

THE IMPACT OF COVID-19 ON EMPLOYMENT CLAIMS AND LITIGATION

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AS EMPLOYERS, INSURERS AND BROKERS CONTINUE

to grapple with the fallout from COVID-19, a variety of pandemic-related claims and litigation have emerged. Federal and state courts and agencies such as the Equal Employment Opportunity Commission (EEOC) are seeing the filing of COVID-19 employment claims with new and complex issues that have come to light.

COVID-19 has not only presented practical challenges for HR departments, many of the issues presented are maturing into claims. HR professionals and in-house counsel are on the front lines in addressing many familiar issues such as accommodations and workplace safety, with insurers weighing the interest in resolution against the likelihood of cases that cannot be resolved without reaching trial, and damage experts who find themselves reaching for their crystal balls.

At approximately 10 months into the COVID-19 pandemic, the number of COVID-19-related employment complaints filed as of early December totaled 1,093. Based on a review of COVID-19-related federal and state court employment complaints, the COVID-19 Employment LitWatch from Jackson Lewis, P.C., shows that the majority of the claims involve disability leave and accommodation, discrimination/harassment, retaliation/whistleblowing, and wage and hour claims. The majority of federal COVID-19 employment cases involve employers in the healthcare, manufacturing, transportation and hospitality industries.

FEDERAL COURT CASE TRENDS

Focusing solely on federal employment cases, Lex Machina's "Special Report: Impacts of COVID-19 on Employment Litigation in Federal Court" (October 2020) identified several significant trends in employment litigation, as well as a few COVID-19-specific trends. Through the first nine months of 2020, Lex Machina found the following:

- A 12% decrease in federal employment cases from 2019, but a 16% decrease compared to the average number of filings from 2010-2019.

- Significant decreases in harassment (-22%), Americans with Disabilities Act (-20%), and discrimination (-17%) from 2019 — a statistic which may be due in part to the lack of workplace contact, the shift to remote work or mass layoffs brought on by the pandemic.
- Approximately 2,000 fewer cases were closed in 2020 than 2019, reflecting the dramatic slowdown in court activity.

Jackson Lewis P.C. LitWatch data published on November 17, 2020, found the majority of federal COVID-19 employment cases have been filed in Florida, New York, Texas, Michigan, Pennsylvania, and Ohio. The majority of these cases involve healthcare, manufacturing, transportation and hospitality industries.

STATE COURT CASE TRENDS

The LitWatch report also considered data from state courts, where the vast majority of COVID-19 employment cases have been filed. The report revealed the following:

- 719 COVID-19 employment cases were filed in state courts, through December 2, 2020.
- Approximately 66% of all COVID-19 employment cases were filed in state court, as opposed to federal court.
- California and New Jersey have significantly more COVID-19 employment cases than any other states and nearly all of the claims in those states have been filed in the state court system (California 207 of 222 cases in state court; New Jersey 131 of 145 cases in state court). Florida, New York, Texas, Ohio, and Michigan round out the top seven states.
- Several states have experienced dramatic upticks in COVID-19 lawsuits since Labor Day.

Initially, COVID-19 presented little that was different from a typical employment practice liability (EPL) claim, according to Robert Nash, assistant vice president, employment practices liability of AXIS Insurance. "...The first one I saw was an administrative charge by a hotel worker. She alleged that coworkers were accusing her of having COVID-19 when that was not the case and that she was being treated differently based upon this



perceived disability.” Ultimately, that claim did not mature into litigation.

However, claims arising from COVID-19 are becoming more troublesome according to Nash. A physician at a chain of pediatric clinics was allegedly terminated in retaliation for complaining that the personal protective equipment (PPE) the clinic was providing was insufficient. A hospital psychiatrist with several COVID-19 risk factors was terminated after his request to “tele-doc” his hospital patients was declined and he refused to go onsite. Several nursing home employees had similar claims, refusing to come into work for lack of adequate protection and then were terminated.

Likewise, there are allegations of discrimination based on COVID-19-related risks. A claimant who lived with an immunocompromised parent requested to work from home so as to not put the parent at risk. The request was declined and the employee was subsequently terminated for not coming into work.

HR: THE FIRST LINE OF DEFENSE

HR professionals have an important role to play in reducing the risks of COVID-related employment claims and litigation. Many industries such as hospitality and travel have had to juggle enhanced risks amid severe disruptions of business.

According to Kirsten Hotchkiss, vice president, global employee relations and employment counsel for American Express Global Business Travel, companies are dealing with a myriad of issues. “This year more than any other, between dealing with furloughs and layoffs, to work from home policies and health & safety issues, while finding creative ways to cut costs and preserve the

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workforce as much as possible, experienced HR professionals are on the front lines in managing employment issues. They are critical to the mitigation of employment risks and claims.”

Issues stemming from accommodations, paid and unpaid leave, as well as retaliation and whistleblower issues, are at the top of the list for potential claims arising from COVID-19. Therefore, companies must have up-to-date policies and people who are trained to proactively deal with these issues.

As an example, companies and employers are seeking to address COVID-19-related issues to accommodate the many individuals who have children “distance learning.”

