After the Storm: Anticipated EPLI Claims in the Wake of COVID-19

Thursday, April 23, 2020
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Questions

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Meet Your Presenters

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EPLI Litigation

Factors leading to the expected flood of EPL litigation
• Quickly evolving legislation and unprecedented public directives
• Employers forced to make hurried (and sometimes hasty) decisions regarding their workforce
• Unemployment numbers massively increasing, along with fears of economic security and $600/week CARES Act unemployment supplement expires 7/31
• Statue of limitations suspended and some courts not currently accepting new filings litigation will blossom when restrictions lifted
• Similarly, EEOC stopped issuing Notices of Right to Sue unless specifically requested
• A very active Plaintiffs’ side bar (the webinars have begun)
Factors leading to the expected flood of EPL litigation

- EPL claims tend to spike during a recession or economic downturn
  - Total EEOC charge filings during the “recession era” (2008-2013) were 21% higher during the ten years prior (an average of 96,948 charges, as compared to an average of 80,218)
  - More specifically…
    - Wrongful discharge claims increased 21% during the last recession when compared to prior years
    - 2008 saw the highest number of age discrimination charge filings with the EEOC over the past 20 years
Families First Coronavirus Response Act (FFCRA)
Overview of FFCRA

• 2 key provisions for employers with fewer than 500 employees:
  – Creates limited paid sick leave
  – Amends FMLA to expand coverage for COVID-19 childcare-related reasons

• Emergency paid sick leave (EPSL) and expanded FMLA leave (EFMLEA) provisions are effective **April 1, 2020** and will remain in place until **December 31, 2020**
### Emergency Paid Sick Leave vs Emergency FMLA

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<thead>
<tr>
<th></th>
<th>Emergency Paid Sick Leave</th>
<th>Emergency FMLA</th>
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<tbody>
<tr>
<td>Employer coverage</td>
<td>Less than 500 employee and most public entities</td>
<td>Less than 500 employees and most public entities</td>
</tr>
<tr>
<td>Employee coverage</td>
<td>All, from day one</td>
<td>Employed at least 30 days</td>
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<tr>
<td>Reasons</td>
<td>6 reasons</td>
<td>1 reason</td>
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<tr>
<td>How long</td>
<td>80 hours (2 weeks) paid</td>
<td>12 weeks paid (combined with EPSL)</td>
</tr>
<tr>
<td>How much</td>
<td>Regular rate* or 2/3 regular rate</td>
<td>2/3 regular rate</td>
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<tr>
<td>Cap per day</td>
<td>$511* or $200*</td>
<td>$200</td>
</tr>
<tr>
<td>Aggregate cap</td>
<td>$5,110* or $2,000*</td>
<td>$10,000</td>
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*Depending on reason
Potential Exposures Under the FFCRA

- Failure to provide leave/pay benefits based on employer improperly calculating number of employees for eligibility purposes
  - *i.e.*, potential adverse legal implications of claiming that separate entities are an integrated employer and entity is above 500 employees
- Improper designation of individuals as Health Care Providers or Emergency Responders for exclusion from EFMLEA
- Claims related to employee eligibility, including determinations of availability of EPSL and EFMLEA based on whether an employee is able to telework while caring for their child
- Claims related to calculations of whether the correct amount of leave or pay was provided
- Questions regarding allowance and calculation of intermittent leave
Potential Exposures Under the FFCRA

Retaliation

• Employers may not discharge, discipline, or otherwise discriminate against any employee who takes paid sick leave under the FFCRA

• Employers many not discharge, discipline or otherwise discriminate against any employee who files a complaint or institutes a proceeding under or related to the FFCRA

• First cases already filed:
  – In a claim filed in USDC, E.D. Penn, plaintiff claimed employer terminated her employment in retaliation for exercising her child care leave rights under FFRCA
FFCRA Penalties

• EPSL: unlawful termination is treated as discriminatory discharge under the FLSA and the failure to provide EPSL is treated as failure to pay minimum wages under the FLSA
  1) Fines (up to $10,000) 2) Imprisonment (up to 6 months), and 3) Payment of damages (including liquidated damages, attorney’s fees and costs)

