Cr. 473 (RA), 2020 WL 1970603 (S.D.N.Y. Apr. 24, 2020) (granting compassionate release after government agreed to waive exhaustion).
6. The exhaustion requirement may be waived under the following circumstances: (1) the relief sought would be futile upon exhaustion; (2) exhaustion via the agency review process would result in inadequate relief; or (3) pursuit of agency review would subject the petitioner to undue prejudice. Poulios, No. 2:09-CR-109, 2020 WL 1922775, at *1 (E.D. Va. Apr. 21, 2020).
7. See e.g., *United States v. Hussain*, 3:16-cr-00462-CRB, at 4-5 (N.D. Cal. October 6, 2020) (holding that a pre-surrender defendant had exhausted his administrative remedies even though he was not in BOP custody and thus could decide the motion on the merits, and stating that the language of 18 U.S.C. 3582(c)(1)(A) "requires a defendant to exhaust his administrative rights before moving for relief; it does not expressly require a defendant to exhaust those rights while in custody. Nor does the statute imply that the defendant must be in custody."; *United States v. Vernell Butler*, 1:14-cr-00445 (N.D. Ill. April 6, 2020); *United States v. Quinones-Santos*, 3:17-cr-00278-JAG (P.R. September 20, 2020): *United States v. Peter J. Konopka*, 1:17-cr-00616 (N.D. Ill. September 10, 2020); *United States v Joe Turner*, 2:18-cr-0012-LA (E.D. Wisc. September 24, 2020).
8. See e.g., from October 8, 2020, to November 30, 2020, the number of COVID-19 active positive inmate cases increased exponentially from five to 331 active COVID-19 cases.



Can the Right to Liberty and the Pursuit of Happiness Remain 'Inalienable' While Simultaneously Attempting to Defeat COVID-19?

One State's Attempt to Strike the Delicate Balance Between Constitutional Rights and Public Health During a Pandemic

By Fruqan Mouzon and Bradford Meisel

It is in middle school when U.S. students first hear the story of the great Patrick Henry proclaiming, "Give me liberty, or give me death." Most believe that if placed in the same situation as Governor Henry, they would have held the same level of intense commitment. After all, liberty comes with a price and we believe that even if that price is death, we would gladly pay it.

One of the many things we have learned from the COVID-19 catastrophe, however, is that in reality, most Americans would happily hand over their liberty if there is any measurable statistical chance of an early death. The specter of a certain and sudden death is not necessary. About 0.15% of the U.S. population has died from COVID-19-related causes.[1]

In the immediate aftermath of Sept. 11 and the subsequent anthrax attacks, there was a palpable movement to err on the side of caution by increasing government power in the face of disaster, even if at the cost of individual liberty. The debate around whether one should sacrifice liberty for security raged on, with security winning out more often than not. Widespread support for the Patriot Act is an example.

In the months following 9/11 and the anthrax attacks, the Model State Emergency Health Powers Act was developed. At the time, there was significant concern that the United States was at risk of a large-scale bioterror attack including highly communicable pathogens or poisons. Within five years, the overwhelming majority of states enacted statutes based on the MSEPHA, including, Connecticut,[2] Delaware,[3] Florida,[4] Arizona,[5] Maryland[6] and Michigan.[7]

New Jersey's MSEPHA-inspired statute, the New Jersey Emergency Health Powers Act, took effect on Sept. 14, 2005.[8] Given that, at the time, the United States had not experienced a severe pandemic in more than 85 years, the legislature was undoubtedly far more concerned with combatting biological

warfare and terrorism than naturally occurring pandemics like COVID-19. Interestingly, the COVID-19 emergency is the first and only public health emergency declared pursuant to this statute since it was enacted. Despite the statute mostly being enacted with a view toward terrorism, it unambiguously applies to naturally occurring pandemics. Specifically, the statute gives the governor authority to declare a public health emergency in the event of a serious and imminent threat caused by "the appearance of a novel or previously controlled or eradicated biological agent" that poses a high probability of "a large number of deaths, illness or injury."[9]

COVID-19 attacked the country with lightning speed and the response was swift and decisive. On March 4, 2020, Gov. Phil Murphy confirmed the state's first positive case.[10] One week later he issued Executive Order 104, which mandated the closure of all recreational facilities, amusement centers, bars, gyms, restaurants and shopping malls.[11] Five days after that, another executive order required New Jerseyans to stay home unless absolutely necessary and it also mandated the closure of all retail businesses, except for certain "essential" stores such as pharmacies, liquor stores, cannabis dispensaries and grocery stores.

No less than 30 executive orders followed, as the number of positive cases ebbed and flowed and information about the virus improved. Parks and golf courses were ordered to close on April 7.[12] But, a few weeks later, following New York Gov. Andrew Cuomo's decision to permit golf courses to reopen, New Jersey reopened its public parks and golf courses too.[13] By the end of May, youngsters could play organized sports again and by July, you could go to the barbershop for a much-needed haircut.[14] By the end of summer, you could get a workout in the gym or go to a restaurant with your spouse for your anniversary and by year'send the state would allow you to attend places of worship or to give a loved one who had passed away a proper send-off, with limits, of course.[15]

It is beyond cavil that many of the liberties we have so willingly relinquished in the face of COVID-19 are freedoms that have been long revered and protected with righteous indignation. As a Pennsylvania District Court Judge recently remarked, a stay-at-home order amounts to "a population lockdown" completely unprecedented in United States history, even during previous public health crises such as the 1918–1919 Influenza Pandemic.[16] Justice Marshall once commented that "the freedom to leave one's house and move about at will is of the very essence of a scheme of ordered liberty and hence is protected against state intrusions by the Due Process Clause of the Fourteenth Amendment."[17] The U.S. Supreme Court has long recognized this right to move from one place to another as "an attribute of personal liberty" because "an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is a part of our heritage."[18] As multiple federal courts have bragged about American liberty pointing out the fact that "citizens can walk the streets, without explanation or formal papers, is surely among the cherished liberties that distinguish this nation from so many others."[19]

Orders closing non-essential businesses, houses of worship and prohibiting gatherings including funerals and weddings challenge the long-recognized principle that "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[20] "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom..."[21]

While most Americans were open to the idea of government measures designed to slow the spread of COVID-19, even at the expense of civil liberties, these unprecedented measures faced pushback including lawsuits challenging their constitutionality. Various plaintiffs alleged that among other things, orders restricting individuals' movement and travel violated the Due Process Clause; the state had unconstitutionally infringed upon parishioners' free exercise of religion by being either overcautious, insensitive or discriminatory in restricting religious services and

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gatherings; orders permitting certain businesses to remain open while requiring others to close were arbitrary and violated the Equal Protection Clause; restrictions on gatherings and the operation of theaters and cinemas violated First Amendment rights to free speech; and orders closing certain businesses constituted regulatory takings entitling such businesses to just compensation.

Constitutional challenges to Murphy's COVID-related executive orders had limited success. Courts consistently deferred to the governor with regard to the "safety and health of the people" whom he was elected to "guard and protect."[22] Courts reasoned that they must afford broad latitude to state officials who "undertake [ ] to act in areas fraught with medical and scientific uncertainties."[23] They were consistently unwilling to second guess decisions made by politicians based on recommendations from scientific experts, given the judiciary's lack of public health background, competence or expertise.[24]

In *Rock Baptist Church v. Murphy*, the New Jersey District Court held that capacity limits on indoor gatherings did not violate the Free Exercise Clause because it treated religious and secular gatherings similarly enough to stay on the right side of the Constitution.[25] Likewise, the Court held in *National Association of Theater Owners v. Murphy* that an executive order allowing certain indoor recreation and entertainment centers to operate but not cinemas did not violate the First Amendment, the Equal Protection Clause, or Article 1 of the State Constitution.

