

Coronavirus Lawsuits More Than Double In 2021; Those Against Healthcare Providers Steadily Increase

June 7, 2021 – Dorsey Health Law

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Despite widespread vaccine availability and the corresponding optimism about returning to “normal,” the coronavirus pandemic continues to spawn hundreds of employment and health-related lawsuits. Many of these lawsuits have been aimed at employers in the healthcare sector and relate to workplace safety, retaliation, and wrongful termination or wrongful denial of leave. In fact, since our last update on this topic (available [here](#)), the healthcare sector has increased its relative share of coronavirus lawsuits compared to other industries. In December 2020, approximately 20 percent of lawsuits alleging labor and employment violations related to coronavirus arose from the healthcare industry; today, that number is approximately 25 percent.

The total number of coronavirus lawsuits has also increased dramatically. At the end of 2020, 1,235 total lawsuits had been filed against employers related to the coronavirus. Today, that number has more than doubled; there have been 2,560 lawsuits, including 200 class actions. States with the most filings include California (666), New Jersey (293), Florida (198), New York (184) and Ohio (156).



Whether brought in California, Iowa, or elsewhere, coronavirus lawsuits most commonly assert that employers violated federal and state mandates, guidelines, and regulations regarding employee safety. One such federal mandate was the Families First Coronavirus Response Act (FFCRA), passed by Congress in March 2020 (and, with certain exceptions, expired in December 2020). While operative, the FFCRA required employers

with fewer than 500 workers to provide employees with a certain amount of compensated

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time off for various reasons linked to COVID-19, including if employees become ill. Importantly, however, the FFCRA provided that certain employees—i.e., “health care providers and emergency responders”—may be excluded from entitlement to both emergency family leave and emergency paid sick leave. In addition to FFCRA cases, employees have also filed lawsuits alleging that their employers violated the federal WARN Act (or similar state laws), which in certain circumstances requires that employers with 100 or more employees provide at least 60 days’ notice before conducting a mass layoff.

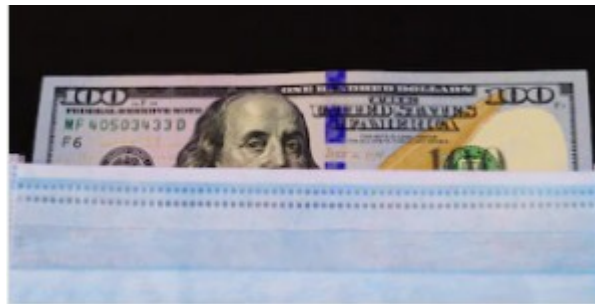
Even though there are fewer lawsuits involving COVID-19 related issues in states like Iowa, the recently filed Iowa cases are representative of the types of cases occurring across the country. In one case, an employee of a hospital asserts that she was terminated after she raised concerns about the lack of available personal protective equipment and about staff failing to wear masks correctly. She also claims that she raised concerns about a social event where staff were attending without masks and without adhering to social distancing guidelines. Another case involves claims by a food manufacturer’s nurse supervisor asserting her employer’s lack of preparedness for COVID-19 and her resulting firing after she raised safety concerns. Although other employment-related cases in Iowa have been filed against employers outside the health care industry, similar cases could be filed against those in the health care industry in the future. These cases include allegations that employers denied leaves of absence for an individual with high risk conditions and failure to implement proper screening, social distancing and other protective measures, which in one case resulted in deaths from COVID-19. On the flip side, Iowa has also seen recent litigation filed with an individual asserting a civil rights violation for requiring students to wear a mask to school.

A recent development that may impact future coronavirus litigation is the updated federal guidance on mask mandates. On May 13, 2021, the U.S. Centers for Disease Control and Prevention (“CDC”) revised its guidance to reflect that “fully vaccinated” individuals no longer need to wear masks, whether indoors or outdoors, except in limited circumstances. And while there is a caveat for “local business and workplace guidance,” OSHA is advising employers to follow CDC guidelines for fully-vaccinated employees. Accordingly, employers across the nation now face the practical challenge of maintaining a safe and compliant workplace in an increasingly open environment, while at the same time minimizing their risk for legal liability.

While many states have enacted legislation that limits the liability of healthcare providers for actions or omissions during the pandemic, most of the legislation leaves openings for plaintiff’s lawyers to argue that their clients’ claims are not prohibited, especially with respect to employment-related claims. For example, Iowa enacted the “COVID-19 Response and Back-to-Business Limited Liability Act”. Under the Iowa Act, providers cannot be held civilly liable for various actions, which include, but are not limited to screening, assessing, diagnosing, caring for or treating individuals with COVID-19. The Act also provides protection for acts or omissions relating to non-COVID-19 patients, if those acts or omissions result from supporting the state’s response to COVID-19. This may include acts such as providing treatment outside the premises of a health care

facility or using equipment and supplies outside their normal use. As seen by the lawsuits described above, the Iowa Act does not prevent the filing of employment-related claims and notably, liability can still be established even in non-employment related contexts if the provider acted recklessly or engaged in willful misconduct.

Navigating the highly dynamic landscape of federal, state, and local coronavirus rules and policies presents numerous challenges for employers. But healthcare providers can still employ a number of proactive steps to reduce their potential exposure.



- Providers should understand their obligations under relevant federal and state law and provide employees protected leave as appropriate. When in doubt, we recommend that employers err on the side of granting the requested leave.
- Providers should revise company policies as necessary to incorporate the new regulations that apply to COVID-19 exposure and sick leave.
- To the extent feasible, providers should consider offering teleworking opportunities for eligible employees.
- Providers should implement a system for recording employees' requests for leave and the reasons supporting those requests, i.e., an employee's symptoms and the date for a test or doctor's appointment. However, providers should not require employees to provide further documentation, such as certification that the employee sought a diagnosis or treatment from a healthcare provider.
- Providers should be mindful of the risks of taking personnel actions that could lead to discrimination or retaliation lawsuits by workers who requested or took applicable leave. As always, providers should properly document their termination decisions.
- Providers should carefully consider whether and how they will ask employees to provide proof of vaccination, and they must be aware of relevant legal considerations if making those inquiries. Several jurisdictions have implemented laws banning employers from requiring so-called "vaccine passports" or other methods of requiring individuals to provide proof of vaccination to gain access, entry, or service.
- Providers may initially want to strongly encourage employees to get vaccinated—with the caveat that it may be mandatory in the future—and only require vaccination in the future if absolutely necessary.