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Class Action Trends Report, Fall 2021: "COVID-19-Related Class Actions: Where Are They Now?"

Article By:

Mia Farber

David R. Golder

Eric R. Magnus

Hundreds of COVID-19-related class actions have been filed against employers since the start of the pandemic. What is the status of COVID-19 employment litigation?

A (temporary?) fall-off

The number of new court filings dropped across-the-board during the pandemic, owing in part to the practical difficulties of filing court complaints during a quarantine and a general reluctance to litigate in the midst of an outbreak. Employment cases fell by 13 percent from 2019 to 2020, according to data from Lex Machina. Yet, despite the fall-off in the aggregate, Lex Machina found an increase in employment cases based on COVID-19 during November 2020 to December 2020. Still, COVID-19 cases represent only 3 percent of employment cases filed in 2020, Lex Machina reports. Moreover, of these, only about 4 percent are class actions, according to Jackson Lewis' COVID-19 Employment LitWatch.

Is it possible the anticipated wave of COVID-19 class actions will not come to pass? It is too soon to tell, given the ongoing state of the pandemic, the delay in return-to-work and the legal claims that may rise accordingly, the typical lag time between an alleged offense and complaint filing, and the impact of courts having lifted tolling periods that were suspended during the height of the pandemic. Below is a sampling of COVID-19 class action lawsuits that employers have faced so far.

Wage and hour suits

More than 3,000 lawsuits related to COVID-19 were filed from March 2020 to August 2021. Hundreds of these suits have been brought as putative class or collective actions — a clear majority of which asserted wage and hour claims. About 125 COVID-19-related wage and hour class and collective actions have been filed in federal courts, according to data from Lex Machina; of these, nearly one-third have been resolved (ending in likely settlements). The Jackson Lewis COVID-19 Employment LitWatch shows an equal number of state-court wage and hour class action filings have been filed.

Like all wage and hour class actions, these suits pose a risk of significant exposure and defense costs if they survive early dismissal. There are a variety of factual allegations underpinning these claims. Examples include:

COVID-19 screening

- A trucking company required California-based class members to wait in line without pay for mandatory COVID-19 temperature checks before starting their shifts. The plaintiff in the case then brought a separate representative action seeking penalties under the California Private Attorneys General Act (PAGA).
- A motion to dismiss is pending in a suit alleging a Wisconsin senior living facility did not pay proper minimum wage or overtime to a class of employees for time spent taking their temperature and filling out a symptom questionnaire before clocking in. A suit filed in a Missouri federal court in February 2021 alleges a national retailer required employees to undergo unpaid mandatory screening before clocking in; the same allegations were raised against the employer in a suit filed a month later in a federal court in Arizona.
- In a class action filed in August 2021 in California state court, employees of a home improvement chain alleged the employer failed to provide a safe work environment because it ceased using temperature checks and COVID-19 symptom questionnaires about a month after the COVID-19 pandemic began.

Pandemic premiums

- A suit filed in federal court in June 2021 alleges an Illinois liquor store franchisee agreed to provide workers premium pay to work through the COVID-19 pandemic, but then failed to properly calculate or pay overtime accordingly. Also in June, a similar lawsuit was filed in Illinois on behalf of skilled nursing workers who were offered higher pay to care for COVID-19 patients and work through the pandemic, but the employer allegedly did not follow through.
- In a lawsuit filed in late-August 2021 against a retail chain under the California Labor Code and PAGA, California-based employees alleged the employer did not identify the correct pay rate and earnings on their wage statements as the recorded wage rate did not reflect the hourly premium they were paid during the height of the pandemic.
- A meatpacking company paid a “responsibility bonus” both to employees who worked during the height of the pandemic and to those who were sick with COVID-19 and utilized available sick days, but it did not factor the bonus into the overtime rate. The company argued that the bonus was akin to a gift and that the bonus did not need to be factored into the overtime premium because it was paid to employees whether they worked or not. That question will remain unanswered, however, as the district court in September 2021 granted final approval to a settlement resolving the dispute.
- A breach-of-contract claim contending an employer failed to pay a premium during the pandemic in accordance with a company policy of awarding premium pay during emergencies was dismissed after the employer pointed out disclaimers that made clear the company policy

was not binding.