Despite legal challenges to several executive orders, New Jerseyans by and large backed the governor's actions. According to a Rutgers-Eagleton poll conducted April 22 and May 2 of 2020, 66% of New Jersey adults believed the state was "moving to lift restrictions and reopen businesses at just the right pace" and 19% believed the state was lifting restrictions and reopening businesses too quickly.[26] According to a Stockton University poll conducted in October, 55% of New Jersey adults believed that the measures taken to combat the COVID-19 pandemic were "just right," 18% believed the measures did not go far enough," and 54% rated Murphy's COVID-19 response as "excellent" or "good."[27] A Fairleigh Dickinson University poll found that 72% of New Jersey adults approved of Murphy's COVID-19 response while President Donald Trump, who criticized restrictions imposed by state governments, earned only 25% approval for his handling of the crisis.[28] Moreover, in a September 24 interview, National Institute of Allergy and Infectious Diseases Director Dr. Anthony Fauci praised New Jersey's handling of COVID-19 as an example for all other states seeking to safely reopen their economies.[29]

Benjamin Franklin observed that "those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety." If the polls are to be believed, it is safe to say that most New Jerseyans disagree with Mr. Franklin. ⚖

Endnotes

1. As of March 2, the United States had suffered 515,000+ COVID-19-related deaths among its population of approximately 328.2 million.
2. C.G.S.A. § 19a-131-131j
3. 20 Del. C. § 3131-3150
4. F.S.A. § 381.00315
5. A.R.S. § 36-787
6. MD Code, Public Safety, § 14-3A-01-08
7. M.C.L.A. 10.122
8. N.J.S.A. 26:13-1-31
9. N.J.S.A. 26:13-3(a); N.J.S.A. 26:13-2
10. Atrino, Anthony G., *N.J. coronavirus update: Fort Lee man, 32, is first to test positive for virus in state*. N.J. Advance Media (Mar. 5, 2020), nj.com/coronavirus/2020/03/nj-coronavirus-update-fort-lee-man-32-is-first-to-test-positive-for-virus-in-state.html
11. N.J. Executive Order 104, March 16, 2020.
12. N.J. Executive Order 118, April 7, 2020
13. N.J. Executive Order 113, April 29, 2020
14. N.J. Executive Order 149, May 30, 2020; N.J. Executive Order 154, June 13, 2020
15. N.J. Executive Order 180, August 27, 2020; N.J. Executive Order 183, September 1, 2020; N.J. Executive Order 196, November 16, 2020
16. *County of Butler v. Wolf*, 2020 WL 5510690, at *19-*22 (W.D. Pa. Sept. 14, 2020)
17. *Bykofsky v. Borough of Middletown*, 429 U.S. 964-965 (1976) (Marshall, J. dissenting)(citations omitted)
18. *City of Chicago v. Morales*, 527 U.S. 41, 53-4 (1999)(citations omitted)
19. *Waters v. Barry*, 711 *F. Supp.* 1125, 1134 (D.D.C. 1989)(quoting *Gomez v. Turner*, 672 *F.2d* 134, 143-44 n. 18 (D.C. Cir. 1982)
20. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)
21. *Truax v. Raich*, 239 U.S. 33, 41 (1915)
22. *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)
23. *Marshall v. United States*, 414 U.S. 417, 427 (1974)
24. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985)
25. *Rock Baptist Church v. Murphy*, 2020 WL 4882604 (D.N.J. Aug. 20, 2020).
26. See eagletonpoll.rutgers.edu/wp-content/uploads/2020/05/NJ-Pandemic-Future-Reopening-and-Concerns.pdf
27. See insidernj.com/stockton-views-covid-19-pandemic-fall-along-partisan-political-lines/
28. See view2.fdu.edu/publicmind/2020/201016/index.html; view2.fdu.edu/publicmind/2020/201016/index.html
29. See abc7ny.com/anthony-fauci-rand-paul-covid-19-nj-news/6535589/

20/20 Hindsight on 2020's Coronavirus Pandemic and Its Effect on the Practice of Family Law

"Business as Usual" Took on a New Meaning in the Family Law Legal Arena Amid the COVID-19 Pandemic

By Jhanice V. Domingo

In the wake of the COVID-19 pandemic in 2020, "business as usual" took on a new meaning in the family law legal arena. While families and businesses explored different ways to cope with changes to the *status quo* and adjust to "new norms" inevitably some problems, challenges and disputes remained the same. Such is life and for many, custody, parenting time, support, and other family law related issues did not cease in a pandemic. In fact, in some cases, they were exacerbated as a result of additional tensions caused by the public health crisis. Family law judges, arbitrators, mediators, and litigators worked around the clock trying to resolve the typical family law disputes but the problem solving was by far not "business as usual" amid the novel coronavirus public health crisis.

For one, as part of the New Jersey State Judiciary's social distancing efforts to slow the spread of the coronavirus, there were no in-person Superior Court proceedings as of March 18, 2020, except for extremely limited emergent matters and certain ongoing trials. The limited sessions had a profound impact especially on litigants who needed to resolve issues and disputes that were not deemed emergent but were

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important, nonetheless. With courts limiting sessions to emergent matters only, and having to postpone previously scheduled motions, hearings, etc., litigants and family law practitioners had to look elsewhere for resolution. New Jersey courts were backlogged as they were before the COVID-19 pandemic. More than ever, litigants and family law practitioners had to think "outside of the box" to resolve disputes. When litigation was no longer a realistic route, alternative dispute resolution such as mediation and arbitration where a neutral third-party assists parties in resolving disputes outside of court proved to be effective and sought-after substitutes to litigation.

Well before the COVID-19 pandemic, technology allowed people to be in the "same room" without having to physically be in the same room. With Skype, FaceTime, Zoom conference, and other video conferencing platforms, people already were able to have virtual face-to-face communications. Business already was done by videoconferencing. But it certainly was not until social distancing was required to combat the COVID-19 pandemic did New Jersey courts and attorneys, in general, and New Jersey family law courts and family law practitioners, in particular, really start taking advantage of these virtual platforms.

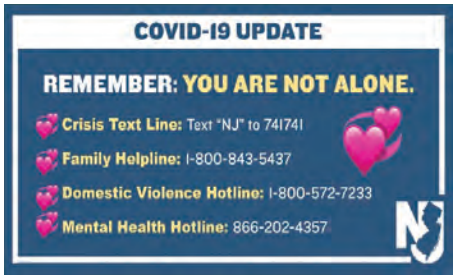
In the family law legal arena, in-person case management conferences, motion hearings, early settlement panels and other hearings were converted to telephonic and/or video conferences to keep cases moving. To accommodate litigants who needed the immediate assistance of a neutral third party in resolving custody, parenting time, support, and other family law related issues in the midst of the COVID-19 pandemic, virtual mediation and arbitration developed. These changes gave litigants the opportunity to resolve issues and disputes without delay or interruption notwithstanding the state of affairs in New Jersey.

In some respects, for those who already settled their divorce cases, it became easier to put divorces through. Because there were no in-person court appearances, uncontested divorce hearings were conducted telephonically or by video conference. Some Family Court judges even started granting divorces "on the papers." Therefore, litigants who already settled their divorce by way of a marital settlement agreement did not have to appear in court in person to be granted a divorce.

COVID-19 Mandatory Lockdowns and the Rise in Divorce and Domestic Violence

Some married couples enjoyed the extra quality time and being home with their spouse. But, for others who were already in troubled marriages before the COVID-19 outbreak, the significant increase in time together due to a mandatory lockdown not surprisingly caused increased tension and stress at home. Stressors caused by the pandemic—health issues, disagreements regarding the children, financial stress due to layoffs or reduced wages, etc.—create problems in a healthy marriage. All the more where there was already a breakdown in communication and lack of trust in a strained marriage, these stressors caused spouses to become even more estranged and decide to separate or divorce.

