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**General Trends**

- ❖ Total COVID-19 cases nationally from 1/30/20-10/3/22 = 6,281
- ❖ Most new cases in the last 30 days:
  - ❖ CA = 41
  - ❖ NJ = 21
  - ❖ NY = 26
- ❖ Most common case type = employment discrimination
- ❖ Most common industry = healthcare

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**General Trends**

- ❖ Illinois total cases = 199
  - ❖ Employment discrimination = 52
  - ❖ Vaccine = 34
  - ❖ Retaliation/whistleblower = 31
  - ❖ Remote work/leave conflicts = 30
  - ❖ Wage & hour = 14
  - ❖ Negligence/wrongful death = 10

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**Vaccine Mandate Litigation**

- ❖ Challenges to employer's ability to have and enforce vaccine mandates
- ❖ Challenges to employer's enforcement or administration of mandate
  - ❖ Existence and application of accommodation provisions
  - ❖ Disability v. religion
- ❖ Northshore University Health System class action and settlement

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## “Take-Home” COVID Litigation

- ❖ Can a household or family member of an employee sue an employer for contracting COVID from the employee/family member?
  - ❖ *Kuciamba v. Victory Woodworks*- CA case brought by spouse of employee who claims to have contracted COVID from spouse, who contracted COVID at work. Spouse had severe symptoms. Federal district court dismissed the suit, appeal pending at the 9<sup>th</sup> Circuit with certified questions for CA Supreme Court
  - ❖ *See’s Candies Inc.*- former employee sued company claiming insufficient safety protocols led to non-employee husband’s death after he contracted COVID from employee spouse. California state court refused to dismiss the claim and appeals court agreed. California Supreme Court declined to hear appeal, so case proceeds.

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## Things to Watch

- ❖ Whistleblower, retaliatory discharge and OSHA retaliation complaints
  - ❖ Discharge preceded by complaints of resident abuse/neglect associated with staff shortages
  - ❖ Discharge preceded by complaints on unsafe work environment, i.e. lack of PPE
- ❖ Discrimination in terms & conditions of employment associated with response to pandemic
  - ❖ Decisions to layoff and recall
  - ❖ Quality & distribution of PPE
  - ❖ Shift changes, staffing cuts
- ❖ Disability discrimination and failure to accommodate
  - ❖ Refusal to allow remote work as accommodation for disability

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## Reduce Risk/Exposure

- ❖ Risk assessment is critical
  - ❖ Prior to a termination that appears strictly based on performance, conduct, rule or policy violation, investigate whether the employee has made any complaints which would increase exposure to retaliation claims
  - ❖ Prior to implementing RIF, temporary layoff or other measure, perform same assessment for impacted employees
  - ❖ Must avoid making any decision in a vacuum
- ❖ Post-demand, pre-suit strategy
  - ❖ Undertake immediate investigation into claims and allegations
  - ❖ Confirm existence of documentation, electronic or otherwise (good and bad)
  - ❖ Early assessment of exposure to plan strategy for resolution

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# COVID-19 LITIGATION

The Resident/Client Front

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## Main Issues

- ❖ Potential claims and allegations
- ❖ Affirmative defenses
- ❖ Litigation strategy
  - ❖ Motion to dismiss
  - ❖ Motion for summary judgment

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## Goals

- ❖ Establish immunity qualifications under Executive Order 2020-37 and/or the PREP Act
- ❖ Anticipate plaintiffs' strategies to overcome dispositive motions
- ❖ Pleading-stage dismissal of Nursing Home Care Act and common law negligence claims
- ❖ Summary judgment dismissal of willful and wanton claims

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## Potential Claims

- ❖ Nursing Home Care Act
- ❖ Survival – Negligence
- ❖ Survival – Willful and Wanton
- ❖ Wrongful Death – Negligence
- ❖ Wrongful Death – Willful and Wanton

**Potential allegations:**

- Failure to provide necessary services
- Failure to comply with Control of Communicable Diseases Code
- Failure to isolate residents suspected of or diagnosed as having communicable diseases
- Failure to adequately observe, assess, and evaluate changes in condition
- Failure to develop up to date care plan
- Failure to notify family and physicians of changes in condition
- Failure to protect from neglect
- Failure to implement a care plan which identified resident as being at high risk for contracting COVID-19
- Failure to properly train employees on infection control and prevention
- Failure to implement infection control and prevention policies to prevent a COVID-19 outbreak
- Failure to ensure adequate supply of PPE
- Failure to continuously screen residents and staff including temperature checks and checklists to identify symptomatic patients
- Failure to enforce social distancing

