

Employer Resources from May 6, 2020 webinar *Leading Through COVID-19*



Laura Salerno Owens, President and Shareholder
laurasalerno@markowitzherbold.com

As we discussed during the call today, we are in a time of rapid change. Never before have we seen the economy shutter so quickly, Congress pass huge relief bills and new laws so rapidly, or businesses receive large-scale loans so speedily. That means we are in uncharted territory and people will make mistakes. Mistakes lead to litigation. Below is a recent article from Law360 that speaks to the trends lawyers expect to see in the post-COVID-19 world. I want to emphasize that none of this may happen to your business and assure you that if it does, we are here to help. My firm has nearly thirty lawyers that specialize in all areas of litigation and one of our clients has described us as being able to solve “unsolvable” problems. But as we all know, an ounce of prevention is worth a pound of cure, so I recommend you take steps now to think about how your business will deal with these issues and minimize liability. I’m happy to answer any questions as to how your business can do that.



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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

5 Types Of Suits Employers Are Bracing For Post-Pandemic

By Braden Campbell

Law360 (April 29, 2020, 8:09 PM EDT) -- Employment attorneys are forecasting a wave of novel litigation once the dust settles from the COVID-19 pandemic, including suits alleging employers shorted newly remote workers on pay or refused to provide time off guaranteed by the coronavirus leave law. Here, Law360 looks at five kinds of lawsuits employers can expect to see more of as the world tries to get back to normal.

Timekeeping Challenges Spark Wage Claims

The Fair Labor Standards Act and its state equivalents require employers to pay non-salaried workers a minimum wage for every hour they work, and extra when they work 40 hours or more. The sudden

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move to telework during the coronavirus pandemic has made that harder to do — and could spark lawsuits.

“In traditional employment settings, there’s a lot of tracking mechanisms that are utilized by employers to determine when, for example, people take lunch breaks and do certain types of things,” said Adam Karr, an [O’Melveny & Myers LLP](#) attorney who represents employers in class action lawsuits.

Because of the “compressed” shift to telework, businesses may not have adapted to track workers’ hours or make sure they’re not working through lunch breaks, Karr said. This could spark costly class actions alleging they shorted workers on hours of work per week.

Similarly, the move to telework may have forced some workers to buy equipment or use personal devices for work, and businesses may be on the hook for some of the costs, Karr said. The FLSA requires businesses to reimburse workers when expenses push their pay below minimum wage, and some state laws are more generous to workers.

And employers may incur liability after the return to physical work if they make their workers take certain measures before clocking in, [Akin Gump Strauss Hauer & Feld LLP](#) employment group head Robert Lian said. Wage laws generally put businesses on the hook for any time workers spend under their control, which may mean paying workers while they wait for temperature checks or clean personal protective equipment.

“You could see situations in which employees might be alleging that this is tantamount to control,” Lian said.

New Leave Law Means New Liabilities

As the pandemic exploded in mid-March, Congress passed the Families First Coronavirus Response Act, which imposed the first-ever federal paid sick time mandate.

The law makes employers with fewer than 500 workers provide them with a certain amount of time off at full or partial salary for many reasons tied to coronavirus, including if they fall ill or can’t work because they have to care for a child whose school has closed. As the crisis wears on, it’s likely employers will face suits alleging they botched this obligation.

“Employers really need to have done a proper job of determining eligibility of their workers ... and provide them paid leave properly,” [Troutman Sanders LLP](#) employment litigator Román D. Hernández said. If employers deny time off to eligible workers or miscalculate their pay, they may face suits, he said.

Employers may also see suits alleging they retaliated against workers who requested leave, which a former Eastern Airlines director [recently accused the airline of doing](#). In possibly the first complaint with claims under the new law, Stephanie Jones alleged the company fired her days after she asked for leave to care for her 11-year-old son. Jones’ FFCRA firing suit won’t be the last.

“I think that we will see an increase in retaliatory discharge cases in the near future,” Hernández said.

