COVID-19 Employment Litigation Continues Based on Failure to Accommodate Virus-Related Illnesses

Insights
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The litigation fallout against employers over COVID-19-related issues is starting to take shape in California – and there has been a definitive uptick in cases alleging the employer is not accommodating physical and/or mental disabilities under California's version of the Americans with Disabilities Act (ADA). Accommodating employees' physical and mental COVID-19-related illnesses has proven to be challenging for employers, but you can prevent (and defend against) potential litigation in this area by learning from recent cases.

Prime Example

One such example is the recent lawsuit filed by Jonathan Pantani against his former employer, Instapage, Inc. Pantani alleges that Instapage failed to accommodate him after he suffered an anxiety attack related to COVID-19.

Toward the end of November 2020, Pantani requested three accommodations that were allegedly suggested by his treating medical health professional: (1) extended time off around Thanksgiving; (2) time off work to meet with a therapist; and (3) "set" working hours with limited responsibilities during non-working hours and on weekends. Pantani alleges his requests for accommodation were not properly considered and that his employer ultimately terminated him for requesting the accommodations. Pantani alleges that Instapage advised him he was being terminated because of his "lack of alignment" and "general unhappiness at work."

While the outcome and veracity of the allegations are unknown, Pantani's allegations of his employer failing to accommodate a mental health condition and terminating him on account of his condition are fairly common. These types of cases are a reminder that you need to identify those employees who have physical or mental condition that could trigger protection under the ADA. Anxiety and mental distress created by COVID-19 fears clearly may trigger obligations under the ADA.

What Can You Do?

You may be able to avoid these types of claims by doing several things. First, you need to be able to quickly recognize that the ADA may provide protection to certain employees. Once the ADA issue is flagged, you will need to engage in a dialogue with the employee – an interactive process – and

determine what reasonable accommodations can be provided to the employee and make a record of the same.

In those instances when you are hesitant to provide the requested accommodation, you should document why it is an undue burden to provide the accommodation and attempt to offer alternative reasonable accommodations. For example, for an employee who is unable to work on the worksite but the essential functions of the job require being on site, you may offer a temporary leave of absence even if there is no other statutory obligation to do so.

Finally, to avoid allegations that any terminations you carry out were a result of either the employee's mental or physical condition or in retaliation for seeking accommodations, you need to be able to articulate a legitimate, non-discriminatory, basis for the termination. Highly subjective reasons (e.g. bad attitude) for a termination make that hurdle higher to get over.

Conclusion

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' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any attorney in our California offices.

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