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EPL Claims in the Age of COVID-19: Where We Are and What We Can Expect

I. INTRODUCTION

The COVID-19 pandemic has changed the workplace in significant ways, and the changes it brings to the landscape of employment litigation are just as significant. This panel presentation focuses on recent trends in employment litigation in light of the COVID-19 pandemic, including the impacts COVID-19 will have on EPLI coverage and social inflation; threshold issues when a claim is brought to court, such as forum selection, jurisdiction, and statutes of limitations; a discussion of the different employment law claims that have arisen related to the COVID-19 pandemic; and an overview of the employment litigation risks implicated by the COVID-19 vaccine. This panel presentation will assist agents by giving them a basis to determine coverage and exclusions under EPLI policies in light of recent litigation trends, helping them assess the merits and value of the new claims that have arisen due to the COVID-19 pandemic, and will assist underwriters when they are developing and costing policies.

II. THE IMPACTS OF COVID-19 ON EPLI COVERAGE AND THRESHOLD LITIGATION ISSUES

A. COVID-19 and Social Inflation

Social inflation is the concept that societal trends and views towards litigation have an impact on the cost of legal insurance claims. Social inflation may contribute to increased litigation and settlement costs in the wake of the COVID-19 pandemic. One reason for this is that the media coverage of employer decisions and COVID-19-related precautions tends to be negative and can negatively impact public opinion of employers. This media coverage may skew future jurors' opinions in favor of employees that they feel have been treated badly by their employers, contributing to larger jury awards to these employees. On the other hand, this media coverage may also cause employers who have been denied legal insurance coverage to be viewed in a sympathetic light, which contributes to larger jury awards towards those employers in insurance disputes. In either case, jury members may seek to "punish" a party they perceive to be a "bad actor," potentially leading to an increased number of jury verdicts in favor of the "wronged" party and larger monetary awards. All of these factors related to the COVID-19 pandemic may cause a rise in legal insurance costs.

On the other hand, court closures due to COVID-19 have delayed litigation, which may result in the slowing of social inflation. The delays may result in less cases going to trial, as parties become frustrated with the delays. This decrease in trials, however, does not mean that the cost of legal insurance claims will decrease. Current trends indicate that litigants facing court delays may be more eager to settle lawsuits outside of court to avoid drawn-out litigation, which may drive up the amount of settlements. While it is still too soon to tell exactly what impact the COVID-19 pandemic will have on

EPLI costs, the trends in litigation and settlement costs due to social inflation indicate that the cost of legal insurance claims is on the rise.

B. The Effect of COVID-19 on Forum Selection and Choice of Law

Court closures and changes in court procedures due to the COVID-19 pandemic have caused large delays in litigation in some courts. This has brought to light issues with the enforceability of forum selection clauses, as litigants encounter issues with forum availability. For example, in Conduent *Business Services, LLC v. Skyview Capital LLC*, C.A. No. 2020-0232-JTL (Delaware Court of Chancery), the parties were subject to a forum selection clause designating New York as the forum of choice. However, the New York courts were so backlogged with cases due to COVID-19-related court closures and modified court procedures that expedient litigation was not an option in that forum. The Delaware Court of Chancery held that the forum selection clause should be ignored in this instance, as the New York court would not have been able to litigate the case on a schedule that might avoid irreparable harm. The Delaware Court held that it, instead, was an appropriate venue for the case, as it had personal and subject-matter jurisdiction.

C. The Effect of COVID-19 on Jurisdiction

As the COVID-19 pandemic has forced businesses to transition to a remote-working model, employees may move (temporarily or permanently) out of state, while continuing to work for their employer remotely. This may lead to jurisdictional challenges if an employee files suit in a state from which they work remotely but where the employer does not do business. A court only has the power to decide disputes involving parties over which it has personal jurisdiction. For a court to have jurisdiction over a defendant employer, the employer must have "purposefully availed" itself of the privileges of conducting activities in the forum state.

