Workforce Management and COVID-19: A Discussion of Critical Next Steps in the Pandemic Response

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Introduction

- The COVID-19 pandemic hit employers hard and fast with little time for planning or preparation.
- As states begin the process for what is hoped to be an eventual return to some sort of “new” normal, employers must be ready to recognize the risks, mitigate those risks, and be prepared to defend the actions and decisions they made in response to the COVID-19 pandemic.
- We anticipate employers will be faced with several types of employment lawsuits stemming from the COVID-19 pandemic.
- We’re going to share our thoughts on the coming wave of litigation and what you can do to help mitigate business risk.
What Are We Going To Cover?

- Wage and Hour Compliance During and After the Pandemic
- New Employee Leave Laws and Liabilities
- The Surge in Safety Obligations, Concerns and Claims
- Mass Layoff Obligations
- Protecting Against Disability Claims
- Whistleblower Claims are on the Rise
- Application of the National Labor Relations Act
- Don’t Forget State Laws
COVID-19 Response

- **Phase 1: Reacting to the Problem**
  - *Advanced Notice:* Many employers have changed schedules from full-time to part-time, converted salaried employees to hourly, or reduced pay or salaries. Some jurisdictions require a certain amount of advanced warning of such changes, often in writing.
  - *Payroll Interruption:* Businesses facing a sudden and unanticipated interruption in their cash flow have found themselves struggling to meet payroll. Failure to pay all earned wages, of course, or to pay them timely, can lead very quickly to litigation or agency enforcement action.
  - *Accrued Unused Time Off:* Employers must be mindful of statutory or contractual obligations to pay out accrued paid time off and final earned wages, and to do so timely in accordance with any state jurisdictional requirements. In addition, furloughs for exempt employees that do not coincide with a full workweek can lead to claims under the Fair Labor Standard’s Act’s salary basis regulations.
Phase 1: Reaction, contd.

- **Show-Up or Reporting Time Pay:** When workers report for their scheduled shift but there is no work available for them, there may be an obligation to provide reporting time or show-up pay.

- **Incentive Compensation Plans:** Employers should consider whether they have bonus or incentive plans or programs that may in some jurisdictions present a risk of claims for at least a pro rata payout from employees who were on track for a bonus and find themselves without a job.
Phase 2: Preserving Operations

- Remote Work: Businesses trying to remain in operation in an era of social distancing and stay-at-home orders have seen many employees working from home as a solution, at least in the short run.
  - Work-from-home arrangements for businesses that had not previously developed and rolled out well thought-out policies and practices create a number of different concerns that could lead to wage and hour claims.

- For example, timekeeping systems may be ill-equipped to capture all working time in remote work situations, inviting claims for off-the-clock work. Likewise, showing compliance with meal and rest period requirements may be challenging. And in some jurisdictions, claims may arise for certain expenses such as computer and telephone equipment, internet and telephone service, electricity, insurance, and even conceivably a portion of rent or mortgage obligations.
Phase 2: Preserving Operations, contd.

- Communications with Furloughed Workers: Where businesses have furloughed salaried exempt employees, it is important to resist the temptation to contact those workers from time to time with work-related questions, as at some point such contacts may be beyond *de minimis* and trigger an entitlement to a full workweek’s salary.

- Modifying Job Responsibilities: Consider whether the affected exempt employees will still meet the criteria for exempt status.
  - For example, under the altered working structure, do supervisors still oversee two or more full-time-equivalent direct reports? Do exempt employees still have an exempt primary duty? Or, in California, do they still spend more than half of their time engaged in exempt tasks?
Phase 3: Back to Business

- **Employee Scanning Processes:** As businesses plan for restoring operations, many are contemplating temperature checks, additional pre-shift sanitizing, or other additions to the daily check-in procedure. These procedures may lead to claims that this activity is compensable work.

- **Advanced Notice:** When employers start to increase wage rates and schedules to pre-pandemic levels, the same notice requirements mentioned above for compensation reductions may apply. And in some industries and localities, predictive scheduling laws may apply.

- **Temporary Labor:** Some businesses may find it tempting to look to temporary staffing agencies, independent contractors, or other non-employee models for flexibility to hedge against uncertain demand and a potential second wave of the virus. Doing so, however, may lead to joint employment or worker classification claims.
Wage and Hour: What it all Means?

