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(Deposit photos)

Employment lawyers brace for COVID-19 litigation

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BOSTON — Employment lawyers don't know precisely what shape the wave of litigation triggered by employer responses to the COVID-19 pandemic will take, but few doubt that that wave is coming.

In the "rush" to implement furloughs and layoffs, many employers simply lacked the time to conduct appropriate disparate impact testing and analysis to determine whether employees in protected groups were affected more than others, according to Lynn A. Kappelman, an employer-side attorney in Boston.

"There's no question that we are going to see disparate treatment claims — potentially class actions — coming out of the decisions to implement furloughs, layoffs and return to work," Kappelman says.

Meanwhile, Providence, Rhode Island, employment attorney Chip Kirwan sees the work-from-home plans implemented by many employers during the pandemic as "incubators" for wage and hour claims.

"Those claims will spike due to slack 'hours worked' record-keeping," says Kirwan, who chairs the Rhode Island chapter of the National Employment Lawyers Association.

Kirwan adds that employees have additional incentive to pursue wage and hour claims with a recent amendment to Rhode Island's Wage Act. Under G.L. §28-14-20(d), liquidated damages are now defined to include two times the wages owed to the employee for the first offense.

And as employers formulate plans for their businesses to reopen and employees to return, lawyers expect there to be whistleblowers quick to report companies for failing to follow state and federal safety standards designed to protect workers from the coronavirus.

"I won't say that all of the plaintiffs' lawyers are 'licking their chops,' but they are certainly laser-focused on this," Kappelman says. "I fully expect they are locked and loaded and ready to file suits as soon as they can."

But Boston litigator Mark D. Szal, who represents both employers and employees, questions just how successful plaintiffs' attorneys will be in pursuing COVID-19 cases in the months and years to come.

"I think juries may give employers more of the benefit of the doubt given the unprecedented climate and need to make decisions in real time," Szal says.

Discriminatory layoffs?

Kappelman sees employment decisions made in response to COVID-19 as being fraught with risk in terms of potential discrimination litigation. It is easy to conceive of bias claims arising from allegations that an employer's layoffs disproportionately impacted minorities, women or older workers, she says.

A decision as simple as recalling management-level employees first in a staged ramping up of the business may be viewed as discriminatory if members of a protected class are underrepresented in a company's management, Kappelman points out.

But the discrimination analysis for claims arising from the pandemic is essentially the same basic analysis for furloughs and layoffs caused by other economic downturns, says Framingham labor and employment attorney Robert G. Young.

"In picking certain individuals for a furlough or a layoff, can you justify it with a legitimate business reason?" Young says. "The employee always wants to know, 'Why me?' Those risks are always present."

What makes the current situation different from past recessions, Young says, is that some employees may fear having to return to work.

Boston employment attorney Rebecca Pontikes says she recently received a referral in a case involving fathers who believe they were laid off because they have young children. She's also been asked about an employer who allegedly considered reducing the pay of employees on the assumption that they would not be as productive because they had children at home.

"Both of these situations could potentially be gender discrimination," Pontikes says. "I have been telling people to remember that employees still have rights [during the pandemic]. It's not a case of 'all bets are off.'"

Kappelman also sees the broad potential for disputes over employers failing to accommodate an employee's disability or family and medical leave requests. For example, an employee may not want to come back to work because she is pregnant and fears catching COVID-19.

"You may say the truth is the [Equal Employment Opportunity Commission] doesn't see pregnancy as a disability, 'so I don't have to accommodate you unless you have some underlying condition that causes it to be a difficult pregnancy,'" Kappelman says. "But if that person says 'I'm not coming back to work' and then you lay them off, maybe they have a 'regarded as' [discrimination] claim."

Kirwan says that, under Rhode Island law, quitting to preserve health if "definitized" will be construed to constitute "good cause" for purposes of preserving entitlement to unemployment compensation.

However, Kirwan adds, claimants should assume that "universal amorphous fears about ambient COVID exposure may not constitute 'good cause' without specific COVID facts sufficient to persuade a reasonable [Department of Labor and Training] referee."

