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Representing employees made vulnerable by the COVID-19 pandemic

WIN YOUR COVID-RELATED WRONGFUL-TERMINATION CASE AND IDENTIFY WAGE-AND-HOUR ISSUES CAUSED BY THE PANDEMIC

The COVID-19 pandemic has ravaged the economy and fundamentally changed the workplace. Many businesses have made workforce reductions and spur-of-the-moment changes to how and where their employees work Unfortunately, some employers used their need to downsize as an opportunity to discriminate against employees within a protected class (i.e., age, disability, race, sex, etc.) or retaliate against employees for a protected activity (i.e., filing a whistleblower complaint, etc.).

At the same time, a lot of companies took advantage of other vulnerable employees – those with little employment security – by asking them to work off the clock or incur unreimbursed expenses, expecting they wouldn't complain because they felt grateful to have a job. This article will provide tips on representing employees made vulnerable by the COVID-19 pandemic, helping you win your COVID-related wrongful-termination case and assisting you in identifying wage and hour issues caused by the pandemic.

The COVID-related wrongful termination case

Between January 2020 and April 2020, the U.S. lost 22.1 million jobs, and the unemployment rate reached 14.8% – the highest rate observed since data collection began in 1948. (Falk, *Unemployment Rates During the COVID-19 Pandemic R46554*, Congressional Research Service (June 15, 2021) p. 4). A year later, in May 2021, the unemployment rate was still at 5.8%, and the number of unemployed persons was 9.3 million, which are well above their pre-pandemic levels (3.5% and 5.7 million, respectively, in February 2020). (U. S. Bureau of Labor Statistics, The Employment Situation - May 2021, May 2021.)

Because of this reality, you will certainly see defendants using the pandemic as justification for your client's termination, even if it played no role at all. While a reduction in force can be a legitimate, nondiscriminatory reason to dismiss an employee, the California Supreme Court has long recognized that downsizing alone is not a sufficient explanation for the consequent dismissal of a protected worker, stating that "[i]nvocation of a right to downsize does not resolve whether the employer had a discriminatory motive for cutting back its work force, or engaged in intentional discrimination when deciding which individual workers to retain and release." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358.) The tips provided below can help you win your wrongful termination case where the defendant proffers the COVID-19 pandemic as the reason why your client was terminated.

Tip No. 1 – Was there really a layoff?

The COVID-19 pandemic has impacted each economic sector differently. Many businesses barely suffered, and some even thrived. Therefore, the first issue is to determine whether the defendant truly underwent a reduction in force or if your client was the beginning and end of the layoff. Keep in mind that a "reduction in force" of one employee can be evidence of discrimination/retaliation. (See *Moody v. Pepsi-Cola Metropolitan Bottling Co., Inc.* (6th Cir. 1990) 915 F.2d 201, 208-209.)

Before litigation, it may be difficult to determine how many other employees were terminated in the alleged layoff. One way you can gather information about a company's workforce is to look up their Paycheck Protection Program loan information. The website https://projects.propublica.org/coronavirus/bailouts/ provides inside information about the business operations, including the number of jobs reported at the time the company applied for a PPP loan.

After the lawsuit is filed, you should conduct discovery to determine the number of employees affected by layoff. Request the company's organization charts and other documents explaining the chain of authority before and after your client was terminated to see if there truly was a workforce reduction or simply a reorganization. You should also acquire information about the dates and positions of all persons hired after your client was terminated.

If you can prove there was no layoff, you are in great shape. Not only will the defendant not be able to meet its burden on summary judgment to articulate a "legitimate, nondiscriminatory reason" for the termination, but you can also use the defendant's false reason for termination as evidence of a discrimination/retaliation at trial. Proof that the defendant's explanation is false is probative of discrimination/retaliation, "and it may be quite persuasive."

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(*Reeves v. Sanderson Plumbing* (2000) 530 U.S. 133, 147.) "Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." (*Ibid*.)

Tip No. 2 – Search far and wide for any direct evidence

If you are satisfied there was a legitimate reduction in force, the issue becomes whether the defendant included your client in the layoff for an illegal reason (i.e., because of their protected class and/or because of their protected activity). The best way to prove discrimination/retaliation is direct evidence. Direct evidence is evidence that proves a discriminatory/retaliatory animus "without inference or presumption." (*Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1221.)

