

## [Antitrust Law Daily Wrap Up, FRANCHISING & DISTRIBUTION—III. Cir.: McDonald's workers get preliminary injunction to enforce social distancing, face-covering policies, \(Jul. 7, 2020\)](#)

Antitrust Law Daily Wrap Up

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By [Joy P. Waltemath, J.D.](#)

The restaurants had a social distancing policy that suggested employees could safely be unmasked within six feet of one another so long as their encounters lasted less than 10 minutes.

Although three franchisee-owned McDonald's restaurant locations had made significant and continuing progress in addressing a claimed public nuisance in their allegedly inadequate COVID-19 policies and protections for employees and the public, an Illinois state trial court found that in two areas—how social distancing was defined and how it was enforced—the restaurants' approach was insufficient. The stores' official policy was that employees and managers could take off their masks and stand within six feet of each other as long as they did not do so in excess of 10 minutes, which conflicted with the Illinois governor's executive order on social distancing and CDC guidance. Some stores also did not successfully enforce their face-coverings policy, which resulted in employees wearing their masks below their nose and mouth or not at all, due to the "10-minute" rule. Consequently, the court granted in part a preliminary injunction requiring the restaurant owners to train employees on social distancing consistently with the executive order and enforce their mask-wearing policies when employees are not six feet apart ([Massey v. McDonald's Corp.](#), June 24, 2020, Reilly, E.).

Five employees and four family members or cohabitants sued several McDonald's Chicago-area franchises (and McDonald's and McDonald's USA) for injunctive relief based on public nuisance and negligence. They wanted the court to require the restaurants to:

- (1) provide workers with an adequate supply of face coverings and gloves;
- (2) supply hand sanitizer for workers and customers entering the restaurant;
- (3) enforce policies requiring employees to wear face coverings during their shifts and requiring customers entering a store to wear face coverings;
- (4) monitor infections among workers and, when an employee experiences COVID-19 symptoms or is confirmed to be infected with COVID-19, inform fellow employees immediately of their possible exposure; and
- (5) provide employees with accurate information about COVID-19, how it spreads, and risk of exposure, and train employees on proper handwashing practice and other preventative measures established by the Center for Disease Control (CDC).

In its factual review, the court found COVID-19 to be a "deadly and highly infectious disease;" citing the CDC, it noted that 14 percent of infected people suffered severe health effects and 5 percent suffered critical effects, including respiratory failure, shock, and multi-organ dysfunction. More than 2 percent of infected people died. Recognizing this severe threat, federal, state, and local governments have issued orders and guidance on social distancing, face coverings, and other infection control procedures. In Illinois, social distancing and mask wearing are not optional but are required.

**Public nuisance.** The elements of a public nuisance are: (1) the existence of a public right; (2) a substantial and unreasonable interference with that right; (3) proximate cause; and, (4) injury. Here, the workers and those who lived with them sought to abate a "prospective nuisance"—before an outbreak occurred at one of these restaurants. "A court does not have to wait for [harm] to happen before it enjoins such a result," the court pointed out.

**Infection and injury "highly probable."** The possibility of an infection at the stores and injury that would follow are "highly probable," the court concluded, given the positive COVID tests (at least five) at two of the McDonald's stores at issue and that employees have shown all the symptoms of COVID-19 but had a negative test result at the other store. The workers identified five alleged interferences with the public right: (1) failure to provide workers with an adequate supply of face coverings and gloves; (2) lack of hand sanitizer for workers and customers; (3) lack of enforcing policies requiring employees to wear face coverings at work and requiring customers to wear face coverings; (4) failure to monitor infections among workers and, if an employee experiences COVID-19 symptoms or tests positive, inform fellow employees immediately of their possible exposure; and (5) failure to provide employees with accurate COVID-19 information and risk of exposure, and failure to train employees on preventative measures.

The court then separately addressed each store involved as to the alleged interferences listed above: masks and gloves; hand sanitizer; policy enforcement; infection monitoring; and communication of risks and training on preventative measures. While there were slight individual differences between stores, overall the court found that McDonald's took many available measures to mitigate COVID-19, including putting up plexiglass in the drive-thru and at the counter, providing personal protective equipment (PPE), taking employee temperatures, doing wellness checks, and putting up signs. But the evidence showed "two serious failures," concluded the court.

**Social distancing and mask wearing.** The first was a problem with social distancing training, which included an addendum that employees could safely stand within six feet of one another, without a mask, so long as they did not do so for more than 10 minutes; the second was the failure to enforce the mask-wearing policy properly. This combination resulted in the failure of employees to either remain six feet apart or wear a mask, which increased the health risk for the employees, their families, and the public as a whole and conflicted with the governor's executive order on social distancing—"potentially undoing any good it has done as we fight this incredibly contagious disease."

**Supply issues addressed.** However, at each of the three stores, the court found masks, gloves, and hand sanitizer to be in good supply, and other than social distancing, the stores had provided accurate information about COVID-19 and were working to train employees on preventative measures. There may have been prior issues as to all these elements, but McDonald's had cured the defects and an injunction was not required, the court determined.

**Improper mask-wearing.** Unfortunately, employees were observed frequently wearing their masks below their nose and chin—although they were "trying their best," as the employer described it. In the court's view, "trying your best" in a pandemic can still cause substantial interference with the public health in a pandemic, especially when employees are not expected to remain six feet apart for periods of less than 10 minutes. The "inability to ensure that employees are appropriately covering their face when not six feet apart is unreasonable given the magnitude of the potential consequences."

**Likelihood of success.** Acknowledging that the stores have made efforts to enforce their policy, the court found "the reality is that the current procedures Defendants are using are not working," resulting in potential "exposure to a highly contagious and deadly disease." Stressing expert testimony that staying six feet away significantly reduces the viral exposure to other workers and, when combined with a mask, reduces the transmission of the virus among the workforce, and that short repeated exposures can result in transmission, the court found the stores' 10-minute social distancing policy and inadequate mask enforcement "contradicts the Governor's Executive Order and Illinois public safety guidelines on social distancing, which require people to maintain a 6 foot distance from each other or wear a mask." As a result, the plaintiffs had shown a likelihood of success on the merits of their public nuisance claim.

**Negligence.** That was not the case, however, with their negligence claim, since there was no duty of care owed by McDonald's Corporation or McDonald's USA to employees of their franchisees, although those franchisees owed a duty of care to their employees. But as opposed to public nuisance law, which allows prospective injunctive relief, any injury here was speculative and would not support injunctive relief based on negligence principles, which required imminent injury.

**Clear right to relief.** "Plaintiffs and the public have a right not to be unnecessarily endangered by COVID-19 and this is a clear right in need of protection," concluded the court, disagreeing with the decision in [Rural Community Workers Alliance v. Smithfield Foods](#), which is not binding authority on the court. Instead, it held that "the possibility of being infected by COVID-19 is an irreparable harm," and one that a monetary award would not remedy. Here the plaintiffs were asking the restaurants to enforce or edit their own policies to bring them into alignment with the Illinois governor's orders, as well as the CDC. "The hardship McDonald's would suffer by strictly enforcing its mask policy and retraining employees on proper social distancing procedures is slight," said the court, concluding, "There is a long road to recovery for all of us. The balance of equities therefore leans in favor of the injunction."

The case is [No. 20 CH 4247](#).

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Companies: McDonald's Corp.; McDonald's USA, LLC; McDonald's Restaurants of Illinois, Inc.; Lexi Management LLC; DAK4, LLC

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