Generally, the fact that an employee is located in and works remotely from another state is not sufficient to give rise to personal jurisdiction over the employer in that state. Courts have held that "[i]n remote-work cases, however, a defendant's mere knowledge that an employee happens to reside in the forum state and conduct some work from home does not constitute purposeful availment." *See Perry v. Nat'l Assoc. of Home Builders*, 2020 WL 5759766 (D. Md. Sept. 28, 2020). This is especially true if the move was voluntary -- the employee's unilateral decision, for the employee's personal convenience -- and if the employee's location is incidental to their employment. *See Callahan v. Wisdom*, 2020 WL 2061882, at *12 (D. Conn. Apr. 29, 2020).

However, there may be enough to give rise to personal jurisdiction in an employee's remote-work location if the employer purposefully sought to hire employees in that state (*see Williams v. Preeminent Protective Servs., Inc.*, 81 F.Supp.3d 265, 272 (E.D.N.Y. 2015)), used the employee's move to serve its business interests in that state, or provided assistance or equipment to aid the employee in business development or conducting existing business in that state (*see Stuart v. Churn LLC*, 2019 WL 2342354, at *5 (M.D.N.C. June 3, 2019)). It is also worth noting that the location of an employee in a different state may also have an effect on diversity jurisdiction if a party seeks to bring or remove a lawsuit to federal court.

D. The Effect of COVID-19 on Statutes of Limitation

In light of delays in litigation caused by the COVID-19 pandemic, many states have tolled statutes of limitation on legal claims for defined periods of time, through either executive orders or state Supreme Court decisions. Employers in these states may have claims brought against them after the statute of limitations would have normally passed, which are still valid due to the tolling of the statute of limitations. EPLI insurers will need to be wary of these "delayed" claims. Additionally, certain agencies, such as the Equal Employment Opportunity Commission (EEOC), paused their charge and/or investigation-related operations for certain periods of time. Employers and EPLI insurers may now have to deal with these claims, months after the time for filing may have ordinarily passed.

III. COVID-19-RELATED TRENDS IN EMPLOYMENT LITIGATION

A. An Overview of COVID-19 Related Employment Litigation

The legal claims that we consider COVID-19 related generally fall into two main categories: (1) cases based upon alleged violations of COVID-19-related protections; and (2) cases that are based upon traditional employment laws that have a nexus to the COVID-19 pandemic. The cases in the first category generally arise from protections for employees that were put into place specifically in response to the COVID-19 pandemic, such as the protections of the Families First Coronavirus Response Act (and now the American Rescue Plan Act). The cases in the second category can arise from any of the employment-related laws under which employees may bring claims against employers, but concern allegations specifically related to the COVID-19 pandemic. The majority of the claims discussed in this panel presentation will fall into the second category.

B. Breach of Contract Claims

We have seen a rise in employee breach of contract claims concerning furloughs, layoffs, and terminations or employment due to the COVID-19 pandemic. For example, in the case *Gillule v. Manhattan Woods Enterprises, LLC, et al.*, Case No. 032379/2020 (Rockland County, New York), an employee alleged that his employer breached his employment contract by furloughing him and failing to bring him back to work when feasible, discontinuing the payment of his salary and benefits, and terminating his employment without cause.

C. Retaliation and Whistleblower Claims

Employees have brought retaliation and whistleblower claims related to the COVID-19 pandemic, alleging that they have had adverse employment actions taken against them for complaining of an employer's lack of adherence to COVID-19-related safety protocols, failure to enforce social distancing requirements, and for exercising COVID-19 related leave rights. For example, in the case *Cimmino v. Italian Village Pizzeria*, No. UNN-L-002507-20 (Union County, New Jersey), an employee alleged he was fired after complaining that employer failed to provide masks and institute adequate social distancing protocols. He further claimed that his termination was also in retaliation for requesting that he be quarantined after co-workers exhibited flu-like symptoms and some tested positive for COVID.