• EMFLEA: The penalties for failure to adhere to the provisions of the amendment are the same as those under the FMLA: back pay, front pay, liquidated damages, attorney’s fees

• Both companies and individuals can be sued by private individuals affected, or by the DOL
  – An employer that does not meet the normal covered employer test under the FMLA (i.e., an employer that does not have 50 or more employees within 20 or more workweeks during this calendar year or last calendar year), is not subject to private civil actions by employees but would be subject to private civil actions under the jurisdiction of the DOL, which could bring an enforcement action for violations
Usage & Implementation of Paid Time Off

• General FMLA related litigation

• Claims relating to state Paid Family Leave Acts
  – Failure to provide time-off from work

• Claims relating to state and local Earned Sick time laws
  – Failure to provide pay
**EPLI coverage**
- Named perils vs. all risk
- Where is the coverage “home” for EPSL and EFMLEA violations?

**Observations on COVID-19 claim notices to date**

**Retaliation concerns**
- Easier burden for plaintiff – show protected activity, an adverse employment action, and a causal connection between the two
  - Can take many forms – reprimand, termination, transfer to a less desirable position or schedule or demotion
- Difficult, costly to defend
- Most frequently alleged basis of discrimination
Claims Arising From Disability Related Questions, Medical Exams, Accommodation Requests and Medical Privacy Concerns
The Basics: Americans with Disabilities Act

• The Americans with Disabilities Act of 1990 (the "ADA") requires an employer to provide reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship
  – In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities
• The ADA also prohibits disparate treatment on the basis of disability or being regarded as disabled
• ADA requires that employers maintain confidentiality of employee’s medically related information
• Most states have similar, if not more protective, disability discrimination laws, often times with more expansive allowable damages
EZ Company, a mid-size manufacturing business, wants to ensure that all of its employees are safe during the COVID-19 pandemic.

Because EZ is an essential business which is remaining open during the pandemic (and many job functions cannot be performed remotely), it asked employees to identify if they suffer from medical conditions that make them vulnerable to COVID-19.

EZ then furloughed those employees for their own safety until the apex of the crisis passes.
YES

- Under the ADA, employers cannot ask employees to disclose any medical condition which CDC says makes the employee vulnerable to COVID-19.

- However, employers may ask if employees are experiencing symptoms, such as fever, chills, cough, or sore throat; may send employee home if they display symptoms; may encourage employees to telework and may ask if employee has been tested.
Jane, an EZ employee, informed EZ that she tested positive for COVID-19. In an effort to protect its workforce and notify employees of a potential exposure to allow for adequate precautions, EZ e-mails employees to inform them that Jane tested positive.

Jane is cleared to return to work within two weeks after she tests positive. She has difficulty obtaining a doctor’s note. Out of concern for Jane and other employees, EZ requires her to remain out of work for an additional two weeks to ensure she is not contagious.

Upon her return, Jane notices that her co-workers avoid her, and she is having difficulty obtaining assignments from her team leaders.
Soon after Jane returns to work, EZ finds itself in the position of having to reduce its workforce. Jane, who historically has been a mediocre performer, is among a number of employees selected for lay-off.

Jane attends a webinar sponsored by a well-known plaintiff-side law firm and decides to commence suit against EZ.
What types of disability related claims can we expect to see in Jane’s lawsuit against EZ?

• Failure to treat medical information obtained during employment-related medical examinations and inquiries as confidential.

• Employers have an obligation to maintain confidentiality of employee medical information and should not identify an employee when disclosing a COVID-19 diagnosis to co-workers.

• Claim that she was “regarded as disabled” as a result of COVID-19 diagnosis (is COVID-19 a disability under the ADA?)

• Generally an employer’s request for a return-to-work doctors’ note is lawful. However, according to the EEOC and many state and local administrative agencies, because requests for medical notes related to COVID-19 could place excess burdens on the health care system, employers should not request medical notes to confirm disability related to COVID-19.