- COVID-19 presents one of the most serious challenges in the past several decades.
- Employers need to remain aware of risks created by decisions made over the past few weeks and months.
- For companies already under stress, wage and hour class litigation is likely the last business challenge you need to fact. Action items?
Employer Response to New Leave Laws May Create Liability

- As the pandemic exploded, Congress passed the Families First Coronavirus Response Act, which imposed the first-ever federal paid sick time mandate. Many states followed suit.

- Employers need to have done a proper job of determining eligibility of their workers and provide them paid leave properly. If they deny time off to eligible workers or miscalculate their pay, they will face suits.

- Employers may also see suits alleging they retaliated against workers who requested leave.
  - Example: Former Eastern Airlines director recently alleged the company fired her days after she asked for leave to care for her 11-year-old son.
Leave claims, cont.

- Robtoy v. The Kroger Co. dba Peyton’s Northern Distribution Center
  - Although it’s not a covered employer under the FFCRA, a Kroger distribution center worker argues that the grocery chain was estopped from denying paid leave for her COVID-19 self-isolation because the company had represented that it amended its own emergency leave policy to align with the protections afforded under the FFCRA. Kroger also purportedly revised its attendance policy so that points assessed due to COVID-19 symptoms would be removed once medical documentation was provided. Yet the worker claims she was fired due to attendance points she accumulated during her 14-day quarantine (in keeping with her physician’s instructions to self-isolate). Her suit alleges that Kroger never initiated a discussion with her about taking leave under the statute, and interfered with her protected rights under the FMLA and FFCRA.

- Action items?
OSHA Reporting Requirements Have Changed

- The Occupational Safety and Health Administration has changed its policy for when employers need to record coronavirus cases as being work-related, the agency announced Tuesday.

- Under the new policy, employers who are required to keep OSHA injury and illness logs must determine if workers’ COVID-19 cases were job-related. Previously, OSHA said only health-care employers, corrections facilities, and emergency-response providers were required to make that determination.

- The agency acknowledged the determination may be difficult to make.

  - “Given the nature of the disease and community spread, however, in many instances it remains difficult to determine whether a coronavirus illness is work-related, especially when an employee has experienced potential exposure both in and out of the workplace,” OSHA said.
Know Your Stuff: Common Safety Questions

- **What if an employee does not self-report, but the employer notices the employee exhibiting symptoms of COVID-19?**
  - The employee need not self-report for the employer to send an employee exhibiting COVID-19 symptoms home. As discussed, employers should send the employee home and take all appropriate steps to inform other employees of potential exposure without disclosing the identity of the affected employee.

- **Can employers ask employees if they have symptoms of COVID-19?**
  - The EEOC has said that employers subject to the ADA are permitted to ask employees if they are experiencing symptoms associated with COVID-19 consistent with the ADA’s requirements. In a recent webinar, the EEOC indicated that different considerations may apply in cases involving employees who are teleworking and not physically interacting with coworkers.
Common Safety Questions, contd.

- **Can employers require employees who are “higher-risk” to stay home or direct them to leave the workplace once they have reported to work?**
  - Generally no, this is not permissible under the ADA and other equal employment opportunity (EEO) laws absent a directive from the CDC or state/local public health authorities that employers should take such measures. This is a complex issue and may require an analysis of the particular facts. We suggest consulting legal counsel before taking any act that requires an employee to leave the workplace due to a high-risk status.

- **Can employers conduct body temperature screenings of employees who report to worksites?**
  - At this time, employers may conduct body temperature screenings of employees before they enter the workplace. Employers should develop appropriate protocols for conducting the screening and retaining any confidential medical information consistent with the ADA…
Employers may also ask employees to temperature test prior to work every day and to self-certify that they are fever-free before entering the workplace.

Records of such temperature checks should be treated as a confidential medical record and handled accordingly.

In certain circumstances, wage and hour laws may also require employers to pay employees for “waiting time” spent to be tested, even if the employee is sent home due to fever.

**Can employers require employees to report personal travel?**

The EEOC has advised that an employer may inquire if an employee has traveled to any locations identified by the CDC as a Level 3 risk area. Additionally, employers may ask employees if they have traveled to any areas where state or local public health officials recommend that visitors self-quarantine after visiting. As of May 11, there is a Level 3 Travel Alert on all global destinations. The CDC has also put a Level 3 warning on all cruise travel.
Can employees refuse to wear masks at work?