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Safety Actions Surge

Workers for hospitals, food processing facilities, retailers and other employers have fallen ill during the coronavirus pandemic, and to the extent unsafe working conditions are to blame, they may face litigation.

“If you were to be a betting person ... that would be one area where you would see the most obvious increase in the number of claims,” Lian said. And it’s likely the Department of Labor’s [Occupational Safety and Health Administration](#) will account for the bulk of them, he said.

The agency has [so far resisted a chorus of calls](#) from workers’ advocates to make employers implement specific safety measures or face fines. But it has urged employers to follow the [Centers for Disease Control](#) and Prevention’s coronavirus safety recommendations, and said it will bring enforcement actions under the Occupational Safety and Health Act’s general duty clause, which makes employers ensure their workplace is “free from recognized hazards that are causing or likely to cause death or serious physical harm.”

The OSH Act does not empower workers to sue over unsafe job conditions, but if they’ve fallen ill, they can file claims for workers’ compensation. While it’s generally difficult for workers to prove they contracted a virus at work, some states have recently eased this burden by presuming workers with coronavirus caught it on the job.

Workers may also attempt to bring state law suits if they contract the virus. Though workers’ compensation law generally blocks workers from filing private suits over workplace injuries and illnesses, that bar is not absolute, so employers may face safety disputes from several angles.

“You’ll see it at OSHA, I think you’ll see it in workers’ comp, you may see workers bring claims in court and claim the workers’ comp bar for some reason does not bar that claim in court,” said [Epstein Becker Green](#)’s David Garland, who chairs the firm’s employment, labor and workforce management steering committee. “I think you can see it in all three forms.”

Mass Layoffs Invite Notice, Bias Suits

The wave of layoffs that accompanied the coronavirus’ rapid spread could spark suits alleging employers failed to give workers a heads up or discriminated by letting certain workers go but not others.

The federal Worker Adjustment and Retraining Notification, or WARN, Act requires that employers with 100 or more employees give at least 60 days’ notice before closing or laying off a certain number of workers. Businesses that miss this window may have to provide workers back pay, plus penalties.

“There were so many companies that had to downsize so quickly, and I suspect that it was hard for employers across the board to comply with the WARN Act” and its state equivalents, Lian said.

At least one big-name employer has already been hit with a suit alleging its virus layoffs violated the

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WARN Act. On April 16, two former Hooters workers accused the sports bar chain of [axing nearly 700 Florida workers](#) without notice in late March.

But not all sudden layoffs violate the WARN Act. If a business shuts down because of “unforeseeable” circumstances, it’s not liable. Employers hit with suits may claim the pandemic was such an event, Lian said.

Attorneys also expect to see suits alleging employers that downsized discriminated when deciding which workers to let go.

Discrimination laws let workers challenge actions that have a “disparate impact” on workers of a certain race, sex or other protected class, even if the employer didn’t discriminate intentionally. For example, a business that lets its top earners go may face an age bias suit, Hernández said.

“Highly compensated employees tend to be those with the most tenure, who tend to be those who are of age,” he said.

Vulnerable Workers Turn to the ADA

As employers transition back to in-person work, they may find some workers reluctant to return. If those workers have conditions that make them susceptible to the coronavirus, employers may invite Americans with Disabilities Act suits by pushing them to report.

The ADA gives workers a right to request a “reasonable accommodation” that allows them to do their job, and lets workers sue if they’re unfairly denied one. For example, a worker with an underlying condition may ask that they be allowed to “continue to work remotely even when the majority of the workforce comes back full-time,” Karr said. If the business refuses, the worker may sue, he said.

Businesses that transitioned their operations online at the height of the pandemic may have a tough time refusing such requests going forward, Lian said. Even before the pandemic, workers and employers frequently sparred in court over whether employers violate the ADA by refusing to let disabled workers telework.

“In light of the widespread working from home that many employees have had to do over the past now seven weeks ... I think it’s going to be harder for employers to say working from home is not a reasonable accommodation,” he said.

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