Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

Briefly

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A CALL FOR ACTION…AND BALANCE

Mary Celeste Moffatt

"[The Smithfield Foods] case … illustrates how an employer's response to the pandemic can be subject to scrutiny when challenged, and the importance of documenting those steps."

As more businesses in Tennessee and other states begin to "reopen" following the relaxation or expiration of stay-at-home orders, employers are faced with continuing issues of workplace safety to address the coronavirus pandemic. Modern technology has introduced ways for employers to monitor employee compliance with social distancing in the workplace, to screen employee body temperature upon arrival, and to evaluate employee health status on a daily basis as well as gathering information on their overall medical history – all in the name of workplace safety. As the pandemic continues and businesses employ such measures in an effort to combat the virus, employers may experience an increase in employee complaints and resistance to overly invasive measures. Given the lack of certainty with respect to the safety-measures that are or are not required, employers will continue to be challenged to balance workplace safety measures with the existing employment laws regarding employee privacy and discrimination.

Meanwhile, employers may also find their safety practices being challenged as insufficient by workers who fear exposure to the virus in the workplace. There is no doubt that employers should continue to adhere to guidance issued from various governmental agencies including OSHA, the Department of Labor, and the CDC, which can be found on these agencies' respective websites.

While there is no specific OSHA standard relative to the pandemic, OSHA's *general duty clause* under Section 5(a)(1) of the Act requires employers to provide a workplace that is free from recognized hazards that are causing or are likely to cause death or serious physical harm. OSHA also prohibits employers from retaliating against employees who complain regarding workplace safety issues or employees who (according to OSHA's "Desk Aid" for its investigators) "exercise any right afforded by the OSH Act."

Employers uncertain as to how far they should go to respond to the pandemic in the workplace may wish to consider the recent case of *Rural Community Workers Alliance/Doe v. Smithfield Foods, Inc., et al.* (USDC, W. D. Missouri, 5:20-cv-06063). While Smithfield Foods, as a meatpacking industry, has unique workplace challenges not faced by all employers, the case nonetheless illustrates how an employer's response to the pandemic can be subject to scrutiny when challenged, and the importance of documenting those steps.

On April 23, the plaintiffs petitioned the United States District Court for the Western District of Missouri to compel Smithfield Foods to institute certain measures to reduce the potential for exposure to the pandemic in the workplace, seeking a declaration that the plant constituted a public nuisance and that Smithfield breached its duty to provide a safe workplace. On April 27, Smithfield moved to dismiss the case in its entirety and in support of its position, Smithfield noted OSHA's primary-jurisdiction in the area of workplace safety and advised the Court that just one day before the case was filed, on April 22nd, OSHA had sent Smithfield a "Rapid Response Investigation," requesting extensive information from Smithfield regarding its COVID-19 work practices and giving Smithfield only seven days to respond (which it did on April 29th).

According to the extensive information it provided to the Court regarding its response to the threat of

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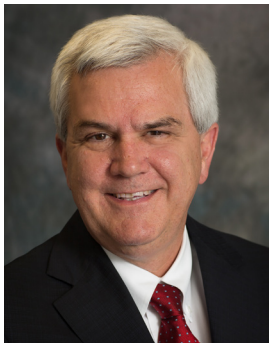

Howard B. Jackson

"[W]ith the increased anxiety due to the pandemic, the frequency of requests for emotional support animals may increase."

"DOES YOUR DOG BITE?" SERVICE ANIMALS IN THE WORKPLACE

In "The Pink Panther Strikes Again" Inspector Clouseau famously asks a hotel clerk standing near a dog, "Does your dog bite?" "No" is the response. When Clouseau reaches down to pet the dog it just about chews his finger off. Upset, Clouseau looks to the man and says, "I thought you said your dog did not bite!" The man replies, "That is not my dog!"

Bringing service animals to work is no laughing matter, however. The subject deserves education and attention so that employers and employees can find good solutions. In addition, with the increased anxiety due to the pandemic, the frequency of requests for emotional support animals may increase.

One of the first things to note in connection with this subject is that bringing a service animal to work is different than bringing the animal to a store or other place of public accommodation. Title III of the Americans With Disabilities Act (ADA) applies to places of public accommodation, but Title I of the ADA applies to the workplace. Title I does not grant employees an automatic right to bring a service animal to work.

