

# Employers are bracing for four types of employment claims arising out of the COVID-19 pandemic

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As we ease into a “new normal” across the country, we’re seeing early evidence that COVID-19-related employment claims are on the rise. A new Liberty Mutual/Ironshore sponsored [white paper](#), authored with Peter J. Woo of Goldberg Segalla, LLP, outlines the top four types of potential employment claims expected in 2020.



1 Leave- and discrimination-related charges



2 Breach of employment contract



3 WARN Act violations



4 Wage- and hour-related claims

**Questions for claims professionals, risk managers, human resources professionals, and in-house attorneys to ask after receiving a COVID-19-related claim.**



## 1 Leave- and discrimination-related charges

### Leave-related complaints

Many employees grappling with the effects of COVID-19 are requesting time off from work. A covered employer who denies the requested leave, requests improper documentation, or retaliates against an employee for taking such leave may be subjecting themselves to potential exposure to a claim of violation of the Family and Medical Leave Act (FMLA), the Families First Coronavirus Response Act (FFCRA), or state-equivalent laws.

### Discrimination-related charges

It is anticipated that employees perceived as “unhealthy” or “high risk” may be subject to disparate treatment, or conversely, may seek accommodations because they are fearful to return to work. As well, employees may seek leave for stress caused by the coronavirus that has adversely affected the employee’s state of mind. In addition to discrimination based on disability, employers could face claims of discrimination based on national origin, race, or age in connection with the etiology of COVID-19.

### Whistleblower retaliation

Driven by fear and uncertainty, employers have already seen a marked increase in complaints by employees about workplace safety, exposure to COVID-19, and adherence to local and state public health orders and/or the Occupational Safety and Health Administration (OSHA) directives regarding social distancing, disinfecting workstations, and/or other decrees. Other whistleblower claims could arise based on improper execution of the FFCRA, and other employment protections under state and federal law.



## 2 Breach of employment contract

As companies scale down operations, many are faced with the inability to perform their obligations under employment contracts which set out specific terms, including dates of employment and compensation structure. Employers may find themselves in a litany of lawsuits filed by employees claiming breach of contract and other contract-related causes of action in connection with either termination of employment agreements or pay reductions that are contrary to the terms of the agreements.



### 3 WARN Act violations

Under the federal WARN Act, a covered employer must provide advanced written notice to employees who may be subject to a plant closure or mass layoff, as defined under the law. Given the sudden and immediate impact of COVID-19 on businesses, employers are arguing that it is virtually impossible to provide the required 60-day notice under the federal mandate. We can expect to see litigation arise from violations of the federal WARN Act.



### 4 Wage- and hour-related claims

#### **Timekeeping claims**

Employers may have to contend with employee claims that employers failed to provide and/or pay for all required meal periods, rest breaks, and overtime for remote and on-site employees.

#### **Reimbursement claims**

As employees continue to work remotely, they will seek reimbursement for expenses incurred involving the use of their personal cellphone, electricity, internet usage, or other home office costs. Employers are advised to review company policies with respect to reimbursement and the relevant law in the employer's jurisdiction, and develop a strategic plan of action accordingly. Failure to do so will result in claims for failure to reimburse expenses, which may, in certain jurisdictions, entitle the employee to attorney's fees if the employee prevails on the cause of action.



Questions for claims professionals, risk managers, human resources professionals, and in-house attorneys to ask after receiving a COVID-19-related claim.

### Generally

- Are there any joint employer issues?
- Can the employer seek indemnification from a third party?

### Leave-related complaints

- Do the plaintiff and defendant fall within the definitions of "employee" and "employer" within the statute?
- Have employers provided the required notices to employees?
- Does the employee have a qualifying need?
- What communications exist between the employer and employee regarding the need?
- Does the employer have a legitimate basis to deny leave under the law or use any exceptions promulgated by statute?

### Discrimination claims

- What policies have employers put in place to minimize the risk of COVID-19-related discrimination?
- What kind of education has the employer provided to its human resources departments with respect to handling these types of complaints?
- What kind of evidence demonstrates the decision-making processes regarding any complaints received?
- Has the employee sought workers compensation benefits related to the claim?

### Whistleblower retaliation

- What safety protocols have been put in place since the pandemic started?
- Has the employer used any of the recommendations by federal health and safety officials such as OSHA or the CDC?
- Were there any legitimate business reasons for taking any action against the employee?

### Breach of contract

- Are there any written or oral modifications of the original agreement?
- Is there a force majeure clause? Does it specifically reference pandemics?
- Did the pandemic have an immediate adverse effect on the employer's business?
- How has the employer attempted to mitigate any impossibility or impracticability of performance of the contract?
- In light of businesses reopening, is the duration of the reduction of pay commensurate with the financial concerns of the employer?

### WARN Act violations

- Does the layoff or plant closure fall within the scope of the federal or state WARN Acts?
- If notice is required, was it adequate under the law?
- Can the employer rely on any of the exceptions under statute?

### Timekeeping wage and hour issues

- Has the employer enacted any supplemental policies and break practices for employees who are remote?
- How has the employer attempted to communicate and enforce these policies to remote employees? On-site employees?
- Have employees signed arbitration agreements?

### Reimbursement demands

- What kind of policy does the employer have regarding reimbursement of expenses?
- What is the procedure to seek reimbursement?
- Has the employer considered alternative methods to reimburse employees (e.g., flat monthly stipend)?

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