BELLNUNNALLY

NAVIGATING EMPLOYMENT LAWS AS AMERICA RETURNS TO WORK

As businesses start bringing employees back to work, their decisions on which employees to bring back to work, eliminating jobs, working conditions and requests for accommodations made by employees can give rise to claims under state and federal employment laws. Questions will arise, such as "How do I manage older workers who are vulnerable to the virus?"; "How does the pandemic impact my leave of absence policy?"; and "Are virus sufferers considered 'disabled' under the law?" In answering these questions, the principal laws employers need to consider are the Families First Coronavirus Response Act (FFCRA); the Family and Medical Leave Act (FMLA); the Americans with Disabilities Act (ADA) and its state equivalent under the Texas Commission on Human Rights Act (TCHRA); the Age Discrimination in Employment Act (ADEA) and its TCHRA equivalent; Title VII of the Civil Rights Act of 1964 and its TCHRA counterpart; the Fair Labor Standards Act (FLSA); the National Labor Relations Act (NLRA); and Texas common law that prevents an employer from firing an employee for refusal to commit a criminal act.

FAMILY AND MEDICAL LEAVES AND SICK LEAVE PAY

The FFCRA includes the Emergency Family Medical Leave Act (EFMLA) and the Emergency Paid Sick Leave Act (EPSLA). The EFMLA expanded the application of the FMLA to employees who are not able to work or telework due to the need to care for a child under 18 if the child's school or childcare is closed because of the COVID-19 public health emergency. The rights of the employee and the obligations of the employer are set out in detail in the March 19 article, *What the Families First Coronavirus Response Act Means to Your Business*, but briefly, the employee is entitled to 12 weeks of leave, 10 of which are paid at two-thirds, and to reinstatement to his/her job at the end of the leave.

Additionally, an employee who contracts COVID-19 or who has a child, spouse or parent with COVID-19 may qualify for traditional FMLA leave if the virus constitutes a serious health condition, which will be the case if the worker is symptomatic. An employer cannot interfere with or deny the exercise of rights under the FMLA or EFMLA and cannot discharge an employee because the employee has asserted rights under the FMLA and EFMLA. An employer that violates the EFMLA or FMLA is liable for back pay, liquidated or double damages and attorneys' fees and must reinstate the employee to his/her job. Under the current Department of Labor Guidelines, the EFMLA is considered part of the FMLA; therefore, an employee cannot take the full allocation of leave time under both laws. For example, if a worker takes six weeks of leave under the EFMLA, he/she will only have six weeks of leave remaining under the FMLA.

The EPSLA provides up to 80 hours of paid sick leave for full-time employees and the two-week equivalent for part-time employees who miss work because of being quarantined or are caring for a person who is quarantined on account of the virus, are experiencing COVID-19 symptoms and seeking medical attention, or are caring for a child whose school or child care is closed because of the virus. As set out more fully in

the March 19 article, the amount of sick leave pay for employees depends on their eligibility for the leave. Failure to pay sick leave is governed by the FLSA, which allows an employee to recover unpaid wages, liquidated or double damages and attorneys' fees. Additionally, the FLSA has broad anti-retaliation provisions that prohibit employers from firing employees who have filed complaints regarding violations of the FLSA. Courts have interpreted the filing of a complaint to include verbal complaints, which could include complaints to a manager that the employee was not paid all or part of the sick leave pay to which the employee was entitled.

Therefore, an employer must demonstrate that its decisions for not taking back an employee or eliminating the job of an employee who has taken leave under the EFMLA or FMLA, drawn sick leave pay under the EPSLA or exercised other rights under the EFMLA, FMLA or EPSLA are based upon legitimate non-discriminatory reasons.

RETURN TO WORK AND DISABILITY CLAIMS

Based on current ADA guidelines, it is unclear, given the (normally) temporary nature of the disease, whether COVID-19 would qualify as a condition that is a "disability" under the ADA. However, even in the absence of COVID-19 being an actual disability, employees can still be "regarded as" disabled and gain protection under the ADA. Employers will also receive requests for accommodation under the ADA and TCHRA from employees who have a medical condition that makes them more susceptible to COVID-19 than other employees. These conditions could include diabetes, heart disease and auto-immune disorders, which almost certainly qualify as disabilities under the ADA. Accommodation requests are likely to include things like working from home or modifying the employee's workspace to make it less likely that the employee will contract the virus. If an employer denies a request for an accommodation, it needs to have a solid factual basis for why the requested accommodation is not reasonable or would cause an undue burden on the business. Employers should only deny a request for an accommodation after engaging in the interactive process between the employer and employee required under the ADA and the TCHRA to determine if there is a reasonable accommodation that will permit the employee to perform the essential functions of the job without causing an undue hardship to the employer. The EEOC has not yet issued guidance on the extent to which COVID-19 represents a "disability," but we expect that soon. In the meantime, employers should err on the side of treating it as a disability, particularly if an employee is displaying symptoms.