- According to a class action suit filed in a Philadelphia court, a pharmaceutical company breached its promise to provide a 15-percent hazard pay premium at its vaccine plant through the course of the pandemic to technicians required to work 40 hours a week. A motion for summary judgment is pending.

Overworked due to COVID-19?

- County correctional officers sued alleging they were denied pay for regular and overtime wages for work done during the COVID-19 crisis, which required them to work extensive extra time following sanitation and hygiene protocols. The case was filed in April 2020; a motion to dismiss was filed in September 2020 and is pending.

- Police department employees alleged they were not paid for emergency compensatory time worked during the early months of the pandemic.

- Fast-food workers filed suit contending their employer refused to let them take their meal and rest breaks because the restaurant was too short-staffed as a result of the pandemic.

Expense reimbursement

(These claims invariably have been filed in California).

- An employer required employees to work from home but failed to reimburse expenses, including use of personal cellphones and the purchase of masks and other related expenses, according to a suit filed in October 2020 in a state court in California.

- A state court complaint filed in January 2021 alleges an employer required workers to sign illegal contracts that require them to pay for necessary business expenses and failed to reimburse home office expenses when employees were required to work from home because of the pandemic.

- A March 2021 state court complaint against an online retailer asserts that after stay-at-home orders were imposed in California, class members worked from home and were not paid "electricity, internet, and office infrastructure which should be reimbursed."

Claims arising from federal COVID-19 response

- Restaurant servers contend their employer began paying higher hourly wages as it revised its operations due to the pandemic so that it could receive forgiveness for loans it received from the Paycheck Protection Program, but then refused to allow the servers to keep their tips and failed to pay them overtime. The lawsuit, filed in an Ohio federal court in April 2020, was voluntarily dismissed a month later, perhaps due to private settlement.

- A suit filed in an Illinois federal court in April 2020 contends the employer received $5 billion in federal funds to protect employees during the pandemic by agreeing it would not make employees take a temporary suspension or unpaid leave or reduce their pay or benefits. However, management and administrative employees were then required to take 20 unpaid days off. A motion to dismiss is pending.

- A collective action filed in a Florida federal court in January 2021 alleges an employer failed to pay employees two weeks' pay while they were forced to quarantine due to a diagnosis or exposure to COVID-19, in violation of the paid sick leave provisions of the Families First Coronavirus Response Act. The case is in mediation.

COVID-19 takes a litigation toll

Some 20 states (and individual courts) had temporarily suspended tolling periods due to the pandemic. The duration varied greatly: Virginia pushed deadlines back 21 days, but in New York, where an initial suspension was extended month to month, tolling periods were suspended for a total of 228 days. In one class action filed in federal court in May 2021, the plaintiff restaurant servers cited "COVID tolling" in asserting claims under New York Labor Law for unpaid spread-of-hours premium and call-in pay, unlawfully withheld gratuities, and failure to provide proper wage notices and wage statements. The parties reached a settlement that the court approved in August, resolving the case.

While some states suspended only the limitations period that would have expired during the designated period of emergency, in other jurisdictions, the tolling period was extended even for limitations periods that expired after the emergency period ended.

In their wake, challenges remain:

Confusion. Perhaps due to the haste with which such tolling periods were issued, in some instances, it is unclear whether the tolling provision was a grace period that ended upon the date established for lifting the suspension or, rather, whether the directive tacked on additional time in which to file state-law claims.

Forum shopping. Plaintiffs may look to file in a state that extended the tolling period in an attempt to pursue claims that otherwise would be time-barred. For their part, defendants may want to consider filing a motion to transfer actions brought in a state that had suspended its tolling periods during the height of the pandemic.

