

Employment Law & the Continuing Pandemic

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Adjusting to new norms during the COVID pandemic has had serious public health consequences as well as business and workplace impacts, not the least of which include the employer-employee relationship and dialogues concerning employee safety, management, and retention. These changes have had a ripple effect on jobs in education from layoffs to leaves of absence, remote working to social distancing, workplace safety concerns to retaliation and whistleblower claims, to name a few.

One result has been a wave of employee claims raised internally and in the federal and state agencies and courts concerning such matters as employee reasonable accommodations, paid sick leave, other leaves of absence, discrimination, retaliation, whistleblower claims, wage and hour laws, and Occupational Safety and Health Administration (“OSHA”) violations. Between March 2020 and April 2021, there have been over 2,300 lawsuits (including 188 class actions) filed against employers due to alleged labor and employment violations related to COVID-19, with the most common claims being retaliation, discrimination and Family and Medical Leave Act claims.¹

Another result is a series of federal and state laws enacted to address aspects of the employee-employer relationship affected by the pandemic. In March 2020, the federal government passed the Families First Coronavirus Response Act (“FFCRA”), Public Law No. 116-127 effective April 2020 through December 2020, which *required* certain employers to provide employees with up to 80 hours of paid sick leave and 10 weeks of expanded family medical leave for specified reasons related to COVID-19 in 2020.² Although the FFCRA expired, the American Rescue Plan Act of 2021 (“ARPA”), H.R. 1319, extends tax credits available to employers with fewer than 500 employees who *voluntarily* choose to grant employees FFCRA paid leave through September 30, 2021. In addition, ARPA provides, among other things, that expanded family and medical leave can be taken for all of the reasons that an employee can take FFCRA leave. Both the FFCRA and ARPA provide rights of action for claims of discrimination, retaliation, leave interference, or wage payment failures. In addition, ARPA prohibits FFCRA tax credits to employers who discriminate in favor of highly compensated employees, full-time employees, or tenured/non-tenured employees in providing FFCRA benefits. Accordingly, it is recommended that schools adopt and maintain clear and easily accessible policies and practices to explain the COVID-19 related leaves available to employees and the process by which employees may utilize such benefits.

In addition, in January 2021, OSHA published a non-mandatory guidance entitled “Protecting Workers; Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace” which offers strategies and practices for managing COVID in the workplace.³ The OSHA Guidance advises employers to establish policies and practices that, among other things:

- Do not distinguish between workers who are vaccinated and those who are not;

¹See <https://www.littler.com/publication-press/publication/covid-19-labor-employment-litigation-tracker>;
<https://lexmachina.com/blog/recent-impact-of-the-pandemic-on-employment-litigation-nov-dec-2020/>

² See <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>

³ See <https://www.osha.gov/coronavirus/safework>

- Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards;
- Consider reasonable accommodations for workers who are unable to wear or have difficulty wearing certain types of face coverings due to a disability (including masks with clear coverings to accommodate deaf or hearing deficit employees who may rely on lip reading).

While the OSHA Guidance is not mandatory, it does incorporate mandatory OSHA regulations which prohibit reprisals or discrimination against an employee for reporting a work-related illness or exposure to one as well as discrimination against an employee for speaking out about unsafe working conditions. Schools are encouraged to work with their general counsel to incorporate OSHA's recommendations into policies and practices as you continue to implement appropriate control measures and protections uniquely related to COVID-19 in the workplace.

In addition to federal law COVID-19 changes, all 50 states have taken similar actions, but restrictions vary and so does the length of time the measures are in place so, again, be guided by your general counsel to ensure compliance with your state's COVID requirements. Recently, several states also have enacted COVID liability shield laws which provide varying forms of immunity from liability for certain businesses and employers against lawsuits raising claims related to COVID-19. These safe-harbor laws often require strict compliance with CDC, state, and local department of public health guidance to take advantage of immunity protections. Moreover, while such immunity laws may provide a measure of comfort to employers, there is no protection for intentional, willful, or reckless misconduct, and immunity from liability does not mean immunity from litigation.

Wright Specialty education clients are advised to be proactive in this challenging climate. As k-12 public schools, charter schools, colleges, and universities negotiate this changing employment landscape and welcome employees back to the workplace, we recommend that you work closely with your legal counsel to keep abreast of seemingly ever-evolving guidance from the U.S. Centers for Disease Control and COVID-19 related federal and state law changes. Best practices include working closely with legal counsel to ensure policies are consistent with the current employment laws when addressing employment issues associated with COVID. Be sure to communicate policies and processes openly with your employees. Tread lightly when contemplating strict changes like the currently uncharted territory surrounding mandatory vaccine requirements for employees, which could implicate privacy rights as well as disability and/or religious exemption issues. Finally, do not lose sight of existing employment law obligations and document clearly all employment-related decisions.

