

Anticipated COVID-19 Employment Related Litigation

Presented by:

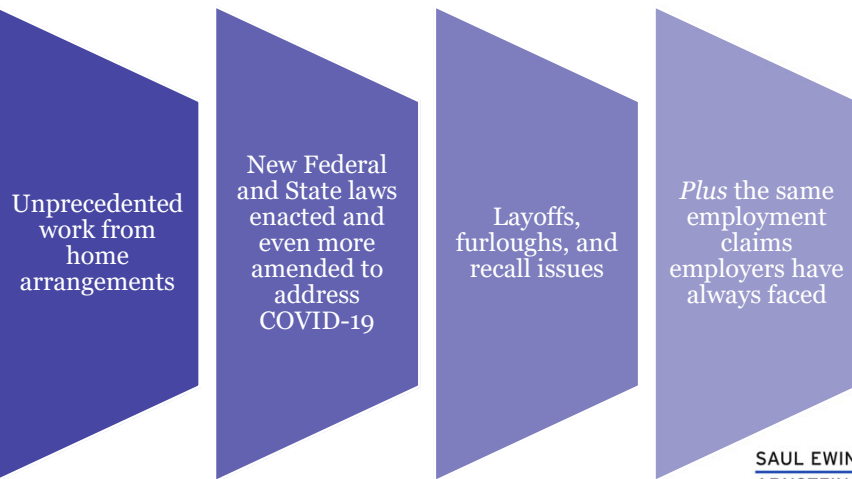
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Saul Ewing Arnstein & Lehr LLP
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Issues Arising From:



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Employment Litigation Risk Areas

- Discrimination
 - Pretext
- Reductions-in-Force
- Furloughs
- Recall to Work
- Accommodations
- Leave
- FLSA
- Whistleblower
- Retaliation
- FFCRA
- WARN
- “Take Home”
 - Exposing Family Members

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LITIGATION TRENDS

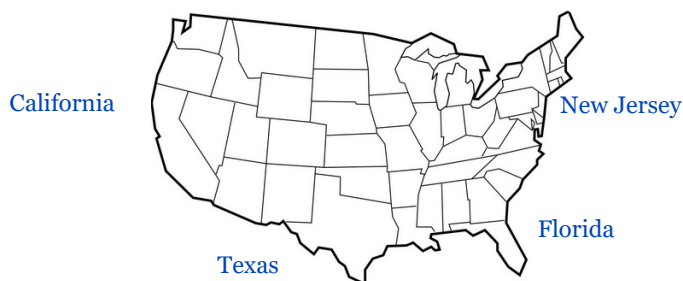


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Data Reviewed

- Federal court filings between March 1, 2020 and October 15, 2020
 - 800+ new lawsuits filed
- States with the most filings



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Common Case Types

- Accommodations/Leave
 - Requests for remote work
- Whistleblower/Retaliation
- Discrimination
 - Pretext
 - Reductions-in-Force
 - Furloughs
 - Recalls

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EMPLOYMENT DISCRIMINATION

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Potential Litigation Risk Areas

- Reductions-in-Force/Furloughs
 - Handling the process both in layoff and rehire
- Disparate Impact Claims
- Allegations of employers using COVID-19 as pretext
- Discrimination
 - Disability
 - Exposure
 - Positive COVID-19 test
 - Accommodation issues
 - Age
 - Pregnancy

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Discrimination Case Examples

New Jersey lawsuit
alleging pregnancy
discrimination

California lawsuit
alleging religious
discrimination

New Jersey lawsuit
alleging race
discrimination
related to furlough/
termination

Michigan lawsuit
alleging age
discrimination

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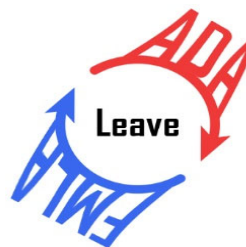
What Can Employers Do To Mitigate Risk?

- Conduct impact analysis when implementing furloughs and reductions-in-force
- Create a return to work plan that is applied consistently to all employees
- Use objective criteria for furloughs, reductions-in-force, and recalls
- Document a business case in all decisions
- Review existing policies and consider their application in light of COVID-19

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FMLA AND ADA: LEAVE AND ACCOMMODATIONS

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Risk Areas To Consider

- Vulnerable employees
 - Compromised immune systems: does the employee have a disability or serious health condition?
- Caring for a family member
 - Is the employee needed “to care for?”
- Quarantine
 - Exposure v. Positive Test
 - Does the employee need FMLA?
- Accommodation issues
 - Can the employee work remotely?

