

Beware of the Top 5 Employment Law Risks Due to COVID-19

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As employers struggle to continue their operations under the “new normal” of the COVID-19 pandemic, we are already seeing a number of lawsuits stemming from the pandemic. The following is a summary of the key issues that are likely to cause most employers headaches and potential exposure in the near future:

1. Failure to Safeguard the Workplace

Nearly all employers know that they should maintain a safe and healthy workplace. However, this has been difficult for most employers because COVID-19 exposure in the workplace may be unavoidable even with impeccable safety protocols and precautions.

As a result, there have been numerous OSHA claims filed by employees regarding potential exposure to COVID-19. Furthermore, many states have made it easier for employees to bring workers’ compensation claims regarding COVID-19 exposure. Employees have also filed wrongful death lawsuits for allegedly intentional conduct that led to COVID-19 exposure.

In order to minimize the risk and exposure for such claims, employers should do all they can to keep their workers safe,

including following the CDC's guidelines for operating. Ensuring the safety of the workplace has also been extensively covered by our prior articles discussing employee training, workplace surveillance, and temperature-taking, among many others.

Furthermore, Foley's Labor and Employment attorneys have created a guidebook called *Best Practices for COVID-19 Preparedness*, which summarizes proposed actions to create a safe workplace. Our attorneys have also drafted COVID-19 Workplace Protocols, which provide an action plan in the event an employee is exposed or potentially exposed to COVID-19. Employers can reach out to their Foley contact to obtain these helpful resources.

While maintaining good safety practices and protocols regarding COVID-19 may not stop all potential claims, it will place the employer on the best footing to maintain a strong defense and reduce liability.

2. Failure to Properly Pay Employees

Most employers have good practices and policies in place to ensure employees are paid properly. However, COVID-19 has created some unique issues that could result in unexpected liability.

One key concern is the quick shift to teleworking for many employers. Employers should create protocols to ensure that teleworking employees are being provided any required meal/rest breaks, and that all hours worked by nonexempt staff are being properly recorded (i.e., tracking time for an employee

answering a call or responding to an email after normal business hours from home). In addition, at least in California and Illinois, an employer will likely need to reimburse employees for their mobile phones and any other expenses that are incurred while working from home (i.e., home internet).

Furthermore, for employers who have implemented a temperature-taking program, some state laws (i.e., California), are likely to require that the time spent waiting to get a temperature taken must be paid.

3. Failure to Accommodate High-Risk Workers

Most employers are aware of their obligations under the Americans with Disabilities Act (ADA) and other equivalent state laws. While a generalized fear of COVID-19 is not, in and of itself, a covered disability under the ADA, the ADA could apply to employees who claim to have underlying conditions that make them more susceptible to COVID-19. Employers are likely to be subject to liability if they refuse to provide reasonable accommodations to such employees, which could include additional personal protective equipment, teleworking (even though other employees are back at work), or a leave of absence.

4. Failure to Comply with the Families First Coronavirus Response Act (FFCRA)

The FFCRA has been in effect since April 1, 2019, but there have been numerous guidelines posted by the Department of Labor (DOL) clarifying the new leave requirements. As if keeping up

with all of the updates was not difficult enough, a federal court has stricken a portion of the DOL's final rule and expanded the benefits provided by the FFCRA. We have already seen a number of lawsuits alleging that employers have interfered with FFCRA rights or improperly retaliated against employees who have requested leave under the FFCRA. As the pandemic continues, employers must ensure they are up to date with all the nuances of this new law in order to limit liability from such suits.

5. Failure to Properly Conduct Layoffs/Reinstatements

While we hope that most of the layoffs/furloughs that initially occurred at the beginning of the pandemic have settled, we have already seen new lawsuits stemming from such layoffs. For instance, claims could arise from failure to provide proper notice under the federal Worker Adjustment and Retraining Notification (WARN) Act or similar state laws. Although notice may not be required for furloughs lasting less than six months, some state laws do not have a similar exception, and the effects of the pandemic have now lasted well over six months, such that the exception may no longer apply.

Notwithstanding any advance notice requirement under the WARN Act, if a group of employees with certain legally protected characteristics (i.e., race, sex, disability, etc.) have been disparately impacted by the layoff, there could be potential liability for discrimination. The same issue could exist if certain groups of employees are disparately impacted on any reinstatement decisions.

Lastly, some states, such as California, do not have a practical distinction between permanent layoffs and temporary furloughs, such that a furlough could be treated like a termination and any final wages with all accrued vacation or paid time off would need to be paid out upon termination.

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