

Insights, News & Events

WHAT CAN A HOSPITALITY EMPLOYER LEARN FROM A MEAT PACKING PLANT'S ALLEGED BUTCHERING OF THEIR COVID-19 RESPONSE? A 4-STEP ACTION PLAN

Publication

0

A meat packing plant is under the knife after a former employee filed a class action lawsuit filed against it in a California federal court alleging the company encouraged its employees infected with COVID-19 to work, implemented policies and practices that facilitated the spread of COVID-19, and thereby knowingly exacerbated the spread among its employees and the local community. This class action is a troubling example of the new wave of COVID-19 lawsuits raising multiple statutory claims. And it has far-reaching implications for employers who were and are slow to act in response to COVID-19. What can hospitality employers do to avoid a similar slaughter?

THE ALLEGATIONS

Maria Pilar Ornelas, a Latinx woman, alleges that her employer, Central Valley Meat Co., Inc. exposed her and close to 200 minority-dominant workers to COVID-19 at its Hanford, California facility when it allowed at least one worker who tested positive for the virus on April 2 to continue working without safety precautions. Ornelas claims that despite there being at least nine confirmed positive cases in early April, Central Valley waited until April 22 to notify workers that it had a positive COVID-19 case and only did so after a worker posted an alert on Facebook that the company had a confirmed case.

Shortly after, Ornelas claims she became seriously ill and the company denied her a test and told her to continue working. By the end of her shift and into the next day, her

Related People



Erin Price

Partner

916.210.0382

Service Focus

Litigation and Trials

Workplace Safety

Industry Focus

Hospitality

symptoms worsened but because she was unable to contact Human Resources, her supervisor instructed her to come to work anyway. Ornelas refused and tested positive for the virus a few days later, and in turn, infected her boyfriend and placed her family members at risk.

Due to her COVID-19 infection, Ornelas claims she needed a reasonable accommodation and a leave of absence under federal and state statutes. Instead, Central Valley pressured Ornelas to return to work despite her illness stating they might not hold her job open for being on sick leave. During this time, the company maintained its "No-Fault Attendance Policy," whereby workers received a point against them for missing work, regardless of the reason. Once an employee accumulated, 18 points they were terminated. In light of the pandemic, the company also implemented a "Bonus Appreciation Policy" where employees who worked all available hours each week earned \$100 per week (\$200 per pay period).

Further, Ornelas claims the company implemented an "Attendance Incentive Policy" whereby employees lost \$2.50 per hour for every scheduled hour not worked, even if the reason was that employees were sick or disabled from COVID-19. Ornelas claims these actions caused sick employees to report to work and resulted in violations of the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and California state leave statutes. Moreover, Ornelas claims that the company violated its workers' privacy by disclosing a "Master COVID Tracking list" containing confidential health information of more than 800 employees to several people without authority view the list.

As a recently filed action in its early stages, there is no certainty that these allegations will result in liability on Ornelas's 10 claims on behalf of herself and all others similarly situated, including, but not limited to, public nuisance, negligence, Confidentiality of Medical Information Act (CIMA), disability discrimination and failure to accommodate in violation of state and federal law, and interference with the right to medical leave in violation of the FMLA and state law. Nonetheless, this case is particularly instructive for employers in critical infrastructure that continue operations during these unprecedented times.

STAY OFF THE CHOPPING BLOCK – A 4-STEP ACTION PLAN TO HEED GUIDANCE AND BE PROACTIVE

While the claims Ornelas asserts are not novel, the factual circumstances underlying them are and there is no way to predict how a court will navigate through the particular difficulties employers such as Central Valley were faced with and continue to face throughout this pandemic. However, the gravamen of this recent lawsuit is Central Valley's alleged failure to timely notify workers of positive COVID-19 cases, implement safety measures among workers, and modify workplace policies that pressure sick employees to work.

Accordingly, it is clear that hospitality employers must be dynamic in protecting their workforce as infection numbers continue to rise and federal, state, and local officials respond with modifications to phased re-openings. In that respect, here are four best practices that could help you defend against similar claims:

1. ***Promptly Identify And Notify Workers Of Positive COVID-19 Cases***

Create a COVID-19 assessment and control plan, ensure all workers know how to contact a qualified workplace coordinator with any COVID-19 concerns, and establish a system for employees to contact their supervisors if they are experiencing COVID-19 symptoms or if they have come in contact with a suspected or confirmed COVID-19 case.

Once a positive COVID-19 case is identified, follow these [seven steps](#): isolate/quarantine the infected employee; conduct contact tracing to identify individuals in close proximity (within six feet) for a prolonged period of time (15 minutes or more) with the infected employee during the 48-hour period before the onset of symptoms; address employees in close proximity to the infected employee according to respective guidance for non-critical infrastructure and critical infrastructure workers; record, report, and investigate the work-relatedness of COVID-19; clean and disinfect your workplace; and notify all employees who work in the location or area where the employee works and third parties who may have been exposed to the infected employee.

2. *Follow Industry-Specific Guidance To Address Exposure Risk*

For example, the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) issued interim guidance for [Meat and Poultry Processing Workers and Employees](#) addressing factors that affect workers' risk of exposure, including distance between workers, duration of contact, and type of contact. To address those factors, the CDC recommends promoting social distancing, encouraging single-file movement with six-foot of distance between each worker in the facility, staggering arrival, departure, and break times, discouraging workers from carpooling to and from work, and adjusting shifts or cohorting to maintain processing capacity while putting measures in place to minimize exposure.

3. *Review Leave And Incentive Policies*

Address absenteeism through monitoring, responding, and implementing plans that allow business functions to continue in the event of an unexpected increase. Policies should be reviewed, analyzed, and modified as appropriate to reduce the likelihood of sick workers in the workplace and adjust incentives to ensure employees are not penalized for taking sick leave due to COVID-19. Additionally, consider flexible options for sick leave such as donating leave to other employees or a system for advance of future leave.

4. *Maintain Confidential Health Information And Implement Policies For The Same*

All employee health information, including test results, must be kept in a separate, confidential medical file separate from personnel file that is viewed only by management with a need to know. If an employee tests positive for the virus, notification to affected employees must be made in a way that does not reveal the personal health information of an employee. Moreover, if COVID-19 testing is permissible in your jurisdiction and industry, the process should be documented pursuant to a testing policy to defend against discrimination claims, and to comply with HIPAA and state privacy laws, signed employee authorization forms must be obtained for consent to the testing and consideration of the results in determining an employee's work eligibility.

CONCLUSION

As guidance, best practices, and circumstances related to COVID-19 continually evolve, hospitality employers do not have the luxury of 20/20 hindsight. However, you can benefit from the constant change and reduce the likelihood of future litigation by taking recommended action at the outset to provide a safe work environment, as well as protect your workforce and the community. For further information about COVID-19-related litigation being filed across the country, you can visit our [COVID-19 Employment Litigation Tracker](#). Our [COVID-19 Employment Litigation and Class & Collective Actions section](#) also has a listing of our litigation-related alerts and team members handling these types of cases.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our [Hospitality Practice Group](#).

For more information, [contact the author here](#).