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## Affirmative Defenses

- Illinois Executive Order 2020-37
  - Provides immunity from civil liability for injury or death relating to the diagnosis, transmission, or treatment of COVID-19 nursing homes and long term care facilities **Health Care Facilities** or **Health Care Professionals** providing services in a Health Care Facility, shall be immune from civil liability for any injury or death relating to the diagnosis, transmission, or treatment of COVID-19 alleged to have been caused by any act or omission by the Health Care Facility or the Health Care Professional, which injury or death occurred at a time when a Health Care Facility or Health Care Professional was rendering assistance to the State in response to the COVID-19 outbreak by providing health care services consistent with current guidance issued by IDPH.
  - Deaths and injuries caused by "gross negligence or willful misconduct" are shielded from liability under the order.
  - Immunity provided "during the pendency of the Governorial Disaster Proclamation," which began March 9, 2020 and was ultimately extended through June 27, 2020.
- "Health Care Facilities" includes long-term care facilities licensed under the Illinois Nursing Home Care Act, Federally Qualified Health Centers and assisted/supportive living facilities.
- "Rendering Assistance" must include, consistent with current guidance and recommendations from IDPH:
  - Taking measures such as:
    - Increasing the number of beds;
    - Preserving personal protective equipment;
    - Taking necessary steps to prepare to treat patients with COVID-19
  - Conducting widespread testing of residents and widespread and regular testing of staff for COVID-19; and
  - Accepting COVID-19 patients upon transfer or discharge from a Hospital or Health Care Facility.

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## Affirmative Defenses (cont.)

- ❖ Establishing qualifications for immunity under EO 2020-37:
  - ❖ Nursing homes, long-term care facilities, and assisted/supportive living facilities considered "Health Care Facilities" under the Order
    - Employees also considered "Health Care Professionals" under EO 2020-37
  - ❖ Acquire records, documents, and affidavits reflecting that facility "rendered assistance" under the Order (e.g. compliance with IDPH recommendations and testing requirements, increased bed capacity, etc.)
    - "Taking measures such as" - implies that strict compliance is not necessary to qualify for immunity - substantial compliance with IDPH guidelines and implementation of pandemic response strategies likely sufficient

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## Affirmative Defenses (cont.)

- ❖ **Public Readiness and Emergency Preparedness Act (the "PREP Act"), 42 U.S.C. § 247d-6d (eff. January 27, 2020)**
  - "[A] covered person shall be immune from suit and liability under federal and state law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or use by an individual of a covered countermeasure if a Declaration has been issued with respect to such countermeasure."
    - "Covered countermeasure" means any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19 or any device used in the administration of any such product, and all components and constituent materials of any such product.
    - "Covered activity" includes "any activity that is part of an authorized emergency response at the federal, regional, state, or local level."
    - Immunity covers persons and entities "who provide a facility to administer or use a 'covered countermeasure' in accordance with a declaration."
  - The Advisory Opinion suggests PREP Act immunity coverage will extend to "covered persons" possessing a **reasonable belief** they are providing a "covered countermeasure" in furtherance of a "recommended activity." Advisory Opinion at 2.

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## Affirmative Defenses (cont.)

- ❖ **Establishing qualifications for immunity under the PREP Act:**
  - Argument: to the extent skilled nursing and assisted living facilities are administering or using 'covered countermeasures' such as covered personal protective equipment (PPE) and covered drugs to prevent and treat COVID-19, they should qualify for immunity.
    - "Covered countermeasures" now includes PPE "used to limit the harm that COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom, might otherwise cause."
  - "Rendering assistance" under EO 2020-37 comparable to being a "part of authorized emergency response at the federal, regional, state, or local level" requirement of PREP Act.

→ **Once established, immunity defenses will likely provide sufficient basis to defeat Nursing Home Care Act and common law negligence claims.**

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## Immunity Defenses: Jurisprudence

- ❖ The central issue in early cases interpreting the PREP Act in the context of the COVID-19 pandemic was whether allegations of "nonfeasance" were covered by the PREP Act.
- ❖ The initial trend in COVID-19 jurisprudence interpreting the PREP Act involved courts' refusal to conclude that allegations of "nonfeasance" – or a complete failure to act and/or administer covered countermeasures – were covered by the PREP Act.
  - See, e.g., *Smith v. Bristol at Tampa Rehab. & Nursing Ctr., LLC*, 2021 WL 100376, at \*2 (M.D. Fla. Jan. 12, 2021)
  - *Estate of Maglioli v. Andover Subacute Rehab. Ctr. I*, No. CV 20-6605 (KM)(ESK), 2020 WL 4671091, at \*8 (D.N.J. Aug. 12, 2020).
- ❖ Accordingly, Plaintiffs have carefully crafted their complaints to allege only that facilities' complete failure to act resulted in the decedent's injuries.

