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attorneys at law

Identifying Key Liability Risks in the Workplace and Among Your Workforce

Presented to Washington County 2035

June 30, 2020

Panicked employees. Hesitant customers. Today's business environment is under rapid-fire change. Join **Kathy L. Nusslock** and **Laurie E. Meyer** of **Davis|Kuelthau, s.c.** for a look at key factors to address in your efforts to establish and maintain resiliency during this challenging time. Walk through several real-life scenarios and identify areas of possible exposure, including common-law negligence, statutory premise liability, OSHA, requests for accommodation and claims of discrimination, workers' compensation, failure to protect, and return to work issues.

1. What Creates the Risk?

a. Common law negligence.
   1) Duty to use ordinary care under the circumstances.
   2) Breach or failure to use reasonable care.
   3) Cause.
   4) Injury.

b. Legislatively created (statutory, code or regulatory agency rules). Examples only:
   1) Premise liability - Wis. Stat. § 101.11(1).
   2) OSHA.
   3) Federal Civil Rights laws.
   4) Workers' compensation.

c. Misrepresentation (e.g. of safety measures or effectiveness of safety measures).

2. Exposure Among the Workforce.

a. Employees return to work.
   1) Employer fails to follow CDC guidelines.
   2) Employee fails to follow employer-required CDC guidelines.

b. Employees refuse to return to work.

c. Workers' compensation exclusivity provisions.

3. Business Premises.

a. Limited visitors or frequenters.

b. Business relies on customers.

c. Business relies on one-on-one contact.

d. Hospitality industry.

4. Defending Against Risk.

a. Insurance.
b. Releases (more of a deterrent).

5. Recommendations.

a. Follow federal, state and local guidelines.
b. Clearly advise employees and frequenters of any restrictions/requirements put in place as safety measures.
c. Inform employees and frequenters of the risks they assume for their own failure to comply with these restrictions/requirements.
d. Monitor the effect of the safety measures they implement and be ready to adapt to ever changing guidelines and changing public health concerns.
e. Document. Document. Document.

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We will continue to monitor the impact of COVID-19 and provide information businesses need today to prepare for a continually changing tomorrow via our **Navigating Disruption: Business Resilience Resources** hub.

Avoiding Employment-Related Liability as Employees Return to Work

June 29, 2020

By: Laurie E. Meyer

As states and municipalities relax safer-at-home measures, stores, restaurants, offices, manufacturers, and other employers across the country are either re-opening for business or returning their employees from remote work. Despite the best of intentions to comply with seemingly ever-changing laws, orders and agency guidance, many businesses worry about whether there will be an upsurge in the number of employee lawsuits or claims arising from the COVID-19 pandemic. This article identifies the most likely types of claims that may be seen by employers and describes steps employers can take to manage their risk.

1. Discrimination, Retaliation and Harassment Claims

Back in March, decisions regarding closures and the resulting layoffs and furloughs were made in a bit of a hurry. In situations where less than an entire workforce was sent home, hopefully, decisions about which employees were chosen for layoff or furlough were made carefully, with attention paid to the relative skills, performance, and job functions of each employee. Employers now returning employees to work—or to the workplace in phases—face the same decisions, and may be second-guessed if they treat employees differently based on impermissible reasons. The Equal Employment Opportunity Commission (EEOC) has made clear that employers may not make assumptions about their employees' ages, ability to telework, known or perceived disabilities, or suspected vulnerabilities when making these decisions. Even decisions made out of benevolence toward employees may be deemed discriminatory in retrospect if they were made based on these paternalistic assumptions. Thus, employers should avoid blanket exclusions for individuals perceived as vulnerable when creating and implementing return-to-work policies.

Employees adversely affected by such a reduction-in-force decision may also allege that the decision was pretextual to eliminate employees with protected characteristics. In other words, they may claim that their employer used the furlough or layoff process as an "excuse" to get rid of employees in certain age, race, national origin, gender or other protected categories. Employers making layoff or phased return-to-work decisions should therefore take care to "audit" their lists of affected employees to determine if certain groups have been adversely impacted.

