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Blog Post

COVID Infections May Be Down But COVID Lawsuits Are Up: What Employers Should Consider

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It comes as no surprise that employee claims against employers are on the rise. In the early months of the COVID-19 pandemic, there was a drastic decline in newly filed employment-related lawsuits. The decline was likely the result of shelter-in-place orders and other restrictions on working in the workplace. However, the months of November 2020 and December 2020 saw a spike of more than a 17 percent increase in new employment cases, as compared to the same time period in 2019, according to Lex Machina, which provides legal analytics. States seeing the highest number of new filings include New York, California, Pennsylvania, Florida, and Texas.

The correlation between an economic downturn and an increase in employment litigation is normal: when profits drop, companies reduce headcounts and former employees, unable to find subsequent employment due to lack of availability of open jobs, are more likely to sue their most recent employer who terminated their employment. Add to that equation the host of new challenges presented by COVID-19, and you have a proliferation of claims.

This uptick in cases appears to be a signal of what's to come, and employers should be prepared. Recent COVID-19-related workplace claims most commonly allege some form of wrongful termination,

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retaliation, failure to accommodate, or failure to provide adequate workplace protections against COVID-19.

These issues can be thorny. For example, in one recent case, an employer closed its offices in accordance with a government order and ordered its employees to work from home in response to the spread of COVID-19. One employee, who lived in New York and worked out of the company's New York office, was diagnosed with COVID-19 and went on an approved leave. With the company's approval, the employee later temporarily relocated to another state to avoid New York's high infection rates. Circumstances then required the employee to relocate again, but his doctor advised him not to return to New York yet because of the prevalence of COVID-19 there and the lack of available health care facilities. Thereafter, the employee decided to relocate to another country, where he had family. The employee assured the company that his move abroad would not impact his ability to perform his work. The company, however, allegedly rejected the request and terminated the employee. The employee then filed suit for alleged retaliation for taking leave under the Family and Medical Leave Act and for requesting an accommodation.

This situation in the foregoing case presents several challenges for an employer. The company allowed the employee to take time off during his COVID-19 infection and further accommodated his request to temporarily work from another state. But was the company obligated to accommodate the employee further by allowing him to work remotely from another country?

Although, arguably, the employee's work could be performed from anywhere, there are other considerations to address. For one, the longer a U.S.-based employee works in another country, the more likely that the local laws of that country will apply to the employment relationship. This could have drastic implications on the employer's ability to

terminate employment, time-off requirements, benefits, and payroll taxes. Just because an employee can work from an international destination, and may have done so previously during brief vacations as the employee in this case alleged, does not necessarily mean that allowing international work for a longer period is just as easy, nor without financial and regulatory consequences. As with every case, the devil is in the details.

Employers faced with requests to relocate should consider the state or country in question, the reason why the employee is requesting to work from that location, and the duration of the request. If the location is domestic, the employer must still consider the impact of state and local laws. Keep in mind when an employee works from another state, there may be state tax and other implications that an employer cannot ignore. If the location is abroad, the employer also must consider the employee's immigration status and other impacts on the business, including data security. Before making any decision, the parties should thoroughly document their expectations of such an arrangement and the employer should seek the advice of legal counsel. Critically, employers should document what accommodations were considered and, if applicable, objective reasons as to why any particular accommodation was or was not granted. Any accommodation requests and responses should be addressed pursuant to the requirements of the Americans with Disabilities Act (ADA) and any state or local regulations, as applicable.

Another common litigation scenario involves allegations of discrimination in layoffs. In one recent case, an employee worked for a company for six years and recently was promoted to a management position. In late March 2020, he experienced COVID-19-like symptoms and informed the company of same. The employee then tested positive for COVID-19 and allegedly attempted to engage in discussions regarding an accommodation. Instead of exploring potential accommodations, the employee alleged

that the company terminated his employment. The company said his termination was part of a layoff due to declining profits. However, the employee claimed that the company did not explain why he was the only manager selected for layoff, especially since he had more seniority than others in his position. The employee filed suit alleging disability discrimination.

