



## Will COVID-19 Employment Lawsuits Become Part of the “New Normal”?

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John S. Gannon has defended employers against claims of discrimination, retaliation, harassment, and wrongful termination, as well as actions arising under the FMLA, and wage and hour law. John also has experience with lawsuits seeking to enforce restrictive covenants and protect trade secrets. John frequently assists employers in litigation avoidance strategies. He regularly counsels employers on compliance with state and federal laws, including the Americans with Disabilities Act, Fair Labor Standards Act, and Occupational Health and Safety Act. John is a regular contributor to business publications and to the Massachusetts Employment Law Letter.



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## Different Legal Theories

- Negligence/Recklessness
- ADA Violations
- NLRA Retaliation
- FFCRA Violations
- OSHA and Healthcare Whistleblower Retaliation
- Q&A



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## Lawsuits

*“Hundreds of lawsuits stemming from the coronavirus pandemic are rapidly amassing in state and federal courts, the first wave of litigation challenging decisions made early during the crisis by corporations, insurance companies and governments.”*

- Washington Post, 5/1/20

*Will be “biggest trial lawyer bonanza in history”*

- Senator Mitch McConnell

## Negligence

- General Theory:
  1. Employer/business did not take adequate steps to protect workers/customers
  2. Worker/customer gets sick/harmed as a result of this breach (causation)
  3. Worker/customer (or family member) harmed as a result of this breach (damages)
- *“You did not take steps to prevent me from coronavirus, I have injury that flowed from that”*

# Negligence

- Evans v. Walmart, Inc., No. 2020L003938 (Circuit Court of Cook County, Illinois, April 6, 2020)
  - Family of a Walmart employee in Illinois who died after contracting COVID-19, filed lawsuit accusing business of failing to adequately screen and protect workers
  - Claim negligence (wrongful death); recklessness (willful/wanton misconduct)
  - Brought against Walmart and building owner
- What about worker' comp?
  - Even if applicable, Section 28 claim in Mass.

# Negligence

## Allegations include business:

- Failed to promote and enforced social distancing
- Failed to provide protective equipment such as masks and gloves
- Failed to warn Evans and other employees that various individuals at the store may have been infected
- Ignored employees who said they were experiencing symptoms of COVID-19
- Failed to follow OSHA and CDC guidelines
- Failed to periodically inspect the store for condition and cleanliness to minimize risks to employees and others
- Failed to provide employees with antibacterial soaps, wipes or other recommended cleaning agents
- Failed to develop policies for prompt identification and isolation of sick people
- Failed to halt store operations after learning various employees were experiencing COVID-19 symptoms
- Failed to train employees in proper risk mitigation procedures

## Negligence: *What can you do to prevent?*

- Follow CDC Guidance
  - Guidance for businesses and employers
    - <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
  - New General Business FAQs
    - *What to do if employee has symptoms?*
    - *What if employee suspected/confirmed diagnosis?*
    - *When should employee return?*
    - <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html>
  - Reopening Guidance for Cleaning Workplaces
    - <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>

## Negligence: *What can you do to prevent?*

- Follow OSHA Guidance
  - Guidance on Preparing Workplaces for COVID-19
  - <https://www.osha.gov/Publications/OSHA3990.pdf>
  - Summary:
    - Develop an Infectious Disease Preparedness and Response Plan
    - Implement basic infection prevention measures
      - Good hygiene; respiratory etiquette; telecommuting options
    - Develop policies for prompt identification and isolation of sick employees
      - Report when have symptoms; self-monitoring
    - Communicate workplace flexibilities
      - Stay home when sick; leave available

# Discrimination

- Discrimination/Harassment Issues
  - Pandemic fear/blame should not be misdirected against individuals because of a protected characteristic
  - Part of return to work protocol?
  - Layoffs – pretext for discrimination?
- Confidentiality
  - Temperature check logs; self-identification information; test results, etc.
  - Separate from personnel file (should have separate medical files for employees)

# Disability Discrimination

- Reasonable Accommodation Issues
  - Protection for those at higher risk due to preexisting condition
    - EEOC suggests: *Temporary job restructuring of job duties, temporary transfers, or modifying a work schedule or shift assignment while reducing exposure to others in the workplace*
  - Preexisting condition exacerbated
    - Stress, anxiety, PTSD, etc.
  - Undue hardship analysis: Ok to consider sudden loss of revenue
  - Direct threat: Can employers exclude high risk employees from the workplace?

