Inside Counsel’s 4-Step Plan To Minimize Risk Of COVID-19 Claims

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The Washington Post recently published an article with the headline: “As workplaces reopen, coronavirus could unleash an ‘avalanche’ of lawsuits over family leave and discrimination.” Inside counsel who fail to heed this prediction may soon find themselves mired in expensive and time-consuming litigation.

Since the start of the COVID-19 pandemic, employers have been faced with a seemingly non-stop influx of novel issues in managing their workforces. Now, as companies contemplate or begin to reopen their doors, you must consider a myriad of decisions that will have far-reaching effects for both your organization and your employees. In order to effectively manage risk, however, decisions cannot be made under the old business-as-usual paradigm. Rather, you must make them through the lens of COVID-19. You will face not only a host of new federal, state, and local laws, but you must also quickly gain proficiency in addressing novel issues under existing laws such as the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and the Occupational Safety and Health Act (the OSH Act).

The following four-step action plan for inside counsel provides a foundational roadmap towards effectively minimizing risk relating to COVID-19 claims. These steps require a team effort with relevant stakeholders, including HR professionals and managers, and should be implemented as soon as possible – ideally before reopening your workplace.
1. Review And Update Your Policies And Reporting Procedures

When developing a return-to-work plan, you must ensure that you update your leave policies, or create a temporary leave policy, to address both the Families First Coronavirus Response Act (FFCRA) and other applicable leave laws that will apply in the context of COVID-19. Effective April 1, the FFCRA expands leave protections through both the Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). The new laws require employers with fewer than 500 employees to provide employees with paid leave (businesses with fewer than 50 employees may qualify for an exemption) through December 31, 2020, for qualifying reasons related to COVID-19, including if they become ill or are unable to work because they have to care for a child whose school or place of care has closed.

You should also consider implementing a COVID-19-specific policy. This policy should be drafted in accordance with agency guidance, including that published by the CDC, OSHA, the EEOC, and the DOL, and should cover key topics including:

- How to respond to an employee who relays COVID-19 symptoms or who reports to work with such symptoms;
- What questions may be asked of an employee in order to ascertain if they may be allowed in the workplace;
- Whether and how temperatures will be taken and COVID-19 and/or antibody testing will be conducted (and what disclosures or authorizations may be necessary, such as an authorization of the testing facility to release results to the employer, and for the employer to disclose results as may be necessary to inform potentially-exposed employees and prevent further spread);
- What privacy and confidentiality measures must be taken under the ADA, HIPAA, and state and local laws;
- What personal protective equipment (PPE) is required and who is responsible for providing it; and
- What social distancing and other safety measures employees must adhere to and what the consequences are for employees who are non-compliant.

Notably, while the EEOC has issued guidance on COVID-19 testing and temperature taking, as of the date of publication of this article, the EEOC has not issued guidance on antibody testing. It remains unclear whether such testing is permissible.

Any COVID-19 policy must also comply with state and local requirements which may expand rights and protections for employees and impose additional obligations on employers because of the COVID-19 pandemic. It is also important to include information about your organization’s accommodation process, or refer employees to the existing accommodations policy. Some of your
employees may be entitled to accommodations under the ADA and/or the Rehabilitation Act, where applicable, related to PPE, testing requirements, or even physically reporting to work. Any COVID-19-specific policy should include a disclaimer explaining that it may be amended in accordance with changing needs as the pandemic evolves. You should schedule regular meetings with internal stakeholders in order to review the policy and determine whether and when updates must be made.

When creating or modifying policies, you must be mindful of your obligations under Title VII of the Civil Rights Act, the ADA, the Rehabilitation Act (where applicable), the Age Discrimination in Employment Act (ADEA), the FMLA, and the OSH Act, and other laws that prohibit discrimination or offer whistleblower protections. Now is a critical time to review and update existing anti-discrimination and anti-retaliation policies to ensure that such policies are legally compliant, clear, and thorough.

In reviewing and updating these policies, you should be mindful that the FFCRA provides private rights action for interference, and retaliation. You should consider providing examples of unlawful discrimination, harassment, or retaliation that are specific to COVID-19, including but not limited to:

- Discrimination or harassment based on a COVID-19 diagnosis;
- Discrimination or harassment based on national origin directed at workers of Asian descent;
- Discrimination, harassment or retaliation directed at caregivers or employees who exercise their rights under the FFCRA or FMLA in connection with COVID-19;
- Discrimination or harassment against older employees, or employees with disabilities who may be viewed as “high risk” for COVID-19 complications; and
- Retaliation or harassment directed at employees who raise health and safety concerns related to COVID-19.

You should also consider implementing a flexible schedule policy to support employees who have challenges due to COVID-19 disruptions, such as allowing for modified schedules to avoid busy commuting times, to spread out employee arrival and departure times at work, and/or to allow for childcare. To the extent you anticipate making such modifications, it is advisable to do so by way of a written policy to minimize manager discretion and the risk of decisions being made in an inconsistent manner.