On March 21, 2020, New Jersey Gov. Phil Murphy signed Executive Order No. 107 requiring all New Jersey residents to stay at home until further notice, except for certain exceptions. This stay-at-home directive was intended to help "flatten the curve" as the nation dealt with the COVID-19 pandemic. The resounding message was: Stay SAFE. Stay HOME. But, unfortunately for victims of domestic violence, home was the least safe place to be. Within 24 hours of signing the Stay-at-Home Order, Murphy tweeted the COVID-19 update below—an important reminder for those who did not feel safe at home.



As predicted by experts and health care professionals, there was an increase in domestic violence cases. After all, abuse in all its forms, continues and even escalates when isolation and financial stress are at their peaks during a pandemic. Victims of domestic violence continued to suffer various forms of abuse at the hands of their abusers—physical, mental, emotional, financial, etc., and more than ever, it was important for victims of domestic violence to be reminded that they are NOT ALONE. State and local police departments, municipal courts, and the Family Part of New Jersey Superior Courts in all 21 counties of New Jersey continued to handle applications for temporary restraining orders (TROs) notwithstanding the COVID-19 crisis. But despite the strong response from the government and social service agencies, domestic violence rates continued to increase and disproportionately affected low-income and marginalized individuals more, according to research conducted by Partners for Women and Justice.

Effects of COVID-19 Pandemic in the Legal Analysis of Family Law Disputes

Some of the questions that family law judges and practitioners had to answer included: What are the "rules" of shared custody while following stay-at-home orders? What if a parent is an essential worker? How can parenting time exchanges be done safely? What type of information do co-parents need to be sharing with one another to guard everyone's health?

Courts had to find the right balance between: (1) ensuring that a parent and

child continue to have meaningful parenting time; and (2) protecting the child against the risk of exposure to the coronavirus. For divorced parents who were essential workers, especially those serving on the frontlines, parenting disputes with former spouses were especially contentious. Parents who worked in the health care industry as physicians, nurses, medical technicians, nurse aids, etc. had greater risk of exposure to COVID-19. And as such, this caused the other parent to demand the suspension of in-person parenting time.

Although generally, the terms of an existing divorce custody and parenting time agreement remain in full force and effect except as otherwise mutually agreed upon by the parents or ordered by a Court of competent jurisdiction, in the case of the COVID-19 outbreak, there were legitimate—and novel—health and safety factors to consider in determining custody and parenting time disputes between divorced co-parents. But the legal decision-making process for judges remained the same: cases were analyzed based upon their own set of unique facts and circumstances and disputes were decided on the merits of the arguments and evidence. The core inquiry remained unchanged: What is in the *children's* best interests? Family law judges called upon to decide these COVID-19-related disputes often inquired: (1) whether a parent adhered to the statewide stay-at-home order for New Jersey residents; (2) whether a parent or anyone in his or her household had been exposed to anyone who had tested positive for COVID-19; (3) what safety precautions a parent had taken to ensure that their home is a suitable and safe environment for parenting time; (4) whether a parent or any other household member exhibited any symptoms of the virus; and (5) whether the child(ren) had any health issues (e.g., asthma or other respiratory issues, compromised immune system, etc.) that made them more susceptible to contract the virus.

To err on the side of caution and to minimize persons in and out of one's home, curbside pickup and drop off were often utilized provided that the child(ren) was/were of an age where this could be safely accomplished. Before the COVID-19 pandemic, curbside pickup and drop off generally were only utilized in cases where there was an existing restraining order or in highly contentious divorces. Parents and/or third parties who were providing transportation were required to adhere to CDC guidelines and safety precautions such as cleaning and disinfecting frequently touched surfaces (car door handles, power window buttons, seatbelts, dashboards, etc.); covering the mouth and nose with a mask; wearing gloves. Common sense hygienic and safety precautions recommended by the CDC to prevent illness and/or the spread of the virus also were required during parenting time exchanges.

It is human nature to fear the unknown. Because there were so many unknowns regarding the coronavirus, it was understandable for parents to have many questions and concerns. A good rule of thumb was: if the information is something that a judge may later consider either to allow or deny parenting time, it was probably best that it be disclosed, and if any way could be perceived as problematic, to be addressed head-on. Another good guide used by family law practitioners: Disclose to the other parent what you would want disclosed to you.

The COVID-19 pandemic also presented some questions regarding financial relief in the context of a divorce when the closing of businesses, layoffs, furloughs, and reduced income for those who were fortunate to keep their jobs were prevalent. Tensions were high between obligor-spouses who had alimony and child support obligations and obligee-spouses who were dependent upon that financial support. In New Jersey, alimony and child support obligations can be modified based upon a showing of a substantial change in circumstances such as unemployment or reduced income of the obligor-spouse.

One of the factors for the Court's consideration is whether the obligor-spouse who becomes unemployed and/or suffers a reduction in income has made diligent efforts to seek replacement employment or comparable income. Depending on the obligor spouse's work experience and qualifications, age, income, and other factors, this already may be a lengthy process. In the context of the COVID-19 pandemic when businesses are required to close, unemployment rates are high, work forces are being reduced, etc., this problem was compounded especially since by statute, the obligor-spouse seeking a modification of their support obligations are prohibited from filing an application for modification until they have been unemployed, or have not been able to return or attain employment at prior income levels, or both, for a period of 90 days. And even after that initial 90-day threshold, the obligor-spouse must show that the substantial change in circumstances is permanent.

With certain exceptions being made due to the COVID-19 pandemic—from the Internal Revenue Service extending the deadline to file income tax returns to mortgage relief for those experiencing financial hardship due to the coronavirus pandemic—some questioned whether the COVID-19 pandemic qualified as an extraordinary temporary circumstance that required a different analysis. The question remains unanswered as there is currently no reported case law directing how family court judges should handle support modification applications related to coronavirus cases, and the end of the COVID-19 pandemic remains unknown. ⚖

Compelling Parties to Participate in Remote Arbitration Hearings

By Theo Cheng

One adverse impact of the pandemic has been to create delays in the scheduling of in-person arbitration evidentiary hearings due to ongoing governmental regulations, travel restrictions, and concerns over personal health and safety. This delay undoubtedly compromises the promise of arbitration as an expeditious and cost-effective dispute resolution process. By agreement, some parties have arranged to proceed remotely using any one of the many available video teleconferencing (VTC) platforms, such as Zoom, WebEx, or Microsoft Teams. Even if the arbitration agreement expressly prohibits holding a remote hearing, the parties could nonetheless agree otherwise and proceed remotely.

But what if there is a dispute between the parties as to whether to proceed remotely? When the parties' arbitration agreement specifically forbids remote hearings, it is a relatively easy matter for the arbitrator to refrain from proposing a remote hearing, deny applications to proceed remotely, or sustain an objection when one party wishes to proceed remotely while the other does not.[1] But rarely do today's agreements explicitly address this issue.

Because the arbitrator is the decision-maker charged with resolving the parties'

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disputes, there are several things for arbitrators, parties, and counsel to consider in evaluating an application to convert an in-person hearing to one conducted remotely or, conversely, to seek to postpone an in-person hearing until a future date when it is safe to do so. By its very nature, arbitration is a creature of contract. When there is a fundamental disagreement about the manner in which the proceeding should be conducted—particularly, the main event—the default arguably ought to be what the parties had originally intended when they entered into the agreement, namely, the traditional in-person hearing. The pandemic also presents a dynamically changing situation, and the advent of mass vaccinations of the general population raises the hope that scheduling in-person hearings will not be indefinitely postponed.

