Employers Beware: COVID-19 Litigation May Spark Additional Claims

Insights
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As businesses across the country begin to face a wave of COVID-19-related workplace litigation, some are learning the hard lesson that some of these claims may also dredge up long-simmering employment conflicts unrelated to the pandemic. An example comes from a recent case filed in Florida, where an air-conditioning technician just sued his former employer alleging that it failed to provide him personal protective equipment (PPE) while performing work during the pandemic. His lawsuit had twice the punch, however, because it also alleges that his employer misclassified him as exempt and failed to pay him overtime. As a finishing touch, he alleges that his employer terminated him in retaliation for complaining about not only his safety concerns but also his failure to receive overtime. This lawsuit shows that, while you are focusing on resuming operations and safely returning employees back to work, you must also prepare to defend COVID-19-related litigation.

The Factual Allegations: *Macke v. HT AirSystems of Florida*
According to the May 6 federal lawsuit filed in Orlando, Robert Macke worked for HT AirSystems of Florida as an air-conditioning technician. Macke alleges that, on April 1, he sent an email to management objecting to being required to work in the field without being provided with any PPE. He said he pointed out that the Occupational Safety and Health Administration's (OSHA's) PPE standards require using gloves, eye, face, and respiratory protection when job hazards warrant them. "As Plaintiff was expected to constantly travel to public places, including hospitals, during the COVID-19 pandemic," his complaint alleges, "it is clear that PPE was warranted, but was not provided."

He also claimed that OSHA's General Duty Clause requires an employer to provide its employees with a safe workplace free of recognizable hazards, which includes providing PPE to at-risk workers and not subjecting employees to hazardous or unsafe conditions. Macke claims that these complaints to management were protected activity under state law, but that approximately three weeks later, HT informed him that it was terminating his employment, effective immediately, and without reason. He alleges that the real reason his employer terminated him was in retaliation of his safety complaints.

But his lawsuit didn't end there. Macke claims that HT classified him as an employee exempt from overtime and paid him a regular salary without overtime despite the fact that he regularly worked 50 to 60 or more hours per week. However, he claims that he performed a number of non-exempt duties; had no authority to hire, fire, or evaluate HT employees; could not determine or change the

duties; had no authority to hire, fire, or evaluate HT employees; could not determine or change the schedules or rates of HT employees; and did not exercise independent judgment. In other words, he claims he should not have been exempt from overtime.

Macke claims that he had repeatedly complained to HT about his belief that he had not been paid properly. The lawsuit goes on to say that HT announced certain changes to its pay practices that would have ultimately culminated in Macke and another "misclassified" air-conditioning technician going from salaried to hourly effective May 1. In the same email where he complained about the lack of PPE, Macke claims he once again complained about his pay and alleged misclassification. He claims that his termination in late April was also motivated because of these complaints.

Macke's lawsuit raises claims for unpaid overtime and retaliation under the Fair Labor Standards Act (FLSA), and a separate claim under Florida's Whistleblower Act. Macke seeks to recover unpaid overtime compensation, back pay, front pay, liquidated damages, declaratory relief, attorneys' fees and costs, punitive damages, and other damages.

Understanding The Legal Claims: Key Takeaways

The biggest takeaway from Macke's lawsuit is that, even as we are flattening the curve with respect to incidents of reported COVID-19 cases, we are just starting to see the beginning of an expected wave of COVID-19 litigation – and litigation of general employment disputes are still commonplace. For this reason, you should be on guard against the fact that COVID-19-infused allegations are likely to infect your otherwise run-of-the-mill employment and labor claims.

Turning to Macke's FLSA claim for example, misclassification and overtime claims under the FLSA are neither novel nor a consequence of the pandemic. Indeed, plaintiffs' lawyers have long relied on the FLSA to challenge pay practices. Under the FLSA, employees who work in excess of 40 hours a week must be paid one-half times their regular rate of pay. The FLSA, however, provides a number of exemptions to the overtime rule for employees based on their salaries, duties, or by virtue of the particular job they perform.

