New COVID-19 Lawsuit Sends Warning To Employers Too Large To Be Covered By FFCRA

Insights
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A terminated Kroger Co. distribution center worker has just sued the grocery store giant over its handling of absences for what she alleges were COVID-19 symptoms. The most interesting aspect of this claim is that the ex-employee alleges that her termination for violating the company's attendance policies violates both the Family and Medical Leave Act as well as the Families First Coronavirus Relief Act, even though Kroger has over 500 employees and is not covered by the FFCRA.

The case, filed in federal court in the Northern District of Indiana, is one of the first of many anticipated lawsuits as the country begins to emerge from the worldwide pandemic. What can all employers – especially those who believed they were well outside the reach of the FFCRA – learn from this claim?

Kroger's Amended Leave Policy
According to the lawsuit, Kroger amended its attendance policies in late March to provide employees with up to 14 days of paid leave subject if they are subject to a mandatory quarantine or choose to self-isolate due to COVID-19 symptoms. The polices attached to the complaint indicate that such leave would only be approved if the need for leave was verified by a health care professional.

The policy apparently further requires documentation to include the worker's name, diagnosis, date seen by the medical provider, and a return-to-work date. Likewise, employees are to submit appropriate documentation within three calendar days of the first absence. According to the complaint, failure to follow these requirements would result in the issuance of attendance points, which may lead to termination.

Employee Claims She Was Terminated Despite Following Policy
According to her complaint, Ariel Robtoy was a "case selector" at a Kroger distribution center in Indiana who alleges she developed "COVID-19 like symptoms" between April 4 and 5. Robtoy called out sick on April 6 and sought medical care through a telehealth visit with a local hospital. As a result of this visit, she was prescribed medication and told not to return to work until April 9. The note she received from her physician and she says she provided to Kroger did not, however, mention COVID-19; it simply indicated "shortness of breath." According to the complaint, a human resources representative did not approve the leave because the doctor's note lacked the term "COVID-19."

Following the onset of a sore throat a few days later, Robtoy again sought medical treatment through a telehealth visit. She received a diagnosis that her ailment was most likely an "upper respiratory infection," though this time the note mentioned COVID-19 and indicated that she should self-isolate for 14 days. Robtoy claims she submitted this note to human resources via email but did not receive a response.

Around April 15, Robtoy noticed that her paystub did not reflect payment for the time off, despite allegedly complying with Kroger's amended leave policies. She alleges that she was given the opportunity to use vacation time, but had none available. She claims she was terminated due to having accumulated too many attendance points.

It is important to note that these allegations are, at this point, simply allegations. Kroger has not yet responded to this very recent lawsuit, and as most employers know, there are always two sides to every story – especially when it relates to a contentious workplace termination. However, it is still of value to examine this complaint to see what lessons employers can glean from the allegations.

Legal Theories

In her lawsuit, Robtoy claims that Kroger violated her rights under the Family and Medical Leave Act (FMLA) and the Families First Coronavirus Relief Act (FFCRA). Under the FMLA, a qualified employee of a covered employer is entitled to up to 12 weeks of unpaid, job protected, leave to attend to a serious health condition.

Assuming Robtoy satisfies the 12-month tenure and 1,250-hours worked requirements, as she alleges, she may have a valid claim, so long as her self-isolation was due to a "serious health condition." Under existing regulations, a "serious health condition" means an illness, injury or impairment involving inpatient care or continuing treatment by a health care provider. It is unclear from the allegations in the complaint whether Robtoy was "incapacitated" as FMLA regulations typically require, or whether a 14-day isolation recommendation satisfies the "continuing treatment by a health care provide" requirement.

Robtoy's second claim — that Kroger violated the FFCRA — stands on shaky legal grounds. Kroger employs more than 500 employees and is therefore exempt from the statute's coverage. Seeking to evade the FFCRA's clear exemption, however, Robtoy claims that Kroger should be barred from arguing that it is exempt because it voluntarily adopted a policy providing 14 days of paid leave for employees exhibiting COVID-19 symptoms.

While certainly a novel claim, it seems unlikely to survive a court's scrutiny – even assuming it is accurate that Kroger adopted a leave plan identical to the FFCRA's requirements, which is unclear from the complaint. However, it is worth keeping a close eye on this potential theory of recovery in the event that the federal court in Indiana – or some other jurisdiction – adopts the argument and creates an additional area of concern for large employers.

What You Should Watch For

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If your organization is covered by the FMLA and/or FFCRA, you should take careful steps to ensure compliance. If you who updated policies to reflect these changing statutes or to voluntarily offer certain leave to employees affected by COVID-19, you should endeavor to comply with your own polices in order to avoid unnecessary litigation risk.

You should also note that some jurisdictions permit breach of contract claims based on employer policies or handbooks. This allegation was probably not included in Robtoy's claim because Indiana is not one of those states. However, you may have operations in such a state and need to be especially careful if you have advanced new policies in the wake of the pandemic. Make sure your managers and supervisors are well aware of the contours of your new rules so they do not inadvertently create a claim.

What's Next?

Robtoy's suit is one of the first of likely thousands that will be filed challenging employers' responses to the COVID-19 pandemic. According to court records, Kroger has not been served with this lawsuit, but we will keep you apprised of any development in this case, and any others that may impact employer's rights and obligations as employers get back to business.

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, the author, 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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