Employers may also not retaliate or discriminate against employees for requesting or taking leave under the Families First Coronavirus Response Act (FFCRA), the Family and Medical Leave Act (FMLA), or for voicing concerns about workplace safety.

Finally, employers should be on guard against potential harassment claims, especially in light of reports that persons of Asian descent have been the target of harassment arising from the suspected origin of the novel coronavirus. Employers who are found to have known about (or should have known about, with proper vigilance) unlawful harassment can be found liable for this harassment.

Employers who unlawfully discriminate or retaliate against employees in these ways may face claims under a host of laws, including the Family and Medical Leave Act, the Americans with Disabilities Act, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, or state worker's compensation laws.

2. Disability Failure-to-Accommodate Claims

While employers should not *assume* that an employee cannot work based on the individual's known or perceived disability, they should understand that they *do* have a duty to engage in an interactive process with employees who request an accommodation due to a disability. This duty to provide *reasonable* accommodations exists under both the federal Americans with Disabilities Act (ADA), which applies to employers with 15 or more employees, and the state Wisconsin Fair Employment Act (WFEA), which applies to employers with one or more employees.

In the COVID-19 context, the duty to accommodate arises when an employee requests leave or another accommodation because his or her existing disability makes him or her particularly vulnerable to COVID-19 or the disability is exacerbated by the threat of COVID-19 or the safety precautions taken. For instance, an employee may have diabetes or a heart or lung condition which places him or her in increased danger if he or she were to contract COVID-19. Another employee may request an accommodation because his or her diagnosed panic and anxiety disorder is exacerbated when he or she works in close proximity with other people. Still another employee may have claustrophobia or asthma which makes complying with a face mask requirement difficult or impossible. In these situations, the law requires the employer to engage in an interactive dialogue with the employee, and potentially the employee's medical providers, to determine what reasonable accommodations, if any, can be made for the employee. Examples of such accommodations may include telework (where possible), additional physical barriers from other workers, or even limited leave in some circumstances. Again, analyses of such requests and possible accommodations should be undertaken on an individualized basis, ideally with experienced employment counsel.

3. Failure to Protect Claims

Worker's Compensation: Employees who sustain injury during the course and scope of their employment may make claims under state workers compensation laws. In most such claims, it will be significantly challenging for employees to prove they contracted the coronavirus while at work, rather than through other means, such as riding public transportation or shopping at the grocery store. In Wisconsin—with the notable exceptions of emergency health care workers and first responders—such employees would have to prove causation, which may be a bar to many claims.

OSHA: According to the general duty clause of the Occupational Safety and Health Act (OSH Act), employers are required to provide their employees "a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." The federal Occupational Safety and Health Administration (OSHA) can cite employers for violating the general duty clause if there is a recognized hazard and they do not take reasonable steps to prevent or abate it.

Monitor Published Guidance: Employers should regularly monitor OSHA and CDC guidance to ensure that they are following the most current recommendations from both agencies, based on their particular industry and circumstances. While many employers may view such guidance as not "the law" but rather only suggested (and thus optional) recommendations, they should be aware that an OSHA investigator will likely not look kindly on an employer who refuses to implement well-publicized recommendations.

Develop a Formal Return-to-Work Plan: If employers have not already done so, they should develop and implement formal return-to-work plans addressing such things as PPE and social distancing expectations,

sanitation procedures, employee questionnaires and/or temperature testing, handling of visitors, and protocols for dealing with employees or visitors who test positive for COVID-19 or who report being in close contact with someone who has tested positive. Employers should regularly update such plans when necessary, ensure that all requirements are followed by employees and visitors alike, and promptly investigate all complaints of non-compliance. Such plans will assist employers who must defend against claims alleging that they did not provide adequate safety precautions for employees.

