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COVID-19 employment lawsuits

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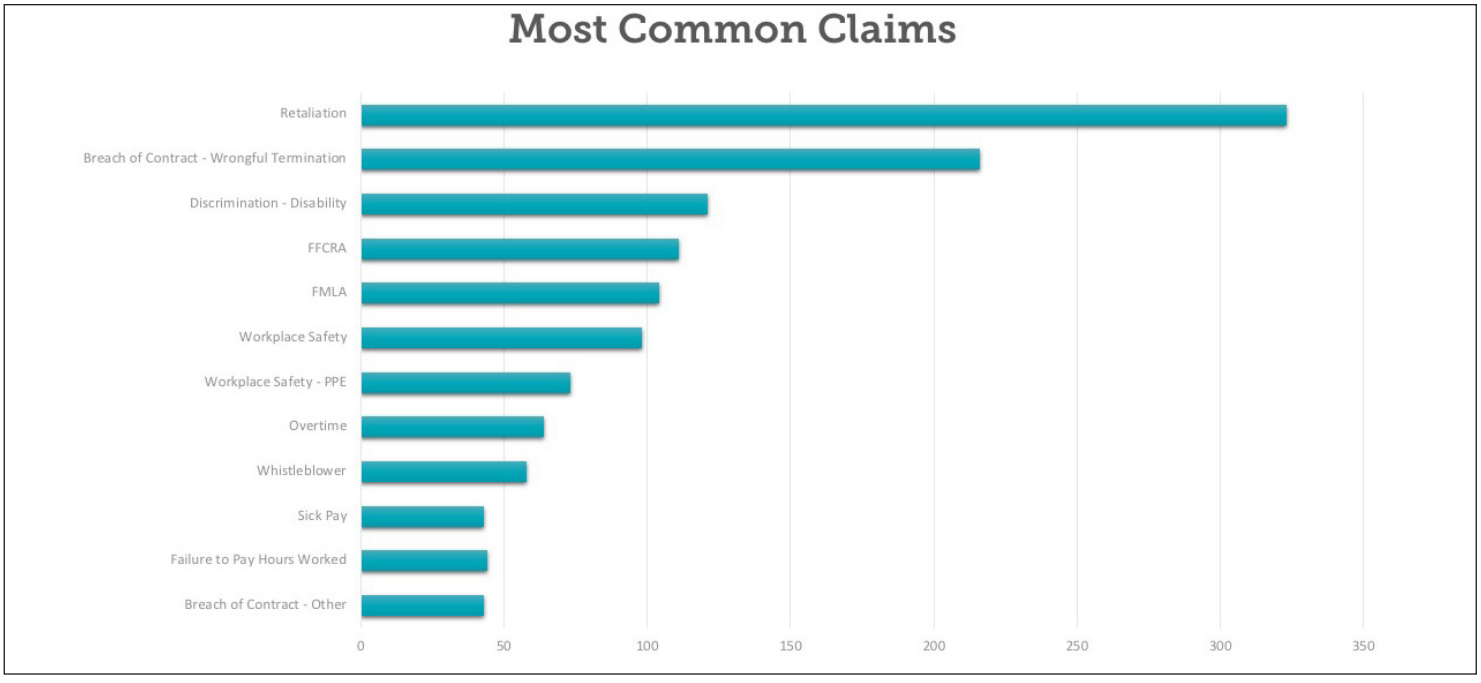
Although defending against employment lawsuits has always been a part of doing business, the pandemic has brought with it a host of new claims.

Numerous lawsuits stemming from COVID-19 have been filed in federal and state courts since March 2020, ranging from customer and client claims related to COVID-19 exposure, to more focused claims from employees under various federal, state and local laws addressing workplace health and safety, non-discrimination, and employment termination.

As of September 18th, at least 739 lawsuits directly related to labor and employment violations have been filed (including 77 class action suits). California leads the nation with 144 employment lawsuits already filed, with New Jersey, Florida and New York close behind.

These claims raise a number of allegations, including retaliation, breach of contract, discrimination, leaves of absence, wage and hour, and workplace safety concerns, among others.

