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5 Tips for Employers to Safeguard Against Employee Discrimination Claims Arising from COVID-19

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Highlights

- As employers continue to navigate the coronavirus (COVID-19) pandemic and contemplate returning employees back to the workplace, these unprecedented circumstances present an exceptional risk for an increase in employment discrimination claims.
- This Holland & Knight alert provides practical tips that employers should consider to help minimize the risk of employment discrimination claims related to COVID-19.

In the wake of the evolving coronavirus pandemic (COVID-19), employers were suddenly faced with unique challenges to their ability to protect the health and safety of their employees. As a result, many employers transitioned all or parts of their workforce to remote working environments. Employers whose workforces are not compatible with remote work were encouraged, and in many instances required, to implement safety precautions to minimize exposure to COVID-19 in the workplace. Other employers were forced to reduce their workforces by implementing furloughs or layoffs. Adding to their challenges, employers have had to determine the best way to support employees who require time off or are returning to work after taking leave because of COVID-19. Now, as employers continue to navigate the COVID-19 pandemic and contemplate returning employees back to the workplace, these unprecedented circumstances present an exceptional risk for an increase in employment discrimination claims.

Employers should consider the following practical tips to help minimize the risk of employment discrimination claims related to COVID-19:

1. Deterring Discrimination Against Employees Based on Race and National Origin

An alarming consequence of COVID-19 being characterized as a "Chinese virus" and the use by some individuals of derogatory terms such as "kung flu" is a potential increase in claims of discrimination or harassment based on an employee's race or national origin. To reduce the possibility that employees are subjected to discriminatory or harassing behavior, employers should explicitly communicate to employees that heightened fears and concerns related to COVID-19 must not be displaced and projected onto individuals because of their race, national origin or other protected characteristics. Employers should remind employees of their anti-discrimination policies and that discrimination or harassment of employees based on their protected status will not be tolerated. Employers should also review their anti-discrimination and anti-retaliation policies to ensure that the policies include a comprehensive internal reporting process.

2. Preempt Discrimination Against Employees Who Test Positive or Are Designated "Presumptive Positive" for COVID-19

Because of the fear surrounding the pandemic, employees who return to work after recovering from a positive or "presumptive positive" diagnosis of COVID-19, or caring for a family member with a positive or "presumptive positive" diagnosis of the coronavirus, may be subject to discrimination or harassment based on the employee's actual or

perceived disability. To help reduce the likelihood of these claims, an employer should distribute information explaining how it will address employees who are experiencing COVID-19-related symptoms or require leave to care for a family member experiencing coronavirus-related symptoms, and the protocol for returning to work. As a primary matter, employees should be prohibited from reporting to work if they are currently experiencing COVID-19-related symptoms, and be required to notify the employer if the employee or their family member tests positive or presumptive positive for COVID-19. The employer policy should also outline the process for returning to work, and may include a requirement that an employee who takes COVID-19-related leave may only return to work after submitting a fitness for duty certification from a healthcare provider. However, as a practical matter, healthcare providers may be too busy to provide fitness for duty certifications and innovative approaches, such as relying on local clinics or permitting certification through email, may be necessary. Employers should refer employees to its anti-discrimination and anti-retaliation policies, and state that discrimination and harassment of employees returning to work following COVID-19-related leave may constitute unlawful discrimination based on the employee's actual or perceived disabilities, which is strictly prohibited.

If employees have concerns about the health of their colleague(s) or the safety of the workplace, the employer should encourage them to raise their concerns with their supervisor or Human Resources so that the employer can promptly investigate such concerns and take appropriate action. The U.S. Equal Employment Opportunity Commission's (EEOC) guidance regarding pandemic preparedness in the workplace within the scope of the Americans with Disabilities Act (ADA) permits an employer to send an employee home if the employee reports to work with symptoms associated with COVID-19 or is diagnosed as positive or "presumptive positive" for COVID-19. (See Holland & Knight alert, "EEOC Publishes Further Guidance for COVID-19 Pandemic Preparedness in Workplace," April 23, 2020.)

3. Preventing Whistleblower Claims and Preempting Retaliation Claims by Employees Who File OSHA Complaints Based on COVID-19 and Related Safety Issues

The Occupational Safety and Health Act of 1970 (OSHA) requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm," including specifically occupational exposure to COVID-19. If an employee believes that their working conditions are unsafe – because of potential exposure to COVID-19 or any other reason – the employee may file a safety and health complaint with OSHA. The OSHA Whistleblower Protection Program prohibits employers from taking adverse employment action against employees who raise or report concerns about hazards or violations of various federal law, including specifically those related to COVID-19.

