

Labor & Employment Law Daily Wrap Up, STRATEGIC PERSPECTIVES **—Add a looming rise in employment class actions to COVID-related concerns, (Apr. 21, 2020)**

Labor & Employment Law Daily Wrap Up

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By [Lisa Milam, J.D.](#)

"The class action floodgates have not yet opened, but they will," cautions the co-chair of Jackson Lewis' class action practice group.

COVID-19, and the impact of the drastic measures taken to beat back the unprecedented worldwide pandemic, continue to have a profound impact on employers. The challenges of maintaining a safe workplace, managing a suddenly remote workforce, adhering to a flurry of new legal and regulatory requirements, and ensuring the ongoing viability of a business amidst a harsh economic downturn are daunting. Adding to the burden: Employers can expect to see a sharp rise in lawsuits—particularly high-stakes class-action litigation.

"While every employer in the country is doing its best to navigate these uncharted waters, interpret a patchwork of state and federal legislation, and dissect constantly changing guidance from the U.S. Department of Labor, the IRS, governors' offices, and the like, these times are fertile grounds for the plaintiffs' bar," said [Stephanie L. Adler-Paindiris](#), Principal in the Orlando, Florida, office of Jackson Lewis and Co-Chair of the firm's Class Action and Complex Litigation Practice Group.

The filing of legal claims, both individual and classwide, has already begun; employers face whistleblower suits, complaints over furloughs, worker safety, and other issues. According to Adler-Paindiris, several of the firm's clients have already been sued for employment issues relating to COVID-19. But the full force of class litigation has yet to materialize. "The class action floodgates have not yet opened—but they will. Once the dust settles, we will have a full-blown overgrown garden of potential class and collective claims," she cautioned. "While it may be tough to do so at this time, it's critical for employers to think about what might be coming and how they can take steps now to minimize exposure."

Adler-Paindiris spoke to *Labor and Employment Law Daily* about the coming class-action crisis and how employers can minimize the damage.

What industries have been most impacted by COVID-19?

Many industries have been financially devastated by the effects of this virus. Those in the hospitality and retail businesses have been hit particularly hard. Restaurants, bars, and retail stores are closed, people are not flying, hotels are almost empty. We've already seen class action lawsuits filed against cruise lines and airlines and expect that will only increase. Additionally, gyms, movie theatres, casinos, sports and entertainment—they are all significantly impacted.

The abrupt change in lifestyle for Americans has consequences for additional industries too. For example, the demand for cars is decreasing. Relatedly, as people continue to work from home and avoid travel, the demand for oil and gas has plummeted. We have only seen the tip of the iceberg in terms of industries affected by this pandemic.

Why is there a heightened risk of class litigation in particular in this environment?

The claims that come out of COVID-19 are particularly susceptible to class and collective treatment. Many of the decisions that employers are making during this time necessarily affect a large number of employees. Just about every action to reduce expenses or pay benefits or alter schedules may be susceptible to class or collective

treatment. The stakes are really high, as these decisions are difficult, often made quickly, and affect a large number of employees.

We are in uncharted waters on many of these new issues, and employers have little guidance from the government or the courts.

What types of claims should employers be most concerned about?

We anticipate several buckets of claims that will be filed, in no particular order of importance:

Disability and leave of absence management. For example, ADA accommodations: The duty to accommodate does not cease just because employees are now working from home. The unusual amount of discussions about employees' medical condition, taking temperatures, and all the other questions about an employee's history or symptoms present more cause for concern. We expect to see regarded-as-disabled claims by employees who are perceived to have pre-existing conditions, are immune-compromised, or have COVID-19. There is no clear guidance on whether COVID-19 is even a disability under the ADA such that regarding someone as having COVID-19 would be a violation. We expect there to be a lot of litigation surrounding these issues.

We have already seen some cases filed over the Families First Coronavirus Response Act (FFCRA) and whether emergency FMLA or paid sick leave should have been granted under the new law, whether the employer entity is subject to the FFCRA, and whether an employee has been retaliated against for seeking leave under the FFCRA.

Privacy, data, and cybersecurity. These claims were already on the rise pre-COVID, and we expect these claims to skyrocket. Earlier this month, a class action lawsuit was filed in California under the California Consumer Privacy Act (CCPA) alleging a video conferencing company failed to properly safeguard the personal information of its users. The proposed class included "all persons and businesses in the U.S." whose personal information was collected or disclosed to a third party "upon installation or opening" the app. This is just the beginning of these kinds of claims.

Employers should review their video conferencing procedures and platforms and other technologies used to support work-from-home arrangements. Read the fine print in those vendor agreements. Employers not only want to avoid class action lawsuits, but also to protect their company's proprietary information and the personal identifying information of their employees and customers.

Wage and hour claims. Wage and hour issues are always fertile ground, and the current crisis will give rise to many claims, including class and collective suits for off-the-clock work, reimbursement for business expenses, misclassification, etc.

