Litigation Pitfalls for Employers in a COVID-19 World

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The COVID-19 pandemic has caused companies and their management teams to react quickly and make adjustments to their business operations instantly. Many companies are doing what they can to survive while, at the same time, trying to ensure their employees stay safe. In what can only be referred to as a "trial by fire" of operations and health care crisis management, it is imperative that any decisions made by management in these uncertain times do not cause more (unforeseeable) problems later. Here are some litigation pitfalls to avoid:

1. Whistleblower Retaliation

In the wake of the pandemic, many of us have become hypersensitive to clean hands, faces, the surfaces that we touch, and the air we breathe. So too have employees. Companies should therefore expect to see increased concern about sanitation practices and the provision of PPE from their employees.

Recently, a nurse in Chicago sent a company-wide e-mail telling coworkers that the hospital's masks were less safe than N95 masks. The next day, she wore her personal N95 mask to work, and was terminated. She claims she was terminated in retaliation for making a good-faith safety complaint, in violation of Illinois' whistleblower statute.

These types of situations may run afoul of OSHA's prohibition on retaliation. Indeed, any employee accessing OSHA's guidance related to COVID-19 at osha.gov will be advised of federal whistleblower protections. Violations of OSHA's whistleblower protections can result in serious citations and hefty fines for employers. Many states provide similar protections, including the right to file a civil cause of action and the provision of attorneys' fees to the prevailing party. Thus, employers should remember to take any and all safety complaints seriously and be mind of whether their response could trigger potential litigation.

2. Disclosure of Private Medical Information

Employers have been forced to respond to situations where an employee has contracted COVID-19 and come into contact with other employees. The primary issue has been whether an employer can disclose the name of the infected employee to those he or she may have come into contact with. In California, the Department of Fair Employment and Housing has stated unequivocally that the employee's identity not be

revealed and provides the following guidance on how to handle such a situation:

Employers should not identify any such employees by name in the workplace to ensure compliance with privacy laws. If an employee tests positive for or is suspected to have COVID-19, the employer will need to follow the most current local, state, or federal public health recommendations. Employers should take further steps at the direction of the local public health department that may include closing the worksite, deep cleaning, and permitting or requiring telework.

Employers may notify affected employees in a way that does not reveal the personal health- related information of an employee. For example, the employer could speak with employees or send an email or other written communication stating : "[Employer] has learned that an employee at [office location] tested positive for the COVID-19 virus. The employee received positive results of this test on [date]. This email is to notify you that you have potentially been exposed to COVID-19 and you should contact your local public health department for guidance and any possible actions to take based on individual circumstances."

Employers may not confirm the health status of employees or communicate about employees' health.

Inadvertently disclosing employee medical information could lead to a variety of federal law violations including those under HIPPA, the FMLA and the ADA. Employees can file suit for this disclosure and collect damages and attorneys' fees.

3. Discrimination Based On Perceived Disability

The ADA, and other state statutes prohibit discrimination based on actual disabilities. Generally speaking, a two-week recovery from a viral infection would not constitute a disability under most of these laws. However, these statutes also prohibit discrimination based on the **perception** of disability. That is, if an employer perceives an employee to be impaired, and treats the employee differently as a result, the employer has violated the ADA.

Long before the outbreak of COVID-19, the Equal Employment Opportunity Commission's regulations offered the following example of unlawful employer conduct:

This situation could occur, for example, if an employer discharged an employee in response to a rumor that the employee is infected with Human Immunodeficiency Virus (HIV). Even though the rumor is totally unfounded and the individual has no impairment at all, the individual is considered an individual with a disability because the employer perceived of this individual as being disabled. Thus, in this example, the employer, by discharging the employee, is discriminating on the basis of disability.

While this example does not appear in the current version of the regulations, it is based on the same statutory language. While COVID-19 is, in reality, much less permanent than an HIV infection, the perception

of infection may nonetheless lead to liability. Should an employee believe he or she has experienced perceived disability discrimination, he can file suit for damages (including back pay and front pay) and attorneys' fees.

4. Negligence Claims for Personal Injury or Wrongful Death

The debate about what can be done to avoid catching COVID-19 has been a subject of great controversy which will undoubtedly rage in the coming months in the media, political debates, and the like. Based on early virus-related litigation, it appears some employees are seeking redress from their employers.

For example, the estate of a deceased Wal-Mart employee has already filed suit, claiming the employer did not do enough to protect employees from infection. The lawsuit alleges that the employee mentioned his early symptoms to his supervisors, but was largely ignored. Instead of taking his complaints with the appropriate degree of caution, the complaint alleges, Wal-Mart required him to continue working in an environment with insufficient guidelines regarding social distancing, protective equipment, and sanitation.

There is no question that Wal-Mart, as a provider of groceries and other essential goods, may continue operating without violating the "stay-at-home" orders currently in place. Employers must be aware, however, that labeling their business as "essential" does not insulate them from liability for failing to protect their employees from workplace hazards. In nearly all personal injury or wrongful death lawsuits, a central question is whether the employer acted **reasonably**.

What a judge or jury might consider "reasonable" — in terms of social distancing, protective equipment, and sanitation, especially — is drastically different today than it was only a few weeks ago. Accordingly, employers are advised to take care to follow CDC and other reputable guidance regarding workplace safety and the exposure to COVID-related working conditions to assist in the defense of any potential negligence claims.

5. Employee Business Expense Reimbursement as a Result of Working Remotely

In an effort to stay open, some employers have arranged for their employees to work from their homes. These employers, however, should be mindful of whether their particular state laws require them to reimburse employees for reasonable and/or necessary business expenses. In California, for instance, the California Court of Appeal held in *Cochran v. Schwan's Home Service*, held that an employer must reimburse expenses for personal cell phones to the extent they are used for business purposes. The failure to do so can lead to hefty fines, penalties and liability for an employee's attorneys' fees which employees tend to bring as class actions.

6. Failure To Provide Paid Leave — FFCRA doesn't tell the whole story

As many employers are undoubtedly aware, the Families First Coronavirus Response Act (FFCRA) went into effect April 1 and provides certain employees with up to 12 weeks of paid leave as a result of COVID-19. While the FFCRA provides the framework for paid leave required by federal law, employers must be mindful of other similar requirements imposed by their relative states and municipalities.

For instance, Los Angeles and New York City have both implemented laws that give many employees paid leave outside of the FFCRA. Other governmental bodies, including Michigan, New Jersey, and the City of Seattle, have amended or interpreted their existing paid-leave laws to liberally benefit those impacted by COVID-19, including not only victims of the virus, but also those caring for vulnerable family members or children whose schools have been cancelled. These local laws provide redress to employees if an employer denies them the newly mandated leave including the right to a payment for any paid leave withheld along with attorneys' fees.

If you have questions, please contact Laura Reathaford, Bill Cross, Employment & Labor Practice Group Chair Kathryn Nash or your regular Lathrop GPM contact[1].

[1] Lathrop GPM does not represent any party to any legal matter discussed in this alert, as of the date of initial publication.