To hold a safe and fulsome in-person hearing, though, appropriate protocols should be considered by all of the participants, which could include any or all of the following:

- use of personal protective equipment (PPE);
- erection of portable plastic dividers at each table, around witnesses, and around the arbitrator (or, in the case of a panel, around each arbitrator);
- enforcement of social distancing requirements and hand-washing in compliance with recommendations of applicable health authorities;
- daily or periodic COVID-19 testing of all the participants in the proceeding;
- use of VTC platforms to accommodate individuals who may need to participate remotely (which is no different than when an accommodation is made for an individual witness to appear to testify for a limited time);
- imposition of any applicable travel and quarantine restrictions;
- selection of a hearing room with sufficient square footage and adequate ventilation;
- daily or periodic disinfection of the hearing room; and
- institution of shorter hearing days and frequent breaks.

Notwithstanding the adoption of the foregoing precautions, it can be difficult to imagine holding a hearing with an absolute guarantee of personal health and safety. Moreover, the practicality of having witnesses testify during an in-person hearing raises potentially problematic issues because mask wearing can obfuscate a witness's appearance, facial expressions, diction, demeanor, and reactions. Social distancing and facial masks may also bar or severely limit approaching or handing unsanitized documents and other exhibits to witnesses on the stand. There are also many competing views and perspectives on whether credibility determinations can be better assessed when witnesses appear in-person as opposed to on video. Framed differently, the question may be whether a video appearance is sufficient for a trier of fact to make that kind of assessment, and the answer to that question may differ depending upon how critical witness credibility is to the central issues in dispute. In short, the quality of in-person examinations of witnesses remains in doubt when pandemic safeguards are employed, although having witnesses appear on a VTC platform has obvious limitations.

In the end, parties, counsel, and arbitrators are reminded of the old adage that "justice delayed is justice denied," and, in many circumstances, a delay in the proceeding invariably advantages one party at the expense of another. If the prospect of an in-person hearing, in fact, seems delayed, an arbitrator operates under certain ethical duties that suggest an obligation to affirmatively propose that the parties at least seriously consider converting the proceeding to a remote hearing. For example, under the Code of Ethics for Arbitrators in Commercial Disputes, arbitrators have a responsibility to the arbitration process itself and must observe high standards of conduct so that the integrity and fairness of the process are preserved.[2] Arbitrators should also conduct themselves in a way that is fair to all the parties and should not be swayed by outside pressure, public clamor, fear of criticism, or self-interest.[3] They should further conduct the proceeding to advance the fair and efficient resolution of the matters submitted for decision,[4] and they should also afford all parties the right to be heard, allowing each party a fair opportunity to present its evidence and arguments.[5]

Accordingly, there is a sound basis under the code for the notion that arbitrators have an ethical obligation to affirmatively propose that the parties undertake a remote hearing, especially when the prospect of an in-person hearing seems delayed. These underlying ethical principles underscore the importance of maintaining the integrity and fairness of the process, advancing the fair and efficient resolution of the dispute, and affording parties a fair (but, notably, not necessarily perfect) opportunity to present evidence and arguments. They also operate as constraints on an arbitrator's authority and exercise of discretion in resolving a dispute over proceeding with a remote hearing.

Many arbitration agreements typically incorporate the use of a particular provider's arbitration rules, default to the Federal Arbitration Act (FAA, 9 U.S.C. § 1 *et seq.*) or applicable state arbitration statute (such as the New Jersey Arbitration Act, N.J.S.A. § 2A:23B-1 *et seq.*), or leave the conduct of the arbitration proceeding to the sound discretion of the arbitrator. In each case, the arbitrator generally is afforded broad discretion to conduct the proceeding in a manner that advances the expeditious and cost-effective resolution of the dispute, while being consistent with its underlying premise of fairness and due process.[6]

But exercising that discretion requires care on the part of the arbitrator to ensure that the party objecting to proceeding remotely and seeking a postponement to a day when an in-person hearing can be held has made an appropriate showing. Some factors for arbitrators, parties, and counsel to consider include:

- Timing considerations in the arbitration clause or case management orders
- The age of the proceeding
- The stage of the proceeding when the party makes the request or objection
- Whether it is premature to determine if the arbitrator should move the hearing online
- Whether there were previously any in-person hearings held in the matter
- The location and nature of a possible in-person hearing
- Whether the arbitrator can resolve a portion of the case through documentary submissions or a remote proceeding
- Whether the requesting party's reasons for postponement are reasonable and well founded
- Whether the objecting party will suffer any undue prejudice by shifting to a remote hearing
- Whether there exist any continuing liability or time-sensitive matters, such as an emergency health and safety issue
- The state of government regulations and associated travel restrictions, along with the family and health considerations of the arbitrator, counsel, parties, and witnesses
- Whether there are legitimate concerns over the use of the VTC platform, such as:
  - Competency of the arbitrator, counsel, parties, or witnesses
  - Availability of appropriate equipment (devices, headsets, microphones, speakers, monitors, etc.)
  - Difficulty preparing or marshaling witnesses
  - Efficient handling of exhibits
  - Improper coaching of witnesses
  - Preservation of confidentiality
  - Platform security
- The technical support available to address real-time issues that may arise
- Whether the arbitrator will be able to understand the testimony and exhibits, assess the witnesses, and decide the dispute fairly.[7]

In these extraordinary times, examples of reasons that likely would not establish sufficient good cause to prevent a conversion to a remote hearing—absent extenuating circumstances—likely include a mere desire or preference on the part of any participant to proceed in-person; a lack of training on or familiarity with VTC platforms, particularly given the numerous training opportunities and tutorials offered for low or no cost; an unfamiliarity, discomfort, disdain, or fear of technology; and the inability for any group of participants (*e.g.*, counsel, parties, and/or witnesses) to be in the same physical location, either before or during the hearing. By contrast, some obvious examples that would likely qualify as establishing sufficient good cause include situations where a hearing participant tests positive for COVID-19; lives in the same household as someone who has tested positive for COVID-19; has been exposed to someone who has tested positive for COVID-19; must care for a family member who has tested positive for COVID-19; has closed the business due to governmental regulations; is unable to access the office where relevant case files are located; or is in a location with unstable or unreliable telephone or internet service that the participant cannot otherwise remediate.

Presently, there is little authority concerning the propriety of an arbitrator ordering parties to conduct a remote hearing. For example, in *Legaspy v. FINRA*,[8] the respondent in a FINRA arbitration challenged FINRA's ruling (and the arbitral panel's subsequent order) rescheduling his in-person hearing to one held via Zoom by filing an action in federal court seeking a temporary restraining order and preliminary injunction against FINRA. Specifically, Legaspy contended that remote proceedings will be cumbersome and procedurally irregular because the claimants are from Argentina and will require an interpreter; there are dozens of witnesses and hundreds of documents that would have to be shared remotely; and, by the time the hearing is over, he will have spent so much on attorneys' fees that he will have exhausted his insurance coverage, and, as a result, due to FINRA capitalization rules, he will effectively be forced out of business before he could move to vacate any award against himself. The court ultimately concluded that Legaspy had not met his burden for obtaining interim relief because his claims were not likely to succeed on the merits. In part, the court based its conclusion upon the well-settled principle that "[o]nce the case has been submitted to arbitration, federal courts leave it to arbitrators to sort out their own procedures."[9] In the court's view, here, "[w]hether FINRA can or should conduct a hearing remotely is a question of procedure that FINRA, not this court, must decide."[10] The court also specifically rejected Legaspy's argument that FINRA proceedings cannot be remote because parties are entitled to "attend all hearings" under FINRA Rule 12602(a), concluding that Legaspy may still "attend" the hearing remotely, exactly as he had done for the telephonic TRO hearing in court.[11] Moreover, the court rejected Legaspy's other argument that remote hearings are prohibited because the rules specify that the hearings will take place at some "location" but do not mention remote hearings, concluding that the parties, witnesses, and arbitrators are still "located" somewhere in a remote

proceeding, just not all at the same location.[12] Finally, as to Legaspy's contentions regarding his inability to effectively defend himself in a remote proceeding, the court concluded that he had not presented any evidence that he would be irreparably harmed by being required to arbitrate remotely, noting that "[r]emote hearings are admittedly clunkier than in-person hearings but in no way prevent parties from presenting claims or defenses…. Legaspy has established, at most, that he would prefer not to arbitrate remotely, not that remote proceedings make it more likely that he will suffer any harms."[13]

