

## Striking the Balance: Making the Tough Judicial Call

By: James P. Anelli, Joshua A. Mooney and Andrew F. Susko

*Litigation Alert*

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In a watershed Opinion, the United States District Court for the Western District of Missouri refused to provide requested judicial intervention and relief regarding meat-processing plant safety issues raised by workers and advocacy groups, ceding instead primary jurisdiction to allow the Occupational Safety and Health Administration (OSHA) to first determine whether the Centers for Disease Control (CDC) guidelines regarding safe COVID-19 workplace practices are being followed. *Rural Community Workers Alliance and Jane Doe v. Smithfield Foods, Inc.* (U.S. Dist. Ct., W.D. Missouri) (Opinion by, Kays, J., May 5, 2020). In so holding, the court expressed its belief that OSHA's expertise and experience in workplace regulation placed the agency in a "better position to" render workplace safety in connection with COVID-19. In deferring to OSHA, the court also favored the articulation of a more uniform, national standard, in lieu of potentially inconsistent judicial decisions which could create an unworkable patchwork standard.

The *Smithfield* opinion, by District Court Judge Greg Kays, on May 5, 2020, refused the plaintiffs' request for federal court judicial intervention, preliminary injunction and temporary restraining order, allowing instead OSHA the initial opportunity to address and potentially resolve the issues presented. In a detailed and well-reasoned Opinion, the Missouri District Court provides guidance to processing suppliers in the food chain industry regarding how that chain can operate in the changing landscape of the COVID-19 national emergency. Identifying the coronavirus pandemic, the national emergency declared by President Trump on March 13<sup>th</sup>, the Missouri stay-at-home order following the Governor's declaration of a state of emergency and CDC published guidance for business and employers, the court deferred to an existing ongoing OSHA investigation and invoked the rarely used doctrine of "primary jurisdiction" to dismiss the civil action, without prejudice.

In *Smithfield*, the court was asked to review the practices of the Smithfield meat-processing plant in the context of COVID-19, including: 1) the use of personal protective equipment (PPE); 2) the use of engineering controls to protect against the spread of the coronavirus on the production line; 3) direct workplace line and plant policies and procedures changed or implemented in response to the pandemic; and, 4) the use of available contact-tracing methods. The civil action, filed after the initiation of an OSHA investigation of the Smithfield plant, was commenced by an anonymous worker, Jane Doe, and an advocacy group, Rural Community Workers Alliance. The plaintiffs contended that the meat plant was "not taking adequate steps to prevent transmission of the virus at its plant" and was thereby endangering the safety of the Smithfield workers, as well as members of the surrounding community.

In addition to alleging that several Smithfield meat-processing plants in the United States became major COVID-19 "hotspots", the Complaint also claimed that Smithfield had failed to comply with CDC guidelines and failed to implement required precautions to keep its workers and area community residents safe from the coronavirus. Specifically, the Complaint sought to rectify claimed unsafe plant practices, including: 1) inadequate distancing between workers on the production line floor; 2) prohibitions on workers taking breaks to wash their hands or face; 3) preventing workers from covering their face if needed to sneeze or cough; 4) implementing a sick leave policy penalizing workers from missing work when they exhibited symptoms of COVID-19; and, 5) failing to establish plans for worker testing and contact tracing. The civil action filed in United States District Court sought only declaratory judgment relief, and did not seek damages, that the plant's practices constituted a public nuisance and that Smithfield had breached its duty to provide a safe workplace. The suit sought a temporary restraining order and preliminary injunction requiring Smithfield to do the following: 1) provide masks; 2) ensure social distancing; 3) give employees an opportunity to wash their hands while on the production line; 4) provide tissues; 5) change leave policies for workers with symptoms of the virus; 6) give workers access to COVID-19 testing; and, 7) develop a contact-tracing policy.

In considering the relief sought, the *Smithfield* court was presented with affidavits from plaintiff Jane Doe, regarding the working conditions she was experiencing on the cutting floor, and an expert declaration from an occupational medicine specialist serving in the California Department of Public Health. At a video conferencing hearing and argument on the preliminary injunction, the court reviewed a CDC and OSHA jointly-issued "Meat and Poultry Processing Workers and Employers – Interim Guidance" (the Joint Guidance), which provided supplemental guidance concerning safety in meat-processing plants specific to the COVID-19 pandemic. The Joint Guidance identified the following steps to reduce transmission of COVID-19 among employees: where "feasible" engineering controls such as (1) staggering shifts and breaks; (2) requiring workers to stay six feet apart and/or erecting physical barriers between workers; (3) placing hand washing or hand sanitizing stations and encouraging hand hygiene; (4) providing workers additional "short breaks to wash hands"; (5) providing tissues; (6) allowing workers to take breaks in alternative areas to ensure social distancing; (7) providing PPE for use during the shift; and, (8) increasing the frequency of sanitizing in work and common places. In addition, the Joint Guidance also recommends that employers should educate employees on measures that can be taken to decrease the risk of spreading the virus, including measures to promote social distancing and visual cues on floors as reminders for social distancing. The Guidance encourages employers to screen workers by implementing temperature checks before entering the workplace and sending home any workers who appear to have symptoms (cough, fever or shortness of breath) and to monitor contacts so that they can alert anyone who may have been exposed to the virus. In addition, the Joint Guidance recommends employers review leave and incentive policies so that workers are not penalized for taking sick leave if they contract COVID-19.