State vs. federal claims. Federal courts will likely apply a state's tolling order only to a plaintiff's state-law claim, but not a federal claim arising from the same alleged conduct. (One federal court in North Carolina, for example, refused to extend a state tolling order to a plaintiff's discrimination claim under Title VII.) Consequently, different limitations periods may apply to the federal and state claims.

Lack of uniformity. Because states, and even individual courts, exercised their own authority to suspend tolling periods as they deem proper, defendants in nationwide or multistate class actions may have to grapple with the effects of a maddening patchwork of provisions. In some instances, it may be advisable to enter into a uniform tolling agreement with the plaintiffs.

Increased exposure. Perhaps most vexing: it is unclear, in some jurisdictions, whether the tolling order simply extends the deadline in which to file or also means a longer liability period — particularly as to wage and hour class actions.

Legal challenge. In some jurisdictions, tolling periods were suspended by virtue of an executive order from the governor; in other instances, the state supreme court issued the directive. In both instances, the suspensions may be susceptible to challenge on separation-of-powers grounds as statutory limitations periods typically fall within the constitutional authority of legislatures.

Discrimination claims

The overwhelming majority of COVID-19-related lawsuits are single-plaintiff cases. According to complaint filings compiled in LitWatch, there are nearly 600 discrimination-related cases brought by individual employees. However, a number of class actions claiming discrimination have been brought, including several suits filed quite recently.

- A hospitality employer fired a 64-year-old employee, and other similarly situated older employees, citing COVID-19 restrictions and lower hotel occupancy levels, according to a suit filed in August 2021 in a federal court in New York.

- An August 2021 complaint against a Massachusetts hospital contends that only Black employees were assigned to clean COVID-19 rooms. When asked why, one white supervisor replied, “we do not clean COVID rooms.” The plaintiffs are seeking $2 million and equitable relief to cease the unfair treatment.

- A suit under the Uniformed Services Employment and Reemployment Rights Act brought on behalf of a nationwide class of employees who were or are serving in the Armed Services or National Guard alleges their employer failed to provide equal pay and benefits under its COVID-19 emergency time off program to employees who were or are still on military leaves of absence. An employer offered half-pay during the pandemic to all employees on military leave but denied the pay to those whose military leave began before the pandemic started, according to a suit filed in July 2021 in a federal court in Maryland.

- An online retailer provided COVID-19 protections to managers, who are overwhelmingly white, while failing to take safety measures like temperature checks for other employees (most of whom are non-white) or to instruct them to quarantine after close contact with a coworker who tested positive for COVID-19. A motion to dismiss the suit is pending.

- A class action pregnancy discrimination suit filed in a California state court in May 2020 contends the plaintiff was fired for refusing to meet with customers face-to-face during the pandemic.

Layoffs: split decisions on WARN

Fears that employers would face a sharp spike in class actions under the Worker Adjustment and Retraining Notification (WARN) Act have been largely unrealized. So far, a small number of cases have been filed — the majority of which are class actions.

The WARN Act requires employers to provide written notice at least 60 days before closing a plant or implementing a mass layoff, if at least 50 full-time employees (comprising at least one-third of the full-time workforce at a single site) will face an “employment loss,” defined as an involuntary termination (other than a for-cause discharge), a layoff exceeding six months, or a reduction in work hours of more than 50 percent, during each month of any six-month period.

An exception to the 60-day notice requirement exists if the plant closing or mass layoff is due to a natural disaster such as a flood, earthquake, or drought; *or* is the result of "unforeseeable business circumstances" — a sudden, unexpected event outside the employer's control. If the exception does apply, then the 60-day notice requirement is excused but not waived altogether; the law requires "as much notice as is practicable." With respect to COVID-19, the legal dispute has centered largely on whether the pandemic satisfies an exception to the WARN Act's notice requirements.

