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Kendra D. Simmons

Ashley R. Thronson

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Employment Question of the Day: April 27, 2020

Legal Update
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Question

What kind of litigation will arise out of COVID-19, and what can employers do now to prepare?

Answer

Employers have a lot to deal with right now as they attempt to navigate numerous statutory and regulatory changes. Thinking about, and preparing for, future employment litigation that will arise from the COVID-19 pandemic is probably not top of mind.

But we are already starting to see COVID-related employment litigation arise that may develop into larger trends. Meanwhile, some states are relaxing or tolling litigation-related deadlines. While employers are certainly occupied dealing with more immediate issues, those issues should be addressed with an eye toward how actions taken now will affect, or be perceived in, future litigation.

Below we summarize some of the first COVID-related employment litigation we have seen:

1. Families First Coronavirus Response Act

There can be no doubt that the FFCRA will be a source of litigation in the months and year(s) to come.

On April 23, the DOL announced an investigation that resulted in an employer paying out sick leave under the FFCRA that it previously refused to pay after an employee was ordered by medical providers to self-quarantine with COVID-19 symptoms. And just two weeks after the FFCRA took effect, a former employee of Eastern Airlines sued the company and individual representatives for FFCRA interference, retaliation, and other violations. *Jones v. Eastern Airlines, LLC, et al.*, Case No. 20-cv-01927 (U.S. District Court for the Western District of Pennsylvania).

The employee is a single mother with an 11-year-old son and claims that her requests for flex time "and the continued ability to work from home" were denied. Because her employment was terminated prior to the Act becoming effective on April 1, however, her entitlement to leave under the Act is unclear at best. Regardless, though, employers can learn from this suit how employees will frame future FFCRA litigation and how employer actions can be perceived.

While employers are dealing with stressful exigent circumstances right now, by the time FFCRA claims are litigated, the urgency of some of these issues likely will not be the same. If these claims were litigated today, judges and juries may be more understanding of the difficult decision points employers are facing. In her suit against Eastern Airlines, Jones included in her publicly-filed Complaint, the language of entire emails that—without context—portray the employer's HR consultant as less than sympathetic.

So be understanding, but open and honest, with employees in having conversations about current challenges and alternative work arrangements. Know that what you say, and how you say it, can and will be used against you, especially as judges and juries hearing these future cases will undoubtedly have been personally affected by COVID-19 in some way.

The other key takeaway is to document, document, document—the reasons for denying a request for leave, the reasons the employer believes in good faith (after consultation with a competent employment attorney) that the employee is not eligible for leave, and the reasons certain employees were selected for furlough and layoff.

2. Other Discrimination Complaints

We have begun to see COVID-related charges of discrimination alleging disability discrimination. For example, in one such charge, an employee alleges that he was told to telework because of his compromised immune system, and then subsequently laid off due to his medical condition.

We also expect to see "failure to accommodate" charges of discrimination, especially as employers begin requiring employees to return to work. We predict that litigation over teleworking and leaves of absence as reasonable accommodations will increase exponentially. And we predict that a number of lawsuits will arise out of employees' refusal to return to work due to fears of contracting COVID-19. On this latter point, the EEOC has advised:

"Although many people feel significant stress due to the COVID-19 pandemic, employees with certain preexisting mental health conditions, for example, anxiety disorder, obsessive-compulsive disorder, or post-traumatic stress disorder, may have more difficulty handling the disruption to daily life that has accompanied the COVID-19 pandemic. As with any accommodation request, employers may: ask questions to determine whether the condition is a disability; discuss with the employee how the requested accommodation would assist him and enable him to keep working; explore alternative accommodations that may effectively meet his

needs; and request medical documentation if needed."

What can an employer do to guard against a lawsuit and put the company in the best possible position to defend a claim? Engage. Consult. Document.

- **Engage** with employees—seek to understand the reasons an employee is refusing to return to work, or the reasons that an employee is requesting to telework, and fully engage in the interactive process to determine whether a reasonable accommodation is possible.
- **Consult** with legal counsel—counsel can not only help navigate sticky situations to help you avoid litigation, but the advice you receive *may* be a partial defense to certain claims (e.g., FLSA, FMLA and perhaps the FFCRA).
- **Document** conversations with employees, efforts taken to determine whether an accommodation is possible and the reasons for whatever decision is ultimately made.

3. OSHA Charges

We expect to see—and have begun to see already—an uptick in OSHA charges related to "unsafe" working conditions. We also expect to see a wave of OSHA retaliation complaints. Someone at your company should be tasked with monitoring and adapting the company's policies and practices to the evolving CDC guidance on COVD-19 to mitigate this risk.

4. WARN; Wage and Hour

Employers have also had to make other tough decisions recently in furloughing or laying off employees, reducing compensation, reducing hours and potentially even changing employees' classification status. These practices present a particular risk of class action litigation. Counsel should be consulted when making these decisions and implementing these changes because any misstep could result in future liability. And consultation with counsel may be a defense to liquidated damages (i.e., doubling of the damages). Working with counsel now will help position employers for the best possible defense in any related future litigation. Finally, employers many want to reconsider implementing arbitration agreements with class action waivers.

5. Tolling or Extending Statutes of Limitations and Other Deadlines

Conscious of the fact that both individuals and companies are focused on more urgent issues right now, a number of states and judicial districts have issued orders or legislation that toll statutes of limitations or otherwise extend or relax litigation-related deadlines.

For example, in Minnesota:

- All statutory deadlines, including statutes of limitations, for state district court or appellate court proceedings are stayed until 60 days after the end of the

peacetime emergency;

- Statute of limitations for filing a charge of discrimination with the Minnesota Department of Human Rights is tolled until the *earlier* of 60 days after the end of the peacetime emergency or February 21, 2021;
- The deadline to submit a written response to a charge of discrimination has been extended from 20 days to 60 days; and
- The deadline to appeal a Department of Human Rights determination has been extended from 10 days to 30 days.

In Iowa, state statutes of limitations have been tolled for 76 days. On March 16, an order was issued tolling deadline from March 17 to May 4, which was later extended to June 1. Any deadline imposed by a statute of limitations that would otherwise fall in this March 17-June 1 window is extended for 76 days (e.g., "if the statute would otherwise run on April 8, 2020, it now runs on June 23, 2020 (76 days later)").

North Dakota has not, at this time, issued any statewide orders or legislation tolling or expanding litigation-related deadlines. The North Dakota Supreme Court has issued orders extending certain deadlines, but likewise stated that those orders do "not stay or extend any statute of limitation or repose for commencing an action in civil cases."

Takeaway

Employers should be conscious of not operating with an emergency mindset too far into the future. While the decisions being made now are certainly important and have high stakes, employers should consider the effect these current decisions will have on future litigation. Moreover, while the relaxation of litigation deadlines may provide some short-term relief, it will also give plaintiffs more time to file claims in these jurisdictions and could ultimately cause additional delays in resolving these claims.

If you have questions regarding these obligations or others related to COVID-19, contact your Fredrikson & Byron Employment & Labor attorney.

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