D. Discrimination Claims

The COVID-19 pandemic has caused employers to see a rise in discrimination claims by employees based on a number of different protected classes, including age, race, national origin, ancestry, pregnancy, caregiver status, and online harassment.

1. Age

There is a growing concern over treatment of older workers in the workplace due to the general perception (supported by medical findings) that older adults, aged sixty and up, are more susceptible to COVID-19. Employers may find themselves in legal trouble as a result of treating their older workers differently than their younger workers. The plaintiff in *Jeffery Goldman v. Sol Goldman Investments, et al.*, Case No. 1:20-cv-06727 (Southern District of New York) was a sixty-nine-year-old housing litigation attorney who alleged that his employer discriminated against him based on age when it terminated his employment when he refused to return to work in-person and provided a doctor's note to support his need to work from home, due to his many risk factors for serious COVID-19 symptoms. The employer then replaced the plaintiff with a much younger employee. Similarly, the plaintiff in *Joseph Savino v. Luxury Cars of Southampton Inc.*, Case No. 2:20-cv-04152 (Eastern District of New York) was a sixty-eight-year-old salesperson who discovered that two younger employees were returned from a furlough two months earlier than he was and alleged discriminatory treatment.

2. Race, National Origin, and Ancestry Discrimination

Especially towards the beginning of the COVID-19 pandemic, increased anti-Asian animus due to the Chinese origin of the COVID-19 virus caused an increase in workplace discrimination claims. The EEOC has noted an increase in complaints of discriminatory animus based on race, national origin, and ancestry by workers of Asian descent or who are perceived to be of Asian descent. *See, e.g., Timothy Burkhard v. City of Plainfield et al.*, Case No. L-002356-20 (Union County, New Jersey) (The plaintiff, a firefighter, alleged racial discrimination stemming from racial comments made to him by co-workers based on his Asian-American ethnicity in relation to the COVID-19 pandemic). In addition to the rise in anti-Asian animus, the COVID-19 pandemic has disproportionately affected persons of color, which can create additional discriminatory animus. *See, e.g., D'Anjou v. Performance Food Group, Inc.*, Case No. 2:20-cv-10871 (District of New Jersey) (The plaintiff alleged that employer targeted African-Americans for layoff during a COVID-related reduction in force.). In light of this increase in claims of race, national origin, and ancestry discrimination, and the more racially-charged atmosphere created by the COVID-19 pandemic and other current world events, such as the Black Lives Matter movement, employers must take care that any furloughs, lay-offs, and recalls are conducted in a nondiscriminatory manner.

3. Pregnancy and Caregiver Status

Similar to age discrimination in this context, there is the danger that employers may treat pregnant employees differently due to beliefs about their susceptibility to COVID-19. While it is true that some pregnant employees may be at higher risk for serious COVID-19 symptoms, employers must not make assumptions about a pregnant employee's ability to work or treat the employee differently from other employees, unless the employee requests such accommodation. *See, e.g., Reiter v. Dejean and Kuglen Eye Associates, LLP*, Case No. 20-06-07399 (Montgomery County, Texas) (The plaintiff, a pregnant employee, alleged that she informed her employer of her pregnancy and was terminated, rather than being brought back from furlough with her fellow employees).

The closure of schools and places of care for children has placed an extra burden on parents during the COVID-19 pandemic, sometimes necessitating extra accommodation from employers or leaves of absence from work. While the Families First Coronavirus Response Act (FFCRA) no longer mandates leave from work for childcare obligations when schools and places of care are closed or remote due to the COVID-19 pandemic, employers must be wary of treating employees differently due to their status as parents. *See, e.g., Stephanie Jones v. Eastern Airlines*, Case No. 2:20-cv-01927 (Eastern District of Pennsylvania) (An employee who requested and was denied FFCRA leave to care for her son while his school was closed alleged that her employer discriminated against her based on caregiver status).