The two courts to consider the issue have been split. In one class action in Florida, a federal court denied an employer's motion to dismiss WARN Act claims on the basis of "the unprecedented economic upheaval" unleashed by COVID-19. The defendant employer argued, "If those circumstances do not qualify for the WARN Act's exemptions for unforeseeable business circumstances or natural disasters, it is not clear what would." However, the court disagreed. Although it assumed the pandemic qualified as a "natural disaster," it found the defense did not apply in this case because the employer did not establish the layoffs were the direct result of a natural disaster. "This isn't a situation where, for example, a factory was destroyed overnight by a massive flood—that would be a 'direct result' of a natural disaster," the court explained. "This is an indirect result— more akin to a factory that closes after nearby flooding depressed the local economy."

As for the unforeseeable business circumstances exemption, the court explained that whether the six days' notice provided in this case was as much notice as practicable under the circumstances was a "hotly contested factual issue" to be resolved at a later stage in the litigation. However, as the appeal was pending, the parties on September 15, 2021, notified the trial court that they had settled the case. The bottom line is that, if the U.S. Court of Appeals for the Eleventh Circuit had adopted the district court's reasoning in the case, employers in the circuit would be unable to dispose of WARN Act claims arising from COVID-19 without at least some litigation.

Several other COVID-19-related WARN Act cases are being litigated; several litigants had moved for stays pending the resolution of these questions by a circuit court. Meanwhile, new cases continue to be filed.

Washington watch

Independent contractor rule withdrawn. In an expected move, on May 5, 2021, the U.S. Department of Labor (DOL) officially withdrew the Trump-era final rule addressing independent contractor status under the FLSA. The rule, which never took effect, would have established a uniform standard for determining a worker's status under the FLSA by reaffirming an "economic reality" test to determine whether an individual is in business for themselves (independent contractors) or is economically dependent on a potential employer for work.

The DOL had already delayed the final rule's effective date and, on March 11, 2021, issued a proposal to withdraw it. Proponents of the rule generally believed it provided a clearer and preferable analysis for determining employee or independent contractor status, while its opponents have argued it would have facilitated the exploitation of workers reclassified or misclassified as independent contractors. Because the DOL's withdrawal took effect *immediately*, the judicial precedents and DOL regulations and guidance that were in place prior to the final rule's publication continue to apply.

Paycheck Fairness Act fails to advance in Senate. On June 8, 2021, Democratic efforts to cut off debate, prevent a filibuster, and force a vote in the U.S. Senate on the latest iteration of the Paycheck Fairness Act were defeated by a 49-50 vote against cloture that fell along party lines. A two-thirds majority vote — 60 in favor — was needed to move forward.

This latest version of the Paycheck Fairness Act, which cleared the U.S. House of Representatives on April 15, 2021, by a 217-210 vote, would address wage discrimination based on sex, defined to include sex stereotypes, pregnancy, sexual orientation, gender identity, and sex characteristics.

DOL officially yanks joint employer rule. On July 29, 2021, the DOL announced that it is rescinding, effective September 28, 2021, the joint employer rule issued under the Trump Administration. Viewed favorably by employers, the 2020 rule provided updated guidance for determining joint employer status under the FLSA and provided a four-factor balancing test to determine when an entity is acting directly or indirectly in the interest of an employer in relation to the employee. Opponents supporting rescission of the rule believed it improperly narrowed the test for joint-employer status and conflicted with decades of DOL interpretation, the text of the FLSA, and Congressional intent.

The move came as no surprise, as the DOL had proposed to rescind the Trump-era rule on March 12, 2021. Among other things, the DOL pointed to the lawsuit brought by 17 states and the District of Columbia challenging the lawfulness of the rule. On September 8, 2020, the federal district court in New York overseeing the litigation vacated most of the rule after concluding it violated the Administrative Procedure Act. The case, which may now be declared moot, is being appealed to the U.S. Court of Appeals for the Second Circuit.

Other class action developments

Massive wage and hour judgment reversed. In a significant victory for California employers, the U.S. Court of Appeals for the Ninth Circuit vacated a $102 million award against a major retailer in a suit alleging that the employer violated the California Labor Code's wage statement and meal-break provisions. The federal appellate court's opinion provides an important clarification of the cognizable harm required to establish Article III standing under the PAGA and the Labor Code's wage statement requirements, explaining that the employee does not have standing to bring PAGA claims in federal court for alleged Labor Code violations that the employee himself did not suffer, and that an employer may make lump-sum payments as a retroactive adjustment to employees' overtime rate to factor in bonus payments without identifying a corresponding "hourly rate" for the payment on employees' wage statements.

