

Top Five Employment Law Liabilities Facing Employers Post-Pandemic

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The COVID-19 pandemic has exposed employers to an influx of novel employment law issues. Many employers already have experienced an uptick in related internal complaints or litigation. Below we identify five particular employment law liabilities employers may be exposed to once the dust settles from the pandemic.

Wage and Hour Claims

The shift to telework during the coronavirus pandemic has forced many employers to set aside traditional tracking mechanisms that are used to determine when employees take breaks and clock off. As a result, employers may be vulnerable to employee claims that employers failed to provide and/or pay for all required meal periods, rest breaks, and overtime for remote and on-site employees. To proactively minimize potential wage and hour related claims, employers should ensure to the extent possible that employees are properly compensated for all hours worked. In addition, employers can minimize minimum wage violations by complying with applicable federal, state and local laws that may require employers to reimburse employees for certain expenses incurred in order to telework, such as cell phone, high-speed internet, or other equipment costs. Moreover, employers should consider encouraging managers to execute best supervisory practices in the telework environment, including setting clear expectations with employees, conducting regular check-ins, promptly addressing issues, and making other efforts to maintain clear communication.

Leave Complaints

As the pandemic unfolded in March, [Congress passed](#) the Families First Coronavirus Response Act (FFCRA), which imposed the first-ever federal paid sick time mandate. The law requires employers with fewer than 500 workers to provide employees with a certain amount of compensated time off for various reasons linked to COVID-19, including if they become ill or are unable to work because they have to care for a child whose school has closed. In the months following the height of the pandemic, covered employers may encounter allegations that they failed to comply with obligations under the

FMLA, FFCRA, and [state](#)– or [local](#)-equivalent laws by denying the requested leave, miscalculating employees’ pay, requesting improper documentation or retaliating against an employee for taking such leave, etc.

To minimize exposure to these pitfalls, employers should consider taking proactive steps to determine their potential obligations under relevant federal and state laws and provide employees protected paid leave as appropriate. In addition, employers should carefully weigh the risk of taking personnel actions that could potentially lead to discrimination or retaliation lawsuits by workers who requested or took applicable leave.

Workplace Safety

The Centers for Disease Control and OSHA have released [general employer guidance](#) and [safety recommendations for certain industries](#). OSHA has released [updated enforcement guidance](#) regarding how to make work-relatedness determinations with respect to COVID-19 record-keeping. And, all states and most localities have orders regarding mandatory safety precautions.

Many employers, particularly essential employers, have seen an increased number of complaints to OSHA or state plan OSHA about COVID-19 related workplace safety. In most of these cases, OSHA has utilized its “rapid response investigation” or “RRI” informal investigation approach, which typically does not include an on-site investigation. Until a few weeks ago, OSHA was taking a hands-off approach to record-keeping issues, but the most recent guidance included an announcement of enforcement activity in this area. Under OSHA’s recordkeeping requirements, COVID-19 is a recordable illness and employers face potential risks for failure to comply with recording/reporting requirements.

Employers already are facing a number of workers’ compensation claims that allege workers contracted COVID-19 on the job. Many states have passed or are considering expanding the scope of workers’ compensation law to increase the likelihood of compensability. If claims are not covered by workers’ compensation, employers could face negligence claims, as workers’ compensation exclusivity may not act as a bar. Employers should consider consulting with in-house or outside counsel to strategize best practices for complying with evolving recommended safety measures and the necessary strategic decisions regarding the interplay of these issues.

Discrimination Charges

As employers across the nation contemplate return-to-work protocols, many may find some workers reluctant to return, particularly employees with preexisting conditions who may be in danger if they return to work and are exposed to COVID-19. Employers may invite Americans with Disabilities Act (ADA) suits by requiring employees to report or unfairly denying a request for a reasonable accommodation that allows them to do their job safely. Further, the widespread telework arrangements that many companies have successfully transitioned their operations to during the pandemic may make it more difficult for employers to refuse to let disabled workers continue working from home as a reasonable accommodation. Employers should consider consulting with in-house or outside counsel to assess their ADA compliance in light of recent guidance regarding [the ADA, Rehabilitation Act, other EEO laws and COVID-19](#). In addition, employers should follow required protocols set forth by [EEOC guidance with respect to COVID-19 vulnerable employees](#).

EEOC guidance confirms that employers are [authorized to administer COVID-19 tests](#) and implement other safety measures before allowing employees to enter the workplace. However, employers must

keep in mind that discrimination laws permit employees to challenge actions that have a disparate impact on workers of a certain national origin, age or other protected class, even if the employer did not discriminate intentionally. For example, if a business subjects employees of Asian descent or of certain demographics disproportionately infected with COVID-19 to heightened screening standards compared with others based on their protected characteristic.

To minimize potential discrimination claims, any personnel actions should be made based on legitimate, non-discriminatory business reasons.

WARN Act Violations

In the months following the COVID-19 outbreak, many employers were put in the difficult position of implementing sudden layoffs and other workplace reductions due to COVID-19-related business losses. Unfortunately, the efforts to quickly downsize likely made it hard for employers to provide mandatory notice to affected employees, which could spark suits alleging employers failed to adhere to obligations under the federal Worker Adjustment Retraining Notification Act of 1988, 29 U.S.C. § 2100 et seq. (“WARN”) and its state counterparts (so-called “mini-WARN” laws).

WARN requires that employers with 100 or more employees give at least 60 days’ notice before closing or laying off a certain number of workers. State “mini-WARN” laws are often more expansive in their coverage. Generally, employers that fail to provide timely notice may have to provide workers back pay, plus penalties. The “unforeseen business circumstances” exception in federal WARN and most analogous state laws may excuse strict compliance with notification requirements but, as of the date of this article, the federal government has not yet provided any guidance on the application of this exception to COVID-19. Further, while [some states](#) have expressly stated in an executive order that the current pandemic is an unforeseeable business circumstance under federal law, it remains unknown how courts will weigh state executive orders. Given the continued lack of clarity on the applicability of certain exceptions, employers are well advised to take the time now to [analyze the applicability of this exception](#) rather than make assumptions about it.

Final Thoughts

The COVID-19 pandemic and related legislative and public health measures will continue to impact business operations for the foreseeable future. Employers should exercise diligence to mitigate the risk of potential exposure to employment claims by reviewing all new applicable laws, regulations and agency guidance, revising company policies as necessary, and continuing to anticipate potential claims as the public health crisis progresses.

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