COVID-19 and Employment Practices-Related Claims

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LOCKTON®

COVID-19 has put many countries across the world, including large parts of the U.S., on lockdown, leading to a rapidly changing employment landscape. Entire industries have come to a halt, and many others are struggling to survive. As employers contemplate layoffs, furloughs and reduced hours for their workforce, and as they continue to make decisions in unfamiliar circumstances, employment claims related to COVID-19 will be prevalent. Claims for wrongful termination following employee layoffs are starting to trickle in. Employees of ride-sharing companies Uber and Lyft have already filed class-action lawsuits alleging failure to provide sick leave to employees in the wake of COVID-19. In addition, federal workers exposed to COVID-19 through their jobs have sued the federal government for a 25% increase in pay as a result of working in hazardous conditions. Possible bases for claims against companies and individuals in management positions may also include:

- Perceived disparate treatment of employees with illness or perceived COVID-19 infection.
- Perceived disparate treatment of employees in protected classes in layoff and furlough decisions.
- Failure to accommodate ill or infected employees.
- Failure to accommodate employees who request leave to take care of ill relatives.
- Failure to accommodate employees who request leave to provide child care.
- Disclosure of private information or employment-related defamation relating to COVID-19 infection.
- Harassment of and retaliation against employees who belong to certain racial, national origin or age groups.
- Harassment of and retaliation against employees with real or perceived illness, or COVID-19 infection.
- Wrongful termination, retaliation or discrimination stemming from reductions in staff during business slowdowns.
- Inconsistent application of workplace policies.
- Retaliation claims arising out of whistleblower issues related to health and safety in the workplace.
- Retaliation claims stemming from requests for FMLA leave.
- Wage and hour claims, particularly for employees in healthcare and essential industries who may be experiencing an increase in working hours, as well as from employees recently laid off in any industry.[1]
- Invasion of privacy claims by employees and third parties based on the company's collection of health and other information.

While most of these claim scenarios would likely trigger coverage under a standard employment practice liability insurance (EPLI) policy, not all policies are created equal and companies are advised to consult with their broker to ensure their policy includes the broadest coverage available in the marketplace. We highlight below, however, several circumstances pertinent to the COVID-19 pandemic where coverage may be problematic.

[1] Wage and hour coverage in EPLI policies is very limited. Whether there is any coverage for wage and hour-related claims will depend on the specific policy's terms and conditions.

Coverage limitations and considerations

Because COVID-19 is a virus affecting the human body, policyholders should keep in mind most EPLI policies contain an exclusion precluding coverage for bodily injury, as such claims are better addressed under a workers' compensation policy. However, EPLI policies that do exclude bodily injury typically contain an exception for claims alleging emotional distress, mental anguish and humiliation. Therefore, a claim by an employee alleging they contracted COVID-19 at work resulting from the company's negligence would likely trigger the policy's bodily injury exclusion. Additionally, a claim by that same employee alleging emotional distress as a result of contracting the virus in the workplace could trigger coverage for defense costs and related indemnity amounts.

It is also important to note EPLI policies do not cover claims for violations of FMLA[2] or OSHA[3]. However, most policies do extend coverage to claims that allege retaliation by an employee for having exercised their rights under the FMLA or OSHA or similar state or local laws.

Thousands of OSHA claims have already been filed across the U.S. with employees alleging their working conditions are not safe due to a lack of precautions taken by their employer against the coronavirus, such as lack of handwashing stations, sanitizers, masks or adequate protective gear on location, or employees being unable to practice social distancing due to the nature of their jobs. Such claims are unlikely to trigger coverage under an EPLI policy (they are typically filed under workers' compensation policies), but to the extent an employee refuses to go to work citing workplace safety conditions and is discriminated against, harassed, terminated or otherwise retaliated against as a result, coverage would likely trigger under the EPLI policy.

Though many claims will likely stem from reductions in force or employee layoffs, EPLI policies do not cover claims brought for violations of the WARN Act[4] or similar state or local laws. In other words, EPLI coverage would be excluded for an employee claiming his employer failed to provide the requisite advance notice of an impending layoff under the WARN Act. However, should that same employee allege wrongful termination resulting from the layoff, EPLI coverage would be triggered. Although these two scenarios may appear to be similar and the result to the employee is the same, how the claim is characterized and under what law or statute it is brought is critical; it can mean the difference between full coverage for defense costs and settlement on the one hand, and no coverage at all on the other.

In addition to the above claim scenarios, COVID-19 also presents potential third-party discrimination issues. Businesses may see increased harassment or discrimination claims from clients, customers, suppliers, service providers or vendors who may be perceived as ill or infected with COVID-19. The good news is most EPLI policies provide coverage for such third-party harassment and discrimination claims, with certain exceptions for financial institutions.

[2] The Family and Medical Leave Act (FMLA) is the federal law which entitles certain employees to unpaid job-protected leave for up to 12 weeks per year for specified family and medical reasons.

[3] The Occupational Safety and Health Administration (OSHA) is the federal law responsible for worker safety and health protection.

[4] The Worker Adjustment and Retraining Notification Act (WARN) is a federal law which mandates employers with 100 or more employees give advance notice to employees in cases of qualified plant closings and mass layoffs (50 employees or more).

With respect to employment claims, employers may also see an increase in the quantum of settlement demands. As terminated employees face a shrinking and uncertain job market, they are likely to make increased demands in order to offset a potentially longer period of unemployment. Such outcomes are already happening, even where the wrongful termination claims were made prior to, and are unrelated to, COVID-19.

Underwriting concerns

EPLI underwriters, bracing for an increase in claims due to COVID-19, have already added new questions to policy applications and renewals. Common questions include:

- Whether the company anticipates any layoffs and if so, whether severance packages will be offered to those employees.
- Whether the company has consulted with outside counsel regarding decisions and protocols surrounding layoffs.
- What percentage of the company's workforce is being affected.
- If the company intends to pay its employees any wages during any scheduled downtime.
- What anti-retaliation policies are in place for whistleblowers and employees who avoid working on-site or traveling for fear of safety.
- How the company is ensuring that its employees are reporting COVID-19 infection or symptoms of infection.
- Whether temperature testing or any physical exams are being required for employees.
- How the company is taking preventative measures to mitigate the spread of infection.
- Whether the management of employees' health information is being done in compliance with HIPAA and similar state laws.
- How is the company handling accommodation requests from employees that may be covered under the ADA.
- Whether the company is planning any increased hiring in light of the crisis.
- Whether any changes being considered to the company's paid sick leave policy.

In addition to a more onerous application and renewal process, at least one insurer has already issued a Coronavirus Exclusion which would broadly preclude coverage for any claim in any way caused by, or resulting from, COVID-19. Any attempt by carriers to add such sweeping language onto their policies will be faced with stiff and continued resistance by Lockton. Fortunately, there remains enough capacity in the EPLI marketplace for policyholders to consider alternate carriers, if necessary.

Employers face many difficult decisions right now. On top of that, federal and state legislation is evolving on a near-daily basis. Many EPLI carriers provide HR resources to their insureds, such as HR hotlines, websites and consultations with employment attorneys. Lockton's coronavirus-related resources can be found at www.lockton.com/coronavirus. In addition, many law firms have COVID-19 information and resources available to the general public on their websites.

Lockton stands ready to assist our clients with any employment or other matters related to the pandemic.

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