• Discrimination/hostile work environment on the basis of a COVID-19 diagnosis

• Retaliation for engaging in protected activity (i.e., taking leave)
Howard, an estimator at EZ, suffers from high blood pressure and diabetes. EZ is aware of Howard’s disability and, for a number of years, EZ has accommodated him by allowing him breaks throughout the day so he can administer insulin shots.

Because Howard is a member of the population who is at high-risk for COVID-19, he requests that he be allowed to work from home.

EZ determines that Howard’s job cannot be performed remotely and denies his accommodation. Howard resigns as he fears for health and feels he has no choice but remain home.
Does Howard Have Any Valid Claims?

YES

- Failure to accommodate or engage in interactive dialogue
- Employers may be required to provide reasonable accommodations to employees with underlying conditions for whom exposure to COVID-19 may pose a particular risk of complication or who are pregnant by, for example, allowing them to telework, change their schedules, or provide certain personal protective equipment
- Would Howard still have a claim if he requested to work remotely because he suffered from anxiety and other mental health issues exacerbated by the COVID-19 crisis?
- Mental health conditions are considered to be disabilities
• If job could be performed from home during COVID-19 crisis, will telecommuting be a per se reasonable accommodation moving forward?
  – But see, Yochim v. Carson (7th Cir, 2019): 7th Circuit affirmed summary judgment in favor of employer finding that the plaintiff did not have an entitlement to full-time telework under the law. The court noted that the restructuring of the plaintiff's office showed the need for the plaintiff to be present in the office to interact with attorneys of other disciplines at employer.

• Claims arising from employer’s failure to accommodate home worker (ergonomic desks, etc.), especially when employee has been adversely affected
Potential Claims Arising Out of RIF/Furloughs, Recalls and Managing A Remote Workforce
EEO Protection Laws

- Title VII of Civil Rights Act of 1964
- Americans with Disabilities Act
- ADEA
- GINA
- FMLA
- State and local laws expand categories of protected characteristics, i.e., sexual orientation, gender identity, caretaker status, etc.
- Damages include back pay, front pay, emotional distress and attorneys’ fees
Potential Claims

Employers have considered a number of options to reduce workforce costs, all of which may lead to EEO related claims:

- Reassigning employees to areas of more critical concern
- Reducing wages/salaries
- Reducing hours of work
- Furloughs
  - a/k/a temporary layoff, temporary leave, inactive status, “on reserve”
- Terminations
  - a/k/a reductions in force or “RIFs”, layoffs
- Decisions regarding the workforce returning to work will also give rise to claims
Potential discrimination/retaliation claims arising out of RIF/Furlough/Recall decisions

- Retaliation arising out of selection for RIF or furlough because of protected activity, including requesting or taking leave for COVID-19 related reasons
- Discrimination arising out of selection for RIF or furlough because of membership in a protected class
- Failure to rehire due to membership in a protected class or engaging in protected activity (i.e., requesting or taking leave or receiving a COVID-19 diagnosis)
- Disparate impact claims arising out of RIF or furlough
  - i.e., older employees or a particular protected class disparately impacted by employer decisions
Potential discrimination/retaliation claims arising out of RIF/Furlough/Recall decisions

- Disparate treatment claims arising out of the provision of severance or other benefits for certain RIF’d/furloughed employees, and not others
- Disparate treatment claims arising out recalling certain employees from furlough, and not others
- Claims under the ADEA (i.e., requiring that employees over the age of 60 do not report to work because age group associated with higher risk of COVID-19)
Potential Claims

Other potential discrimination claims

• Disparate treatment discrimination and harassment claims on the basis of national origin, in particular against Asian/Chinese employees (i.e., the “Chinese virus”)
  – EEOC and state and local agencies closely monitoring
  – Potential for systemic claims?

