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Avoiding Pandemic-Related Employment Litigation and Disputes

Employers navigating the coronavirus (COVID-19) pandemic cannot ignore the threat of labor and employment claims that may arise from the crisis. Indeed, a steady stream of pandemic-related lawsuits have already been filed, with employees seeking to hold their employers liable on an assortment of claims. Some of these claims are new, based on recently enacted statues and regulations. Others repackage existing anti-discrimination, wage-and-hour, and labor law theories to fit novel, COVID-related claims. In either scenario, the risks these suits present are real, and the potential liability is substantial.

Unfortunately, this initial wave of litigation is likely only the beginning. In the weeks and months ahead, the scale and variety of COVID-19-based claims will only increase as workplaces reopen and employers take difficult but necessary steps to address health and safety concerns.

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Avoiding the risks posed by such litigation will require good judgment, informed decision-making, and a practical knowledge of the relevant legal issues. To that end, we have prepared a brief overview of the types of claims employers are likely to face in the coming months. We also offer strategies for employers to consider to mitigate their potential exposure.

COVID-19 STATUTES AND REGULATIONS

Statutes and regulations passed in response to the pandemic have had the perhaps unintended effect of creating new sources of employment litigation. At the state and local level, several jurisdictions have mandated paid leave for hardships relating to COVID-19, such as quarantine, medical treatment, or childcare. These developments require employers to stay up to date on the laws of all jurisdictions in which they operate to avoid claims relating to eligibility for paid leave, paid leave calculations, or retaliation for use of protected leave.

At the federal level, the Coronavirus Aid, Relief, and Economic Security ("CARES") Act imposed a number of conditions on the funds it made available to employers, including restrictions on furloughs, limitations on executive compensation, and prohibitions on stock buybacks. Although there is no indication that Congress created a private right of action to enforce these aspects of the CARES Act, employees may try to circumvent that hurdle by arguing that they can sue as third-party beneficiaries of the agreements employers entered to obtain federal funding. As a general rule, such claims would have to overcome precedent that, in the absence of a private right of action, a plaintiff cannot bring a third-party-beneficiary claim against the recipient of a government program for failing to comply with its terms. Nevertheless, one such suit has already been filed, with an employee alleging that an employer violated the conditions of CARES Act funding by reducing employee hours.

ANTI-DISCRIMINATION CLAIMS

Statutes that long predate COVID-19, such as federal, state, and local anti-discrimination laws, are likely to be a significant source of pandemic-related litigation. For example, many difficult judgment calls employers must make with respect to employees at heightened risk from COVID-19 are subject to potential challenge under the Americans with Disabilities Act ("ADA"). The Equal Employment Opportunity Commission ("EEOC") has stated that an employer may bar employees from the workplace for their own safety if the situation presents a "direct threat" that cannot be reduced or eliminated by reasonable accommodation. But the EEOC has also stated that an employer may not exclude an employee solely because she has a disability that the Centers for Disease Control and Prevention ("CDC") has identified as placing the employee at a "higher risk for severe illness" if she contracts COVID-19. Threading this needle will likely involve consideration of the severity of the pandemic in a particular area, the employee's health, the employee's job duties, the likelihood that the employee will be exposed to COVID-19 at the worksite, measures that the employer is taking to protect all workers, and whether accommodations are available to mitigate risk.

The Age Discrimination in Employment Act ("ADEA") requires employers to make similarly complex judgment calls. According to the CDC, individuals aged 65 and above are at greater risk of severe illness if infected with the COVID-19 virus. The ADEA, however, generally precludes employers from making certain employment-related decisions on the basis of age. Moreover, it allows employees to challenge not only intentional discrimination (i.e., disparate treatment) but also facially neutral policies or practices that have a disparate impact on a protected category. Employers may thus face difficult decisions when considering whether, when, and how to return older, at-risk employees to work. As such, employers should evaluate potential "bona fide occupational qualification" or "reasonable factor other than age" defenses in this context.

Discrimination claims by parents, particularly following COVID-related school and childcare closures, present additional risks. Several states recognize parental or family responsibility status as a protected category. Additionally, Title VII prohibits employment decisions grounded in stereotypes about women as caregivers. Employers should carefully consider these issues when making operational changes in light of the pandemic.

WAGE AND HOUR CLAIMS

Wage-hour litigation has long been an area where plaintiffs' theories and causes of action quickly evolve, and the employer community is thus likely to face a bevy of wage and hour claims in the wake of the pandemic. For this reason, employers should evaluate their wage-hour risk in light of workplace changes that have occurred over the last few months.

As an initial matter, changes in employee duties necessitated by the virus—such as work-from-home arrangements or business restructuring—may subject employers to claims that employees have lost their "exempt" status under federal and state overtime laws. To make such allegations, white-collar workers may rely on COVID-related pay deductions or the imposition of increased non-exempt duties, commission-based employees may point to decreased sales, and "outside salespersons" may assert that working from home means they are no longer "outside."

