Avoiding Labor and Employment Law Claims in the Wake of the COVID-19 Shutdown

By Charles H. Kaplan, Adam W. Perry, and Glen P. Doherty

As workplaces reopen, accountants and their clients and employers must be aware of the potential labor and employment law claims they may face related to the COVID-19 shutdown and the current gradual return to work in New York State and around the nation. Management needs to take action now to reduce the likelihood of such workplace law claims and increase the chances that management will prevail in responding to such claims if they do arise. The authors have identified several key legal areas where accountants, clients, and employers should take notice.

Wage and Hour Claims

Many employers have not kept proper records for employees working remotely who are non-exempt under the federal Fair Labor Standards Act (FLSA), the New York Labor Law, and other state wage and hour laws. In general in New York, workers who are not exempt executive, administrative, or professional employees must receive overtime pay for working more than 40 hours in a week. Without adequate records, management will have difficulty defending a worker's claim that she is owed overtime pay because she worked more than 40 hours in a week. In addition, where such workers have worked intermittent hours during the day (e.g., four hours in the morning, no work in the afternoon, and then four hours in the evening), laws in states such as New York may require additional spread-of-hours pay. Laws in New York and other states require that workers receive meal breaks, which an employee working from home may not have taken. In addition, management may be required to reimburse employees for equipment and materials used at home to perform job duties. Furthermore, in workplaces where employees must wear personal protective equipment (PPE) due to COVID-19, employers may need to pay workers for such time donning and doffing PPE at the beginning and end of a shift, depending upon various factors. In sum, employers need to make sure that they have complied fully with these wage and hour law requirements.

In addition to facing wage and hour claims based on failing to pay workers properly, employers may need to defend actions alleging that management incorrectly misclassified workers as exempt from federal and state wage and hour laws. As noted earlier, executive, administrative, and professional employees who are paid on a salaried basis are generally exempt from the overtime pay provisions of the wage and hour laws. However, many employers incorrectly classify workers as holding such

exempt positions. For example, under the federal FLSA, there are minimum weekly wage requirements for exempt employees. Under the New York Labor Law, however, the minimum threshold amounts for the weekly salaries of exempt executive and administrative employees are significantly higher than those under federal law. In addition, management may face claims that the employer misclassified workers as independent contractors rather than employees.

Employment Discrimination Claims and Family Leave Claims

Employers that laid off some of their workers may face claims under federal and state laws that they discriminated against certain classes of employees when determining who would remain and who would be separated. A similar issue will arise as management returns employees to their jobs. Employees who are not returned in the first wave of reinstatements and employees who are not returned at all may claim that management discriminated against them because of their age, sex, race, national origin, religion or some other protected reason. Employers need to make sure that layoffs and returns to work do not disproportionally affect

employees in any protected class. Employers have a right to reduce their workforces in time of economic adversity. However, management must make sure that such reductions in force do not discriminatorily affect employees in any protected classes, and are not based on any discriminatory criteria; for example, an employer cannot select a worker for layoff because the employer believed that the employee was planning to retire soon.

Another issue concerning the employment discrimination laws is the obligation of employers to reasonably accommodate the disabilities of employees. Older workers and employees with certain health conditions may be reluctant to return to the workplace, particularly if they need to use public transportation to travel to their jobs. Under federal, state, and local disability discrimination laws, management will need to determine whether an employee's concerns are based on a disability. The employer will then need to engage in an interactive process with the employee (documented in writing) concerning reasonably accommodating the disability if such accommodation will not be an undue hardship to the employer. Because of recent amendments to the New York State Human Rights Law and the New York City Human Rights Law, disabled employees have greater rights under these state and local statutes than they have under the federal Americans with Disabilities Act.

Furthermore, employees with children at home (because schools and daycare centers are closed) who do not receive the leave to which they believe they are entitled may make claims under federal and state family leave laws, as well as under statutes prohibiting employment discrimination on the basis of marital or familial status.

In addition, employees of Asian national origin may face discrimination on that basis from fellow employees who blame China for the COVID-19 pandemic. Employers need to be alert for, and if necessary take steps to stop, workplace harassment against Asian employees.

Finally, employees are returning to work in the midst of national turmoil over the relationship of the police to communities of color. Employers need to be aware of, and if necessary halt, any workplace harassment based on race that arises from the heightened tensions over these issues.