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FMLA and ADA Case Examples

E.D.Pa. lawsuit alleging failure to offer FMLA

California lawsuit alleging failure to accommodate due to pregnancy

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What Can Employers Do?

- Develop clear safety protocols for employees returning to the workplace
- Train managers to identify risks, respond to requests, proper confidential information handling, and to avoid retaliation
- Be practical when considering accommodation requests

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FLSA: WAGE AND HOUR



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FLSA – Employer Obligations

- Obligations under the FLSA continue when an employee is required to work from home, the same as if they were present at their work site.
- **Salaried exempt employees** - must be paid for any week they perform work (including telework).
- **Hourly non-exempt employees** - must be paid for each hour worked, including telework.

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FLSA in A “Non-Traditional” Working Environment - Risks

- Non-Exempt - Accurate Time Keeping Practices
 - Remote employees recording all time worked
 - Breaks – normal policies continue to apply
- Exempt - Did workers’ duties change?
 - For example, a worker who used to be a full-time manager now performing a variety of different non-managerial jobs because there are less people.
 - Does this worker still qualify as exempt?

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FLSA in A “Non-Traditional” Working Environment - Risks

- Off-the-Clock Work
 - Paying for integral preliminary and postliminary activities related to COVID-19 safety procedures
 - Emails and calls
 - Danger of always being “on call” can lead to compensable time
 - After a non-exempt “clocks out,” you should not be emailing or calling them with work
 - Danger in smartphone access
- Expense Reimbursement
 - Internet usage
 - Equipment (mailing, printer)



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What Can Employers Do?

Communicate to employees clear work from home expectations

Understand how you are tracking time

If salaried employees are working “non-traditional” hours (for example to care for children during the day), communicate to them not to expect hourly employees to always be available.

Each time a new/different duty is assign to a salaried employee, determine if it continues to fall under their exemption reason.

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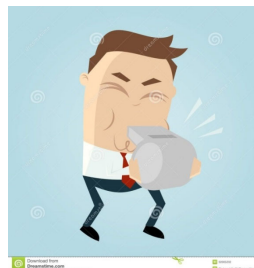
David Evans III et al. v. Thomas J. Dart et al., (N.D.Ill. May 7, 2020).

- Plaintiffs allege that the county failed to pay them regular or overtime wages for the time they spent at the beginning and end of their shifts sanitizing themselves, their uniforms, and their personal protective equipment, all of which was required in response to the COVID-19 pandemic.
- The plaintiffs allege that these activities, which were uncompensated, took approximately 20-30 minutes each shift.

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WHISTLEBLOWER AND RETALIATION

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Potential Litigation Risks

- Objecting to Unsafe Working Conditions
- Exposure at Work
 - Customer facing
 - Traveling
- Failure to Implement Safety Policies and Procedures
- Failure to Follow Safety Policies and Procedures
- Failure to Train on Safety Policies and Procedures
- Failure to Provide PPE
- Failure to Reimburse for PPE

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Whistleblower - Statutory Claim

- Example New Jersey
 - It is unlawful for an employer to take any adverse action against an employee who discloses, objects to, or refuses to participate in any activity, policy or practice which the **employee reasonably believes**
 - (1) is in violation of a law, or a rule or regulation promulgated pursuant to law,
 - (2) is fraudulent or criminal, or
 - (3) **is incompatible with a clear mandate of public policy concerning the public health**, safety or welfare or protection of the environment. N.J.S.A. 34:19-3.

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Whistleblower – Common Law Claim

- Example Maryland
 - Maryland courts have found a violation of a clear mandate of public policy only under very limited circumstances: **where an employee has been fired for refusing to violate the law** or the legal rights of a third party, and **where an employee has been terminated for exercising a specific legal right or duty.**” *King v. Marriott International, Inc.*, 866 A.2d 895, 901, 160 Md. App. 689 (2005)

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What Can Employers Do?

Implement Safety Policies and Procedures in accordance with state and federal laws and guidance AND

Actually follow those procedures!

Training, training, and more training

Consider designating a point person for COVID-19 issues

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Duffy v. Berkeley Heights Dental Group PA (Union County, New Jersey)

- Plaintiff claims she strenuously objected to and questioned her employer's compliance with the reopening requirements.
- In response to these concerns she alleges that "management was hostile," and failed to address her concerns.
- In response to a litany of specific concerns, the plaintiff alleges that a member of management responded: "we've been closed for two months, you're going to cost me money."
- She alleges she was terminated for her complaints.
- Plaintiff brings claims under the New Jersey Conscientious Employee Protection Act and public policy.

