

Employment Law Update and Key COVID-19 Issues

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COVID-19 Litigation Trends

- ▶ Increased court filings
- ▶ Usual suspects:
 - ▶ Retaliation
 - ▶ Discrimination
 - ▶ Wage and hour/unpaid sick leave
- ▶ But new factual bases

Examples

- ▶ Dallas plaintiff alleges her employer pressured her to commit a criminal act — reporting to work in defiance of local orders — and then terminated her when she refused.
- ▶ Kentucky plaintiff alleges he was wrongfully terminated for complaining about lack of gloves.
- ▶ Illinois nurse alleges she was wrongfully terminated for warning employees that masks were inadequate to protect them from COVID-19.
- ▶ New Jersey plaintiff alleges he was terminated after expressing concern when co-workers with COVID-19 symptoms continued reporting to work.



COVID-19 and...

Retaliation/Whistleblower

- ▶ Complaints regarding unsafe work conditions
 - ▶ Failure to protect workers
 - ▶ Failure to enforce work rules
 - ▶ Failure to follow guidance
 - ▶ Refusals to return to work
- ▶ Other protected activity
 - ▶ Leave requests
 - ▶ Misappropriation/misuse of funds received from CARES Act

What are the Risks of Taking Adverse Employment Actions?

- ▶ The pandemic has increased the number of whistleblower complaints filed with OSHA.
- ▶ January – April 2020 saw a 30% increase in whistleblower complaints compared to the same period in 2019.
- ▶ Of the 4,100 whistleblower complaints received from February – May 2020, 1,600 (39%) related to COVID-19.
- ▶ Despite staffing reductions at OSHA, the agency continues to prioritize COVID-related complaints.
 - ▶ OSHA has already processed 50% of these complaints, with an average screening time of 10 days.

How to Avoid Retaliation Claims:

- ▶ Understand the new legal landscape.
- ▶ Carefully document the reasons for any termination.
- ▶ Maintain records of any complaint and resulting investigation.
- ▶ Be ready to show how any termination decision was entirely unrelated to a workplace complaint or other protected conduct.

COVID-19 and...

Discrimination

- ▶ Disability
 - ▶ Failure to accommodate
 - ▶ Preexisting conditions/increased risk
 - ▶ “Regarded as” disabled
 - ▶ Title III access claims
- ▶ Other Protected Categories
- ▶ Hopefully coming soon: vaccine implications

More on Discrimination Claims

- ▶ Challenging the purported reason for being *selected* for an adverse employment action.
 - ▶ Eg, New York plaintiff did not dispute the need to have a layoff but alleged he was selected because of his age.
 - ▶ EEOC has made clear that employers should avoid blanket policies requiring “high risk” employees (under CDC guidance) to remain on furlough or continue to telework while others return on-site, lest employers violate laws prohibiting discrimination.



WHY
ME

COVID-19 and...

Wage and Hour

- ▶ Timely payment of wages
- ▶ Payout of accrued PTO
- ▶ Partial furlough weeks and exempt employees
- ▶ Regular rate and hazard pay issues for non-exempt employees
- ▶ Unpaid sick leave under FFCRA or similar state/local statutes/ordinances
- ▶ Failure to provide sick leave to misclassified 1099 workers
- ▶ Unreimbursed business expenses (PPE or home office equipment)
- ▶ Uncompensated time for completing health screenings, temperature checks, etc.
- ▶ Misclassification due to changes in duties
- ▶ Off-the-clock work by remote workers
- ▶ Meal and rest period violations for remote workers

DOL – Timekeeping and Remote Work

- ▶ The DOL issued new guidance on August 24, 2020.
- ▶ General Rule: Employer obligated to pay employees for all hours the employees are “permitted to work.”
- ▶ This is true even if the employer did not request the work be performed. If the employer knew or had reason to believe the employee performed the work, the employer must pay the employee.
- ▶ DOL guidance affirms the importance of a clear time reporting system in telework scenarios.
- ▶ Employers bear the burden of preventing work they do not want performed.

