

## **SOS #2 COVID-19 Employee Litigation: Understanding the Basics**

Lawyers know that in tough economic times there is almost always a rise in workplace litigation. That trend is holding true in the age of COVID-19, according to reporting many large law firms provide. Their “case tracker” documentation allows for legal observers to gauge the legal marketplace.

So begins the battle between employment lawyers that represent employers, and the plaintiffs’ bar that searches for trends in litigation. The national pandemic is causing employers to struggle, as they navigate new workplace laws [i.e.: *Families First Coronavirus Act* (“FFCRA”) which enacted the *Emergency Paid Sick Leave Act* (“EPSL”), and the *Emergency Family and Medical Leave Act* (“EFMLA”) to name a few], in a system defined with existing rules and standards. As an increasing number of private sector employers start pushing a return-to-work strategy, what should school administrators or board members know as decisions are made to open up school for in-person teaching? How could “remote-learning” change the standards that schools are held to as employers?

As COVID-19 litigation grows, the immediate trend seems to fall into two categories. The two most common types of cases involving employees (and to some extent 1099 contractors) are (1) discrimination and (2) issues addressing *work-from-home* or leave. These types of workplace litigation are not exactly new, but cases being filed seem to have plaintiffs’ attorneys pushing familiar complaints with new Coronavirus twists. The new twists show an emerging emphasis on employees with pre-existing conditions.

California and Florida typically lead the country as the most litigious states for employment lawyers, if for no other reason than the size of their populations. However, with so many employees affected by the pandemic, the trend of “Covid-19 litigation” will likely hit harder in all states, and snag employers who never dreamed of being on the receiving end of an employee lawsuit. By example, let us look at two cases filed in the last few months:

- Florida – A case filed in federal court in Florida focused on an employer’s failure to operate under, and provide, FMLA leave for an employee that notified the employer they were “immune-compromised” during a COVID-19 quarantine. The plaintiff’s attorney argues that his client was terminated shortly after inquiring about FMLA leave due to the risk factors associated with the client’s health.
- New Jersey – A case was filed against an employer for terminating an employee with a pre-existing heart condition that the employee had made known to the employer. Such termination was alleged as illegal, rather than providing the employee with the requested leave under the FMLA (Family Medical Leave ACT) and/or as an accommodation under the ADA (Americans with Disabilities Act).

Both cases demonstrate a trend that seems to be emerging. In both instances, the plaintiff’s lawyers argue that their clients: (1) needed the time off from work due to lack of workplace safety procedures or safeguards, and heightened risk of COVID-19-related complications arising from preexisting conditions and, (2) the employees were terminated as a result of their inquiry about their options for leave.

The simple fact that an allegation against an employer occurs does not mean any law was violated or that the allegations even have merit. However, what provides a jolt of caution is seeing the number of claims that are all following similar patterns being filed from coast-to-coast within a very short period of time. So, what should school leadership do?

## **What Should School Leadership Do?**

It almost seems ironic for school leadership, but the first step at protecting yourself starts with education.

- (1) Take time to ask a Board member or school attorney to update you, and those deemed “Supervisors”, on how requirements under new laws such as the FFCRA or EFMLA are applicable to your school. Much of the private workplace went through this quick education earlier in the year, while schools were mandated to be closed. It is easy to lack understanding or even unjustly fear certain aspects of the law. As an example, EFLMA eligibility expires on December 31, 2020 and is not likely to be something of focus in the spring.
- (2) Understand that all of the hard work you are putting into “Remote Learning” may be changing the standards you will be held to, when asked to provide for “reasonable accommodations” under laws such as the ADA (Americans With Disabilities ACT).
- (3) Update your existing employment contracts with “Work-From-Home” addendums that clearly outline expectations, responsibilities and prohibitions. If during the school year you find the school in a short-term remote-learning environment, or even an extended one, setting expectations that (a) follow school policy and (2) serve to refresh employees of their duties is very important.
- (4) Recognize that HR (Human Resources) leadership needs to be prepared BEFORE some of the scenarios presented above arise, to know how to react quickly. Individuals familiar with federal or state discrimination laws and requirements for administrative process prior to lawsuits may not be aware that this is not applicable to FMLA claims. For this reason, HR should be quick to respond to employees who request time off due to a COVID-19 related issue. (NOTE: recent surveys of school leadership working on back-to-school strategies suggest that a number of employees (especially older employees) have great concern on returning to work. This reality suggests that HR needs to be ready to address FMLA and ADA requests in a timely way.)
- (5) Training! FMLA issues can not only give rise to liability for a school employer, but for individual “supervisors” as well, if not handled properly. Supervisors (Deans, principals, department heads etc..) should escalate inquiries for *work-from-home* to the appropriate HR leader, and avoid off-the-cuff remarks that could give rise to a claim of discrimination or retaliation.
- (6) PAPER! When dealing with any employee concern it is always important to document requests for leave, accommodations or concerns. A paper trail not only shows that employee concerns were addressed in a timely way, but can also serve as strong evidence that requests were not ignored, providing evidentiary rationale behind decisions to accommodate or even terminate.

The COVID-19 Pandemic is an unprecedented period in our lifetime. Unprecedented times often call for unprecedented planning, management and action. Do not be caught or lulled into a false sense of security, that following, or establishing, a set of guidelines to deal with COVID-19 will provide for a liability shield in any or all matters. Seek out substantive solutions in the form of systems, software, training, support or expert advice, and/or services to create additional barriers of protection for your school.

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