



Caregiver COVID-19 Workplace Litigation Begins To Emerge

Insights

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Many companies were left struggling to quickly understand and comply with the Families First Coronavirus Response Act when it went into effect earlier this year. As more and more employees continue to request leave under the Act, some are also starting to bring lawsuits alleging that their requests for leave were wrongly denied, or that they were retaliated against for asserting their rights under the Act. A recent trend involving litigation from caregivers – employees needing to care for an individual with COVID-19 – should attract the notice of employers. What do employers need to know in order to avoid being on the receiving end of such a claim?

An Emerging Trend: Lawsuits From Caregivers

The Emergency Paid Sick Leave provision of the Act allows an eligible employee to take 80 hours paid sick leave because the employee is:

1. subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. advised by a health care provider to self-quarantine due to COVID-19 concerns;
3. experiencing COVID-19 symptoms and seeking medical diagnosis;
4. caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
5. caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or
6. experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

While the first three provisions focus on an individual's own COVID-19 concerns, the fourth and fifth allow leave for employees needing to care for someone else. Further, the Emergency Family Medical Leave Act allows eligible employees to take 12 weeks of job-protected leave to allow an employee, who is unable to work or telework, to care for the employee's child (under 18 years of age) if the child's school or place of care is closed or the childcare provider is unavailable due to a public health emergency.

Examples Of Recent Cases

Recent lawsuits filed across the country are starting to show a particular trend of litigation regarding employees who have taken or requested leave to act as a caregiver for someone else. For

example, a lawsuit filed in federal court in Florida in July alleges that an employer terminated a woman shortly after she provided proof that her grandfather tested positive and needed a caregiver. She alleged that her employer owed her for 80 hours paid leave she believed she was entitled to under the Act, and that she was retaliated against for exercising her rights under the Act by requesting leave.

A recent similar case filed in Ohio claims that an employee was terminated after she inquired about taking leave to care for her son while his school was closed due to COVID-19. Similarly, an employee in New Jersey has filed a lawsuit alleging she was terminated after asking for Emergency Family Medical Leave when her child's preschool closed due to COVID-19. Specifically, the employee claims that her requests for leave were ignored, and that her emails were not responded to.

In all of these cases, the plaintiff alleged that they needed time off from work due to a need to care for someone else. Likewise, in all cases the employees claimed that they were terminated once they inquired about their options for leave.

Of course, 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.

Further, now that schools are beginning to open up to varying degrees across the country, employers will face additional requests for leave from working parents based upon the of school plans in their area. Moreover, employers need to prepare for the possibility that a positive COVID-19 test in the community could suddenly close schools or classes without much warning.

What Should Employers Do To Avoid Similar Claims

Employers should first and foremost exercise diligence in quickly responding to employees requesting time off due to a caregiver need. 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. Notably, [a New York federal court recently held](#) that supporting documentation may not be required as a precondition for FFCRA leave. Thus, employers should ensure documentation is not required to commence the leave under the FFCRA. Supporting documentation can be submitted after the leave has commenced, however.

Just because an individual makes inquiries about Emergency Paid Sick Leave or EFMLA 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.

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