

Blog Post

# COVID-19 Related Litigation Surges: What Employers Can Do To Minimize Exposure

October 14, 2020

The much-anticipated surge of COVID-19 pandemic-related litigation has begun. As the pandemic continues to lay siege to the United States economy, claimants' lawyers and government agencies have begun setting their sights on employers.

In early May, we blogged [here](#), predicting an uptick in a variety of claims, including those relating to workplace safety, discrimination in furlough and termination decisions, disability issues, leave issues, and wage and hour issues.

As predicted, employers are increasingly finding themselves the target of such lawsuits, as well as other categories of legal actions that are only beginning to emerge. Nearly seven months into the pandemic, here are some of the litigation challenges employers currently face:

## 1. OSHA Enforcement Actions

Amid continued criticism of its enforcement efforts and a revelation in May that the U.S. Occupational Safety and Health Administration (OSHA) had issued only one COVID-19 related citation after two months of the pandemic, the agency has begun escalating its imposition of penalties on employers for alleged failures to provide personal protective equipment (PPE) and other workplace safety measures, violations of employee exposure and hospitalization reporting requirements, and other pandemic-related

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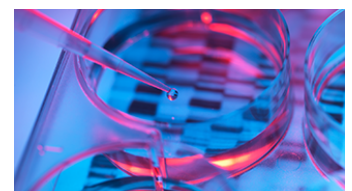
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shortcomings. In September alone, OSHA and the U.S. Department of Labor have assessed or proposed:

- a \$13,494 fine against a Louisiana-based healthcare system after finding its employees were either sharing used protective gowns or wearing no protective gown at all while treating patients;
- a \$13,500 fine against a meat packing company after finding nearly 1,300 workers in its Sioux Falls, South Dakota plant had contracted COVID-19 and four had died;
- a \$15,615 fine against a Colorado-based processor of beef, pork, and prepared foods, after finding an estimated 300 workers had contracted the coronavirus and seven had died; and
- a \$28,070 fine against a New Jersey-based residential health care facility after finding it had failed to provide respirators to workers treating patients with COVID-19 like symptoms, and even after providing respirators, had failed to adequately train and evaluate workers on proper use.

The escalation of enforcement measures isn't limited to OSHA, either; state agencies also have become more aggressive in their enforcement efforts. In mid-September, California's OSHA-equivalent proposed just under a half-million dollars in COVID-19 related fines against a food manufacturer and its temporary staffing agency, for failing to implement appropriate social distancing and other safety measures, failing to investigate COVID-19 cases among its employees, and failing to report a COVID-19 fatality. The agency found nearly 400 employees had been exposed to the coronavirus at various places within one of the companies' jointly-operated plants. Similarly, in late September, Nevada's OSHA-equivalent fined two Las Vegas restaurants a total of almost \$10,000 after inspectors observed employees wearing face masks below their noses and patrons eating and drinking on bar tops, an area the Governor had ordered closed in an effort to quell the

spread of the coronavirus. Also in September, Oregon's OSHA-equivalent fined a restaurant and a pharmacy a total of \$23,300 for their continued failure to ensure their employees' compliance with mask and social distancing requirements. In the majority of cases recounted above, government penalties were imposed based upon investigations that were prompted by complaints made to those agencies, either by patrons or by employees.

Although many of the companies cited to date have expressed their intention to challenge OSHA's penalties, such aggressive enforcement measures are unlikely to stop, especially if OSHA and equivalent state agencies continue to be subjected to heightened scrutiny for their policing and enforcement efforts. So far, fines have been primarily assessed against employers in the food manufacturing and processing, food and beverage, healthcare, and hospitality industries, but this may not always be the case; OSHA's enforcement authority under the Occupational Health and Safety Act extends to all "employers" (defined as "person[s] engaged in a business affecting commerce who ha[ve] employees").

Employers can minimize the risk of complaints, investigations, and ultimately penalties by being proactive. They should ensure that they have implemented and maintained adequate pandemic-related safety measures consistent with current federal, state, and local guidance and trained employees on both those measures and how COVID-19 is spread. They should establish a reporting mechanism for employees to report concerns about workplace safety or other COVID-19 issues, and a process for addressing those issues. And they should have employees acknowledge their obligations to help minimize the virus's spread and to report issues that arise, just as they would acknowledge their obligations to report other conduct in the workplace that threatens the safety or well-being of workers.

