Alerts

Published: May 20, 2020

Top Five COVID-19 Litigation Risks for Employers: Is Your Company Prepared?

Services

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Despite the best of intentions to comply with the myriad of laws, orders and recommendations and to "do right" by employees while dealing with the current pandemic and recession, employers remain vulnerable to a whole host of potential COVID-19-related claims. Ever-changing guidance and return-to-work orders complicate the issues. Keeping abreast of the actual and potential legal theories being raised is key to assessing potential COVID-19-related litigation risk. This article alerts employers to the "Top 5" claims and issues being raised now and suggests risk mitigation strategies so that you can be prepared.

1. Face Coverings

After weeks of isolation and lockdown, and as more and more states and localities require cloth face coverings to be worn outdoors, when shopping and inside the workplace, some are pushing back. Several employees may directly contest a face covering requirement, others may choose not to comply and still more may inadvertently fail to abide by the requirement. Employers must promptly act to investigate, address and appropriately respond to any non-compliance. Failure to do so could create complicity in violations of local or state requirements, and, even worse, might potentially lead to the spread of illness that could be attributed to the employer's inaction. Employers should put clear policies in place to address when protective gear is required and disciplinary action for non-compliance. And they must enforce such policies consistently and fairly. Doing so will help insulate employers from allegations that they did not provide adequate protective equipment and/or refused to suspend operations to allow for sanitation, which can lead to compensatory and punitive damages.

While an employer generally would be within its rights to send employees home until they are ready to follow the rules, if an employee's refusal is due to a medical

condition, the employer should engage in an interactive dialogue consistent with the ADA and accommodate as necessary.

Employers should take particular care where employees complain about face-covering requirements as a group, because such complaints may constitute concerted, protected activity under the National Labor Relations Act. Discharging or taking adverse employment action against employees who engage in such activity can lead to serious legal risk.

On the other hand, private employers may not realize their employees are not entitled to First Amendment "free speech" rights in a private workplace. That is, the First Amendment limits how federal or state government actors can restrict speech, but it places no limits on non-governmental employers. Thus, private employers have disciplined employees for threatening or inappropriate speech, even if it is unrelated to work or occurs outside the workplace. Recently, one law firm employee was fired for posting an apparent gun-violence threat against any business that required him to wear a mask.

To reduce potential legal liability, we recommend that employers:

- Comply with local and state orders regarding required face coverings, social distancing and other safety measures for employees
- Implement policies and procedures to ensure employee compliance
- Investigate employee non-compliance promptly, discuss the reason(s) for non-compliance and take effective remedial action when necessary
- Be aware of protected, concerted activity and refrain from discharging employees who complain together

2. Plexiglass, Other Protective Measures and the ADA

Employers, of course, want to protect their workers, especially those of advanced age or with underlying medical conditions, but there are limits to how far they can go. Recent EEOC guidance cautions employers against singling out employees they consider "vulnerable" or excluding them from the workplace, and the ADA precludes adverse employment action based on a perceived disability.

While some well-intentioned employers may be considering the addition of physical barriers in the workplace to reasonably accommodate certain employees, they should be aware that modifying the work environment for only employees with underlying medical conditions may result in a "scarlet letter" or label employees considered "vulnerable," leading to unintended violations of the ADA's confidentiality requirements. At the same time, implementing the same barriers for the entire workforce may be cost-prohibitive, especially during this pandemic-induced recession. Employers should consider whether uniformly changing the workplace environment would pose an "undue burden" which, as per EEOC guidance, may be a bit lowered during these trying times.

To reduce potential legal liability, we recommend that employers:

- Refrain from making assumptions about employees with known pre-existing medical conditions
- Avoid blanket exclusions for individuals perceived as vulnerable when creating and implementing return-to-work policies and procedures
- Continue to engage in the ADA interactive dialogue on an individualized basis, determining what reasonable accommodations, if any, can be made for an individual who requests one
- Assess cost and alternatives to physical barriers at the outset and implement a uniform approach to avoid inadvertently singling out a certain employee population

3. Symptom Monitoring, Contact Tracing, and Privacy Laws

To comply with state and local return-to-work orders, as well as CDC and EEOC guidance, many employers are implementing symptom-monitoring protocols for employees, vendors and customers, ranging from employee self-monitoring to temperature scan stations for all those walking in the door.

While some employers may opt for no-contact infrared scanners to take temperatures, companies that serve large groups of people or larger employers may implement thermal-scanning devices that utilize facial recognition to identify individuals. Such devices are capable of accurately reading temperatures, even from a few feet away, of large groups of people. Some employers are also considering contact-tracing apps for their employees.

These methods implicate, however, additional requirements under some states' biometric privacy laws, including, for example, Illinois's Biometric Information Privacy Act ("BIPA"). BIPA contains detailed requirements designed to ensure that any individual providing biometric information, which includes a scan of face or hand geometry, has consented to the collection of such information, and requires private entities in possession of biometric information to develop a publicly-available written policy establishing a retention schedule and guidelines for permanently destroying biometric information when the initial purpose of collecting or obtaining the information has been satisfied.