MOST COMMON CLAIMS



Where workplace liability is concerned, there is no shortage of laws or regulations under which employers may face claims.

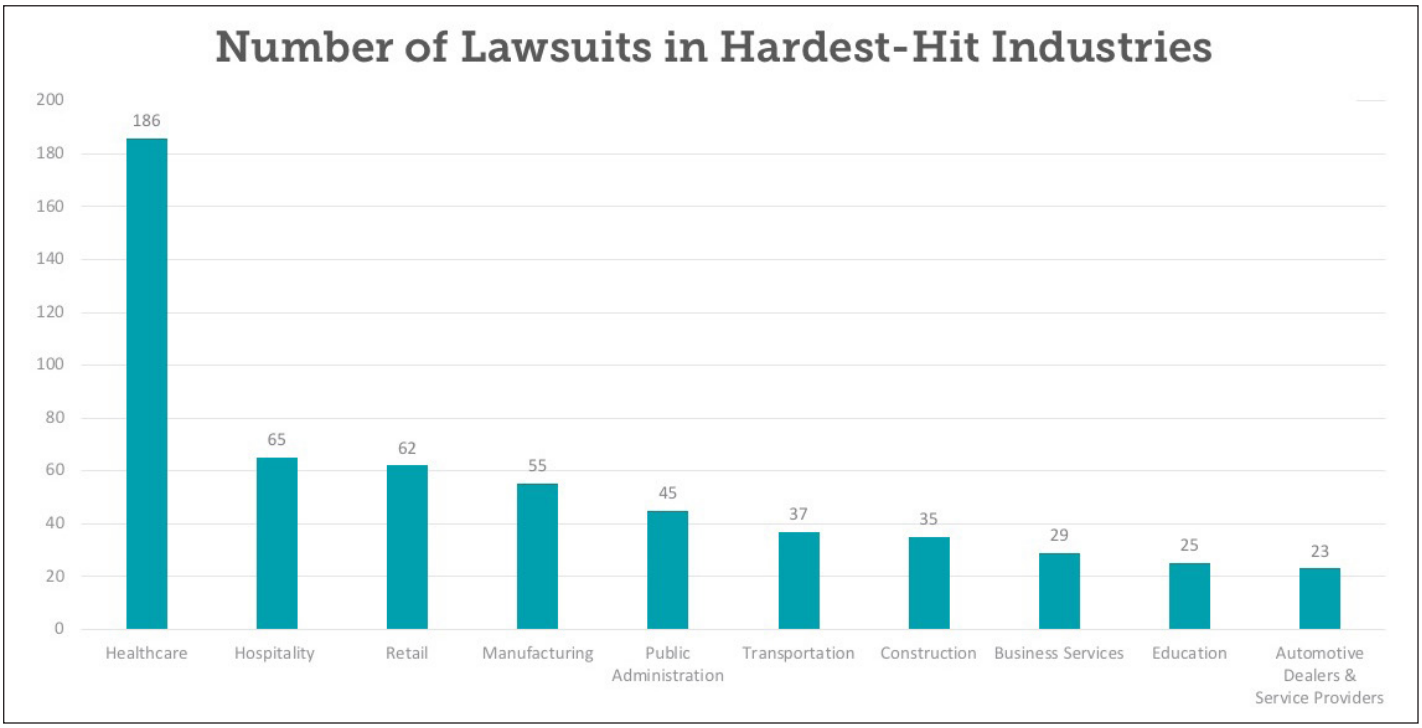
To date, while at least a dozen states have enacted laws to shield employers acting in good faith from liability for COVID-19 claims, they have largely been confined to claims of exposure to the virus — we have not seen significant legislation offering any type of protection for labor and employment claims in particular.

> Given the rapid (and at times haphazard) pace at which the federal government, states, and localities have enacted laws responding to COVID-19 and employment, there are several types of claims of which employers should be mindful.

Nor has the federal government yet acted on proposals to limit COVID-related liability for employers and businesses, although proposals to do so have been introduced, and are discussed below.

The largest number of claims have been filed against healthcare industry employers.