• Harassment claims arising from working remotely
  – How are people conducting themselves on video meetings?
  – More causal approach to emails and other interactions given a more relaxed workplace
  – Less day-to-day interaction between HR and employees

• Discrimination claims based on caretaker status and gender for requiring a return to a physical site before schools and daycares re-open
Potential Claims

Breach of Contract related claims

- Promissory estoppel or breach of contract claims for rescinding offers of employment
- Breach of contract arising out of reduction of salary or termination of employment
  - Is the “force majeure” defense available?
- Failure to pay severance per an applicable severance plan (also could give rise to ERISA liability)
• “Or any other protected class”
  – Discrimination is discrimination is discrimination

• Breach of employment contract issues
  – Triggering wrongful act
  – Contract exclusion will apply
    • But carveback for defense expenses, or liability that would have attached in the absence of contract

• Severance not “Loss”? 
Retaliation/Whistleblower Claims
Expect an Increase Whistleblower/Retaliation Claims Safety Related Issues

• A number of states have whistleblower statutes that prohibit employers from retaliating against employees who complain about violations of law. For example:
  – New Jersey’s Conscientious Employee Protection Act
  – New York’s Labor Law Section 740(2) providing a cause of action for whistleblowers who refuse to participate in an activity in violation of law, rule or regulation, “which violation creates and presents a substantial and specific danger to the public health or safety”

• Many states also recognize a “public policy” exception to “at will” employment where an employer takes adverse action against an employee for refusing to commit an unlawful act
  – Number of cases have been filed claiming employee subjected to adverse action in retaliation for complaints regarding the employer’s failure to keep the workplace safe or violating Executive Orders
• **Grocery chain:** Claim of wrongful discharge in violation of Kentucky public policy. Employee alleges his employment terminated after he complained about safety and made numerous specific requests for employer to implement safety measures in its store in accordance with Kentucky Governor’s Executive Orders and mandates from the CDC.

• **Healthcare:** Claims that employer terminated employee in violation of public policy and South Carolina law after she complained about inadequate safety measures at a long term care facility.

• **Public facility:** After a concession operator employed by a public venue complained that the employer was operating the business in violation of the Governor’s Executive Orders regarding gatherings, his employment was terminated in violation of public policy.
• **Funeral home:** Funeral director claims her employment was terminated for her attempts to comply with public mandate restricting gatherings.

• **Healthcare:** Physician contends his employment terminated in violation of public policy after he complained about N95 masks and hospital discharge policy for COVID-19 patients.

• **Cruise line:** Class action by cruise ship employees claiming employer failed to protect crew members from COVID-19 despite prior notice of the “explosive contagiousness” of COVID-19.
  – Claims asserted under Jones Act and general maritime law
Workers Comp Claims

Will We Be Litigating Workers Compensation Preemption/Wrongful Death/Negligence Claims?

- **Evans v. Walmart**: Wrongful death claim asserted against employer and owner of shopping center. Complaint alleges, among things, that Walmart failed to properly respond to symptoms of COVID-19 among several workers at the store. It also alleges the company failed to share this information with workers and to safeguard them with gloves and other protections, or to enforce appropriate distancing, among other measures.

- Are wrongful death/negligence claims pre-empted by Workers Compensation?
  - Workers compensation laws generally apply to accidental injuries arising out of and in the course of employment and preempt all common law and statutory claims, aside from narrow exceptions
  - Whether COVID-19 sufficiently related to “in the course of employment” to fall under a state’s workers compensation law may be resolved differently among the states
  - Was the death/transmission accidental within the meaning of the laws?
Other Potential Safety/Retaliation Related Claims

- Claims Under Occupational Safety and Health Act (“OSHA”):
  - Failure to furnish a safe workplace
  - Imminent danger exception: “Essential” employees who are terminated for refusing to work out of fear of COVID-19 may challenge/litigate under “imminent danger exception”
  - Retaliation
  - Employees must file a complaint within thirty days with OSHA, which can then bring an enforcement action
    - Potential of awards of backpay, compensatory and punitive damages

- Claims under the National Labor Relations Act (“NLRA”)
  - Section 502 of the NLRA (which also applies to non-union employers) protects a refusal to work due to “abnormally dangerous” working conditions
  - Does exposure to COVID-19 present an “abnormally dangerous” working condition?
• Claims for certain workplace statutes typically excluded under EPLI policies:
  – OSHA
  – WARN
  – COBRA
  – NLRA
  – FLSA
  • But consider Wage and Hour insurance
    – Defense expense sublimit versus “standalone”

