



COVID-19 EPL Litigation/Claim Developments

As state and local governments begin to lift the stay-at-home orders implemented in response to COVID-19, we're beginning to see an uptick of employment related claims, primarily involving the following key issues and allegations, such as retaliation, discrimination and workplace bias, wage and hour claims, and health & safety concerns. Included below are some of the main categories of EPL claims we've seen arising out of the pandemic:

Employer Retaliation Claims

One of the common COVID-19 related employee claims we've seen raised is retaliation for an employee's raising potential misconduct or safety related concerns about their work environment or an employer's preventative actions (or lack thereof) taken in response to COVID-19. Another variation of these retaliation claims alleges retaliatory actions by employers for employees participating in coronavirus-related protests or boycotts. Generally, employers are prohibited from taking an adverse action against employees for raising concerns re. employers' potential misconduct or legal violations, or for engaging in collective action. Though these types of claims may be easily defensible – particularly if it can be demonstrated that there's a legitimate, non-retaliatory basis for the employer's actions – they can still be costly to defend in the current litigious climate. As EPL policies generally afford coverage for retaliation notwithstanding other policy exclusions, many savvy plaintiff's attorneys are ensuring to include this allegation as a means to trigger EPL policies and their corresponding "deep pockets" as a potential source for settlements.

Discrimination and Workplace Bias Issues

Discrimination and/or workforce bias are frequently being alleged in pandemic-related EPL claims. These claims come in varying forms, depending on the type of protected class against which discrimination is alleged, and the circumstances in which they occur, ranging from disability discrimination claims alleging ADA violations, or bias based on race, national origin, etc. in violation of Title VII or local laws, to allegations of age discrimination in violation of the ADEA. Outlined below are some common examples of how we've seen these claims arise in connection with COVID-19:

Disparate Impact/Discrimination Claims Based on Disability, Age, etc.

With the recent spate of mass layoffs and the impending re-hiring of employees as stay-at-home orders are lifted, claims have been filed alleging employers' actions failed to comply with WARN Act requirements, or had an adverse effect on certain protected groups of employees. These same claims/issues apply to employers as they bring back furloughed employees, and should be considered in the decision process as to which employees to re-hire. It's important to consult with counsel and any regulatory guidance and directives and be mindful of the potential for such potential claims of disparate impact or discrimination against older employees or those with disabilities perceived to be more susceptible to contracting COVID-19.

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Individual employees have also brought claims based on their employer's alleged disability-related inquiries, medical examinations, and/or failure to provide reasonable accommodations for disabilities in connection with COVID-19. Note, pursuant to the CDC and EEOC's guidance, while it is permissible to screen employees for COVID-19 symptoms or potential exposure, employers are generally prohibited from inquiring if employees have preexisting conditions subjecting them to higher risk of coronavirus-related complications, absent a request for reasonable accommodation. The EEOC has also issued guidance that, unless it poses an undue hardship, employers must try to reasonably accommodate employees who are at a higher risk of complications from COVID-19 prior to excluding them from the workplace.

Discrimination Claims Based on Race, Color, National Origin, etc.

Another area ripe for EPL claims arising out of the pandemic are claims alleging race, color, national origin discrimination and workplace bias in violation of Title VII and/or state and local laws. With the advent of the coronavirus in the U.S., there has been a notable increase in hate crimes against Asian Americans. The EEOC also issued a statement warning employers to look out for instances of harassment or mistreatment of Asian-Americans during the outbreak. These types of claims, whether brought by individual employees, purported class actions, or by third parties/customers, would typically trigger coverage under EPL policies and should be reviewed for reporting as soon as a written demand or complaint is received. From a risk management and mitigation perspective, employers should proactively engage with their HR departments to provide training aimed at raising awareness of and eliminating such discriminatory actions in the workplace.

Wage & Hour Claims

As we've seen employers re-shuffle their workforce in response to the pandemic, by shifting to work-from-home arrangements, cutting wages or modifying employees' work schedules, we've also seen an influx of wage and hour claim filings and purported class actions. Clients can expect

to see more of these types of claims, alleging misclassification, unpaid wages, etc. and should be careful to ensure compliance with all state and local laws governing wage and hour/notification requirements.

Please note EPL policies generally exclude coverage for wage & hour claims; however, most policies include a carveback affording coverage for retaliation claims, and some policies may also include limited defense costs coverage for such claims. It is important to review any claims with your broker upon receipt for potential coverage.

Health & Safety Issues

We have also begun to see claims brought by employees raising health and safety related concerns alleging employers failed to take appropriate actions to address for workplace safety and provide reasonable accommodations. These type of claim filings not only allege direct bodily injury and/or negligence from contracting COVID-19 at work (which would not typically be covered under EPL policies), but also invasion of privacy, retaliation for raising safety issues or constructive discharge/wrongful termination for failing to return to work due to health concerns. From a risk management perspective, clients should take all precautions to ensure compliance with CDC, OSHA, and other governmental directives, and consult with HR, legal and compliance to safeguard employees' health.

Please note EPL policies generally exclude OSHA-related claims; however, most policies include a carveback affording coverage for retaliation claims, so coverage may be triggered if an employee alleges retaliation by an employer for raising safety concerns along with OSHA violations. Similarly, EPL policies generally exclude Bodily injury precluding coverage for claims by employees for medical expenses/bodily injury; however, most policies include a carveback affording coverage for claims alleging mental anguish, humiliation or emotional distress, which may apply depending on how a claim is pled/if it includes other covered allegations.

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As employees begin returning to work, clients should be mindful of and consult with counsel in crafting their return to work policies and how they address employee requests for accommodations, any internal/written demands or claims of discrimination, invasion of privacy, retaliation, etc. As noted above, many EPL policies provide coverage for the costs of defending against many employee claims and some may afford coverage for employee privacy claims involving unauthorized access to employees' individually identifiable health information, and/or aid with engaging loss prevention consultative services for HR/employment related issues.

As such, it's critical to review your policy with your broker and be cognizant of its terms and scope of coverage. It's important to note many of these types of claims can trigger coverage under an EPL policy, often from the initial receipt of any written demand (i.e., not just once a suit or administrative charge is filed), so timely reporting to your insurer and/or broker is imperative.

Should you have any questions and would like to discuss further please reach out to:

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