Failure to establish a policy and obtain consent exposes companies to class action lawsuits with potential damages ranging in the millions. Case in point: Facebook recently settled a BIPA suit for $550 million. As of this writing, BIPA is the only state biometrics statute that authorizes a private cause of action for violations, but companies in several states can be at risk for investigation by some states' attorneys general, such as in Washington and Texas.

Moreover, based on the recent surge in COVID-19-related hacking activity, data breaches likely are on the rise, leading to potential class action lawsuits.

Even no-contact temperature taking devices present risks. If such devices collect personal information in computerized data form, this could implicate state breach notification laws which, in general, require notification to individuals if there is a loss of personal information.

Finally, the collection or recordation of employees' temperatures or symptoms, whether digitized or handwritten, could lead to liability under the ADA for failure to retain confidentiality.

To reduce potential legal liability, we recommend that employers:

- Develop clear written policies for symptom monitoring
- Where appropriate and feasible, have employees sign written consent forms for the collection of symptom information
- Instead of retaining employee symptom information, test for symptoms without retaining the medical information to avoid running afoul of the ADA's confidential information requirements

4. Denial or Miscalculation of Sick or Family Leave

As schools remain closed and many summer childcare options are operating with reduced capacity, employees continue to request leave under the Families First Coronavirus Response Act (FFCRA). The FFCRA provides paid leave for employees who need time off to care for themselves or a family member affected by COVID-19, or where a child's school or daycare closes due to COVID-19. Employers are presented with unique challenges and litigation risk as they delicately balance staffing and business needs with their employees' needs to care for themselves and family members.

The FFCRA only applies to employers with less than 500 employees, but there is risk for employers of all sizes. One employee sued her very large employer on the theory that by amending its leave policy to be consistent with FFCRA, it is estopped from denying FFCRA benefits. And employers near the 500 employee level, or those with related entities that (if combined) would bring them over 500, who determine the FFCRA does not apply to them are susceptible to class actions claiming the company misapplied the aggregation rules governing applicability of the statute.

More predictably, employees may bring actions under the federal Fair Labor Standards Act ("FLSA") based on denial or miscalculation of FFCRA leave pay, particularly because employers have some discretion to deny FFCRA claims. For instance, leave need not be provided if another "suitable" person is available to take care of the employee's child, or where the employee can fulfill job duties while teleworking. There also may be disputes as to how the employer calculates the amount of leave pay, particularly when ascertaining the employee's "average" pay or hours is difficult because the employee has worked less than six months at the employer or has an irregular schedule. Any successful claims can be costly due to the potential for not only back-pay but also statutory penalties, personal liability and attorneys' fee awards.

Employers can take prescriptive measures to avoid such claims, including:

- Have legal counsel review the complex aggregation rules in the FFCRA
- Ensure good documentation of how employees were counted and consistency with corporate records, including payroll, benefits and time records
- Ensure clear and consistent documentation of reasons for and calculations of leave pay; obtain consensus or agreement with affected employee

5. Furloughs, Reductions in Force, Layoffs and Increased Whistleblower Claims

Many employers have had to, or are continuing to, implement furloughs, reductions in force or hours and/or layoffs. At the same time, employers are implementing more specific safety measures, such as the ones mentioned above like face coverings, symptom-monitoring and contact tracing, and are even setting up COVID-19-specific hotlines so employees can report others' non-compliance with social distancing and other new safety-related guidelines. The combination of potentially many more employees engaging in whistleblowing, a protected activity, and the record number of employment separations, increases the likelihood of whistleblower claims.

In addition, more layoffs, furloughs and reductions could lead to claims for violation of the minimum wage and overtime provisions of the FLSA. In addition to backpay, employers can be liable for unpaid 401(k) contributions, bonus program payments, unused but accrued vacation time and applicable employment-related taxes. Potential liability extends beyond the company to decisionmakers, who under the FLSA and most state-equivalent laws may have personal liability. Some states even impose criminal penalties.

Finally, employees adversely affected may allege the RIF was pretextual to eliminate employees with protected characteristics. For this reason, it can be extremely helpful to conduct an adverse impact analysis prior to finalizing reduction decisions. The analysis shows, from a statistical perspective, whether individuals in a protected class have been selected for the reduction at a higher than proportional rate.

Some risk mitigation strategies include:

- Thorough documentation of the decisional process, preferably after engaging and involving legal counsel to preserve privilege
- Perform a statistical analysis, preferably in an attorney-client privileged setting, to verify whether the RIF has a disparate impact on employees in any protected classes

Contact Us

If you have further questions or require more information regarding this update, please contact Stacey Bowman, Brittany Falkowski, Anne Mayette, A.J. Weissler or your Husch Blackwell attorney.

COVID-19 Return-to-Work Resource

For the many businesses that partially or completely shuttered their on-site operations due to government-mandated COVID-19 orders, transitioning employees back to the workplace is an unprecedented and complex endeavor. Husch Blackwell's Return-to-Work Resource Center provides best practices, answers to common questions and potential issues to consider.