4. Failure to Protect Employee Privacy and Abide by Confidentiality Requirements

In published guidance, the EEOC has directed that while ordinarily, medical questionnaires required of employees or temperature testing would be impermissible under the ADA, they are allowed in the COVID-19 context due to the direct threat posed by the pandemic to the health and safety of employees. Consequently, many employers have implemented symptom-monitoring protocols for employees, which range from self-monitoring and reporting to employer-imposed temperature checks. While gathering such information is permitted under the law, employers should take adequate steps to ensure that it is protected as confidential employee medical information. That means employers should treat and store such information just as it does all other employee medical information it receives—i.e., in files separate from employee personnel files with limited access by other employees.

5. Denial or Miscalculation of Sick or Family Leave

For private employers with fewer than 500 employees, the FFCRA provides paid leave for employees who need time off to care for themselves or a family member affected by COVID-19, or where a child's school or childcare is unavailable due to COVID-19. Even as summer has arrived, summer childcare options may be limited, and many areas of the country are experiencing increased positive tests for COVID-19. Thus, employees may continue to request leave under the FFCRA. Employers must remember that the FFCRA is in place until the end of 2020, and they should be cognizant of their obligations under the law.

Employees may bring actions under the federal Fair Labor Standards Act (FLSA) based on denial or miscalculation of FFCRA leave pay. As we have previously advised in our ***FFCRA Regulations*** article, employers should not assume that the FFCRA does not apply to them simply because they have fewer than 50 employees. The exception for small employers does not apply to employee requests for emergency sick leave but only to requests for leave due to school or childcare unavailability—and then applies only in defined circumstances that should be analyzed on a case-by-case basis.

6. Wage and Hour Claims

In order to comply with safer-at-home orders and ensure social distancing, many employers had to make sudden changes to their workforces with little notice or preparation. Many began allowing non-exempt employees to telework for the first time. Some may have been forced to change the compensation structures of exempt employees for economic reasons. Others may have required employees to spend time preparing for work in additional ways related to COVID-19 (e.g., cleaning and donning PPE or assisting with cleaning work areas before or after their shifts).

While these changes came on suddenly, employers should always remember that the wage and hour laws pertaining to minimum wage and overtime requirements still apply. Employers should review their timekeeping procedures and compensation structures with an eye toward the following questions:

- Are non-exempt employees who are working from home adequately tracking and reporting their time?

- Have non-exempt employees been instructed as to their start and end times each day? Are they permitted or expected to work outside of those times? Do they check and respond to emails and voicemails at other times?

- Are non-exempt employees expected to clean work areas off the clock? Are they spending more than a *de minimis* amount of time off the clock cleaning, donning or doffing PPE?

- Are the salaries of exempt employees impermissibly "docked?"

- Have exempt employee salaries been reduced below the applicable overtime exemption thresholds?

- Have any compensation reductions resulted in minimum wage violations?

7. Federal and State WARN Violations for Mass Layoffs or Closings

The federal Worker Adjustment and Retraining Notification Act (WARN Act) and its state counterpart, the Wisconsin Business Closing and Mass Layoff Law (Wis-WARN), were both enacted to require certain employers to provide employees with written notice prior to a permanent or temporary shut down or mass layoff of an employment site, facility, or operating unit, in order to help affected employees prepare for new employment. (The federal WARN Act applies to businesses with 100 or more employees, while Wis-WARN applies to employers with 50 or more employees. These laws have differing triggering thresholds for the required notices which are described in our ***Telework, Shortened Work Schedules, Layoffs, and Worksite Closures: Handling Employment Interruptions in the Age of COVID-19*** article.

