

These Coronavirus-Related Workplace Issues May Lead to Lawsuits

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The coronavirus pandemic has raised many workplace compliance issues—which can lead to lawsuits if employers don't keep up with evolving guidelines on wage and hour laws, leaves of absence, work-for-home arrangements, and bias prevention.

"Employers need to be aware that COVID-19-related litigations have started, and such lawsuits are being filed with increasing frequency," said Melissa Camire, an attorney with Fisher Phillips in New York City.

Compliance issues are emerging in new ways, she said. For example, due to the pandemic, many employers are dealing for the first time with furloughs, salary reductions, reductions to work hours and remote work.

Some states have enacted liability shields to protect employers that act in good faith (<https://www.littler.com/publication-press/publication/states-enact-laws-limiting-covid-19-liability>) from coronavirus claims, but the federal government is still debating nationwide legislation. "With Congress looking to add protections for employers against these kinds of lawsuits, it's clearly an issue that's here to stay," said Michael Lotito, an attorney with Littler in San Francisco.

He noted that an employer's goal shouldn't be to prevent lawsuits, but rather to establish trusting relationships with employees so they feel comfortable talking to managers before issues escalate to litigation.

Here are some of the top coronavirus-related workplace issues that may lead to litigation and how to mitigate the risk of a lawsuit through employer policies and practices.

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'A COVID-19 Twist'

"Many of the discrimination lawsuits look like typical workplace disputes with a COVID-19 twist," Camire observed. For example, legal issues may be raised if a pregnant employee is furloughed due to the pandemic and is later replaced by a nonpregnant employee.

Fisher Phillips has tracked (<https://www.fisherphillips.com/covid-19-litigation>) more than 400 employment-related COVID-19 lawsuits so far, with the most cases filed in California, Florida, New Jersey, New York and Texas. The most frequently filed claims involve discrimination, leaves of absence and work-from-home issues.

Generally, Camire explained, employees will allege that they didn't receive paid sick leave or paid family leave that they were entitled to under the federal Families First Coronavirus Response Act (<https://www.dol.gov/agencies/whd/pandemic>) (or another statute that provides for leave) or that their request to work from home was denied.

The reasons behind leave or work-from-home requests vary: The employee may have received a COVID-19 diagnosis or instructions to quarantine or may be vulnerable to the virus due to age or a pre-existing medical condition. The employee may have child care issues because of the pandemic or may need to care for a family member.

Even when employees exhaust their leave entitlement—or when leave is otherwise unavailable—they may be entitled to take time off or work from home as a reasonable accommodation under the Americans with Disabilities Act (ADA).

"Employers put themselves at risk by refusing to engage in an interactive dialogue with an employee who requests time off as a reasonable accommodation under the ADA or a similar state or local law," noted Michael DeLarco, an attorney with Hogan Lovells in New York City.

Whistleblower claims are another source of litigation. Some jurisdictions protect employees who complain (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/philadelphia-enacts-covid-19-whistle-blower-legislation.aspx)—or "blow the whistle"—about unsafe working conditions related to COVID-19, such as violations of mask mandates and other public health orders.

"If an employer takes an adverse action against the employee in response to the complaint, that may be the basis for a retaliation claim," DeLarco said.

Camire has seen an increase in COVID-19-related class actions, particularly with respect to safety concerns and wage and hour issues.

Under the Occupational Safety and Health Act, employers have a duty to provide a safe and healthy workplace that is free from known hazards. State and local governments may enforce more-stringent requirements. In Virginia, for example, employers must take additional steps (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/virginia-adopts-covid-related-workplace-safety-mandate.aspx) to curb the spread of the coronavirus or face penalties under the state's emergency temporary standard (<https://www.governor.virginia.gov/newsroom/all-releases/2020/july/headline-859234-en.html>).

Some wrongful-death lawsuits have been filed by workers' family members (https://www.wsj.com/articles/families-file-first-wave-of-covid-19-lawsuits-against-companies-over-worker-deaths-11596137454?mod=hp_lead_pos5) who claim that unsafe working conditions during the pandemic led to illness and death.

Mitigating Risk

Workplace compliance guidance has frequently changed over the last few months as government and business leaders navigate new territory during the pandemic.

Employers should check for updates (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Labor-Department-Issues-More-Coronavirus-Related-Workplace-Guidance.aspx) from the U.S. Department of Labor, which has been periodically adding guidelines addressing common questions about leaves of absence, work-from-home arrangements, and wage and hour issues.

Despite the novel issues that may arise during the pandemic, many classic best practices for avoiding litigation still apply. "Remember that typical HR best practices cannot be ignored simply because we are in a pandemic or operating in unprecedent times," Camire said. She recommended the following practices to help mitigate risk:

- Managers should work closely with the HR and legal teams when dealing with employee discipline, terminations, furloughs, leave requests and other employment decisions.
- Employers should make sure the reasons behind any employment decisions are well-documented and well-supported.
- Employers must stay on top of new compliance issues. Federal, state and local governments have enacted pandemic-specific laws and continue to update guidance.

- Business should show employees that they take safety seriously by developing and communicating a comprehensive safety plan that follows U.S. Centers for Disease Control and Prevention guidance (<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>), as well as state and local requirements.
- When possible, employers should strive to be flexible and creative when approaching COVID-19-related employment issues.

Training managers is also critical to limiting potential legal exposure. "Managers should be trained on what to do if an employee contracts COVID-19 or is exhibiting symptoms," DeLarco said. The employer will have to maintain information confidentially and may need to conduct contact tracing and facilitate cleaning to protect other employees from the virus.

Managers should also be trained on what to do if an employee refuses to come to work or to be tested or screened for COVID-19 symptoms.

"While not necessarily protected under the law (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-when-is-fear-a-protected-reason.aspx), managers should be trained on how to manage the generalized fear in employees, and what measures may be taken to mitigate such fear," DeLarco added.

Lotito noted that supervisors should be trained to be empathetic. The company should also keep in mind that supervisors are struggling, too, and may need more support during the pandemic.

"Focus on how to be a better company," he suggested. "Build trust through transparency and honesty." Employers should carefully craft their messages and ensure employees feel engaged and that their voices are heard.

"Effective communication takes more than an open-door policy," Lotito said, because "many people don't have the courage to walk through the door." Find creative ways to encourage employees to talk to leadership, he said, and give them more opportunities to be heard so that they don't go outside of the organization to resolve their complaints.

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