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The Next COVID-19 Employment Litigation Hotbeds

By **Braden Campbell**

Law360 (September 16, 2020, 9:16 PM EDT) -- In the coming weeks and months, the safety and wrongful termination lawsuits that have made up the bulk of coronavirus-related litigation thus far in the pandemic may give way to wage, discrimination and other claims, experts say.

The suits filed so far reflect workers' main concerns in the early days of the pandemic, as government shutdowns forced millions onto the unemployment rolls and workers who still had jobs feared reporting to work. As more businesses and courts open up and other claims percolate, employers may be in for a new set of suits.

"I do anticipate that there will be more suits in the future [and] I think there will be a shift from what we've seen to date," Paul Hastings LLP employment partner Jeffrey Webb said.

Here, Law360 looks at areas of workplace law that could soon become litigation hotbeds.

Discriminatory Layoffs, Disability Bias

The sudden shutdowns amid COVID-19's rapid spread in March forced businesses to lay off or furlough millions of workers, many of whom have not gotten their jobs back. Six months later, these mass layoffs could spell lawsuits.

Laura Jacobsen, labor and employment law group co-chair at McDonald Carano LLP, said she expects to see a wave of suits accusing employers of unwittingly discriminating against certain groups in their layoffs. So-called disparate impact suits accuse an employer of applying a neutral policy or practice to discriminatory effect. If a layoff fell harder on older workers, the employer could face a lawsuit even if it didn't consciously discriminate, Jacobsen said.

"If you're looking at performance, you tend to decide that the people who are in their 30s are better performers than people in their 60s," Jacobsen said. "When an employer just looks at it from that [performance] standpoint and they put it in front of my eyes and I ask for everybody's age, I say, 'Ooh, we have a problem here.'"

Employers may also face bias suits if their layoffs fell harder on workers of a certain race, or if they cut ties with more members of a certain sex, Jacobsen said.

And the return to work poses similar concerns if employers avoid recalling workers in protected groups, Webb said.

"I think that there are potential age claims, disability claims ... when employers trying to do the right thing are refusing to bring people back into the workplace that they're afraid pose a risk to themselves," he said.

The coming months could also see an uptick in suits alleging employers violated state or federal law by refusing to let disabled employees work from home, Seyfarth Shaw LLP employment partner Gerald Maatman said. These laws require employers to provide disabled workers with "reasonable accommodations" as long as they do not cause "undue hardship" for the business.

Historically, workers have faced an uphill battle proving they're entitled to telework as a reasonable

accommodation. But workers wary of returning to the office due to a disability-related predisposition to COVID-19 complications now have more ammo for suits if their employers refuse.

"That calculus is a lot different today ... because the workplace has been redefined in the last few months in terms of how you get work done," Maatman said. "That has very interesting permutations for [Americans with Disabilities Act] litigation."

Wage and Hour

The ubiquity of remote work during the pandemic could also mean legal trouble for employers that have shorted workers on wages by failing to keep a close watch on their hours.

"The transition of people from physically traveling to an office, working during the day and traveling home, to simply walking down the hallway to the computer in a room has changed the work day, the stop time, the start time," Maatman said. "Inevitably there are going to be claims."

Federal and state laws require that employers pay overtime-eligible employees for all hours worked, and extra when they work more than 40 hours in a week. As the line between work and downtime blurs, businesses may face unpaid wage claims if workers log on early or answer a late-night email and aren't paid for their time, Maatman said.

McDonald Carano's Jacobsen said she also expects to see lawsuits accusing employers of failing to reimburse workers for business expenses they incurred during the shift to remote work. Federal law requires employers to pay the difference if work expenses push pay below minimum wage, and some state laws go even further. If workers have had to buy office equipment or upgrade their internet to telework and haven't been reimbursed, they may sue, Jacobsen said.

Businesses are particularly vulnerable to pay lawsuits in California, which has the country's strongest set of wage and hour laws, Paul Hastings' Webb said. For example, the Golden State requires employers to reimburse "necessary" expenses and to provide paid meal and rest breaks when workers hit a certain number of hours.

"I think people were reluctant to bring claims because they were lucky to have a job ... and plaintiffs counsel may have been concerned that this may not be the right time to bring these claims, when companies are in bad economic situations," but those cases will come, Webb said.

Family and Sick Leave

The coronavirus pandemic has brought with it new legal obligations in the form of federal, state and municipal laws requiring employers to provide workers paid time off if they can't work because of the virus. Uncertainties in these new laws could lead to lawsuits for employers that deny workers time off — especially surrounding entitlements to take off due to school closures.

"Lots of parents who thought that kids were going to be in school, their kids are now at home," Maatman said. "That pressure point is going to really hit the fan in the month of September."

The federal leave law, known as the Families First Coronavirus Response Act, requires most employers with fewer than 500 workers to provide paid time off to workers who can't do their jobs for reasons related to the coronavirus. Among other things, the law lets workers take up to 12 weeks off with partial pay if they can't work because their child's school has closed.

One area of the new law that is "ripe for litigation" is an exemption from the long-term leave requirements for businesses with fewer than 50 workers, Jacobsen said. The DOL issued guidance for implementing the FFCRA in April, saying businesses are exempt if granting leave would "jeopardize the viability of the business as a going concern." That standard could be tricky to navigate because some absences are tougher to weather than others, Jacobsen said.

"In the same business, you might be able to provide that leave for one employee but not for someone who is more critical," Jacobsen said.

The FFCRA's long-term leave requirements are built on the Family and Medical Leave Act, so

employers face many of the same administrative challenges that could open them up to suits, Jacobsen added. For example, employers may face challenges over eligibility for "intermittent leave" or when recalling workers whose time is up.

"It's going to come down to classic FMLA issues," Jacobsen said.

--Editing by Kelly Duncan.

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