• Impact of Bodily Injury exclusion

• “For” versus “based upon, arising out of…”
Class claims under WARN, COBRA, OSHA, as well as Wage hour claims under the FLSA and State laws
Wage/Hour Class Claims

- Misclassification to the extent exempt employees performing non-exempt work in a reconfigured workforce
- Failure to comply with state wage notification laws regarding pay reductions
- Failure to track and pay overtime
- Off the clock, work from home claims by non-exempt employees
- Failure to reimburse business expenses (cell phones, internet)
- Failure to pay wages/vacation/PTO on termination
  - **Hair salon**: Putative class claim under FLSA for failure to pay final wages after closure of hair salons.
  - **Restaurant**: Putative class action claim that restaurant group didn't pay its servers any wages during the last two weeks of March, just before it was forced to close or reinvent its locations as takeout-only establishments because of COVID-19.
Wage/Hour Class Claims

• Expect more gig economy/independent contractor related litigation:
  – Rideshare: Company putting drivers and the public at increased risk during pandemic by not providing workers with paid sick leave, as required by California law.
  – Rideshare: New York drivers filed a proposed class action accusing the company of forcibly logging off drivers who had not completed 180 rides within a month, which they say is an even higher bar for gig workers now that the COVID-19 has slowed business. The Complaint also alleges that company violated "the spirit, if not the letter" of the NYC Council's Local Law 150, a regulation put in place for the NYC Taxi and Limousine Commission to establish drivers' minimum pay.
WARN Class Claims

Worker Adjustment and Retraining Notification Act (WARN) Class Claims

• WARN Act is a federal law that requires employers with 100 or more employees to provide written notice to various government officials, affected employees, and any union representatives at least 60 days before certain group separations

• Many states have mini-WARN Acts with different notice periods and definitions of employers and group separations

• Federal WARN Act, as well as the state mini-WARN Acts, all have extremely specific information that must be included in each notice

• Potential for litigation maximized if employers do not return furloughed workers to work within a 6 month period
  – Notice obligations may be retroactive to date of leave as the initial layoff date will be deemed the beginning of the employment loss
  – In addition, unforeseeable business exception allowing employers to avoid 60 day notice period may not be acceptable in 6 months
WARN Class Claims: Litigation Has Commenced

- 3/23/20: Two former employees of home furnishing retailer claim company fired 700 workers without giving them proper notice under WARN.

- 4/3/20: Claim under WARN regarding termination of 140 employees with insufficient notice and using the pandemic as a pretext for improper layoffs.

- 4/17/20: Two former restaurant chain employees filed a proposed class action in Florida federal court alleging the company violated WARN by not giving employees any advance notice before executing layoffs in March due to COVID-19 pandemic. Plaintiffs are seeking damages equal to 60 days’ compensation and benefits for a class covering all employees in Florida.
COBRA Class Claims

• Consolidated Omnibus Budget Reconciliation Act (COBRA) notice claims were starting to accelerate pre-COVID
  – Cases allege COBRA notice missing details required by the model DOL notice, such as the name and contact information of the plan administrator
  – Cases seek statutory penalties and other damages on a class-wide basis
    • Damages sought include up to $110 per day per person for a plan administrator’s failure to provide the required initial COBRA notice or the COBRA election notice.
    • Court has the discretion to award legal fees to the plaintiff’s counsel
• COBRA notice claims expected to increase (potentially lower hanging fruit)
• Consider other lines of coverage
  – Wage and Hour (standalone vs. defense expense sublimit)
  – D&O
  – Cyber
  – Fiduciary Liability
  – G/L, Work Comp

• What can I expect at my renewal?
  – Questions underwriters are asking
  – New exclusions?
  – Rate activity
Thank You!

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Thank you, PLUS Diamond Sponsors
Thank you for your time.