NUMBER OF LAWSUITS IN HARDEST-HIT INDUSTRIES



Given the rapid (and at times haphazard) pace at which the federal government, states, and localities have enacted laws responding to COVID-19 and employment, there are several types of claims of which employers should be mindful. The following is just a snapshot of some of these claims.

WAGE & HOUR

Timekeeping

If a non-exempt employee performs any work during a quarantine or similar period, the employer should ensure that the employee accurately tracks their working time and is paid for that time in accordance with all applicable federal, state, and local laws.

> Employers may be struggling with how to accurately keep track of an employee's time when working from home or how to ensure that employees are appropriately taking meal and rest breaks.

Non-exempt employees working from home during quarantine should be directed to comply fully with any and all company policies related to timekeeping, overtime approval, and meal and rest breaks. Employers may be struggling with how to accurately keep track of an employee's time when working from home or how to ensure that employees are appropriately taking meal and rest breaks.

Approximately 20 states have some form of meal or rest break requirements. Importantly, recent court decisions in Oregon and Washington State have held that employers have an affirmative duty to "ensure" that non-exempt employees receive and take all required meal and rest breaks.

To address this concern, employers can consider implementing a policy signed by employees requiring them to acknowledge they are expected to schedule and take meal and rest breaks and to accurately and thoroughly record time worked.

Business expenses

As more and more employees are working from home due to the pandemic, many employees have incurred costs associated with working from home. Depending on the jurisdiction, an employer may be obligated to reimburse the employee for any costs associated with teleworking.

Federal law does not require specific "item-by-item" reimbursement of tools and services incidental to carrying on the employer's business; however, the employer must reimburse the employee to the extent the incurrence of those expenses causes the employee's wages to dip below minimum wage. In addition, some states have laws or guidance addressing reimbursements and allowable deductions from wages.

Often, these laws will allow deductions only when authorized in writing by the employee or will restrict the employer's right to take deductions that impact minimum wage. Over half of states and some local jurisdictions have laws or guidance impacting reimbursements and deductions.

Some jurisdictions require employers to reimburse employees a reasonable percentage of the employee's cell phone or internet use, even where working from home imposes no additional charge to the employee. Employers should closely review the applicable reimbursement statutes that apply to them to ensure compliance.

Reporting time pay

If an employee is sent home from work due to illness or because the employer is implementing a mandatory furlough, certain jurisdictions may require reporting time pay to compensate the employee for reporting to work even if no work was performed or if the employee was sent home prior to working a full shift.

> Employers should also consider whether they may be subject to a state or local ordinance creating a "right to recall" for employees subject to a reduction in force as the result of the pandemic.

Jurisdictions that have some version of a reporting time pay law include, for example, California, Connecticut (for hospitality or retail only), District of Columbia, Hawaii, Massachusetts, New Hampshire, New Jersey, New York, Oregon, and Rhode Island. Employers with non-exempt employees in these jurisdictions should consult applicable law to assess when and how much reporting pay is owed.

Compensable work time

Employers can expect disputes and litigation over the compensability of new pandemic-related activities, such as temperature checks and other health screening activities. The question of compensability for pre-shift activities is a complex area of law, and the compensability of these particular activities has not been extensively considered previously.

The result of these litigation tests will depend heavily on state law, in particular the manner in which the jurisdiction follows federal Portal-to-Portal Act.[1] Those states with wage and hour statutes that track federal law, and those without state wage and hour statutes, may be more likely to deem such pre-shift activities as non-compensable.

Generally, employers should carefully consider state requirements before implementing home health checks or screenings, as there is a risk that such activity can begin the workday.

In addition, the DOL's Wage and Hour Division in a recent Field Assistance Bulletin reaffirmed that employers are required to pay their non-exempt employees for all hours worked, "including work not requested but allowed and work performed at home.

If the employer knows or has reason to believe that an employee is performing work, the time must be counted as hours worked."[2] According to the DOL, employers still have an obligation to exercise "reasonable diligence" in tracking the hours their teleworking employees work.

Downsizing and reductions in force

Employers that have been forced to downsize their workforces in the wake of the pandemic should also be mindful of the federal Worker Adjustment and Retraining Notification (WARN) Act. The WARN Act generally requires that employers that are closing a plant or laying off a significant number of workers for an extended period, are required to provide 60 days' notice to workers, as well as to the state.