Importantly, both laws have a number of exceptions, among them one for layoffs or closings caused by "unforeseeable business circumstances." The laws also generally do not apply in the case of a short-term furlough (rather than lay-off) of employees. While these exceptions may well have been met back in March if the closing or layoff was the sudden result of compliance with a state or municipal safer-at-home order, or if a furlough was initially anticipated to be of short duration, these laws may become applicable in the future. Furloughs may turn into permanent layoffs or another large reduction-in-force may be necessitated by the continued economic downturn. Employers must be cognizant of both laws' requirements to avoid inadvertent missteps in the event that one or both laws apply in the future.

8. NLRA Claims and OSHA "Whistleblower" Claims

NLRA Claims: Many employers believe that the National Labor Relations Act (NLRA) does not apply to them simply because they do not have a union. However, Sections 8(a)(1) and 8(a)(3) of the NLRA prohibit employers from retaliating against an employee for, among other things, participating in "concerted activity"—whether or not it is union activity—so long as it is done for the purpose of collective bargaining or other "mutual aid or protection." Thus, if an employee makes a complaint, either with other employees or on their behalf, in order to improve working terms or conditions, that activity may be protected. Discharging or taking adverse employment action against employees who engage in such activity can lead to serious legal risk. In a recent National Labor Relations Board (NLRB) decision, *Maine Coast Regional Health Facilities*, 369 NLRB No. 51, (March 30, 2020), the NLRB held that healthcare workers who were terminated for voicing concerns about working conditions in health care facilities may have a retaliation claim under the NLRA.

OSHA Whistleblower Claims: Section 11(c) of the OSH Act prohibits employers from retaliating against employees for exercising their rights under the statute, including raising a health or safety complaint with OSHA. 29 U.S.C. § 660(c). The protections contained in Section 11(c) apply to employees who report conduct they reasonably and in good faith believe violates the OSH Act. Although Section 11(c) does not provide for a

private cause of action, employees can submit a complaint to the Secretary of Labor. After investigating the employee's complaint, the Secretary of Labor can sue the employer in federal court on the employee's behalf and seek relief including reinstatement, back pay with interest, compensatory damages, punitive damages, and other appropriate relief.

If you have any questions about this article or need further information, please contact your Davis|Kuelthau, s.c. attorney, the **author linked above**, or the related practice group chair linked **here**.

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Practice Areas

- Appellate Practice
- Commercial Finance
- Employment Litigation
- Intellectual Property
- Labor and Employment
- Litigation
- Trusts, Estates and Succession Planning

Industries

- Food and Beverage
- School and Higher Education

Education

- J.D., *magna cum laude*, Marquette University Law School
- L.S.B.A., University of Wisconsin Milwaukee (Economics)

Kathy Nusslock returned to a commercial litigation practice in 2017 after serving as the firm's Chief Operating Officer from July of 2014 through September of 2017 and firm President from December of 2014 through September of 2016. As Chief Operating Officer, Kathy worked in conjunction with the Board of Directors and was responsible for overall management of the firm's operations, including human resources, facilities management, and oversight of accounting/finance, information technology, and marketing/business development.

Kathy maintains an active caseload providing representation on a broad range of litigation matters in state and federal trial and appellate courts as well as in arbitration and other alternative dispute forums. Kathy has significant experience working with complex litigation matters ranging from employment discrimination and employment benefits disputes to unfair trade practices. Kathy also is experienced in disputes involving intellectual property, restrictive covenant and other agreements, breach of contract and warranty claims, and trust and estate disputes.

Kathy's clients include individuals, small, mid-sized and large corporations, as well as governmental entities. Kathy works closely with these clients and other attorneys to develop strategies in dealing with electronically stored information, including the preservation, collection and production of this information.

As a talented leader and successful trial attorney, Kathy's dedication to the legal industry has not gone unnoticed. She has been proudly ranked among Wisconsin's *Super Lawyers*® since 2005, honored among the Top 25 Women Attorneys in Wisconsin, by *Super Lawyers*®, for six terms, recognized by the *Wisconsin Law Journal* among their 2013 Women in the Law and recognized as one of the *Best Lawyers in America* since 2015. Kathy is the proud recipient of the Brennan Award from the National Trial Advocacy College, joining such distinguished leaders as Justice Antonin Scalia, former Attorney General Benjamin Civiletti and others.