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***Montes v. Borinquen Health Care Center,
Inc. (Miami-Dade County, Florida)***

- Plaintiff worked as a licensed practical nurse for the defendant. And complained to his supervisor about allegedly inadequate PPE and lack of social distancing.
- Plaintiff alleges that after his complaints, the defendant “harassed” him by “complicating his work,” by, for instance, not disclosing dates and start times by which he was supposed to report for work.
- Plaintiff alleges he was ultimately terminated “within months” of complaining about inadequate PPE and social distancing.
- Plaintiff alleges his termination was unlawful retaliation for his complaints pursuant to the Florida Whistleblower Act.

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**FAMILIES FIRST
CORONAVIRUS RESPONSE
ACT (FFCRA)**

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Enforcement of the EMFLA

- Employers with 50-500 employees are subject to enforcement by the Department of Labor, or through a private right of action
- Employers with 1-49 employees are subject to enforcement by the Department of Labor, only
 - The FMLA does not traditionally apply to employers with less than 50 employees
- Damages available are those under the “standard” FMLA, including, depending on the facts of the case:
 - Back-pay
 - Front-pay
 - Liquidated damages equal to amount of back-pay + front-pay
 - Emotional distress damages
 - Punitive damages

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Enforcement of the EPSLA

- All covered employers are subject to enforcement by the Department of Labor, or through a private right of action
- Enforced under mechanisms of the FLSA
- Damages under the FLSA include:
 - The amount of unpaid wages,
 - Equal amount of liquidated damages, and
 - Attorney’s fees.
- FLSA claims are typically brought as collective actions
 - Similar to class-actions but prospective plaintiffs must “opt-in.”

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Retaliation For WFH/No Summer Child Care

- Plaintiff was allowed to WFH to assist with child care when her daughter's school was cancelled in March.
- When her summer child care options were also canceled, she requested leave under the FFCRA, EPSLA and EFMLEA.
- Her employer did not respond to her request, but terminated her.
- She filed a lawsuit for EFMLEA interference, EFMLEA retaliatory discharge, EPSLA/FLSA minimum wage violations, EPSLA/FLSA retaliation, breach of contract, and promissory estoppel.
 - ***Atwood v. JCF Residences Management Company, LLC, et al. (Middle District of Tennessee)***

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Wrongful Termination/FMLA Violation

- Plaintiff advised her employer that as a result of the COVID-19 pandemic, she anticipated having child care issues and would likely need to apply for FMLA leave.
- On March 27, she took a vacation day and while on vacation, her supervisor texted her and asked if she planned on taking FMLA leave.
- Plaintiff did not respond to the text message, but returned to work the following day.
- Plaintiff alleges that she was terminated the next day.
- She claims that the person who terminated her told her that **it was better** for the plaintiff to **collect unemployment** than to take FMLA leave.
- The plaintiff brings claims for wrongful termination, violation of the FMLA, and a request for equitable relief.
 - ***Rosario v. Barclay Brand Corporation, et al. (Middlesex County, New Jersey)***

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WARN ACT

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WARN Act

- Generally, employers must provide employees with **60 days' notice** before a **triggering event**
- Implicated because it covers mass-layoffs/workforce reductions
- Applies to employers with 100+ employees
- Penalties/Claims
 - Private right of action
 - Wages and other benefits EE would have earned during notice period
 - Civil penalty of up to \$500 for each day the ER violated the notice requirements

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Mini-WARN (State)

- Many states have enacted their own “mini-WARN” Act
- Some have been modified with COVID-19 related exceptions
- Make sure to check state law

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“Unforeseeable Business Circumstance”

Exception to notice requirement

- (b) The “unforeseeable business circumstances” exception under section 3(b)(2)(A) of WARN applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.
- the circumstance is caused by some **sudden, dramatic, and unexpected action or condition outside the employer's control.**

20 CFR § 639.9(b)

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Litigation

Class action under WARN Act for failure to timely provide proper written notice after being subjected to a mass layoff or plant closing due to COVID-19.

- *Olga Calero, et al Fanatics Inc v. Fanatics Retail Group Fulfillment LLC* (Middle District of Florida-Tampa) (September 9, 2020)
- *Brazier et al v. Real Hospitality Group, LLC et al.*, SDNY (October 3, 2020)

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For more information on COVID-19, please visit
Saul Ewing Arnstein & Lehr's COVID-19 resource
page:

<https://www.saul.com/COVID-19-resource-page>

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Thank You!



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