

# Amazon Fends Off COVID-19 Claims

By Allen Smith, J.D.

November 6, 2020

**T**he Occupational Safety and Health Administration (OSHA), not the courts, should rule on whether Amazon's workplace policies at a Staten Island, N.Y., warehouse adequately protected the safety of workers during the pandemic, the U.S. District Court for the Eastern District of New York decided Nov. 1. Even if the court did not defer to OSHA, the claims would fail, the court added.

Workers at the warehouse and their family members sued Amazon earlier this year for public nuisance, breach of the duty to protect the health and safety of employees under New York Labor Law (NYLL) Section 200, and failure to timely pay employees for COVID-19 sick leave, which the plaintiffs claimed were earned wages under NYLL Section 191. One of the plaintiffs tested positive for COVID-19 in March 2020, and several members of her household also experienced symptoms, including her cousin, who died in April 2020.

Rob Duston, an attorney with Saul Ewing Arnstein & Lehr in Washington, D.C., said the workers' legal theories "were a bit of a stretch." For example, public nuisance "really isn't applicable to contagious disease," he said.

Kara Maciel, an attorney with Conn Maciel Carey in Washington, D.C., said the decision "should be welcome news for employers who are operating during the pandemic and struggling to navigate the complicated and often changing federal and state regulatory framework to keep their workers safe and healthy."

The case relieves employers from having to defend against litigation designed to negate the role of OSHA, said Manesh Rath, an attorney with Keller and Heckman in Washington, D.C.

But Michael Wietrzychowski, an attorney with Schnader in Cherry Hill, N.J., and Philadelphia, said, "The court left open the possibility that similar challenges could be made under other state laws that differ from New York state law." In addition, the decision may be reconsidered by the district court or appealed, he noted.

## Background

So far in New York state, COVID-19 has infected more than 512,000 people and killed over 33,000 people, the court noted.

Amazon's JFK8 fulfillment center runs 24 hours a day, seven days a week, and is larger than 14 football fields. The facility employs thousands of workers.

The plaintiffs claimed that Amazon's operations at the warehouse did not comply with applicable state workplace guidance. They first argued that Amazon's productivity requirements prevented employees from engaging in basic hygiene, sanitization and social distancing.

Amazon tracks employees in real time to determine whether they perform a task in each minute and aggregates a total time off task ("TOT") every day. Employees are warned and penalized, and may be fired, if their TOT exceeds certain amounts, the plaintiffs asserted. TOT is automatically counted even during paid rest breaks, includes bathroom breaks and requires supervisors to recode certain TOT activities to prevent them from being counted against the employee.

The plaintiffs claimed that employees' fear of accumulating TOT causes them to skip hand-washing and sanitizing their workstations and to rush through the facility in a way that prevents social distancing. Amazon officially suspended rate requirements in March 2020, but the plaintiffs claimed that the change was not effectively communicated to employees until July. There allegedly is still confusion over the policy, and the productivity requirements could be reinstated at any time.

Amazon conducts contact tracing for COVID-19 infections among its employees, but the plaintiffs claimed that it failed to do so adequately.

In addition, they said that the company failed to clearly communicate to employees the availability of leave related to COVID-19 and did not promptly pay workers the required leave.

The plaintiffs also maintained that Amazon's leave policies were inadequate to encourage workers to take time away from work if they were experiencing symptoms of COVID-19.

### Relief Sought

The plaintiffs sought an order requiring Amazon to:

- Communicate clearly that if workers are experiencing COVID-19 symptoms, they should not come to work and will be paid on their next paycheck for taking quarantine leave.
- Continue suspending rate requirements and refrain from counting hand-washing and bathroom breaks against TOT requirements.
- Provide workers with adequate time and tools to clean their workstations.
- Comply with New York's COVID-19 paid-leave law.
- Improve its contact-tracing efforts.

Two plaintiffs also sought damages for the company's alleged failure to timely pay COVID-19 sick leave pay.

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### Court's Decision

"No doubt, shutting down JFK8 completely during the pandemic while continuing to provide employees with pay and benefits would be the best protection against contagion at the workplace," the court said. "But someone has to strike a balance between maintaining some level of operations in conjunction with some level of protective measures. The question is whether it should be OSHA or the courts."

Courts are not experts in public health or workplace safety matters and lack the expertise OSHA has to oversee compliance with evolving industry guidance, the court noted. "Plaintiffs' claims and proposed injunctive relief go to the heart of OSHA's expertise and discretion," it stated.

Court decisions could lead to inconsistent rulings, while OSHA determinations would be more flexible and ensure uniformity, the court added.

The court also ruled that New York's workers' compensation law pre-empts plaintiffs' NYLL Section 200 claim for past harm.

In addition, COVID-19 leave did not constitute wages for purposes of Section 191, the court decided.

### Reactions to Ruling

Maria Boschetti, an Amazon spokesperson, said, "Nothing is more important than the health and safety of our employees, which is why at the onset of the pandemic we moved quickly to make more than 150 COVID-19-related process changes. And, we continue to innovate, learn and improve the measures we have in place to protect our teams."

Groups representing the workers, including Towards Justice, Public Justice and Make the Road New York, called the decision "devastating" for Amazon employees and said they're considering whether to appeal, according to CNBC (<https://www.cnn.com/2020/11/02/judge-dismisses-amazon-worker-lawsuit-over-coronavirus-safety.html>).

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