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EMPLOYMENT LAW ALERT | NIXON PEABODY LLP

APRIL 29, 2020

How employers can prepare for expected waves of coronavirus (COVID-19) related litigation

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The COVID-19 pandemic upended the American workplace with little advance warning. Suddenly, employers had to make difficult choices under severe economic pressure about furloughing and laying off employees. Congress simultaneously provided financial relief for some employers through the CARES Act, and created significant compliance challenges by passing complicated new laws such as the Families First Coronavirus Relief Act ("FFCRA"). For millions of employees, the pandemic brought reduced wages or unemployment, workplace exposure to a dangerous virus, and choices between their job and taking care of their families. The most fortunate have jobs to return to and their health. Others have suffered lost jobs and experienced reduced income. Still others have suffered serious illness or worse.

Some employees—acting individually or in class and collective actions—will seek to hold their employers responsible for the bad things that happened to them because of the pandemic. Some jurisdictions have given potential plaintiffs more time to sue by extending statutes of limitation. Some enforcement agencies are delaying issuing the permission claimants need to file a suit in court. This all adds up to a perfect storm, which will unleash waves of litigation before, during, and after the economy fully reopens. Now is the time to prepare.

Wrongful death and personal injury claims

It is inevitable that representatives of deceased employees or employees who have had COVID-19 and recovered will sue employers claiming that the employers' negligence or intentional wrongdoing caused them to contract coronavirus. The risk of these suits will escalate as employers reopen and employees return from remote working or furlough. The importance of taking steps to protect workers from infection cannot be overstated, and we will address the risk of liability under the federal Occupational Safety and Health Act, and similar state laws, in an upcoming alert. Here, we focus on a critical defense all employers should consider asserting in any tort claim arising from employee infection.

The defense—commonly referred to as "exclusivity"—arises under state workers' compensation statutes. Such statutes establish a scheme providing for compensation of workers' lost wages, medical expenses, and other damages arising from workplace injuries and occupational diseases. An

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injured or sick worker need not prove employer negligence or intentional wrongdoing to recover benefits. Generally speaking, the worker need prove only that the worker's injury or illness arose from and is sufficiently connected to the employment. In return, state statutes typically make the workers' compensation claim the exclusive avenue for the worker to seek redress for the alleged workplace injury or illness. This means that courts should dismiss claims under state tort law seeking damages based upon contraction of COVID-19 at work. And employers can rely on workers' compensation insurance to protect them.

Showing the requisite connection to the workplace will in many cases prove difficult or impossible. Yet in other cases, such as those involving workers with demonstrable close contact with one or more infected persons in the workplace, the requisite showing will be easier. We expect these cases to be highly fact intensive and in some cases also dependent upon the occupation involved. Some states or workers' compensation insurers have already, as a matter of policy, deemed health care providers or other workers with unavoidable risk of exposure to be presumptively entitled to benefits. For example, California's largest workers' compensation insurer has announced that it will relieve "essential workers" from the obligation to prove that they contracted coronavirus at work. Rhode Island's largest workers' compensation insurer has taken similar action.

Employers and their insurers will want to consider raising the exclusivity defense for several reasons. First, workers' compensation insurance (except for self-insured employers) covers any benefits awarded under the workers' compensation law. Second, the benefits available are subject to limits that don't exist under state tort law. Third, some types of damages such as punitive damages will be completely unavailable in a claim covered by workers' compensation law.

Keep in mind that the workers' compensation exclusivity defense only applies to claims asserted by employees—not independent contractors or other third parties (e.g., delivery people or consultants) who claim that they contracted the virus while in your workplace. Causation will be difficult but not impossible to prove and the litigation will not be on the insurer's dime. Thus, as employers reopen their businesses, they must plan to protect the safety of such third-party visitors.

In some states, employees can avoid the exclusivity defense by proving that the employer was grossly negligent. Gross negligence is hard to prove. And states define "gross negligence" in different ways; the required level of wrongdoing varies from state to state. How gross negligence claims will fare in the COVID-19 context is unclear. Following local, state, and federal guidelines regarding reopening of business won't immunize you against a gross negligence or other type of claim, but such compliance will be powerful medicine in litigation.

