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COVID EMPLOYMENT LITIGATION TRENDS & PREDICTIONS

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Employees and others around the country are filing legal claims related to COVID. It is a feeding frenzy. Insurance markets are stressed and PEO risk managers have full plates

managing and mitigating claims. The future is uncertain; however, we have sufficient data to paint a decent picture of where we are today and attempt some predictions.



HOW MANY CLAIMS HAVE BEEN FILED?

Around 2,000 lawsuits have been filed in courts across the country related to COVID and the workplace.¹ The states with the highest claim volume are California (461), New Jersey (256), and Florida (146). Adjusted for population, New Jersey is the most active with approximately 29 cases per 1 million people, as compared with California, which has around 12 cases per million.

WHO IS GETTING SUED?

Small to mid-size businesses (SMBs) are taking the brunt of employment litigation. This is notable given the focus of the PEO industry on SMBs. Roughly one-third of all lawsuits are filed against employers with 50 or fewer employees.

WHAT INDUSTRY IS HARDEST HIT?

The healthcare industry is the hardest hit industry on a national basis, which is no surprise given the physical exposure and compliance complexities in that industry. There are some deviations in other industry concentration by state. In New York and New Jersey, for example, government employer groups saw the most claims. In most states, retail, manufacturing, and hospitality are among the hardest hit industries, along with healthcare.

IS THE VOLUME GOING UP OR DOWN?

COVID lawsuit volume spiked in the first quarter of 2021. More than one-fourth of all claims filed since the beginning of the pandemic were filed during the first

quarter of the year, making the first quarter the most active yet. While the future is uncertain, lawsuit intensity may continue as the court system becomes more open and claimants approach deadlines to file their claims.

ARE THE CASES LINGERING OR CLOSING?

Many cases are lingering. Based on data through late January, approximately 29 percent of the COVID-related cases have closed. As we would expect to see with employment-related claims, most of those closed cases were resolved through settlement (77 percent).

WHAT ARE EMPLOYEES CLAIMING?

The most common claims are failure to grant leave or remote work. Many claims assert that employers failed to provide leaves of absence under pre-existing leave laws and leave laws specific to COVID, such as the Families First Coronavirus Response Act (FFCRA). The next most common claims are discrimination and retaliation.

Discrimination claims include disability discrimination based on alleged failure to accommodate and/or termination due to disability or association with a disabled person. One of the first COVID discrimination cases filed was based on an employee asserting termination because the employer believed a family member of the employee had COVID.

Many of the COVID failure-to-accommodate claims involve employees alleging that pre-existing health conditions required them to either take leave or work from home to avoid contracting COVID.

These include claims by employees with compromised immune systems, heart conditions, lung conditions, and pregnancy. Employers sued in these cases generally will be called upon to demonstrate that they could not accommodate employee requests due to undue hardships on the business and that they had non-discriminatory reasons for making decisions.

Retaliation claims referencing COVID are mostly a combination of employees claiming they were terminated for reporting safety violations and employees claiming they were terminated in retaliation for attempting to take protected leave. Retaliation claims tend to be more difficult to defend than other employment claims due to the subjective nature of the allegations, especially in states with stringent anti-retaliation laws.

WHAT ABOUT WAGE & HOUR CLAIMS?

While these are not the most common lawsuits at this point, they are concerning due to the range of liability and limited insurance. Remote work environments and social isolation may heighten the risk of employees working off-the-clock during the pandemic by responding to emails, texts, and calls at all hours and throughout the weekend. These claims



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may carry longer statutes of limitations and this may lead to a slower evolution of wage and hour claims. In states with robust wage and hour laws, other concerns include unreimbursed home office expenses and lack of opportunity for meal and rest breaks while working from home.

ARE EMPLOYEES SUING BECAUSE THEY WERE INFECTED AT WORK?

Of course, there are many workers' compensation claims alleging work-related COVID infections. Those claims are processed through state workers' compensation systems. A small percentage of employees are also filing lawsuits in court, attempting to bypass the workers' compensation system. The remedies available in court are potentially much greater than standard workers' compensation benefits, hence the motive to get into court. The viability of court claims is tied to state law. In some states, there may be a viable theory for using "gross negligence" or "public nuisance" principles to pursue claims beyond a garden variety workers' compensation claim. Litigants

relying on those theories often point to violations of state and local safety orders, such as failure to require masks or notify workers of positive tests in the workplace. It is too soon to judge how these claims will fare when challenged with exclusive remedy defenses, but some have been dismissed.

WHAT DOES THE FUTURE HOLD FOR PEOs?

A spike in litigation is not surprising, but it is a concern given the impact on claims. Focused claims management will be more important now than ever if litigation dockets continue to swell. Industry and state-specific PEO client monitoring and evaluation may be appropriate given the data. PEO client companies with employees who are still displaced from their normal workplaces could experience a spike in claims as they bring employees back to the workplace. Decisions about who comes back and who doesn't present potential allegations of discrimination and failure to accommodate. We also may see fluctuations in labor demands based on a surge in hiring in response

to business rebounding, potentially followed by rounds of layoffs in response to business normalizing or contracting. This process could create litigation ripple effects and may lead to PEOs experiencing litigation spikes at varying times based on client mix, geography, and other PEO-specific factors. ■

1 All data in this article is based on the Fisher Phillips COVID-19 Employment Litigation Tracker, www.fisherphillips.com/covid-19-litigation, as of March 25, 2021. Due to inherent limitations in the availability of national litigation data, the data is comprehensive but not exhaustive.

▼ This article is designed to give general and timely information about the subjects covered. It is not intended as legal advice or assistance with individual problems. Readers should consult competent counsel of their own choosing about how the matters relate to their own affairs.



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