Health, safety claims

Kappelman says she expects to see a "flurry" of health and safety claims brought by employees alleging they contracted the coronavirus when they returned to work because their employer failed to follow appropriate safety guidelines issued by the Occupational Safety & Health Administration, Centers for Disease Control & Prevention, or equivalent state and local agencies.

Clients will need to develop plans for reopening their businesses that adhere closely to state and federal guidelines issued for maintaining workplace safety during the pandemic, says Michael Brier, a business attorney in Boston.

OSHA recently issued guidance on preparing workplaces for COVID-19. For example, the guidelines advise employers to discourage employees from using other workers' phones, desks, offices or tools.

"OSHA does have a general duty rule that you have to ensure a safe workplace," Brier says. "What you could potentially start seeing are complaints to OSHA saying [an employer is] not creating a safe work environment because workers are too close to each other or don't have protective masks and gloves."

Amy Carlin, a management-side lawyer in Boston, says more employers are implementing temperature checks at work or requiring employees to "self-certify" that they've not had any symptoms of COVID-19 and that they've taken their temperature within the last 24 hours and not registered above 100.4 F.

Carlin doubts whether it would be useful for employers to require employees to sign general disclaimers acknowledging the risk of COVID-19 before returning to work. She says that her Massachusetts clients are looking for the state to issue workplace safety standards for businesses that reopen once the state of emergency is lifted.

"Our advice to clients is to take all of the precautions that are suggested" by state and federal authorities, Carlin says.

According to Kappelman, employees would have serious hurdles to overcome in proceeding with claims to hold an employer liable for a COVID-19 infection. Assuming the claims are covered by workers' compensation, state exclusivity provisions would ordinarily bar a tort suit, she says.

Apart from workers' comp exclusivity, Young says, employees alleging they contracted COVID-19 at work would have a tough time proving causation.

"When you're talking about a virus, who knows where somebody could have acquired it from?" Young says. "How do you prove it occurred in the workplace as opposed to anywhere else?"

Kappelman does see the potential for certain class claims based on allegations that an employer failed to meet OSHA guidelines in providing personal protective equipment or keeping the workplace sanitized. Likewise, she sees a great potential for whistleblower retaliation suits brought by employees who claim they lost their job because they reported safety violations.

Young points out that an employer may also face potential liability under the National Labor Relations Act when non-union employees band together for their "mutual aid and protection" in challenging the adequacy of COVID-19 safety measures in the workplace.

"There would be the risk of retaliating against those individuals for raising those issues," he says.

Wage and hour 'traps'

Kappelman predicts wage and hour claims triggered by the COVID-19 crisis will become the "low hanging fruit" for the plaintiffs' bar. She attributes that to the many "traps" unwary employers can place themselves in when reducing pay and workforce. For example, she says an employer can trigger an overtime obligation by cutting the pay of a previously exempt salaried employee to below federal or state limits.

"The federal exemption level is $35,568 a year," Kappelman says. "You can't be an exempt salaried person if you make below that amount."

An employee can also lose salaried exempt status if the employer ties a reduction in salary to a corresponding reduction to hours worked, she adds.

Employers also may inadvertently expose themselves to wage and hour liability by their interactions with furloughed salaried employees. For example, employers should be wary of reaching out to furloughed employees for help transitioning through a reduction in workforce.

"If you furlough Suzy Jones, an exempt employee, but you keep emailing, calling and texting her asking if she'd mind just walking you through how to do [this or that task], for every hour in a week that Suzy Jones spends [on those tasks], you have to pay her for an entire week's worth of work," Kappelman says. "You can't ask exempt employees who are furloughed to do any work, or else you have to pay them."

Employers should further resist the temptation to allow managerial employees to "pitch in" and perform non-managerial tasks needed to reopen a business.

"If you're spending more than 50 percent of your time doing the work instead of managing people, all of the sudden you are no longer salaried exempt," Kappelman says. "If you're working 50- or 60-hour weeks, now you're entitled to overtime."