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Federal and State WARN Act Claims

Many employers that laid workers off as the economy shut down did not follow the requirements of the federal Worker Adjustment and Retraining Notification (WARN) Act, and of state mini-WARN Acts in such jurisdictions as New York, New Jersey, and California. Because the New York State WARN Act applies to employers that are smaller than those covered by the federal WARN Act, some employers may have correctly concluded that they were not subject to the federal law, but may have not realized that they were bound by the New York statute. Furthermore, to the extent that employers do not return to work employees whom they believed would only be laid off temporarily, such continued layoffs may trigger new obligations under federal and state WARN statutes, in particular where the layoff extends for more than six months. If management does not meet these additional statutory notice requirements by distributing late WARN notices or supplemental WARN notices, an employer may face claims by laid-off workers under these laws.

Workplace Safety Claims

Employees have already begun to file wrongful death actions against employers based on exposure to COVID-19 in the workplace. Such actions seek to avoid the Workers' Compensation bar on employee claims against employers for workplace injuries by alleging intentional, willful, or wanton conduct by the employer. In addition, other workers have filed workplace safety claims against employers using a public nuisance theory which avoids the Workers' Compensation bar because such actions seek only injunctive relief—requiring management to correct the allegedly unsafe conditions—rather than damages. In addition, employees may address their workplace safety concerns to the federal Occupational Safety and Health Administration (OSHA), which can then cite an employer for safety violations. For all of these reasons, it is crucial that management follow New York State's reopening guidelines (including by developing a reopening plan that meets New York requirements) and that employers also follow the guidance

published by the federal Centers for Disease Control and Prevention.

Employee Privacy Claims

Employers must remember their obligations under HIPAA (if the employer is a healthcare provider or health plan covered by HIPAA) and other statutes (such as the Americans with Disabilities Act), to safeguard confidential employee medical information. With regard to employees returning to work, management will also need, to the extent possible, to keep confidential employee health data that employees share with their employers. Management should make every effort to protect the medical confidentiality of an individual employee, while still providing sufficient information to other employees in the workplace for them to take appropriate actions to protect their health. In many cases, this can be done without sharing the name of the person who was infected by COVID-19.

In addition, to the extent that employers are engaging in the electronic monitoring of workers inside and outside the workplace, certain state privacy laws may serve as grounds for employee claims if employers misuse or disclose such data. Employers in unionized workplaces may need to bargain in good faith over such employee monitoring to the extent that it is a change in the terms or conditions of employment.

Enforcing Restrictive Covenants

Courts in New York and other states have often been loath to enforce restrictive covenants that are overbroad, such as prohibitions on soliciting customers with whom an employee had contact before her employment or customers with whom an employee had minimal interactions. As the COVID-19 pandemic continues, it is likely that courts may decline to enforce covenants that they would have deemed reasonable six months ago. Where a laid-off employee's ability to find any employment will now be in question, courts may be less welcoming to employers' arguments in restrictive covenant actions.

Courts in New York and most other states (California is a notable exception) will enforce a properly drafted restrictive covenant. However, in order for a court to issue an injunction that prohibits a former employee from working for a competitor, the court will require that the employer demonstrate the following:

- That the employer has substantial likelihood of success on the merits;
- That the remedy available to the employer at law—damages—is inadequate, and the employer will suffer irreparable injury if the court does not enjoin the conduct of the employee;
- That, under the circumstances, the court's enforcement of the restrictive covenant at issue would not violate public policy; and
- That when the court balances the equities between the employer and the employee, such balance is in favor of the employer.

After the massive layoffs and continuing business failures caused by COVID-19, it appears likely that courts in New York and other states will more readily find public policy problems with enforcing restrictive covenants. Furthermore, courts will also more likely find that the balance of the equities favors the employee where a force beyond the employee's control—the coronavirus—resulted in the employee's dismissal. In addition, to the extent that a court finds that an employer's layoff of an employee or reduction of an employee's salary due to the COVID-19 pandemic was a material breach of the employment agreement, the court may rule that such breach renders the restrictive covenant unenforceable.

In sum, in addition to the wide range of workplace law claims that employers may face as their workplaces reopen, management will also encounter more difficulties when seeking to enforce restrictive covenants. The laws in this, and all of the other areas discussed above, vary considerably from state to state. Any employers should ensure that they have consulted with counsel knowledgeable and current in the applicable state law before it takes any action. Employers, guided by seasoned labor and employment law counsel, need to act now to address such issues and to reduce the risk of such claims.■

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