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PERSPECTIVE

COVID-19 rewrites the employment discrimination playbook

By Sonya Goodwin

The COVID-19 pandemic has completely rewritten the playbook for U.S. companies that do their best to avoid claims of employment discrimination. Until recently, these employers had just two or three boxes that needed to be checked before they could proceed with disciplining or terminating an employee: Protected class? Protected activity? Retaliation?

Now the "gotcha" list has become like the magic beanstalk that keeps growing, and companies large and small find themselves facing claims for routine business actions that never before would have raised red flags. A record number of lawsuits filed in 2020 allege discrimination or retaliation because of COVID-related issues, and that number is expected to grow significantly in 2021.

Employers are dealing with unique challenges that they've never confronted before. How do they terminate or lay off workers in response to unprecedented business downturns while, at the same time, minimizing the risk of being sued by disgruntled employees? How do they ensure compliance with evolving safety ordinances without, at the same time, running afoul of ADA and other employee protections? How do they manage confrontational workers without, at the same time, being hit with retaliation claims?

What was once a routine downsizing is now fraught with special considerations. A problem employee — who also happens to have taken medical leave because of COVID — is now a bigger problem for the employer. Even extensive documentation establishing the employee's record of poor work performance or bad attitude may not be dispositive against a claim that the worker was singled out because of a protected medical leave. Which is not to say that documentation isn't important: now more than ever it should be created and maintained.

A presumption under California law that COVID-19 is a workplace injury covered by workers compensation for some employees could help both workers and employers in these difficult times. It provides much-needed relief for workers dealing with the virus by covering their medical expenses. At the same time, it may afford employers an opportunity to dispassionately review possible job performance issues and avoid making termination decisions in the heat of the moment.

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Recent guidance from the Equal Employment Opportunity Commission on COVID vaccines further sets employers up for a potential nowin legal battle. If the shots are required by employers, as the guidelines allow, expect to see claims of religious and disability discrimination asserted by vaccine skeptics. Although companies have every right to challenge what they believe to be spurious claims of religious belief or physical disability asserted by vaccine refuseniks, they may only do so in limited situations. Ultimately, such challenges could be time-consuming and costly even when the employer's evidence, such as social media posts or statements to coworkers, is incontrovertible. Additionally, requiring employees to get the vaccine may stoke workplace culture battles and could lead to the loss of a large number of employees if a significant portion of the workforce refuses to get the vaccine.

On the other hand, if employers make getting vaccinated optional, as most are expected to do, they could find themselves facing whistleblower complaints about unsafe workplaces, as well as workers who refuse to show up at the allegedly unsafe worksite. Companies have always faced the challenge of being mindful for potential whistleblowers, but now the confluence of public safety and problem employees is especially difficult. The very same employees who raise performance red flags with their outspokenness and confrontational tactics are likely to be the ones to assert whistleblower claims if disciplined or terminated. It's a Hobson's choice for management.

The bottom line is that "at-will" is almost meaningless these days. Employers can require that workers show up for work, but they have to be inordinately mindful of accommodating employees who raise tenable concerns. State law requires businesses to create return-to-work plans that spell out details such as how many employees can be physically present in a designated area, when and where masks must be worn, and where hand-washing stations or sanitizers will be situated. But so much is still unknown about the ever-mutating virus and its transmissibility — even among groups that have been vaccinated.

Looking at the COVID-era workplace from the worker perspective, it is helpful for employees to appreciate the new dynamic. Workers need to recognize that most companies have been doing their best to respond to an ever-changing legal landscape while trying to protect both their customers and employees. As difficult as it has been for workers — furloughed, working from home with children under foot, caring for sick family members — the COVID pandemic has been remarkably challenging for employers. It will take considerable patience and effort to move this country and its workforce back to something that approaches pre-pandemic "normal."

As we move toward that new normal, employees have an important role to play. Those who request accommodation, whether that involves working remotely or bypassing vaccines, must take the time to document everything. Any hint that discrimination, harassment, or retaliation could be a partial motivating factor for discipline or termination affords the employee both leverage and tactical options. Where potential safety lapses are observed, these should be reported to management and, if no further action is taken, to CalOSHA or another appropriate agency.

The best advice for both employees and employers is to plan for things to go wrong and start preparing. Workers could find themselves sidelined by employers unwilling to accommodate remote work or other job modifications. Companies large and small could face waves of negligence, discrimination and retaliation claims stemming from the pandemic. Ongoing court closures and diminished jury pools will likely drive a spike in arbitrations, mediations and settlements of workplace complaints. Employers will begin settling claims they would once have litigated, and employees — who once would have held out for high jury verdicts — will accept less money sooner. I predict that few will want to wait four or five years for an award from a business that may no longer exist. ■

Sonya Goodwin, *partner at Sauer & Wagner LLP of Los Angeles, represents employees and employers in a wide range of claims, including wage and hour violations, discrimination, harassment, retaliation, wrongful termination, defamation, intentional infliction of emotional distress and breach of contract.*