State law analogues of WARN (so-called "mini-WARNs") often impose similar if not more burdensome requirements.

While WARN provides certain exceptions to these notice requirements (most notably, when a plant closure or mass layoff is the result of business circumstances that were not reasonably foreseeable at the time notice was required), the applicability of these exemptions with respect to COVID-19 remains unclear.

Despite the unpredictability and uncertainty of the pandemic and its duration, and of the ever-changing governmental and societal responses to the pandemic (including, for example, renewed and extended restrictions on travel, business and social activities) all of which impact business in unforeseeable ways, plaintiffs may challenge businesses for invoking the "unforeseeable business circumstances" exception to give shortened WARN notice or to extend layoffs beyond six months.

In addition, WARN includes certain "lookback" provisions that may trigger a notice requirement, even retroactively, where an employer is not letting everyone go at the same time. And while some states have modified their state WARN laws to be more forgiving of COVID-related job losses, others are proceeding apace with WARN expansions contemplated prior to the pandemic.

As employers prepare to reopen businesses, or return employees from furlough, they should be mindful of WARN Act obligations.[3] This is especially true where federal funding to maintain jobs (such as under the Paycheck Protection Program[4]) may be running out, and employers are facing the unwelcome prospect of having to let workers go, potentially triggering WARN notice requirements.

While legislation introduced in the U.S Senate would exclude COVID-related closures and layoffs from notice requirements

under WARN, the fate of this effort is not at all clear. Employers contemplating uncertainty as to whether and how they will maintain their employee numbers are advised to consult with counsel sooner, rather than later.

Employers should also consider whether they may be subject to a state or local ordinance creating a "right to recall" for employees subject to a reduction in force as the result of the pandemic.

Currently, some localities in California, including San Francisco, Los Angeles, and Long Beach, are creating (or have already created) these types of laws with a private right of action for employees to sue if they are not reinstated to their position following a pandemic reduction-in-force.[5]

DISCRIMINATION CLAIMS

Americans with Disabilities Act (ADA)

Historically, claims of discrimination have increased as unemployment has gone up. In the 15-year period prior to the pandemic, the highest level of unemployment in the United States occurred in 2009 and 2010.[6]

Notably, and perhaps unsurprisingly, the highest number of discrimination charges filed with the U.S. Equal Employment Opportunity Commission (EEOC) also occurred in fiscal years 2010 and 2011.[7] Given the unprecedented levels of COVID-related unemployment, we see no reason to think that this historical trend will not continue.

Employers should be aware of the ADA's requirements governing what medical information employers can seek from employees and how and when to "reasonably accommodate" employees with disabilities. Based on the EEOC's current view, it is unclear whether COVID-19 is or could be a disability under the ADA.

Regardless, in relying on the findings of the CDC and others public health authorities, the EEOC has determined that "an employer may bar an employee with the disease from entering the workplace" because the COVID 19 pandemic meets the "direct threat" standard under the ADA, that is, "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."[8]

An employer's obligation to make reasonable accommodations and engage in the interactive process remains in place based on EEOC guidance. The EEOC's guidance on this issue, however, has continued to evolve as the agency attempts to balance ADA reasonable accommodation obligations with an employer's concern about the "direct threat" to the employee's health and others by returning an employee to the workplace.

Employers should remain mindful of this tension in their dealings with employees who may or may not have high risk factors, employees who may have been exposed to the virus, as well as what sort of accommodations employers may be able to reasonably provide to their employees.

Age Discrimination in Employment Act (ADEA), Pregnancy Discrimination Act (PDA), and other discrimination laws

Particularly where employers are beginning to return their employees to the workforce, they should be mindful of potential pitfalls even where they believe they are acting in an employee's best interests. The EEOC has cautioned against possible infection control strategies and conduct that may conflict with the ADEA, PDA, Title VII, or state equal employment opportunity laws.

