COVID-19's Litigation Aftermath: Preparing for the Coming Wave of Legal Claims

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Since March, over 1,000 lawsuits have been filed alleging labor and employment law violations related to the coronavirus, at least 104 of which are class actions. The healthcare industry has been hit hardest, followed by manufacturing, hospitality, and retail. The types of complaints are generally familiar—retaliation, wrongful termination, workplace safety, leaves of absence, and discrimination—but the context has changed. Plaintiffs allege they have been retaliated against for reporting poor safety conditions, denied COVID-related leave requests, discriminated against in pandemic-induced job eliminations, and subjected to unnecessary exposure to coronavirus risks.

To minimize risk of suit, workplace safety concerns must be taken seriously. Although there is no private right of action under the Occupational Safety and Health Act, business disruptions from OSHA investigations are costly and time-consuming. When employees feel their concerns are ignored, they find a venue that appears to be responsive. OSHA has received nearly 38,000 complaints related to workplace conditions and practices in response to the coronavirus. And, apart from OSHA investigations, creative plaintiffs' attorneys are filing public nuisance lawsuits related to the pandemic. Public nuisance claims have existed in common law for centuries and generally involve four elements: (1) existence of a public right; (2) substantial and unreasonable interference; (3) proximate cause, and (4) injury. These elements are not well-defined, which is part of the appeal for attorneys seeking to punish employers whose response to the coronavirus is, in their opinion, less than ideal. A sound way to protect your company against these claims is to follow governmental directives and guidance on reducing coronavirus exposure in the workplace and to document your actions as the guidance changes.

Employees are also suing employers for alleged retaliation after complaining about perceived deficiencies in workplace safety measures. Regardless how much an employer does to avoid exposing employees to COVID-19, for some, it will not be enough. To help defend yourself, take complaints seriously, investigate them thoroughly, document the investigation and outcome—i.e., what you found and what you did based upon the findings—and follow up with the employees who complained to ensure they know their concerns were heard.

While employers are trying to keep their businesses running safely in these trying times, many are having to reduce their workforce, which increases the risk of disparate treatment and disparate impact claims. Not only do employers need to use objective, defensible selection criteria for eliminating positions, they also need to consider employees taking leave or requesting other accommodations related to the coronavirus to ensure they are not targeted for selection. Further, although the pandemic's impact on the company's financial condition may justify the reduction, employers must still avoid the temptation to select the most expensive employees (who are frequently older members of the workforce) to help their bottom line.

Similarly, if a mass layoff is still a possibility for your company, violations of the federal Workers' Adjustment and Retraining Notification (WARN) Act or state versions of this law can create significant liability, including back pay, benefits, medical expenses, civil penalties, and attorneys' fees. Although the WARN Act seems straightforward, a number of technicalities and exceptions can easily cause employers to stumble. To help reduce exposure to WARN-related litigation, monitor the schedule of layoffs to determine whether notice is required within applicable aggregation periods, place employees on excused leave with pay to provide full notice, track employees on furloughs, give as much notice as possible, and consider identifying unforeseeable business circumstances in your layoff notices. Also, apart from federal WARN requirements, check to see whether the states in which you operate have state mini-WARN statutes with different obligations or state rules requiring notice to the unemployment insurance departments.

In addition to reductions in force and layoffs, many employers are reducing the number of hours that employees are working or changing employees' job responsibilities. These actions could create issues under the Fair Labor Standards Act (FLSA). For example, many employees who otherwise are exempt from overtime requirements under the outside sales exemption are no longer working primarily away from the employer's place of business. Thus, adjusting the hours or job responsibilities of employees may require converting them to non-exempt. Before converting employees, consider if another exemption might apply. Consideration of employees' exempt status will likely need to be individualized rather than based upon job titles or families.

Employers should ensure employees are being paid according to the applicable federal or state minimum wage, regardless of reductions in pay or hours. Because so many employees are working remotely now, tracking and paying employees for all hours worked may be more challenging, but it is still necessary. The U.S. Department of Labor has issued guidance to employers on this subject. (www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf). Essentially, the guidance is in line with employers' responsibility in the ordinary course: employees must be paid for hours worked if the employer permitted the work or had reason to know the employee was working. Many employees are juggling childcare and schooling obligations, so their work hours may be outside the norm, making it more difficult for employers to spot "unauthorized" work time. Revising existing policies or establishing new expectations for work time in writing may be necessary to reduce the risk of claims for unpaid wages or overtime.

Much COVID-related litigation is based upon leaves of absence. Many employers are used to the challenges presented by the Family and Medical Leave Act. With enactment of the Families First Coronavirus Response Act and numerous state or local laws expanding existing leave rights or creating new ones, additional employers are learning of their new obligations in stressful circumstances. Unfortunately, many employees are not forgiving of mistakes, and employers are finding themselves defending claims that employees have been denied their rights or retaliated against for exercise their rights under these laws. Employers should be familiar with the new/expanded leave laws, including the documentation requirements related to requests.

As if the outbreak of the coronavirus has not created a sufficiently difficult environment in which to operate your business, plaintiffs' attorneys are exploiting employers' mistakes. Staying abreast of new leave/sick pay laws and workplace safety guidance is crucial to reduce exposure to suit, as is paying close attention to changes in employees' jobs during the pandemic. Clear and frequent communication, including listening to employees, is more important now than ever before to lead your company through the immediate impact of the pandemic and the lingering effects of potential litigation arising from it.