Should you have additional questions on federal laws and how they might apply to different employment-related situations, please refer to our EPLI hotline. Information about the EPLI Hotline is provided on the following page.

DISCLAIMER: The information provided herein does not, and is not intended to, constitute legal advice; instead, all information and content is for general informational purposes only. Please contact your general or labor counsel for guidance.

¹ See OSHA's Recording and Reporting Occupational Injuries and Illness requirements, 29 CFR 1904.35(b); and Section 11 (c) of the OSHA Act of 1970.

¹ See Alabama Coronavirus Liability Bill, S.B. 30; Georgia COVID-19 Pandemic Business Safety Act, S.B. 359; Idaho Coronavirus Limited Immunity Act, H.B. 6, Idaho Code, Title 6, Ch. 34; Indiana Coronavirus Liability Bill, Public Law 166; Ohio Coronavirus Liability Bill, H.B. 606; Oregon Bill Relating to Claims Arising During the COVID-19 Emergency Period, H.B. 4402; Tennessee COVID-19 Recovery Act, S.B. 8002 (Amends TCA Title 9, Chapter 8, Part 3; Title 29, Chapter 34; Title 29, Chapter 20 and Title 49, Chapter 7, Part 1); W.Va. COVID-19 Jobs Protection Act, S.B. 277. See also "50-State Update On COVID-19 Business Liability Protections" for state-specific legislation at <https://www.jdsupra.com/legalnews/50-state-update-on-covid-19-business-2317578/>.

Employment Liability Hotline for Our Education Clients

(866) 758-6874

The Hotline is available Monday – Friday from 8:30 am to 6:00 pm Eastern time

What is it?

To assist Insureds who purchase Educators' Legal Liability insurance (which contains Employment Liability coverage), Wright Specialty has developed a cost-free Employment Liability Hotline to provide answers to everyday employment-related issues. Wright Specialty developed this program in conjunction with Jackson Lewis LLP, a national law firm with 61 offices and over 950 attorneys across the United States. For over 55 years, Jackson Lewis has assisted employers to develop preventive programs and to defend workplace law claims. Jackson Lewis represents employers in all aspects of workplace law, including employment litigation, disability and leave management, reductions in force, affirmative action, benefits, immigration, wage-hour, trade secrets and restrictive covenants, drug testing and labor relations. The firm maintains a website providing comprehensive information about these and other workplace law topics.

What can I use this service for?

The Hotline is for general legal overview. It is not intended to provide a determinative answer as to whether a specific adverse personnel action should be taken. Before a decision is made as to whether to discharge an employee, deny reinstatement after a leave of absence, take any action after receiving a complaint of harassment, or taking any other employment action, you should consult with experienced employment counsel and examine all aspects of that particular situation. The Risk Management Hotline is a very useful tool to obtain information about federal laws and how they might apply to different employment-related situations. It can also be used as a way of inquiring about appropriate steps to take when investigating complaints or reports of harassment, discrimination or retaliation.

The Hotline is a good tool to conduct an analysis of the factors to consider when evaluating possible claims relating to denials of promotion, salary increases or requests for training.

How do I use it?

To verify that callers are insured by Wright Specialty, a caller must provide his or her name, the name of the policyholder and the policy number, as well as the caller's e-mail address, mailing address and telephone number. After obtaining this information,

a representative of Jackson Lewis, who will be providing this Hotline, will ask the caller succinctly to state the question and to provide a brief description of the facts which relate to the question. Callers can leave a voice mail message and will receive a response within one business day of the call.

Can I report claims and lawsuits?

No. The Hotline is a resource for general overview about human resources and employment issues. Please do not use the Hotline to ask questions about coverage or matters beyond the hotline, such as "Can I fire Sally?" or "If I fire Jim, does my policy cover an age discrimination claim?" It is not to be used to report the filing of administrative charges, arbitration demand letters, and service of lawsuits or other notices of claim. Providing such information to Hotline attorneys does not obligate them to provide notice on your behalf to Wright Specialty. It is your responsibility to notify Wright Specialty in accordance with the terms of the employment practices liability insurance policy. If you have any questions about how to report a claim, you should contact your insurance broker or representative.

Paul J. Siegel, Esq., a partner with Jackson Lewis since 1985, will oversee management of the hotline. You should contact Mr. Siegel if you have any questions about the hotline or any concerns about how a question you presented has been addressed. You can reach Mr. Siegel at 631-247-4605 or at siegelp@jacksonlewis.com. If Mr. Siegel is unavailable, please contact Kathryn Barry, Esq. at 631-247-4612 or kathryn.barry@jacksonlewis.com. If you have technical problems accessing the Hotline, contact your insurance representative or Andrew Graham at Wright Specialty – agraham@wrightinsurance.com.