In granting the Motion to Dismiss by Defendant Smithfield, the court gave weight to Smithfield's plant manager's supplemental declaration on the plant's response to the Joint Guidance. The court considered an additional declaration from a professor of environmental health at The George Washington University on behalf of the plaintiffs, but gave limited weight to the several declarations on behalf of the plaintiffs as either lacking specificity or personal knowledge of the conditions at the Smithfield plant, especially in light of the Joint Guidance and steps taken to bring the plant into compliance with the same. The court found the declarations on behalf of the Smithfield representatives to be credible and that recent plant changes had been undertaken to conform to the Joint Guidance.

In its findings of fact, the *Smithfield* court noted the following practices to be in compliance with the Joint Guidance: (1) all employees undergo thermal screening before entering the plant; (2) if employees exhibit "one primary symptom or two secondary symptoms" of COVID-19, instructions for next steps including direction for quarantine and guidance from personal physicians is required; (3) such employees are sent home for 14 days of paid leave, or until a negative COVID-19 test result had been received; (4) employees with underlying health issues or concerns (verified by a physician) placing them at a higher risk for COVID-19, are also given 14 days of paid leave and then moved to short term disability leave; and, (5) while quarantined, Smithfield employees are participating in contact-tracing. The court also noted that as of April 29, none of the thirteen (13) plant employees receiving testing for COVID-19, had tested positive.

In addition to these measures, Smithfield assigned both a nurse and health safety clerk to perform checks throughout the plant, communicated to its employees the policies and procedures being implemented, provided ear-looped face masks upon entry to the plant each day, and if the mask breaks or becomes soiled new ones are provided and must be worn at all times other than at meals, or at certain plant locations where employees are spaced six feet apart. These masks "prevent threat of germs if an employee sneezes or coughs while on the line." Additionally, employees were required to wear nitrile gloves and a plastic face shield while on the production floor.

Rejecting the plaintiffs' claim that failing to allow Smithfield's production line employees to wash their hands "without penalty" was unsafe, the court noted that due to the nature of the meat-processing business, employees were required to wear gloves on the production line. When workers leave the line for breaks, they then remove their gloves and sanitize their hands before entering common areas. Similarly, the employees are required to wash their hands and then put their gloves on before returning to the production line.

The court further noted the availability of hand sanitizer, the Smithfield practices in that regard, social-distancing requirements during breaks and at staggered workday start times, and concluded that the practices appeared reasonable under the circumstances.

Applying primary jurisdiction that allows a court to “coordinate judicial and administrative decision-making”, quoting *Access Telecomms. v. Sw. Bell Tel. Co.*, 137 F.3d 605, 608 (8<sup>th</sup> Cir. 1998), the *Smithfield* court stated it is empowered to refer a matter to an administrative agency with appropriate jurisdiction in the first instance even though “the matter is initially cognizable by the district court”. *Id.* After noting that the doctrine of primary jurisdiction is to be invoked only sparingly, the court concluded it was empowered to refer an issue or claim to the appropriate administrative agency and either dismiss or stay the action currently pending before the court. After highlighting the two purposes of applying the doctrine of primary jurisdiction are to: 1) obtain the benefit of the agency’s experience and expertise and 2) promote uniformity and consistency within a particular field of regulation, the court concluded that both of these criteria were met.

At its core, the *Smithfield* court believed that OSHA, with expertise and experience in workplace regulation, was in a “better position to make this determination than the court is,” regarding whether the Joint Guidance is being complied with and whether the Smithfield workplace is safe in the context of the COVID-19 emergency. In sum, the court held “the issue of Smithfield’s compliance with OSHA’s guidelines and regulations falls squarely within OSHA/USDA’s jurisdiction.” Rejecting the plaintiffs’ position that there was irreparable injury and noting the court was not unsympathetic to the threat COVID-19 presented to plant workers, emphasizing that “this is not the same as analyzing whether employees risk exposure if they continue to work, and, unfortunately, **no one can guaranty health for essential workers – or even the general public – in the middle of this global pandemic.**” (Emphasis added).

The *Smithfield* decision is one of judicial restraint and deference in favor of a balanced and uniform, national response to workplace safety in the context of food supply chain and economic survival, all to be administered outside of the court system in the first instance. Not discussed, but of related interest, is whether compliance with the Joint Guidance ultimately provides protection from and even immunity from suit. It’s an approach seen in other contexts. For instance, in data privacy and security, the Ohio Data Protection Act provides a legal safe harbor from liability for the failure to maintain an adequate data security program where an organization maintains and complies with a written cybersecurity program that reasonably conforms to an industry recognized cybersecurity framework standard. See O.R.C. Ann. § 13540.2(A), (D). Such an approach incentivizes organizations to improve safety in lieu of relying on punitive measures for non-compliance.

In addition, for COVID-19, some states are providing immunity from suit on a host of levels, including providing immunity from civil liability to both healthcare workers and healthcare institutions. As other institutions and entities begin to open to the public, including restaurants, universities, and entertainment venues, questions for such organizations remain as to whether compliance with governmental and regulatory guidance regarding COVID-19 safety will entitle such companies to protection from civil liability. Whether state legislatures will enact legislation creating such immunity, even if only for a period of time in the wake of developing national and/or state guidelines, also represents a critical issue toward re-opening. As the pandemic continues to unfold, the challenges to maintain essential food and supply chain workplace operations, and the further re-opening of additional economic activities, will require measured, careful, and judicious forethought.

If you have any questions please contact James P. Anelli (anellij@whiteandwilliams.com; 201.368.7224), Joshua A. Mooney (mooneyj@whiteandwilliams.com; 215.864.6345) or Andrew F. Susko (suskoa@whiteandwilliams.com; 215.864.6228).

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. [Read all of the updates here.](#)

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