You should also review your internal reporting processes (both for employee concerns or complaints and for leave requests) to ensure they are functional and accessible to employees. Many workplaces have experienced significant structural changes because of COVID-19, including layoffs, reorganizations, and transitions to remote-work. As a result, existing processes may not be actively monitored or fully functional, and they may not be appropriate to address COVID-19 specific concerns.
Similarly, you should consider creating an “alternative” method of reporting to further minimize the risk of retaliation. For example, where an existing reporting structure may call for complaints to be made to an employee’s direct manager, you should consider having an alternate option for complaint intake – such as an HR representative or a designated non-supervisory employee. Affording an alternative means of complaint reporting that is one-step removed helps to provide separation between the employee and their manager – the most common relationship giving rise to retaliation claims.

Importantly, you should keep in mind that there may be situations where a well-intentioned policy or action puts your organization at risk for violations of anti-discrimination laws. Policies – both new and old – should be applied uniformly and consistently to all employees, regardless of age, race, sex, national origin or any other protected characteristic.

For example, while there is no federal law identifying caregivers as a protected class, a policy that offers caregiver protections and flexibility exclusively to mothers, but not fathers, puts organizations at risk for gender discrimination suits under Title VII. Significantly, some state and local laws recognize caregiver status as a protected class. In such jurisdictions, you must exercise extra caution to ensure your policies do not disproportionately impact caregivers. By offering an inclusive policy, such as a caregiver policy that offers protections to all employees, you will not only address important employee needs but also minimize the risk of litigation.

2. Create A COVID-19 Task Force And A Mechanism For Regular Check-Ins

As the pandemic continues, there will be a marked increase in COVID-19-related employment litigation. What appears to be the first suit filed under the FFCRA provides an illustrative example of what to expect. An Eastern Airlines employee in Pennsylvania alleges that she made a number of requests to multiple managers to work from home and to be afforded flexibility and alterations to her work schedule in order to care for her 11-year old son whose school had been closed due to COVID-19. She alleges that she received a hostile response and was terminated shortly thereafter.

It is important that employers be proactive in implementing measures to avoid these types of situations. One way to do this is to create a COVID-19 task force to oversee COVID-19 related matters, such as managing FFCRA leave requests and responding to employee concerns related to COVID-19.

Creating a COVID-19 task force will ensure that your organization handles matters in a consistent manner across the workplace. Your COVID-19 task force should include a designated leave expert, human resources professionals who are well versed in your COVID-19 policy and trained on the nuances of federal, state, and local guidance and legislation, and a designated employee liaison to whom employees can direct questions and concerns about COVID-19. As part of the reopening process, you should make employees aware of the creation of the task force and advise them to direct all questions or concerns to the designated liaison.
You should work with the COVID-19 task force to monitor employee issues, develop talking points for answering leave questions and requests, and to ensure the task force is fully familiar with updated policies. The task force should also be charged with staying abreast of new developments and agency guidance and engaging in risk assessment and response. Identifying and assessing risk associated with workplace safety is a critical element of the return-to-work process, so your COVID-19 task force should be prepared to identify possible hazards or risks in the workplace, assess options for addressing and minimizing such risk, and ultimately respond to employee safety concerns.

As noted above, the task force should include a designated leave expert. As the return-to-work process continues, employers will inevitably be faced not only with discrimination and retaliation claims, but also claims alleging that they incorrectly determined employee eligibility or miscalculated an employee’s paid leave under the FFCRA. In a new suit filed against Kroger Company in Indiana, an employee in the company’s distribution center who was allegedly terminated for violating the company’s attendance policies asserted violations of the FMLA and the FFCRA. The employee alleges that although Kroger has over 500 employees, the FFCRA should apply because Kroger had voluntarily adopted a policy allowing for 14 days of paid leave for employees exhibiting COVID-19 symptoms.

While such a claim is unlikely to survive a court’s scrutiny where the FFCRA doesn’t otherwise apply, this case demonstrates the creative theories that employees will develop to pursue leave claims arising out of COVID-19 leave, further demonstrating the importance of having a designated leave specialist. It is important that your designated leave specialist take a holistic view of every request, recognizing that, even in circumstances where leave is not required under applicable laws, refusing to grant leave to employees to attend caregiver responsibilities may run afoul of Title VII.

The cases described above provide a number of valuable lessons, including that a critical component of minimizing liability is accuracy and consistency. By having a designated COVID-19 task force, you can create a built-in control mechanism to ensure the laws and the organizations policies are being applied correctly, and that requests are being handled in a uniform and consistent manner. You should also schedule regular check-ins with your leave expert, ideally on a weekly or bi-weekly basis, to review recent requests and decisions and to stay abreast of concerns being raised by employees. Such involvement by inside counsel also helps to preserve the attorney-client privilege wherever possible.

