

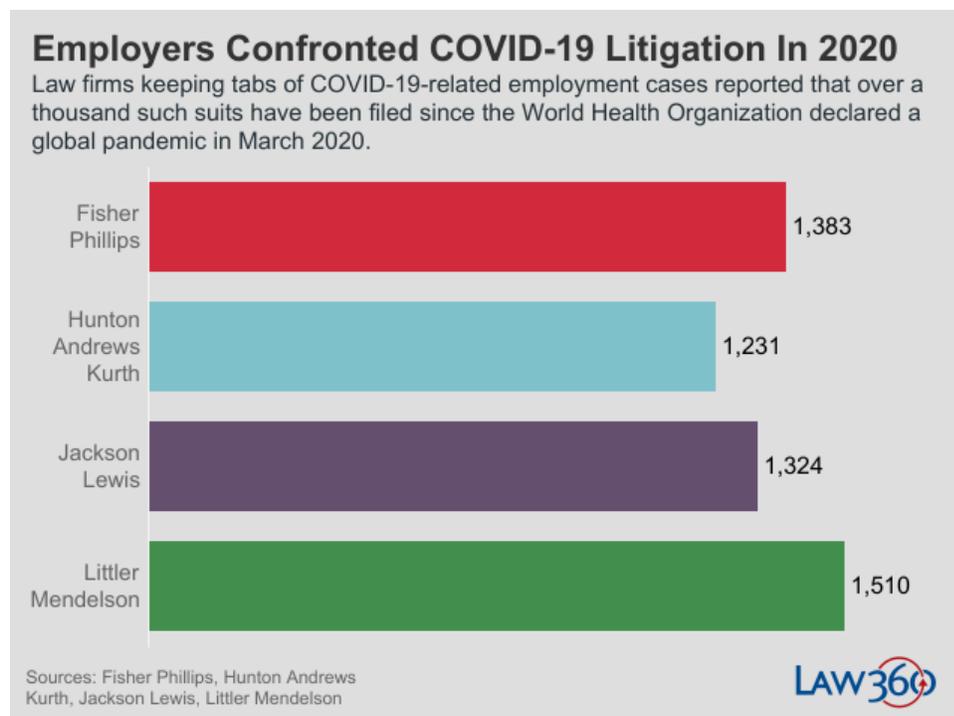
5 Tips To Help Employers Tamp Down A Virus Lawsuit Wave

By **Amanda Ottaway**

Law360 (January 14, 2021, 5:44 PM EST) -- COVID-19-related employment suits have been on the rise since the onset of the pandemic, and that litigation surge is expected to continue or even intensify in the coming year, attorneys say.

Firms tracking virus-related employment litigation say hundreds of those suits — centering on issues like remote work arrangements, retaliation and discrimination allegations — cropped up in 2020.

"As we go through this pandemic surge ... it makes sense that there's going to be a wave of litigation that may follow that as well," said Janie Schulman, a partner at Morrison & Foerster LLP, which released a survey last month that found in-house lawyers are bracing for an influx of employment suits.



Exactly what 2021 holds for coronavirus litigation is still anybody's guess. But here are a few tips that can help employers minimize their liability in the event that the anticipated lawsuit spike pans out.

Remind Everyone About the ADA's 'Interactive Process'

The Americans with Disabilities Act requires that both employers and employees engage in a good-faith back-and-forth about potential accommodations for an employee with a disability, called the "interactive process."

"That communication, that interactive process, is essential on both sides," said Fisher Phillips partner Kathie Caminiti. "And so the employer would do well to refresh themselves regarding the interactive process, make sure that they understand the obligation to engage, and that their employees who are making those decisions regarding accommodations are knowledgeable about the obligation and practice."

Epstein Becker Green attorney Denise Dadika said she and her colleagues are working under the assumption that COVID-19 is a disability, since the ADA defines that term broadly.

She emphasized that even if employers know in advance they're not going to grant an employee's request to accommodate, they should be sure to engage in the interactive process anyway.

Multiple experts warned that employees will cite the ADA in requests to work from home in the coming months, for both legitimate mental and physical disabilities such as underlying conditions that make them more vulnerable to COVID-19 complications. And as Bracewell LLP partner Bob Nichols noted, some may simply prefer working from home for its convenience.

Make Sure Your Work-From-Home Policy Is Clear and Consistent

Employee requests to work from home this year should be handled thoughtfully and consistently, legal experts noted.

"Candidly, when the law is unsettled in any area is where you see more litigation," Caminiti said. Employers should carve out policies and practices, she advised.

"Remote and telework may well be embraced, but it's going to require some deliberate thought," she said.

