



Potential Employer Liability Stemming from the COVID-19 Pandemic

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In March 2020, the COVID-19 pandemic forced many employers to adjust to remote work to comply with their state's stay-at-home orders. Long after those orders subsided, work-from-home has persisted as a partial or total response to pandemic risks. As companies continue reopening for in-person operations, businesses gearing up to return to work face a minefield of potential liabilities relating to discrimination, leave, workers compensation and retaliation, among others.

Employment litigation stemming from the pandemic gained steam in 2021, according to a COVID-19 Employment Litigation Tracker maintained by the law firm Fisher Phillips. In the first eight months of this year, an average of 253 employment suits per month were filed, compared with 159 per month in the last eight months of 2020. Case filings tend to ebb and flow with the disease itself, and accelerated this past summer as the Delta variant raged. As of September of this year, more than three-quarters of suits filed were clustered in three issue types, according to the tracker: cases focused on remote leave/work-from-home issues (28%), cases alleging employment discrimination (26%) and retaliation/whistleblower allegations (24%). Through November 23 of this year, the tracker shows more than 3,900 COVID-related employee suits filed to date. One positive note for employers is that only 3% of cases filed in the first eight months of 2021 are class actions.

Below we outline these top liability considerations:

Leave requirements. Prior to the pandemic, the federal Family and Medical Leave Act required employers to offer unpaid family leave of up to 12 weeks annually. The pandemic also prompted some states to expand their family leave laws. A number of jurisdictions also required employers to offer paid leave to employees

impacted by COVID-19, while on a national level, the Families First Coronavirus Response Act (FFCRA) mandated leave for certain COVID-19-related reasons. Paid leave laws and associated regulations continue to evolve, requiring employers to monitor the evolving regulations and ensure compliance with all applicable requirements, and provide a clear basis for employee claims related to COVID-19.

Discrimination claims. Federal, state and local laws protect employees from discrimination both generally and during the COVID-19 pandemic. Under these laws, employers must take steps to prevent discrimination and harassment against individuals due to age, race, color, religion, sex and disability.

The American with Disabilities Act (ADA) provides protections to employees who may have physical, mental or emotional disabilities, but who are otherwise qualified to perform the essential functions of their jobs, and appears to be the leading source of discrimination related to COVID-19 claims. Claims of this sort usually take the form of an employee contracting COVID-19 and/or seeking a "reasonable accommodation" when the employee's reaction to COVID-19 is severe or if it complicates or exacerbates one or more of the employee's other health conditions/disabilities. However, laws prohibiting workplace discrimination based on religion and pregnancy also will likely see an increase in



claims. For example, a company that terminates or takes other action against an employee who refuses the vaccine for religious or disability related reasons may face a discrimination claim.

Retaliation claims. Almost all states and the federal government recognize some form of a wrongful discharge claim under anti-retaliation statutes or under common law. Employers may be forced to pay damages if an employee proves that the employer retaliated after he or she raised a health and safety concern. State law, however, is not the only source of protection for employees pursuing complaints related to health and safety practices. At the federal level, Section 11(c) of the Occupational Safety & Health Act also prohibits employers from retaliating against employees because they report unsafe and unhealthful working conditions, including complaints of such conditions during the pandemic.

Employers facing liability for the aforementioned claims should review their insurance programs for potential coverage:

Workers compensation and disability claims. Workers compensation coverage may be triggered by workplace exposure to COVID-19. This may provide some protection for employers concerned about potential liability and damages, as workers compensation often is considered the exclusive remedy for injuries and illnesses that arise out of work, avoiding employee personal injury and damage claims. That protection is not absolute in all jurisdictions or situations, however.

Workers compensation insurance policies generally cover occupational diseases and injuries, i.e., those that: 1) are due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation, or employment; and 2) are not an ordinary disease to which the general public is equally exposed outside of employment. There are, however, instances in which “ordinary diseases” may be covered if it is possible to establish a direct connection between the workplace and the circumstances through which the disease was contracted. For example, if an illness is triggered by an event at the workplace and directly flows from the work that is being performed, it may be argued that the resulting disease has been the result of an accident causing bodily injury. The coronavirus, spread by respiratory

droplets and smaller aerosol particles, is so highly contagious that even vaccinated health care workers are wearing full isolation gear while treating those infected. If it is determined that an employee contracted the virus at work, it is quite likely that workers’ compensation insurance would respond to the injury. But establishing that the disease was in fact contracted at work can be challenging, given the ubiquity of infection threats.

Workers compensation laws vary considerably by state. To date, about 11 states have passed workers compensation law pertaining directly to COVID-19 infection; many other bills remain in committee or have failed. As of May 2021, the National Council on Compensation Insurance reported that COVID-19 workers compensation claims to date were relatively modest, with a bit more than 45,000 claims and \$260 million of incurred losses stemming from COVID-19 to that point in the 38 states where the NCCI is the licensed rating organization.

Employment practices liability insurance. EPLI insurance provides coverage, including defense and indemnity, for claims alleging wrongful employment-related acts or practices. Claims typically covered under an EPLI policy include wrongful termination, breach of employment agreement, retaliation claims, wrongful deprivation of career opportunity, and employment-related infliction of emotional distress. Whether an employer can recover under an EPLI policy in response will depend on the specific wording of the policy, the allegations in the underlying complaint, and the damages sought.

D&O, CGL and other potential insurance. Depending on the claimant alleging harm or wrongdoing and the allegations set forth in the claim, other types of insurance may provide additional coverage for COVID-19-related employment losses. Claims by individuals other than those personally sickened— such as shareholders in companies facing stock price drops or financial loss as a result of the pandemic— may be covered under a company’s directors & officers (D&O) insurance program. Commercial general liability (CGL) insurance may provide coverage for third party claims alleging bodily injury not otherwise covered by workers compensation insurance. Employers faced with claims arising



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out COVID-19 should examine all available policies, speak with their insurance brokers, and contact an insurance professional if questions arise concerning the scope of coverage for COVID-19 related losses and claims. **R**

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