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Blog Post

Avoiding Potential Workplace Claims Arising from Reopening of Businesses

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As employers contemplate or commence reopening, they should be cognizant of potential workplace claims which are likely to escalate in the COVID-19 era. Such claims can arise out of a wide range of situations, including: deciding which employees should be brought back to the worksite first, which should be allowed to continue to telework and where there isn't sufficient work, which should be terminated; barring vulnerable workers from returning to work; failing to provide a safe workplace; interfering with leave rights; and wage and hour errors. Employers should take steps now to reduce exposure to such claims.

Potential Discrimination Claims

Given the likelihood that most employers will have a phased reopening in light of the need for continued social distancing measures and changed business needs, employers must be careful in selecting who to bring back from furlough first, who will be allowed to continue to telework, and where necessary, who should be terminated. To do so, they should plan ahead, using legitimate non-discriminatory criteria in making their selections.

Such criteria might include, for example, seniority, operational needs, skill sets, or performance ratings. While managers might then evaluate each employee based on the chosen criteria, the company should consider having the selections reviewed by a second

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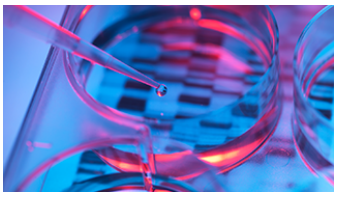

neutral person, ideally from Human Resources. Employers should document their decision-making process in advance and retain the documentation. Employers should analyze the results to determine whether there is an adverse impact on any particular protected category, and if so, adjust or be prepared to justify the decision.

Just as they should be careful in choosing who should to return to the workplace and when, employers should be similarly careful in choosing whether to bar certain employees from returning. Specifically, employers should not automatically bar those employees who have been identified as at higher risk for severe illness from COVID-19, including persons 65 or older, or those with underlying chronic health conditions, including pregnancy. Such actions could give rise to clams that an employer violated the Americans with Disabilities Act (ADA), the Pregnancy Discrimination Act, or similar state laws.

Earlier this month, the Equal Employment Opportunity Commission (EEOC) issued, then withdrew, then reissued guidance on that topic. The EEOC currently says “the ADA does not allow the employer to exclude the employee – or take any other adverse action – solely because the employee has a disability that the CDC identifies as potentially placing him at ‘higher risk for severe illness’ if he gets COVID-19.” Barring such an employee is not permitted, unless the disability poses a “direct threat” to the employee’s health that cannot be eliminated or reduced by reasonable accommodation. That means employers should make an individualized assessment of the particular employee’s situation, taking into account factors such as: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; the imminence of the potential harm; the severity of the pandemic in the employee’s location; the employee’s own health; the employee’s particular job duties; and the likelihood that the employee will be exposed at the worksite.

The employer should engage in a dialogue with the employee to determine whether there is an accommodation which could eliminate or reduce the risk of harm, such as telework, leave, or reassignment. An employer should only bar a vulnerable employee from the workplace if, after taking those steps, "the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation," the EEOC says.

With school closures and child care responsibilities, employers also should be mindful of potential claims based on caregiver discrimination, sometimes also referred to as "family responsibilities discrimination." Employers must be careful not to assume that only mothers have such responsibilities. While no one federal law expressly prohibits caregiver discrimination, Title VII, the Equal Pay Act, the ADA, and the Family Medical Leave Act can all come into play to protect those with child care responsibilities at home. In addition, a host of state and local laws provide various protections to caregivers.

Further, the new Families First Coronavirus Protection Act (FFCRA), covering employers with fewer than 500 employees, provides new leave rights to employees who are unable to work or telework for reasons including: 1) that the employee needs to care for an individual subject to quarantine; or 2) to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19. The information and documentation employers can request of employees seeking FFCRA leave is limited, and employers should be careful not to seek documentation in excess of those limitations. Cases alleging interference with FFCRA leave rights or retaliation for exercising those rights already have been filed, and no doubt there will be more.

If and when employees request time off due to caregiving requirements, employers should explore the situation carefully, honor leave rights, and strive to be flexible where possible.

