

## Trends, Targets and Hotspots in Employment Related Litigation COVID - 19



Kerry A. Shad

October 28, 2021

EXPECT EXCELLENCE®



©2021 Smith Anderson

## Volume of Cases Nationwide

- March 2020 - Mid-October 2021
  - Federal - > 1,700
  - State - > 2,200
  - Total - Nearly 4,000

\*

Information in slides 1-12 based on data collected and reported by national firms, including Littler Mendelson and Fisher Phillips.

EXPECT EXCELLENCE®

2

## What types of claims are being filed?

- Top 3
  - Retaliation/Whistleblower
  - Discrimination
    - Disability
    - Age
  - Wage and Hour
    - Overtime
    - Off-the-clock

## What types of claims are being filed?

- Mostly single-plaintiff claims
- Some class/collective actions
  - Wage and hour
  - Discrimination
  - Retaliation

## What industries are targeted?

- Federal
  - Healthcare
    - Service providers
    - Nursing home/LTC
    - Hospitals
  - Manufacturing
  - Retail
  - Construction
- State
  - Healthcare
    - Service providers
    - Nursing home/LTC
    - Hospitals
  - Retail
  - Manufacturing
  - Construction

## Where is the (legal) action?

### Pop Quiz #1

Q: True or False

Only 2 states or territories have 0 total COVID-19-related claims filed?

A: True

## Where is the (legal) action?

### Extra Credit

Q: Which two?  
Guam  
Wyoming  
Montana  
North Dakota  
Rhode Island

A: Wyoming and North Dakota

## Where is the (legal) action?

### Pop Quiz #2

Q: In what state have the most cases been filed?  
Pennsylvania, New York, California, Illinois, or Florida?

A: Illinois  
Just kidding - of course its California 😂  
30% of all cases with over, with over 1,000 in state court

## Where is the (legal) action?

- Top 5 States
  - California
  - New Jersey (most per capita)
  - New York
  - Florida
  - Ohio

## How about North Carolina?

### Pop Quiz #3

Q: How many cases filed in North Carolina?  
12, 26, 58, 109

A: 26! (ranked 27<sup>th</sup> overall, and 40<sup>th</sup> when you consider population)  
23 in federal court  
3 in state court  
10 filed since 8/11/2021

## What about North Carolina?

- Most common claims:
  - Retaliation
  - Wrongful termination
  - Disability discrimination

## Does Size (of employer) matter?

- Over 1/3 of all cases filed against employers with 1-50 employees
- Nearly 1/2 of all cases filed against employers with < 500 employees

## COVID-19 Wage & Hour Claims

- Time spent on symptom screening
- Time spent donning/doffing PPE
  - Before shifts
  - After breaks
  - Shortened meal breaks
- Remote work and lack of recordkeeping
- Reimbursement

## COVID-19 Whistleblower/Retaliation Claims

- Raising concerns about health & safety issues
  - *King v. Trader Joe's* (Kentucky)
    - Complained about lack of safety protocols, failure to comply with health & safety guidelines
    - Created Facebook group page to complain
    - Terminated

## COVID-19 Whistleblower/Retaliation Claims

- Multiple cases filed against healthcare employers
  - Unsafe work conditions
  - Inadequate PPE
  - Requirement to work in person
- Raising concerns about “legality” of mask or vaccine mandates or temperature checks
- Employee does not have to be right

## COVID-19 Whistleblower/Retaliation Claims

- NC REDA
  - Complaining about lack of PPE
  - Refusing to come to work because felt violated stay-at-home order
  - Nurse’s aide asked for assignment not on COVID floor due to hypertension



## COVID-19 Whistleblower/Retaliation Claims

- Risk is increased when:
  - Management does not embrace compliance with safety protocols
  - Management questions the need for the protocols
  - Supervisors do not follow the rules
    - Subordinate's "reminder" is protected

## Risk Mitigation

- Speak-up culture
- Strong policy
- Options for reporting concerns
- Train supervisors to recognize complaints of unsafe or illegal actions and to report it to HR
- Robust investigations

## Risk Mitigation

- Be aware of the timing
- Consistent approach
- Factual support - documentation of issues is key
- Watch out for “not a team player”; “can’t get along”; “insubordination”

## COVID-19 - Age Discrimination

- Not allowing older workers to return to work/terminating/not hiring
- Terminating older workers but allowing younger workers to take voluntary leaves or reduced pay/hours
- Failure to rehire older workers after reopening
  - Class action against the Kimberly Hotel in NYC

## Risk Mitigation

- Follow policies (if any) on rehiring
- Know local laws re rights to rehire (e.g. California)
- Review prior communications (e.g. “temporary” layoff?)
- Consider offering everyone their job back

## Risk Mitigation

- If publicize open positions encourage all former employees to apply
- Clearly state any change in duties/pay
- Document reasons for laying off/terminating or returning some but not others

## NC Immunity Laws

- Only protects against claims that conduct caused someone to *contract* COVID-19
  - Unless there was gross negligence, recklessness or intentional infliction of harm
  - Separate protections for health care providers and facilities
  - **No protection against retaliation or discrimination claims**

## Covid-19 Litigation

THANK YOU!



# Trends, Targets and Hotspots in Employment Related Litigation COVID - 19



Kerry A. Shad  
October 28, 2021

**EXPECT EXCELLENCE®**