Nichols said that while courts historically haven't held up working from home as an accommodation for ADA claims, 2020 showed that many workers can do their jobs remotely just fine — making it harder for employers to convince judges and juries that they need their staffers in the office.

"I think there's going to be a real reckoning in the coming months over that," he said.

As with any policy, inconsistency in granting work-from-home requests is a recipe for trouble, experts warned.

The challenge, Caminiti said, lies in whether employees claim a disability and how the interactive process is handled.

"With respect to the employees who prefer to work from home, and there are a lot of them ... those employees have no right to remote work unless the employer also finds it desirable," she said.

Stay on Top of the Latest Safety Standards

Epstein Becker's Dadika noted that employers should ensure their workers are complying with federal and local safety guidance, such as wearing masks in the workplace and keeping desks six feet apart, both for overall safety and so there are fewer potential avenues for complaints.

Employers should also install internal complaint procedures, such as tip lines, if they haven't already, she said.

"I think they should make sure their employees know that there's an avenue for employees to raise concerns," Dadika said. "Sometimes it's that employees feel like they're unheard, and they don't have anywhere to go but to file a claim."

In addition to reviewing their existing obligations, MoFo's Schulman recommended that employers specifically task someone with keeping track of new legislation, regulations and other legal developments around COVID-19 — a challenging but crucial task. That information must then be disseminated to both managers and workers, attorneys said.

Be Aware Your Vaccine Policy Won't Please Everybody

Schulman also said she expects a wave of vaccine-related lawsuits, and warned that even the most diligent efforts of employers may not stave off suits from disgruntled workers.

"You're kind of trying to figure the odds," she said. "If you're an employer trying to decide what to do, it's a combination of being a bookie and figuring out which odds are worse for you, and also trying to do right by your employees."

Schulman said she wouldn't be surprised to see vaccine approaches vary by region — for example, fewer mandates in regions of the U.S. that emphasize personal freedom. She added that some mandates are expected in hard-hit industries, such as health care and manufacturing.

Companies that mandate worker vaccinations could face employee claims that they were not accommodated under the ADA or Title VII, which protects religious observance. But those that don't require vaccinations could end up with a workplace outbreak, which could lead to its own claims, Schulman said.

Legislative mandates are also not off the table. In December, for example, a member of the New York State Assembly proposed a bill that would require vaccines for those who can safely receive them "if public health officials determine that residents of the state are not developing sufficient immunity from COVID-19."

And in response to a 2019 measles outbreak, New York City ordered vaccinations in certain ZIP codes, with a fine for noncompliance.

A mid-December 2020 survey by the Kaiser Family Foundation found that over a quarter of the U.S. public said they will "probably or definitely" refuse the shots. Employers are concerned about potential vaccine-related litigation by this significant chunk of the population, said Nichols, the Bracewell attorney.

Nichols said he thinks most employers will decide not to mandate that employees receive the COVID-19 vaccine.

"That's a fight that a lot of companies just don't want to take on," he said.

Some blowback could be similar whether or not companies choose to mandate, Schulman added: Either way, companies risk bad press and alienating their employees.

"There's going to be some number of employees who will be unhappy that they're required to take a vaccine; there will be some other number of employees who are going to be unhappy because their employer isn't requiring everyone to take a vaccine. There are going to be people who claim they were injured by the vaccine that was provided or mandated by the employer," Schulman said.

Remind Employees About Workers' Comp

Schulman said legal complaints can often be headed off by workers' compensation.

"I like to start with the basic reminder that most lawsuits where somebody gets infected with COVID, and they want to complain about being sick and the damages from being sick, will be covered by workers' compensation," Schulman said. "Workers' compensation will be the exclusive remedy for those people."

There are some exceptions under different state laws — for example, some states don't require workers' compensation insurance, or state laws contain various exceptions if an employer drops the ball on safety, Schulman said.

"But the mere fact that you get COVID at work in the middle of a pandemic is generally not going to be enough to allow people to sue for civil damages for their injuries," she said.

She noted she's seen lawsuits in which "creative plaintiffs and their lawyers have tried to plead around workers' compensation preemption, with varying degrees of success," including under the so-called public nuisance theory, alleging public safety health threats.

Amazon warehouse workers in Staten Island sued under the public nuisance theory last year, alleging their reportedly unsafe workplace put other New York residents in danger when exposed workers went to the grocery store or used public transportation.

Though their federal lawsuit was shot down, they appealed to the Second Circuit in November.

--Additional reporting by Braden Campbell, Vin Gurrieri, Anne Cullen, Adam Lidgett and Mike LaSusa.
Editing by Abbie Sarfo.