In a somewhat different context, the National Academy of Arbitrators, the organization of labor and employment arbitrators in the U.S. and Canada, issued an advisory opinion on the subject of ordering remote hearings.[14] Based on the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, the academy concluded that, in the absence of a collective bargaining agreement or an *ad hoc* agreement prohibiting video hearings, an arbitrator may—in exceptional circumstances—order a remote hearing, in whole or in part, without mutual consent and over the objection of a party. The substance of this opinion, including the academy's guidance on factors that arbitrators, parties, and counsel should consider in terms of remote proceedings, is highly instructive regardless of whether the dispute arises in the labor-management context. However, in its opinion, the academy also urged arbitrators to first obtain the parties' agreement to proceed remotely before determining that a video hearing is necessary to provide a fair and effective proceeding. Indeed, nothing in the opinion "imposes an affirmative obligation to order a video hearing absent the agreement of the parties."

Undoubtedly, as more disputes over the format of the evidentiary hearing arise, additional objections will be lodged, either as an interlocutory challenge or as a ground for vacatur of the final award. To that end, keep in mind that, under the FAA, parties may move to vacate an arbitration award "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown."[15] State arbitration statutes, like the New Jersey Arbitration Act, often have similar provisions or afford vacatur under the general catch-all of arbitrator misconduct.[16] Thus, to guard against vacatur of the final award, all arbitration participants should strive to create a complete record of all views on the matter before the arbitrator rules on an application or objection to convert an in-person hearing to a remote hearing. ⚖

Endnotes

1. *See, e.g.,* Code of Ethics for Arbitrators in Commercial Disputes (2004) ("Code"), Canon I.E. ("When an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely.").
2. *See id.*, Canon I.A.
3. *See id.*, Canon I.D.
4. *See id.*, Canon I.F.
5. *See id.*, Canon IV.B.
6. *See, e.g.,* N.J.S.A. 2A:23B-15(a) ("An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding."); AAA Commercial Arbitration Rule 32(c) ("When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must still afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination."); AAA Construction Industry Arbitration Rule 33(c) (2015) (same); CPR Non-Administered Arbitration Rule 12.1 (2018) ("The Tribunal shall determine the manner in which the parties shall present their cases."); JAMS Comprehensive Arbitration Rule 22(g) (2014) ("The Hearing, or any portion thereof, may be conducted telephonically or videographically with the agreement of the Parties or at the discretion of the Arbitrator.").
7. *See* Neal Eiseman, "Can a Commercial Arbitrator Demand a Virtual Hearing?," *N.Y.L.J.* (May 20, 2020); Nat'l Academy of Arbitrators, Formal Adv. Op. No. 26 (Apr. 1, 2020); American Arbitration Association, "Considerations for Rescheduling Adjourned Cases" (2020).
8. No. 20 C 4700, 2020 U.S. Dist. LEXIS 145735 (N.D. Ill. Aug. 13, 2020).
9. 2020 U.S. Dist. LEXIS 145735, at *6-7 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)).
10. *Id.* at *7.
11. *See id.* at *8.
12. *See id.*
13. *Id.* at *11-12.
14. *See* Nat'l Academy of Arbitrators, Formal Adv. Op. No. 26 (Apr. 1, 2020).
15. 9 U.S.C. § 10(a)(3).
16. *See, e.g.*, N.J.S.A. 2A:23B-23(a)(3) ("[T]he court shall vacate an award made in the arbitration proceeding if…an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement…").

How The Global Covid-19 Pandemic Has Affected Landlord Tenant Practice In New Jersey

By Bruce E. Gudin

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It was March 16, 2020, when the pronouncement was made that the Courts were going to transition from in-person to remote proceedings. Landlord/tenant trial calendars would be suspended in the interests of public health and safety to curb the spread of COVID-19. No one could have imagined what was to unfold. Pending court cases were rescheduled, as were pending executions of warrants of removal (lockouts). Then they were rescheduled again, and then again, this time, "without a trial date."

We are now well into 2021. As of the writing of this article, the court situation is "status quo" in a sense, and in flux in another sense. Most cases, including all routine nonpayment of rent cases, are not even being scheduled for mediation, much less trial dates, and no lockouts based upon a rent default or otherwise are proceeding. Eviction cases originally filed in February 2020, and those filed since, have been issued docket numbers with no hearing dates, something that used to be a simultaneous occurrence. As of this writing the state has surpassed 60,000 active eviction cases, all of which are now officially in backlog; a number that is no cause to celebrate.

On March 27, 2020, the President of the United States signed the Coronavirus Aid, Relief, and Economic Security Act into law. The law included protections for tenants and homeowners and implemented a federal eviction moratorium for tenants living in certain types of housing. The eviction moratorium was intended to last 120 days, and as of the writing of this article was extended until March 31, 2021. The CARES Act also restricted lessors of "covered properties and programs" from filing new eviction actions for non-payment of rent, and also prohibited charging fees, penalties, or other charges to the tenant related to nonpayment of rent. The federal moratorium also provides that a lessor (of a covered property or program) may not evict a tenant after the moratorium expires, except on 30 days' notice. The CARES Act is worthy of mention as it impacts all new tenancy cases to be filed as well as pending cases, as will be discussed below.

Aside from declaring a state of emergency in general, the New Jersey governor has broad emergency powers.[1] They can declare a public health emergency if there is "the appearance of a novel or previously controlled or eradicated biological agent."[2] Public health emergencies expire after 30 days unless renewed by the governor.[3] On March 13, 2020, the governor issued Executive Order 103 which implemented a state of emergency *and* public health emergency. The governor has followed that order with a host of additional pronouncements. Notably, Executive Order 106 signed by the governor on March 19, 2020, suspended residential evictions for two months *after the conclusion* of the public health emergency *or* state of emergency. Through a series of additional executive orders, the governor has extended the public health emergency. The Feb. 17, 2021, executive order renewed and extended the state public health emergency for an additional 30 days. Given the surge of the virus this winter, it is reasonable to expect that the public health emergency will be extended. The result is that with limited exceptions, evictions of residential tenants cannot proceed until Executive Order 106 is rescinded or the governor does not renew the public health emergency status, in which case evictions (lockouts) can proceed 60 days thereafter.

The Governor's Executive Order 128, issued on April 24, 2020, permits residential tenants to use their security deposit to pay rent that is due, or to become due, provided that they notify the landlord in writing. Tenants will not need to submit an additional security deposit unless they extend or renew their lease. If the tenant and landlord extend or renew the lease, the security deposit must be replenished in full no later than six months following the end of the public health emergency established by Executive Order 103, or upon renewal of the lease, whichever is later.

The New Jersey Supreme Court has issued a series of omnibus orders that affect "LT" practice. On June 11, 2020, the Fourth Omnibus Order directed that: (a) lockouts of residential tenants (evictions) continue to be suspended in accordance with Executive Order 106; (b) landlord/tenant complaints may continue to be filed with the courts, and new complaints shall include an email address for the landlord and to the extent available an email address for the tenant; (c) the courts shall schedule conferences, including to obtain or confirm contact information from the parties and conduct settlement negotiations in an effort to resolve matters; and (d) trials continue to be suspended until further notice. The Court has continued those provisions in their subsequent omnibus orders, including the current (as of this writing) Ninth Omnibus Order dated Oct. 8, 2020.

