

## Client Alert **Employment & Labor**

### **Risky Business: COVID-19 Employment Litigation Claims Will Be on the Rise**

As New York and New Jersey take steps to relax shelter-in-place executive orders, allowing more businesses to reopen and recall employees to work, companies face challenges to comply with the myriad of constantly evolving executive orders as well as guidance documents issued by the Centers for Disease Control (“CDC”) and the Occupational Safety and Health Administration (“OSHA”) to resume work and to minimize risks.

Virtually every aspect of the pandemic has increased potential employment litigation exposure from a variety of sources, including existing statutes as well as new federal, state and local laws. These risks are exacerbated by the fact that so many employees in the Tri-State area are, and will remain, unemployed, coupled by what will inevitably be an active plaintiffs’ bar ready to file claims. Claims may be triggered if employees resist calls to return to the workplace based on fears of COVID-19 exposure and suffer adverse consequences when they do not return, are exposed to the virus while they are at work, or are denied the right to continue working remotely or other requested accommodations.

The areas employers are likely to see an uptick in litigation include:

- Employment discrimination claims arising under federal, state and local human rights laws, based on discriminatory rehire and recall decisions, a failure to reasonably accommodate employees with bona fide disabilities related to COVID-19, and co-worker harassment based on pandemic-related health concerns.
- Safety violation claims arising under the Occupational Safety and Health Act from alleged employer failures to take appropriate measures to reduce COVID-19 exposure and spread within the workplace.

May 19  
**2020**

This Client Alert has been prepared by Sills Cummis & Gross P.C. for informational purposes only and does not constitute advertising or solicitation and should not be used or taken as legal advice. Those seeking legal advice should contact a member of the Firm or legal counsel licensed in their state. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. Confidential information should not be sent to Sills Cummis & Gross without first communicating directly with a member of the Firm about establishing an attorney-client relationship.

- Negligence claims based on personal injuries allegedly suffered by employees due to workplace hazards, which may or may not be pre-empted by Worker's Compensation statutes.
- Claims based on inadequate or non-existent written notices when employees were laid off or furloughed, arising under the federal WARN Act as well as under "mini-WARN Act" statutes in those states that have them (such as New York and New Jersey).
- Wage and hour claims arising under the Fair Labor Standards Act and applicable state laws related to salary and hours reductions that were instituted when companies sought to reduce operating costs due to declining revenue and/or based on a failure to properly record hours worked while working remotely.
- Leave of absence claims, where employee requests for additional leave are denied, or where employees have not received COVID-related paid leave benefits while remaining actively employed - under the federal Families First Coronavirus Relief Act, applicable state governor executive orders, and local ordinances.
- Whistleblower retaliation claims arising under existing state laws if employees who raise internal health or safety concerns suffer adverse action.
- Unfair labor practice charges arising under the National Labor Relations Act if employees engage in a variety of "protected concerted activities" related to COVID-19 health and safety concerns.

In order to minimize the risk of claims, it is advisable for employers to take proactive steps, such as by:

- Developing a return-to-work plan that incorporates executive orders, CDC, OSHA and local health authority workplace safety guidance on personal protective equipment ("PPE"), workspace hygiene, social distancing measures and, where applicable, wearing masks.
- Implementing a reasonable accommodation process to evaluate requests for temporary job restructuring, position transfers, remote work, leave or modified work schedules.
- Handling recall, rehire and job offers in a manner that limits the risk of discrimination claims.
- Preserving the confidentiality of all medically-related information provided by employees in response to the pandemic.
- Investigating and responding to internal employee complaints and expressions of concern regarding any workplace safety or health issue raised by employees reluctant to return to work, handle certain tasks, or attend certain meetings.

- Training managers and supervisors on minimizing workplace injury claims based on COVID-19 conditions.
- Reviewing reductions-in-force for compliance, including analyzing WARN Act issues, drafting WARN Act notices or evaluating the sufficiency of such notices.
- Determining whether any adjustments made to employee salaries for work performed during the past months compromised their exempt from overtime status, how this can be repaired, and what, if any, notices must be sent to affected employees when doing so.
- Evaluating requests for leaves of absence and determining what, if any, leave entitlements exist under federal, state and/or local laws, which must be reviewed on a case-by-case basis and properly documented.
- Analyzing whether employees engaged in protected concerted activities related to COVID-19-related safety and health concerns before taking adverse action.

---

Attorneys in our Employment Law Practice Group are available to provide advice and guidance on these and other proactive measures, and to defend any COVID-19 related administrative charges or court complaints filed by current or former employees.

---

**Grace A. Byrd, Esq.**

Client Alert Issue Co-Author; Of Counsel, Employment and Labor Practice Group  
[gbyrd@sillscummis.com](mailto:gbyrd@sillscummis.com) | (973) 643-6792

**Clifford D. Dawkins, Jr., Esq.**

Client Alert Issue Co-Author; Associate, Employment and Labor Practice Group  
[cdawkins@sillscummis.com](mailto:cdawkins@sillscummis.com) | (973) 643-3381

**Jill Turner Lever, Esq.**

Client Alert Issue Co-Author; Of Counsel, Employment and Labor Practice Group  
[jlever@sillscummis.com](mailto:jlever@sillscummis.com) | (973) 643-5691

**David I. Rosen, Esq.**

Client Alert Issue Editor; Chair, Employment and Labor Practice Group  
[drosen@sillscummis.com](mailto:drosen@sillscummis.com) | (973) 643-5558