Direct evidence often consists of statements by the termination decisionmaker that reveal bias. Therefore, ask your client if there were any discriminatory/retaliatory comments made at work and if so, confirm those comments by witnesses. In addition, review performance reviews or disciplinary write-ups for evidence that may show an animus towards your client based on their protected class or activity.

All comments should be relevant, even if they were made unrelated to the termination decision. In federal court, comments that the defendant will predictably label as "stray remarks" are still probative as circumstantial evidence of an illegal intent. (See *Reeves, supra*, at 146.) On the other hand, in California courts, any biased "remark not made directly in the context of an employment decision and uttered by a nondecision maker may be relevant, circumstantial evidence of discrimination." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 539.) Moreover, if you find direct evidence, you should survive a motion for summary judgment "even if the evidence is not substantial." (*Godwin, supra,* 150 F3d at 1221.)

Tip No. 3 – Get the stats

Another way to prove discrimination in your COVID-related wrongful-termination case is through a statistical analysis of the employees who were laid off and those who were retained. Such evidence may create an inference of a discriminatory intent. (See *Diaz v. American Telephone & Telegraph* (9th Cir. 1985) 752 F.2d 1356, 1363.) In fact, statistics alone can constitute a prima facie of discrimination if the disparities are substantial. (See *Hazelwood School Dist. v. United States* (1977) 433 US 299, 307-309.)

Often, the defendant will have had to provide the data necessary to conduct a statistical analysis to comply with WARN laws or with the Older Workers Benefits Protection Act. Regardless, discovery should be conducted to determine exactly who was laid off and who was retained. That information can then be used to determine if a disproportionate number of persons from the relevant protected class were terminated.

Tip No. 4 – Scrutinize the selection criteria

In a legitimate reduction in force, a company establishes objective criteria to determine who to select for termination. Length of employment, education, and performance metrics are all proper criteria for an employer to use. Of course, if the defendant established objective criteria but then deviated from that criteria to include your client in the layoff, that is great evidence of discrimination as it is indicates "improper purposes [were] playing a role" in the termination decision. (*Village of Arlington Heights v. Met. Hous. Dev. Corp.* (1977) 429 U.S. 252, 267.)

If the defendant did use objective criteria, determine whether the criteria used created a disparate impact on a protected class. For example, an employer financially impacted by the COVID-19 pandemic may use salary for differentiating between employees to include in a layoff. The California Legislature has declared that action discriminatory if doing so "adversely impacts older workers as a group." (Gov. Code, § 1294.)

More often than not, employers use subjective selection criteria to determine who to include in a layoff. Courts appreciate that the use of such criteria is ripe for abuse and "should be viewed with much skepticism." (*Nanty v. Barrow Co.* (9th Cir. 1981) 660 F.2d 1327, 1334.) That is because subjective measures like "potential," "attitude," or "versatility" can easily be used by employers to cover up their biases. Indeed, use of subjective criteria "provides a convenient pretext for discriminatory practices." (*Ibid*.) Thus, where the stated reasons are subjective criticisms of an employee, courts are more likely to find pretext. (*Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125, 1136.)

Further, in a situation where subjective criteria was used, make sure you present evidence of your client's satisfactory job performance and qualifications for the position. Such evidence may indicate your client should not have been selected for termination. It also may be used to prove the termination reason was pretextual. (See *Ash v. Tyson Foods, Inc*. (2006) 546 U.S. 454, 456-457.)

Even better than when a defendant uses subjective criteria is when a defendant used no criteria at all. When an employer lacks basic documentation to prove its claimed reason for termination, a jury may infer that the reason is pretext. (*McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d. 1103, 1123.) Again, pretext can be established by showing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons." (*Hersant v. California Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.)

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Tip No. 5 – Shifting reasons for the termination

Finally, in litigation, you may notice the defendant adds reasons for why your client was terminated in order to boost its defense. We view this as the employer acknowledging a bad termination decision. You should lean into the defendant "shifting" its reason for termination and argue it is evidence of pretext. "Shifting justifications over time calls the credibility of those justifications into question." (*Cicero v. Borg-Warner Auto., Inc.* (6th Cir. 2002) 280 F.3d 579, 592.)