Employers should carefully review and comply with the evolving COVID-19-related restrictions and safety measures to ensure compliance, including guidance from OSHA on Preparing Workplaces for COVID-19, and how to Prevent Worker Exposure to Coronavirus (COVID-19), as well as the Centers for Disease Control and Prevention (CDC) guidance for maintaining healthy business operations during COVID-19. Certain safety measures may be easy to implement, including encouraging employees to frequently wash their hands with soap or an alcohol-based hand rub, avoiding close contact with other individuals (including other employees, customers and/or patients) by moving or restricting employee work stations, and ensuring that employees use controls to prevent exposure to the virus, including social distancing, personal protective equipment (including the use of gloves and masks) and cleaning supplies. Employers should inform employees of efforts to keep the workplace clean and disinfected, and educate employees about steps that they can take to protect themselves at work and at home. Finally, employers should encourage employees to internally report any concerns regarding the health and safety of the workplace.

4. Providing Reasonable Accommodations to Employees on a Temporary Basis

Because COVID-19's effects on the majority of individuals are temporary and have little to no long-term impact,

COVID-19 alone likely would not constitute a covered disability under the ADA. However, the ADA requires employers to assess whether an employee has an ADA-qualifying "disability" on a case-by-case basis. Employers may experience an increase in accommodation requests from employees with underlying ADA-qualifying physical or mental health conditions that may be exacerbated or complicated by COVID-19. If an employee's job is unable to be performed remotely, and the employee has a disability that makes them more susceptible to severe effects or complications from the virus, the employer should grant an employee's request for a reasonable accommodation that would minimize the employee's potential exposure to COVID-19, or offer the employee additional protection, unless doing so would cause an undue hardship.

In assessing whether an accommodation is reasonable, the employer should consider the cost to the employer, and whether the employee will only require the accommodation for a limited period of time (for the duration of the pandemic). Low cost, temporary solutions may meet the employee's needs during the COVID-19 pandemic without causing undue hardship for the employer. For example, if an employee is immunocompromised, but is otherwise able to perform the essential functions of the job, an employer may accommodate the employee's request for reduced contact by permitting the employee to work in an empty office instead of a cubicle in close proximity to other employees, staggering employee workstations to provide more distance between employees, or providing employees with protective equipment, until such date that the government lifts mandatory and/or voluntary safety measures relating to COVID-19. It is also important for employers to remain flexible and consider whether it can offer other short-term accommodations, such as teleworking, a temporary job restructuring of marginal job duties, a temporary transfer to a different position or a modification to an employee's work schedule that might result in reduced exposure to others in the workplace or while commuting.

5. Avoiding Possible Discrimination Claims When Implementing a Furlough or Layoff

In an effort to reduce costs and protect the viability of business operations during this period of economic instability, many employers are reducing their workforces by implementing temporary unpaid furloughs or layoffs. An employer may use any criteria to select employees for furlough or layoff, provided that the employer does not base the decision on an employee's age, disability, race, national origin, sex, pregnancy or pregnancy-related condition, religion or any other class protected by federal, state or local law. Often, employers eliminate positions that cannot be performed effectively on a remote basis, or eliminate employees based on their seniority or performance. While this criteria is permissible on the surface, employers should conduct an "impact analysis" of the employees selected for furlough or layoff and the employees retained, and determine whether the criteria utilized adversely impacts individuals of a certain protected class(es). For example, selecting older workers, pregnant workers or workers with known health issues for furlough or layoff as a means of "protecting" them from COVID-19 likely will be deemed unlawful discrimination.

Conclusion

Employers must remain diligent about preventing and responding to allegations of unlawful discrimination and retaliation in the workplace, particularly as the unprecedented challenges related to COVID-19 continue to develop. For more information or assistance on this topic, please contact the authors or another member of Holland & Knight's Labor, Employment and Benefits Group.

DISCLAIMER: Please note that the situation surrounding COVID-19 is evolving and that the subject matter discussed in these publications may change on a daily basis. Please contact your responsible Holland & Knight lawyer or the authors of this alert for timely advice.

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jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel.

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