

## [Labor & Employment Law Daily Wrap Up, TOP STORY—Whistleblower lawsuits on the rise as employers continue to grapple with COVID-19 pandemic, \(Apr. 16, 2020\)](#)

Labor & Employment Law Daily Wrap Up

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By Wayne D. Garris, Jr., J.D.

Dorsey & Whitney attorney Kent Schmidt has been tracking COVID-19 related lawsuits including those brought by grocery store employees, government employees, and others.

As the COVID-19 pandemic continues, employers still face the challenge of keeping up with constant changes in legislation, regulations, and health and safety guidance. Over the past several weeks, employers have been dealing with a new challenge in the form of employee lawsuits alleging wage and hour, safety, and WARN Act violations related to the pandemic.

Kent Schmidt, a partner at Dorsey & Whitney, has been tracking COVID-19 related employment litigation at his blog, [Left Coast Law](#). In an April 13 post, he warned employers of another potential risk of liability—whistleblower claims—specifically, "[e]mployees claiming to be subject to retaliation for raising concerns about health and safety or compliance with laws, including COVID-19 related directives." The post highlighted two lawsuits, filed on the same day in Kentucky state court, by employees who alleged they were fired for raising COVID-19 related safety concerns.

**Grocery store employee.** In [King v. Trader Joe's East, Inc.](#), a Trader Joe's employee created a private Facebook group for employees to discuss their concerns about the grocer's lack of safety measures for employees. The employee alleges that when a manager confronted him about the Facebook group, the employee requested that the employer provide additional sanitizers, cleaning products, gloves, and masks. The manager, however, asked the employee to resign from his position, and when the employee refused to resign, the manager terminated him. The plaintiff is alleging wrongful discharge in violation of public policy.

**Social gathering directives.** The second Kentucky case, [Norris v. Schoppenhorst-Underwood Brooks Funeral Home, LLC](#), was brought by the president of a funeral home. She alleges that after the Kentucky governor's March 11 directive limiting social gatherings to less than 50 people, she called a staff meeting to develop a strategy to comply with the directive and other measures to slow the spread of COVID-19, such as more frequent cleaning. The owner of the funeral home allegedly did not want to implement any such measures and, instead, fired the president. She filed suit seeking reinstatement and backpay.

**Challenges for employers.** The two Kentucky cases illustrate a growing trend of employees accusing employers of failing to take measures to protect employees from exposure to COVID-19 and allegedly retaliating against those employees who complain about the lack of safety measures. *Labor & Employment Law Daily* has previously reported on a Chicago-area nurse's whistleblower [complaint](#) in Illinois state court. Additionally, workers for Amazon and Instacart walked out of their jobs demanding that the companies take additional safety measures, such as more extensive cleaning of warehouses and provide workers with disinfectant wipes and hand sanitizer. Since then, a group of U.S. Senators has [questioned](#) whether Amazon's recent firing of one of organizers of the walkout was retaliatory.

Whistleblower and retaliation claims can always be challenging for employers, but the COVID-19 crisis presents additional difficulties. "While attempting to keep the business afloat and profitable, employers are scrambling to comply with all types of federal, state, and local regulations of general applicability, in addition to the new directives being rolled out on a daily basis" Schmidt wrote. "These challenges will continue into the coming weeks as workplaces transition to the new normal—whatever that may look like."

**What can employers do?** Schmidt recommends several actions that employers can take to avoid COVID-19 whistleblower claims. The most obvious, he notes, is not to fire employees who raise safety concerns. "In the *Trader Joe's* case filed in Kentucky last week, the allegation is that the company expressly terminated the plaintiff because of his complaints about health and safety."

Schmidt also advises employers to review their reporting processes and to ensure that supervisors know to take all complaints seriously and document them. "Every complaint or concern needs to be documented and escalated to a health and safety point person. Maybe that point person needs more support now," he told *Labor & Employment Law Daily*.

The need for clear reporting and documenting processes is especially important given the high volume of information, and misinformation, about COVID-19 that employees may be receiving. Schmidt continued, "If litigation arises, the employer will be able to show who received the complaint, whether the employer determined the complaint was legitimate, whether or not it was acted upon, and show that the complaining employee faced no repercussions."

**Litigating COVID-19 whistleblower claims.** As these complaints, and others, make their way through litigation, Schmidt anticipates challenges for attorneys litigating these claims—both employers' and plaintiffs' counsel. "These cases will be unique, but the difficulty will also depend on the employer's conduct," he remarked. "Every trier of fact is going to bring their life experience as it relates to COVID-19, and there may be some degree of sympathy on how daunting compliance is. The question will be 'Is this a true whistleblower or is this some who was discharged or laid off and trying to fit it in to COVID-19?'"

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