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## Immunity Defenses: Jurisprudence (cont.)

- ❖ However, in *Garcia et al. v. Welltower OpCo Group LLC et al.*, SACV 20-02250JVS(KESx), the court concluded that the allegations in the complaint directly related to the administration to or the use by an individual of a covered countermeasure. For example, the complaint detailed infection control measures and procedures including symptom checking, staff monitoring and screening, and limiting visitation. In other places, the complaint “directly draws upon the use (and in some case, misuse) of PPE and references a “[r]esumption of [o]perations plan.” (*Id.*).
- ❖ The court determined that the allegations of use and misuse of PPE and the infection control measures directly related to covered countermeasures within the meaning of the PREP Act. (*Id.* at 13). Significantly, the court reasoned that **“Plaintiffs cannot escape this finding by arguing that the PREP Act does not cover the failure to use or administer covered countermeasures, either.”** (*Id.* at 14). The court ultimately granted the defendant’s motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

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## Immunity Defenses: Jurisprudence

- ❖ More recently, courts have gone against the initial trend in concluding that the PREP Act does apply to bar certain claims. *Michelizzi et al. vs The Beatitudes Campus, L.L.C. et al.* (CV 2021-094566).
- ❖ In a recent Arizona state matter (*Michelizzi et al. vs The Beatitudes Campus, L.L.C. et al.*), the defendant attempted removal to federal court based on the PREP Act. The federal court found no basis for federal jurisdiction, and the case was remanded to state court. The state court, however, dismissed the case, concluding that the PREP Act barred the claim.
- ❖ In dismissing the claim, the state court found that the PREP Act provided immunity from suit for claims related to the administration of COVID-19 countermeasures. The only viable claim the court held was for willful misconduct -- a claim which had not been pled, and for which plaintiff was unable to meet procedural or substantive thresholds. Even if plaintiff could state a willful misconduct claim, the court found she failed to exhaust the administrative remedies under the PREP Act.

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## Immunity Defenses: Jurisprudence (cont.)

- ❖ Executive Order 2020-37 is still largely without precedent.
- ❖ That said, the Sixteenth Judicial Circuit Court, Kane County, Illinois, recently certified to the Second District of Illinois Appellate Court (in a long-term care matter involving allegations of negligence related to COVID-19 and the application of the relevant federal and state immunities) a question under Rule 308 seeking to interpret and clarify the very novel immunity issues at play in the matter. On April 14, 2022 (and again on April 25, 2022 following an unsuccessful Motion to Reconsider by the plaintiff in that matter) in *James, et al. v. Geneva Nursing and Rehabilitation Center, LLC*, (a consolidation of five plaintiffs’ claims against the defendant, Nos. 2020 L 247, 2020 L 259, 2020 L 260, 2020 L 264 & 2020 L 273.) (IL Cir. Ct., Kane Cnty.) the circuit court granted the defendant’s petition for interlocutory appeal pursuant to Rule 308.
- ❖ The circuit court certified the following question: **“Does Executive Order 2020-19 provide blanket immunity for ordinary negligence to healthcare facilities that rendered assistance to the state during the COVID-19 pandemic?”** The circuit court also stayed discovery proceedings pending the Second District Appellate Court’s decision. The case is currently pending.

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## Litigation Strategy

- § 2-619 Motion to Dismiss
  - Assert affirmative defense of immunity provided by Executive Order 2020-37 and PREP Act
    - Establish immunity qualifications
    - Anticipate constitutional challenges
    - → dismiss Nursing Home Care Act and common law negligence claims
  - Attack sufficiency of § 2-622 report

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## Litigation Strategy (cont.)