The employment provisions of the ADA of course require that employers provide reasonable accommodation for employees with disabilities. Accordingly, while the ADA does not grant an employee an automatic right to bring a service animal to work, neither do employers have the ability to dismiss the request out of hand.

Where the employee's disability and need for a service animal are not obvious an employer may request documentation of the disability and the need for a service animal. Documentation that the disability exists typically comes from the health car provider. Remember that an employer is entitled only to enough information to validate that the condition exists, and to determine the nature of the limitations it places on the person's ability to perform essential job functions.

Suppose you receive a request to bring a service animal to work. The employee submits a note from a psychologist that says she suffers from anxiety and that the presence of the animal calms her such that she can focus and perform tasks both at home and at work. Must you allow the employee to bring the animal to work? The answer is, of course, it depends.

The animal must be properly trained such that it does not pose a threat to others. A dog such as the one that tried to have Inspector Clouseau's hand for a snack is not allowed. In addition, the employer does not have to make provisions for care of the animal, such as seeing that it has bathroom breaks. That said, a reasonable accommodation may include, for example, allowing the employee to modify her break schedule in a manner that allows her to tend to the animal's needs. The employee is not entitled to additional break time for this reason.

A question that arises when employees want to bring a service animal to the workplace is how to handle the situation when another employee has allergies. Linda Carter Batiste with the Job Accommodation Network ("JAN") recently offered some thoughts in the JAN *Consultants Corner: Volume 02, Issue 01* regarding how this might be addressed.

- Eliminate in-person contact. Perhaps the employees could work in different areas of the building. Different paths of travel in and around the workplace could be established. The employees could communicate by phone, e-mail, or teleconference. Alternatively, one employee could work at home some or all of the time, or schedules could be altered such that they do not work at the same time.
- Minimize exposure if in-person contact cannot be eliminated. One employee could be provided a private/enclosed workspace. Portable air purifiers could be used at or near workstations. The employer and employees can develop a plan such that the two are not using common areas such as the break room at the same time.
- Request that the employee who uses the service animal use dander care products on the animal regularly. Ask the employee who is allergic whether he or she would be willing to use an allergen/nuisance mask to reduce exposure.

It is also worth noting that there may be other ways to accommodate the employee's legitimate need. For example, might other work changes such as working in a private space or at different times help with anxiety reduction? The general rule - that so long as the accommodation is effective it need not be the one the employee prefers - applies in this setting as well.

By working together with the employee toward a reasonable solution, hopefully employers can avoid being "bitten" by this issue! (Sorry! Couldn't resist.)

WIMBERLY LAWSON OFFERS ASSISTANCE WITH COVID-19 ISSUES FOR EMPLOYERS

One of the most important aspects of our practice at Wimberly Lawson is the wide array of seminar presentations and update articles we do each year for client education and support. This year the emphasis has been on **CRITICAL ISSUES FOR EMPLOYERS REGARDING THE CURRENT COVID-19 SITUATION.**

Thanks to our alliances with local Chambers of Commerce and local and national Human Resources organizations we have been able to offer a number of live events, in addition to posting written ALERTS, in rapid response to the crisis. **To view our complimentary resources for employers, please see below.**

In addition, Wimberly Lawson offers tailor-made labor and employment law seminars for our clients at their workplace. The Firm has achieved the status of HRCI Approved Provider and also achieved the status of SHRM Preferred Provider (for more information about certification or recertification please visit their websites at www.hrci.org and www.shrmcertification.org). For details please contact attorney Howard Jackson at hjackson@wimberlylawson.com or 865.546.1000.

SEMINARS

- ***"The Covid-19 Ripple Effect: Economic & Medical Impact on the Payment of Temporary Benefits"*** / Monday, April 27th / Presented by the National Workers' Compensation Defense Network (Wimberly Lawson is the NWCDN's exclusive Tennessee member) / For a RECORDING of this webinar, please go to https://event.webinarjam.com/t/click/274mytm5ulksg0argvb7nzbp6f0
- ***"Coronavirus Update for HR Professionals Series"*** / Presented by Wimberly Lawson and Tennessee SHRM
  - » **Conference Call #3** / Wednesday, April 8th
  - » **Conference Call #2** / Thursday, March 26th
  - » **Conference Call #1** / Friday, March 20th
  - » For RECORDINGS, please go to www.tnshrm.org
- ***"Navigating Difficult HR Decisions in a Time of Uncertainty"*** / Thursday, March 26th / Presented by Wimberly Lawson and the Tennessee Chamber of Commerce and Industry / For a RECORDING of this call-in seminar, please go to https://www.youtube.com/watch?v=roEfmK1W7K4&t=1s

