

Leading Through COVID-19: Top Issues for Lawyers and Leaders

Wednesday, May 20, 2020

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What We're Going to Discuss



CONTRACT ISSUES



REOPENING ISSUES



FUTURE LITIGATION

Contracts in the age of COVID-19

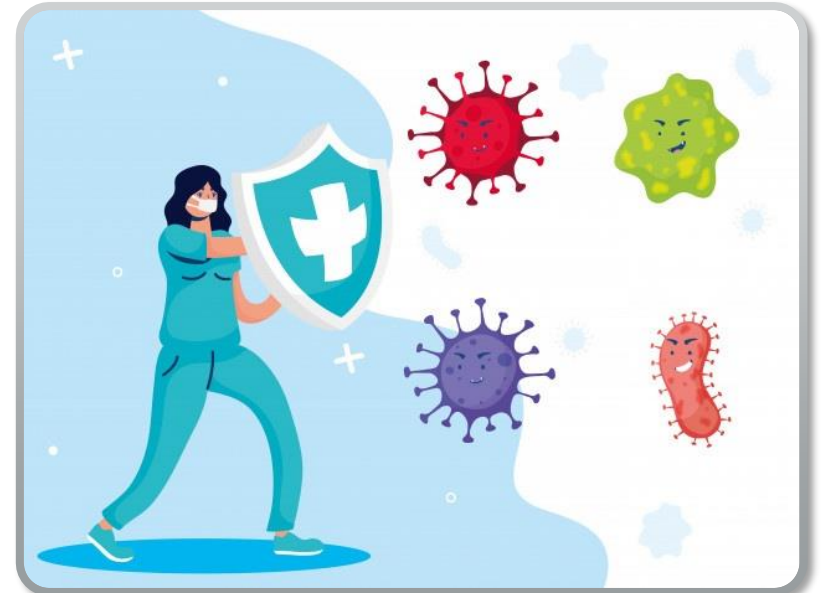


Force Majeure





Force Majeure



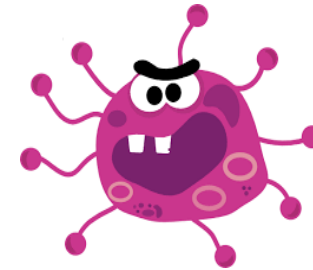
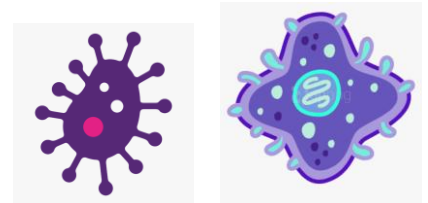
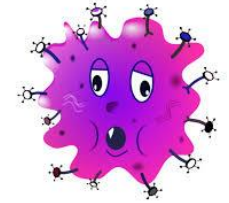
Force Majeure: Impossible?



Chance

THIS CARD MAY BE KEPT
UNTIL NEEDED OR SOLD

GET OUT OF **CONTRACT**
FREE



IMPOSSIBILITY:

- ✓ Unforeseen
- ✓ Impossible

To sustain an impossibility defense, the “supervening event” must have been “unanticipated” by the parties. As the [U.S.] Supreme Court has explained, if an event “was foreseeable,” it “should have been [provided] for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed” by the party whose performance was frustrated. In other words, an impossibility defense only excuses non-performance if the “unanticipated event [] could not have been foreseen or guarded against in the contract.”

World of Boxing LLC v. King, 56 F. Supp. 3d 507, 512 (S.D.N.Y. 2014)



*E. Air Lines, Inc. v.
McDonnell Douglas
Corp.*, 532 F.2d 957,
994 (5th Cir. 1976)



Lakeman v. Pollard
43 Me. 463 (1857)



Coombs v. Nolan
6 F.Cas. 468 (S.D.N.Y. 1874)

Frustration of purpose:



- Performance Possible
- Supervening Event
- Not Anticipated at Execution of Contract
- Value of Performance is Substantially Destroyed

Habitat Tr. for Wildlife, Inc. v. City of Rancho Cucamonga,
175 Cal. App. 4th 1306, 1336
(2009)

And when all else fails . . .



