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PERSPECTIVE

Reopening risks for employers: avoiding post-COVID legal infections

By Todd R. Wulffson

Now that California is allowing counties to move to Stage Two of re-opening (Stage Four is the removal of all restrictions), employers are confronted with a myriad of logistical and other decisions which will impact the profitability of the business. Although it certainly should not be the primary consideration, minimizing risk from potential lawsuits needs to be an important part of the reopening calculus, particularly given the crush of often unique legal issues confronting California businesses.

Discrimination Claims Relating to Rehiring

Unless an employer plans to return all furloughed (or laid off) employees to work at the same time, it will need to develop and use an objective, nondiscriminatory and legitimate rehiring plan. The most important law for California employers to consider on this issue is the Fair Employment and Housing Act. The FEHA makes it unlawful to discriminate against an individual with respect to any employment decision based on a protected characteristic, which can include the age, race, religion, gender, sexual orientation, disability, national origin or citizenship status, among others. (Employers should ignore everything they read about excluding people age 65 or older from the workplace, as the Centers for Disease Control and Prevention's recommendation here is not law, and it can get a California employer sued that tries to follow it). California law is more expansive than federal law, and prohibits discrimination on the basis of "perception" or "association." Therefore, even if an employee is not actually a member of a protected class, but is perceived as such, the employer can be sued.

The rehiring process should be similar to any other hiring process, and an employer must look not only at the stated basis for recalling employees (i.e., whether there is disparate treatment of any individual), but also whether the result of the recall process will have a disparate impact on any group. In other words, is the group of employees selected for recall representative of the furloughed employees as a whole? This same analysis should have been done if employees were initially laid off or furloughed, and the recall may give the employer its last chance to remedy any problems with the layoff or furlough.

Even if asked to return, some employees may express hesitation to return before a vaccine is widely available. They may also have childcare issues because everything is shut down, or may be caring for an ill family member. If the employee can work remotely, they should be allowed to do so for as long as practicable. If it is necessary for the employee physically to return to work, provide any requested leaves consistently, and keep in mind that under the FEHA, a legitimately fearful employee may be able to make out a viable claim for a real or perceived disability associated with the media-fueled fear of the virus. Employees fearful of infection who return from furlough may also become immediately eligible for paid leaves under the federal Families First Coronavirus Response Act, and/or it may be a reasonable accommodation to allow them to remain furloughed for several months.

Failure to Provide Paid Leave Benefits Required by Law

Over the last two months, there have been numerous federal, state and local emergency paid leave laws that have been enacted with little advance notice to employers, and most of these laws took effect immediately (or on very short notice). This created a patchwork of varying paid leave laws that employers had to digest and implement essentially overnight. The Department of Labor itself could not decide on the precise requirements of the federal paid sick leave law, the FFCRA, for weeks, in order for employers to be clearly informed about their compliance obligations. Understandably, there are going to be instances of non-compliance with the technical details of each law. Unfortunately, it is very likely that we will see claims for unlawful denial of paid leave and/or related violations (e.g., failure to calculate the amount of pay for sick leave) as a result. All that employers can do to mitigate against risk in this area is to try to stay on top of federal, state, and local paid leave developments and adopt compliant policies and practices. Additionally, where it is unclear whether a reason for leave qualifies as a covered reason for paid sick leave under an applicable law, employers would be wise to interpret the qualifying reasons liberally in favor of coverage.

Employee COVID Testing Is a Petri Dish for Lawsuits

Whether a business is legally required to perform testing on employees entering its facility, or the company decides it is a good idea, any testing needs to be done properly and cautiously. Any testing needs to be applied to all employees equally. Employers should ensure that certain employees (e.g., older, Asian-American or disabled employees) are not being singled out, and are not required to undergo additional testing or other safety precautions, which are not required of other employees. Care should also be taken with respect to anyone that had COVID-19 and recovered. They are likely the least risk in the workplace, and it would be illegal to treat them as if they have a heightened risk.