FFCRA lawsuits

The FFCRA, which includes the Emergency Family and Medical Leave Expansion Act ("EFMLEA") and the Emergency Paid Sick Leave Act ("EPSLA"), imposes on employers with 500 or fewer employees the requirement to give employees expanded paid family and medical leave ("EFML") and emergency paid sick leave ("EPSL"). Although the FFCRA does not apply to employers with more than 500 employees, some local authorities have passed emergency legislation that for practical purposes expands the FFCRA coverage to include employers other than those identified in the federal legislation. For example, the Cities of San Francisco and San Jose have enacted laws requiring employers with more than 500 employees to provide to their employees benefits similar to the FFCRA. Similarly, the City of Los Angeles requires employers that have either 500 or more employees in the City or 2,000 or more employees nationally to provide supplemental paid sick leave of up to two weeks (80 hours). Large employers also should be aware that FFCRA

requirements might be triggered if they institute furloughs or layoffs that bring their employee counts down to 500 or fewer.

The EFMLEA expands the FMLA to require employers to give employees 12 weeks of paid EFML (10 of which need to be paid) if the employee needs to provide care for a child under 18 due to school or care facility closures, or because a care provider is unavailable. Unlike regular Family and Medical Leave Act ("FMLA") leave, to be eligible, employees need only to have worked for at least 30 of the last 60 days. Generally, employees on EFML will be entitled to two-thirds of their regular rate of pay, with a daily cap of $200 per day, or $10,000 total.

The EPSLA requires employers to provide two weeks of paid sick leave to employees at one of two rates—either $511 per day for up to ten days if they need leave for their own care, or two-thirds of their regular rate up to $200 per day for up to ten days if they need leave to care for someone else. EPSL must be made available immediately, regardless of how long the employee has worked for the employer.

The FFCRA expressly incorporates for its enforcement existing FMLA and Fair Labor Standards Act ("FLSA") remedies provisions. This means that an employee who is denied EFML or not paid during the leave per the law will have a cause of action to recover damages (lost wages, salary, benefits, and other compensation) or actual monetary losses resulting from the denial of leave (e.g., the costs of child care), with interest. If the employee is successful, the employee will also be entitled to liquidated damages in an amount equal to the damages plus interest (essentially doubling the lost compensation or costs incurred). The employer will also be liable for the employee's attorneys' fees and costs, reasonable expert witness fees, and other reasonable costs of the litigation. Although liquidated damages can be avoided if the employer acted in good faith and had a reasonable ground for believing it was not violating the law, the employer has the burden of proof on this defense. As with ordinary FMLA claims, an EFML claim may be brought as a class action.

Similarly, the EPSLA provides that the enforcement and remedy provisions of the FLSA will apply to employers who fail to comply with the EPSLA paid sick leave requirements or who terminate or take other action against employees asserting rights under the EPSLA. The EPSLA treats denial of paid sick leave wages as a denial of minimum wages for FLSA purposes. Thus, employees denied their sick leave pay will have a cause of action to recover the sick leave pay, liquidated damages in an amount equal to the sick leave pay (essentially doubling the damages), interest, and attorneys' fees. FLSA collective actions (like class actions but even easier to maintain) enable employees to bring claims not only on their own behalf but also on behalf of similarly situated employees.

An employer's liability for monetary losses suffered by an employee wrongfully denied EPSL or EFML may seem deceptively small because of the daily and per employee aggregate caps set by FFCRA. (Combining EFML and EPSL, the maximum amount an employer might pay in leave benefits to an employee is $15,110.) But the class and collective action vehicles, plus the potential for attorney fees and liquidated damages awards, should make these suits attractive to plaintiffs' lawyers and very costly for employers who fail to comply with the FFCRA. Indeed, well-funded and prominent plaintiffs' firms have already filed COVID-19 lawsuits and are advertising for class representatives.

Some simple math illustrates that a class or collective action as small as 33 employees could subject an employer to a million dollars of damages liability [$15,110 * 33 employees * 2 (double damages)].

That figure does not include an award to plaintiffs of attorneys' fees and other costs that collectively could easily tally another $500,000.

Given the potential exposure, employers subject to the FFCRA who wrongfully failed to provide employees with the required EPSL or EPFML when absent for qualifying reasons should consider a make whole approach to avoid litigation—particularly class or collective actions. Some employers will have access to Payroll Protection Program ("PPP") money, which, if spent paying employees money due under the FFCRA, and spent during the eight-week period following the loan, might be subject to the PPP loan forgiveness provisions. At the very least, these payments would decrease the amount recoverable in any lawsuit, and decrease the incentive for the lawsuit to be brought in the first place.

Federal and state discrimination claims

Federal and similar state laws protect employees from discrimination because of protected class characteristics. For understandable reasons, many employers moved quickly to select employees for layoff or furlough. Many employers skipped the best practice selection process documentation, and the discrimination testing typically done in a reduction in force context. With assistance of counsel, employers can conduct a review now for litigation exposure purposes, in the form of a protected attorney-client communication. This may be especially important for larger employers whose employees did not receive EPSL or EFML.