4. Online Discrimination and Harassment

As many workplaces continue to work remotely, employees may interact more online than they do in-person. It is important to note that online conduct can form the basis of claims of discrimination and harassment. The remote work atmosphere due to the COVID-19 pandemic may lead to an increase in claims based on such online conduct. Employers should make sure that their anti-harassment and anti-bullying policies address online harassment.

E. The Americans With Disabilities Act

Similar to the rise in other discrimination claims due to employer perception of employee susceptibility to COVID-19, the COVID-19 pandemic has caused a rise in disability discrimination by employees who feel that their employer has treated them differently due to a disability. Two lawsuits filed by a cancer survivor and an asthmatic physical education teacher demonstrate this trend. The case involving the cancer survivor, *Mondello v. Kelco Construction, Inc.,* Case No. 606551/2020, demonstrates the danger in making assumptions about an employee's susceptibility to COVID-19, based on the employer's perception of an employee as having a disability. The cancer survivor alleged that his employer regarded him as having a disability due to his status as a cancer survivor and discriminated against him based on this perceived disability, and ultimately terminated his employment. *See Mondello v. Kelco Construction, Inc.,* Case No. 606551/2020 (Suffolk County, New York). The second lawsuit, *Amanda Fisher v. Norwalk Public Schools*, Case No. 3:20-cv-01623 (District of Connecticut), demonstrates the issues that may arise when employers fail to provide reasonable accommodations related to the COVID-19 pandemic to employees with disabilities. The physical education teacher alleged that her employer failed to accommodate her disability when it denied her request to work remotely due to her asthma (which made it difficult for her to wear a mask), thus making her more susceptible to COVID-19. Employers must carefully evaluate all requests for reasonable accommodation related to COVID-19 and be sure that they are not treating employees differently due to their own assumptions about an employee's susceptibility to COVID-19.

F. Wrongful Discharge

The COVID-19 pandemic has also resulted in an increase in claims of wrongful discharge by terminated employees alleging that their employer had improper reasons related to COVID-19, such as for refusing to violate a stay-at-home order or for requesting FFCRA leave. For example, in *Amy Reggio v. Tekin & Associates,* Case No. No. CC-20-01986-B (Dallas County, Texas), the former General Counsel of a commercial real estate development firm near Dallas filed a lawsuit alleging that she was wrongfully terminated for refusing to violate a stay-at-home order when her employer refused to allow her to work from home, insisting she come in to work in-person.

G. Tort Claims

The COVID-19 pandemic has also lead to a meteoric rise in the number of employment-related tort claims. A number of these claims center on allegations that an employer has taken insufficient or no COVID-19 precautions, thus exposing employees to an unacceptable risk of COVID-19 transmission. *See, e.g., Alexandra Nedeltcheva et al. v. Celebrity Cruises Inc.,* Case No. 1:20-cv-21569 (Southern District of Florida) (a proposed class action by cruise line employees for negligence alleging that the cruise line failed to follow basic safety precautions, despite knowing that COVID-19 was likely present on its cruise ships); *Yaquelina Rivera v. Poly-America L.P.,* et al., Case No. DC-20-13735 (Dallas County, Texas) (the widow of a former employee, sued her husband's former employer for gross negligence in failing to take precautions to protect employees from COVID-19 including providing PPE, hand sanitizer, or to implement safety policies and social distancing). Other claims focus on employers' failure to warn employees of other COVID-19 cases in the workplace.