Discrimination, harassment, and retaliation. We expect to see claims alleging discrimination to explode once the dust settles. When employers are forced to make decisions about furloughs, reorganizations, and layoffs, their selection decisions will be challenged. We will see an increase as decisions are made to lay off or furlough some employees—but not others. The typical claims coming out of mass layoffs usually focus on age, gender, and disability. There will also likely be litigation surrounding which employees are selected to return to work, and in what positions.

Benefits and COBRA. We anticipate class actions under the Consolidated Omnibus Budget and Reconciliation Act (COBRA) addressing whether notices should have been provided when employees were furloughed and whether employees are covered by their employer's insurance policies. Many COBRA class actions were filed even before the pandemic, and the current reality means even more lawsuits will come.

WARN Act. We already have seen litigation filed under the Worker Adjustment and Retraining Notification (WARN) Act and know that there will be more coming in the next 6 to 12 months. Many employers understandably have chosen to furlough employees given the uncertainty, but as those furloughs approach six months, WARN will come into play and likely be the subject of litigation.

Will the pandemic be an "unforeseen business circumstance" for WARN Act purposes? At what point are COVID-related layoffs no longer "unforeseen"?

Whether an employer will be able to avail itself of the "unforeseen business circumstances" exception is, quite literally, the million-dollar question! We definitely expect WARN class action litigation surrounding whether unforeseen business circumstances can be invoked and proven in order to avoid liability for failing to provide notice.

Documentation. Our country has never experienced a pandemic like this in modern history, so there is little guidance or precedent upon which the courts can rely to make these determinations. We expect the issues to be extremely factual and individualized as to what was happening in the country and the world, the directives from the CDC and local government, and what information employers relied upon to make the decisions they made to save their businesses. We recommend an employer document all the information they relied upon when making furlough and layoff decisions.

Assessing an employer's WARN Act obligations is extremely complex. There are a multitude of WARN issues that can be litigated, including whether an action was a "plant closing" or "mass layoff," under the statute, and whether the action was an "employment loss." Employers should consult with their counsel on these complex issues.

The FFCRA provides that violations of its paid sick leave provisions constitute a failure to pay minimum wages. Does this mean a greater uptick in Fair Labor Standards Act (FLSA) collective actions?

Absolutely! We anticipate an increase in all kinds of FLSA collective actions due to the numerous wage and hour issues relating to both exempt and nonexempt employees. We know that there will be litigation surrounding whether employees should have been given job-protected leave or paid sick leave benefits.

There also will be scrutiny of whether an employer was subject to the requirements of the FFCRA. The 500-employee rule has been applied differently by different companies; this will likely result in a challenge to those employers that grouped subsidiary or parent companies together to meet the 500-employee threshold.

What causes of action do you foresee that employers may *not* anticipate?

I think the focus may sometimes be on the "easy" to anticipate claims: *i.e.*, employees working off the clock or alleging that they were not paid correctly. However, as noted earlier, we anticipate there will be class actions relating to benefits and COBRA. While many companies are furloughing employees and graciously agreeing to keep employees on their benefit plans and pay the premiums, it's critical for employers to consult with a benefits attorney if they furlough employees to determine whether employees can be covered, or whether COBRA notices must be issued.

Are there particular jurisdictions that concern you?

There are certain jurisdictions that are always more litigious, particularly with respect to class actions. We would expect California to be fertile ground, as well as Florida and New York.

I think in general, the stakes are really high because the decisions made by employers affect a large group of people, which can create exposure. Employers are often forced to make difficult and rushed decisions to keep their businesses alive with little guidance from the government or the courts. The guidance that has come out of the DOL and other government agencies is often rushed, which results in confusing and at times inconsistent positions. The agencies have actually amended the guidance leaving those employers that already made decisions and relied on prior guidance confused as to next steps. This environment is fertile ground for litigation in almost every court in our country.

What preventive measures do you advise employers to take now, and as we begin to reopen the economy?

First and foremost, employers should not forget about good employment hygiene. It is more important than ever that employers utilize all the best employment practices. There will likely come a day when every employer will need to defend one or more decisions made during this pandemic. In order to do so, employers must ensure they maintain clear and contemporaneous documentation to support every decision, provide sound reasons for the decisions made, and are able to competently back up the reasons why the employer took the actions it took.

How will this pandemic change the workplace generally and the employer/employee dynamic?

I think a lot about how this pandemic has forever changed the workplace. Will employees be more or less likely to show loyalty to their employer and therefore be less likely to file suit? Will the economics of the future dictate the litigation landscape, regardless of how employees think about their employer?

I also wonder how juries will see these issues. There will not be a single juror who was unaffected by this pandemic, either due to a job loss or a loved one who was ill or passed away. Will jurors be sympathetic to employers that are struggling to stay afloat to employ people, or will they be viewed harshly and in an untrusting light? For ongoing news and guidance on employment class and collective action trends and developments, watch for Jackson Lewis' [Class Action Trends Report](#), a quarterly newsletter published in collaboration with Labor and Employment Law Daily. Attorneys: Stephanie L. Adler-Paindiris (Jackson Lewis).

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