

Insights, News & Events

ADDING INSULT TO INJURY: EMPLOYERS FACING COVID-19-RELATED LAWSUITS COMMONLY FACE TACKED-ON WAGE AND HOUR CLAIMS

Insights
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It's never good news to hear that you have been sued, but lately the flood of COVID-related cases come with something extra – wage and hour claims. In essence, former employees who are retaining counsel for claimed wrongful termination (or similar) claims are commonly throwing in claims about missed meal or rest breaks and unpaid hours worked for good measure. Employers can learn from these cases to gain insights and tips for anticipating employee claims and preparing to avoid (or mitigate) them.

Case Studies and Summaries

While there are [many COVID-19 cases pending in California](#), two cases from Sacramento County and Orange County provide good case studies for this tacking-on trend.

In *Aguayo v. Shield N Seal*, an employee started his employment with a small Nevada City manufacturing company in February 2020. He claims that in the very early days of the pandemic, he was exposed to employees who were not wearing a mask and was made fun of for wearing a mask at work. On March 17, 2020 – the day of the first stay-at-home order in California – he concedes that his employer told him and his fellow employees that they could work from home if

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they chose to do so. He proceeded to work from home from March 18 to September 21, although he came into the office on occasions to retrieve items.

The employee then contends that he was directed to return to the office starting September 22. He alleges he protested doing so because he was concerned about returning to the office due to his asthma combined with concerns about office safety. He claims to have seen team members without masks and contends the company didn't ensure workplace items were disinfected on those occasions he went into the office to retrieve them. The employee states he was terminated the same day he complained.

While you might think this is the end of the story, the employee then alleges that, during his seven-month employment – during which time he admittedly worked from home for six of those months – he had his meal and rest breaks interrupted, was forced to complete extra work off the clock, and was not reimbursed for business expenses. (Note: failure to reimburse for business expenses during the pandemic is an unfortunately common mistake made by employers in California and elsewhere; [check out our recent alert summarizing the problem and offering some specific solutions.](#))

Specifically, he says he “constantly” received calls from the company during which time he would inform the caller he was on his meal or rest break but would be directed to complete various tasks anyway. He also claims that he would be called right before his shift was scheduled to end with additional tasks that had to be completed and was not compensated for the overtime he was forced to work. Finally, he says he had to purchase work supplies and was not reimbursed for them or for his cell phone or home internet which were used while he was working from home.

Similarly, in *Venta v. Kairos Management One, LLC*, Aly Diaz Venta claims that she tested positive for COVID-19 on May 5, and admits that her Orange County-based employer provided with medical leave to quarantine for

two weeks. However, she contests that once those two weeks were up, she was advised of the requirement to produce a negative test before returning to work. She claims the earliest test appointment she could obtain was June 2. Venta alleges she received her negative test result on June 4 and promptly notified her company, but was told several days later that they had already hired new staff and did not have any availability for her to work. Venta contends she was formally terminated on June 23 in retaliation for taking medical leave relating to COVID-19.

But just like with the claims above, Venta didn't stop there. In addition to her retaliation claim, Venta claims that during her entire employment she was never told about or provided with rest breaks. She also claims that her meal periods were interrupted five days per week and was therefore not provided with the opportunity to take her legally mandated meal periods. Finally, she claims that she worked five overtime hours per week for two months (March and April 2020) but was not paid time-and-a-half for those hours.

These are just some examples of the types of claims employers are facing as add-ons to COVID-related litigation. It is important to remember that these cases are in their early stages of litigation and the employers in question have not yet even had an opportunity to mount a full defense. The allegations outlined above are just that – allegations. However, even an analysis of one-sided allegations can be helpful to employers who want to avoid befalling similar fates.

Key Takeaways

Taking to heart the allegations outlined in these two cases, there are a number of steps employers can take to help eliminate or mitigate the risks of facing wage and hour claims any time an employee is let go during a crisis.