Consistent with the Court's orders, settlement conferences have been conducted, but unfortunately, not many. By order dated July 14, 2020, the state Supreme Court authorized several steps to support the resumption of landlord/tenant case processing during the "ongoing COVID-19 crisis." Pursuant to a "Notice To The Bar" from Hon. Glenn A. Grant, J.A.D. dated July 14, 2020.

> "[C]urrent circumstances require the New Jersey courts to implement a cohesive strategy for landlord/tenant cases pending service and landlord/tenant cases pending trial. To that end, with input from tenant advocates and landlord representatives, the Court has authorized both permanent and interim measures to support the resumption of service of landlord/tenant complaints and the scheduling of settlement conferences while landlord/tenant trials remain suspended. Those measures are critical to facilitating the best possible outcomes for tens of thousands of New Jersey residents who face potential loss of housing in the coming months."

The Court, in the July 14, 2020, order, adopted amendments to the Landlord/Tenant Summons Form (Appendix XI-B) and the Complaint Form (Appendix XI-X). Both forms now include fields for party email addresses and to indicate whether the case involves a residential or commercial tenancy, in order to facilitate communications and differentiated case management. Based on the ongoing suspension of landlord/tenant trials, the summons also was amended to remove the trial date field. The July 14, 2020, order relaxes Rules 6:2-1 ("Form of Summons") and 6:2-2 ("Process; Filing and Issuance") as necessary for implementation of those amendments to the forms. It also temporarily relaxes Rule 1:13-7(d) ("Dismissal of Civil Cases for Lack of Prosecution"), so as to prevent the dismissal of landlord/tenant complaints that have not yet been served or scheduled for trial, and Rule 1:40-7(b) ("Tenancy Actions"), so as to temporarily eliminate

the requirement of same-day trials if landlord/tenant matters are not resolved via complementary dispute resolution.

Rule 6:2-2(a) ("Delivery to Clerk; Issuance"), is relaxed so as (1) to require landlords who have filed a complaint between March 25, 2020, and July 24, 2020, seeking to evict a tenant for nonpayment of rent to submit a CARES Act Compliance Certification in a form promulgated by the Administrative Director of the Courts; and (2) to eliminate the requirement for landlords that file electronically to submit an original and two copies of landlord/tenant pleadings. *All* landlord tenant filings *must* now be done "paperless" using the courts' Judiciary Electronic Document Submission system.

While landlord/tenant trials remain suspended, the Court has provided an "Exception for Orders to Show Cause in Emergencies." The Court's July 14, 2020, order permits landlords to apply for an Order to Show Cause for eviction. The basis of that landlord/tenant action cannot be nonpayment of rent, except in the case of the death of the tenant. All applications for an Order to Show Cause will be reviewed and will proceed to a trial only if the court determines that an emergency exists. Examples of such emergencies, according to the Court, "include but are not limited to, documented violence, criminal activity, or other health and safety concerns." The Court's Order also acknowledges that an eviction may proceed in the "interest of justice" as provided by Executive Order 106.

An application based upon the allegation of an emergent circumstance is permitted in New Jersey. There are four factors the court must consider.[4] They are: (1) whether there would be immediate and irreparable harm if relief is not granted, (2) whether the application involves a settled area of law, (3) the likelihood of success on the merits, and (4) balancing the hardship to the parties in granting or denying relief.

The meaning of "interest of justice" requires some perspective. There has been a distinction drawn between the serious injustice standard compared to the interest of justice standard in the realm of sentencing in a criminal case. In *State v. Megargel*,[5] the New Jersey Supreme Court found that to meet the "interest of justice standard" there must be a compelling reason to reduce certain criminal sentences. In *Wellington Belleville, L.L.C. v. Belleville Tp.*,[6] the Tax Court found "interest of justice" meant that the court had limited discretion because the:

> circumstances must be (1) beyond the control of the property owner, not self-imposed, (2) unattributed to poor judgment, a bad investment or a failed business venture, and (3) reasonably unforeseeable

Our Supreme Court has recognized that cases involving:

> (1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification"

have satisfied the "interest of justice" standard in *Rule* 4:69-6(c).[7]

The "interest of justice" in general terms means that the court is satisfied that the decision clearly needs to be made. Aside from the interest of justice standard, there are times when a court can exercise some degree of discretion. "The Appellate Division enjoys considerable discretion in determining whether the 'interest of justice' standard has been satisfied and, as a result, whether to grant a motion for leave to file an interlocutory appeal." *Brundage v. Estate of Carambio*, 195 N.J. 575, 599 (2008).

The phrase "necessary in the interest of justice" has also been employed when the court felt constrained to make a decision because that was the only way to have a fair and correct result.[8] So, the "necessary in the interest of justice" standard is more restrictive than the plain "interest of justice" standard.

Whether to employ the serious injustice, interest of justice, discretionary, or any other standard would seem to be informed by the type of decision to be made and whether there was intent toward flexibility or strict adherence. Adding the word "necessary" to the phrase "interest of justice" is a standard that is higher than plain "interest of justice," but not so high as a serious injustice.

EO 106 states:

> While eviction and foreclosure proceedings may be initiated or continued during the time this Order is in effect, enforcement of all judgments for possession, warrants of removal, and writs of possession shall be stayed while this Order is in effect, unless the court determines on its own motion or motion of the parties that enforcement is necessary in the interest of justice. This Order does not affect any schedule of rent that is due.

The July 14, 2020, Supreme Court order states in paragraph 5:

> landlords/plaintiffs may in emergent circumstances apply for an Order to Show Cause for eviction. The basis of that landlord/tenant action cannot be nonpayment of rent, except in the case of the death of the tenant. In determining whether to issue the Order to Show Cause, the court will review the complaint and determine whether an emergency exists (e.g., violence against other tenants; criminal activity; extreme damage to residence; death of tenant resulting in vacancy of the rental unit) and based on that determination may schedule a landlord/tenant trial. As permitted by Executive Order 106, an eviction may proceed in the "interest of justice."

That provision was then rephrased in the Supreme Court's Eighth Omnibus order, dated Sept. 17, 2020, in paragraph (4)(a)(iv). Regarding landlord tenant trials, the order provides:

> (iv) Trials continue to be suspended until further notice, except that landlords/plaintiffs may in emergent circumstances (e.g., drug offenses, threats against landlord, theft) apply for an Order to Show Cause for eviction. The basis of that landlord/tenant action cannot be nonpayment of rent, except in the case of the death of the tenant. In determining whether to issue the Order to Show Cause, the court will review the complaint and determine whether an emergency exists, and, based on that determination may schedule a landlord/tenant trial. As permitted by Executive Order 106, an eviction may proceed in the "interest of justice."

Directive 20-20 issued by the Acting Administrative Director of the Courts on July 28, 2020, provides some guidance as to when landlord tenant trials can proceed during the public health crisis. It states:

> The court will review all applications for an Order to Show Cause with the case proceeding to trial only if the court determines that an emergency exists. The Anti-Eviction Act, N.J.S.A. 2A:18-61.1, and the Summary Dispossession Act, N.J.S.A. 2A:18-53, provide the following grounds for the removal of tenants that may constitute emergent circumstances justifying an LT trial:
>
> - Disorderly tenant (N.J.S.A. 2A:18-53(c) or 2A:18- 61.1(b));
> - Willful or gross negligent damage to premises (N.J.S.A. 2A:18-53(c) or 2A:18-61.1(c));
> - Abating housing or health code violations (landlord seeks to permanently board up or demolish premises because cited by authorities/inspectors for substantial health and safety of tenants) (N.J.S.A. 2A:18-61.1(g));
> - Occupancy as consideration of employment (N.J.S.A. 2A:18-61.1(m));
> - Offenses under comprehensive drug act (N.J.S.A. 2A:18-61.1(n));
> - Assaults or threats against landlord or certain other persons ((N.J.S.A. 2A:18-61.1(o));
> - Eviction for civil violations (tenant found by preponderance of evidence that theft of property, assault, terroristic threats against landlord or member of their family, employee of landlord's, etc.)(N.J.S.A. 2A:18-61.1(p));
> - Eviction for theft (N.J.S.A. 2A:18-61.1(q)); and
> - Human trafficking (N.J.S.A. 2A:18-61.1(r)).
>
> The above list is not meant to be exclusive. The court will take into consideration the circumstances of each case in determining whether a trial is warranted.