Potential Safety Claims

The Occupational Safety and Health Administration (OSHA) imposes a general duty on employers to provide a workplace safe from recognized hazards like to cause harm. While the statute does not provide employees the right to bring a lawsuit directly against the employer for failure to do so, OSHA can certainly pursue such claims. Moreover, the lack of a private right of action has not dissuaded health care workers, transportation workers, and plant workers from filing multiple suits around the country seeking to require their employers to provide a safe workplace and comply with safety guidelines. Whether any of those claims will succeed is unclear, but the negative publicity alone can damage an employer's reputation among employees, customers, and shareholders alike.

Further, if employers take adverse action against employees who complain about the company's failure to provide a safe workplace, employees do have the right under OSHA to sue the company for retaliation – and such suits are being filed. Taking actions against employees who complain on behalf of themselves and their co-workers can also lead to claims of violation of the National Labor Relations Act, even in a non-unionized workplace setting.

Hence, employers should take safety issues seriously. While OSHA has declined to issue specific regulations on COVID-19 precautions, it has issued guidance on preparing the workplace for the return of employees and maintaining a safe work environment. Guidance offered by OSHA and by the CDC should be considered the baseline for employers to follow. Smart employers will proactively develop a workplace safety plan consistent with that guidance prior to opening, and

ensure it is followed as the workforce returns. Among other things, employers should ensure:

- the use of healthy hygiene practices and implementation of Personal Protective Equipment (PPE);
- seating distance of at least 6 feet and staggered gathering (starting/closing) times;
- restricted use of any shared items or spaces;
- training all staff in all of the safety requirements; and
- ongoing monitoring protocols such as establishing routine, daily employee health, and temperature checks.

Keep in mind that workers' compensation insurance ordinarily provides employees with benefits for any illness or injury arising out of and occurring in the course of their employment. In most states, such workers' compensation statutes grant immunity to employers for other claims, subject to very limited exceptions typically involving the intentional acts of an employer. Lawyers are already challenging the limits of that intentional act exception, bringing claims alleging that employees got COVID-19 as a result of the employer's failure to follow safety precautions in the workplace.

For example, a wrongful death action was brought against a big-box retailer, after an employee died of COVID-19 complications. His estate sued, claiming the company knew that employees were exhibiting COVID-19 symptoms but failed to take reasonable care to keep store employees safe and healthy, by, among other things, failing to clean and sanitize the store, failing to implement and promote social distancing guidelines, and failing to provide PPE to employees.

Employers should monitor evolving CDC and OSHA guidance, as well as guidance from their state and local agencies, and take steps to comply.

Potential Wage and Hour Claims

Wage and hour claims can arise in multiple return-to-work scenarios. Here are just a few:

During the pandemic, employers may have laid off some exempt employees and transitioned their duties to others and/or cut salaries. Employers would do well to remember that to be properly classified as exempt from the Fair Labor Standard Act's (FLSA) overtime and recordkeeping provisions, an employee must both be paid on a salary basis (currently $684 a week/$35,568 annually) and meet the duties tests of one or more of the recognized exemptions. If your exempt workers are no longer primarily performing exempt duties or if their salary has dipped or will dip in the future below the minimum threshold, you should consider reclassifying such employees to hourly non-exempt workers.

And if you furlough exempt workers, make sure they perform no work while furloughed, as an employer must pay an exempt worker's salary for any week in which he/she performs any work.

Non-exempt workers who telecommute present other concerns. Be sure you have and enforce timekeeping policies for remote non-exempt workers.

Temperature screening procedures present a separate potential wage and hour issue. If employees must wait to be screened, depending on the circumstances, time spent waiting to be screened may not be compensable under the federal FLSA, but it may very well be compensable under state law.

These are but a few of the potential claims on the horizon as businesses reopen and bring back their workers. Akerman has a Coronavirus Resource Center, and has created multiple documents which employers can use or adapt as they bring back their workforce, available in the Return to Work Resource

Guide. For assistance with policies, training, procedures, or issues that arise out of the reopening of your business post-COVID-19, contact your Akerman attorney.