Workers who don’t want to wear mandatory face coverings during the pandemic have scant legal options to avoid discipline for failing to comply. That type of mandatory safety measure is a term of employment that can justify a termination if it’s broken. Workers might be able to avoid mandatory face-covering requirements in limited circumstances, such as if they have a medical condition or a religious reason that prevents wearing a mask.

BONUS QUESTION: What’s the right way to social distance in an elevator?
Safety Actions Will Surge

- As states begin to allow businesses to reopen, several state and local governmental bodies have developed guidelines and protocols that all employers are required to follow, with many additional requirements for some industry-specific businesses.

- It is very likely employers will see an increase in state and local government enforcement actions and OSHA enforcement actions in situations where the employer is not following the numerous required safety guidelines and protocols that are applicable to its business and/or in situations where an employee makes a complaint alleging the employer is not doing enough to protect employee safety.

- Likewise, in situations where an employee contracts COVID-19 and believes he/she was exposed to the virus at work, employers likely will be faced with workers' compensation claims, and perhaps even deliberate intent type claims in some situations.
Safety Actions, cont.

- **King v. Trader Joe’s East, Inc.**
  - A Trader Joe’s employee created a private Facebook group for employees to discuss concerns about the grocer’s lack of safety measures for employees. When a manager confronted him about the group, the employee requested that the store provide additional sanitizers, cleaning products, gloves, and masks. The manager fired him, and he filed suit alleging wrongful discharge in violation of public policy.

- **Norris v. Schoppenhorst-Underwood Brooks Funeral Home**
  - The president of a funeral home in Kentucky alleged that after the governor’s March 11 order limiting social gatherings to less than 50 people, she called a staff meeting to develop a strategy to comply with the directive and other measures to slow the spread of COVID-19, such as more frequent cleaning. The owner of the funeral home did not want to implement any such measures and, instead, fired the president, she alleged. She filed suit seeking reinstatement and backpay.
Safety Actions, contd.

- **Estate of Evans v. Walmart, Inc., and J2MEvergreen, LLC**
  
  The estate of a former Walmart employee who died from complications of COVID-19 has sued the retail giant in an Illinois state court alleging that management knew that several employees at the Evergreen Park, Illinois, store were symptomatic but failed to take appropriate action to keep workers and customers safe. Before the employee died on March 25, several workers had symptoms, and another worker purportedly died four days later due to COVID-19 complications. The complaint contends that both workers contracted the deadly virus at work.

- Action items?
Mass Layoffs and Implications for Notice and Bias Suits

- We anticipate employers will be faced with disparate treatment discrimination and retaliation lawsuits in regard to any layoff, furlough, or separation decisions made due to the COVID-19 pandemic should an individual feel that he/she was selected for layoff or separation based upon a protected characteristic and/or based upon some type of protected complaint made in the workplace.

- Likewise, employers should anticipate being faced with disparate impact discrimination lawsuits if the adverse employment decision disproportionately impacted a protected class, even if the employer did not intentionally discriminate.

- Action items?
As employers transition back to in-person work, they may find some workers reluctant to return. If those workers have conditions that make them susceptible to the coronavirus, employers may invite ADA suits by pushing them to report.

The ADA gives workers a right to request a “reasonable accommodation” that allows them to do their job, and lets workers sue if they're unfairly denied one. For example, a worker with an underlying condition may ask that they be allowed to continue to work remotely even when the majority of the workforce comes back full-time. If the business refuses, the worker may sue.

Businesses that transitioned their operations online at the height of the pandemic may have a tough time refusing such requests going forward.
How to Accommodate At Risk Workers

- The EEOC has updated its guidance on COVID-19 and the ADA, clarifying how to accommodate individuals who are at high risk for severe illness from the coronavirus.

- If an employee with a disability who is at high risk requests an accommodation, the EEOC noted that the employer may discuss with the employee:
  - How the disability creates a limitation. The employer may request medical documentation of a disability that isn't obvious, including health records or prescriptions if doctors are difficult to reach.
  - How the requested accommodation will effectively address the limitation.
  - Whether another accommodation could solve the issue.
  - How the proposed accommodation will enable the employee to continue performing the job's essential functions.
How to Accommodate, contd.

