

# EMPLOYMENT PRACTICES LIABILITY TRENDS

## IN THE TIME OF COVID-19: RETALIATION AND MORE

A lot has changed in 2020 with the spread of the COVID-19 pandemic, but one trend that has not changed is the increase in employment practices claims. The virus has led to new bases for such claims and provided both the states and the plaintiffs' bar with ample opportunities to seek recovery from employers. In this white paper, we aim to educate employers about some of the new grounds for litigation.

### Retaliation as a Result of Safety Concerns

As the pandemic continues, warehouses shipping essential goods remain very busy, and employees continue to enter the workplace with regularity. On April 22, 2020, the office of the New York State Attorney General wrote to Amazon in regard to an incident at its Staten Island, New York warehouse. <sup>1</sup>Former Amazon employee Christian Smalls had reached out to the New York State Department of Health in March, according to the Attorney General's office, complaining about warehouse conditions that did not comply with COVID-19 guidelines on social distancing, cleaning, and infected workers. Mr. Smalls was subsequently terminated, with Amazon stating that he was terminated "for putting the health and safety of others at risk and violations of the terms of his employment" as a result of attending a demonstration at the warehouse during quarantine for his contact with a sick employee. <sup>2</sup>In her letter, the New York State Attorney General alleged that the warehouse might have violated state whistleblower laws. The office's letter states that its early findings "raise serious concern that Amazon may have discharged [Smalls] in order to silence his complaints and send a threatening message to other employees that they should also keep quiet about any health and safety concerns."

Hospitals are the front line of the world's response to COVID-19, and unsurprisingly, are also seeing litigation as a result of the crisis. Kenisa Barkai, a nurse at Detroit Medical Center, appeared in a local news report about conditions at the hospital during the pandemic, asserting the hospital needed supplies and expressing fears about contamination of patients. <sup>3</sup>Several days later, she was terminated, with the hospital asserting a violation of its social media policy for an earlier video she had posted online demonstrating the equipment worn to protect patients with COVID-19. She has filed a lawsuit against the hospital for retaliation, alleging she was dismissed over speaking to the media and internal concerns she had raised about safety during the epidemic. She also plans to file a complaint with the National Labor Relations Board (NLRB).

Additionally, the New York State Nurses Association (NYSNA) has filed a lawsuit against Westchester Medical Center. <sup>4</sup>In the complaint, the NYSNA asserts that the hospital's admonishment of an employee for speaking about workplace safety during the epidemic to the media violates the employee's First Amendment rights. <sup>5</sup>This further demonstrates the retaliation risk, as even employees who are not dismissed could have potential grounds for making a retaliation claim.

<sup>1</sup>Selyukh, Alina. "Amazon Warehouse Safety 'Inadequate,' N.Y. Attorney General's Office Says." NPR, 27 Apr. 2020, [www.npr.org/2020/04/27/846438983/amazon-warehouse-safety-inadequate-n-y-attorney-general-s-office-says](http://www.npr.org/2020/04/27/846438983/amazon-warehouse-safety-inadequate-n-y-attorney-general-s-office-says)

<sup>2</sup>Bellafante, Ginia. "We Didn't Sign Up for This': Amazon Workers on the Front Lines." New York Times, 3 Apr. 2020, <https://www.nytimes.com/2020/04/03/nyregion/coronavirus-nyc-chris-smalls-amazon.html>

<sup>3</sup>Loop, Emma. "A Detroit Nurse Was Fired After Speaking Out About Her Hospital's Handling Of The Coronavirus Outbreak. Now She's Fighting Back." BuzzFeed News, 21 Apr. 2020, <https://www.buzzfeednews.com/article/emmaloop/detroit-nurse-fired-lawsuit-coronavirus-sinai-grace>

<sup>4</sup><https://www.nysna.org/press/2020/nys-nurses-association-files-three-lawsuits-protect-nurses-health-and-safety#.XqhNpmhKg2w>

<sup>5</sup>Complaint at 17, New York State Nurses Association v. Westchester County Healthcare Corporation Sup Ct Westchester County 2020

While employers are justifiably concerned with safety issues in the workplace, it is important to consider that actions taken concerning workplace safety could also implicate state and federal laws prohibiting whistle-blowing and retaliation. This can be particularly true in how employers respond to employee concerns about their safety in the workplace, which are only amplified in the current environment.

## Workplace Leave and Accommodation

Workplace leave and accommodation have also become hot button employment issues in the COVID-19 era. The NYSNA also filed a complaint against the Montefiore Medical Center that makes allegations about the improper allocation of leave and inadequate accommodation of disabilities and pregnancy for nurses dealing with COVID-19 patients.<sup>6</sup> The nurses believe that COVID-19 and its severity may implicate their leave policies and the need for accommodation given any pre-existing condition or pregnancy. These types of allegations could implicate a whole host of laws, including the Family Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and their state equivalents. The federal Department of Labor advises that those with COVID-19 or caring for a family member with the illness could be eligible for leave under the FMLA.<sup>7</sup> The Equal Employment Opportunity Commission (EEOC) has advised that COVID-19-related medical conditions could allow for accommodation under the ADA.<sup>8</sup> State laws often provide even more stringent requirements for leave and accommodation requests. Employers should keep these guidelines in mind when dealing with leave and accommodation requests.

Companies seeking to mitigate risks presented by the threat of COVID-19 litigation can do so with employment practices liability coverage. As the legal community monitors for COVID-19 employment law filings throughout the country that could eventually open avenues of pandemic-based causes of action, employers should process the effects of these cases and consider the scope of their policies to ensure that such litigation will be addressed.

*Please be advised that any and all information, comments, analysis, and/or recommendations set forth above relative to the possible impact of COVID-19 on potential insurance coverage or other policy implications are intended solely for informational purposes and should not be relied upon as legal advice. As an insurance broker, we have no authority to make coverage decisions as that ability rests solely with the issuing carrier. Therefore, all claims should be submitted to the carrier for evaluation. The positions expressed herein are opinions only and are not to be construed as any form of guarantee or warranty. Finally, given the extremely dynamic and rapidly evolving COVID-19 situation, comments above do not take into account any applicable pending or future legislation introduced with the intent to override, alter or amend current policy language.*

<sup>6</sup>Complaint at 17, New York State Nurses Association v. Montefiore Medical Center, S.D.N.Y. 2020 <https://www.dropbox.com/sh/swxxdn4In78i2yh/AAC1WmU4B2MT0nHuDCR6RNqBa?dl=0&preview=MC+complaint.docx>

<sup>7</sup><https://www.dol.gov/agencies/whd/fmla/pandemic>

<sup>8</sup>[https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm)

