Practical Tips to Minimize Labor & Employment Risks Arising From Coronavirus Concerns in the Workplace and Workforce [Part II]

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This second alert of a multipart series provides practical tips to minimize legal risk arising from the following legal perils that await any unprepared or ill-informed employer.

As the world's information about the Coronavirus ("COVID-19") continues to quickly update, employers must remain aware of the many potential legal risks that can rapidly arise when grappling with COVID-19 in U.S.-based workplaces and workforces. This second alert of a multipart series discusses the following legal perils that await any employer who is unprepared or ill-informed.

Discrimination Perils

The existence or possibility of COVID-19 in the workplace and/or workforce is not a license to discriminate. Yet, misinformation about and/or fear of COVID-19 could result in discriminatory action, which is unlawful and can take many forms. Depending upon the circumstances, ostracization, verbal attacks, physical violence, denial of access and accommodations, and questioning about health information can be forms of discrimination. Reportedly, these circumstances have already occurred in some venues.[1]

Depending upon their circumstances, employer liability for similar, discriminatory actions could implicate a host of local, state, and federal laws such as Title VII, the ADA, the FMLA, the Rehabilitation Act, and local and state civil rights laws like Michigan's Elliott-Larsen Civil Rights Act. Indeed, because there is a lot we do not know about the virus, it remains to be determined whether suffering from COVID-19's respiratory illness qualifies as a disability.

Notably, OSHA has published COVID-19 specific guidance—Stigma and Resilience[2]—recognizing that "[f]ear and anxiety about a disease can lead to social stigma toward people, places, or things. For example, stigma and discrimination can occur when people associate a disease, such as COVID-19, with a population or nationality, even though not everyone in that population or from that region is specifically at risk for the disease."[3] "It is important to remember that people—including those of Asian descent—who do not live in or have not recently been in an area of ongoing spread of the virus that causes COVID-19, or have not been in contact with a person who is a confirmed or suspected case of COVID-19 are not at greater risk of spreading COVID-19 than other Americans."[4] Implicitly, that guidance recognizes that employees who are members of a protected class and who are stigmatized can become discriminated against in the workplace thereby causing legal liability for employers.

Similarly, an employee who has a relationship with "protected" persons also can be discriminated against at work due to the employee's "association" with members of a protected class. This is because courts have recognized discrimination claims based upon an "association" with individuals who are disabled or who are members of a particular race. Employees, therefore, are protected from discrimination because of their advocacy on behalf of protected class members. For example, if an employee advocates against discriminatory conduct in the workplace directed towards a member of a protected class, then, depending upon the circumstances, that advocacy, arguably, could be protected, even if the advocating employee is not a member of the protected group and regardless of the degree of the association.

Applying associational discrimination theories (e.g., expense theory, disability by association theory, and distraction theory) to potential COVID-19 situations, associational discrimination could arise in several scenarios like the following. An employee, "disabled" because of COVID-19 and covered by the employee's health plan, is discharged because of the cost

to the employer. An employer takes an adverse action against an employee who is associated with a person "disabled" by COVID-19, the "disability" is communicable, and the employer fears the employee may develop the disability. An employer takes an adverse action against an employee who is inattentive in the workplace because a protected, associated individual, "disabled" by COVID-19, requires the employee's attention.

Practice Tips: Employers should have in place, and published to employees, written policies dealing with attendance, recordation of time, leave, communicable illness, travel, teleworking, and against unprofessional conduct, harassment, retaliation, and discrimination (updated to include prohibition against "associational" bias). A best practice is that each employee provides written acknowledgment that the employee has read the policy and understands the policy. In light of the recent COVID-19 generated fervor to wear respirators, employers should thoroughly be aware of OSHA's Respiratory Protection standards[5] as well as their company respiratory protection policy and protocol. If applicable to your work environment and if there is no such policy or protocol in place, then establish a policy and protocol.

Discriminatory conduct by employees, consumers, business partners, and others always should be swiftly responded to by employers. Now is a perfect time to make sure that all of the required posters are positioned in the workplace and also to remind all employees: (1) about company policies against unprofessional conduct, harassment, retaliation, and discrimination and the various ways report to the company (e.g. management, HR, anonymous hotline, etc.) actual or suspected violations of company policies; (2) that discrimination can arise in a variety of ways, including (a) physical (e.g., touching, blocking normal work movement), (b) verbal (e.g., questioning about health information or associations with protected persons, innuendos, slurs, nicknames, jokes, remarks, threats, and sounds), and (c) non-verbal (e.g., gestures, drawings, cartoons, pictures, graphics, posters); (3) to follow company policies and immediately report unprofessional conduct, harassment, retaliation, and discrimination to the person/entity the company designated to receive such reports, regardless of who has created the situation that potentially violates company policies. Remain aware that despite COVID-19, the law does not mandate that an employer simply ignore misconduct, even if the employee's behavior is potentially tied to or caused by a medical condition or disability.

