

Post COVID-19 Risk Assessment and Mitigation Prospectus

Unprecedented times have called for unprecedented measures by employers. Our clients have taken swift, decisive and selfless actions to stabilize their businesses, protect their employees and customers, and prepare for what we anticipate will be a comeback of epic proportions when America returns to in-person work.

Meanwhile, employee-side attorneys, unions and administrative agencies have likewise been focusing on *their* business and gearing up for what they expect will be a bonanza when operations return to a sense of normalcy. The decisions made over the last two months by employers are being scrutinized, and, fair or not, will be the subject of intense debate, litigation and investigations.

At Constangy, all we do is workplace law. We created this short Prospectus as a resource for our clients to conduct a self-assessment of some of the activity we anticipate/issues we believe will be vetted, and to offer a helping hand. Some mitigation tactics are common sense, like documenting decisions, ensuring consistency, and training personnel; others are more nuanced or company-specific, however, and we've learned that there's rarely a one-size-fits-all solution for our clients.

Whether assisting your company in assessing risk, or helping to mitigate evident liability arising out of actions which have already been taken, we will continue to be your business partner during this time, and we're here for you 24/7. Please reach out to your Constangy contact, or any of our attorneys, for assistance.

Benefits

- Whether employers followed benefit plan terms in either continuing or ending coverage due to reduction in hours or furlough and whether plan terms match administrative practice and legal requirements
- Paid time off and sick leave issues

Contracts

- Whether employers breached contracts, or properly sought amendments, in connection with schedule reductions, pay/bonus cuts, furloughs, layoffs and other cost-cutting measures
- Delayed start dates for hires/rescinding offers
- Increased employee mobility, triggering non-compete and trade secret theft litigation
- The applicability of common law contract defenses and enforceability of force majeure clauses

COVID-19 Legislation

- Compliance with the federal Families First Coronavirus Response Act, state/local COVID-19 sick leave legislation, and related retaliation claims by those who sought/utilized such benefits
- Compliance with stay-at-home/shelter-in-place orders, and decisions to self-designate as an essential employer (or require essential employees to report physically to work)

Discrimination/Retaliation

- National origin/race discrimination claims by Asian-Americans (particularly Chinese-Americans) given the origins of COVID-19
- Disability and FMLA discrimination claims associated with COVID-19 diagnoses
- Individual and class action discrimination/retaliation claims brought by those included in layoffs, furloughs, schedule reductions and pay cuts, and by those not rehired after the crisis

Employee Expenses

- Work from home reimbursements (e.g., cell phone, WiFi, office supplies, etc.)

Federal Contractors

- Recordkeeping and affirmative action compliance with respect to cost-cutting measures

Immigration

- Whether employers were compliant with Form I-9/E-Verify temporary procedures to avoid DOJ investigations and DHS audits
- DOL/USCIS recordkeeping practices of employer's H-1B programs during COVID-19 related temporary measures

OSHA/Workplace Safety

- Whether an employer is complying with its responsibility to provide a safe and healthy workplace, including negligence cases filed by individuals blaming employers for claimed workplace infections
- Avoiding whistleblower claims of retaliation for reporting COVID-19-related concerns

Union Relations

- Compliance with collective bargaining agreements in connection with COVID-19 driven decisions
- Union organizing at companies which have utilized layoffs, furloughs or other cost-cutting measures

Wage and Hour Issues

- Compliance with the salary basis test in connection with furloughs, schedule reductions and pay cuts
- Claims arising out of time spent associated with safety procedures (temperature or symptom checks, donning and doffing additional PPE, etc.)

WARN Act/Mini-WARN Act Compliance

- Triggering of WARN Act/Mini-WARN Acts in conjunction with layoffs, furloughs and office closures

Workers' Compensation

- Workers' compensation claims by infected employees
- Retaliation claims by individuals chosen for layoffs, furloughs, pay cuts and other measures who have utilized workers' compensation benefits