Other tort claims involve the "public nuisance" doctrine. These claims focus on allegations that an employer's actions (or lack thereof) have created a "public nuisance" that will further spread COVID-19. The goal of these claims is not damages for injuries, but to protect society from harm via injunctive relief, *i.e.*, forcing the employer to comply with applicable laws or guidance. *See, e.g., McDonald's Corp.*, Case No. 2020-CH-06748 (Circuit Court of Cook County, IL, filed May 19, 2020) (McDonalds employees brought a public nuisance claim alleging that their employer's inadequate COVID-19 protocols and safety measures constitute a public nuisance that will further spread COVID-19); *Palmer et al. v. Amazon.com, Inc.*, Case No. 1:2020cv02468 (federal court, New York, filed June 3, 2020, dismissed, appeal filed Nov. 24, 2020) (Seven warehouse workers brought a lawsuit alleging that Amazon created a public nuisance by failing to follow minimum public health standards to prevent transmission of COVID-19.).

Other tort claims against employers related to the COVID-19 pandemic involve claims of liability for COVID-19 exposure, or, even further, wrongful death due to preventable COVID-19 exposure at work. *See, e.g., Doe v. Smithfield Foods, Inc.*, Case No. 5:20-cv-06063 (Western District of Missouri) (Employees filed a lawsuit against the Milan, Missouri meat processing plant alleging failure to protect workers from COVID-19 exposure after at least eight workers showed COVID-19 symptoms, requiring them to stay home from work.); *Evans v. Walmart, Inc.*, Case No. 2020L003938 (state court, Illinois) (Relatives of an employee who died of COVID-19, who was believed to have contracted it while working for Walmart, filed a lawsuit alleging that Walmart is responsible for his death.).

H. Workers' Compensation

COVID-19 is now covered under many states' Workers' Compensation laws as a reportable work injury for which Workers' Compensation benefits are conceivably available, depending on the particular circumstances. Employees can conceivably receive compensation for contracting COVID-19 in the workplace even if their employer was not negligent.

I. Occupational Safety and Health Act Claims

The Occupational Safety and Health Administration (OSHA) has received thousands of complaints from workers, alleging that their employers are violating federal COVID-19 prevention guidelines, and has issued hundreds of citations. These complaints come from a variety of industries and include allegations that employees are being forced to work too close to each other, given inadequate protective equipment, being denied protective equipment, and that they are being forced to

work in unsafe conditions where COVID-19 transmission is more likely. Notably, there is no private right of action under the Occupational Safety and Health Act. Therefore, OSHA must receive a complaint and/or begin an action against an employer for violations of the Occupational Safety and Health Act.

J. Families First Coronavirus Response Act Claims

While employers are no longer obligated to provide leave to employees under the FFCRA, employers may still encounter claims by employees who feel that their rights under the FFCRA (and now the American Rescue Plan Act) were violated. The FFCRA includes a private right of action by employees, in addition to a right of action for Department of Labor enforcement. Many employees have taken advantage of the private right of action for FFCRA leave interference and retaliation in cases such as *Jones v. Eastern Airlines, LLC*, Case No. 2:20-cv-01927 (Eastern District of Pennsylvania) and *Deborah Kofler v. Sayde Steeve Cleaning Service Inc.*, Case No. 8:20-cv-1460-T-33AEP (Federal court, Florida, filed June 26, 2020). There is, additionally, the potential for private class action claims by employees under the FFCRA. Because an employer's obligation to provide FFCRA leave expired on January 1, 2021, it is unclear whether employees may bring claims under the FFCRA for alleged interference or retaliation after this date.

K. WARN Act Claims

The COVID-19 pandemic caused employers to furlough and lay off employees, implicating not only federal WARN Act, but sometimes state WARN acts as well. Each state WARN Act may have requirements and applicability that is different than the federal WARN Act, so employers must familiarize themselves with what is required by the laws in their state(s) of operation. Employees have filed WARN Act class action claims due to COVID-19-related layoffs, such as *Scott and Seales v. Hooters III, Inc.*, Case No. 20-cv-00882 (Middle District of Florida), where a group of former Hooters employees alleged that their employer engaged in a mass layoff without adequate notice.

