COVID litigation, lessons for businesses from the courtroom

Since the COVID-19 pandemic struck in earnest last March, the courts have been flooded with lawsuits. To date, about 10,000 employer-focused lawsuits have been filed — with more coming every day. There have been 1280 lawsuits filed in the last six weeks alone. No state is unaffected. California led the pack with 259 while tiny Vermont clocked in at 3 cases.

These lawsuits come in a wide variety of shapes and forms. From risk to exposure and wrongful death claims to leave denial, the ADA, retaliation cases, and more, businesses find themselves in tricky legal situations. Even as businesses continue to adapt and new issues are arising like vaccination requirements for employees.

While many of these cases are still pending, each lawsuit offers important lessons for employers who want to avoid being the next target. We've analyzed some of the top cases and their likely litigation triggers to help you revamp your pandemic response and avoid running into your own lawsuits.

Employee exposure is likely covered under worker's comp

Many of the cases filed involve employee workplace exposure to COVID-19. At the beginning of the pandemic, it was unclear whether workers could easily make a workers' compensation claim. Generally, community-acquired illnesses like the flu or common cold aren't covered by workers' comp. That's true even during a flu epidemic. But COVID-19 is potentially more severe than other common illnesses and workplace exposure is more likely. At

first, proving that workers became infected at work rather than at home or elsewhere was a big hurdle. Since then, dozens of states have modified their workers' compensation laws to create an assumption of workplace infection. Those states include California, which has modified its workers' comp law to presume all workers who test positive are covered. That assumes, of course, that they were present in the workplace. Minnesota, New Jersey, and Vermont cover all essential workers as defined in each state. All in all, almost half the states have modified their workers' comp laws to cover COVID-19.

Federal workers also now can pursue workers' compensation claims. The American Rescue Plan Act (ARP) created a workplace exposure presumption. Federal employees with COVID-19 who had contact with patients, the public, or co-workers are assumed to be workers' comp eligible. The result is that most employee claims won't come through state or federal courts. Instead, expect an increase in workers' comp claims — and eventually increased premiums. Fortunately for employers, workers' comp claims are the exclusive remedy for workers. Unless their employers have been grossly or criminally negligent, workers must be satisfied with comp benefits.

Employers could still be on the hook for wrongful death claims

There's an exception to that general rule, however. Some family members are filing state wrongful death lawsuits against employers if a worker dies. Here are recent examples of pending cases.

The widow of a nurse working at a mental health facility filed a lawsuit alleging her spouse died. Raymond, she claimed, got COVID while working because the employer didn't follow state pandemic rules. In another case, the widow alleged that her husband, Michael, worked on a vessel that violated local COVID-19 rules. Michael allegedly caught the virus when the ship's captain went onshore in New Orleans, then a hot spot. Both cases allege gross or wanton negligence, which puts the cases outside the workers' comp system.

Lesson

Treat COVID-19 workplace infections as possible workers' compensation claims. Work with your state's insurance carrier. Also consider whether your safety measures can stand up to a claim of gross negligence.

Customer and family exposure is murkier

Unlike workers' compensation claims for workers, family members and customers have a different avenue to sue you. They can claim gross negligence, alleging that they caught COVID-19 because you didn't protect an employee from infection. Here's how one recent case that may become a test case is playing out.

Robert worked for Victory Woodwork at a construction site in San Francisco last summer. The company knowingly transferred in other workers that Robert alleged had been exposed to COVID-19. Robert then tested positive after being required to work next to the others. Corby, his wife, also became infected. Both were hospitalized. Corby sued, alleging that the company should have isolated the workers to avoid infection. She claimed that her illness was therefore the employer's responsibility. Fortunately for this employer, the case was dismissed. However, the case may be appealed.

Lesson

Minimize workplace infections to prevent customer and family lawsuits. Follow all current CDC, OSHA, and state guidance on prevention.

Leave denial could land you in court

One new lawsuit angle focuses on denying leave for COVID-19 related reasons such as quarantine or recovery.

The first lawsuit batch revolved around the Families First Coronavirus Recovery Act (FFCRA). That law, which expired December 31, 2020, provided full or partially paid leave for isolation, testing, recovery, and school closings. There are still lawsuits over denied leave pending from before the law's expiration. At this time, new lawsuits are unlikely unless you opt to provide the leave and then renege.

There's another kind of lawsuit rearing its ugly head. Employers who deny isolation and recovery leave may be violating the FMLA.

Anthony worked at a medical facility in Pennsylvania, treating patients. He learned that six patients had tested positive. He called his doctor, who told him to isolate for 14 days per CDC guidance at the time. The doctor also said to get tested. Anthony did and his test was positive. He informed HR. Seven days later, the employer called and told him he was needed at work. He refused, citing the CDC, and was fired. He has now filed a lawsuit alleging that he was never offered FMLA leave or provided with required notices. The judge hearing the case said it can move forward. Because a doctor diagnosed Anthony with COVID-19 and ordered another test later, the absence was for a serious health condition.

Lesson

Always consider whether a COVID-19 infection may be a serious health condition under the FMLA.

Whistleblower lawsuits may tread on retaliation laws

Some employees allege that their employers punished them for revealing or reporting COVID-19 infections or ignored safety guidance. These whistleblower lawsuits can be based on federal or state laws that bar retaliation. By far the greatest number of claims come through OSHA. But state laws also protect whistleblowers. Here's a recent example.

In a state law whistleblower claim, a New Jersey pizza shop has been sued. A worker claims his employer didn't provide masks or assure social distancing. When he complained and asked to be isolated after potential exposure, he was told to not return to work.

Lesson

It's never a good idea to punish health and safety complaints. Most states have laws outlawing retaliation. Plus, such action usually triggers federal agency complaints, compounding your troubles.

COVID-19 could be a disability under the ADA

There are also lawsuits seeking to clarify when COVID-19 creates significant enough long-term problems to constitute an ADA disability. For example, so-called "long-hauler" COVID patients with significant mental or physical problems likely qualify. That means their new disabilities will require employer reasonable accommodations. Since long-haul symptoms include fatigue, brain fog, neurological disorders, and weakness, more ADA accommodation claims are coming.

In one recent case, an employer fired a worker who took COVID leave. The employer alleged she had been careless and could have infected her co-workers. She sued, alleging that her employer regarded her as disabled by her infection when it fired her.

Lesson

Always consider whether a recovering COVID positive worker is disabled under the ADA. If so, offer reasonable accommodations.

Requiring vaccinations may not be a good idea

Employers anxious to resume full operations may want to require worker vaccination. But you could face backlash for making a COVID-19 vaccination a condition of employment. For example, some disabled workers may object if their disability makes vaccination potentially dangerous. That can happen with some immunocompromised workers as well as those with allergies to vaccine ingredients. Others may have long-held religious objections to vaccines in general. Both groups should be reasonably accommodated.

In addition, some states prohibit requiring vaccination if the vaccine isn't fully FDA approved. At this time, all 3 COVID vaccines have only provisional FDA approval. Plus, some state governors have issued executive orders barring businesses from requiring vaccination for workers and customers. All these can trigger vaccine lawsuits. The first lawsuit was recently filed.

Isaac works as a detention officer in New Mexico. As a first responder, he is required to receive one of the provisionally approved vaccines. He refused and sued, alleging that he does not want to be a "human guinea pig." The employer's policy only provides exceptions for documented disabilities or religious objections. His lawsuit is pending.

Lesson

Employers considering making vaccinations required should review their state laws and plan for reasonable disability and religious accommodations.

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