Though employers may be particularly concerned for their more vulnerable employees, the EEOC has made clear its position that employers may not prevent older workers, or pregnant workers, from returning to work if they wish to do so, even if the employer believes it is acting to protect these workers from risk.[9]

In these situations, EEOC guidance does encourage employers to be flexible, and nothing prohibits an employer from accommodating, for example, an older worker's request to continue to telework (although some state laws that prohibit "reverse age discrimination" might be implicated in this scenario).

The EEOC has cautioned against possible infection control strategies and conduct that may conflict with the ADEA, PDA, Title VII, or state equal employment opportunity laws.

Additionally, though certain communities, countries, or areas of the world may become "hotspots" for the virus, employers should be careful to refrain from relying on such information in making employment decisions so as not to run afoul of Title VII.

Notably, mistreatment and harassment of Asian Americans and others of Asian descent also has received widespread coverage in the press in recent months.[10] Based on these types of concerns, EEOC Chair Janet Dhillon has cautioned against mistreatment or harassment of Asian Americans and others of Asian descent, which can result in unlawful discrimination on the basis of national origin or race.[11]

Leaves of absence

Both the federal government, by way of the Families First Coronavirus Response Act (FFCRA),[12] and numerous state and local governments, have adopted new laws, ordinances, or regulations relating to paid leave for employees during the COVID-19 pandemic.

Already we are witnessing claims from employees alleging that they were denied leave to which they were entitled under these new laws, or retaliated against for seeking leave.

Employers should monitor developments in this area closely, and make sure their leave programs are coordinated to meet varying federal, state, and local requirements.

SAFETY AND HEALTH

Duty to provide a safe workplace

A host of legal and public health issues must be considered to ensure the safety and health of employees as they return to work. Employers are balancing federal guidance and recommendations with evolving local guidance and orders.

Moreover, different sectors of the economy may have drastically different requirements and guidelines to follow upon their physical return to work, particularly for public-facing businesses and the healthcare sector.

An employer that does not adopt measures to prevent the spread of the coronavirus at work adequately could face liability for failure to comply with its duty to provide a safe workplace under OSHA.

> Whether an employer has a unionized or non-unionized workforce, employers should remain aware of their obligations under the National Labor Relations Act.

Now that certain worksites are reopening, employers are dealing with employees who develop symptoms of COVID-19, test positive for COVID-19, are clinically diagnosed with COVID-19 ("presumptive positive"), and/or have been in close contact with a presumed positive or confirmed COVID-19 individual.

Employers are creating exposure control plans and dealing with how and when to record and/or report a confirmed case of COVID-19 in the workplace pursuant to OSHA standards.

In addition, the Commonwealth of Virginia became the first state to enact an Emergency Temporary Standard directly regulating COVID-19.

This comprehensive standard applies to all employers in the Commonwealth and includes obligations to conduct a hazard assessment of job tasks, implement engineering and administrative controls to protect employees from COVID-19, and to conduct training. Employers should take note as other states may begin to follow Virginia's lead.

Retaliation

Employees who have continued to work in essential businesses are increasingly filing complaints regarding personal protective equipment, social distancing, and other health and safety measures during the pandemic. At the same time, many employers are faced with the reality of changing or reducing hours, cutting pay, or terminating employees due to the widespread decline in business activity.

The combination of increased health and safety complaints with a simultaneous escalation of employment actions that many employers must take due to business necessity has also lead to an increase in retaliation claims being filed under state and federal law.

The risk for employers under certain federal anti-retaliation laws is also increased because a lower causation standard — the "contributing factor" standard — may be applicable in some instances. Specifically, under certain federal anti-retaliation laws, a complaining party may establish that they have a viable claim that should be heard by proving, among other things, that a retaliatory motive played a "contributing factor" in the adverse employment decision.

In addition, under OSHA, complainants generally do not need to show the alleged violation they complained about actually took place. A viable retaliation claim requires only that they had, among other things, a "good faith" basis for making the allegation in the first instance, which is a low bar to clear.

Moreover, federal law is not the only source of protection for employees pursuing complaints related to health and safety practices. A majority of states recognize some form of a wrongful discharge claim under anti-retaliation statutes or under common law, which is based on court decisions rather than a statute or regulation.

Employees may be entitled to significant damages if they prove that an employer took adverse action against them because they raised a health and safety concern, and the remedies vary from state to state.

