Troubling Pattern Of COVID-19 Workplace Litigation Begins To Emerge

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As an increasing number of employees return to work, employers should be aware that a number of COVID-19-related lawsuits raising FMLA and ADA concerns have already begun to emerge. What do employers need to know in order to avoid being on the receiving end of such a claim?

An Emerging Trend: Employees With Preexisting Conditions

Recent lawsuits filed across the United States are starting to show a particular trend of litigation regarding employees with preexisting health care conditions. For example, a lawsuit filed in federal court in Florida at the end of May alleges that an employer failed to provide FMLA leave for an immune-compromised employee during the COVID-19 quarantine. In that case, the employee alleged that he was terminated shortly after inquiring about FMLA leave due to his own risk factors.

A recent similar case filed in Pennsylvania also claims an employee with an elevated risk for COVID-19 was terminated after he attempted to inquire about the option of using leave under the FMLA. On the same day, a separate action was filed in New Jersey alleging that yet another employer terminated an employee with a preexisting heart condition rather than provide him with requested leave under the Family and Medical Leave Act (FMLA), or as an accommodation under the Americans with Disabilities Act (ADA).

In all of these cases, the plaintiff alleged that they needed time off from work due to a heightened risk of COVID-19-related complications arising from preexisting conditions. Likewise, in all
cases the employees claimed that they were terminated once they inquired about their options for leave.

As employers who have experience with workplace litigation know, the mere fact that an allegation occurs does not mean that any laws were actually violated, or that the allegations even have merit. However, the fact that claims following a similar pattern are being filed across the country in such a short period of time does indicate that employers should be on guard against risks for such claims in their own workforces.

What Should Employers Do To Avoid Similar Claims

Employers who are familiar with federal and state discrimination laws and the requirements for an administrative process prior to lawsuits should be aware that such an initial process does not apply to FMLA claims. Because there is no required administrative process, companies could realistically face a federal lawsuit within days of an adverse employment action that can be connected to an FMLA benefit request. For this reason (among others), you should be diligent in quickly responding to employees requesting time off due to a COVID-19 related issue, or otherwise requesting an accommodation due to COVID-19 or another underlying health condition.

For example, while more and more employees are returning physically to work, inquiries to continue to work from home should be treated as a possible request for a reasonable accommodation under the ADA. All managers should know to escalate such requests to the appropriate person within their workplace instead of replying with an off-the-cuff remark that could give rise to a claim of discrimination or retaliation. Having a person within each workforce to whom such requests can be routed can ensure that they are responded to timely and consistently.

It is also important to document all discussions regarding requests for leave or other accommodations. Having a paper trail that can show requests were responded to and relevant information provided can be extremely helpful in defending claims where the plaintiff may allege that their requests were ignored. Likewise, you should document the rationale behind decisions to terminate.

Just because an individual inquires about FMLA does not mean you cannot terminate them for another reason or include them in a layoff. However, you must be aware that your own ability to explain why they were terminated is essential. Once a lawsuit or charge of discrimination is filed, you are obligated to respond with legitimate, non-discriminatory reasons for your employment decisions. Having clear and detailed paperwork prior to a termination will at least ensure you are in the best position to defend its decision if a discrimination or retaliation claim arises after the employee is let go.
These Lawsuits Likely Herald The Firsts Of Many

Employers everywhere should be aware of the lawsuits that may be coming in the states where you are operating. The plaintiffs’ bar will take advantage of this opportunity and will file similar lawsuits. For further information about COVID-19-related litigation being filed across the country, you can visit our COVID-19 Employment Litigation Tracker. Our COVID-19 Employment Litigation and Class & Collective Actions section also has a listing of our litigation-related alerts and team members handling these types of cases.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips’ Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.