



COVID-19's Next Wave:

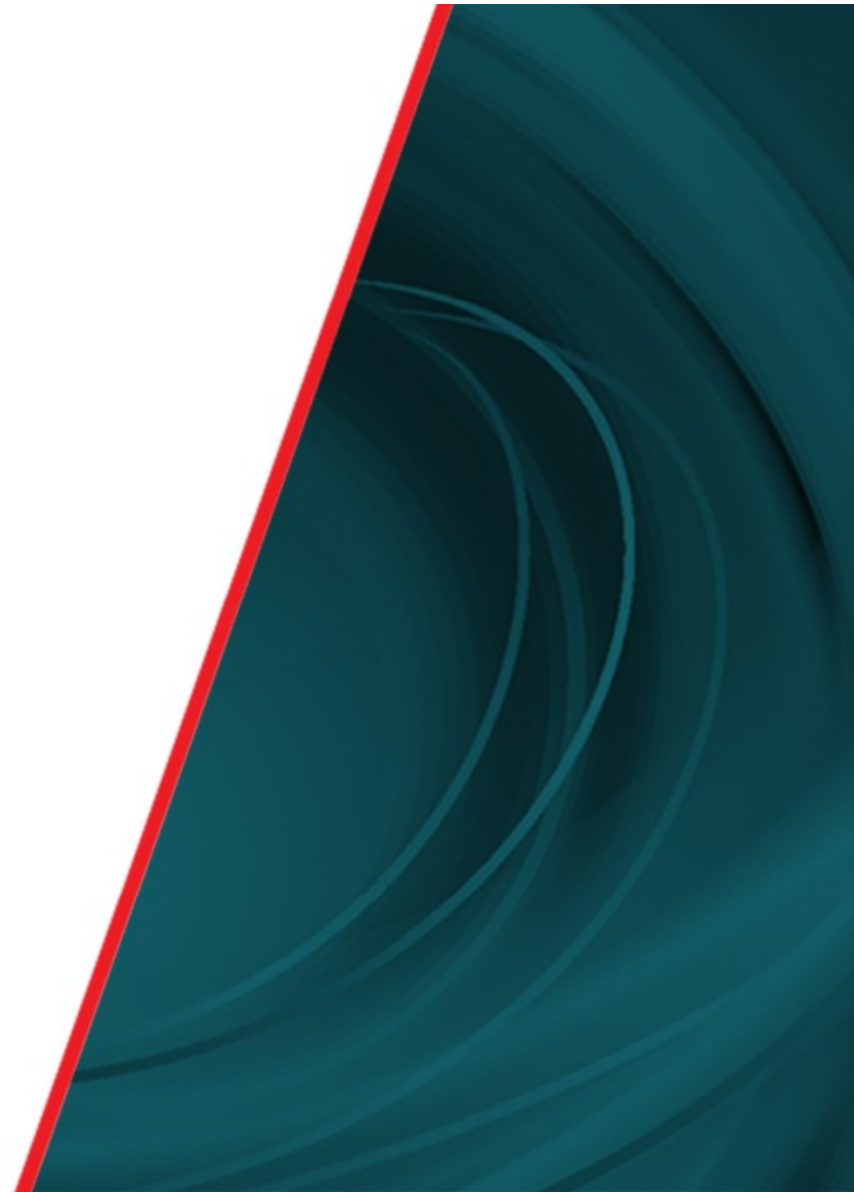
Legal Claims Looming for Employers



Kerry A. Shad

October 15, 2020

EXPECT EXCELLENCE®



Legal Claims Looming

- Wage & Hour
- Other Claims
- WARN
- Immunity Laws
- Waivers/Releases

Potential Wage & Hour Traps

- Tracking Telework Hours for Non-Exempt Employees
 - In 2019 @ 24% of employees performed some work from home on an average day
 - Skyrocketed since March 2020

US DOL Wage & Hour Division Field Assistance Bulletin - August 24, 2020

Potential Wage & Hour Traps

- FLSA places burden of tracking hours on the employer
- All hours worked or “suffered or permitted” to be worked are compensable, even if:
 - Did not ask for the work to be done
 - Did not want the work done
 - Had a rule against the work being done

