

# Preparing for the New Wave of Employment Claims in the Wake of COVID-19

# Presenter



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Board Certified by the Texas Board of Legal Specialization in Labor and Employment Law, John Linker focuses his practice on defending businesses of all sizes in matters involving wrongful terminations, union organizing, breach of contract matters, unfair labor practice charges, discrimination and harassment claims, Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA) compliance, and wage and hour issues. He also represents clients in investigations by government enforcement agencies such as the Office of Federal Contract Compliance Programs (OFCCP), the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), the Department of Homeland Security (ICE), the National Labor Relations Board (NLRB), and the Occupational Safety and Health Administration (OSHA). John has experience litigating labor and employment-related matters in state and federal courts and manages complex employment matters and class action cases around the country.

# Workplace Enforcement Trends *Before* COVID-19

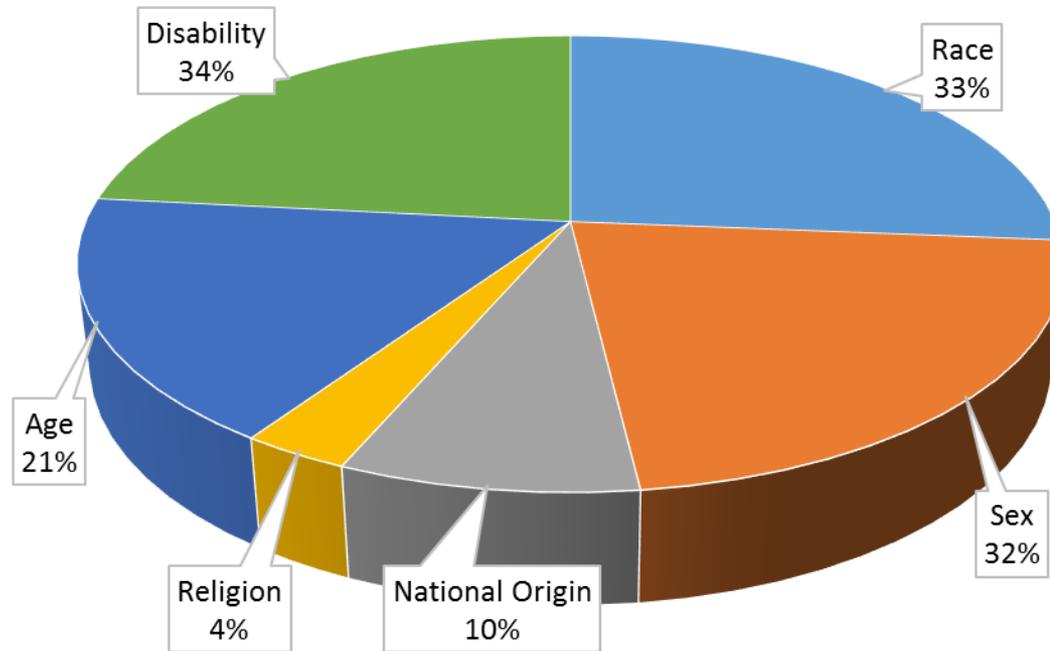
- Enforcement Agencies Flex their Muscle in Election Years
  - Discrimination charges at record highs
  - Aggressive investigation of claims
  - EEOC lawsuits and settlements at record levels
- Congress passing numerous “Message Bills”
  - The Right to Organize Act—attacking secret ballot elections again
  - Forced Arbitration Injustice Act

# The Latest Statistics on Workplace Complaints

- In 2019, the EEOC received 72,675 Charges of Discrimination
  - EEOC Filed 157 Lawsuits in 2019, slightly down from 2018
  - EEOC obtained \$386 million dollars from employers in 2019
  - This doesn't include private suit recovery!



# Complaints Filed with the EEOC in 2019



# The New Wave of Employment Claims Arising from COVID-19

- Potential Discrimination Claims
- Potential Safety Claims
- Potential Privacy Related Claims
- Potential Wage and Hour Claims



# Potential Discrimination Claims

# Discrimination Claims Arising Out of Various Situations

- Business Disruptions Requiring a Reduction in Force (RIF)
- Families First Coronavirus Response Act (FFCRA) Claims
- Americans with Disability Act (ADA), Age Discrimination in Employment Act (ADEA), and Family Medical Leave Act (FMLA) Claims

# Even Critical Infrastructure Businesses Subject to Business Disruption Concerns

- If a RIF is necessary, how do you choose?
- Legitimate Non-Discriminatory Criteria:
  - Seniority
  - Operational Needs
  - Skill Sets
  - Performance Ratings/Attendance/Safety
- Importance of Conducting Adverse Impact Analysis

# FFCRA Claims on the Rise

- FFCRA requires private employers with fewer than 500 employees to provide employees with paid sick leave and expanded family medical leave related to COVID-19
  - Qualifying employees unable to work entitled to 2 weeks of paid sick leave
  - 10 Weeks of paid expanded FMLA leave at 2/3 of employee's pay when he/she is unable to work to care for child whose school or child care provider is closed due to COVID-19 restrictions
  - Emergence of State laws providing emergency paid sick leave for public health related emergencies—targeting those employers with 500 or more employees

# Enforcement Actions and Lawsuits

- Unlawfully Denying Benefits
- Improperly Requiring Employees to Use Accrued Personal Sick Leave
- Terminating Employees in Retaliation for Requesting Leave
- Interfering with FFCRA-Entitled Leave (asking for more documentation than required)
- **REMEMBER:** These Claims are attractive targets because the employee can immediately file a lawsuit without the need to file with enforcement agency...and individuals can be sued personally under the FFCRA!!