Kathy continues to serve as Counsel to the Firm.

Notable Representations

As a trial attorney, Kathy's clients included individuals, small, mid-sized and large corporations, as well as governmental entities. Below are a few examples of her litigation experience.

Professional Activities

- Admitted, United States Supreme Court
- Admitted, Seventh Circuit Court of Appeals
- Admitted, United States District Courts: Eastern and Western Districts of Wisconsin, Northern District of Illinois, Northern District of Ohio, Northern District of Texas, District of Colorado, and Western District of New York
- ABF, The Fellows of the American Bar Foundation
- Admitted, State Bar of Wisconsin and Florida
- President's Council, Eastern District of Wisconsin Bar Association
- Member, Eastern District of Wisconsin, Court Liaison Committee
- Member, Milwaukee Bar Association
- Faculty Member, National Trial Advocacy College at the University of Virginia School of Law (2009 – 2018)
- Member, Former President, Serjeants' Inn
- Wisconsin Law Foundation Fellows
- Member, Eastern District of Wisconsin Federal Rules Committee
- Lawyers for Libraries (2013 – 2016)

Recognitions

- *Best Lawyers® in America* - Commercial Litigation, Litigation - Labor and Employment (2015-2020)
- Martindale-Hubbell – AV Preeminent® Attorney, 2019 Women Leaders in Law
- *Best Lawyers® in America*, Women in the Law (2017)
- Fellow, American Bar Foundation (2017-2018)
- Wisconsin Super Lawyer, *Super Lawyers Magazine* – Business Litigation (2005-2019)
- Fellow, Wisconsin Law Foundation (2015-2018)
- Martindale-Hubbell - Preeminent Women Lawyers (2014)
- Women in the Law, *Wisconsin Law Journal* (2013)
- Top 25 Women Attorneys in Wisconsin, Super Lawyers (2006, 2008, 2009, 2010, 2012, 2014, 2018, 2019)
- Super Lawyers Corporate Counsel Edition (2008-2010)

General Commercial Litigation

Breach of Joint Venture Agreement
Kathy, along with three of her partners, defended a manufacturer against a $50 million claim by its foreign partner for breach of a joint venture agreement. The representation was a significant success: after a week-long arbitration hearing before the International Chamber of Commerce, all claims against the client were dismissed and an award was entered in favor of the client on its counterclaim.

Financial - Banking Matters
Kathy represented a real estate developer in the interpretation of a pre-payment penalty clause in a permanent financing loan agreement.

Kathy successfully represented a troubled credit union in resolving various employment matters.

Commercial Real Estate

Development Associate Agreements
Kathy successfully represented a business owner in the interpretation and enforcement of business development restrictions.

Intellectual Property

Non-compete, Trade Secrets
She has experience representing numerous clients in disputes brought against former employees for breach of a non-compete agreements and violations of the trade secret statutes. Kathy successfully invoked the Computer Fraud and Abuse Act to prevent employees from disseminating confidential employer information, using this law separately or in conjunction with the enforcement of various employment contracts.

Kathy defended a Wisconsin manufacturer from claims of tortious interference with contract, misappropriation and theft of trade secrets in Texas state court.

Labor & Employment

Employment Litigation
Kathy successfully defended a Wisconsin company sued in federal court in federal court in Colorado when it hired a former employee of a competitor. Although the competitor alleged the Wisconsin company interfered with its contract with the former employee (containing restrictive covenants), a non-economic resolution was negotiated between the competitor and the former employee and the matter dismissed in its entirety.

Kathy defended a national company against claims of gender and disability discrimination in federal court in Texas.