1. Implement a Remote/Alternative Work Policy

Employee handbooks and other policies are frequently written with the concept that the

employee is physically in the office. When employees are in their own locations, having a remote/alternative work policy can ensure employees understand their obligations in an at-home context that differ from when they are in the office.

For example, meal and rest breaks procedures in the office may include telling employees they can leave the work area on their break so as not to be interrupted to help make sure employees are being provided with uninterrupted breaks, but that language doesn't help you in the same way when an employee is remote. Instead, it is helpful to instruct employees that they are not permitted to answer phone calls or emails while at home on their break. Similarly, language regarding use of time off, timekeeping, company property, reimbursement, liability for accidents during work hours, and similar topics should be included in a remote/alternative work policy.

Even if your employees are not currently working remotely, or if you have been working remote without incident to date, you should consider whether implementing a remote or alternate work policy will assist with ensuring employees understand when remote work is permitted. This can help avoid claims of favoritism or discrimination if certain employees are permitted to work remote on an ad-hoc basis. It can further offer a clear outline of how remote work is expected to be conducted so you are not scrambling to put together a policy at the last minute when it becomes necessary.

2. Create Clear Expectations

Many wage and hour claims revolve around disputed testimony. For example, an employee claims a supervisor instructed them to complete a certain task before going home but also said the employee is not authorized to work overtime, forcing the employee to work "off the clock." The supervisor

says it never happened. Who is to be believed in litigation?

It can help to have documented expectations that employees acknowledge to help bolster the company's position. For example, strong policy language regarding the prohibition of any off the clock work, an instruction to immediately report to HR or a hotline any instruction by a supervisor to work off the clock, and attestations on time cards where employees attest the records reflect all hours they worked can help.

In the world of remote work, expectations can include work hours. For example, the employee in the first case above claims he was being contacted right before the end of his work shift with additional tasks to complete that day. Phone records will show the actual times he was contacted – but in the absence of a clearly established work shift, it may be difficult to show whether that time was at the end of his shift or not. If work hours are clearly communicated, and employees are instructed not to deviate from those hours without previously clearing a change with their supervisor, then those expectations can be combined with the phone logs to show whether phone calls were regularly made near the end of a shift as claimed. In the absence of a document outlining expected work hours however, the logs are less useful.

This same principle extends to other wage and hour claims including business expense reimbursement (including setting a clear expectation that employees report any incurred expenses for reimbursement), meal and rest periods, and timekeeping, among others.

3. Document, Document, Document

The importance of documentation has not changed during the current remote work era. If anything, it is even more important these days. Were you sending regular meal and rest break reminders pre-COVID? If so, make sure to keep that up. Did you previously

use meetings as an opportunity to remind employees to clock all hours worked? Keep doing so during virtual team meetings – and make sure you have a written record of those reminders.

If you do not have regular reminders in place, now is the time to think about implementing those reminders (and consult with your Fisher Phillips attorney on the language to make sure it is up to date with legal requirements). In addition, employee attestations can be helpful in having employees acknowledge the accuracy of their time records and reporting on any claimed meal or rest breaks they were unable to take. If you do not have an attestation in place, now is a great time to get started.

4. Complete a Wage and Hour Audit

Employers have had to deal both with a slew of new pandemic-related legislative and regulatory changes during the past year and also non-COVID-19 changes, ranging from minimum wage increases (impacting the salary basis requirement for your exempt employees) to eligibility for leave under the California Family Rights Act ([smaller businesses are now subject to leave requirements](#)). In addition to [making sure your policies are up to date for 2021](#), consider conducting a wage and hour audit to make sure that your employees are properly classified, hourly compensation meets minimum wage and overtime requirements (including proper calculation of the regular rate of pay to incorporate applicable bonus or commission compensation), your wage statements are legally compliant, reimbursement practices are up-to-date, and similar potential issues are caught and addressed before litigation ensues.

Conclusion

These are just some of the many steps that can be taken to help eliminate or mitigate potential claims by former employees in times of crises. Employers in California and across the country should be aware of the lawsuits that may be coming in the states where

you are operating. 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 developing workplace issues. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.