As far as permissible types of testing, do not automatically adopt a company-wide temperature-taking regimen. The Equal Employment Opportunity Commission has authorized it, but in California, it can be considered to be a medical exam, which collects medical information.

The generally accepted threshold for a fever is 100.4 degrees, but if a company decides to use forehead temperature scans, the person doing the scans should have a modicum of training.

The EEOC has also stated that employers may ask all employees who will be physically entering the workplace if they have COVID-19, symptoms associated with COVID-19, or ask if they have been tested for COVID-19 or have been in close proximity to someone recently diagnosed. Symptoms associated with COVID-19 include cough, sore throat, fever, chills, shortness of breath, new loss of smell or taste, as well as gastrointestinal problems, such as nausea, diarrhea and vomiting. Employers may not ask employees who are teleworking these questions.

Employees with symptoms or who fail the temperature check should be sent home to consult with their own health care provider (and according to the labor commissioner, should be paid reporting pay — which is half their shift, a minimum of two, and maximum of four, hours of pay). Telling the employee they are laid off, or even that they must stay home without pay for any length of time, is discriminatory, and may get the employer sued. Employees can and should be denied entry into the workplace if they refuse to answer screening questions and/or submit to temperature screening. All medical information obtained from an employee and documented (including whether the employee has COVID-19) must be maintained in a confidential medical file for the employee (i.e., HIPAA rules apply).

If applicable law or the employer's policies requires employees to wear personal protective equipment in the workplace (e.g., masks, gloves), the employer is obligated to provide that equipment or reimburse for it pursuant to Labor Code Section 2802. Moreover, OSHA regulations require that the employees be trained on how to properly use the equipment. If an injury occurs and no training was provided, it may be an OSHA violation. If an employee reports that they have a disability that prevents them from wearing the required protective equipment, the employer has a duty to reasonably accommodate the employee by providing different protective equipment or allowing an exception.

Wage and Hour Claims Will Increase

In California, it is a virtual certainty that COVID-related wage and hour actions against employers will increase, both on behalf of individual employees, and on a representative basis through the Private Attorneys General Act. Anticipated wage and hour claims include (1) claims alleging that non-exempt employees working remotely were not paid for all hours worked (due to relaxed or different timekeeping systems used for remote work and/ or due to performing some work while on an unpaid furlough), (2) claims alleging that employees were not reimbursed for all necessary business expenses associated with remote work, (3) claims that employees were not reimbursed for supplying personal protective equipment (e.g., masks and/or gloves) used in the workplace; (4) claims that employees who were temporarily furloughed and then laid off were not timely paid their final wages; and (5) claims that exempt employees had pay deductions that violated the salary rule requiring that exempt employees generally must be paid their full salary for any workweek in which they perform work. Catching any of these in an internal audit (conducted with counsel), may help avoid legal action by the labor commissioner or employees.

Human Resources Needs to Stay on Their Toes

COVID-19 provides a potentially fertile ground for bullying or inappropriate jokes in the workplace. There are currently several potential social stigmas against Asians, Asian-American employees, and people perceived to be improperly (too much or too little) concerned about the virus. An inappropriate meme circulated via email, a joking reference to the "Kung Flu," or pejorative statements about Chinese wet markets, may all truly offend some employees, and can be ammunition against the company in any harassment or discrimination lawsuit.

Increased monitoring of employees under the guise of warding off potential bad behavior may result in invasion of privacy, harassment or discrimination claims if the company begins reviewing emails, snooping on employee social media posts, or interrogating employees. Monitoring employee communications and social media posts may also give rise to an unfair labor practice claim before the National Labor Relations Board, as employees have the right to engage in concerted activity, which includes discussing their wages, hours and working conditions.

Returning employees to work is a good opportunity to review the employee handbook, make sure policies are current, and conduct any needed training. Given California's recent requirement that all employers with five or more employees provide sexual harassment training every two years, there is nothing stopping a business from adding on some timely training relating to post COVID-19 issues.

Employers should be primarily focused on recouping their economic losses due to the shelter-in-place orders. However, cutting corners with respect to returning employees from furlough may negate any gains if the result is avoidable employment litigation. ■

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