Avoiding Employment-Related Liability as Employees Return to Work

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As states and municipalities relax safer-at-home measures, stores, restaurants, offices, manufacturers, and other employers across the country are either re-opening for business or returning their employees from remote work. Despite the best of intentions to comply with seemingly ever-changing laws, orders and agency guidance, many businesses worry about whether there will be an upsurge in the number of employee lawsuits or claims arising from the COVID-19 pandemic. This article identifies the most likely types of claims that may be seen by employers and describes steps employers can take to manage their risk.

1. Discrimination, Retaliation and Harassment Claims

Back in March, decisions regarding closures and the resulting layoffs and furloughs were made in a bit of a hurry. In situations where less than an entire workforce was sent home, hopefully, decisions about which employees were chosen for layoff or furlough were made carefully, with attention paid to the relative skills, performance, and job functions of each employee. Employers now returning employees to work—or to the workplace in phases—face the same decisions, and may be second-guessed if they treat employees differently based on impermissible reasons. The Equal Employment Opportunity Commission (EEOC) has made clear that employers may not make assumptions about their employees' ages, ability to telework, known or perceived disabilities, or suspected vulnerabilities when making these decisions. Even decisions made out of benevolence toward employees may be deemed discriminatory in retrospect if they were made based on these paternalistic assumptions. Thus, employers should avoid blanket exclusions for individuals perceived as vulnerable when creating and implementing return-to-work policies.

Employees adversely affected by such a reduction-in-force decision may also allege that the decision was pretextual to eliminate employees with protected characteristics. In other words, they may claim that their employer used the furlough or layoff process as an "excuse" to get rid of employees in certain age, race, national origin, gender or other protected categories. Employers making layoff or phased return-to-work decisions should, therefore, take care to "audit" their lists of affected employees to determine if certain groups have been adversely impacted.

Employers may also not retaliate or discriminate against employees for requesting or taking leave under the Families First Coronavirus Response Act (FFCRA), the Family and Medical Leave Act (FMLA), or for voicing concerns about workplace safety.

Finally, employers should be on guard against potential harassment claims, especially in light of reports that persons of Asian descent have been the target of harassment arising from the suspected origin of the novel coronavirus. Employers who are found to have known about (or should have known about, with proper vigilance) unlawful harassment can be found liable for this harassment.

Employers who unlawfully discriminate or retaliate against employees in these ways may face claims under a host of laws, including the Family and Medical Leave Act, the Americans with Disabilities Act, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, or state worker's compensation laws.

2. Disability Failure-to-Accommodate Claims

While employers should not assume that an employee cannot work based on the individual's known or perceived disability, they should understand that they do have a duty to engage in an interactive process with employees who request an accommodation due to a disability. This duty to provide reasonable accommodations exists under both the federal Americans with Disabilities Act (ADA), which applies to employers with 15 or more employees, and the state Wisconsin Fair Employment Act (WFEA), which applies to employers with one or more employees.

In the COVID-19 context, the duty to accommodate arises when an employee requests leave or another accommodation because his or her existing disability makes him or her particularly vulnerable to COVID-19 or the disability is exacerbated by the threat of COVID-19 or the safety precautions taken. For instance, an employee may have diabetes or a heart or lung condition which places him or her in increased danger if he or she were to contract COVID-19. Another employee may request an accommodation because his or her diagnosed panic and anxiety disorder is exacerbated when he or she works in close proximity with other people. Still another employee may have claustrophobia or asthma which makes complying with a face mask requirement difficult or impossible. In these situations, the law requires the employer to engage in an interactive dialogue with the employee, and potentially the employee's medical providers, to determine what reasonable accommodations, if any, can be made for the employee. Examples of such accommodations may include telework (where possible), additional physical barriers from other workers, or even limited leave in some circumstances. Again, analyses of such requests and possible accommodations should be undertaken on an individualized basis, ideally with experienced employment counsel.

3. Failure to Protect Claims

Worker's Compensation: Employees who sustain injury during the course and scope of their employment may make claims under state worker's compensation laws. In most such claims, it will be significantly challenging for employees to prove they contracted the coronavirus while at work, rather than through other means, such as riding public transportation or shopping at the grocery store. In Wisconsin—with the notable exceptions of emergency health care workers and first responders—such employees would have to prove causation, which may be a bar to many claims.

OSHA: According to the general duty clause of the Occupational Safety and Health Act (OSH Act), employers are required to provide their employees "a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." The federal Occupational Safety and Health Administration (OSHA) can cite employers for violating the general duty clause if there is a recognized hazard and they do not take reasonable steps to prevent or abate it.

Monitor Published Guidance: Employers should regularly monitor OSHA and CDC guidance to ensure that they are following the most current recommendations from both agencies, based on their particular industry and circumstances. While many employers may view such guidance as not "the law" but rather only suggested (and thus optional) recommendations, they should be aware that an OSHA investigator will likely not look kindly on an employer who refuses to implement well-publicized recommendations.

Develop a Formal Return-to-Work Plan: If employers have not already done so, they should develop and implement formal return-to-work plans addressing such things as PPE and social distancing expectations, sanitation procedures, employee questionnaires and/or temperature testing, handling of visitors, and protocols for dealing with employees or visitors who test positive for COVID-19 or who report being in close contact with someone who has tested positive. Employers should regularly update such plans when necessary, ensure that all requirements are followed by employees and visitors alike, and promptly investigate all complaints of non-compliance. Such plans will assist employers who must defend against claims alleging that they did not provide adequate safety precautions for employees.

