

Common Employment Practices Claims Arising Out of COVID-19

As COVID-19 continues to spread throughout the United States, there has been a massive upheaval of the American workplace. Employers have found themselves drafting and implementing policies and procedures addressing a wide array of issues including remote work, layoffs, furloughs, pay cuts, workplace conditions and many more. Not surprisingly, the uncertainty wrought by COVID-19 has left employers at an increased risk of exposure to employment-related claims alleging wrongful termination, discrimination, retaliation and many others.

This Risk Insights piece will serve as a guide to the most common potential causes of action related to COVID-19 that may lead to employment-related litigation. As is the case with all inherently legal issues, employers are strongly recommended to seek the guidance of legal counsel when faced with any of the claims discussed herein.

Workplace Health and Safety

There have already been a multitude of safety violation claims filed under the Occupational Safety and Health Act (OSHA) and state equivalents. These safety violations typically allege that an unsafe workplace has caused sickness and/or death due to COVID-19, or that an employer failed to take appropriate measures to reduce COVID-19 exposure and spread within the workplace. Such “appropriate measures” might include failure to provide hand-washing stations, sanitizers, masks or adequate protective gear on location. Other claims have

alleged that employees have been unable to practice social distancing due to the nature of their jobs.

Leave Claims (FMLA and FFCRA)

In addition to traditional paid and sick leave, COVID-19 spurred the passing of the Families First Coronavirus Response Act (FFCRA), which includes the Emergency Family and Medical Leave Expansion Act and the

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Emergency Paid Sick Leave Act. The FFCRA requires employers with 500 or fewer employees to give employees expanded paid family and medical leave, and emergency paid sick leave.

Without analyzing the unique provisions of the FFCRA, it must be noted that the Act expressly incorporates existing Family and Medical Leave Act (FMLA) and Fair Labor Standards Act (FLSA) remedies provisions. This means that an employee who is wrongfully denied expanded leave or not paid during the leave will have a cause of action to recover damages (lost wages, salary, benefits and other compensation) or actual monetary losses resulting from the denial of leave (e.g., the costs of

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child care), with interest. Likewise, employers that fail to comply with the Expanded Paid Sick Leave Act will be made liable to remedy provisions under the FLSA.

Given the extensive exposure, employers should consider speaking with legal counsel in order to update and implement leave-related policies. Employers might also consider training their managers and supervisors on updates to the policies and laws, as they will be on the front lines when dealing with leave-related issues.

Wage and Hour Claims

With employees being asked to work from home, and employers restructuring their workforce (including salaries and compensation) to fit their current needs, it's vital to remember that this reshuffling can give rise to claims under the FLSA and applicable state laws related to salary and hours reductions. Altering work arrangements and compensation structure may be necessary to keep some organizations afloat, but such changes may inadvertently alter the classification status of their workers. Such classification issues may lead directly to an FLSA claim.

Discrimination Claims

Numerous federal and state laws protect employees from discrimination based on protected class characteristics. Laid-off or furloughed employees may bring claims under federal and state anti-discrimination laws, challenging the purported reason they were selected for an adverse employment action. Employers should be careful to use objective means when deciding which employees to lay off or furlough. They will also want to retain records of the criteria used, and, in certain instances, evaluate whether any disparate impact may result from the decision.

Employees might also bring a claim based on an employer's failure to reasonably accommodate employees with a bona fide disability related to COVID-19. Such claims might even be based on a denial of a request to allow an employee to work from home.

Retaliation Claims

Most state and federal laws contain provisions that make it unlawful for employers to retaliate against employees who exercise their protected legal rights or oppose unlawful employer actions. For instance, there have already been numerous claims that allege retaliation for objecting to unsafe working conditions and exposure to individuals with COVID-19 symptoms in the workplace. Other retaliation claims may arise out of an employee complaint that the employer wrongfully denied a request for leave.

The most important practice in insulating your business from a retaliation claim is documentation. Extensively documenting the employer's reasoning behind their employment decisions can be the difference between a successful retaliation defense and a costly judgment.

Wrongful Termination Claims

With the major increase in employee furloughs and layoffs, it is no surprise that there has been an increase in wrongful termination claims. Wrongful termination claims can arise out of a multitude of COVID-19-related issues. One example is a claim that the employee was terminated for complaining about a lack of personal protective equipment. Another example would be a claim that the employee was terminated for lodging a complaint about co-workers with COVID-19 symptoms reporting to work.

To mitigate the potential for a wrongful termination claim, employers should proceed carefully upon receiving employee complaints. Employers should also maintain meticulous records of complaints, the investigation process and the ultimate reasoning behind the termination.

Disclosure of Confidential Information Claims

Because the Centers for Disease Control and Prevention (CDC) and state/local health authorities have acknowledged community spreading of COVID-19 and issued precautions, employers have been allowed to

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measure employees' body temperature. However, this newly expanded testing capability exposes the employer to an array of privacy-related issues.

In order to maintain the privacy of COVID-19-related medical documents, the ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file. An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that they have the disease or suspect they have the disease, or the employer's notes or other documentation from questioning an employee about symptoms.

Conclusion

These are just a few examples of the most common types of claims that may arise as a result of COVID-19. It is imperative that employers are aware of these potential issues and proceed accordingly. Moving forward, employers should consider the following:

1. Develop a return-to-work plan that contemplates federal and local safety guidance (e.g., CDC, OSHA and state health authorities) on personal protective equipment, workspace hygiene, social distancing measures and many others.
2. Consult with legal counsel when implementing (or updating) policies and procedures to ensure compliance. Ensure counsel is also present when undergoing recall, rehire and job offers, as this stage is the epicenter for multiple employment-related claims.
3. Ensure that those policies and procedures are implemented in a fair and equal manner.
4. Ensure proper communication to all employees, particularly the line managers who will be responsible for implementation.
5. Maintain the confidentiality of all medical-related information provided by employees in compliance with federal and state guidance.
6. Train managers and supervisors on new policies and procedures drafted in the wake of COVID-19.
7. Regularly monitor new federal, state and local guidance, as well as legislative enactments.

Contact Zywave, Inc. today for more risk management guidance.