- In the event that an employer is considering keeping an employee out of the workplace because the employee is part of the higher-risk group, the standard for doing so is high and so are the risks:
  - The “direct-threat standard.” Under this standard, an employee must pose a direct threat to himself or herself or to others to be excluded from the worksite. The EEOC defines direct threat in its guidance on pandemics and the ADA as “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.”
  - An individualized assessment based on reasonable medical judgment about the employee’s disability—not the disability in general—using the most current medical knowledge and the best available objective evidence.
According to the U.S. Centers for Disease Control and Prevention (CDC), employees with conditions that put them at a higher risk for severe illness from the coronavirus include individuals who are immunocompromised as well as people with:

- Chronic kidney disease who are undergoing dialysis
- Chronic lung disease
- Diabetes
- Liver disease
- Moderate to severe asthma
- Severe obesity (body mass index of 40 or higher)
What if the Employee Does Not Request an Accommodation?

- Employers should not ask an employee if he or she has an underlying medical condition unless and until the employee puts the employer on notice of the condition.
  - However, once an employer is on notice of the employee’s medical condition, they should immediately engage in the interactive process.
  - Certain state and local laws hold employers to a higher standard in this regard.
- NOTE: Requests for accommodation also may be made by third parties, such as doctors, spouses or friends.
- Some employees are requesting accommodations to lower their risk of contracting COVID-19 and exposing a high-risk individual they live with or care for. Employers are generally not required by law to honor such an accommodation request, but many are attempting to do so when practicable.
Some workers are refusing to come to work out of fear of contracting the coronavirus.

Employers must weigh the employees’ legal rights and understandable health concerns with the organizations’ business needs.

We’ve already talked about the ADA and how it might require employers to accommodate workers from returning to work. But, there are two more exceptions we need to discuss: OSHA and the NLRA.
The OSHA Exception

- Employees can refuse to work if they reasonably believe they are in imminent danger. They must have a reasonable belief that there is a threat of death or serious physical harm likely to occur immediately or within a short period for this protection to apply.

- An employee can refuse to come to work if:
  - The employee has a specific fear of infection that is based on fact—not just a generalized fear of contracting COVID-19 infection in the workplace.
  - The employer cannot address the employee's specific fear in a manner designed to ensure a safe working environment.
The NLRA Exception

- The National Labor Relations Act (NLRA) grants employees at unionized and nonunionized employers the right to join together to engage in protected concerted activity. Employees who assert such rights, including by joining together to refuse to work in unsafe conditions, are generally protected from discipline.

- Here’s how the CWA is advising its members:

Q. My employer refuses to close down even though a coworker tested positive for COVID-19. We don’t feel safe. Can we walk out if the company isn’t listening to us?

- Under some circumstances, yes! NLRA covered workers have the legally protected right to walk out in protest of critically unsafe working conditions. In Detroit, bus drivers refused to drive until the buses were properly cleaned. Their refusal of working in unsafe conditions was protected concerted activity. They are now back to work.

In an example prior to the Coronavirus, a group of employees in Omaha, NE walked off the production line to protest the speed of the line and other working conditions, and thereafter met with the plant manager. An NLRB administrative law judge found that the Employer had unlawfully discharged the employees in retaliation for engaging in concerted protected activity and ordered the Employer to reinstate the employees with full back pay and benefits.
Whistleblower Claims

- There is a growing trend of employees accusing employers of failing to take measures to protect employees from exposure to COVID-19 and allegedly retaliating against those employees who complain about the lack of safety measures.

- **Reggio v. Tekin & Associates, LLC**
  
  The former general counsel of a real estate investment firm has sued the company alleging that it fired her for refusing to violate mandatory shelter-in-place orders in her Texas county—one of the hardest hit by the pandemic—to travel to her worksite in another county. The plaintiff alleges she told the company president that she was able to perform all her duties from home and that she did not want to violate the law or lose her job, but that apparently didn’t matter. She is asking for more than $1 million for her alleged wrongful discharge against public policy.
Whistleblower Claims, contd.