Employers often support these employees with remote work options and special accommodations where necessary. While such accommodations are not always required by law, companies largely want to “do the right thing,” which can go a long way to avoid potential workplace issues. Documented, progressive discipline continues to be an important means of defending any workplace claims that arise from substandard performance that leads to termination.

HR departments must also monitor state and federal workplace laws and executive orders, which continue to change dramatically to protect employees during the pandemic. Over the past year, amendments to the Family Medical Leave Act, the Families First Coronavirus Act, and a myriad of state executive orders have imposed different requirements for how companies operate during a pandemic. Such changes include significantly expanded justifications for paid leave, enhanced protections against workplace retaliation, and other mechanisms designed to support employees.

Failure to understand the impact of COVID-19-related laws and regulations and their interplay with one another can create internal disputes that tend to mature into claims.

RISK MITIGATION AND EARLY RESOLUTION

Claims professionals want to help insured parties to address and resolve issues early on — at the demand letter stage if possible. That is when economic harm is most manageable. This requires ensuring companies have appropriate policies in place to deal with pandemic-related issues.

In addition to a review of prior claims experience, the underwriting process itself must look to whether a company has up-to-date handbooks and policies, whether the company has an HR department, whether HR staff are appropriately trained and other considerations. These factors allow the insurance providers to make reasoned judgments about the companies they deal with and the risks associated with providing coverage.

When a claim arises, claims professionals are often interested in exploring early resolution. During the pandemic, plaintiff's attorneys routinely assert COVID-19-related claims following a familiar pattern. They serve a demand letter to test potential for settlement through mediation or other pre-complaint negotiations, which can avoid costly and time-consuming litigation. Although early resolution may be the goal, claims professionals and counsel may wish to delay a resolution if litigation is most likely to occur and/or the settlement demand is unreasonably inflated.

Civil jury trials are likely years away as courts attempt to clear clogged dockets brought on by mandatory closures and other pandemic-related issues. Unless claimants opt for virtual bench trials — an unlikely scenario for most claimants' counsel — they will not see their day in court for some time.

CALCULATING DAMAGES

When claims arise from pandemic-related issues, the question driving resolution often comes down to hard dollar damages. In other words, what economic loss is at issue? This question challenges claims calculation experts who are left with more questions than answers when faced with projecting lost earnings.

Consider the “but for” situation. In assessing economic loss, this calculation considers what a claimants' earnings would have been “but for” the liability issue and projects these earnings into the future by subtracting actual earnings to come up with the lost earnings. Before COVID-19, this calculation would be less complicated.

However, during the pandemic, the ability to mitigate damages and secure alternate employment is anything but predictable. In addition, factors such as stimulus checks from future federal legislation, unforeseen temporary or permanent reductions in the workforce, the need for unpaid leave, and many others can affect an employee's earning potential.

All of these considerations must inform an estimate of economic damages, before even considering other components of exposure such as emotional distress and any attorneys' fee-shifting provisions that are implicated. Potential punitive

damages are less of an issue for insurers due to coverage exclusions and prohibitions under the law, but this can certainly raise the stakes.

SETTLEMENT NEGOTIATIONS DURING COVID-19

The approach to pre-litigation demands used by plaintiffs' counsel has become more nuanced during the pandemic. Many plaintiffs who find themselves out of work are more eager than ever to settle, which can shift the balance of power toward the employer in settlement negotiations. That doesn't mean that insurers and defense counsel are able to obtain expedited resolutions across the board. Many if not most experienced employment counsel continue to treat each claim on its merits and seek the appropriate result regardless of the current environment. Eventually, the courts will schedule jury trials again and news of adverse verdicts will provide motivation to settle.

However, plaintiffs and their counsel realize that pandemic-related delays in the litigation process will likely cause them to wait years before they receive compensation if they are waiting to settle at the steps of the courthouse. Some argue that court delays are changing the dynamic of settlement because plaintiffs' lawyers are not able to settle claims with the same vigor and timing that they might have experienced if there was the threat of a jury trial around the corner. From the defense perspective, what is the incentive to pay money today if a trial will not occur for several years? Without a looming deadline, there can be a greater incentive to drag out the process.

BANKRUPTCIES EXPECTED TO RISE

Stimulus funds have helped to shield some businesses from closure, but the economic strains of the pandemic are still forcing many large and small businesses into bankruptcy. The automatic stay provisions of the U.S. Bankruptcy Code then prohibit action against the debtor, but the stay would not apply to individual defendants or other corporate parties. Likewise, many financially strained individuals are filing for bankruptcy protection. When individuals file for bankruptcy, they can lose the right to pursue an employment claim for lack of standing or failure to disclose the claim on a bankruptcy petition. Knowledgeable insurers and counsel are inquiring regularly regarding the filing of bankruptcy claims and the ability to use this information in defense of agency and litigation matters.

Just as the COVID-19 pandemic has upended our lives, it has clearly affected the workplace. It has accelerated many of the trends that existed before the pandemic, such as remote work and flexible hours. Employers and insurers are wise to work together with counsel to protect against COVID-19-related workplace claims through updated policies, training and proactive risk mitigation practices.

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