Municipal - Governmental Representation
Kathy has represented school districts and the individual board members in suits involving allegations of discrimination, wrongful termination and violations of open meetings law.

- Super Lawyers Business Edition (formerly Corporate Counsel Edition) (2011 - 2015)
- Brennan Award, National Trial Advocacy College, University of Virginia School of Law (2010)

In addition, she counseled a municipality in a multi-million dollar suit involving the condemnation of a parcel of land for the redevelopment of the downtown district.

Trusts, Estates and Succession Planning

Trust and Estate Litigation
Kathy frequently represents individual and corporate personal representatives and trustees in litigation over the interpretation of trust and estate documents, a decedent's distribution elections, allegations of breach of trust and other breaches of fiduciary duty, and intra-beneficiary dispute.

Community Involvement

- Board Member, Milwaukee County Historical Society
- Member, Marquette University Law School Advisory Board
- Member, University of Wisconsin – Milwaukee's Graduate School Cabinet
- Board Member, Dorothy Inbusch Foundation
- Former Member, Shorewood Board of Appeals (2009 – 2018)
- Former Board Member, Next Act Theatre (2003 – 2016)

Published Articles/Presentations

- Nov. 10, 2017 – Presentation, "Representing Clients' Interests in Another State," Marquette University Law School
- Sept. 13, 2017 - Panel Member, "Federal Practice Tips" Eastern District of Wisconsin Bar Association
- Nov. 13, 2015 – Presentation, "Representing Clients' Interests in Another State," Marquette University Law School Traveling CLE
- March 20, 2013 – "The Hidden Minefield of eDiscovery." Wisconsin Department of Justice"
- February 17, 2011 - Panel Member - "Mediation in the Eastern District of Wisconsin: Advice from the Bench and the Bar."
- July 16, 2010 - Lecture, "The Legal Side of Business Relationships," presented at the Second Annual Conference at The Pilates Center, Boulder, CO
- November 18, 2009 - Lecture, "Nuts and Bolts of Litigation Holds," Electronic Discovery Conference, presented by the Eastern District of Wisconsin Bar Association
- June 4, 2009 - Presenter/Panel Member Minnesota State Bar Association
- November 7, 2008 - Lecture, "Use of Electronic Evidence in Litigation – A Mock Trial," presented to Wisconsin Department of Justice, Division of Legal Services
- November 6, 2008 - Lecture, "Law and Practice of Electronic Discovery," presented at the Milwaukee Bar Center
- April 24, 2008 - Lecture, "E-Discovery: What Is It? How Do You Get It? How Do You Preserve It?" presented to Wisconsin Department of Justice, Division of Legal Services
- June 21, 2007 - Lecture, "Beyond the Rules," State Bar CLE
- November 15, 2006 - Lecture, "Ignoring ESI Has A Price," presented to Davis & Kuelthau, s.c.
- May 14, 2004 - Lecture, "Metadata," Paralegal Association

- December 1, 2004 - Lecture, 2004 Midwest Law & Technology Conference & Expo, Midwest Tech Show
- “Just How Privileged Are We?” Wisconsin Lawyer, Vol. 64, No. 9
- “Living With Discrimination, “ Wisconsin Civil Trial Journal, Vol. 1, No. 1

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Practice Areas

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- Litigation

Industries

- Food and Beverage

Education

- J.D., Marquette University
- B.A., Carroll College

Recognitions

- *National Law Review's* Go-To Thought Leader - Employment Law (2019)

Laurie E. Meyer

Shareholder

As a member of Davis|Kuelthau's Labor and Employment practice, Laurie combines her experience in human resources management with over 20 years of employment law practice to provide creative, strategic counsel and defense to employers of every size on a full range of employment issues. This depth of experience allows her to provide legal assistance to employers in ways that minimize risk and avoid litigation and support long-term business goals. Laurie takes a practical approach to solving employment problems for her clients and achieving their goals in a cost-effective way.