- Whistleblower and retaliation claims can always be challenging for employers, but the COVID-19 crisis presents additional difficulties. What can employers do?
  - The most obvious is not to fire employees who raise safety concerns.
  - Employers should also review their reporting processes and to ensure that supervisors know to take all complaints seriously and document them.
  - The need for clear reporting and documenting processes is especially important given the high volume of information, and misinformation, about COVID-19 that employees may be receiving.
Increased Union Activity and Organizing

- As businesses face daily new challenges in the wake of the COVID-19 pandemic, many are now confronting a new challenge: demands from their own employees for more pay and a safer work environment. This will lead to aggressive, union organizing efforts.
  
  - AFL-CIO President Richard Trumka: “As we face the greatest worker safety challenge and crisis of our lifetime, the U.S. Department of Labor, the Occupational Safety and Health Administration and Mine Safety and Health Administration are missing in action,” according to the union president.”
  
- On May 18, 2020, the AFL-CIO sue OSHA to compel the agency to issue an emergency temporary standard to protect workers from the novel coronavirus.
  
  - The emergency petition, filed in the U.S. Court of Appeals for the District of Columbia Circuit, outlines how thousands of workers have been infected on the job through exposure to ill co-workers, customers, patients, and other members of the public who had not been screened before entering a workplace.
  
- Action items?
EEOC Update

- Right-to-sue letters on hold. The EEOC has temporarily suspended the issuance of charge closure documents unless a charging party requests them. This means that charging parties will not be faced with the statutory time limit for filing litigation after the EEOC’s closure of a charge investigation—an obvious concern given the COVID-19 pandemic.

States Take the Lead – Know Your Jurisdiction!

- **New Jersey**: Governor Phil Murphy on April 14 signed S. 2374, which expands state Family Leave Act protections to allow employees forced to take time off to care for a family member during the COVID-19 outbreak with up to 12 weeks of unpaid family leave in a 24-month period without losing their jobs.

- **New York**: Governor Andrew Cuomo on April 12 issued a temporary executive order mandating that employers must provide essential workers with cloth or surgical masks free of charge to wear when directly interacting with the public. The governor also said he will issue an executive order expanding the eligibility of workers who may conduct antibody tests, to help ensure that as many state residents as possible have access to antibody testing.

- **Washington**: Effective April 8, employers in Seattle may not require a doctor’s note or healthcare provider verification for use of paid sick time during the public health emergency, under a temporary emergency rule adopted by the city’s Office of Labor Standards.
This month, Cali. Gov. Gavin Newsom issued an executive order that is likely to dramatically expand the number of Calif. employees who can receive COVID-19-related workers’ compensation benefits.

Under the order, an employee who performs work at the employer’s workplace on or after March 19, 2020, then tests positive for, or is diagnosed with, COVID-19 within 14 days of working in the workplace, will benefit from a presumption that the employee contracted COVID-19 in the workplace and is therefore eligible for workers’ compensation benefits.

The employer can rebut this presumption and avoid coverage if it establishes that the employee contracted COVID-19 outside the workplace—a very difficult burden for employers to meet.

What is the takeaway here, especially for employers that don’t have California operations?
Legislative Update: Will Businesses Be Shielded from COVID-19 Lawsuits?

- As more businesses make plans to reopen, lawmakers are split on whether to hold employers responsible for shielding workers from COVID-19.

  - Some lawmakers want to protect employers from coronavirus-related lawsuits, but others are concerned such protection would lead to employers not taking proper steps to safeguard workers.

  - Republican members of Congress and business groups that want to provide legal safe harbors for employers have argued that immunity from coronavirus lawsuits is necessary to protect companies that plan to reopen soon, as well as businesses that have remained open during the pandemic. Although some Democrats oppose blanket protections for businesses, they may agree to limited immunity for employers who take certain steps to safeguard their workers.
Summary of Action Items and Key Takeaways

- Form a pandemic response team
- Prepare your workplace for the next phase of the pandemic
- Update your policies and procedures
- Train your supervisors and employees
- Audit your practices
- Prepare for anticipated litigation
Conclusion

- This is a complex and ever-changing environment.
- It is important for employers to understand employment litigation trends in order to best plan to mitigate problems. It is critical to make sure the right policies and procedures are in place (updated accommodation procedures, compliant wage and hour protocols, a fully vetted layoff process, a robust return to work playbook, etc.).
- Although there is no way to completely eliminate the risk of litigation, complying with best practices now will certainly pay off in the long run.
Questions?
Thank you

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