In misclassification lawsuits, the filing party typically asserts that an employer paid them a salary or incorrectly described their job duties to avoid its overtime obligations. Macke's claim is no different. Based on the allegations as pleaded, it appears Macke is asserting that HT improperly took advantage of the FLSA's executive exemption that only applies to employees who: are compensated on a salary bases at a rate of not less than $684 a week; have the primary duties of managing the business or a department within the business; and have authority to hire, fire, promote or change the status of employees. Whether Macke's claims are true remains to be seen, but his case demonstrates that now is a good time for employers to revisit classifications of exempt workers where appropriate.

Whistleblower claims are equally as common as wage and hour claims and also are not a pandemic byproduct. Florida's whistleblower statute, like the laws in most states, provides that employers cannot take any retaliatory personnel action against an employee who engaged in certain protected

activity including objecting to, or refusing to participate in an activity, policy, or practice of the employer which is in violation of a law, rule, or regulation.

Yet Macke's case demonstrates that whistleblower claims are likely to take new shape as employers continue to navigate this new COVID-19-impacted environment. Without a doubt, more and more employees who face demotions, terminations, and reductions in schedules or pay will assert that their reports about their employer's alleged failure to follow legal protocols with respect to safety measures in this COVID-19 climate were the cause of those personnel actions.

By way of illustration, in the HT litigation, Macke leans on OSHA standards that require employers to provide PPE to protect employees from workplace hazards as the basis of his whistleblower claim. He asserts that HT's purported failure to provide a face covering to protect him against the coronavirus violated OSHA and by reporting it, he was a whistleblower under Florida law entitled to protection.

As alluded to above, Macke's claims at this point are nothing more than allegations. HT will have its chance to respond to and defend against these claims. HT's response (particularly any defenses it raises) will provide more insights in this area as a new body of cases continues to develop.

Shielding Yourself Against COVID-19 Claims

More employers may very well face a Macke-type lawsuit in the near future. To guard against that, here are a few best practices that you should implement now:

1. **Follow OSHA and CDC Guidelines.** As employers are reopening, the best defense against claims related to the safety of employees is to follow all guidelines of state and local health departments, OSHA, and the Centers for Disease Control and Prevention (CDC). This includes following all recommended safety practices including, but not limited to, providing PPE, regularly cleaning and disinfecting workplaces, and appropriately distancing employees to limit exposure. You should train all employees on following these guidelines, but you must pay particular attention to train management-level employees on how to respond to safety concerns raised by employees.
2. **Timing and Documentation are Important.** In this pandemic environment, it is evitable that employers will have to make personnel changes that will be tough on employees. It never looks good when those decisions are made at or around the same time an employee complains the employer allegedly violated a law. Retaliation and whistleblower claims are a hazard of such circumstances. Therefore, when making those decisions, consider the risks and benefits associated with it before acting. And, when proceeding with such personnel decisions, be sure that the appropriate documentation exists leading up to and through the date the action is taken that demonstrates that the personnel action is unrelated to any protected activity such as complaining of a failure to follow OSHA guidelines. This documentation will be key in responding to and defending against employment law claims.

3. **Be Aware of the New Litigation Landscape.** The novel nature of the COVID-19 pandemic is certain to change the litigation landscape of employment claims. While employers are reversing employment decisions previously made in response to the coronavirus (e.g., recalling furloughed employees, changing pay practices), they must consider the implications of them and regularly consult with employment counsel along the way. For example, Macke's misclassification claim could have easily triggered a potential COVID-19-related allegation if HT had changed him from exempt to non-exempt as a result of the pandemic but recently restored him back to exempt status. The reality is that the unique nature of this pandemic is likely to develop a number of new fact patterns that you must be alert to in order to appropriately defend against them. Fisher Phillips regularly publishes alerts and provides real time resources that can assist employers as we all traverse this new litigation reality.

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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