Laurie has handled litigation matters involving Title VII, the Americans with Disabilities Act, the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Occupational Safety and Health Act, the Wisconsin Fair Employment Act, as well as other federal, state, and local laws and ordinances. She has also handled several unreasonable refusal to rehire worker's compensation claims and unemployment compensation claims.

Laurie regularly advises her clients on how labor and employment-related legislation and regulation may affect their businesses and assists clients in developing compliant handbooks, policies and practices. She also guides her clients in difficult employment matters, from employee performance reviews, terminations, reductions-in-force, wage-and-hour issues, and responding to discrimination and harassment complaints.

Laurie frequently lectures and conducts in-house management and supervisor training for human resource organizations and companies of all sizes in the areas of medical leave management, social media and electronic communication management, and illegal harassment.

Laurie is a member of the Defense Research Institute's (DRI) Employment and Labor Law Steering Committee, serves as its Publication Chair and chief editor of several of its publications. She is also a member of the State Bar of Wisconsin and the Society of Human Resources Management (SHRM).

Professional Activities

- Member, State Bar of Wisconsin
- Member, Defense Research Institute
    - Co-Chair, Publications Sub-Committee
    - Co-Editor, annual *For the Defense* Labor and Employment Law issue
    - Member, Employment Law Steering Committee
    - Legislative Liaison, Wisconsin
- Member, Metro-Milwaukee Chamber of Commerce
- Member, Wisconsin Defense Counsel
- Member, Milwaukee Bar Association
- Member and Former Chancellor, Barristers Club of Milwaukee
- Board Member, Economics Wisconsin
- Member, FaB Wisconsin
- Member, Waukesha County Business Alliance
- Guest Lecturer, UW-Milwaukee Lubar School of Business' Employment Law Course (2015)

Addressing Key Business Liability Risks in the Workplace and Among Your Workforce

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Identifying Key Liability Risks in the Workplace and Among Your Workforce

Sample Fact Pattern – One

A large grocery store chain provided an essential service and was able to remain open during the coronavirus pandemic. Store owners were relieved that the stores would be bringing in revenue while many other businesses were closed completely or operating on a limited scale. Management followed the CDC guidelines and required social distancing among its employees and customers, the use of masks for all who entered the premises, erected plexi-glass barriers at the check-out lines, cleaned all carts and baskets as well as premises and provided hand sanitizer in wall dispensers. The stores seemed to be weathering the COVID-19 storm well, both financially and health-wise. On Friday, however, the store confirmed 18 of its employees tested positive for COVID-19 and an additional 65 employees were sent home to quarantine. A subsequent investigation revealed several complaints by employees to their supervisors that management guidelines were not being followed or enforced.

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Sample Fact Pattern – Two

A mid-size "essential business" manufacturer has an employee who has been able to telework since March despite having to homeschool her elementary school aged children during the day. Her employer allowed her to accomplish her work at the time-of-day of her choice, so she generally did her work in the late afternoons and evenings because she home-schooled her kids in the morning. In early June, the employee notified her employer that her children's school year had ended but that their summer camp had been canceled, leaving her without childcare for the summer. The employee has requested expanded FMLA leave under the FFCRA. She has indicated that she would like to use her available PTO for the first two weeks of unpaid leave, and would then like to take the remaining ten weeks at two-thirds pay. She has provided documentation to show that the summer camp has been cancelled. Is the employee eligible for expanded FMLA leave under these circumstances?

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Sample Fact Pattern – Three

After several months of furloughing its employees, an employer has called its furloughed workers back to work. Several of those employees refuse to return to work. The employer asks each employee why they do not want to return, and gets varying answers:

- "I make more money on unemployment right now. I can't give that up."
- "I have a serious heart condition, and my doctor has recommended that I not return to work because she considers me immunocompromised."
- "I am scared of returning to work. I don't want to come back until there is a vaccine."