- ❖ **Alternative initial responses:**
  - ❖ Motions to dismiss and compel arbitration (where relevant)
  - ❖ Removal to federal court – even with PREP Act defense, unlikely for COVID-19 claims in state court.
    - *Burrell v. Bayer Corporation*, No. 17-1715, 2019 WL 1186722 (4th Cir. Mar. 14, 2019) (anticipated assertion of an express preemption defense did not alone necessarily raise a substantial federal question because “under the well-pleaded complaint rule, . . . our inquiry is limited to the plaintiff’s statement of his own claim; we do not consider affirmative defenses”). *Id.* at \*5.
    - **BUT – in rare cases** – state-law claims that really and substantially involve a dispute or controversy respecting the validity, construction, or effect of federal law may provide basis for removal. (*Magnetek, Inc. v. Kirkland & Ellis, LLP*, 2011 IL App (1st) 101067)
  - ❖ Motions to stay pending the outcome of appeals involving the immunity defenses.
  - ❖ Plaintiffs’ motions to consolidate.
- ❖ **Motion for summary judgment on willful and wanton claims**

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## § 2-619 Motion to Dismiss

- ❖ **Bases:**
  - ❖ **Immunity provided by Executive Order 2020-37 and PREP Act**
    - Dismissal under § 2-619(a)(9) is appropriate when an affirmative matter bars or defeats the plaintiff’s claim. **The existence and preclusive effect of immunity is one such affirmative matter.** *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 115 (2008).
    - The relevant statutes referenced in Executive Order 2020-37 are: 20 ILCS 3305/15 (IEMA Act); 20 ILCS 3305/21 (IEMA Act); 210 ILCS 50/3.150 (EMS Act); and 745 ILCS 49 (Good Samaritan Act).
      - A review of existing case law lends guidance as to how the assertion of immunity as a defense under the IEMA Act, EMS Act, and Good Samaritan Act, may apply to the COVID-19 context.
    - “Considering the breadth of the preemption clause [of the PREP Act] together with the sweeping language of the statute’s immunity provision, we conclude that Congress intended to preempt all state law tort claims arising from the administration of covered countermeasures...” *Parker v. St. Lawrence County Pub. Health Dept.*, 102 A.D.3d 140 (N.Y. App. Div. 2012).
  - ❖ Insufficient § 2-622 affidavit
    - *Gulley v. Noy*, 316 Ill. App. 3d 861 (4th Dist. 2000)

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## Constitutional Challenges to Immunity

- ❖ Constitutes "special legislation" conferring a special benefit or exclusive privilege on a person or class to the exclusion of others similarly situated.
  - **Response:** Does not favor one class over another and applies to all Health Care Facilities "rendering assistance" – e.g. hospitals, clinics, nursing homes, etc. – equally.
    - *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 165 Ill. 2d 25, 40 (1995); *Jasper v. Chicago Marl League Ball Club*, 309 Ill. App. 3d 124, 128 (1999)
- ❖ Denies equal protection under the Illinois and U.S. Constitutions.
  - **Response:** Civil immunity for Health Care Facilities & Professionals responding to a pandemic is rationally related to legitimate state interest in increasing hospital capacity, resources for fighting COVID-19, and controlling the pandemic.
    - *Berner v. Burns*, 113 Ill. 2d 219, 228 (1986) (establishing rational basis test for medical malpractice legislation)
  - Does not arbitrarily discriminate.
    - No damages cap – anyone with negligence claims will be barred, *Miller v. Rosenberg*, 196 Ill. 2d 50 (2001)
    - Narrowly tailored to provide immunity only for claims involving injury or death relating to the diagnosis, transmission, or treatment of COVID-19. *Makoney v. Elmhurst Park Dist.*, 47 Ill. 2d 367, 369 (1970)

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## Motion for Summary Judgment

- ❖ Where the providers of emergency services provided extensive care and followed SOPs, courts have found that there was no willful and wanton misconduct despite a bad outcome for the patient.
  - In ruling on a motion for summary judgment, the trial court may determine that a defendant's actions do not amount to willful and wanton conduct where no other contrary conclusion may be drawn from the record presented.
    - *Brock v. Anderson Road Ass'n*, 287 Ill.App.3d 16, 222 Ill.Dec. 451, 677 N.E.2d 985 (1997) (paramedics' failure to diagnose heat-related illness due to their unfamiliarity with thermometer was not willful and wanton misconduct given the extensive care provided to decedent in conformity with standard operating procedure)
    - *Urban v. Village of Lincolnshire*, 272 Ill. App. 3d 1087, 651 N.E.2d 683 (1st Dist. 1995) (police officer's high-speed pursuit outside his jurisdiction of a speeding motorcycle did not constitute willful and wanton misconduct where the officer acted out of public safety concern and used safety precautions)

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# Thank You

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