

How Can I Get My Employees to Return to Work During a Pandemic and Not Get Sued?

By **Julie Levinson Werner** and **Lauren M. Hollender**

As employers begin to require their employees to return to the workplace, they remain concerned about COVID-19-related litigation. Initially, many were concerned about an anticipated increase in lawsuits alleging that unsafe workplaces caused employees to contract COVID-19 and develop related injuries, including wrongful death. In most cases, however, direct claims against employers for employees' personal injuries should be barred by the applicable state workers' compensation statute — at least absent allegations of intentional wrongdoing or harm. Now the bigger threat that employers face is workplace safety whistleblower and retaliation claims, which increased drastically since the start of the pandemic. Here is what employers need to know about those claims and the proactive steps they can take to avoid litigation.

A Substantial Increase in Whistleblower and Retaliation Claims

According to a recent report, the Occupational Safety and Health Administration (OSHA) has received a significant number of whistleblower complaints due to the pandemic. OSHA's whistleblower program received 30 percent more whistleblower complaints during the first four months of the COVID-19 pandemic than during the same period in 2019. Of those cases, 39 percent were directly related to COVID-19, including many claims that employees were retaliated against for having reported potential workplace safety violations, including social distancing and personal protective equipment violations.

OSHA is not the only venue where claims have been filed. Employees have filed lawsuits in court alleging that they were terminated or retaliated against for having complained

about workplace safety or working conditions, exercising COVID-19-related sick or family leave rights, or requesting disability accommodations. In fact, according to litigation trackers, whistleblower and retaliation complaints comprise the largest number of COVID-19 lawsuits being filed, second only to COVID-19-related employment discrimination complaints. These claims involve a wide variety of fact patterns. Here are some examples:

- *Williams v. Berkeley Heights Dental Group PA* (Union County, New Jersey)
The plaintiff, a dental hygienist, was furloughed from her position in March when her employer temporarily closed due to the COVID-19 pandemic. When the dental practice defendant prepared to reopen, the plaintiff alleges she strenuously objected to and questioned the group's compliance with legal reopening requirements, including Center for Disease Control and Prevention (CDC) guidelines and OSHA regulations. Further, she repeatedly questioned whether the defendant's alleged plan to supply her with only one mask and one cloth gown per day would comply as legally sufficient. She asserts that the defendant offered to recall her to work only if she signed an "employee release/consent" form, which allegedly required her to waive the group's COVID-19-related liability and her workers' compensation rights. According to the plaintiff, she questioned the legality of this waiver, and in response, the defendant terminated her employment.
- *Dimitrova v. Best Western Seven Seas et al.* (San Diego County, California)
The plaintiff, a catering manager born in Bulgaria, alleges her employer wrongfully terminated her shortly after she reported to human resources and the defendant's

general manager that defendant's continued operations during the COVID-19 pandemic violated the governor's stay-at-home order. While working, she claims she observed numerous safety issues including management's failure to implement social distancing, management's failure to provide masks to employees, and employees and guests failing to wear masks. Plaintiff claims that shortly after reporting these conditions, she was placed on furlough and subsequently terminated.

- *Flores v. Triple C Electric Inc., et al.* (Los Angeles, California)
In this case, the plaintiff alleges that his employer terminated him because he contracted COVID-19 and took medical leave to isolate and recover. According to the plaintiff, he promptly reported his positive COVID-19 test to the defendant, who told him to quarantine per CDC guidelines. The defendant also allegedly told the plaintiff he would receive three company-provided sick days and Families First Coronavirus Response Act (FFCRA) sick pay for the remainder of his leave. When he advised his employer he required additional time to recover, his supervisor allegedly accused the plaintiff of being untruthful about his illness. Shortly thereafter, plaintiff was fired. The plaintiff's lawsuit includes claims of disability discrimination, failure to provide a reasonable accommodation, failure to engage in the interactive process, and retaliation.
- *Jean v. Palm Beach Diabetes and Endocrine Specialists, P.A., et al.* (Palm Beach County, Florida)
The plaintiff, a lab technician, alleges unlawful retaliatory discharge in violation of Florida's Whistleblower Act, the Family Medical Leave Act (FMLA), and the FFCRA. The plaintiff alleges that when his supervisor learned he had tested positive for COVID-19, "she told the entire company, without any regard for the stigma felt by people who contracted the virus or [the plaintiff's] HIPAA [Health Insurance Portability and Accountability Act] rights." The plaintiff alleges that after he complained to his supervisor about her disclosures, his supervisor replied she could tell whomever she wanted. The plaintiff further claims that the supervisor, in retaliation for being challenged, harassed him while he was recovering in quarantine and then upon his return to work, necessitating his taking a mental health day. He was then told he had exceeded his paid

time-off allowance, and he was fired. The plaintiff claims that he engaged in protected activity by objecting to the supervisor's conduct and that he was retaliated against for engaging in that protected activity and exercising benefits afforded to him under the FMLA and the FFCRA.

Proactive Steps to Avoid COVID-19 Litigation

While the likelihood of the success of any particular claim will depend on the applicable law and relevant facts, employers can take a number of steps to minimize the risk of being sued and having liability exposure:

- Be aware of and stay current on the updated COVID-19 quarantine rules and executive orders in your jurisdiction. The COVID-19 pandemic is an evolving situation, and employers must be aware of changing requirements.
- Comply with federal, state, and local COVID-19-related laws, including occupancy limits, social-distancing and mask-wearing requirements, cleaning protocols, and new and expanded paid sick and family leaves.
- Develop and distribute a workplace safety plan that encourages employees to bring complaints to management's attention. A written plan that is posted in the workplace is now required by many states and localities.
- Designate a pandemic response coordinator. Consider a hotline. Train managers on what to do or whom to contact if OSHA, the police, or public health officials show up on-site unexpectedly.
- Regularly monitor and implement CDC, OSHA, and local health authority guidance regarding safe practices in the workplace. As guidance changes, update policies and procedures.
- Have protocols in place for asking employees to quarantine after restricted travel.
- Be prepared to respond to confirmed or suspected COVID-19 outbreaks in the workplace. Know what information the company can or cannot disclose to other employees and when the company is legally obligated to notify health authorities.
- Make sure your documentation process complies with both state and federal leave laws, including the FFCRA.
- Train employees regarding new policies and procedures, particularly COVID-19 safety and reporting procedures, and availability of paid time off. Highlight anti-retaliation policies.

- Review leave and accommodation policies, and carefully assess the obligation to allow remote work for those employees with heightened vulnerability to COVID-19.
- Document and investigate complaints as well as responsive actions.
- Carefully assess termination decisions and weigh the risk of whistleblower and retaliation claims.

Lowenstein Sandler's Employment Counseling & Litigation Group would be pleased to speak with you and answer any questions you have about this important topic.

To see our prior alerts and other material related to the pandemic, please visit the Coronavirus/ COVID-19: Facts, Insights & Resources page of our website by clicking [here](#).

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