COVID-19 Conflicts Lead To Breach Of Contract Claims Against Employers

Insights
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Though sometimes overlooked given the abundance of federal and state statutory claims, employers must remember that their existing contractual obligations remain in place during the pandemic. As a review of the Fisher Phillips COVID-19 Employment Litigation Tracker demonstrates, employers must take care when imposing unilateral terminations or salary reductions against employees with written employment agreements or they could face a breach of contract lawsuit – even where the actions are a result of the financial exigencies created by COVID-19. Instead, employers should review any written employment agreements and confirm that the proposed action is permitted (or defensible) before doing so. A failure to consider existing contractual obligations could result in a claim for breach of contract.

Contract Law 101
Though regulated by the individual states, contract law is fairly uniform throughout the country. In all states, parties are free to contract in just about any way they see fit, with very limited exceptions. The tradeoff for this flexibility is that courts will generally hold a breaching party to its enforceable contract.

In the context of employment law, the majority of employment relationships are "at will" and may not be covered by any written agreement. While these relationships are contractual in nature, the employer typically retains the right to modify or terminate the agreement at any time (with exceptions for discriminatory or other unlawful conduct). If the employee agrees to the changes, they continue to report to work. If they do not, they may quit or provide a counteroffer.

Some employment relationships, however, are reduced to writing and modify the "at will" relationship. Such contracts may limit an employer's ability to terminate the relationship through "for cause" provisions, limit an employer's ability to alter compensation, provide guaranteed employment for a term of years, or restrict the employee from engaging in certain competitive activities post-termination. Where employers and employees agree to such arrangements, they are generally enforceable in court should either party breach. This may be true even in times of great economic instability, state or federal shutdown orders, or other unforeseen external forces.

Recent Examples
Given the economic uncertainly surrounding the COVID-19 pandemic, it is not surprising that employers have taken measures to reduce costs. This includes previously unforeseen layoffs and

salary reductions. Two recent cases demonstrate the perils of doing so where employers have written agreements.

Flagg v. Hubbard Radio Seattle, LLC (King County, WA)

In *Flagg*, a popular drivetime radio host in Seattle was terminated "for cause," allegedly related to inappropriate social media posts made in January 2020. Despite advising the host of the behavior in January, the radio station continued to employ him until March when the station's advertising revenue plummeted during a mandatory state-ordered shutdown to combat COVID-19. While the employment agreement in question contained a provision permitting a "for cause" termination, plaintiff alleged that this designation was pretextual and the station was really terminating him to avoid paying his high salary in the midst of the economic downturn.

Fuente-Alba v. Cork Alliance, Inc. (Miami-Dade County, FL)

In 2015, Cork Alliance hired a Chilean husband and wife to work for their wine distribution company in Miami as Chief Operating Officer and Director of Finance and Accounting, respectively. Both signed a 5-year employment contract in which Cork Alliance agreed to cover the costs of relocating from Chile and guaranteed annual salaries. The contracts, written in Spanish, mandated that plaintiffs would receive the agreed-to compensation and benefits "a todo evento," which plaintiffs alleged means the promised remuneration was without condition. In response to the pandemic, the husband's salary was reduced by 50% and the wife was terminated. According to the complaint, these actions are designed to force contractual renegotiations despite the fact that wine sales have "skyrocketed" during the pandemic.

Potential Defenses

While each case is in its infancy and neither court has ruled on the substance of the plaintiffs' complaints, employers should be familiar with a number of contract law doctrines that could provide justification for an action that would otherwise breach an employment agreement. Though the state law in this area may vary from state to state, these general principles should help employers confronting breach of contract claims:

Force Majeure Causes

A "force majeure" clause is a contract provision that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible. These clauses typically contain a list unforeseeable or unpredictable events that would excuse performance — declarations of war or other armed conflict, labor stoppages, natural disasters, "Acts of God," or other external forces that make performance impossible, unwise, or impractical.

While some clauses may be detailed enough to mention pandemics expressly, there is consensus that the COVID-19 pandemic could be considered an "Act of God" that could excuse performance in

certain instances. Of course, the parties must have agreed to include a force majeure clause in the agreement, and in the absence of one, courts are unlikely to infer one.

Impracticability And Impossibility Of Performance

While the parameters may differ, all states have some version of an impracticability or impossibility of performance test. According to the Restatement (Second) of Contracts, if a party's performance of a contractual obligation is made "impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made" a party may be relieved of performance.

Most employment contracts depend on the premise that the employer may be open for business and therefore generating revenue with which to pay employees. In those cases, a strong argument may be had that it is impossible or impractical to perform based on government regulation forcing the employer's closure.

Frustration Of Purpose

Another potential common law defense is "frustration of purpose" which relieves a party from a contractual obligation where their principal purpose is substantially limited without their fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made. For example, an employer who entered an agreement with a group of employees to run a large-scale event in central Florida scheduled in August may have an argument that they should be relieved of their obligations under the agreement. While it is technically possible to run the event, such an event is unwise, may violate state public health regulation, and is unlikely to draw the crowds that would have been present in the absence of a pandemic.

Prevention By Governmental Regulation Or Order

A number of states likewise recognize compliance with a government regulation or order as an excuse to breach of contract. This defense is available where a supervening governmental action prohibits a performance or imposes requirements that make it impracticable. Such action must be unforeseeable. It is possible that an employer could rely on this defense where its compliance with a shut down or stay-at-home order was the reason it may have breached the contract.

Bottom Line

Employers must be cognizant of their existing contractual agreements with employees and how the terms of such agreements may constrain otherwise prudent business decisions such as salary reductions, furloughs, or terminations. In times of economic turmoil, employment-related claims will increase. While there are many defenses available to employers, the contours of each doctrine may vary from state to state.

Any employer contemplating an action that could be in violation of an existing employment agreement is cautioned to review the agreement and the state law governing it before making any decision.

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. For further information, contact your Fisher Phillips attorney.

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