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Coronavirus Lawsuits on the Horizon: Termination and Discrimination

As the COVID-19 pandemic spread throughout the country, many employers responded to this unprecedented and uncertain situation by furloughing and laying off some or all of their workforce. These actions already have spurred labor and employment lawsuits. And more are likely on the horizon, including as employees start returning to work.

Here are a few of the prevailing trends in recent COVID-19 related labor and employment litigation and proactive steps employers can take to help avoid a lawsuit.

WARN and Mini-WARN Litigation

The federal WARN Act requires, in certain circumstances, that employers with 100 or more employees provide at least 60 days' notice before conducting a mass layoff or closing a plant. Less notice may lead to claims for backpay and penalties. Additionally, multiple states have enacted similar "mini-WARN" acts. Employers that conducted layoffs allegedly without complying with these statutes may face legal risk, and several WARN class actions already have been filed.

Two of these cases have been filed in federal court in Florida. In one case, the plaintiffs allege they were given no notice when defendant laid off hundreds of employees in late March. While WARN contains exceptions to notice requirements, including for so-called "unforeseeable business circumstances" (20 CFR §639.9(b)), the complaint further alleges that the company could have and should have evaluated the effect of COVID-19 and complied with WARN. In the second case, the plaintiffs allege they were given no notice when defendant laid off several hundred employees in late April. The plaintiffs allege that defendant had furloughed employees several weeks earlier to suggest that defendant knew enough about the circumstances to predict a mass layoff and to

provide appropriate notice. In both cases, plaintiffs point to the Paycheck Protection Program to argue that the violations were severe, stating that “the fact that Congress recently made available to Defendant … millions of dollars in forgivable loans … only further underscores the severity of the WARN Act violations[.]” A third lawsuit has been filed in the Northern District of California alleging the defendant’s recent business activities suggested the layoffs were inevitable, even without the COVID-19 pandemic.

Employers grappling with COVID-19 that choose to conduct layoffs should consider, among other things, whether they are temporary or permanent before informing employees of the layoff, as this could affect whether WARN notice is required and implicate other laws, such as requirements to provide final pay. Employers also should keep track of how many employees are laid off over time: even if the WARN threshold is not met through an initial layoff, further layoffs thereafter could trigger WARN or mini-WARN requirements. Further information about this topic is available here.

Wrongful Termination

As employers facing economic uncertainty let their employees go, the latter may respond with wrongful termination lawsuits. Such lawsuits continue to be filed as the pandemic drags on. For example, one employee in Dallas, Texas alleges that she was terminated after requesting to work from home in compliance with local stay-at-home orders. The plaintiff contends that her employer’s refusal to let her telework violated “state policy” by pressuring her to commit a criminal act — reporting to work in defiance of local orders — and then terminating her when she refused.

Other wrongful termination lawsuits continue: (i) a former employee in Kentucky alleges he was wrongfully terminated for complaining about a lack of gloves, (ii) an Illinois nurse alleges she was wrongfully terminated for warning co-employees that masks were inadequate to protect them from COVID-19, and (iii) a New Jersey plaintiff alleges he was terminated after expressing concern when co-workers with COVID-19 symptoms continued reporting to work.

To help stave off potential wrongful termination claims, employers should carefully evaluate any workplace complaint; what may seem trivial on first blush could appear more significant when recounted through a lawsuit. Employers should maintain records of any complaint and resulting investigation. If terminating an individual, employers should document the reasons for the termination. Employers should be ready to show how, if tested in a lawsuit, any termination decision was entirely unrelated to a workplace complaint.

Discrimination Claims

Terminated employees also may bring claims under federal and state anti-discrimination laws, challenging the purported reason *they* were selected for an adverse employment action. At least one employee in New York has filed suit challenging his termination, alleging he was among the first laid off as his employer worked to make cuts during the pandemic and was selected because of his age. His employer claims he was terminated for cause, and that they have not engaged in any layoffs. Employers should be careful to use objective means when choosing whom to layoff, retain records of the criteria used, and, where necessary, evaluate whether any "disparate impact" might result from apparently neutral criteria.

Further, discrimination claims may surface as companies decide whom to return to work and when to do so. Employers should consider business needs, compliance with ongoing stay-at-home restrictions, and health precautions in order to choose which employees will return first. Where appropriate, employers should be prepared to engage in the interactive process under the Americans with Disabilities Act to address those concerns of employees fearful of returning to work. Additionally, the Equal Employment Opportunity Commission (EEOC) has made clear that employers should avoid blanket policies requiring "high risk" employees (under the Centers for Disease Control and Prevention (CDC) guidance), such as older or pregnant employees, to continue to telework while others return on-site, lest employers run afoul of laws prohibiting age and pregnancy discrimination.

For more extensive discussion on returning employees to work, please consult our return-to-work employer guide.

As the number of cases around the world grows, Faegre Drinker's Coronavirus Resource Center is available to help you understand and assess the legal, regulatory and commercial implications of COVID-19.

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