Getting back to
work: Issues for
returning
employers and
employees



Common Questions— Can My Employer Do This?



Require me to
return to work
in the office?



Require me to
continue to
work
remotely?



Require me to
wear a mask
at work?



Not require
others to wear
a mask at
work?



Take my
temperature at
the start of
each workday?

Can An Employer Require Employees to Return to Work in the Office?



Employee fall into one of the six categories of FFCRA leave?



Employee have disability or serious health condition? (ADA/FMLA)



Employee subject to “imminent danger” if reports to work? (OSHA)



If the answer is no to all the above, employer may require employee to return to work in office

Fall into Six Categories of FFCRA?



Subject to a federal, state, or local quarantine or isolation order related to COVID-19;



Under advice from health care provider to self-quarantine due to COVID-19 concerns;



Experiencing COVID-19 symptoms and seeking a medical diagnosis;



Caring for an individual subject to a government order or medically advised self quarantine as described above;



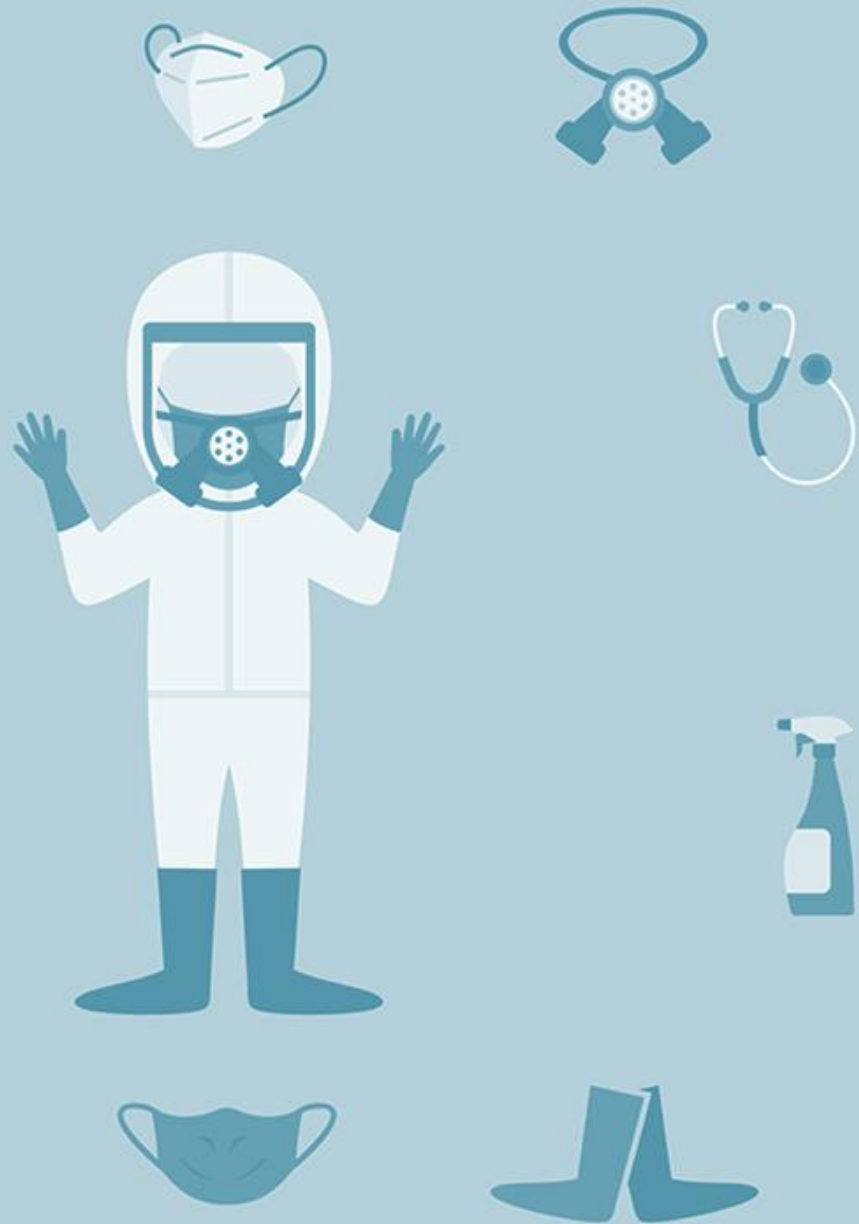
Caring for a child whose school or place of care is closed (or childcare provider is unavailable); or experiencing any other substantially similar condition

