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In-Depth: Labor & Employment Litigation Risks

Supplement to Labor & Employment Litigation Risks Lurk Within Pandemic Chaos (Barack Ferrazzano Client Alert, October 2020).

EEO Claims

Disability discrimination claims pose the greatest risk to employers and have predominated in COVID-19-related filings to date. Such claims have been primarily based on allegations of failure to provide a reasonable accommodation to employees for a diagnosed disability that substantially limits their ability to perform the essential functions of their jobs, or for an underlying medical condition that, while not itself disabling (*e.g.*, claustrophobia), has been rendered so by certain necessary COVID-19 safety protocols, such as a requirement calling for employees to wear face coverings during the workday.

Plaintiffs have also alleged age discrimination based on the alleged adverse employment actions of hypervigilant employers concerned about exposing older workers to COVID-19.

While these claims give employers plenty with which to be concerned, the Equal Employment Opportunity Commission ("EEOC") anticipates that other types of EEO claims are likely to grow. Under the agency's recent COVID-19 FAQ,[1] employers are also at risk of pandemic-related wrongful termination (stemming from furloughs and layoffs) and harassment suits based on national origin, race, and other protected characteristics. Claims will also arise if employers fail to treat confidentially or otherwise mishandle medical information gleaned from COVID-19 screening protocols, including measuring body temperature, which are considered protected medical examinations under the Americans with Disabilities Act.

Employers are also susceptible to lawsuits alleging that employees have been unlawfully denied sick leave or family and medical leave for reasons related to COVID-19 (*e.g.*, to provide care for school-aged children limited to e-learning) under the Family Medical Leave Act, the Families First Coronavirus Response Act, state and local paid leave laws, and employer sick-leave policies.

Wage & Hour Disputes

Companies, particularly those with high numbers of non-exempt workers, **should be on the alert for lawsuits challenging compensation practices related to employee pre- and post-shift activities** such as going through a temperature screening checkpoint and checking emails outside of established work hours; on-shift concerns such as meal and rest breaks during the workday; modified schedules and remote work; and on-call time. Moreover, there is going to be an uptick in litigation involving the question of employee entitlement to expense reimbursement for telephone and internet services to facilitate remote work.

Layoff & Furlough Claims

Along with wage and hour issues, **organizations that conducted mass layoffs and furloughs during the pandemic risk lawsuits alleging failure to comply with the notice requirements of the federal Worker Adjustment and Retraining Notification ("WARN") Act and its state law counterparts**. Under the federal Act, which is solely enforced by private legal action in federal court, written notice must be provided to affected employees when there is an employment loss. A temporary layoff or furlough that lasts longer than six months is considered an employment loss. With the pandemic shutdown entering its seventh month, employers that previously announced and carried out a short-term layoff (six months or less) and later extended the layoff or furlough beyond six months due to business circumstances not reasonably foreseeable at the time of the initial layoff may now be required to give notice.

As noted above, discrimination claims based on disparate selection of protected categories of employees are also likely, as are similar claims based on selection of employees for reinstatement.

Workplace Safety Claims

The Occupational Health and Safety Administration ("OSHA"), the federal enforcer of workplace safety, issued interim enforcement guidance specific to the pandemic, which mandates that employers **adapt infection control strategies "based on a thorough hazard assessment,[2] using appropriate combinations of engineering and administrative controls, safe work practices, and personal protective equipment ("PPE") to prevent worker exposures."** Some OSHA standards also require employers to train workers on elements of infection prevention, including PPE.

In addition, under state workers' compensation laws, employers may be liable for employees' workplace injuries resulting from COVID-19. Indeed, a growing number of states have enacted legislation or taken other steps to limit employees' claimed COVID-19 workplace injuries to the state's workers' compensation laws. In Illinois, for example, there is now a rebuttable presumption of workers' compensation coverage for first responders and front-line workers who are exposed to and contract COVID-19. The law extends the definition of "COVID-19 first responder or front-line worker" to include individuals employed by essential businesses and operations.

Lawsuits premised on a theory of failure to safeguard the workplace have been asserted as negligence claims, violations of state or federal workplace safety laws and COVID-19 safety protocols, and even wrongful death claims. Common allegations include failure to provide workers with adequate personal protective equipment and failure to implement a proper active screening protocol. Retaliation and/or whistleblower claims based on allegations that an employee was terminated for complaining about workplace safety or working conditions, or state-law claims for wrongful termination against public policy are also likely.

Unfair Labor Practice Charges

Private employers that have a non-union workforce usually have not considered whether issues with their employees may give rise to claims under the National Labor Relations Act ("NLRA"). In reality, however, **the NLRA's broad reach extends its protections to almost all private sector employees regardless of whether the workforce is unionized**. Section 7 of the NLRA entitles all employees, union or not, the right to engage in protected concerted activities, which are generally defined as action taken by more than one employee for their mutual aid or common protection. Employers are prohibited under Section 8 of the NLRA from interfering, restraining, or coercing employees in the exercise of their Section 7 rights.

Even though "concerted" activities typically involve two or more employees, in some instances the conduct of a single worker may qualify as protected conduct when the single employee, through his or her individual conduct, prepares for concerted activity or acts with permission or in furtherance of other employees' concerns.

In the context of the pandemic, non-union employers have been caught off guard by unfair labor practice charges before the National Labor Relations Board ("NLRB"), which typically involve employees who have complained about or protested terms and conditions of employment related to COVID-19 policies or safety protocols. For example, nonsupervisory employees who refuse to work in conditions they believe are unsafe may be engaging in protected activity under the NLRA. An employer who terminates such employees without first engaging counsel to thoroughly analyze the facts and options risks a charge. A number of the cases have been dismissed after a finding that there was no "concerted" activity, but given the highly fact specific nature of that inquiry, there is no guarantee that every employer will avoid an adverse NLRB determination or eventual litigation.

- [1]https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
- [2]https://www.osha.gov/SLTC/covid-19/hazardrecognition.html