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Coronavirus lawsuits on the horizon: Termination and discrimination

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As the COVID-19 pandemic spread throughout the country, many employers responded to slowed demand and economic uncertainty by furloughing and laying off some or all of their workforces. Employers also turned to increased remote work.

Recently, as employers have started to return employees to their worksites, many have implemented various safety and hygiene requirements and are navigating rapidly evolving government guidance and requirements from a variety of sources, including the Occupational Safety and Health Administration (OSHA),[1] the Centers for Disease Control and Prevention (CDC),[2] and state and local laws, ordinances, and executive orders.

In sum, employers have had, and must continue, to adapt swiftly and nimbly to this unprecedented situation.

The plaintiffs contend that the fact their employer had furloughed employees several weeks earlier suggested it knew enough about the circumstances to predict a mass layoff and to provide appropriate notice.

With these changing employment practices and evolving requirements come the threat of lawsuits in a host of areas.

Discussed here are some of the prevailing trends in recent COVID-19-related labor and employment litigation and proactive steps employers can take to help avoid a lawsuit.

WARN AND MINI-WARN LITIGATION

The federal WARN Act requires, in certain circumstances, that employers with 100 or more employees provide at least 60 days' notice before conducting a mass layoff or closing a plant.

Multiple states have enacted similar "mini-WARN" acts, which typically have lower application thresholds than the federal act. Less-than-required notice may lead to claims for backpay and penalties. Thus, employers that conducted layoffs without complying with these statutes may face legal risk.

Several WARN class actions already have been filed that challenge the propriety of COVID-19-related layoffs. In one such case, the plaintiffs allege they were given no notice when defendant laid off hundreds of employees in late March.

While WARN contains exceptions to notice requirements, including for so-called "unforeseeable business circumstances,"[3] the complaint alleges that the company could and should have evaluated the effect of COVID-19 and complied with WARN.

In another case, the plaintiffs allege they were given no notice when defendant laid off several hundred employees in late April.

The plaintiffs contend that the fact their employer had furloughed employees several weeks earlier suggested it knew enough about the circumstances to predict a mass layoff and to provide appropriate notice.

In both of these cases, plaintiffs point to the Paycheck Protection Program, stating that "the fact that Congress recently made available to Defendant ... millions of dollars in forgivable loans ... only further underscores the severity of the WARN Act violations[.]"

Employer considerations

Employers grappling with COVID-19 that choose to conduct layoffs should consider, among other things, the likely duration of the layoff, as whether the layoff is temporary or permanent could affect whether WARN notice is required and implicate other laws, such as requirements to provide final pay.

Employers also should keep track of how many employees are laid off over time: even if the WARN or mini-WARN thresholds are not met through an initial layoff, further layoffs thereafter could trigger WARN or mini-WARN requirements.

WRONGFUL TERMINATION/RETALIATORY DISCHARGE

Employment terminations during the pandemic also have resulted in a surge in retaliatory discharge lawsuits. These suits are typically premised on termination for "whistle-blowing" related to COVID-19 preparedness. Such lawsuits likely will continue as the pandemic drags on.

For example, one employee in Dallas, Texas alleges that she was terminated after asking to work from home — allegedly in compliance with local stay-at-home orders.

The plaintiff contends that her employer violated "state policy" by refusing to let her telework and pressuring her to report to work in defiance of local orders, then terminating her employment when she would not do so.

Other wrongful termination lawsuits include:

- a former employee in Kentucky who claims he was wrongfully terminated for complaining about a lack of gloves;
- an Illinois nurse alleging she was fired for warning coworkers that masks were inadequate to protect them from COVID-19;
- a New Jersey plaintiff who claims he was terminated after expressing concern when co-workers with COVID-19 symptoms continued reporting to work;
- and a former employee alleging he was fired after complaining about lack of safety measures for employees, which he raised in a Facebook group.

Employer considerations

To help stave off potential wrongful termination and retaliatory discharge claims, employers should carefully evaluate any workplace complaint: what may seem trivial on first blush could appear more significant when recounted through a lawsuit.

Employers should maintain records of any complaint and resulting investigation. If terminating an individual, employers should document the reasons for the termination.

Employers should be ready to show how, if tested in a lawsuit, any termination decision was entirely independent of a workplace complaint.

DISCRIMINATION CLAIMS

Terminated employees also may bring claims under federal and state anti-discrimination laws, challenging the purported reason *they* were selected for an adverse employment action.

For example, an employee in New York filed suit challenging his termination, alleging he was among the first laid off as his employer made cuts during the pandemic and was selected because of his age.

Further, discrimination claims may surface as companies decide whom to return to work and when to do so.

The Equal Employment Opportunity Commission (EEOC) has taken the position that prohibiting an older employee from returning to work solely based on the individual's age, even if based on what the EEOC has called "benevolent reasons," could lead to an Age Discrimination in Employment Act claim.[4]

Employer considerations

Employers should be careful to use objective means when choosing whom to layoff, retain records of the criteria used, and, where necessary, evaluate whether any "disparate impact" might result from apparently neutral criteria.

Employers also should consider business needs, compliance with ongoing stay-at-home restrictions, and health precautions in order to choose which employees will return first.

Where appropriate, employers should be prepared to engage in the interactive process under the Americans with Disabilities Act to address those concerns of employees fearful of returning to work.

Employers also should consider business needs, compliance with ongoing stay-at-home restrictions, and health precautions in order to choose which employees will return first.

Additionally, as noted above, the EEOC has made clear that employers should avoid blanket policies requiring "high risk" employees (under CDC guidance), such as older or pregnant employees, to continue to telework while others return on-site, lest employers run afoul of age and pregnancy discrimination laws.