## 2. Retaliation Actions

As expected, employees are beginning to allege they were retaliated against for making formal safety-related complaints or criticizing employers' PPE and other safety measures. Although it is too early to make broad predictions about the feasibility of such lawsuits, courts appear amenable to plaintiffs' arguments. For instance, in Illinois, a nurse sued a hospital, alleging she was terminated because she warned colleagues that hospital-provided masks were inadequate to protect against COVID-19. On September 15, a state court denied the hospital's motion to dismiss, reasoning the plaintiff's actions were in furtherance of an important public concern. The court wrote:

Illinois has a clearly mandated public policy of stopping the spread of COVID-19 and protecting the health and safety of its citizens ... Plaintiff's email was not sheerly a 'private' concern, but rather one that relates to the spread of COVID-19 within her hospital work environment and therefore one that has an impact on the general welfare of Illinois citizens as a whole.

Similarly, in August, a former employee sued a Pennsylvania nursing home for terminating him after he expressed concerns regarding the facility's COVID-19 related safety practices.

Employees are also increasingly alleging they were unlawfully terminated in retaliation for making pandemic-related leaves, requests for leave, or requests to continue working remotely. A national delivery company driver recently sued her former employer, alleging in part the company terminated her in retaliation when she fell ill and quarantined for 14 days in accordance with a doctor's orders. Two workers at a Georgia carpet company and a Michigan restaurant, respectively, allege their employers terminated them when they quarantined after each tested positive for COVID-19. This particular category of litigation is unsurprising; the

Families First Coronavirus Relief Act (FFCRA), under which countless employees across the country have requested pandemic-related leave, does not require employees to exhaust their administrative remedies before suing employers, the result being it is easier for plaintiffs to bring employers into court without the initial step of having to lodge a complaint with an administrative agency. Additionally, unlike the Family and Medical Leave Act (FMLA), which applies only to employers with 50 or more employees, the FFCRA applies to companies with fewer than 500 employees – meaning far more employers are vulnerable to suit under the FFCRA than under the FMLA.

The surge in pandemic-related claims is not limited to rank and file employees, either. For example, a former executive of a social networking app company sued alleging she was terminated in retaliation for voicing concerns over the company securing Paycheck Protection Program loans, and an associate general counsel at a real estate development company sued, claiming the company fired him after he asked to continue working remotely.

Employers should therefore tread lightly in addressing both employees' safety concerns and requests regarding leaves of absence or continued teleworking arrangements. In addition, they should have renewed focus on training. Training supervisors on how to deal with employees who raise medical issues has always been important. Supervisors should know how to recognize a request for an accommodation under the Americans with Disabilities Act (ADA) even if the words "accommodation" or "disability" are never uttered, and they should understand the importance of engaging in the "interactive process" when such situations arise. Similarly, supervisors should recognize when an employee has a potentially FMLA-qualifying condition, what they must do when that happens, and the limited time frame the company has to respond once it is on notice.

Now, with the pandemic, additional training is important. Supervisors need to understand their obligations under the ADA, the FMLA, and the FFCRA, and how to respond to the myriad issues that may arise from COVID-19 issues. Employers should also ensure they have systems in place to document employee complaints, requests for leaves and accommodations, and how each was handled.

Terminating employees during the pandemic can be especially challenging. Documentation supporting the timing and the reasons for termination will prove invaluable in the unfortunate event that an employer faces allegations of retaliation or other unlawful employment practices in connection with the COVID-19 pandemic.

### 3. Personal Injury and Wrongful Death Actions

Employers also are facing the occasional lawsuit relating to employee exposure to or contraction of COVID-19 or, in rarer cases, death. That said, it remains an open question whether such suits will be barred under state workers' compensation schemes, which ordinarily divest trial courts of jurisdiction over worker injury claims where the injury was sustained in the course of employment and the employer was not reckless. In addition, it remains to be seen whether Congress will ultimately pass legislation providing COVID-19-related liability protections for employers, an uncertain and hotly-contested proposal.

In the absence of clear legal guidance on the issue of liability for worker illness or death related to the pandemic, employers should remain ever-vigilant, continually evaluating and improving upon their safety procedures (both pandemic-related and not), maintaining candid, substantive communication with employees, and handling COVID-19 issues with care.

### Conclusion

These are unprecedented times. Employers must navigate both new and old obligations, while trying to maintain a safe workplace and keep their businesses in operation during the pandemic. Contact your Akerman attorney if you need help navigating these and other employment issues.

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