THE CERTAIN FALLOUT FROM COVID-19 FOR EMPLOYERS

Employers throughout California (and the nation) are doing their best to handle the COVID-19 crisis, which includes having to navigate a host of uncharted legal issues affecting their workplaces and workforces. These decisions have to be made quickly and without the benefit of well-established legal guidance. Even though employers are operating in good faith trying to manage these novel issues, you can bet that plaintiffs’ lawyers are gearing up to sue employers for all manner of COVID-related personnel actions. This post discusses the types of claims we anticipate, and also discusses “litigation shield” bills that are being considered in several states and on the federal level.

Wage and Hour Claims
In California, it is a virtual certainty that the plaintiffs’ bar will pursue COVID-related wage and hour actions against employers, both on behalf of individual employees and on a representative basis through the already-abused PAGA law. Anticipated wage and hour claims include (1) claims alleging that non-exempt employees working remotely were not paid for all hours worked (due to relaxed or different timekeeping systems used for remote work and/or due to performing some work while on an unpaid furlough), (2) claims alleging that employees were not reimbursed for all necessary business expenses associated with remote work, (3) claims that employees were not reimbursed for supplying personal protective equipment (e.g. masks and/or gloves) used in the workplace; (4) claims that employees who were temporarily furloughed and then laid off were not timely paid their final wages; (5) claims that exempt employees had pay deductions that violated the salary rule requiring that exempt employees generally must be paid their full salary for any workweek in which they perform work; and (6) claims that sales employees classified as exempt because they spend over half of their time selling outside of the office are not exempt employees during this time because they have not been able to sell outside the office or away from their homes.

Employers concerned about any of these listed issues should try to take steps to review their pay practices now to mitigate the risk of litigation ahead.

Negligence and Wrongful Death Claims
For essential business employers, and even non-essential business employers who are resuming operations once shelter-at-home orders are lifted, it is likely that increasing numbers of employees (or their families) will file litigation for “gross negligence” or wrongful death against employers, arguing that they wholly failed to provide a safe workplace and recklessly caused employees to contract COVID-19 and either become hospitalized or die as a result. At least one of these lawsuits already has been filed, and more are sure to follow. This will not be an easy claim for most employees to win because they would have to prove that they contracted COVID-19 in the workplace and not outside the workplace. Even then, an employer will be able to argue that if it is a workplace injury, then the employee is only entitled to benefits through workers’ compensation and not through money “damages” in a civil
lawsuit. Nonetheless, these lawsuits will be costly to defend and that is a loss for businesses regardless of whether they ultimately “win” the lawsuit. The best preventative “defense” to this anticipated area of litigation is to adopt and enforce safe workplace protocols (written) and practices in order to try to prevent employees or visitors from spreading COVID-19 in the workplace.

**Retaliation Claims**

Employers have been faced with numerous issues of essential workers refusing to come to work due to a fear of contracting COVID-19. Fear alone generally is not a qualifying reason to refuse to work or to take various forms of recently enacted paid leave. In some instances, employees have chosen not to work because they have realized they can earn more money collecting unemployment with the $600 CARES weekly supplement than they would earn if they reported to work. Where employees have been terminated for refusing to report to work, it is very likely that there will be lawsuits alleging these employees were unlawfully retaliated against for engaging in the protected activity of refusing to work in unsafe work conditions. If COVID-19 and the employee’s specific work setting are such that an employee could said to have had a reasonable belief that reporting to work could cause serious injury or death, the employee’s refusal to work could be deemed protected activity. Each case will turn on its own individual facts. Sufficed to say, there are no clear rules to guide employer decision-making during this health crisis. For now, employers should use caution when taking adverse action against employees who are not reporting to work due to cited COVID-19 concerns.

**Failure to Provide Paid Leave Benefits Required by Law**

Over the last six weeks, there have been numerous federal, state, and local emergency paid leave laws that have been enacted with little advance notice to employers, and most of these laws took effect immediately (or on very short notice). This created a patchwork of varying paid leave laws that employers had to digest and implement essentially overnight. The Department of Labor itself could not decide on the precise requirements of the federal paid sick leave law, the FFCRA, for weeks, in order for employers to be clearly informed about their compliance obligations. Understandably, there are going to be instances of non-compliance with the technical details of each law. Unfortunately, it is very likely that we will see claims for unlawful denial of paid leave and/or related violations (e.g. failure to calculate the amount of pay for sick leave) as a result. All that employers can do to mitigate against risk in this area is to try to stay on top of federal, state, and local paid leave developments and adopt compliant policies and practices. Additionally, where it is unclear whether a reason for leave qualifies as a covered reason for paid sick leave under an applicable law, employers would be wise to interpret the qualifying reasons liberally in favor of coverage.

**WARN Act Claims**

As a result of the health emergency and widespread shelter at home orders, many businesses have been forced to close their doors and halt operations. This has necessitated furloughs and layoff decisions, most of which could not have been foreseen or planned in order to comply with ordinary notice requirements that apply to certain layoffs and closings that trigger federal or state WARN Act notice requirements (i.e. 60 days’ advance notice of a layoff or closure). Worse, there is a lack of clear law on whether the pandemic excuses strict compliance with these laws’ notice requirements. This is likely to be tested in the courts in the next year because employers were widely unable to
comply. Some states, including California, relaxed the state law notice requirements, but did not eliminate them entirely. This relaxation of requirements was also too little too late for many employers who had already been forced to conduct layoffs.

Employers who are still confronting the need for possible future layoffs or plant closings should mitigate their WARN Act risk by conducting a WARN Act analysis (under federal and any state WARN law) to determine whether notice requirements need to be followed. Ok, this is all depressing. Is there any good news? Maybe a little….

Litigation Shield Laws
Senate Majority Leader Mitch McConnell has announced that he will be pushing for a broad liability shield to protect businesses from COVID-19 related litigation, as part of the next relief package. The scope of protections that would be provided by a liability shield law are unclear at this time, but the conversation thus far has centered on protecting businesses from claims that they caused employees or members of the public to contract COVID-19. This is a good start for a litigation or liability shield, but it does not go far enough. Employers need more broad-based protection from the likely onslaught of litigation. However, even this limited proposal is facing strong opposition from democrats and trial lawyers. Trump, for his part, has signaled support for such a law.

Some states are also considering similar laws. For example, in Utah, the state legislature passed a bill to shield businesses and property owners from claims from people (including employees) that they contracted COVID-19 due to some sort of negligence on the part of the business/property owner. Several other states (New York, New Jersey, Illinois, Michigan, Mississippi) have enacted laws to shield health care providers from certain COVID-19 related claims, in the absence of evidence of gross negligence. Florida is considering a broader liability shield law for businesses. All of these proposed liability shield laws are a great start, but it is very likely that, even if signed into law, they will fall far short of protecting employers from many types of claims.

On the workers’ compensation front, a number of states are passing or considering laws that allow front-line COVID-19 workers and/or certain categories of essential workers to collect workers’ compensation benefits in the event they contract COVID-19. In other words, it will be presumed for workers’ compensation benefit purposes that the illness was contracted in the workplace. In some ways, these laws are helpful to employers because workers’ compensation coverage would prevent a civil lawsuit for damages for alleged employer negligence causing the virus to spread in the workplace. However, the flip side to this is that if COVID-19 becomes more widely covered by workers’ compensation, this has the potential to cause workers’ compensation rates to skyrocket for employers.

Surprised I didn’t mention California as having a liability shield law in the works? Don’t hold your breath for that to happen. ☐

For more information or questions, please contact CDF Partner, Joel Van Parys, at jvanparys@cdflaborlaw.com.

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