Potential Wage & Hour Traps

- Standard is - “knows or should know” work is being done
 - Employer “knows” about:
 - Actual scheduled hours
 - Hours reported by an employee
 - Other hours aware being worked

Potential Wage & Hour Traps

- Employer “should know” about hours:
 - That would be reported through a reasonable process for employee to report unscheduled time worked
 - Ensuring employees know about it)
 - Not implicitly or overtly discouraging reporting
 - No duty to go further (e.g. review phone records, emails, accessing of employer issued devices) if have a reasonable process and employee fails to report
 - That the “evidence” suggests - for example, if supervisor is receiving late-night emails, then that’s probably “notice”

Potential Wage & Hour Traps

- Train supervisors to:
 - Understand these rules
 - Not to impose workloads that can't be done within the scheduled hours, but if they do, don't discourage reporting
 - Be aware if employee should be reporting more hours but isn't

Potential Wage & Hour Traps

- “Continuous Work Day” in COVID-19 Times
 - DOL Temporarily Suspended Guidance in April Requiring Pay for All Hours Between First and Last Principal Activity
 - To allow employees who telework flexibility to help children
 - TIP: Encourage employees to work in blocks of time and record breaks to attend to children

Potential Wage & Hour Traps

- Other Challenges -
 - What is extra work and what just got delayed?
 - What about multi-tasking? Checking emails while helping child with school?
 - What about breaks (rest time vs. meal breaks)?

Potential Wage & Hour Traps

- Commute Time - if employee is working from home and has to go to the office for a meeting, travel time from home office and back may be compensable time

Potential Wage & Hour Traps

- Time Spent Because of Screening and/or Social Distancing
 - Like donning and doffing cases
 - Temperature checks, filling out questionnaires, waiting to enter building and/or to ride elevator
 - Safest approach is to include it in compensable time

Potential Wage & Hour Traps

- Exempt Employees
 - Furloughed, but worked part of a week?
- Expense Reimbursement - phone, internet, equipment, etc.
 - FLSA - cannot require employees to directly pay or reimburse employer for business-related expenses if would cause employee's wage rate to fall below minimum wage or overtime compensation thresholds
 - Some states have special rules
 - For example, in California, an employer must reimburse an employee for all "necessary expenditures or losses incurred by the employee in direct consequence or discharge of his or her duties." Cal. Lab. Code § 2802.

Claims Related to COVID-19

- Remote Work and Leave
 - FFCRA claims - < 500 employees
 - Denial of leave
 - Retaliation for taking leave
 - No required administrative process for claims
 - Lost wages, liquidated damages and attorneys' fees
 - Individual liability possible for managers, HR, executives

Claims Related to COVID-19

- Remote Work and Leave
 - “Heightened Risk” due to preexisting conditions
 - Do employers need to factor this in?

COVID-19 and “Disability”

Peeples v. Clinical Support Options, Inc. (D. Mass. September 2020)

- Facts:
 - Employee provides social services to highly traumatized at-risk clients
 - Employee has “moderate asthma”
 - In March doctor recommended telework due to increased risk from COVID-19
 - In May employer asked all managers to return to office
 - Employee requested 4 weeks of additional remote work - allowed
 - In June telework request denied because managers need to be in the building to provide supervision and in-person client visits if requested

COVID-19 and “Disability”

- Employee reluctantly returned, but had to take lunch in the car and was exposed to people without masks
- End of July renewed request to work from home - denied
- On August 10 Employee submitted “conditional resignation” effective September 5
- August 27 Employer allowed managers with children to work from home 2 days a week
- Employee renewed request - denied

COVID-19 and “Disability”

- Employee sent email - will work in office for a week, but will resume telework on September 8
- Employer said “will enforce applicable policies” if telework starting September 8
- Employee viewed this as threat of termination

COVID-19 and “Disability”

- Filed lawsuit on September 3:
 - Disability discrimination
 - Failure to accommodate/no interactive process
 - Hostile work environment

COVID-19 and “Disability”

- District Court issued preliminary injunction prohibiting termination for 60 days
 - Asthma can be a disability “at least during the COVID-19 pandemic”
 - Whether it “substantially limits” a person is a fact-specific question
 - Consider the “heightened risk of impairment” or of “death or serious injury” if contract the virus

