



## EMPLOYER LIABILITY REMAINS A FOREFRONT EXPOSURE RISK AS COVID-19 ISSUES EVOLVE

*By Whitney Ross and Jeremy Edelson*

As employers grapple with both return-to-work issues and potentially hitting reverse on reopening plans in light of the Delta variant, there are several potential employment claims which employers must prepare to navigate. In addition to new employment laws enacted in response to COVID-19, employers also face growing claims under long-standing employment laws. Laner Muchin, Ltd., a leading employment law firm, and HUB International, have partnered to analyze potential claims that may arise and how employment practices liability insurance (“EPL”) coverage may serve to protect employer assets.

### EXPOSURES

#### **Families First Coronavirus Response Act (“FFCRA”) and Family and Medical Leave Act (“FMLA”) Claims**

Congress enacted the FFCRA to combat the workplace effects of COVID-19 by creating a federal standard for providing paid leave during the pandemic for employers with under 500 employees. The FFCRA amended the FMLA in 2020 (mandated FFCRA leave expired as of December 31, 2020) to allow for limited paid leave for employees who sought medical treatment after experiencing COVID-19 symptoms as well as those who were ordered or advised to quarantine. Employees caring for children as a result of widespread school and daycare closures were also covered under the FFCRA.

Similar to claims under the FMLA, FFCRA claims can be brought for failing to comply by providing the requisite leave and pay. Additionally, employees who allegedly suffered adverse employment action (i.e., discharge or loss of benefits) for exercising their right to FFCRA leave may bring claims for retaliation. Employers may also see more retaliation claims under the FMLA for employees who suffered a serious health condition during COVID-19 or who needed leave to care for a family member and who allege that they suffered an adverse employment action for using FMLA leave.

#### **Discrimination Claims**

COVID-19 suddenly and drastically impacted numerous types of employers, many of whom had to make decisions to, among other things, reduce workforce numbers and pay in response to the pandemic. These decisions could result in discrimination claims brought by individuals who believe that they were discriminatorily selected for layoff or other adverse employment actions such as a salary decrease. Discrimination claims may also stem from employees who fail to comply with employer requirements to be fully vaccinated, wear masks, or follow other safety mandates that can involve religious, medical, or pregnancy accommodation complaints.

Further, employees transitioning back to work may require medical, religious, or other accommodations and bring claims if their specific accommodation requests were denied by the employer. Notably, most court decisions prior to COVID-19 would not have required employers to provide prolonged work from home as a reasonable accommodation. However, the pandemic likely permanently changed the landscape as to how courts will analyze denial of accommodation claims involving remote work.



## Whistleblower and Other Retaliation Claims

Employers may encounter an increasing amount of retaliation claims from employees who allege that they suffered an adverse employment action after engaging in complaints regarding safety or other COVID-19 related protections. These claims are often brought under state common law protections against retaliation for engaging in efforts to further public policy such as reporting crimes or exercising rights to workers' compensation benefits. Another trend that may emerge is Occupational Safety and Health Act ("OSHA") retaliation claims which employers may need to defend before the U.S. Department of Labor ("DOL") if the DOL pursues a claim alleging that employees were retaliated against for reporting OSHA violations.

## Wage and Hour Claims

Wage and hour claims could arise in circumstances where employees allege they were not paid for time spent getting a mandatory vaccine or time spent getting a mandatory COVID-19 test. Further, certain state laws requiring employers to reimburse costs for mandatory COVID-19 tests may give rise to another line of wage and hour claims.

Employers may face additional claims alleging failure to pay overtime which may arise out of significant work from home and improper practices with respect to recording work time.

## Employment Tort Claims

Potential defamation and invasion of privacy claims related to improper disclosure and handling of employee private health information could also be made against employers. Historically, tort claims of this nature were uncommon in the employment context. However, due to the vast personal information employers now require from their workforce, there is the possibility for increased defamation and privacy claims.

## President Biden's COVID-19 Action Plan

On September 9, 2021, President Biden announced a **six-part plan** as part of a broad effort to increase the number of fully vaccinated individuals in the U.S. As part of that plan, the President directed OSHA to develop a rule, which will mandate employers with 100 or more employees to require staff to be vaccinated and to give paid time off to get the vaccine. Unvaccinated employees will be required to get tested weekly.