DOL – Timekeeping and Remote Work

- ▶ Employers must track and pay for the hours worked by remote employees.
- ▶ Employer must pay for hours of which it has actual or constructive knowledge.
- ▶ Constructive knowledge exists if the employer should have acquired knowledge through reasonable diligence.
- ▶ Employer may discipline employees for unauthorized work but must pay them.

DOL – Timekeeping and Remote Work – Takeaways from the Guidance

- ▶ Employers may rely upon normal work schedules to establish hours worked but must have a reasonable process to report hours worked, including unscheduled hours.
- ▶ If employees fail to report unscheduled hours through a proper reporting process, employers generally are not obligated to investigate to uncover unreported hours.
- ▶ Employers cannot discourage reporting of unscheduled hours worked.
- ▶ Employees should be trained on time reporting process.

Mitigation – Take Corrective Actions

- ▶ Correct problematic pay and timekeeping practices.
- ▶ Consider retroactive wage payments/corrections.
- ▶ Consider offering “release” agreements.
 - ▶ Targeted to fix high dollar problems
 - ▶ Targeted to pick off potential lead plaintiffs
- ▶ Opportunity to “fix” pre-existing issues
 - ▶ Reclassify and restructure jobs to address misclassification issues.
 - ▶ Address compensation disparities.
- ▶ Opportunity to roll out an arbitration program with class action waiver

COVID-19 and...

FMLA/FFCRA

- ▶ Failure to provide COVID-19 related leave
- ▶ Interference with ability to take leave
- ▶ Failure to provide sick leave benefit under FFCRA or similar state and local laws

COVID-19 Claims - Unsafe Workplace

- ▶ “Unsafe Workplace”
 - ▶ Cause/fear of illness
 - ▶ Failure to close
 - ▶ Failure to provide PPE
 - ▶ Failure to clean/sanitize/protect workers
 - ▶ Failure to comply with state and local orders

Employee Health and Safety Considerations

- ▶ OSHA has issued guidance for employers regarding COVID-19, including for the following workers: airlines, business travelers, construction, dentistry, environmental/janitorial services, food processors, healthcare, laboratories, manufacturing, oil and gas operations, retail operations, solid waste and wastewater management, and various others.
- ▶ Even if OSHA has not issued guidance for a particular industry/worker, all employers must provide safe workplaces (General Duty Clause).
- ▶ As employers plan to bring employees back to their worksites, consider the potential exposure risks each worksite presents to employees.
- ▶ Return-to-work strategies should incorporate, as much as practical, the CDC's COVID-19 guidance, as well as any state/local requirements.

Employee Health and Safety Considerations (cont'd)

- ▶ Create or update an existing disinfection plan:
 - ▶ Observe disinfection recommendations from CDC (handwashing, face coverings, etc.);
 - ▶ Coordinate with landlords/tenants; and
 - ▶ Stock sufficient supplies, including any required or recommended PPE.
- ▶ Social Distancing – Consider the following:
 - ▶ Continue telework where feasible;
 - ▶ Reconfigure floorplans/workspaces;
 - ▶ Alternate and/or stagger schedules; and
 - ▶ Discourage in-person meetings.

Employee Health and Safety Considerations (cont'd)

- ▶ Require employees and customers/visitors to observe personal hygiene recommendations from the CDC.
- ▶ Monitor employee health:
 - ▶ Consider testing/screening employees, but also consider the practical limitations of these tests.
 - ▶ Employers may require testing (not antibody testing), but what about employees who refuse to submit to testing?
 - ▶ Consider using health questionnaires/attestations.
 - ▶ Require employees to report suspected exposure/infection and implement isolation procedures.
- ▶ Train all employees on new safety practices/procedures.

COVID-19 – To Record or Not to Record?

- ▶ OSHA previously suspended enforcement of its recordkeeping requirements for COVID-19 cases (e.g., OSHA 300 logs).
- ▶ On May 26, 2020, OSHA resumed enforcement of its recordkeeping requirements and announced it would consider the following factors when investigating an employer's recordkeeping compliance regarding COVID-19 cases:
 - ▶ The reasonableness of the employer's investigation into work-relatedness;
 - ▶ The evidence available to the employer; and
 - ▶ The evidence that a COVID-19 illness was contracted at work.