WAGE AND HOUR LITIGATION

Employers are already facing lawsuits for the basic wage-and-hour violations associated with business closures; for example, some plaintiffs are alleging their employers shut down operations and failed to issue paychecks for time already worked.

There are at least four other major categories of wage and hour lawsuits expected as a direct result of COVID-19.

Temporary layoffs

Many employers have turned to rolling, temporary layoffs (or "furloughs") as a quick way to reduce payroll costs. But liability for unpaid wages could result when employees perform work during their layoff weeks.

As a general proposition, if an employer knew or should have known an employee is performing work, the employee is entitled to compensation.

And exempt employees who are paid on a salaried basis under the Fair Labor Standards Act (FLSA) need to be paid their entire salary during a week in which they perform *any* work — likely even if that "work" consists of just checking a few emails.

On the horizon, then, are claims that nonexempt employees are entitled to compensation for time worked at home, and that salaried employees are entitled to their full weeks' pay if they, for example, respond to a supervisor's email or talk on the phone with a customer.

Reducing hours and/or pay

Many employers also are reducing their workers' schedules or pay rates. Although this practice is generally permissible, potential claims that may result include the following:

(1) nonexempt employees may claim they are working off-the-clock to perform the same amount of work in a reduced number of paid hours;

(2) employees exempt from overtime pay may claim their employer forfeited the exemption by directly connecting their weekly salary to the quantity of work performed, thereby defeating the "salary basis" test for the exemption;

(3) employers violated state and local laws by failing to provide adequate notice of salary or hourly rate changes; and

(4) as a result of reduced hours, otherwise permissible paycheck deductions and unreimbursed business expenses have brought workers' average hourly pay rate to below minimum wage.

Working remotely

The shift of the workplace from office to home also raises potential wage and hour issues.

These include off-the-clock claims resulting from longer computer log-in and log-out times on home computers; missed meal and rest breaks in violation of state law; and unreimbursed business expenses, such as for a portion of home internet or personal cell phone bills, or for personal printers or laptops.

Workplace hygiene

As employees return to work, lawsuits may result from employers requiring that employees perform additional screening or sanitizing tasks before or after their shifts.

These may include submitting to temperature checks, answering screening questions, donning and doffing additional personal protective equipment, or sanitizing items touched or worn during a shift. At least one lawsuit in Illinois has been filed related to post-shift sanitizing routines.

Moreover, the FLSA's "continuous workday" rule, which provides that an employee's workday starts at the commencement of his or her principal activities, may lead employees to seek compensation for the so-called waiting time between pre-shift sanitizing procedures and the start of their shifts.

Employer considerations

In light of these risks, employers should ensure they have robust timekeeping policies that include, at a minimum, the expectation that employees report all time worked, a statement that the employer will compensate for all hours reported, and a process for reporting any unauthorized or unanticipated time worked.

And employers should consider evaluating which, if any, workplace hygiene and safety practices could be considered compensable time — and pay employees accordingly.

Employers can also proactively reduce or avoid liability by requiring employees to certify their time worked each week and ensuring employees have a means of submitting business expenses.

And employers should consider evaluating which, if any, workplace hygiene and safety practices could be considered compensable time — and pay employees accordingly.

WORKPLACE SAFETY LITIGATION

Multiple lawsuits already have been filed — some of which have been spearheaded by employee unions or workers' rights organizations — raising claims involving workplace safety related to COVID-19.

The industries most affected by these COVID-19 workplace safety lawsuits include health care, food processing and manufacturing, and transportation, as well as in connection with government employees seeking hazard pay.

Unsafe work environment and employer negligence

Some recent lawsuits have alleged that OSHA standards and recommendations are not being followed by employers.

For example, one plaintiff claims he was terminated because he expressed concerns internally about inadequate personal protective equipment provided by his employer and filed an OSHA complaint expressing these concerns.

In another case, a union claims that an employer failed to provide employees with respirator masks — despite having adequate supplies — and failed to provide cleaning supplies and sanitizer to transportation workers.

In yet another, a cruise line crewmember who contracted COVID-19 while working on a cruise ship alleges that the company failed to take necessary measures to protect thousands of employees after hundreds of crewmembers contracted Coronavirus.

Wrongful death

Several employers have been sued by the family members of former employees alleging wrongful death. These lawsuits generally plead that the employer failed to implement certain safeguards and protocols, which led to the transmission of COVID-19 in the workplace and resulted in the decedent's passing.

Employer considerations

Employers should be proactive in addressing workplace safety, including providing necessary personal protective equipment, enforcing social distancing requirements and minimizing person-to-person contact as much as possible, and regularly cleaning and sanitizing all common areas of the workplace, including kitchens, lobbies, restrooms, and break areas.

Employers also should consider an appropriate screening policy, which could include temperature checks and other measures. In connection with any such steps, employers should take necessary precautions to maintain individuals' privacy and confidentiality.

Finally, employers should stay apprised of changing guidelines and recommendations, including from the CDC, OSHA, and state and local executive orders.

Employers should make sure that they are following the most-recent versions of these regulations and guidance and are communicating any applicable changes to their workforce.

Notes

[1] Occupational Safety and Health Administration, Guidance on Preparing Workplaces for COVID-19, https://bit.ly/2WqNJZy (last visited June 15, 2020).

[2] Centers for Disease Control and Prevention, Guidance for Businesses & Employers, https://bit.ly/2ChTfqy (last visited June 15, 2020).

[3] 20 C.F.R. § 639.9(b)

[4] Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, https://bit.ly/391gUaC (last visited June 15, 2020).

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