Preparing for battle: how to build your litigation defences now

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Introduction

The employment and business decisions made by employers under the spectre of the unprecedented COVID-19 pandemic are now being tested by opportunistic plaintiffs' lawyers.(1) Employers of all sizes should expect a flood of employment litigation alongside ever-changing conditions, constantly updated guidance and, at times, conflicting state and local guidance. Litigation avoidance will require a team effort and proactive communication – both internally and externally. This article outlines the types of claim that are emerging and are expected to increase as a result of COVID-19.(2)

Whistleblower litigation

More than 3,000 complaints have been filed with the Occupational Safety and Health Administration (OSHA) during the pandemic. These complaints typically include:

- health and safety allegations; and
- allegations that employers did not take steps to protect workers.

To mitigate claims, employers should communicate to their employees that health and safety is a top priority and be transparent about any plans to bring workers back to the workplace safely. Employers should provide employees with a forum to ask questions and voice concerns anonymously, so that issues can first be addressed internally before any required reporting to any outside agency. In a recent instructive class action litigation involving a meatpacking distributor, the court found that OSHA, and not the court, should address the safety issues brought by the plaintiffs. This decision provides some insight for employers as they try to mitigate litigation risk and defend against future whistleblower litigation. Compliance with Centres for Disease Control and Prevention (CDC) and OSHA guidelines is most often sufficient, but employers must stay up to date on current guidance and are well adjusted to have a person or team designated to monitor changes and circulate information within the company. Employers should also update compliance policies and procedures and document the basis for any adjustments to compliance measures for employees.

FFCRA claims

Almost 30% of cases filed between March 2020 and May 2020 were claims involving some type of leave, including:

- denial of leave requests;
- retaliation for requesting leave; and
- termination.

For employers subject to Families First Coronavirus Response Act (FFCRA) regulations, there are steps that they can take to protect their business. First, employers should designate an internal FFCRA expert or team to oversee compliance, and consistently and fairly administer the company's policies when handling FFCRA requests from employees. Employers may also want to coordinate with outside counsel, especially when denying a leave request or taking adverse action against an employee who requested or is on leave. Coordinating with counsel can help employers to prevent potential litigation that may result from their decisions.

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Employers should also train managers on how to handle leave requests and direct FFCRA enquiries to the designated person or team responsible for making leave decisions. To avoid any inconsistencies in leave decisions, individual managers should not be the primary point of contact. Moreover, employers should maintain supporting documentation for each leave request so that they have a record of all of the steps in the process. There are also Internal Revenue Service documentation requirements, which must be met for employers to receive tax credits (for further details please see "Preparing for the unknown: how to anticipate and address future workplace problems").

ADA and FMLA claims

Under the Americans with Disabilities Act (ADA), employers cannot discriminate based on an employee's disability and must reasonably accommodate the disabled. Some of the claims now emerging involve employees who allege that they were terminated as a result of having COVID-19 or being at a higher risk of contracting COVID-19. For employees who request a reasonable accommodation, is unpaid leave an option? The Equal Employment Opportunity Commission says yes, "so long as it does not create an undue hardship for the employer". Employers should go through the interactive process and ask questions including:

- what the disability is;
- what specific accommodations are requested; and
- how long they are needed.

Decisions should be made on a case-by-case basis and can often depend on the industry, work environment and individual job responsibilities.

The Family and Medical Leave Act (FMLA) provides certain eligible employees with up to 12 weeks' unpaid leave for covered events, including:

- a serious health condition; or
- caring for their spouse, child or parent who has a serious health condition.

On their return to work, such employees are entitled to reinstatement to their former position or an equivalent position. Current COVID-19-related FMLA claims mostly involve:

- termination or furlough after an employee took leave; or
- a failure to provide leave and the subsequent termination of an employee who reported COVID-19-like symptoms.

To help defend against FMLA claims, employers should designate an employee who is trained on family leave issues to consult with outside counsel to ensure compliance with company and FMLA policy. Managers should be trained to bring any reported issues to HR and maintain such documentation and records.

Workers' compensation claims

As employers reopen, personal injury, workers' compensation and wrongful death claims are likely to proliferate. Claims for work-related injuries and illnesses are covered by workers' compensation insurance. This coverage is mandated in each state and typically compensates employees for medical expenses and lost wages if they are injured or become ill as a result of employment, and may provide damages for specific injuries or even death. Most states recognise some form of exception to workers' compensation as an exclusive remedy. Employees can sometimes avoid liability under workers' compensation statutes and sue for damages under theories of gross negligence or wilful or intentional misconduct.

To mitigate workers compensation claims, employers should:

- have a comprehensive plan to bring people back to work safely;
- proactively address personal protective equipment (PPE) issues; and
- implement other enhanced safety measures.

Some other best practices include:

- promptly notifying employees of suspected or confirmed workplace exposures (while protecting sick employees' privacy);
- advising any symptomatic employees to stay home;
- conducting health screenings before employees enter the workplace;
- providing appropriate PPE; and
- frequent and thorough sanitation of workspaces and blocking common areas.

Staggered shifts can also help to minimise the number of employees in the workplace at the same time. In addition, all employers should document these practices, and the dates on which they are implemented, and continue to comply with all applicable guidelines from the CDC, OSHA and state and local governments, as well as industry-specific guidelines.

Wage and hour issues

The Fair Labour Standards Act requires employers to pay overtime to employees who are permitted – not required – to work. This can be difficult for employers who have non-exempt employees working remotely due to COVID-19. If non-exempt employees work beyond their schedules, employers must compensate them for that time. With so much of the workforce currently working remotely, employers must make sustained efforts to communicate with their employees regarding schedules and the need to log off within standard hours. Employers could set up a daily or weekly email to non-exempt employees as a reminder. If employees work beyond their schedule and incur overtime, employers can discipline them for working without authorisation, but they cannot fail to pay the employee for all hours worked. Meal and rest breaks for non-exempt workers are also likely to be common in COVID-19-related litigation. Employers should remind employees regularly about the state rules and encourage them to take the time or notify their supervisor so that employers can compensate them appropriately.

In addition, there is a wave of claims regarding reimbursable business expenses. Several states (eg, California and Illinois) require employers to reimburse remote employees for reasonable work expenses, including a *pro rata* share of:

- mobile phone bills;
- internet expenses;
- office supplies; and
- office furniture.

Some employees may also request reasonable accommodations (eg, ergonomic equipment) and employers should engage in the ADA interactive process in those cases.

Many businesses that are reopening are putting safety measures in place, such as taking employees' temperatures and conducting health screening questionnaires before employees begin a shift. Employers must be aware that some states have defined certain of these tasks as compensable and should consider how they will track time spent on these tasks as employees return to work.

For further information on this topic please contact Rachel B Cowen or Brian Mead at McDermott Will & Emery's Chicago office by telephone (+1 312 372 2000) or email (rcowen@mwe.com or bmead@mwe.com). Alternatively, contact Richard I Scharlat at McDermott Will & Emery's New York office by telephone (+1 212 547 5400) or email (rscharlat@mwe.com). The McDermott Will & Emery website can be accessed at www.mwe.com.

Endnotes

(1) This article is based on a recent webinar, available here.

(2) This article is part six of a series on returning to work after the COVID-19 pandemic. For earlier articles in the series, please see:

- "Preparing to reopen: how to smoothly transition back to work";
- "Preparing your workplace: how to navigate safety mandates and recommendations";
- "Preparing your workforce: how to avoid legal landmines when bringing employees back";
- "Preparing your responses: how to tackle opening-day obstacles"; and
- "Preparing for the unknown: how to anticipate and address future workplace problems".