Because OSHA is expected to issue the rule as an Emergency Temporary Standard, OSHA will not solicit public comments before issuing this rule, which means that employers may face short compliance deadlines. Employers should be prepared to receive and evaluate employee accommodation requests asking for religious and medical exceptions from vaccination requirements and possibly even from weekly testing requirements. The influx of religious and medical accommodation requests could result in additional Title VII and ADA claims if employees believe they are denied reasonable accommodations to vaccine or testing mandates. Employers could also be facing issues involving employee time off requests for the vaccine and side effects.

## EPL INSURANCE

### Coverage Scope

EPL insurance is the first line of risk transfer for companies facing these types of exposures. EPL generally covers insureds for claims alleging employment practices wrongful acts by any past, present or future employee of the company. The scope of employment practices wrongful acts covered under the EPL policies include, but are not limited to, wrongful termination, discrimination, harassment, retaliation, defamation,

invasion of privacy, and wrongful discipline. Some policies also extend defense cost coverage for wage and hour violations (if a sub-limit is purchased), and other stand-alone wage and hour policies available in the market provide both defense and indemnity coverage.

EPL insurance can also cover third party liability claims. These claims are brought by non-employees (i.e., vendors, customers, clients, etc.) against employees and/or the company for third party wrongful acts. Third party wrongful acts typically include allegations of harassment of, or discrimination against, any non-employee (or applicant for employment).

## Limitations to Coverage

While EPL insurance coverage can be broad, there are several exclusions that companies should be aware of that could limit or bar coverage for certain COVID-19 exposures. These exclusions are not unique to COVID-19 claims but, because of their nature, could create roadblocks to coverage for COVID-19 claims.

EPL policies generally exclude coverage for any claim based upon or arising out of any bodily injury, sickness, disease, or death of any person. This exclusion is common, but it oftentimes carves back coverage for claims of emotional distress, mental anguish or humiliation resulting from an employment practices wrongful act. However, if the introductory language to the exclusion is broad, and any claim otherwise arises out of COVID-19 for bodily injury, sickness, disease, or death, insurers may attempt to limit coverage for the same.

EPL policies may also exclude coverage for alleged violations of workers' compensation, unemployment insurance, social security or disability benefits, the National Labor Relations Act ("NLRA"), the Worker Adjustment and Retraining Notification ("WARN") Act, the FMLA, the Consolidated Omnibus Reconciliation Act ("COBRA"), OSHA, and any similar federal, state, local or foreign statute or common law. However, EPL policies typically provide coverage for any claim for retaliation in connection with these laws.

As discussed above, coverage is also excluded for wage and hour claims under traditional EPL insurance. This includes violation of the Fair Labor Standards Act ("FLSA"), refusal, failure, or inability of an insured to pay (or timely pay) wages, bonuses, perquisites, benefits, or overtime pay for time worked, failure to provide or enforce meal breaks or rest breaks, improper classification of individuals for purposes of determining compensation and other benefits, improper deductions from pay for any employee, and failure to provide timely statements of earnings. However, like certain other EPL exclusions discussed above, coverage is generally available for any retaliation claim in connection with wage and hour violations. Therefore, wage and hour claims that may arise out of COVID-19 (aside from claims for retaliation) would likely be denied absent the purchase of a defense cost sub-limit or a standalone wage and hour policy.

In very limited circumstances, we are seeing certain insurance carriers adding specific COVID-19 restrictions to EPL policies. So far, the staffing industry is seeing exclusionary language added to EPL policies for COVID-19 claims alleging discrimination. Healthcare underwriters are also starting to ask questions about company vaccine requirements for staff and the parameters around vaccinations. We therefore may see an increase in coverage limitations based on company responses to those questions.

As the exposures around COVID-19 continue to evolve, it is important to mitigate the risk of exposure – both through outside employment counsel and through EPL insurance. If you would like to speak with an employment attorney regarding your company's potential exposures to the COVID-19 pandemic, and how your company can mitigate the risk of these claims, please reach out to Jeremy Edelson ([jedelson@lanermuchin.com](mailto:jedelson@lanermuchin.com)). If you would like to discuss your coverage needs as they pertain to EPL insurance, please reach out to Whitney Ross ([whitney.ross@hubinternational.com](mailto:whitney.ross@hubinternational.com)).

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