

Insights, News & Events

3 STEPS TO MAKE SURE YOUR COVID-19 DECISIONS DON'T LEAD TO WRONGFUL TERMINATION LAWSUITS

Insights
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Employers across the country continue to be challenged with difficult decisions about their workforce in the wake of COVID-19, including decisions about employee layoffs and returning employees to the worksite. As businesses try to return to a new normal, employers must avoid making such decisions based on who they perceive as “high risk” for contracting COVID-19, such as older employees. Notwithstanding any good intentions you might have to protect “high risk” older employees, employees would have a strong claim for age discrimination where a decision to not bring the employee back is based on their age. One recently filed lawsuit in Ohio highlights the risks employers face should they make employment decisions based on an employee’s perceived risk due to their age. What can your business learn from these allegations?

THE ALLEGATIONS

In *Theresa Oktavec v. CHS Therapy and Rehab*, a former HR Assistant recently filed an age discrimination lawsuit in Ohio state court alleging that her former employer fired her because it believed that her age put her at a higher risk of a COVID-19 infection. According to the Complaint, Ms. Oktavec, who at age 60 was

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purportedly the oldest employee in the company, was told her employment was being terminated because “a woman of [her] age isn’t suited to work for a company this large” in light of the ongoing COVID-19 epidemic.

Of course, the mere fact that an allegation is made does not mean that any laws were actually violated, or that the allegations even have merit. However, this lawsuit highlights the risk employers face when making employment decisions based on an employee’s age, even if the reason behind the employment decision was well intentioned.

A SHORT LESSON ON PREVENTION: 3 STEPS TO AVOID SIMILAR CLAIMS

Here are three practical suggestions you should consider to avoid a similar fate.

1. DO NOT MAKE DECISIONS BASED ON PROTECTED CHARACTERISTICS

Employers may not involuntarily exclude employees from the workplace based on protected characteristics, like age, even if the decision to exclude was for benevolent reasons, such as safeguarding an employee who is perceived to be at a higher risk from COVID-19. Notwithstanding good intentions, you could face discrimination claims for this conduct. Older workers cannot be excluded from the workplace simply because their age makes them more susceptible to COVID-19.

2. HANDLE WORKFORCE REDUCTIONS IN A REASONED MANNER

In addition to making personnel decisions based upon perceived risk, as the COVID-19 pandemic continues with no end in sight, many employers may continue to need to reduce their costs – including the weight of their payroll – just to survive. As we have highlighted before, when employers shed their payroll, you must

stick to a fair and non-discriminatory workforce reduction process. As a recap, you can achieve this by:

- Developing written neutral and objective criteria for selecting the employees subject to a furlough or layoff;
- After applying the criteria, analyzing the results to determine whether they have a disproportionate impact on employees in a protected class, such as age, gender, or race; and
- If there is a disproportionate impact, considering how the criteria could be modified to minimize the disparate impact.

You must also rigorously document these kinds of personnel exercises and decisions. Should your actions ever be challenged as pretext in a lawsuit – which is increasingly happening across the country – this sort of documentation will be the linchpin to proving that the decisions were lawful.

3. CARRY OUT INDIVIDUAL SEPARATIONS WITH CARE

Even when separating a single employee or a small number of employees, you should keep the broad strokes of the lessons above in mind. The U.S. is in now a recession of an uncertain length, and many people are anxious about staying employed or finding work. Under these circumstances, separated employees might be even more motivated to consult counsel about the lawfulness of their separations than ever before.

Thus, not only will ensuring that performance and other criteria are being applied fairly and consistently across the board be helpful for employers caught up in litigation, but it also could prevent litigation in the first instance. Indeed, where an employer's process is transparent, perceived as fair, and communicated to affected employees, those caught up in the terminations are much less likely to try to challenge it.

WANT MORE INFORMATION ON COVID-19 RELATED LAWSUITS?

Fisher Phillips is on the frontline on monitoring the trends in COVID-19 related litigation. 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.