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

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, employers should note that while they cannot behave adversely towards the employee for their complaint, they can still make the employee go into the office and do not have to allow the employee to work from home.

Employers are more frequently missing the second category of protected COVID complaints. This category contains the employees who are angry about the COVID restrictions and believe their rights are being violated with respect to COVID-related safety procedures. Examples of this include the employee who tells their supervisor that the workplace rule requiring them to wear masks is "unconstitutional" or that it is illegal for an employer to take their temperature. While employees do not have constitutional rights in private employment and the Equal Employment Opportunity Commission has temporarily suspended the prohibition on temperature checks during this pandemic, again the employee is protected despite being wrong. An employer who chastises the employee's challenge of the mask policy as being reprehensible or selfish violates the whistleblower protection, even though the policy is not only legal but actually is required by the law. Again, employers need to understand that while the conduct is "protected," the employer can still require the employee to wear the mask and get the temperature check.

The NLRA Gives Additional Protections for Employee Complaints about COVID

The National Labor Relations Act ("NLRA") protects non-supervisory employees when discussing their terms and conditions of employment with their co-workers or taking actions likely to lead to or facilitate such discussions. "Terms and conditions of employment" includes discussions about policies (or lack of policies) related to working onsite, wearing masks, social distancing, and other COVID issues. Under the NLRA, the employees who publicly post about how your Company is "threatening their lives" by requiring them to come into the office once a week (no matter how essential the work is) are protected. Also under the NLRA, the employees who are laughing and making jokes on breaks about how "stupid" the boss's reminders about "remembering to keep their mask above their nose" are equally protected.

Like all NLRA protected activities, the protections are subject to time, place, and manner restrictions, which means if you would prohibit the employee from talking about other personal topics during working time (such as their favorite television shows), you can prevent the discussion of the "stupid" mask reminders. It also means you do not have to allow an employee to stand on their desk to yell about your in-office work policy. However, the NLRA bars employers from prohibiting engaging in such discussions outside of work hours (such as after work on social media or on breaks).

How Employers Can Protect Themselves from COVID-Related Retaliation Claims

Employers should take the following steps to deal with these ever-increasing risks:

- Train supervisors to recognize employee complaints of illegal or unsafe company actions as protected and to report the information to human resources or other designated role. Supervisors should not be handling the complaint process, but all supervisors need to be adept at recognizing these complaints as protected and raising them to management/human resources.
- Have policies clearly setting out which designated employees should receive complaints. While this does not prevent employees from being protected when they go to their supervisor or other member of management, it does make it more likely the complaints get to the correct person and are not missed.
- Deal with all legally protected complaints in a reasonable and uniform fashion. Specifically, human resources or another designated role should speak with the employee with the complaint, confirm the

company is not doing something illegal (with management, legal counsel or further factual investigation if needed), meet with the employee to explain why the action the company is taking is legal, and then document the process in the company's files.
- Given the vast number of COVID related complaints, management and human resources should be reviewing performance warnings and terminations to ensure prior protected conduct is in no way part of such negative decisions. In particular, adverse actions relating to a failure in "being a team player, " "negative attitude, " "positivity, " "adaptability, " and "insubordination" – while sometimes completely legitimate – may be a guise for illegal retaliation.
- 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.

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