4. Failure to Protect Employee Privacy and Abide by Confidentiality Requirements

In published guidance, the EEOC has directed that while ordinarily, medical questionnaires required of employees or temperature testing would be impermissible under the ADA, they are allowed in the COVID-19 context due to the direct threat posed by the pandemic to the health and safety of employees. Consequently, many employers have implemented symptom-monitoring protocols for employees, which range from self-monitoring and reporting to

employer-imposed temperature checks. While gathering such information is permitted under the law, employers should take adequate steps to ensure that it is protected as confidential employee medical information. That means employers should treat and store such information just as it does all other employee medical information it receives—i.e., in files separate from employee personnel files with limited access by other employees.

5. Denial or Miscalculation of Sick or Family Leave

For private employers with fewer than 500 employees, the FFCRA provides paid leave for employees who need time off to care for themselves or a family member affected by COVID-19, or where a child's school or childcare is unavailable due to COVID-19. Even as summer has arrived, summer childcare options may be limited, and many areas of the country are experiencing increased positive tests for COVID-19. Thus, employees may continue to request leave under the FFCRA. Employers must remember that the FFCRA is in place until the end of 2020, and they should be cognizant of their obligations under the law.

Employees may bring actions under the federal Fair Labor Standards Act (FLSA) based on denial or miscalculation of FFCRA leave pay. As we have previously advised in our ***FFCRA Regulations*** article, employers should not assume that the FFCRA does not apply to them simply because they have fewer than 50 employees. The exception for small employers does not apply to employee requests for emergency sick leave but only to requests for leave due to school or childcare unavailability—and then applies only in defined circumstances that should be analyzed on a case-by-case basis.

6. Wage and Hour Claims

In order to comply with safer-at-home orders and ensure social distancing, many employers had to make sudden changes to their workforces with little notice or preparation. Many began allowing non-exempt employees to telework for the first time. Some may have been forced to change the compensation structures of exempt employees for economic reasons. Others may have required employees to spend time preparing for work in additional ways related to COVID-19 (e.g., cleaning and donning PPE or assisting with cleaning work areas before or after their shifts).

While these changes came on suddenly, employers should always remember that the wage and hour laws pertaining to minimum wage and overtime requirements still apply. Employers should review their timekeeping procedures and compensation structures with an eye toward the following questions:

- Are non-exempt employees who are working from home adequately tracking and reporting their time?

- Have non-exempt employees been instructed as to their start and end times each day? Are they permitted or expected to work outside of those times? Do they check and respond to emails and voicemails at other times?
- Are non-exempt employees expected to clean work areas off the clock? Are they spending more than a de minimis amount of time off the clock cleaning, donning or doffing PPE?
- Are the salaries of exempt employees impermissibly "docked?"
- Have exempt employee salaries been reduced below the applicable overtime exemption thresholds?
- Have any compensation reductions resulted in minimum wage violations?

7. Federal and State WARN Violations for Mass Layoffs or Closings

The federal Worker Adjustment and Retraining Notification Act (WARN Act) and its state counterpart, the Wisconsin Business Closing and Mass Layoff Law (Wis-WARN), were both enacted to require certain employers to provide employees with written notice prior to a permanent or temporary shut down or mass layoff of an employment site, facility, or operating unit, in order to help affected employees prepare for new employment. (The federal WARN Act applies to businesses with 100 or more employees, while Wis-WARN applies to employers with 50 or more employees. These laws have differing triggering thresholds for the required notices which are described in our ***Telework, Shortened Work Schedules, Layoffs, and Worksite Closures: Handling Employment Interruptions in the Age of COVID-19*** article.

Importantly, both laws have a number of exceptions, among them one for layoffs or closings caused by "unforeseeable business circumstances." The laws also generally do not apply in the case of a short-term furlough (rather than lay-off) of employees. While these exceptions may well have been met back in March if the closing or layoff was the sudden result of compliance with a state or municipal safer-at-home order, or if a furlough was initially anticipated to be of short duration, these laws may become applicable in the future. Furloughs may turn into permanent layoffs or another large reduction-in-force may be necessitated by the continued economic downturn. Employers must be cognizant of both laws' requirements to avoid inadvertent missteps in the event that one or both laws apply in the future.

8. NLRA Claims and OSHA "Whistleblower" Claims

NLRA Claims: Many employers believe that the National Labor Relations Act (NLRA) does not apply to them simply because they do not have a union. However, Sections 8(a)(1) and 8(a)(3) of the NLRA prohibit employers from retaliating against an employee for, among other things, participating in "concerted activity"—whether or not it is union activity—so long as it is done for the purpose of collective bargaining or other "mutual aid or protection." Thus, if an employee makes a complaint, either with other employees or on their behalf,

in order to improve working terms or conditions, that activity may be protected. Discharging or taking adverse employment action against employees who engage in such activity can lead to serious legal risk. In a recent National Labor Relations Board (NLRB) decision, *Maine Coast Regional Health Facilities*, 369 NLRB No. 51, (March 30, 2020), the NLRB held that health care workers who were terminated for voicing concerns about working conditions in health care facilities may have a retaliation claim under the NLRA.

OSHA Whistleblower Claims: Section 11(c) of the OSH Act prohibits employers from retaliating against employees for exercising their rights under the statute, including raising a health or safety complaint with OSHA. 29 U.S.C. § 660(c). The protections contained in Section 11(c) apply to employees who report conduct they reasonably and in good faith believe violates the OSH Act. Although Section 11(c) does not provide for a private cause of action, employees can submit a complaint to the Secretary of Labor. After investigating the employee's complaint, the Secretary of Labor can sue the employer in federal court on the employee's behalf and seek relief including reinstatement, back pay with interest, compensatory damages, punitive damages, and other appropriate relief.