# Best Practices

- Designate Internal FFCRA Expert to Oversee Compliance
- Train Front-Line Supervisors on Dealing with Leave Requests
- Fair and Consistent FFCRA Decisions
- Supporting Documentation for Each Request and Denial
- Stay Alert of Your Developing State Law



# ADA and FMLA Claims

# How Has COVID-19 Impacted the ADA and FMLA?

- Liability under the ADA can occur for discriminating against someone that (1) has a disability; (2) because of a record or history of a disability; or (3) for *regarding an individual is disabled*
- COVID-19 not a disability under the ADA (NOW), but you can still face claims from dealing with employees with COVID-19 diagnosis or related symptoms
- COVID-19 will likely broaden employer's obligation to provide reasonable accommodation—employee was *regarded as* disabled or had pre-existing condition
- COVID-19 related symptoms can also trigger serious health conditions under FMLA and need for leave

# Avoiding ADA and FMLA Claims

- No blanket denials for accommodation
- Analyze Each Leave Request Independently
- Document Steps of Interactive Process to Determine Reasonable Accommodation Options, or if Direct Safety Threat Exists
- Consistent Administration of Written Policies
- Stay Alert of Shifting Agency Guidance

*Best Practice*

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# Preparing for a Deluge of COVID-19 Safety-Related Claims

- Rapidly Evolving Area for Meat Industry—regulatory and enforcement guidance changing monthly
- Numerous suits being filed and claims being lodged with OSHA over workplace safety and treatment of workers
- Being Able to Demonstrate Good-Faith Safety Compliance Matters

# The Tip of the Iceberg

- The novel “Public Nuisance” litigation (*McDonald’s*) gaining traction— raising theories of profit over employee safety
- OSHA’s Expanding “General Duty Clause” – current push to provide a new private right to sue under this statute
- Whistleblower Retaliation Claims on the Rise: Take your pick
  - ✓ OSHA – over 4,000 retaliation claims since March
  - ✓ NLRA – complaints about workplace safety is a concerted protected activity
  - ✓ Local and State COVID-19 Anti-Retaliation Measures
  - ✓ FFCRA and ADA – both have anti-retaliation provisions

# Some States Taking Matters Into Their Own Hands

- 7 States have now enacted legislation limiting liability for employers and others from claims relating to COVID-19 exposure—pending in others
- Applies if employer acted in Good Faith to comply with applicable federal and state safety guidance and regulations
- Will not apply if employer acted willfully, recklessly, or intentionally
- Does not apply to other employment related claims from employees

# Steps to Minimize Your Risks

- Continue monitoring OSHA, CDC, and local guidance for meat and poultry processing standards
- Update Written Control Plans as needed
- Enforce your Rules
- Educate and Train your team
- Use your NAMI resources



# Privacy Risks in Monitoring COVID-19

- Virus Mitigation Efforts Creating New Wave of Privacy Claims
  - symptom tracking
  - proximity beaconing
  - thermal imaging to check temperatures
  - Apps where employees share COVID-19 symptoms with employer
  - Tracking devices

## *Before Implementing:*

- Review your state's Biometric Privacy Acts and other data privacy laws
- Develop Communication Plan and Strategy
- Comply with ADA and HIPPA Medical Privacy obligations of confidentiality
- Consider any bargaining obligations or unfair labor practice issues

# Anticipated Wage and Hour Claims From the Pandemic

- Are you properly maintaining your Exempt employee's status?
  - Has salary been reduced below the FLSA threshold (\$684 week)
  - Still primarily performing Exempt duties?
  - Paying full weekly salary for any work performed in that workweek?
- Are you enforcing timekeeping policies for non-exempt employees?
  - Check state law regarding compensability of screening measures before entering workplace
  - Has any additional pay (hazard, bonus, incremental bumps) been properly included in the calculation of overtime?
- Reporting Time Pay obligations relating to Temperature Checking



# Summer Learning Series

Optimize Red Meat Import Process from Australia through Barcodes

July 15 | 4:00 pm EDT

U.S. Livestock & Red Meat Industry July 2020: Assessing the Road Ahead

July 28 | 2:00 pm EDT

August Series to Focus on Family Business and Worker Safety. More information coming soon!

*Additional Questions?*

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