
COVID-19 Is Going To Get Your Company Sued for Retaliation

Description

By [Alicia Samolis](#)

Many employers are worried that COVID will result in legal liability from employee claims. However, some employers are still focusing on the wrong things.

Understanding What Is (and Is Not) Likely to Get You Sued

Absent legislation or an executive order, liability from COVID safety employment claims is not likely to be substantial given: (1) the difficulty in proving causation in the context of a contagious disease present in the general population; (2) the number of mild COVID cases limiting actual damages; and (3) if a law change were to occur allowing certain employees to bring such claims without proving causation, the same would likely only be allowed under the workers' compensation system. With respect to the last point, it is notable that in Rhode Island, the workers' compensation exclusivity doctrine is extremely broad, covering employer's intentional torts against their employees, *Cianci v. Nationwide Ins. Co.*, 659 A.2d 662, 670 (R.I. 1995), and extending to an employer's officers, agents, and employees. R.I. Gen. Laws § 28-29-20. In addition, current proposed bills such as 2021-H 5474 would only allow presumptive eligibility for workers' compensation benefits for essential workers, not litigation.

However, as noted in our article previously published in the Summer 2020 issue of The Anchor titled, [COVID-19 Is Going to Get Your Company Sued for Wage Payment Mistakes](#), COVID presents real liability issues for employers outside of worries regarding sick employees or broken safety standards. In addition to the wage and hour liability previously discussed, COVID has created a large potential for whistleblower claims and National Labor Relations Act ("NLRA") violations.

Your Employees are Blowing the Whistle (and You May be Missing It)

Under the Rhode Island Whistleblowers' Protection Act, R.I. Gen. Laws § 28-50-1, et. seq. ("RIWPA"), Rhode Island employees are protected whenever they complain about something that they believe is a law violation, whether or not they are correct in their belief that the practice is occurring and whether or not the practice actually violates the law. The significance of being "protected" is that the employee cannot be disciplined, warned, given a poor review, terminated, or otherwise treated adversely. Moreover, even when an employer takes an adverse action against the employee for a totally separate reason that is close in time to the protected complaint, a retaliation claim will be difficult to defend.

In the COVID whistleblowing context, companies are receiving more complaints that are protected under the whistleblowing law in two specific COVID-related categories.

The first category is relatively easy to spot. This consists of employees who are worried about the virus and believe their employer is not doing enough to protect them. For example, an employee who complains that the company is not following the latest executive order on occupancy restrictions in the office context (which as of May 5, 2021 is 50% in Rhode Island except when work cannot be performed from home) is protected from retaliation. The protection attaches even when the employee is dead wrong about either the number of employees going into the office (e.g., even if only 10% of employees are going into the office) or the terms of the order (e.g., the order expired and now 100% of employees can be present). Despite the protection,

- Timing alone can sometimes be enough for an employee to make it to a jury on a whistleblower or other retaliation claim. Thus, employers are well-served to think long and hard about eliminating the position of an employee the day or week after the employee raises their protected COVID concern.
- Recommit to best practices as to documentation of performance issues and behavioral problems. While many of these practices may have slipped at a time when employees in human resources roles are working from home or otherwise focused on COVID issues rather than routine documentation issues, employee documentation is vital to defend against retaliation claims.
- Do not let complaining employees rule your policies and procedures. Employees often do not have the rights they think they do and just because they are “protected” from retaliation does not mean the company has to change its substantive policies. Be confident that your Company’s practices are compliant, be firm in explaining this to complaining employees and do not be more lenient in rule enforcement when an employee complains about a rule – this could lead to further complaints.
- Implement a mandatory arbitration agreement to make employee claims less expensive to defend.

Finally, consult your employment attorney when you have doubts about the legality of your practices, when you need guidance through the investigation into employee complaints, or when you need to terminate or discipline an employee who has made a protected complaint.

Partridge Snow & Hahn attorneys Brian Fishman and [Alicia Samolis](#) are ready to answer questions regarding protected COVID complaints and COVID-related retaliation claims. For additional information and resources visit the firm’s [COVID-19 Advisory Group](#) page.

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