What Employers Can Learn From The First FFCRA Interference And Retaliation Lawsuits

Insights
4.20.20

Just a little more than six weeks ago, both political and business leaders in our country were looking for options to help employers and employees deal with the dramatic impact the COVID-19 pandemic was having and would have on business operations and the ability of people to earn a living. The passage of the Families First Coronavirus Response Act (FFCRA) and the paid leave provisions it establishes is a major part of the programs to help those impacted by this world-wide issue. Now, it appears the other shoe is starting to drop.

Lawsuits alleging that employees have been wrongfully denied FFCRA paid leave benefits or terminated in retaliation for requesting such benefits are starting to surface. One recent lawsuit filed in federal court in Pennsylvania provides some insight into what employers can expect from what will very likely be part the "new normal" in employment litigation.

In *Stephanie Jones v. Eastern Airlines*, an airline's former Director of Revenue Management filed claims against her former employer and two executives alleging that she was illegally fired for requesting time off to care for her child under the FFCRA. This lawsuit not only shines a spotlight on the kinds of actions that may lead to litigation under this new statute but also serves as a warning to all employers about the flood of new employment claims that will soon be on the horizon. Interestingly, as alleged, this lawsuit is based on a termination that occurred prior to April 1, 2020 – the effective date of the FFCRA. This fact alone shows how eager people are to use the new FFCRA to support employment claims.

The Allegations
According to her lawsuit, Stephanie Jones was hired at Eastern as the Director of Revenue Management in October 2019. In mid-March 2020, Jones alleges she started contacting various members of management at Eastern to request that she be allowed to continue working from home. She wanted this flexibility, and alterations to her work schedule, to help with her 11-year old son, who was unable to attend school due to COVID-19 issues. According to her lawsuit, Jones made at least eight inquiries regarding her request to continue working from home and for two hours per day of "flex time." She says she reached out to at least four members of the Eastern management team in making these inquiries.

On March 24, 2020, Jones alleges she "formally requested" paid leave under the FFCRA. She alleges

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that her March 24 request resulted in Eastern's acting Chief Human Resource official responding via email with "open hostility," including stating that "the new laws are there as a safety net for employees, not as a hammer to force management into making decisions which may not be in the best interest of the company or yourself."

On March 27, 2020, Eastern terminated Jones during a phone call in which she alleges she was told it was "in the best interest of the parties to part ways" and that there appeared to be a "conflict between" Jones and others at the company. Within three weeks of being terminated, Jones filed a six-count FFCRA lawsuit in the Eastern District of Pennsylvania federal court, alleging both FFCRA interference and retaliation.

Understanding FFCRA Interference And Retaliation Lawsuits

It is important to note that these allegations are simply that – allegations. The lawsuit was just filed on April 16, and Eastern has not yet had the opportunity to respond. And as employers experienced with workplace litigation know, there are always two sides to every story. However, a review of the claims in this lawsuit can help you begin to figure out the kinds of lawsuits that may soon be filed and can help you proactively avoid them from being filed against your organization – or can put you in the best position to defend any that land on your desk. Here are three things you need to know:

1. **These Claims Can Come Swiftly**

   As opposed to some of the more common federal employment law claims you may face, FFCRA claims do not require aggrieved plaintiffs to exhaust administrative remedies before filing a private lawsuit. While employees, who believe they have been wrongfully denied benefits under the FFCRA, can seek assistance from the Wage and Hour Division of the Department of Labor – especially now that the Labor Department's 30-day grace period has expired and the agency will now seek enforcement where appropriate – they can also file a lawsuit directly against their employer.

   Only employers who employ 50 or more employees are subject to lawsuits for interference or retaliation involving extended family medical leave. Because there is no required administrative process, you might find yourself in federal court within days of an adverse employment action that can be connected to an FFCRA benefit request.

2. **Available Remedies Will Make FFCRA Claims Costly**

   As enacted, the FFCRA provides employees pursuing a private action against their employers to seek remedies allowed under the Fair Labor Standards Act (FLSA). This means employees can seek to recover liquidated damages (an amount equal to what is owed in lost wages) for willful violations and attorneys' fees.

   And as Jones' case highlights, she is seeking liquidated damages – including interest. She maintains that the statute requires the employer to prove its actions were in good faith compliance with the FFCRA and that it had objectively reasonable grounds to think its conduct

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did not violate the statute to avoid such an award.

3. **Individual Managers May Be Sued Under The FFCRA**
   Besides naming her former employer as a defendant in the lawsuit, Jones names two individual managers as defendants in the claim. The company's Human Resources Consultant and the Chief Executive Officer must also answer the FFCRA retaliation allegations.

   Because the Emergency Family and Medical Leave and Emergency Paid Sick Leave Act provisions of the FFCRA adopt the enforcement mechanisms of the Family and Medical Leave Act (FMLA) and the FLSA, managers and supervisors may be sued in their individual capacity for violations of the FFCRA. This is because both the FMLA and the FLSA broadly construe "employer" to include "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer."

   For this reason, managers should exercise caution when it comes to FFCRA compliance. Employers should ensure that all managers and supervisors are aware of the FFCRA, what benefits it provides to employees, and that HR should be notified immediately if a manger learns that an employee may need FFCRA leave.

Helpful Best Practices to Consider

It is worth repeating that this lawsuit contains one-sided allegations, and we don't yet know Eastern's side of the story. However, if we consider Jones' allegations as being some of the likely fact scenarios employers will see in future FFCRA litigation, here are some best practices that could help you defend any such case you might happen to face.

- **Designate an FFCRA "expert":** The FFCRA paid leave benefits and the guidelines for administering them are new. Depending on the size of your organization, it will be helpful to have a certain individual or group to review and respond to FFCRA questions and request for benefits. The key is to be consistent and ensure the proper review is conducted in all situations.
- **Train Your Management Team**: While having one person or group review all FFCRA situations is recommended, every member of your management team needs to know enough about the FFCRA to make their direct reports get the help they need and that they do not take actions or make statements that could be problematic.
- **Manage Communications:** In any situation in which an employee is making repeated contacts to multiple members of your management team, the best way to ensure an effective and helpful result is to have one person designated to follow up and address the employee questions or issues. Having fewer people involved in direct communications helps eliminate misunderstandings and keeps communications focused on the most relevant information.
- **Consider Written Termination:** Even in situations in which there is no requirement to provide written notice of termination, such documentation is often helpful where litigation is likely. This is especially true given that litigation under the FFCRA is so novel and an employer's ability to show

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especially true given that litigation under the FFCRA is so novel and an employer's ability to show it made reasonable, good faith efforts to comply with the Act will be critical in responding to retaliation and interference claims.

Conclusion

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 or any member of our Post-Pandemic Strategy Group Roster. 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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