



Emerging Trends In COVID-19 Workplace Litigation

Insights

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As of this writing, employees from across the country have filed more than 430 COVID-19-related lawsuits against their employers and former employers. Not all of these claims have focused on the Family First Coronavirus Response Act (FFCRA) — the federal legislation governing Emergency Paid Sick Leave and Emergency Family and Medical Leave — but rather a substantial number of lawsuits have alleged employer impropriety using COVID-19 as a factual backdrop. Examining some of these cases more closely, some common themes emerge. How should employers prepare for potential litigation?

Examples Of COVID-19 Workplace Lawsuits

Throughout the country, a number of employees have alleged various forms of discrimination in connection with COVID-19 layoffs and reductions in force (RIFs). The below matters are some examples of the types of claims that have been asserted against employers. Significantly, however, the following cases are in the midst of active litigation, and the employers' positions on relevant issues (any pertinent denials of the employees' allegations) are unknown at this time:

- In *Fawaz Kazi v. The Fullman Firm*, a former employee filed a lawsuit in California state court claiming religious discrimination. In support of his claims, the employee alleged that he attended community prayer sessions at his mosque each Friday. When the employee's mosque ceased its Friday community prayer sessions due to COVID-19, the employee began praying at the workplace, which was witnessed by a member of management. Shortly thereafter, the employer terminated his employment for purportedly pretextual reasons. The complaint did not identify the reasons provided for the employee's termination nor how those reasons were allegedly pretextual. Nevertheless, the former employee has alleged \$2 million in damages.
- In *Francois D'Anjou v. Performance Food Group, Inc.*, a former employee filed a lawsuit in New Jersey state court alleging race discrimination. The employee alleged that, via a COVID-19-related RIF, the employer targeted African-American employees for termination and furlough. The former employee did not identify a specific sum of alleged damages.
- In *Allen Manley v. Ram Construction Services and Ram Construction Services Michigan, Inc.*, a former employee filed a lawsuit in Michigan state court claiming that the employer discriminated against him because of his age in connection with the former employee's furlough and subsequent termination of employment. Namely, the former employee worked at the employer for 28 years before being furloughed due to COVID-19. The former employee alleged that his work performance and experience were superior to that of his younger counterparts. but the

employer rehired the younger employees after the furlough and instead offered the former employee a severance agreement following his separation. The former employee asserted that the employer used COVID-19 as a pretext for the termination of his employment. His complaint did not identify a specific sum of alleged damages.

- In *Douglas Daniel v. ABS Seafood, Inc.*, a former employee alleged race and national origin discrimination, retaliation, and myriad other state law claims in connection with the termination of his employment. In support of his claims, the former employee asserted that the employer used COVID-19 as a pretext for the termination of his employment because he was an outstanding worker and the employer did not terminate any other employees because of COVID-19. The former employee did not identify a specific sum of alleged damages.

None of the foregoing cases directly implicate the recent FFCRA and its paid leave provisions, but they do address COVID-19 in some common ways.

Being Prepared For The Common Factors In COVID-19-Workplace Litigation

The foregoing cases share several themes and legal theories, and employers should be prepared to face them should litigation arise. First, the underlying criteria for selecting employees affected by a layoff or RIF should be ready for the limelight in the event of litigation, as such information will likely be discoverable (including in each of the aforementioned cases). For this reason, your selection criteria should be objective and based on measurable data (*i.e.*, production, performance metrics, etc.), and you should be ready for scrutiny by a vigilant plaintiffs' attorney.

Second, you should ensure that your performance metrics are being applied fairly and consistently, both by the same supervisor and across different supervisors. Doing so may limit the viability of discrimination or retaliation claims and further demonstrate the fairness and consistency of your practices.

Third, you should not shy away from conducting adverse impact analyses. An adverse impact concerns a widely applied employment decision (*i.e.*, a layoff or RIF) that is based upon neutral criteria but disproportionately impacts a protected category of individuals. Therefore, as part of the layoff or RIF selection process, you should ensure that your selection criteria are not favoring or harming, for example, individuals of one race versus another.

Although the above steps may benefit you in litigation, using these strategies as preventive measures may be more preferable.

The Number Of COVID-19-Related Lawsuits Will Increase

As noted above, there have been more than 430 employment lawsuits concerning COVID-19 at the time of this publication. This number will only increase with time. You should take appropriate preventive steps not only to curtail litigation, but also provide viable defenses should such cases arise.

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.

We will continue to monitor any further developments and provide updates on these and other labor and employment issues affecting employers, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or [either of the authors of](#) this publication.

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