When it comes to recalling employees, employers should be careful to follow best practices. Employees left out of a recall can claim discrimination either on a disparate treatment theory (intentional discrimination) or a disparate impact theory (a neutral policy that has a discriminatory impact on a protected class). The economic imperatives of coronavirus-related layoffs or furloughs provide an employer with some protection, but the question remains, as it does in any discrimination case, "why me."

Unpaid overtime and related claims

Never before have so many employees—especially employees entitled to overtime compensation under the FLSA (weekly overtime) or state law (weekly or in some places daily overtime)—worked from home. Employees normally report to work and punch in and out or otherwise record their working time at the workplace. Now, many employees instead report to their telework work station. But employers' obligations to pay overtime to those employees when they work overtime is not overridden by the pandemic. Nor does the pandemic obviate the records keeping requirements that the FLSA and state laws impose.

Employers may face individual suits or collective actions for unpaid overtime by employees claiming that while working at home they worked more than the weekly or hourly thresholds. If an employer fails to keep adequate records of time worked on a daily and weekly basis, the courts will accept the employee's testimony about how much they worked as presumptively establishing the hours worked. Because of the liquidated damages, attorneys' fees, and interest available to employees, these cases have significant appeal to plaintiffs' lawyers.

Employers who haven't adopted methodologies to track accurately hours worked at home by non-exempt employees should do so immediately. It is worth fixing the problem belatedly because the relatively short statute of limitations often applicable (e.g., two years for FLSA claims not involving willful violations) will serve to reduce the potential claim as time passes after the employer installs the fix.

Privacy violations

Employers will have greater leeway than in the past to inquire about employees' health and to require testing of employees in the workplace. The federal Equal Employment Opportunity Commission has already issued guidance that permits employers to take the temperatures of employees who come to work and to require testing to determine whether employees have the coronavirus. Since one's temperature at a point in time is not necessarily determinative of COVID-19 status, employers may want to question employees about their health and potential exposure to provide greater safety for employees and third-parties.

But even under these circumstances, employers do not have free rein to obtain and use information about employees' health. As the extent of the privacy intrusion increases, so does the risk of claims and liability. Misuse of the information obtained—failure to maintain confidentiality or wrongfully using it to make hiring or firing decisions—will also provide the basis for invasion of privacy claims and even, in some contexts, discrimination claims. Before obtaining employees' confidential health information, employers should seek expert guidance regarding applicable local, state, and federal laws and guidelines, including those in the Americans with Disabilities Act and state privacy law. Staying within those guidelines will greatly lessen the likelihood of invasion of privacy claims.

Retaliation claims

Most state and federal laws, including those mentioned above, contain provisions that make it unlawful for employers to retaliate against employees for exercising their protected legal rights or opposing unlawful employer actions. For example, an employer cannot take adverse action against an employee because he or she complains that the employer wrongfully denied a request for paid leave under the FFCRA. When deciding whom to layoff or furlough, or whose pay to reduce, employers should consider whether an impacted employee has protected status because of a prior complaint or opposition to an employer action. Even if the employee's position lacked merit, the employee's retaliation claim may have merit. Employers should use extra care to document contemporaneously the reasons for selecting employees who may have protection against retaliation. Such documentation can be invaluable in litigation.

Employment practices liability insurance

Employers fortunate enough to have employment practices liability insurance ("EPLI") should review their policies carefully in preparation for potential litigation. The provisions regarding what the EPLI does and does not cover, and when the employer must notify the insurer of a potential claim, warrant particular attention. Many policies exclude wage and hour claims; presumably insurers will assert that those exclusions apply to some or all types of FFCRA suits. Some policies may not cover breach of employment contract claims. Other typically excluded claims include claims under the Worker Adjustment Retraining and Notification Act, the National Labor Relations Act, OSHA, and COBRA. The policies typically do however cover discrimination, retaliation, and whistleblower claims, and thus claims of these types relating to COVID-19 should come squarely within the policies' protections. Employers must notify their insurers promptly of any claims and should err on the side of caution even if an exclusion might apply.

Next steps

Employers are understandably focused on doing what they need to do to protect their businesses. When formulating short- and longer-term plans impacting employees, employers need to consider the legal exposure that will accompany the planned actions. Lawyers from Nixon Peabody's Labor

& Employment practice are available to help employers avoid, and if necessary defend, all types of employment-related litigation.

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