Motor carriers suable under CA classification law. The Ninth Circuit reversed a district court's order preliminarily enjoining enforcement of California's Assembly Bill 5 against any motor carrier doing business in California. The federal appeals court rejected the lower court's finding that a trucking industry group showed a likelihood of success on the merits of their preemption claim, instead ruling the plaintiff was unlikely to succeed since AB 5 is not preempted by the Federal Aviation Administration Authorization Act of 1994 (F4A). Because AB 5 is a generally applicable labor law that affects a motor carrier's relationship with its workforce and does not "bind, compel, or otherwise freeze into place the prices, routes, or services of motor carriers," it is not preempted by the F4A, the Ninth Circuit concluded.

Rideshare drivers must arbitrate claims. In a suit by Massachusetts rideshare drivers alleging they were misclassified as independent contractors (and transferred by the defendant to a federal court in California), the Ninth Circuit ruled an arbitrator must decide that issue for drivers whose contracts with the rideshare company contain mandatory arbitration provisions. Concluding the drivers did not fall within the interstate commerce exemption to mandatory arbitration under the Federal Arbitration Act (FAA), the appeals court affirmed the district court's order compelling arbitration in a class action requesting a preliminary injunction prohibiting the defendant from classifying drivers in

Massachusetts as independent contractors. It directed the defendant to classify its drivers as employees and comply with Massachusetts wage law.

Court misapplied FAA exemption to last-mile drivers. Reversing a district court's order denying a final-mile delivery company's motion to compel arbitration of its drivers' FLSA claims under the FAA, the Eleventh Circuit ruled the lower court misapplied the test for determining whether the transportation worker exemption applied and erroneously concluded it did. Focusing on the movement of the goods and not the class of workers was erroneous because in the text of the exemption, "engaged in foreign or interstate commerce" modifies "workers" and not "goods." The court remanded the case for the district court to determine whether the drivers were in a class of workers employed in the transportation industry and whether the class was actually engaged in foreign or interstate commerce.

Section 16(b) authorizes "dual capacity" suits. The Seventh Circuit has ruled that a district court erred in concluding an employee who filed a collective action but failed to file her own opt-in consent was barred from pursuing an individual action. The employee filed suit under the FLSA alleging that her employer misclassified her and similarly situated employees. More than 100 employees filed consents; the plaintiff, however, did not. The district court deemed this a fatal flaw for both her collective and individual actions and dismissed the case in its entirety. Vacating in part, the Seventh Circuit found the district court erroneously concluded the facts alleged by the employee related only to the collective action. It held that Section 216(b) of the FLSA authorizes "dual capacity" suits, in which a plaintiff sues simultaneously as a group representative and as an individual. Further, the operative complaint put the employer on notice that she intended to sue in both an individual and a representative capacity. The appeals court left open the question whether FLSA, Section 256(a), requires that written consent to be in a separate document or if it is enough that the complaint itself clearly indicates the intent of the plaintiff to proceed collectively. Seventh Circuit caselaw is inconsistent on the question, and the circuits are split on the issue. The court concluded the state of the law was far too unsettled for it to decide the issue with limited briefing in this case.

Conclusory willfulness allegations cannot save FLSA claim. A divided Second Circuit panel ruled that a FLSA plaintiff relying on a theory of willfulness to invoke the three-year statute of limitations to save an otherwise untimely claim must plead facts that make entitlement to that exception plausible. Affirming dismissal of the employee's FLSA lawsuit asserting he was unlawfully denied overtime pay, the appeals court resolved a split among its own district courts and joined the U.S. Court of Appeals for the Sixth Circuit on its side of the circuit court split, ruling a conclusory assertion of willfulness will not be sufficient for a plaintiff to benefit from the extended three-year limitations period. Though this case involved an employee's individual FLSA action, it will also be helpful for employers defending FLSA collective actions in the Second Circuit.

