



THE JOURNAL

OF THE DELAWARE STATE BAR ASSOCIATION

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Coping with Legal Exposure from the Coronavirus Pandemic as Business Gets Back to Business

BY ADRIA B. MARTINELLI, ESQUIRE, AND LAUREN E.M. RUSSELL, ESQUIRE

Delaware employers are still grappling with the many new laws associated with the coronavirus pandemic: new federal laws on COVID-related leave, CDC and State guidance on proper safety precautions in the workplace, and 20 new executive orders (and counting!) signed by Governor Carney, now including the phased-in reopening of businesses. Many have already had to make difficult decisions about their workforce in response to the economic fallout, including layoffs, furloughs, and reductions in employee hours or compensation.

On top of all this, Delaware employers can expect a new wave of litigation to follow these decisions: wrongful termination lawsuits based on age, disability, or whistleblowing, along with health and safety allegations including wrongful death. Below are just a few of the claims we can anticipate, and key considerations to limit exposure.

Age & Disability Claims

Individuals with certain underlying conditions and those over the age of 60

are especially vulnerable to COVID-19. The Equal Employment Opportunity Commission (EEOC) has made clear, however, that an employer's unilateral decision to place an employee on leave, based only on an employee's age or health, is likely to be a violation of the Age Discrimination in Employment Act (ADEA) or the Americans with Disabilities Act (ADA) — even when it is done with the employee's best interests in mind. Furthermore, as a result of the pandemic and related screening measures, employers

may become aware of employee health issues about which they would not otherwise have known. The employee may later claim that discipline or discharge based on legitimate reasons was instead due to the employee's medical condition, in violation of the ADA.

In addition, if an individual is already out of the workplace on extended leave for COVID-related reasons, he or she might be more likely to land in the first round of layoffs and may claim their termination was due to age or disability. Employers who are now rehiring laid off employees face even more landmines. Some have suggested "restarting" the economy by reinstating younger, low-risk workers before high-risk individuals. If, as an employer, you rehire younger workers while suggesting older workers should stay home, you could run headfirst into an age discrimination claim. Similarly, recalling laid off employees with an eye

toward avoiding leave entitlements (e.g. avoiding parents of young children who may be entitled to Expanded FMLA leave) can land you in hot water under the Delaware Discrimination in Employment Act, which prohibits discrimination on the basis of family care obligations.

To best defend these types of claims you should make sure that any health information is treated confidentially and communicated only to those with a legitimate need to know, ensure that termination decisions based on performance are well-supported by documentation, and carefully consider the impact of any layoff or rehire decisions on those in a protected class, such as older employees or those with disabilities. You should be as flexible as possible accommodating workers who may be particularly vulnerable to the virus, but specific discussions should be driven by the employee. If employers reach out to staff about accommodation for return to the workplace, the best practice is to send a general notice to all employees with information about who to contact regarding any accommodations (including state and federal leave entitlements) they may need. You should be aware, though, that age alone does not require special accommodation under the ADA.

Health & Safety Violations

In addition to discrimination, we are already seeing a host of allegations related to employers' failure to implement adequate health and safety measures for those employees who must be in the workplace. In addressing employee safety, employers should start with the most recent guidance from the CDC,

the Delaware Division of Public Health (DPH), and the executive orders issued by Governor Carney. These resources lay out a series of steps employers should take, including maximizing remote work opportunities, providing cloth masks to those who cannot work in isolation, and health screenings to ensure that symptomatic employees and members of the public do not enter the workplace. Failure to follow these basic requirements in the present will virtually guarantee future claims for work-related injuries ranging from workers' compensation to wrongful death, if the employee suffers the worst outcome. While businesses are actively lobbying state and federal legislators for immunity related to COVID-19 exposure in the workplace, those pleas have not yet yielded any action. Employers should not rely on future immunity to protect themselves in the present.

Employers are also well counseled to view paid leave through a positive, non-punitive lens. Many businesses are concerned that paid leave, implemented in accordance with the Families First Coronavirus Relief Act (FFCRA), will incentivize abuse by employees who see it as an easy way to get out of work. But the reality is that this leave protects your workforce, and employees should be encouraged to use it where applicable. Employees who do not have access to paid leave are more likely to come to work sick and infect co-workers, leading to a much larger impact on business continuity. Anecdotal stories of employees working while sick to avoid losing income are myriad, and demonstrate the vital role played by the FFCRA in putting employers back in

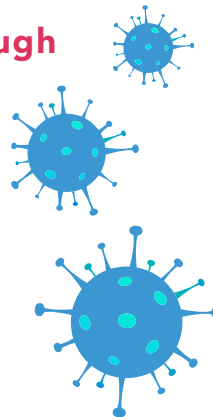
business. So frame leave requests in a positive light, and create a corporate culture that encourages individuals to take care of their own health, so that all members of the workforce are safe.

Finally, employers should be attentive to the threat of whistleblower claims. Many employees are coming forward and publicly accusing businesses of failing to provide adequate personal protective equipment and related precautions designed to prevent the spread of disease. Disciplining an employee for such complaints, even when the employer feels the allegations are unfounded, is extremely risky. Employers should understand that an employee's good faith belief that there has been a violation of required health and safety practices is often enough to sustain a whistleblower claim. The employee does not ultimately have to prove he was right to prevail. If you must discipline an employee who has made a recent complaint about workplace safety, ensure that it is supported by thorough documentation, and attempt to identify similarly situated individuals who were disciplined for the same conduct, to guard against allegations that anyone was targeted for their whistleblowing activities.

Conclusion

As many have noted, we are living through unprecedented times, and the impacts are impossible to fully predict at this stage. But employers should prepare for the coming wave of litigation, and act deliberately to ensure that they are implementing best practices. Do not let the pervasive sense of panic push your business to rash action. When in doubt, the safest course is often a deep breath, and more careful thought about how your actions will be viewed when we have returned to a greater sense of normalcy. 🧘

As many have noted, we are living through unprecedented times, and the impacts are impossible to fully predict at this stage. But employers should prepare for the coming wave of litigation, and act deliberately to ensure that they are implementing best practices.



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