3. Train Your Managers

It is imperative that employers take the necessary steps to ensure that managers at all levels are prepared to respond to employee concerns during the return to work process. You should provide training regarding applicable provisions of and COVID-19 issues related to anti-discrimination and anti-retaliation laws, educate managers on COVID-19 specific policy changes, and provide a “FAQ”
reference sheet with standard answers addressing anticipated employee questions. This effort should be closely monitored by the COVID-19 task force. Further, you should direct all managers to report COVID-19 issues to the task force. This will help to ensure consistent and legally compliant responses across your organization.

With regard to leave, it is critical to ensure that managers at all levels have a sufficient understanding of new leave laws and the organization’s updated leave policies so that they don’t inadvertently interfere with employee rights. You should train managers on how to respond to employee leave questions and should instruct them to notify the COVID-19 task force’s designated leave expert immediately if they suspect that an employee may need leave. This point is emphasized by the Eastern Airlines case, where the former employee alleged that she received a hostile response from her managers in response to her request for FFCRA leave. The importance of having managers who are trained in appropriate and legally compliant responses cannot be overstated – and this is especially important to managers because they may be sued in their individual capacities under the FFCRA.

With regard to anti-discrimination policies, you should educate managers on how those policies may relate to COVID-19. For example, a decision to bring back younger employees first based on the assumption that they are less at risk may disparately impact older employees, or even arguably be direct evidence of age discrimination in certain circumstances.

Similarly, you should refresh managers on how the anti-retaliation provisions under Title VII, the ADA, the FMLA, the FFCRA, and other relevant laws protect against conduct that would be reasonably likely to deter an employee from engaging in protected activity. For example, you must train managers to recognize how an unfavorable or unrequested scheduling change, or any other act that would be reasonably likely to deter a working mother or other caregiver from engaging in protected activity, could expose the organization to retaliation claims, as well as disparate impact claims by male employees. Managers must understand that such decisions create exposure for an organization even when made for altruistic reasons. You should also train managers regarding gender discrimination with an emphasis on stereotyping and harassment, so that they understand that childcare or other family care responsibilities are not appropriate considerations in employment decisions.

You must also train managers on the organization’s COVID-19 policy and any specific revisions to existing policies, as they will often be the first point of contact for employee questions. And finally, to the extent you implement a flexible schedule policy to support employees who have challenges due to COVID-19 disruptions, you must train managers to follow such policies and understand that they are not authorized to exercise discretion outside of what the policy provides absent consultation with HR.
4. Document Your Decisions

During the return-to-work process, you are going to be faced with countless decisions, including those related to staffing and compensation. Each decision, and the reason behind such decision, should be carefully documented. Memorializing contemporaneously the reasons for employment decisions will provide evidence of legitimate, non-discriminatory and non-retaliatory reasons and will be your best defense in an employment lawsuit.

When selecting specific employees for layoffs, furloughs, salary reductions, hiring, or recalls, you should base decisions on objective, non-discriminatory criteria. This could include experience, documented performance history, documented disciplinary history, or years of service. If you can cite specific factors that were used in the decision-making process, you will be in a better position to defend against a possible discrimination or retaliation suit.

Where you are conducting a layoff or RIF that impacts an entire department, team, or location, you should carefully conduct an adverse impact analysis and maintain documentation of the layoff. This documentation should include a clearly articulated reason for the layoff (for example, “XYZ’s Boston office was shut down due to the financial impact of COVID-19 and all Boston employees were laid off”) along with information demonstrating that the layoff impacted the entire group equally and was unrelated to protected status.

Further, in addition to maintaining internal documentation, you must be mindful of obligations that your organization may have under federal, state, or local law to provide notice to employees documenting workplace changes, such as policy changes, structural changes, changes to work hours, layoffs, furloughs, or pay changes. In addition to federal laws that may require specific notices, such as the Worker Adjustment and Retraining Notification (WARN) Act and the Older Workers Benefit Protection Act (OWBPA) Act, you may also be required to provide certain documentation to employees under various state laws.

For example, in New York, employers are required to provide written notice of layoff to employees along with specific documentation regarding unemployment insurance. In Connecticut, employers must notify an employee in writing, or through a posted notice maintained in a place accessible to employer, of any change to wages, vacation pay, sick leave, health and welfare benefits and comparable matters. Requirements vary state-by-state, so it is important to carefully review the law for each state where you have employees to ensure compliance with notification requirements.

Conclusion

As employers prepare to return their employees to the workplace, inside counsel must prepare for a wave of COVID-19 related litigation. Implementing this 4-step action plan will manage risk, minimize potential liability for violations of federal, state, or local law, and position your organization to successfully manage its workforce in the new COVID-19 world.
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 the authors here or here, your Fisher Phillips attorney, or any member of our Post-Pandemic Strategy Group Roster. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

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