Since ejectment cases filed pursuant to *R.* 6:1-2(a)(4) are filed with a DC docket, ejectment cases may proceed to trial. Ejectment cases are causes of action based on N.J.S.A. 2A:35-1 to 3 and N.J.S.A. 2A:39-1 to 8. However, ejectments following foreclosures are subject to a "necessary in the interest of justice" standard to allow a lockout. The governor only mentioned eviction and foreclosure proceedings. The governor did not mention unlawful detainer actions or ejectment actions. Notwithstanding, many courts have held that EO 106 prohibits the execution of any writ of possession. Paragraph 2 of Executive Order 106 specifically says, "all judgments for possession, warrants of removal, and writs of possession in eviction and foreclosure cases shall be stayed." An order for possession can be obtained based on a foreclosure action either within the foreclosure case or by an ejectment action in the Special Civil Part.[9]

So, having provided the foregoing as a backdrop (in the limited space allotted for this article) as to "what's happening out there," it is easy to conclude that the practice of Landlord/Tenant law has seen quite a few changes due to the COVID-19 pandemic, and I would issue this caveat: be extremely careful if you are going to test the practice waters in this field of law. It would be like learning to swim in a tsunami. As a further personal observation, the implementation of the various governmental protections foisted upon us during the pandemic were well-intended. As we're taught in law school, the law abhors a forfeiture, and we are witnessing the government doing whatever they can do to help landlords and tenants avoid such forfeitures. State legislation that became effective Jan. 4, 2021 requires a landlord, with limited exception, to accept rent by credit card. Although the wording of the act may require interpretation, it signals that there is a tremendous and frequent flux in the relationship and obligations of landlords and tenants during this indefinite period of the pandemic. You are advised to "keep posted" as the rollout of the vaccine hopefully restores some stability and normalcy to all of our lives—and we will see the laws and rules undoubtedly change, again. ⚖

Endnotes

1. N.J.S.A. App. A:9-33.
2. N.J.S.A. 26:13-2 and 3(a).
3. N.J.S.A. 36:13-3(b).
4. *Crowe v. DeGioia*, 90 N.J. 126, 132-5 (1982).
5. 143 N.J. 484, 499 (1996)
6. 20 N.J. Tax 331, 335-6 (2002)
7. *Mullen v. Ippolito Corp.*, 428 N.J. Super. 85, 106 (App. Div. 2012).
8. *Windsor Contracting Corp. v. Budny*, 93 N.J. Super. 235, 245 (App. Div. 1966) (requiring a new trial); *State v. Illario*, 10 N.J. Super. 475, 479 (App. Div. 1950) (use of court's contempt power).
9. *Chase Manhattan Bank v. Josephson*, 135 N.J. 209, 225 (1994).

COVID-19 and Apartment Complexes

Why the Unregulated Use of Gyms and Common Areas Could Make Landlords Begin to Sweat

By Izik Gutkin

With COVID-19, our lives have changed immeasurably, both in the United States and abroad. As a corollary, lawmakers at the local, state, and federal levels have considered and enacted policies to address the problems that exist in the world that we now find ourselves living in. For example, the Equal Employment Opportunity Commission recently issued landmark guidelines establishing that employers can mandate that their employees be vaccinated, subject to limited circumstances related to religious beliefs and employee health.[1] However, many other avenues for potential liability remain inconclusive at the moment, setting the stage for what could be a year of landmark court decisions in 2021. One such area that is relatively unclear is the liability of a landlord for a residential apartment complex in the event its tenants or visitors contract COVID-19 and sue the landlord for failing to enact sufficient safety measures to protect them.

There is scant case law on point to which landlords can reference in order to understand their potential liability if a resident were to contract COVID-19. Consequently, there is a dearth of information that would enable landlords to make well-grounded and educated decisions as to the measures they must take to 1) protect their tenants, and 2) reduce exposure to potential lawsuits from tenants who catch the coronavirus. However, by considering the limited legal authority that exists, we can predict a landlord's liability in such a circumstance, and perhaps consider ways in which a landlord can mitigate potential liability.

In particular, the use of gym facilities operated by residential apartment complexes, for which there is some general guidance, offers a crucial and interesting starting point for this discussion. On Aug. 27, 2020, Gov. Phil Murphy enacted Executive Order 181, which mandated that all "health clubs" in New Jersey, including "gyms and fitness centers," could reopen if such institutions adopted certain policies, "*at minimum*." While the laundry list of policies is certainly expansive, it includes: 1) gyms could reopen with certain limitations on occupancy; 2) gym-goers make reservations to limit the number of in-person interactions; 3) gyms sanitize equipment regularly and provide sanitization materials to gym users; and 4) importantly, that the gyms "[r]equire workers and customers to wear cloth face coverings while in the indoor portion of the premises, except where doing so would inhibit that individual's health or where the individual is under two years of age."[2] The executive order also requires gyms to decline entry to those who refuse to abide by the mask-wearing policy unless wearing a mask would pose a risk to that individual's safety, in which case "neither the business nor its staff shall require the individual to produce medical documentation verifying the stated condition."[3]

While Executive Order 181 failed to specify that the requirements listed therein would apply to gyms and fitness centers specifically located with residential complexes or cooperatives, any ambiguity as to whether the order did not

apply to such establishments was clarified with the introduction of Administrative Order No. 2020-21 on Sept. 5, 2020. In this order, Patrick J. Callahan, the State Director of Emergency Management for New Jersey, confirmed that "[h]ealth club facilities located in hotels, motels, condominiums, cooperatives, corporate offices, or other business facilities may open their indoor premises, *but those that are open to the public, and not only to guests, residents, and employees*, must conform to the provisions of Paragraph 1 of Executive Order No. 181 (2020)[.]" (Emphasis added). As such, Administrative Order No. 2020-21 clearly demarcated that residential complexes could be required to enforce certain safety measures in gyms, and presumably in other areas, if they are open to the public.

However, there remains no guidance on the potential liability of a residential complex to residents or others in the event of a COVID outbreak at their remaining facilities. To predict the potential liability, we can turn to the limited relevant case law. In *Snyder v. I. Jay Realty Co.*[4] *Snyder* a negligence suit was brought against a commercial tenant and landlord by a plaintiff who was injured on a platform on the premises that he alleged was negligently constructed. Relying on the Appellate Division's holding in *Hedges v. Housing Authority of Atlantic City*,[5] the New Jersey Court held "that a landlord who negligently fails to provide a passageway that is safe in the dark, may absolve himself from liability by lighting the passageway so that its use becomes safe."[6] In so holding, the Court essentially explained that if the landlord is aware of a danger, the landlord has a duty to make the danger known to others, or to eradicate the danger.

