

Today's GENERAL COUNSEL

FEATURE

Pandemic-Related Employment Litigation

By DAN M. FORMAN



Employers are confronting a tidal wave of pandemic employment litigation as plaintiffs' counsel seek to hold employers responsible for decisions made during a time of rapidly evolving government guidelines, new laws, new regulations, and big changes in the way business is conducted during the pandemic.

WARN ACT

For many years, employers dealing with solvency or M&A issues confronted the Worker Adjustment and Retraining Notification (WARN) Act in conjunction with long-term planning. Now, the rapid onset of Covid-19 and related regulations have caused many unforeseen layoffs, furloughs and business closures. Although some

employers with business disruptions early in the crisis may benefit from the “unforeseeable business circumstances” defense that allows for less than 60 days’ notice of a mass layoff or plant closing, the continuing crisis will make such a defense difficult or impossible to assert.

Many states, like California, have their own versions of the

WARN Act. At the outset of the pandemic, California's Governor Newsom issued an order providing some relief from notice requirements. However, under the "unforeseeable business circumstances" and California's emergency order, notice provisions are not entirely removed, but require employers to give as much notice as practical and provide information as to why notice could not be timely given.

One reported decision from the Middle District of Florida concluded that the parent of Alamo and Enterprise car rental companies could invoke neither the "natural disaster" defense nor the "unforeseeable business circumstances" to dismiss a WARN class action at the pleading stage, and that the "unforeseeable business circumstances" defense was fact-intensive.

WAGE AND HOUR

Nationally, wage and hour errors will be increasingly costly to employers, especially when they are confronted with class action litigation — or, in California, Private Attorney General Act claims. Automation of operations, time-keeping methods and systematization of work processes leads to increasing certification of classes of employees across the country.

Minimum wage increases can create unintended calculation errors with significant consequences. Moreover, employees working in a remote location may not comply with an employer's

attempt to insulate against overtime work. Calculations of "regular rate of pay" become more complicated when employers are providing paid sick leave, paid Families First Coronavirus Response Act (FFCRA) leave, and

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other types of leave and pay that were not contemplated before Covid-19.

Finally, California requires employers to reimburse employees for expenses incurred while carrying out their work. Therefore, California employers who did not provide any kind of reimbursement to employees required to work remotely will likely face class action claims for reimbursement of expenses such as electricity, Wi-Fi and a portion of water bills.

DISCRIMINATION, WORKPLACE SAFETY AND RETALIATION

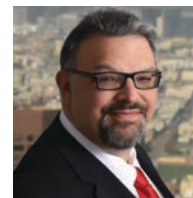
Federal discrimination claims, especially age and disability discrimination, are intertwined with leave laws such as the Family and Medical Leave Act (FMLA), the Families First Coronavirus Response Act (FFCRA), and state law equivalents. The rapidly changing regulations, Covid-19 infections, and the quarantining of employees who were in close contact necessarily implicate the potential for discrimination claims.

There are increasing numbers

of retaliation claims by fired employees who complained about not getting enough leave, safety issues, and compliance with OSHA and other health or safety standards. In California, where failure to engage in the inter-

active process is an affirmative cause of action, this area is rife for increased litigation — especially where employers had little time to make layoff, furlough or termination decisions. Moreover, CAL/OSHA-promulgated emergency regulations have a host of requirements, including the return-to-work criteria for "exclusion pay to many employees."

Litigation rooted in the pandemic will recede with Covid-19, but it is likely to be a long time before that happens.



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