ALERTS – please click on the links below, or go to https://www.wimberlylawson.com/Alerts/

- CDC, EEOC Issue Updates for COVID-19 GUIDANCE - 04/10/2020
- DOL Issues Employee Rights Poster for Paid Leave – 03/26/2020
- EEOC Provides Update on ADA & COVID-19 – 03/23/2020
- New Forms of Federal Paid Leave Arising From the Coronavirus Pandemic – 03/19/2020
- Coronavirus: Critical Issues for Employers – 03/16/2020

If we can provide further legal assistance with your employment law questions, please contact your Wimberly Lawson attorney or send an email inquiry via our Firm's website CONTACT page at https://www.wimberlylawson.com/Contact.shtml

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NOTICE: EEOC DELAYS EEO DATA COLLECTIONS DUE TO COVID-19 CRISIS

In a press release dated May 7, 2020, the EEOC announced that it will delay the anticipated opening of the 2019 EEO-1 Component 1 data collection and the 2020 EEO-3 and EEO-5 data collections because of the Coronavirus (COVID-19) public health emergency. Subject to approval from the Office of Management and Budget, the EEOC expects that filers of such data - which include private sector employers, local referral unions, and public elementary and secondary school districts - will have at least until January 2021 (for EEO-1) and March 2021 (for EEO-3 and EEO-5). The EEOC will provide notice of precise dates as soon as they are available. For more information, please visit https://www.eeoc.gov/newsroom/eeoc-delays-eeo-data-collections-due-covid-19-public-health-emergency.

coronavirus, Smithfield Foods:

- requires thermal screening of all employees,
- does not penalize employees who miss work due to C-19 related symptoms,
- has eliminated co-pays for relevant testing and treatment,
- provides face masks to all employees, gloves and face shields to production-floor workers,
- administers hand sanitizer every 30 minutes to employees, and
- allows employees to fill their personal hand sanitizers using the company supply.

Smithfield also cleans and disinfects in accordance with CDC guidelines, and in order to facilitate social distancing in the workplace has erected plastic barriers along the production lines, and on the eating tables in the break rooms. The Company also temporarily increased employee pay by $5/hour and reduced overall production.

In granting Smithfield's Motion to Dismiss on May 5th, the Court did not decide whether Smithfield was in compliance with the CDC or OSHA guidance, but instead deferred to the jurisdiction of OSHA and the USDA, noting that OSHA's "special competence" includes "enforcing occupational safety and health standards." The Court based its dismissal on a number of factors, and recognized that "Smithfield has taken significant remedial steps…to protect its workers from COVID-19." It is notable that the Court dismissed the Complaint "without prejudice," explaining that if OSHA fails to act quickly, the plaintiffs may seek judicial action through the emergency relief process under OSHA's framework.

At the very least, employers should continue to stay informed on COVID-19 issues, and strive to adhere to any applicable industry-specific guidance. OSHA has recently issued specific guidance for the manufacturing industry workforce, construction workers, retail workers, package delivery workforce, meatpacking and processing facilities, and the restaurant, food and beverage businesses.

Employers should already have in place a COVID-19 Infectious Disease Preparedness and Response Plan and should update other existing policies to reflect these practices.

DID YOU KNOW? WIMBERLY LAWSON HAS LICENSED MEDIATORS

Wimberly Lawson Wright Daves & Jones PLLC has attorneys who are qualified Rule 31 Licensed Mediators in Tennessee. Mediation is a voluntary alternative to litigation, and can help in a wide variety of cases including employer/employee disputes. In mediation, both parties present their arguments to a mediator, who is not a judge but an impartial third party who manages the process and helps the parties talk to each other, explore options, and reach a mutually agreed-upon resolution. Our Rule 31 attorneys can assist you with the process and advise on a final written agreement. Advantages of mediation include more control over the process and outcome, prompt settlement, reduced expenses compared to trial, and privacy. For more information please visit the TN.gov website at https://www.tncourts.gov/programs/mediation/resources-public or contact our attorneys Mary Moffatt or Eric Harrison.

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