# COVID-19 and the NLRA

## Protected Concerted Activity

- Employees have the right under the NLRA to discuss working conditions
  - This includes workplace safety and COVID-19 related fears
- Employers cannot discharge, discipline, or threaten employees for, or coercively question employees about protected concerted activity.

## Section 7

- NLRA protects both union and non-union employees non-supervisory employees who engage in concerted activity for mutual aid or protection
- COVID-19
  - employees refusing to perform certain work assignments or refusing to work without personal protective equipment resulting from fear of COVID-19
  - a single employee claiming the need for PPE on behalf of himself and others

## Section 502

- Protects an employee(s) from permanent replacement if the employee(s) stops work
- Work stoppage based on a good-faith belief that their working conditions are abnormally dangerous, where ascertainable, objective evidence supports that belief, and the perceived danger poses an immediate threat of harm to employee health or safety
  - If these criteria are satisfied does not violate “no strike” provisions in a CBA

## Things to Consider

- If there are concerns or a refusal to work... document!
  - The risk of exposure associated with the type of work
  - Any preventative measures already in effect at the workplace
  - PPE
  - Training for all employees on workplace safety and health (handwashing, social distancing, any applicable local or state face covering orders)
- Employers should analyze the circumstances of any concern or refusal to determine whether the employee's activity is protected

## FFCRA Violations

## Lawsuits

- They've already started
  - Jones v. Eastern Airlines
- Likely many more to come
  - Confusion
  - Continually changing guidance (at least 3x)
  - As of this morning 5/7/20 – 859 COVID-19 related lawsuits nationwide (30% prison conditions)
- Constantly changing landscape
  - Battle in D.C. over enhancing employer protections from liability once reopening (whether that would include FFCRA protections remains to be seen)

## FFCRA Violations

- Violations of paid sick time or unlawful termination provisions are subject to penalties and enforcement under the FLSA
- Violations of the EFMLA provisions of the act are subject to penalties and enforcement under the FMLA
- Non-enforcement period
  - Ran 30 days after the act took effect, so long as employer acted reasonable and in good faith
  - Violations must have been remedied, not willful, and employer must submit written commitment to DOL to comply in the future

## Eastern Airlines

- First widely reported FFCRA lawsuit
  - Alleging interference and retaliation under FFCRA
    - Employee allegedly fired for pursuing rights under FFCRA when child's school closed
  - Demand - wages, employment benefits, or other compensation denied or lost; liquidated damages; employment, reinstatement, promotion, or payment of health-care expenses; and attorneys' fees, costs, interest
  - Interestingly enough termination occurred prior to April 1<sup>st</sup>

## Eastern Airlines

- Plaintiff - Jones, Director of Revenue Management
- Contacted management staff requesting to be allowed to continue to work from home
  - Wanted to work from home and requested two hours per day of flex-time to help with her 11-year old son
  - Jones raised questions about her eligibility for leave under FFCRA and formally requested the leave on March 24th

## Eastern Airlines

- Head of HR at company responded:
  - “the new laws are there as a safety net for employees, not as a hammer to force management into making decisions which may not be in the best interest of the company or yourself”
  - **Don’t say that ^**
  - Reached out via telephone three days later and terminated Jones for a “conflict” with others in the company

## Things to Know

- FFCRA adopts enforcement mechanisms of FLSA and FMLA – managers and supervisors can be sued in their individual capacities
  - Here both the head of HR and the CEO were included in lawsuit
- Claims can come quickly
  - No administrative process required-AKA-case goes straight to court

## Best Practices

- Consult your employment and labor counsel
- Designate point person(s)
  - Consistency is key – proper reviews of requests should be conducted in all situations and all factors considered should be documented
  - Easier to manage requests if all going to same staff member
- Training
  - As with FMLA and other laws supervisors need to be able to recognize when an employee is engaging in protected action

## Whistleblower Complaints

- OSHA Retaliation
  - OSH Act protects those who complain about unsafe conditions
  - Complaint does not need to rise to level of actual violation
- Health Care Whistleblowers
  - State laws (including MA and CT) protect health care workers
  - Complaint about risks to public health or object to participate in such activity