Unionized Workforce Perils

The collective bargaining agreement ("CBA") governs the terms and conditions of a unionized workforce and can impact transfers, relocations, discipline, layoffs, closing facilities, as well as the issuance of policies. The CBA should have a *force majeure* provision and a Management Rights clause (both of which allow for some unilateral employer action). COVID-19 in the workforce and workplace also may create an exigent circumstance, which excuses obligations to notify and bargain with the union when there is an extraordinary, unforeseen event that has a major economic effect requiring immediate action.

Nevertheless, whether unionized or not, employers should determine their obligations under state and federal laws like the Worker Adjustment and Retraining Notification Act ("WARN"). DOL guidance—EMPLOYER'S Guide to Advance Notice of Closings and Layoffs[6]—provides an overview of WARN's principal provisions along with frequently asked questions and answers.

Of course, dealing with a COVID-19-related situation does not necessarily have to trigger an employee's *Weingarten* right to union representation.[7] Still, it is important to know that, under *Weingarten*, an employee, upon request, has the right to union representation at investigatory interviews that the employee reasonably believes may result in discipline to the employee. A corollary part of the *Weingarten* right is the employee's opportunity to meet with a union representative before the investigatory interview, if the employee requested a union representative and if the employee—or the union representative—invoked the right to a pre-interview consultation.

Practical Tips: In the haste of dealing with COVID-19, do not forget that unionized employees have rights governed by a CBA. The CBA should be reviewed before employer action affecting the terms and conditions of unionized employment, including before adopting any kind of new policy as well as engaging in mass layoff, relocation, or discipline. Analyze situations to determine if there has been a trigger of an employee's *Weingarten* right to union representation and/or pre-interview consultation with a union representative. Even if a *force majeure* provision, Management Rights Clause, or exigent circumstances permit unilateral employer changes to certain terms and conditions of employment, it is always best to try to get union (and non-union) buy-in before unilateral employer action.

Concerted Activity Perils

There is bound to be a lot of permissible employee activity and discussion about COVID-19. Section 7 of the National Labor Relations Act ("NLRA") guarantees employees the right "to engage in… concerted activities for the purpose of collective bargaining or other mutual aid or protection."[8] Notably, protected concerted activity does not have to be union-related. It can include employee efforts to improve working conditions or terms of employment.

Depending upon the circumstances, employee discussion and/or complaints related to COVID-19 could be protected concerted activity. For example, if a group of employees approached an employer about informing the workforce about cough and sneeze etiquette, hand hygiene etiquette, or safety precautions (e.g., the use of gloves, eye and face protection, and respiratory protection), then that is protected concerted activity under the NLRA because the action was not about a specific employee.

Concerted activities are protected even if the discussion and/or complaints are rude and insulting. The protection, however, applies only to complaints made on behalf of others, not to individual gripes.

Practical Tips: Even when dealing with an allegedly discriminatory statement related to COVID-19, employers should carefully analyze the statement and circumstances to determine any interplay with Section 7 of the NLRA as it is important to remember that group activity, discussion and/or complaints, even if obnoxious, might be protected concerted activity under the NLRA. Determine the place where the supposed protected activity took place, the subject matter and nature of the activity, and whether there was any provocation for and the employer's role in the possible provocation of the alleged protected activity. Evaluate whether the act or comment was profane, defamatory, or malicious. Discover whether the act or comment was about the employee's individual matters or was engaged in to further the employee's individual, self-interest. Ascertain whether the employee was attempting to initiate, to induce, or to prepare for group action and whether the employee's act was engaged in with other employees or on the authority of other employees. Also, consider whether management knew of the concerted nature of the employee's activity. Before taking any adverse employment action (like a termination), identify the reasons/motivations for taking the adverse employment action. Of course, protected concerted activity should not be the motive for adverse action.

Conclusion

COVID-19 is creating rapidly changing conditions. Mishandling labor and employment nuances arising from COVID-19 in the workplace and workforce can create costly legal risks. As each situation will be fast-moving and very fact-specific, proactive preparedness and swift consultation with your legal team is even more fundamental than before COVID-19.

For more information on how to handle your labor and employment issues and minimize your risk when dealing with COVID-19 issues, please contact Bonnie Mayfield (248-302-5614 or bmayfield@dykema.com) or your Dykema relationship attorney.

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[1] https://www.cnn.com/2020/02/14/us/hmong-men-hotel-refusals/index.html; https://www.dailytargum.com/article/2020/02/rutgers-community-weighs-in-on-discrimination-due-to-coronavirus; https://www.nytimes.com/2020/03/02/world/asia/coronavirus-italy-racism.html; https://www.buzzfeednews.com/article/skbaer/coronavirus-racism-attack-london.

[2] https://www.cdc.gov/coronavirus/2019-ncov/about/related-stigma.html.

[3] *Id*. (eliminating footnote).

[4] *Id*.

[5] https://www.law.cornell.edu/cfr/text/29/1910.134.

[6] https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/_EmployerWARN2003.pdf.

[7] *N.L.R.B. v. J. Weingarten*, 420 U.S. 251 (1975).

[8] https://www.law.cornell.edu/uscode/text/29/157.

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