Pennsylvania law requires pay for security checks. Answering certified questions from the Sixth Circuit, a divided Pennsylvania Supreme Court laid to rest arguments by an online retail giant that the Pennsylvania Minimum Wage Act did not require employers to pay their workers for time spent waiting to undergo, and undergoing, on-site security screenings. Accepting as true the Sixth Circuit's finding of fact that the employer required employees to remain on the premises during that time, the state high court concluded the security screenings constituted "hours worked" under 34 Pa. Code § 231.1 and "there is no de minimis exception."

Related security-check case ends for $13.5 million. In another case that is part of the same multidistrict litigation, a federal district court gave final approval to a $13.5 million settlement of class litigation alleging employees that worked in the online retail giant's Nevada warehouses were entitled to compensation for time spent during security checks. This case had been pending for over a decade, during which time there was significant adversarial motion practice and discovery, with the litigation having reached both the U.S. Supreme Court and the Sixth Circuit. The multimillion settlement includes individual payments averaging $642 to over 4,000 class members who submitted claims, $4.5 million in attorney fees, a range of $15,000 to $20,000 in incentive payments to three named plaintiffs, and $130,000 to the settlement administrator.

Retailer's website not a "place of public accommodation." In a non-employment case, a divided Eleventh Circuit panel held that a supermarket chain's website was not "a place of public accommodation under the ADA." The appeals court held the absence of screen reader software on the grocery chain's website did not act as an intangible barrier that resulted in a vision-impaired customer being discriminatorily "excluded, denied services, segregated or otherwise treated differently than other individuals" in the physical stores. The statutory language of Title III defining "public accommodation" is unambiguous and clear and describes public accommodations as tangible, physical places. Further, in the absence of congressional action that broadens the definition of "places of public accommodation" to include websites, Title III does not apply to the plaintiffs' claim, it explained. Thus, the Eleventh Circuit declined to extend ADA liability to the facts of this case where there was no physical barrier to access.

Victims of intra-office data disclosure lack standing. The Second Circuit affirmed the dismissal of state-law claims filed against a mental healthcare provider following the company's inadvertent disclosure of sensitive personally identifiable information (PII) of 130 current and former employees. Three employees whose information had been shared in the email filed a class action complaint against the employer alleging state-law claims for negligence, negligence *per se*, and statutory consumer protection violations on behalf of classes in California, Florida, Maine, New Jersey, New York, and Texas. Although the Second Circuit found that, in the context of unauthorized data disclosures, plaintiffs may establish an Article III injury in fact based solely on a substantial risk of identity theft or fraud, the employees here failed to show a substantial risk because there was no evidence the PII was targeted or obtained by a third party or any evidence of data misuse. The employees' claims of future risk of identity theft were not substantial enough to confer standing.

ADEA collective conditionally certified. Former IT employees who alleged they were unlawfully discharged as part of a multiyear restructuring initiative won preliminary certification of nationwide Age Discrimination in Employment Act collectives in a suit against two employer entities. The employees claimed the restructuring resulted in the firing of thousands of older workers and the hiring of thousands of younger workers to replace them. The employees claimed the entities shared the common goal of making the entire organization younger, as evidenced by the CEO's stated desire to "recalibrate and reshape" the workforce with a "whole host of young people." A federal district court in California ruled the plaintiffs met their burden in showing employees who were 40 years or older when they were terminated were similarly situated for the purposes of conditional certification of the proposed collectives.

Wage-fixing suit settled. Under a proposed settlement agreement, a poultry processor would pay $29 million to resolve potential class allegations that it, along with other leading poultry processors, conspired to fix and depress wages of workers at chicken processing plants, in violation of the Sherman Act. The putative settlement class includes hundreds of thousands of current and former chicken processing workers. The company also agreed to provide material cooperation to the plaintiffs against the remaining defendants. The defendants have denied the wage-fixing allegations.

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