Additionally, an employer cannot make employment decisions based upon disabilities or perceived disabilities. For example, if an employer knows an employee has a medical condition that may make the employee more susceptible to COVID-19, the employer cannot make a decision to eliminate the employee's job or not bring that employee back to work based on the employee's disability or perceived disability.

Remedies available to a plaintiff in an action for disability discrimination include back pay, front pay or reinstatement to the job, punitive damages and attorneys' fees.

AGE, RACE, GENDER AND NATIONAL ORIGIN ISSUES IN RETURN TO WORK

An employer cannot make decisions to not bring back employees or to eliminate jobs based on protected categories of employees under state and federal employment laws, including the ADEA, Title VII and the TCHRA. This would include not bringing back employees aged 60 and over because they are generally more at risk than others if they contract the virus. Likewise, decisions cannot be made on the basis of national origin or race, such as not bringing back to work employees of Chinese or Asian descent or, alternatively, eliminating their jobs. Similarly, employers cannot base employment decisions on gender, such as declining to bring back women based on an assumption that they have too many childcare responsibilities or will come back only to then request leave under the EFMLA.

Successful plaintiffs can recover back pay, front pay, reinstatement or liquidated damages up to the amount of back pay and attorneys' fees for age discrimination and back pay, front pay, reinstatement, punitive damages, damages for emotional distress and attorneys' fees for race, gender and national origin discrimination.

FAIR LABOR STANDARDS ACT AND ITS IMPACT ON ALTERNATIVE WORK ARRANGEMENTS DURING THE PANDEMIC

One hallmark of the pandemic involves employees working remotely, away from the workplace, their managers and timekeeping mechanisms. If hourly employees work from home, employers must take steps to assure that those employees accurately track all of their time worked and pay overtime for time worked over 40 hours in a week, as well as provide for meal and rest periods. Employers need to make sure their records are accurate for time already incurred and to be incurred by hourly employees working from home. Businesses should implement timekeeping measures via computer log-in and log-out times, and management should regularly converse with their remote workers about their projects, time spent on those projects and worker questions about proper recording of work time.

Additionally, if an hourly employee has been working from home and has personally incurred expenses in setting up a home office in order to perform his/her job, the employee could have a claim under the FLSA if the employee's cost of setting up the office effectively takes his/her hourly rate under the minimum wage. If an employer receives a complaint from an hourly employee that the cost lowered her hourly rate below the minimum wage or requests reimbursement of the cost, the employer needs to carefully evaluate the complaint.

Depending on the industry, some businesses will begin mandatory employee temperature checks before entering the worksite and may require employees to dress in personal protective equipment, or PPE. Whether this employee time is "on the clock" or "off the clock" can vary by state, and the federal government has yet to issue guidance on this particular COVID-19 issue. However, the FLSA generally requires that employees must be paid for: (1) their time performing their "principal" work activity; and (2) any time that is an "integral and indispensable part" of their principal work activity.

Businesses should evaluate whether they consider certain COVID-19 safety measures to fall in these categories and should continue monitoring guidance from the Department of Labor on this issue.

The FLSA allows successful plaintiffs to recover unpaid wages, liquidated or double damages and attorneys' fees.

THE NATIONAL LABOR RELATIONS ACT AND CONDITIONS IN THE WORKPLACE

The NLRA protects employees, including those of non-unionized employers, for engaging in activities that address working conditions, including unsafe conditions arising out COVID-19. If employees make complaints about working conditions, real or perceived, in the workplace or outside of it (like on social media), the conduct may likely be protected under the NLRA. While there is no private cause of action for an employee who is terminated or disciplined for such activity, the National Labor Relations Board can levy substantial fines against an employer and order reinstatement of a terminated employee.

REFUSAL TO COMMIT A CRIME

Employers may have an employee who refuses to return to work because the employee maintains doing so would violate executive orders of the Texas governor or Texas counties with respect to COVID-19. Pursuant to Section 418.173 of the Texas Government Code, violation of such an order carries criminal penalties, and counties and cities have issued COVID-19 orders or passed ordinances relating to activities not allowed on account of the virus that also carry criminal penalties. An at-will employee in Texas cannot be terminated for refusing an employer's direction to commit a crime. Employers should observe the restrictions in the executive orders of the governor and counties and in city ordinances to make sure they are not asking their employees to do something for which there are criminal penalties. If an employer terminates an employee for refusing to commit an act in violation of those orders or ordinances, the employee could sue the employer for wrongful termination. If successful, the employee can recover lost past and future wages and benefits and damages for mental anguish. If an employer is not sure if its request would violate an order or ordinance, it should seek the advice of someone with expertise in this area before it acts because the correct decision can allow the employer to concentrate on reconnecting with and serving its customers instead of dealing with the distraction and expense of defending a lawsuit.

HOW TO MINIMIZE YOUR RISK

While return to work issues in the wake of COVID-19 certainly have challenges, the most important thing employers can do is have a plan, act consistently and partner with human resources personnel or legal counsel in navigating these unchartered waters.

If you have any questions or would like to discuss further, please contact our Labor, Employment and Benefits team.