Can An Employer Require Employees to Continue to Work Remotely?



Elements of remote work policy:

- Remote work is job specific
- Can be revisited
- Outline of work hours, availability, office overhead



Require employees to wear mask? Not require others to wear masks?

- An employer may require employees to wear masks
 - If the employer requires employees to wear cloth face covers, it should provide or pay for them
- Consider OSHA's General Duty Clause
- Develop a non-discriminatory policy
- Train workers on how implementing any new policies to reduce the spread of COVID-19 may affect existing health and safety practices

Can my employer take my temperature?



**U.S. Equal Employment
Opportunity Commission**

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Pandemic Preparedness in the Workplace and the Americans with Disabilities Act

UPDATED IN RESPONSE TO COVID-19 PANDEMIC - March 21, 2020





Demand social distancing measures?



Litigation forecast:
The cases we
expect to see as
businesses reopen



Retaliation Claims





Workers' compensation benefits **may be available** for those who contract coronavirus on the job, but it depends...

Workers' Compensation



Uneven Enforcement of Policies

Insurance Claims



UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

SERO, INC. dba Beast, an Oregon Corporation, on behalf of itself and all others similarly situated,

Plaintiff,

v.

BERKLEY NORTH PACIFIC GROUP, LLC, a Delaware Corporation, BERKLEY INSURANCE COMPANY, a Delaware Corporation, W. R. BERKLEY CORPORATION, a Delaware Corporation, CONTINENTAL WESTERN INSURANCE COMPANY, an Iowa Corporation,

Defendants.

Case No. 3:20-cv-00776

CLASS ACTION ALLEGATION COMPLAINT

- 1. BREACH OF CONTRACT,**
- 2. BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING,**
- 3. UNFAIR TRADE PRACTICES,**
- 4. DECLARATORY RELIEF**

DEMAND FOR JURY TRIAL

CLASS ACTION ALLEGATION COMPLAINT

FFCRA



**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STEPHANIE JONES
211 Paul Pines Drive
West Chester, PA 19380

Plaintiff

vs.

EASTERN AIRLINES, LLC
550 E. Swedesford Road, #210
Wayne, PA 19087

and

JOSEPH MAROTTA
c/o Eastern Airlines, LLC
550 E. Swedesford Road, #210
Wayne, PA 19087

and

STEVE HARFST
c/o Eastern Airlines, LLC
550 E. Swedesford Road, #210
Wayne, PA 19087

Defendants

: CIVIL ACTION – LAW

: No.

: JURY TRIAL DEMANDED

FFCRA Claims

22. Defendant Marotta responded in a fashion that showed open hostility to Plaintiff's request for leave:

Hello Stephanie,

The way we left it yesterday after spending a great deal of time hearing your concerns yesterday was I specifically advised that I would get back to you shortly. You apparently have chosen not wait even 24 hours for a response even though you are currently working from home. As I advised yesterday, People Services will work with you,

look up while at home. As I mentioned yesterday the new laws are there as a safety net for employees not as a hammer to force management into making decisions which may not be in the best interest of the company or yourself.

management into making decisions which may not be in the best interest of the company or yourself.

I will reach back out as I committed shortly and when I have something to communicate.



YOU WERE SO PREOCCUPIED WITH WHETHER OR NOT YOU COULD



YOU DIDN'T STOP TO THINK IF YOU SHOULD

Thank you!



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Kyle Busse
kylebusse@markowitzherbold.com