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CONSTANGY BROOKS, SMITH & PROPHETE LLP

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Protests amid a pandemic: Part Deux
You think you've got this? Think again.

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As we have reported, a state court judge in California recently issued a Temporary Restraining Order prohibiting the reopening of a business until the employer complied with nearly one dozen COVID-19 safety-related requirements. The allegations of the public nuisance lawsuit leading to that TRO were egregious and, if true, reflected a conscious disregard for the health and safety of employees. For example, the lawsuit alleged that the employer failed to inform employees that they had been exposed to COVID-19, and failed to implement social distancing or cleaning protocols.

But, that's not you. You've provided information to employees. You've implemented safety protocols. You're covered. Well, think again.

We also reported on a judge in Illinois, who ordered an employer to do more to protect its employees from contracting COVID-19. The judge specifically noted that the employer had "the right idea," and had implemented safety protocols designed to protect workers, like providing and requiring the use of protective gear and washing stations. But, according to the judge, more needed to be done because "the procedures [implemented by the employer]… are not working [and the employees'] right to work free from exposure to a highly contagious and deadly disease is being substantially and unreasonably interfered with." As a result, the judge ordered the employer to strictly enforce its mask policy and retrain employees on proper social distancing and cleaning requirements.

These two cases, half a country apart, highlight two critical lessons that every employer trying to navigate its way through this crisis needs to learn. First, trying to do the right thing matters. Second -- and this lesson cuts across everything we do in the world of employment litigation -- an employer is no better than its lowest level managers. How those front-line managers supervise employees, and implement company policies, governs the way that their employers will be viewed by both judge and jury. Implementing well-crafted, legally compliant policies and procedures is a required starting point. It reflects "the right idea" and may well provide protection from claims of willful and reckless disregard for the safety of employees.

But unless front-line managers implement and enforce those policies and procedures, exposure (to both the disease and large jury verdicts) still exists. Requiring the use of masks, and social distancing between employees, are best practices. But they are of little value unless enforced, and ensuring

such enforcement requires vigilance, regular follow-up, and regular training.

As we work our way through this national crisis, the federal government (and various state governments) may provide immunity to employers with respect to certain COVID-19-related legal claims. Don't hold your breath waiting for that to happen. And even if it does, any legislation will probably exclude claims based on conduct reflecting a willful, wanton, or reckless indifference to the safety of employees. In the past several months, multiple lawsuits have been filed against employers, all of which seek to skirt the workers' compensation system and win substantial damages from employers, based on such alleged conduct.

Doing the right thing, by implementing appropriate COVID-19 safety protocols, is a crucial first step. But you can't stop there. Front-line managers must be trained on those protocols. Diligent follow-up on that training is required. Enforcement of the protocols is crucial. Having a mask policy is meaningless unless front-line managers correct employee failures and, if necessary, discipline employees for failing to comply. So, you think you've got this? Think again.

Need help with reopening?
Check out our **Coronavirus Return to Work FAQs** for the latest guidance. And more general information is available on our **Coronavirus Resource Center** page.

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