COVID-19 and “Disability”

- Telework can be a reasonable accommodation - here, employee successfully teleworked for 4 months
- Providing KN95 masks, hand sanitizer and wipes, air purifier, and separate private workspace are safety rules, not individualized accommodation

COVID-19 and “Disability”

- Cannot issue a blanket requirement that “all managers must come to work”
- Option to use leave or take a personal leave of absence is not a reasonable accommodation - doesn’t enable employee to do their job
- Likely irreparable harm if accommodation denied or if terminated
 - Risk of injury/death if infected
 - 16.1% unemployment in Massachusetts
 - Loss of health insurance

COVID-19 and “Disability”

- *Silver v. City of Alexandria*, 2020 WL 3639696 (W.D. La. July 6, 2020)
 - 98 year old with aortic valve disease, systolic heart failure and a permanent pacemaker.
 - Elected city councilman and asked to attend meetings remotely
 - Defendant argued that he is not entitled to claim those disabilities BECAUSE they are only COVID-19-related and only “situational”
 - Rejected
 - Neither the ADA nor the Rehabilitation Act contain any language to limit application to certain environmental or health-related situations.
 - “The determination of a qualifying disability in this case cannot be looked at in a vacuum.”
 - “. . . the pandemic is the unprovided-for case.”
 - “. . . consideration of Mr. Silver's documented serious underlying medical situation, in light of the pandemic's existence, is the proper way to make the disability determination here.”

COVID-19 and FMLA

- Having COVID-19 can be a “serious health condition”
- Is a self-isolation/quarantine an “incapacitation”?

COVID-19 and other Discrimination

- Age and Pregnancy Discrimination
 - People 65+ at greater risk if contract virus
 - But cannot “protect” them by not hiring or not recalling them, or by terminating them
 - Same for pregnant women
 - Need to consider carefully requests for leave and remote work

Risk Mitigation

- All requests to work from home and/or for leave should be treated as potential requests for reasonable accommodation and/or FMLA or similar leave
- Train managers to escalate all requests to HR
- Respond timely to all requests for remote work and leaves of absence and the responses
- Document all requests for remote work and leaves of absence and the responses
- Avoid “blanket” rules regarding return to work - individualized assessments and interactive process are critical
- Avoid inconsistent treatment in similar circumstances
- If any adverse action is taken, **MUST** document the reasons
- If employee is outside of North Carolina, be aware that several other states have broader protections (e.g., in New Jersey, COVID-19 itself is a “disability”)

COVID-19 and federal WARN

- 60 days' advanced notice of a mass layoff or plant closing
- Shortened notice when a mass layoff or plant closing is caused by an “unforeseeable business circumstance”
 - employers must issue notices when the plant closing or mass layoff becomes “probable” – i.e., when the objective facts reflect that the layoff is more likely than not
- If layoff originally anticipated to last less than six months, but ultimately extends beyond six months, then an employment loss occurs.
- When “unforeseeable business circumstances” existed at the beginning of the furlough – justifying less than 60 days' notice before the furlough began – still must provide as much notice as possible as soon as it is “reasonably foreseeable” that an extension of the layoff beyond six months, or a permanent separation from employment, is going to happen.
- **ACTION:** Reassess and determine whether employment losses – including furloughs that were anticipated to last less than six months but may now exceed six months – are likely, and provide the required notice.

North Carolina's COVID-19 Immunity Law

HOUSE BILL 118
signed by Governor Cooper, July 2, 2020

AN ACT TO PROVIDE LIMITED IMMUNITY FROM LIABILITY FOR CLAIMS BASED ON
TRANSMISSION OF CORONAVIRUS DISEASE 2019 (COVID-19).

House Bill 118

Article 8.

COVID-19 Limited Immunity.

§ 99E-70. Definitions.

The following definitions apply in this Article:

- a) **COVID-19**. - The disease caused by the SARS-CoV-2 virus. **Person**. - An **individual**; corporation; **nonprofit corporation**; business trust; estate; trust; partnership; limited liability company; sole proprietorship; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; **or any other legal entity**.

House Bill 118

§ 99E-71. Limited immunity.

