

Another Side Effect of COVID - Litigation

U.S. employers are likely to feel like they are on constantly shifting ground in trying to manage their employees in a way that maintains productivity and keeps everyone safe and healthy. Despite those efforts, COVID-19 related litigation claims are on the rise and likely to increase as the nation braces for yet another wave of the pandemic.

Since March 2020, there have been over 4,600 lawsuits filed against employers due to alleged labor and employment violations related to COVID-19 according to sites which track suits filed. States with the most filings include: California (1,378); New Jersey (417); New York (335); Florida (315); and Ohio (241). Pennsylvania, Michigan, Illinois and Connecticut round out the top 10.

California, with its large population and economy, has far and away the largest number of claims. But the geographically small state of New Jersey comes in with the second largest number of claims and the highest percentage of claims per capita. Perhaps unsurprisingly, the filed claims tend to skew against small and medium size employers who may face more challenges in staying current on the applicable federal, state and local laws and who may lack compliance infrastructure.

Types of COVID-19-related employment litigation include:

- Remote work and leave conflicts;
- Retaliation/whistleblowers complaints;
- Employment discrimination claims;
- Wage and hour disputes; and
- Unsafe workplace allegations (ting overcrowding, failure to provide masks and other protective gear, poor ventilation, and other hazards)

Uncertainty as to when or if to bring employees back to the office, who is required to come back and the rules for returning create fertile ground for claims. As employees began returning to the office, or resisted returning to the office, some expressed concerns about the increased risk of COVID exposure. Employees being asked to return to the office also cited medical issues that prevented them from returning. Often, these were mental health issues such as stress, anxiety and depression. Many states have laws which prohibit discharging an employee who complains about unsafe working conditions or retaliating against an employee who point out non-compliance with any applicable regulation.

Vaccine mandates can be a polarizing topic but have largely been upheld by the courts. On December 17, 2021, the Sixth Circuit Court of Appeals granted the Biden administration's Motion to Dissolve the stay on the Occupational Safety and Health Administration's (OSHA) COVID-19 Vaccination and Testing Emergency Temporary Standards and lifted the nationwide stay issued in November. Following the ruling, the OSHA announced it would not issue citations for noncompliance with the standard's testing requirements before February 9, "so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard." This rule applies to employers with 100 or more employees in the U.S.

While mandates may be permissible, they can trigger ADA and medical privacy issues as well as the potential for religious and disability discrimination claims. Even well-intentioned employers can inadvertently create liability exposure by implementing health and safety policies that single out older workers, people with disabilities and other protected groups in violation of anti-discrimination laws.

Failing to have effective safety policies can also be costly. In California, See's Candies is facing a wrongful death suit after an employee contracted COVID at work and then infected her husband who died. The employee alleges she fell ill due to lax safety rules at the candy manufacturing plant including a lack of personal protective equipment. The California Court of Appeal ruled that the death was not derivative of his wife becoming sick, but was instead caused directly by the COVID-19 virus, for which his wife served as a "conduit." As such, workers compensation was not the exclusive remedy and the lawsuit can proceed.

Employers are trying to navigate a constantly changing landscape of laws designed to keep everyone safe. While these laws may well operate as good public policy, they can be a minefield of potential litigation for unwary employers. This aspect of the pandemic appears to be just beginning to flare up.