The foregoing scenario has arisen in countless situations this past year as companies struggle with decisions on who should be laid off when faced with declining profits. How does a company best position itself to defeat claims of discrimination if it needs to reduce its workforce due to a drop in revenue caused by COVID-19?

As a threshold matter, proper documentation and selection criteria is key. Companies should identify the structural changes needed and in what locations and departments, before determining which positions may be impacted. Employers also should determine and document objective, non-discriminatory criteria for selection in a layoff. For example, will the selection consider past performance reviews and disciplinary warnings, job classification, seniority, job duties, department or production line closures? Factors to be considered should not include leave status or prior employment claims made. Further, direct supervisors should not be the sole decisionmakers; rather, a neutral decisionmaker (such as Human Resources) should review the selections and criteria to help ensure decisions are based on legitimate business reasons, and not bias. After selecting the individuals for layoff, best practice is to perform a statistical analysis to determine if any protected groups are disproportionately impacted. If there are significant disparities, the company should review the process again to ensure that there are legitimate reasons for the decisions that the company can substantiate, if it is later called upon to do so.

Another issue raised by the facts above is whether the employer engaged in the interactive process, as contemplated by the ADA. The interactive process can take on many forms, but mainly centers on both the employee and the employer engaging in a dialogue to determine how the employee's medical condition impacts his/her ability to perform the job and whether there are any reasonable accommodations that would allow the employee to perform the job.

While the ADA has restrictions on when and how much medical information an employer may obtain from an employee, the Equal Employment Opportunity Commission (EEOC) has provided some guidance on the issue. The EEOC advises that employers may ask questions and/or request medical documentation to determine whether a medical condition necessitates a reasonable accommodation. Permissible questions include: (1) how the disability limits the employee's activities; (2) how the requested accommodation will effectively address the limitation(s); (3) whether another form of accommodation could effectively address the issue; and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of the position. Employers should document all communications throughout the interactive process, including what accommodations were considered and offered.

Another issue that has arisen during the pandemic relates to the employer's assignment of hazardous work. For example, in another case, a 60-year-old Black man performed housekeeping work at a hospital. After he complained of inadequate personal protective equipment (PPE), he alleged that the hospital retaliated against him by purportedly reassigning all rooms that were used for COVID-19 patients to be cleaned by him. There was another White housekeeping employee who could assist with this work, but she was pregnant. The hospital told the complaining employee that the woman was exempted from performing such work because of

her pregnancy. He filed suit alleging race and age discrimination and argued that Black people are at a higher risk of death from COVID-19 than younger, pregnant White individuals, such as his coworker.

This case illustrates another unique challenge for employers: How does an employer decide which of two protected and high-risk individuals should be assigned to perform hazardous work? There are no easy answers here, but this dilemma could be mitigated by implementing proper PPE and safety protocols, and otherwise having an even-handed approach to the assignment of work, unless otherwise mandated by law. All employers should note that they have an obligation to provide a safe workplace under OSHA's general duty clause. Indeed, OSHA recently issued new guidance on COVID-19-related protections employers should have in the workplace.

Consistent and repeated communications on safe workplace practices and training is critical during this time, especially in industries that regularly encounter COVID-19 patients. Talking with employees about their concerns also is important. If an employee has a safety concern, a wise employer will meet with the employee to discuss the concern, what the employer has done to address the concern, and to discuss whether there are additional steps the employer can reasonably take to alleviate the concern. Often, effective communication will provide the company an opportunity to act before the issue escalates to a claim.

To some extent, employers always will be vulnerable to employment lawsuits. But staying informed on legal requirements, timely and even-handedly addressing employee concerns, and taking appropriate precautions in a thorough and prompt fashion will go a long way to creating a positive work environment.

For assistance with these and other workplace issues, contact your Akerman attorney.