Wage-and-hour issues in four common scenarios caused by the pandemic

In addition to the COVID-19 pandemic being used as an excuse to discriminate or retaliate against employees, the pandemic has also made employees susceptible to being taken advantage of by their employer. Working from home, requiring testing or vaccination, understaffing, and COVID-19-specific work procedures are commonplace among industries where the most vulnerable employees work. Because these scenarios are implemented in conjunction with the pandemic, employees may feel unsure of their rights under wage and hour laws or too insecure about their job security to speak up and demand to be compensated fairly. The following are four common workplace scenarios caused by the pandemic that leave employees vulnerable to abuse by their employer.

Scenario No. 1 – Telework

One of the first reactions to the COVID-19 pandemic was an increase in telework. According to the U.S. Census Bureau, 36.9% of households reported to have worked from home more often because of the pandemic. (U.S. Census Bureau, Household Pulse Survey, December 2020). Employers who once told their employees that their presence in the office was critical to perform their job duties, now expected them to be just as productive, if not more so, while working from home with little to no guidance.

If employees were required to work from home, the main issue that should be explored is whether the employer reimbursed business expenses incurred by the employee pursuant to Labor Code section 2802, which requires employers to reimburse employees for all necessary expenses incurred in performing their job duties.

Although many employers maintain expense reimbursement policies to limit and define expense reimbursements, the Labor Code requires employers reimburse necessary business expenses regardless of timing of the reimbursement request or pre-approval from management. Further, due to the lack of foresight of these telework arrangements, employer's reimbursement policies may not even contemplate the kinds of expenses employees have incurred while working from home.

First, you should account for all of the equipment your client needs to perform their job duties from home. This generally includes a computer, a monitor, a desk, an office chair, or a printer. If your client was required to purchase these items, they are entitled to reimbursement from the defendant. Some employers may have provided a one-time or monthly stipend to pay for equipment. If a stipend was provided, it should be scrutinized for its adequacy to purchase the items it is meant to cover. (*Gattuso v Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554.) Moreover, if an employee uses a pre-existing home office to perform their work duties, employers may still be required to reimburse for the use of personal equipment for business purposes. (*Cochran v Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1127.)

Second, you should account for all utilities your client may use in the course of business, regardless of whether or not they fluctuate based on use. For example, an employee's home Internet, cell phone, or land line bill may be a set amount and not raise with the increased use; however, courts have still ruled that employers must compensate their employees for a "reasonable percentage" of the bill. (*Cochran, supra,* 228 Cal.App.4th at 1137; see also, *Heera v. Zumiez, Inc.* (9th Cir 2020) 953 F.3d 1063.) Employers may reimburse a percentage or provide a set monthly stipend for these expenses, however, they should always be examined for their reasonableness.

Finally, in a work-from-home scenario, you should account for consumable supplies your client may have used while performing their work duties. Examples would be note pads, pencils and pens, printer paper, and printer ink. If an employee is purchasing any supplies in order to successfully work from home, they are entitled to reimbursement for all associated costs.

Scenario No. 2 – Requiring a COVID-19 test or vaccination

As people began to return to in-person work, COVID-19 testing and vaccinations became more accessible and some employers require a negative test and/or proof of vaccination. This requirement raises multiple wage-and-hour issues.

First, employees should be compensated for the time they spend getting tested (although not for the time spent waiting for a result, unless a rapid-result test was required by the employer) and the time spent obtaining a vaccination. This includes time spent traveling to and from the clinic site. If employees were not compensated, this would be considered off-the-clock work and all applicable penalties would apply.

Another question attorneys should ask themselves is, how did the employee get to the testing and/or vaccination site? If employees drove themselves, they should be provided with mileage for the distance driven in their personal vehicles. If they paid for public transportation or a ride-share (i.e., Uber or Lyft) to their appointment, employers should reimburse that cost.

Further, if the employee was required to pay for an employer-required COVID-19 test, that expense may be compensable under Labor Code section 2802.

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Scenario No. 3 – COVID-19-specific work procedures

Another scenario employees may find themselves in is returning to work and being asked to follow new, COVID-19-specific procedures and policies. Examples may include temperature checks, symptom screenings, requiring employees to wear masks or other personal protective equipment, or requiring employees to clock in through their personal devices rather than through time-keeping machines. Implemented incorrectly, there are multiple ways by which unsuspecting employees may be taken advantage of by their employer.

