



COVID-19 Sick Leave Litigation Disproportionately Impacts Healthcare Employers: How to Avoid Becoming Another Statistic

Insights

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As the weather warms amid the dawning of a new chapter in our country, national vaccine distribution is underway (albeit admittedly haphazard) and the light at the end of the tunnel shines brighter in 2021. As the virus continues to rage, the healthcare industry remains dedicated to the fight on the front lines. In a uniquely heroic and resilient industry evaluated by, and thus focused on successful patient care and safety, it is always important that employers be vigilant in insulating liability from the disgruntled employee.

This is particularly important now as the vulnerable healthcare industry continues to combat a dramatic increase in litigation concerning pandemic-related whistleblower/retaliation claims and violations of federal, state and local emergency sick leave laws. We previously analyzed the increase in OSHA inspections targeting the healthcare industry coupled with the concurrent rise in whistleblower litigation across the nation. Amidst the virus surges of the fall and winter, we are also experiencing a significant deluge in emergency leave law litigation distinctly impacting the industry. In analyzing the burgeoning trend of litigation involving COVID-19 sick leave conflicts, this article untangles the web of emergency leave legislation, highlighting the risks and consequences unique to the healthcare industry.

The Statistics

In limiting liability, it is critical that healthcare employers understand the national litigation trend. Our comprehensive COVID-19 Employment Litigation Tracker illustrates daunting numbers. From a national, across-industry perspective, the most common cases are those involving “remote work/leave conflicts,” comprising 27.4% of all pandemic-related employment litigation in the country. 6.2% of all types of cases nationwide is comprised of leave lawsuits exclusively impacting the healthcare industry. Evaluating our industry in isolation, emergency leave cases comprise 28% of employment litigation in healthcare. Interestingly, although this litigation trend certainly impacts healthcare employers of all sizes across the nation, small employers with fewer than 50 employees face five times the number of lawsuits as large employers with 10,000 to 50,000 employees.

The Lawsuits And Stories They Tell

Analysis of the litigation involving emergency leave cases (the majority accompanied by tangential retaliation claims) reveal court decisions focused on examination of the complicated interplay of the federal Families First Coronavirus Response Act (FFCRA) and other pandemic-relief legislation at the state and local levels. The FFCRA, which was passed in March 2020 in response to the unprecedented spread of COVID-19, expired on December 31, 2020. It temporarily expanded the Family and Medical Leave Act (FMLA) to cover leave and loss of income to care for children (as a result of school closure or contraction of the virus) as well as bestowed employees with two weeks of paid sick leave.

The vast majority of leave lawsuits involve the FFCRA, wherein employees allege their employers unlawfully terminated them after, and/or failed to properly comply with, requests for leave when the employee had symptoms, or needed to care for someone who was quarantining or a child as the result of school closure. As female employees disproportionately take up caregiving duties, women bore the brunt of FFCRA violations (whether meritorious or not). Accordingly, we see this unfair trend in the resulting litigation impacting the healthcare industry.

The FFCRA, hardly bipartisan at the time, spurred states and localities to fill the gaps and pass expansive paid leave. This patchwork of state and federal emergency leave legislation, left healthcare employers to navigate burdensome leave law obligations while concurrently facing a mounting shortage in healthcare workers and consumed fighting the virus on the front lines. In healthcare, where most of the industry provides highly specialized 24/7 services, the chaos resulted in the litigation portrayed by the stark statistics.

Lessons Learned Prepare Healthcare Employers For The Future

The lessons of 2020's FFCRA litigation should not be dispelled as President Biden has unveiled legislation seeking to expand emergency paid leave. Moreover, upon the expiration of FFCRA, many states (if they hadn't already), promptly enacted legislation extending pandemic leave far in 2021. Further, in light of President Biden's nomination of Boston Mayor Marty Walsh for Secretary of Labor, we can expect a Walsh Department of Labor to support the expansion of leave rights under the FMLA. In championing paid parental leave for working families, Walsh cites fulfilled and industrious workforces as reasons to expand paid leave.

Additionally, the paramount reasoning for expansion of leave rights during the pandemic (garnering bipartisan support) is healthier, and thereby, more productive employees as well as proven success in curbing the virus in the United States. Specifically, closely studied national data estimates emergency sick leave to prevent 400 COVID-19 cases per state per day or 15,000 cases per day nationwide.

Undoubtedly however, the Biden plan, or the American Rescue Plan, is onerous on healthcare employers, seeking to invoke additional COVID-19 leave obligations in key areas. The expansive proposal seeks to extend paid leave until September 30, 2021; apply to employers with more than 500 employees (who were not covered by the FFCRA) and less than 50 employees (who previously

500 employees (who were not covered by the FFCRA) and less than 50 employees (who previously potentially fell into a small business exemption under the FFCRA); and perhaps most dauntingly, provide 14 weeks of emergency paid sick and family and medical leave. Further, the American Rescue Plan would extend paid leave benefits to categories of workers previously exempted from the FFCRA, including certain healthcare workers and first responders.

While the text of the American Rescue Plan has not been released, the Biden administration will certainly move quickly in expanding emergency COVID-19 leave (if not also permanent sick leave), seeking to accomplish campaign promises as well as curb the deadly virus. Thus, as pandemic relief litigation continues to predominate in the healthcare industry, it is crucial that healthcare employers, many employing first responders spread across the country, monitor and adhere to emergency and supplemental paid sick leave requirements under state and local laws. Although many healthcare employers already provide various forms of paid leave, it is essential to learn and comply with the potential myriad of legislation.

Although it is disheartening that this litigation unduly impacts the industry at the frontlines of the pandemic and vaccine distribution, the healthcare industry is unique in that both employers and employees share strong ethical values of health and safety. These shared values among healthcare providers, predicated upon the common goal of healing, cultivate working environments of comradery and communication. Thus, the importance of ongoing employee communication should not be undervalued as many times the better employees understand the issues, the more likely they are to support their employers' decisions.

Healthcare employers should periodically audit HR practices to ensure not only legal compliance but the cultivation of genuine caring and fairness toward employees. In other words, these traditional values imbedded in the industry's dedication to patient care should also be bestowed to employees with the goal being open channels of communication. This way, hopefully, employee/employer disagreements concerning leave rights are resolved at the onset, eviscerating the risk of costly and laborious litigation.

Concluding Points

Now more than ever, despite the daunting obligations expected of the healthcare industry on the pandemic front lines, healthcare employers must prepare for paid sick leave expansion, including reviewing and adjusting policies and practices for compliance. Alternatively, healthcare employers risk the astronomical expense and time of litigation, which expounds the threat of disgruntled, distracted or ineffective employees, thereby threatening patient care.

As you monitor the expansion of emergency leave, make sure you are subscribed to the [Fisher Phillips' Alert System](#) for the most up-to-date information. For further information, please do not hesitate to contact your Fisher Phillips attorney or member of our [Healthcare Practice Group](#).

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