No Requirement to Allow Telework as Reasonable Accommodation

- ▶ During the pandemic, many employers have permitted, or even required, telework in an effort to keep employees safe.
- ▶ On September 8, 2020, the EEOC updated its guidance titled “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.”
- ▶ The updated guidance includes how to handle a disabled worker’s request to continue teleworking when the threat of the virus becomes less serious.

No Requirement to Allow Telework as Reasonable Accommodation

- ▶ The EEOC stated: “The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job’s essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship.”

No Absolute Requirement to Allow Telework as Reasonable Accommodation

- ▶ Employers must engage in an interactive process to determine if there is a reasonable accommodation that will not cause an undue hardship.
- ▶ However, “the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether the employee could satisfactorily perform his or her job’s essential functions while working remotely.”

What if employee refuses to return to work?

▶ Is there an ADA issue?

▶ If **yes**, is there a reasonable accommodation?

▶ Continued work from home

▶ Unpaid leave

▶ If **no**, follow disciplinary procedure and ultimately terminate.



Report to unemployment agency:
Offers of work forms
or
Report as fraud



Refusals to Work Due to Safety Concerns

- ▶ Common Scenarios/Employee Concerns
 - ▶ General fear of contracting the virus
 - ▶ Afraid of bringing the virus home to family members/vulnerable persons
 - ▶ Lack of PPE/safety measures
 - ▶ Staffing shortages

Refusals to Work Due to Safety Concerns (cont'd)

- ▶ What are some best practices for employers?
 - ▶ Create/update pandemic response plan.
 - ▶ Train employees on safety measures and obtain acknowledgments.
 - ▶ Continue to follow OSHA and CDC guidance; adapt policies as the guidance changes and retrain employees.

Waivers

- ▶ Can an employer ask employees to sign a waiver that employees will not sue the Company if the employee gets COVID-19?
 - ▶ Likely not enforceable
 - ▶ Raises warning signs for employees
 - ▶ Jury will not like them
 - ▶ Workers' compensation coverage if subscriber
 - ▶ Possibly different analysis for non-employees

Screening and Testing

- ▶ What kind of testing or screening can employers do for employees returning to work?

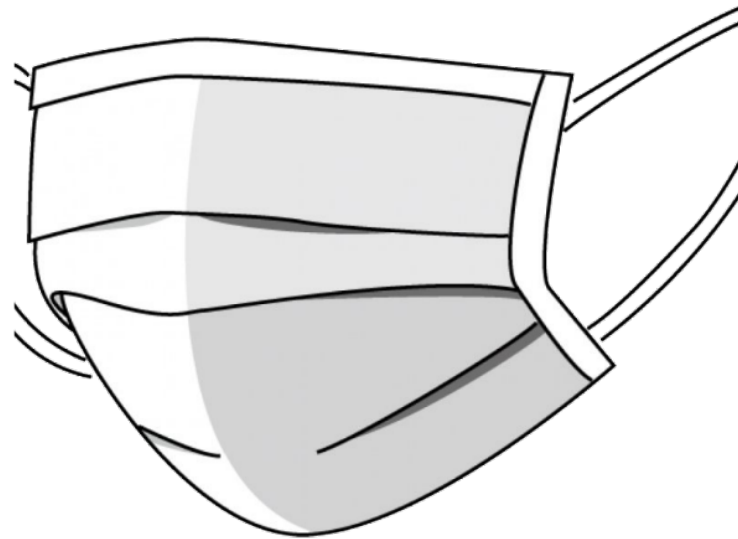


Screening and Testing

- ▶ Some jurisdictions require certain types of testing
- ▶ Employers permitted to
 - ▶ Conduct temperature checks
 - ▶ Ask health screening questions
 - ▶ Test for COVID-19
- ▶ CANNOT test for antibodies
- ▶ Must keep all information separate and confidential

Face Coverings

- ▶ How should employers handle situations where an employee refuses to wear a face covering?



Face Coverings

- ▶ Most jurisdictions require
- ▶ Employers can require
- ▶ May need to engage in interactive process/reasonable accommodation

Audience Questions