BusinessManagement DAILY

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Protecting your business from COVID lawsuit liability

In addition to disrupting how and where employees work, COVID has created a minefield of potential employer lawsuit liability. State and federal laws require businesses to provide hazard-free workplaces for their employees and safe spaces for customers. The coronavirus poses a threat to both. Business liability may come from poor workplace design, lack of cleanliness, or an infectious employee. Employees may file COVID-related lawsuits under the Americans With Disabilities Act (ADA), Family and Medical Leave Act (FMLA), or Workers Compensation (WC).

The regulatory future is at best a mixed bag. The Biden Administration has argued for an Emergency Temporary Standard (ETS) for COVID-19. The standard would create a list of steps employers must take to make their workplaces safe. The Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) will enforce the standard. If history is any guide, the Biden DOL will hire more inspectors to police worksites. Upon taking office, the Obama Administration dramatically expanded DOL's inspection capability.

With a 50-50 Senate and Democrats controlling a small House majority, new regulations may be tempered somewhat. Liability limits to protect business from COVID-related lawsuits remain a legislative bargaining chip that may be cashed in in exchange for a larger stimulus package. At this point, there's no guarantee that *any* federal liability protection will pass in the near future. That means employers must do everything possible to contain the virus and stop its spread to limit liability.

Some states have already enacted liability limitations: Alabama, Arkansas, Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Tennessee, Utah, and Wyoming. These states have either passed legislation to limit liability or their governors have done so by executive order. The following states are considering COVID liability legislation: Alabama, Arizona, Delaware, Illinois, Minnesota, New Jersey, New York, and South Carolina.

Legal liability follows the virus

OSHA issued a number of COVID-related workplace standards during 2020. Largely, those standards deferred to guidance from the Centers for Disease Control (CDC). The ETS, if adopted, would be the new standard for employers. Four states; California, Michigan, Oregon, and Virginia, have issued their own standards. Pulling from these state standards, employers can expect the ETS to require employers to:

- Conduct a workplace exposure assessment;
- Develop a written COVID-19 preparedness and response plan (which includes requirements for social distancing, masks, worker notice, and workplace sanitizing);
- Establish guidelines for the use of personal protective equipment and/or engineering controls (when social distancing is not feasible);
- Implement employee, contractor, and visitor screening procedures
- Conduct employee training regarding safe work procedures; and
- Submit reports to OSHA of positive exposures.

7600 Leesburg Pike, Suite 300, Falls Church, VA 22043-2004 (800) 543-2002

Failure to follow the ETS will create several forms of employer liability. Most immediately, OSHA can issue citations for failure to meet the standards. Employees who complain about employer failures to comply will have whistleblower protections.

For customers, their relatives, and employee relatives who contract the virus, the ETS provides a roadmap for their attorneys. Most likely, the Biden Administration's COVID response program will include enhanced contact tracing. This data could help those who can trace their infection to a business workplace make their case in court.

Workers Compensation is an exclusive remedy until it isn't

WC is the exclusive remedy for employees who get sick in the workplace. But WC laws have one loophole that allows employees to sue in court. Employees who demonstrate the employers showed gross negligence in failing to provide a safe workplace can win in court. WC policies do not cover losses resulting from the employer's gross negligence. This could open some employers up to liability for COVID-related lawsuits if they fail to take adequate safety measures.

Again, the ETS, once issued, provides a roadmap. Employers who show they have followed ETS requirements are unlikely to be taken to court. In the meantime, employers should follow all OSHA and CDC COVID guidelines.

COVID lawsuit liability, the ADA, & GINA

The Equal Employment Opportunity Commission (EEOC) issued COVID-related employer guidance throughout 2020. The key highlights are that employers may ask employees whether they have or are experiencing COVID symptoms before allowing them in the workplace. They may ask if the employee has received a positive COVID diagnosis. Employers can take an employee's body temperature upon arriving at work. Employers can require employees with COVID symptoms to stay home. None of these actions violates the ADA.

Employers, however, can incur liability if they do not follow some key ADA provisions. For example, any medical information gleaned from the employee must be kept confidential. This includes any information about a relative's health or health history.

For example, an employee tells the employer she may have been exposed to COVID. In explaining her reasons for wishing to quarantine, she reveals that her mother is diabetic and is high risk. While the employer may record that information, it must be kept confidential. Even though the mother is not an employee, the Genetic Information Nondiscrimination Act (GINA) enters in the discussion. The Employer may not reveal this confidential information. Further, it may not discriminate against the employee based on her family history of diabetes.

Employers must maintain a confidential folder for all medical information obtained. Restrict access to any confidential information to employees with a legitimate right to know. Those employees must be trained not to reveal confidential information to anyone lacking access privileges. The same rules apply for confidential information obtained under the ADA, GINA, and the FMLA

COVID vaccinations, the ADA, and lawsuit liability

In its most recent guidance, the EEOC explained the parameters for employer requests for information pertaining to an employee's COVID vaccine status. In its questions, the EEOC provided the following:

Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry?

No. There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related. Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity." If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

FMLA and FFCRA

As of December 31, 2020, employers are no longer required to offer Emergency Paid Sick Leave (EPSL) or Emergency Family and Medical Leave. However, the tax credits available for providing it do not expire until March 31, 2021. The extension does not provide longer periods of EPSL or paid FMLA leave. However, some employees may be eligible for more FMLA leave if they are in a new calendar year.

The Families First Coronavirus Response Act (FFCRA) created both the EPSL and paid FMLA leave. It expanded the reasons employees could take leave. Most notably, employees could take leave to get COVID-testing or care for children whose school or daycare facility was closed. Employers may continue to provide paid leave for FFCRA mandated reasons voluntarily and be reimbursed through federal tax credits.

Paid leave or not, employers should still keep any employee awaiting a COVID test result at home. Similarly, any potentially exposed worker should be kept away from co-workers. Employers should revise their leave policies to state whether paid leave will continue. The policy should state how to determine available leave and how much will be paid. Finally, implement these policies fairly. Any favoritism shown in enforcing the policy could leave the employer open to discrimination charges.

Preparing for the future

The Biden Administration has promised further stimulus. Whether that package will extend or expand FFCRA-created leave remains to be seen. What liability limitations the legislation will contain, if any, are a matter of conjecture also.

Now is a good time to examine leave and anti-discrimination policies to ensure they comply with existing law. It is also a good time to examine workplace safety protocols especially related to COVID to protect yourself from lawsuit liability. As the country attempts to stem COVID's growth, workplaces will be under greater scrutiny. Preparation now can save expense later.

Additional Resource: As COVID vaccinations begin to roll out, employers have additional legal considerations to make.