Employers should also carefully consider wage-and-hour issues related to wellness checks, temperature screening, or other workplace health and safety procedures. Even where such procedures are government-mandated, employees may claim they should be paid for this time—and they may find some support in recent decisions deeming other types of pre- and post-work screenings compensable. Similarly, in certain settings, employers could be subject to claims for "on call" or "standby" time from employees working remotely. Resolution of both of these types of claims turns on highly fact-specific inquiries, such as whether the employee's time is spent primarily for her own benefit or the benefit of the employer.

State scheduling, reporting, and break laws that do not accommodate exigencies associated with COVID-19 present another area of potential risk. "Predictive scheduling" laws require employers to provide advance notice of work schedules and work schedule changes. "Reporting time pay" laws compel employers to pay employees a minimum amount whenever they report to work, even if they perform less or no work. Indeed, employees may assert the right to payment under these laws if they report to work but are sent home due to a failed health screening, or when they report to "work" at home but are released early due to lack of work. Many state meal and rest break laws create similar complexities, particularly in the context of COVID-19. In California, for example, employers must maintain accurate records of *when* breaks were taken. To avoid these and related pitfalls, employers should consult with wage-hour attorneys who are highly attuned to the nuances of such laws.

Finally, the COVID-19 pandemic is likely to prompt a surge of claims seeking reimbursement for a wide range of work-related expenses. Such expenses could include materials used to construct facemasks, utility bills for working from home, and office supplies. These claims, which are authorized under certain state laws, are particularly likely in California, where employees can seek civil penalties, costs, and attorneys' fees.

HEALTH AND SAFETY CLAIMS

Plaintiffs and unions are increasingly asserting claims that employers have violated state-law duties of care by subjecting employees to unsafe working conditions. Among other things, these claims allege that employers failed to provide personal protective equipment ("PPE"), to adequately sanitize workplaces, or to require social distancing at the workplace. In some cases, they also maintain that employers improperly disciplined employees for reporting safety concerns or for refusing to work under dangerous conditions.

There are a number of potential defenses to such claims. Depending on the circumstances, these include the workers' compensation bar, OSHA preemption, the doctrine of primary jurisdiction, the inapplicability of public nuisance as a matter of law, compliance with any alleged duty of care, and lack of causation. To maximize these defenses, employers should ensure that they track and preserve evidence of their efforts to protect the workplace from the spread of COVID-19, as well as their attempts to comply with applicable federal, state, and local guidelines (and thus the alleged duties of care).

WARN ACT CLAIMS

The WARN Act, which requires large employers to give advance notice of certain layoffs, is another potential source of COVID-related litigation. Early in the pandemic, many employers conducting substantial layoffs maintained that the Act's "unforeseen business circumstances" exception excused

compliance with WARN's notice obligations. But even where that exception applies, employers must still give notice "as practicable." Similarly, some employers elected not to provide WARN notice because they did not expect layoffs/hours reductions to last the requisite six months. However, even if an employer did not initially give notice for this reason, such notice must be provided if it later becomes "reasonably foreseeable" that the six-month threshold will be met. To avoid unnecessary litigation, employers in this positon should continue to assess whether they remain in compliance with the Act.

LABOR-RELATED CLAIMS

The pandemic has triggered a substantial uptick in union activism, labor litigation, and other labor-relations challenges. In recent weeks, union-led movements have taken steps to inflict reputational damage on leading employers through highly public claims of unsafe working conditions or unfair treatment of employees. The deteriorating economy, vexing safety issues, and potential labor policy changes that could follow the November elections suggest this trend could very well intensify.

Employers should therefore prepare themselves for an increase in unfair labor practice charges and other union-backed litigation. Such actions will likely center on claims of retaliation against employees critical of an employer's conduct in response to the pandemic and allegations that unionized employers acted without satisfying their duties to bargain. The economic fallout from the pandemic could likewise prompt collective bargaining challenges and labor litigation. For instance, reduced contribution headcounts and poor performance in the equities markets will almost certainly accelerate the funding crisis confronting many multi-employer pension plans. This, in turn, could lead to substantial contribution and withdrawal liability increases absent a collectively bargained solution.

The key to minimizing these risks is the development of a comprehensive labor relations strategy tailored to the employer's specific needs and circumstances. While COVID-19 is a complicating factor, any effective labor strategy must focus more broadly on both short- and long-term business objectives, as well as the underlying issues animating a union campaign or incumbent union.

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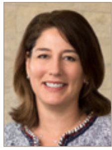

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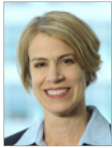

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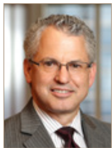

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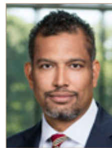

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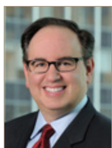

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