L. Wage and Expense Claims

Employers must learn to navigate novel wage and expense issues as a result of the challenges that have been presented by the COVID-19 pandemic. Recent trends in this area of litigation include claims by employees that they are being paid unfairly as a result of their hours of work or pay being cut or that their employers are not paying them properly for time spent undergoing employer-required COVID-19 screenings, such as temperature checks and COVID-19 tests, or to obtain the COVID-19 vaccination. Additionally, several states have laws requiring employers to reimburse employees' work expenses, which may be implicated as employees purchase equipment and services to work from home. For example, in *Jauregui, et al. v. Cytec Engineered Materials, Inc., et al.*, Case No. 30-2020-01164932-CU-OE-CXC (Orange County, California), the plaintiff, on behalf of a putative class of non-exempt employees, alleged a failure to properly pay non-exempt employees for work-related tasks related to COVID-19, including putting on and taking off protective gear, COVID-19 screening and temperature checks, failure to pay minimum wage and overtime, failure to provide accurate wage statements, and failure to reimburse employees for required expenses, such as for PPE and equipment purchased by employees.

M. Labor Claims

Unionized employers may see a rise in claims and unfair labor practice charges related to COVID-19. Some examples of these claims are unfair labor practice charges for an employer's unilateral changes to employees' terms and conditions of employment in response to COVID-19 and claims that an employer has failed to take proper COVID-19 precautions. Additionally, unionized employers will also likely have to bargain over the decision and/or the effects of any decision on their part to mandate COVID-19 vaccinations for their employees (assuming it is lawful to mandate such vaccinations in the employer's state of operation). Unions are currently hard at work to secure certain working conditions and benefits for their members, and will likely continue to do so for the duration of the COVID-19 pandemic.

N. Litigation Risks Associated with COVID-19 Vaccination

The availability of COVID-19 vaccinations will likely bring up new legal risks for employers, based on the decisions they make related to the vaccine for their workforce. While employers can require employees to receive COVID-19 vaccines (but pay attention to any state or local laws that evolve on this topic), doing so may create an increased risk of legal claims under the ADA, Title VII, state law claims, tort claims, workers' compensation claims, wage and hour claims, and labor claims. Under the ADA, employers must provide reasonable accommodation to those whose disability or health condition prevents them from receiving the vaccine, and may be at risk of legal claims if they do not. Similarly, under Title VII, employers must provide religious accommodation to those whose sincerely held religious beliefs prevent them from receiving the vaccine. Some state laws may provide for additional exemptions to mandatory vaccination policies, beyond medical, disability, or religious exemptions. Additionally, employers could be held liable for either tort or workers' compensation claims for an employee's adverse reaction to a mandatory COVID-19 vaccination or in the event that a vaccine does is defective. From a wage and hour perspective, employers could be liable for failure to properly pay employees for time spent getting a mandatory COVID-19 vaccine outside of the workplace. Finally, a unionized employer may run afoul of labor laws for failure to bargain over a mandatory COVID-19 vaccination policy.

On the other hand, an employer's failure to require or provide COVID-19 vaccinations may also come with legal risks in certain situations. These possible claims include OSHA claims, tort claims, and labor claims. Under OSHA, employers may be liable for failure to take proper safety precautions by providing or mandating the COVID-19 vaccine. The possible tort claims that could arise include negligent, knowing, or willful failure to take proper safety precautions by failing to provide or mandate the COVID-19 vaccine.

IV. CONCLUDING THOUGHTS

Employers must educate themselves about the nuances of the many applicable laws surrounding COVID-19 precautions, workplace health and safety, employee rights, and employer obligations related to COVID-19. Through this knowledge, and appropriate action (or, sometimes, appropriate inaction), employers can avoid these COVID-19-related claims as much as possible and mitigate risks for their organizations. As we hopefully transition out of the pandemic, there will also likely be an uptick of claims that arise as it relates to return-to-work issues as well as issues surrounding the COVID-19 vaccine and related safety concerns. These will be discussed in our panel presentation as well.