For instance, many employers have implemented a policy requiring employees to wait outside the premises for a temperature screening and/or to be asked to answer COVID-19 symptom screening questions prior to coming into the workplace. You should analyze whether employees are being fairly compensated for this time. Any time spent waiting for someone to take their temperature or to ask screening questions or performing those tasks is considered work and should be compensated as such. Because of the way it is implemented, these procedures often occur prior to the employee being clocked into work and therefore would be considered off-the-clock work.

Another common COVID-19-related workplace policy is employers requiring their employees to wear masks, gloves, or other personal protective equipment while working. If this equipment is being required by the employer, the employer should either provide this equipment to employees or reimburse employees' costs associated with complying with this policy. (See Lab. Code, § 2802.) Employers who are not reimbursing these necessary expenses are unfairly and unlawfully pivoting the costs of doing business onto their employees.

We have also seen changes in how employees are being asked to clock in. In order to promote social distancing, employers are stepping away from employees clocking in at a centralized location and instead asking them to keep time on their personal devices. While timekeeping on a personal device is not a violation of California labor laws, attorneys should be mindful that the use of personal cell phone devices for any work-related purposes raises issues regarding reimbursement of necessary business expenses under the Labor Code.

Scenario No. 4 – Understaffing

One broad scenario many employees may find themselves in when they return to the workplace is severe understaffing. The most vulnerable employees are also those who have returned to the workplace first, while others may have the luxury to continue working from home or declining to come back to their place of employment.

When an employee is confronted with understaffing, the first casualty is often compliant meal and rest periods. Without sufficient staff coverage, employees are forced to take non-compliant meal and rest periods in order to ensure there are minimal interruptions to customer service.

Under California wage and hour law, including Labor Code sections 226.7 and 512, non-exempt employees must receive a full 30-minute meal break, if they work more than five hours in a day, within the first five hours of the workday. Employees who work more than 10 hours in a day are entitled to a second full 30-minute meal break. Non-exempt employees who work more than three and one half hours in a day are also entitled to a full 10-minute rest period in the middle of the employee's work period, to the extent that it is practicable, for each four hours, or substantial fraction thereof, that they work in a day. If any meal and rest periods are untimely, short or altogether missed, the employer is responsible for a premium payment of one hour at the employee's regular rate of compensation.

Meal and rest periods may also be non-compliant if the employee is considered "on-duty." In other words, if an employer requires an employee to remain on call or available to work during their meal and/or rest periods, those meal and/or rest periods are not lawful. Only in limited circumstances are "on-duty" meal periods lawfully permitted. Specifically, an employer must show: 1) the nature of the work prevents the employee from being relieved of all duty; and 2) the employee agrees in a writing, which they are allowed to revoke in writing at any time, to stay on duty during meal periods. (See IWC Orders 1-15, section 11; IWC Order 16, section 10.)

Note: the California Supreme Court has just decided in *Ferra v. Loews Hollywood* (2021) __ Cal.5th __, that meal and rest period premiums must be paid at an employee's hourly rate of compensation rather than at their regular rate of pay (i.e., the meal and rest-period premiums must include any nondiscretionary bonuses and other nondiscretionary forms of compensation) which may be fertile ground to strengthen these claims.

Bonus – Derivative claims

If it is determined that any of the above-described scenarios occurred, attorneys should also properly value the following derivative claims:

1. Failure to timely pay wages during employment – If an employee has worked off-the-clock, they performed work and were not compensated within the statutorily provided deadline and can seek penalties under the California Private Attorneys General Act ("PAGA") in the amount of $100 for the first non-compliant pay period and $200 for each subsequent non-complaint pay period. (See Lab. Code, § 204, subd. (a).)
2. Failure to timely pay wages upon termination – For every day the employer fails to comply with the statutory deadline to provide final wages upon termination, the employee is entitled to a penalty calculated as a full day of wages at the employee's regular rate, up to a maximum of 30 days. (See Lab. Code, § 201, subd. (a).)
3. Failure to maintain requisite payroll records – If an employee can be shown to have worked off the clock, the employer

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failed to accurately record the number of hours worked daily and the employee may be entitled to seek penalties under PAGA in the amount of $250 per initial violation and $1,000 per subsequent violation. (See Lab. Code, § 223.)

4. Failure to provide compliant wage statements – If an employee has worked off the clock and the total hours worked is not correctly accounted for on the employer-provided wage statements, the employee may be entitled to a $50 penalty for the first violation and $100 for every subsequent violation, up to a maximum penalty of $4,000. (See Lab. Code, § 226, subd. (a).)

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