Turning to the area of a landlord's liability in a residential setting, the Appellate Division in *Dwyer v. Skyline Apartments, Inc.* held that while the duty of a landlord "is not to insure the safety of tenants," landlords nonetheless have a duty "to exercise reasonable care," and the landlord can therefore be found "liable only for injurious consequences to a tenant by reason of defects 'of which he has knowledge or of defects which have existed for so long a time that…he had both an opportunity to discover and to remedy.'"[7] It is also well-settled that this duty of reasonable care necessarily extends to common areas of the residential complex that are under the landlord's control.[8]

Additionally, our courts have even held landlords liable for the foreseeable conduct of third parties that is injurious to residents in certain circumstances. In particular, the New Jersey Supreme Court held that landlords have a duty "to take reasonable measures to safeguard tenants from foreseeable criminal conduct," and, if the landlord fails to do so, "[a] residential tenant can recover damages from his landlord upon proper proof that the latter unreasonably enhanced the risk of loss due to theft by failing to supply adequate locks to safeguard the tenant's premises after suitable notice of the defect."[9] In *Braitman*, the Court also acknowledged the reality that, at least in the context of willful criminal activity, changes in societal patterns could impact the Court's assessment of liability for landlords. Specifically, the Court explained that "the depressing specter of rising crime rates in…urban areas may soon call for reconsideration of the general principle that the mere relationship of landlord and tenant imposes no duty on the landlord to safeguard the tenant from crime."[10] The Court based this guidance on several reasons, including that "[m]any prospective tenants undoubtedly consider the landlord's security measures in selecting apartments, particularly in middle and upper income complexes;" "the growing threat which crime poses to the urban dweller and the increasing reliance which must be placed upon multiple dwellings to meet contemporary housing needs[.]"[11] The Court found further validation by acknowledging that "present and future living patterns" could justify a more expansive duty for landlords, whether by reason of the "frank recognition that the landlord is in a superior position to take the necessary precautions,…or [perhaps because] the concept of an implied warranty of habitability of residential premises… is flexible enough to encompass appropriate security devices[.]"[12]The Court again instructed that while "the landlord is [not] an insurer of the security of the tenant's property," the landlord "should [nonetheless] take those measures of protection which are within his power to take and which will reduce the risk of criminals robbing tenants."[13]

After stints as a judicial clerk with both the trial and appellate courts in New Jersey, **IZIK GUTKIN** *now works as an associate attorney with Gordon Rees Scully Mansukhani (GRSM) in the firm's Florham Park office. At GRSM, Izik handles a variety of legal matters, including but not limited to insurance, commercial, and employment disputes.*

Undoubtedly, while the current status of liability for landlords to tenants and others in residential apartment complexes is not definitive, it is clear that we now live in extraordinary times. By extension, because the Court has acknowledged that the respective liability of landlords is ever-evolving, such liability could presumably be extended to meet the risks posed to tenants by COVID-19, or by any other illnesses or safety hazards that could come about in the future.[14] Landlords will likely never be required to absolutely ensure the health and safety of their tenants. However, it would nonetheless be prudent for landlords to develop and enforce comprehensive and strict health and safety measures in times of crisis, such as the present, to mitigate their exposure to potential liability that could arise from their failure to impose

any measures, imposition of merely lax measures, or from their failure to enforce measures that are actually in place.

Thus, while none of the executive or administrative orders currently enacted by the state of New Jersey mandate the implementation of health and safety measures throughout common areas or for amenities used in residential complexes, this is not alone dispositive as to whether a residential landlord could be found liable for the damages of tenants and others in the common areas of the complex. Presumably, based on the relevant case law, landlords could nonetheless be liable under a theory of negligence in the event of an outbreak if tenants or visitors were to sue the landlord for failing to exercise reasonable care by enforcing mask-wearing and other safety measures in those common areas given that we currently face a widespread public health crisis.[15]

That being said, there are very real practical concerns for prospective litigants. In the few cases that have been brought against businesses by plaintiffs alleging negligence that resulted in their exposure to and contraction of COVID-19, the Courts have largely dismissed these matters due to the problems plaintiffs face in establishing that a business's negligence was the cause of their catching the virus, and because in the vast majority of cases, the plaintiff's injuries were largely de minimis.[16] These are certainly considerations that prospective plaintiffs would need to take into account when seeking to recover against residential complexes.

Notwithstanding the hurdles faced by plaintiffs in COVID-19 negligence cases, it would be unrealistic to assume that the judiciary would find residential complexes owe no duty to enforce health and safety measures for those tenants whose use and enjoyment of common facilities is being harmed by the disregard of public health guidelines by other tenants. This is particularly so with respect to those tenants who are either elderly or who suffer from underlying health conditions, and whose risk of serious illness and/or death from COVID-19 is much greater than the average person. While any restrictions placed by the landlord on its tenants could infringe on their incidental right to use the common areas, such as gyms, such restrictions would assuredly be permissible to prevent harm to the health and safety of tenants.[17] Thus, without speculating as to the breadth and scope of potential damages in negligence lawsuits brought by tenants and others against residential landlords in these lawsuits, it would be prudent for residential landlords to adopt sufficient health and safety protocols, and to enforce those protocols to the extent needed to ensure compliance, to confirm that their tenants remain safe, and to limit their legal exposure in the months and years to come. ⚖

A version of this article will be published in the Spring 2021 issue of Dictum*, the NJSBA Young Lawyers Division newsletter.*

Endnotes

1. *See* EEOC guidelines, Section K.
2. *See* Executive Order 181, 1(P).
3. *Ibid*.
4. 30 N.J. 303 (1959).
5. 21 N.J. Super. 167, 170 (App. Div. 1952),
6. *Snyder*, 30 N.J. at 315–16.
7. 123 N.J. Super. 48, 52–53 (App. Div.), *aff'd*, 63 N.J. 577 (1973) (quoting *Francisco v. Miller*, 14 N.J. Super. 290, 296 (App.Div.1951)).
8. *See Inganamort v. Merker*, 148 N.J. Super. 506, 509, 372 A.2d 1168, 1170 (Ch. Div. 1977) ("the landlord who retains control of…common areas and passageways must exercise reasonable care to assure the safety of these areas," while at the same time ensuring that the landlord does not "deny to…tenants rights which are incidental to their leasehold."); *Terrey v. Sheridan Gardens, Inc.*, 163 N.J. Super. 404, 407 (App. Div. 1978) ("[a] landlord is not an insurer for the safety of his tenants, but he is under a legal duty to maintain a common stairway under his control reasonably fit for use by occupants of the premises and by others lawfully thereon."). In *Inganamort*, the Chancery Court likened the common areas in an apartment complex to "quasi-public streets which must necessarily be utilized by the tenants for communications of mutual interest," thereby holding that a landlord is without the power to prohibit a tenant's use of these areas, which is "an incidental right of a tenancy in an apartment complex," "unless it can be demonstrated that the [use of the area] is being effected in such a way as to endanger the health and safety of the tenants." 148 N.J. Super. At 509–10.
9. *Braitman v. Overlook Terrace Corp.*, 68 N.J. 368, 382–83 (1975).
10. *Id*. at 387.
11. *Ibid*.
12. *Id*. at 387-88.
13. *Id*. at 387–88.
14. *See Braitman*, 68 N.J. at 382–83.
15. *See Snyder*, 30 N.J. at 315–16; Dwyer, 123 N.J. Super. at 52–53; *Inganamort*, 148 N.J. Super. at 509-10.
16. *See* Amanda Bronstad*, Passengers' COVID-19 Lawsuits Stresses Hurdles for Proving Causation, Damages*, Law.com (Sept. 8, 2020), law.com/2020/09/08/new-waters-for-the-law-dismissal-of-cruise-passengers-covid-19-lawsuits-stresses-hurdles-for-proving-causation-damages/; Debra Cassens Weiss, *Causation is an issue in suits against cruise lines by passengers who contracted COVID-19*, ABA Journal (Sept. 11, 2020), abajournal.com/news/article/causation-an-issue-in-suits-against-cruise-lines-by-passengers-who-contracted-covid-19.
17. *See Inganimort*, 148 N.J. Super. At 509–10.

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