- a) In any claim for relief arising from any act or omission alleged to have resulted in the contraction of COVID-19, including any claim based on violation of subsection (b) of this section, no person shall be liable for any act or omission that does not amount to gross negligence, willful or wanton conduct, or intentional wrongdoing.

“Gross negligence” defined:

“[W]anton conduct done with conscious or reckless disregard for the rights and safety of others.” *Suarez ex rel. Nordan v. Am. Ramp Co.*, 831 S.E.2d 885, 893 (2019) (quotation omitted).

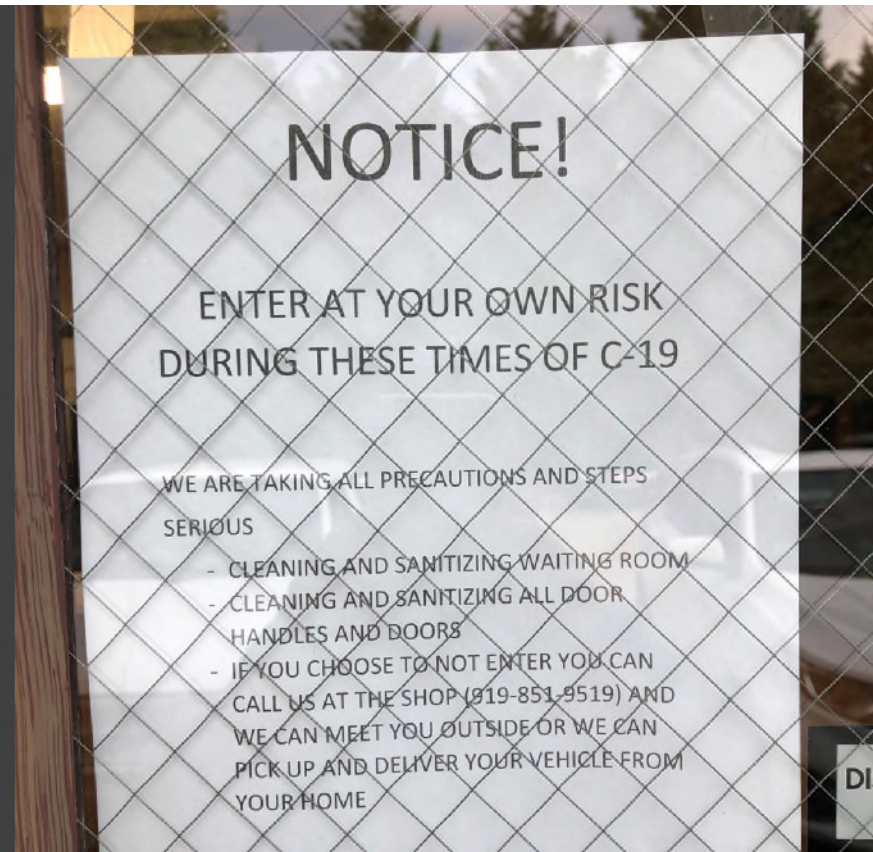
In English: Mistakes, bad mistakes vs. really, really bad mistakes, or worse.

House Bill 118

§ 99E-71. Limited immunity.

- b) Every person shall provide, with respect to any premises owned by the person or under the person's possession, custody, or control, reasonable notice of actions taken by the person for the purpose of reducing the risk of transmission of COVID-19 to individuals present on the premises. No person shall be liable for the failure of any individual to comply with rules, policies, or guidelines contained in the notice required by this subsection. This subsection shall not apply to premises owned by an individual, other than premises that are used in the operation of a sole proprietorship.
- c) This section does not apply to claims before the Industrial Commission seeking benefits payable under the Workers' Compensation Act, Article 1 of Chapter 97 of the General Statutes.

Is this adequate
notice as
required by
H118?





House Bill 118

§ 99E-72. Applicability.

- a) This Article applies to claims arising no later than 180 days after the expiration or rescission of Executive Order No. 116 issued March 10, 2020.

COVID-19 Liability Waivers/Releases

- Are They Necessary?
- Will They Hold Up?



COVID-19's Next Wave:

Legal Claims Looming for Employers



Kerry A. Shad

October 15, 2020

EXPECT EXCELLENCE®