Labor relations

Whether an employer has a unionized or non-unionized workforce, employers should remain aware of their obligations under the National Labor Relations Act. One area where employers should be especially cautious is when employees engage in concerted activity.[13]

Examples of concerted activity include discussions of concerns of the terms and conditions of employment in light of the current pandemic, protesting working conditions, or organizing walkouts over safety conditions.

In all of these cases, employers should take care not to curtail employees' protected right to collective action. Additionally, if workers successfully organize or are already unionized, employers should be aware they may have a duty to bargain over safety conditions.

Given the highly fact-specific nature of these analyses, employers facing potential protected activity in their workplace should consult with counsel to determine how best to respond.

Notes

[1] 29 USC §§251-262 (1947).

[2] U.S. DOL, Field Assistance Bulletin (https://bit.ly/337CBV2) No. 2020-05, Aug. 24, 2020.

[3] *See, e.g.*, Shawn Matthew Clark, Robert C. Long, Bruce R. Millman, Daniel L. Thieme, and Michael J. Lotito, WARN Act Risks Loom for Employers Re-Hiring or Un-Furloughing Employees to Receive Paycheck Protection Program Funding (https://bit.ly/2G5qgIo), Littler ASAP (Apr. 19, 2020).

[4] Generally, the Paycheck Protection Program, which was established by the 2020 Coronavirus Aid, Relief, and Economic Security (CARES) Act, provides low-interest, forgivable loans to small businesses affected by the COVID-19 pandemic. *See* U.S. Small Business Administration, Paycheck Protection Program (https://bit.ly/36r0I91).

[5] *See* Robert Wilger and Francesca Lanpher, San Francisco Releases "Back to Work" Layoff Notice and Related Guidance (https://bit.ly/3jbY6JY), Littler ASAP (Aug. 11, 2020); Sebastian Chilco and Bruce Sarchet, New San Francisco Emergency Ordinance Requires Layoff Notices, Reemployment Rights and Reasonable Accommodation for Eligible Workers (https://bit.ly/343WjQZ), Littler Insight (July 7, 2020); Shiva Shirazi Davoudian and Alexandria Witte, Long Beach, California Follows Los Angeles and Enacts its Own Mandatory Right of Recall and Worker Retention Ordinances (https://bit.ly/2S3kWaX), Littler Insight (May 26, 2020); Shiva Shirazi Davoudian and Alexandria Witte, City of Los Angeles Enacts Mandatory Right to Recall and Worker Retention Ordinances (https://bit.ly/3kP4vuY), Littler Insight (May 7, 2020)

[6] *See* U.S. Bureau of Labor Statistics, Civilian unemployment rate (https://bit.ly/2GkleaU) (last visited Aug. 27, 2020)

[7] *See* EEOC, All Statutes (Charges filed with EEOC) FY 1997 - FY 2019 (https://bit.ly/2S5ixfP) (last visited Aug. 27, 2020)

[8] *See* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (https://bit.ly/3j9kVy8), updated June 17, 2020.

[9] Id. at Q. J.1.

[10] *See*, e.g., Alexandra Kelley, Report highlights emerging trends of Asian American discrimination amid coronavirus pandemic (https://bit.ly/3j5Zjm6), The Hill.com (Apr. 2, 2020); Alex Ellerbeck, Over 30 percent of Americans have witnessed COVID-19 bias against Asians, poll says, (https://nbcnews.to/30cA2zq) NBCnews.com (Apr. 28, 2020); and Yuhua Wang, Asians are stereotyped as 'competent but cold.' Here's how that increases backlash from the coronavirus pandemic, (https://wapo.st/36i770v) The Washington Post (Apr. 6, 2020).

[11] *See* EEOC, Message From EEOC Chair Janet Dhillon on National Origin and Race Discrimination During the COVID-19 Outbreak (https://bit.ly/339Tlv5) (last visited Aug. 23, 2020)

[12] Pub. L. 116-127 (Mar. 18, 2020).

[13] Section 7 of the NLRA, in pertinent part, guarantees employees the right "... to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ..." 29 U.S.C. § 157.

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