

A Wild Fortnight in Employment Law

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By Carolyn Conway Duff and
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Two weeks in September demonstrated the fast-paced nature of changes in employment law, from the never-ending litigation surrounding arbitration clauses, to a myriad of issues presented by the COVID-19 pandemic. Fasten your seatbelts, it's going to be a bumpy article.

NJ Supreme Court Reaffirms Preference for Arbitration

On Sept. 11, the New Jersey Supreme Court issued yet another opinion upholding a challenged arbitration provision. In *Flanzman v. Jenny Craig*, __ N.J. __ (2020), the provision at issue was contained within a document entitled "Arbitration Agreement" signed by the plaintiff, Marilyn Flanzman, when she was still employed by the defendant employer. She left the company after a series of reductions in her hours, which she claimed was motivated by discriminatory animus, and filed suit under the New Jersey Law Against Discrimination (LAD).

Defendants moved to compel arbitration, and the trial court granted the motion. The Appellate Division, in a published decision at 456 N.J. Super. 613 (App. Div. 2018), reversed the trial court, holding that the provision's failure to identify an arbitral forum was fatal to its enforcement.

The Supreme Court of New Jersey reversed the Appellate Division. According to the court, the arbitration provision at issue "did not name the arbitrator, designate an arbitration organization to conduct the proceeding, or set forth a process for the parties to choose an arbitrator." Despite this, the Supreme Court upheld the provision and ordered the case to arbitration.

The court began with the oft-cited premise that under the Federal Arbitration Act (FAA) and the New Jersey Arbitration Act (NJAA), both state and federal law favor arbitration. Likewise both statutes provide mechanisms for filling in missing information in an arbitration provision, such as designating an arbitrator. Specifically, the NJAA allows for the absence of such information because it "provides a default



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procedure for the selection of an arbitrator and generally addresses the conduct of the arbitration, clearly expresses the Legislature's intent that an arbitration agreement may bind the parties without designating a specific arbitrator or arbitration organization or prescribing a process for such a designation."

In upholding the provision, the court opined that although the provision "provides only a general concept of the arbitration proceeding," it nevertheless clearly described arbitration as being "very different from a court proceeding."

At least for now, employees beware and employers rejoice: A lack of detail will not sink an arbitration clause. The next major battle on the arbitration front will decide whether the amendment to the LAD providing that any employment contract

provision “that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable,” N.J.S.A. 10:5-12.7(a), invalidates arbitration clauses after the effective date of March 18, 2019, or whether that amendment, at least as applied to arbitration clauses, is superseded by the FAA.

COVID-19 Presumption Will Increase Workers’ Compensation Claims

On Sept. 14, Governor Phil Murphy signed into law Senate Bill 2380, which creates a rebuttable presumption that an “essential worker” who contracts COVID-19 contracted it at work, and is thus covered by Workers’ Compensation. The new law defines “essential worker” as an employee who “is considered essential in support of gubernatorial or federally declared statewide emergency response and recovery operations; or ... is an employee in the public or private sector with duties and responsibilities, the performance of which is essential to the public’s health, safety, and welfare.”

Drawing ire from the business community, the new law is retroactive to March 9, 2020, when Governor Murphy declared a public health emergency regarding COVID-19 via Executive Order 103, and continues in effect so long as that executive order is extended. The bill provides that the presumption can be rebutted only by a showing by a preponderance of the evidence that

the employee was not exposed to COVID-19 while at work.

Predictions: There will be litigation regarding who is an “essential worker” within the meaning of the law, and there will be negligence claims against employers brought by family members and other third parties claiming they were infected with COVID-19 by an essential worker.

Department of Labor Issues Revisions Relating to COVID-19

Effective Sept. 16, the Department of Labor (DOL) has revised regulations relating to leave under the Families First Coronavirus Response Act (FFCRA). The FFCRA allows employers to exempt certain employee “health care providers” from the FFCRA’s leave allowance. A federal court in New York struck down what it viewed as an overly expansive definition of “health care provider,” contrasting it to the much more narrow definition found in the Family and Medical Leave Act (FMLA) regulations.

In response, the DOL revised the regulations to provide a more narrow definition (although not so narrow as that of the FMLA). The revisions make clear that workers who are ancillaries to health care, such as IT, human resources, food service, etc., are not exempted from the FFCRA’s leave entitlements. However, the DOL maintains a definition of “health care provider” that while encompassing the FMLA definition, also expands on that definition to include employees who “provide diagnostic services, preventive



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services, treatment services, or other services that are integrated with and necessary to the provision of patient care and, if not provided, would adversely impact patient care.” These employees continue to be exempted from FFCRA leave.

While many health care employees will still find themselves exempt from FFCRA leave, employees who support medical providers will benefit from this revision.

The DOL also made other clarifications to the FFCRA, including: FFCRA leave is only permissible where the employee would otherwise have work; the employee must have approval from the employer before taking intermittent leave under the FFCRA; employees have to give employers all required documentation relating to FFCRA leave “as soon as practicable”; and clarifying that notice of leave does not have to be prior to taking leave for Paid Sick Leave and Expanded Family and Medical Leave.

While the need for the FFCRA is hopefully short-lived, the DOL has shown that it will aggressively

monitor the act's implementation and make revisions when necessary.

Equal Employment Opportunity Commission Issues New Guidelines

On Sept. 8, the Equal Employment Opportunity Commission (EEOC) issued new guidelines regarding the intersection between the Americans With Disabilities Act (ADA) and COVID-19. The takeaway is that while the ADA affords employees a certain amount of confidentiality regarding their medical issues, the necessity of the pandemic allows employers to make sensible inquiries regarding potential COVID-19 exposure and infection.

According to the guidelines, employers may ask COVID-19 screening questions upon entry into the workplace without running afoul of the ADA. An employer may bar an employee from the workplace for refusing to answer such questions. The pandemic also permits an employer to inquire further into why an employee is calling out sick from work, in order to determine if it may be COVID-19 related.

If an employee is teleworking or is not coming into physical contact with coworkers or others, then the employer may not ask that employee COVID-19 screening questions. An employer should apply such COVID-19 screening uniformly; if only applied to a particular employee, then the employer must have "a reasonable belief based on objective

evidence" that the employee has COVID-19. The EEOC does allow that employers who follow the guidelines of the Centers for Disease Control and Prevention (CDC) are not in conflict with the ADA.

Employers should not specifically ask whether an employee has a family member with COVID-19. According to the EEOC, such a question runs afoul of the Genetic Information Nondiscrimination Act. The better question is whether the employee has been in contact with anyone who has COVID-19, rather than limiting it to a family member.

The EEOC still stresses that confidentiality should be maintained to the extent possible. For example, an employer may alert other employees that there has been a COVID-19 case at work by generally describing the employee's location or role, but without specifically identifying the employee. The guidelines do allow for internal reporting of COVID-19 positive employees to the extent necessary.

The pandemic has uprooted many ways of life, and the EEOC has provided sensible guidance to help businesses balance the requirements of the ADA with the pressing medical needs of COVID-19.

Claims Regarding COVID-19 in the Workplace

There has been a recent spate of lawsuits asserting claims regarding COVID-19 in the workplace. A few recent cases serve as harbingers of

the types of cases that may soon be flooding the courts.

One common theme that is beginning to pop up are cases involving employees who refuse to go to work due to what they deem to be unsafe working conditions—a failure to have, or to enforce, a mask policy, a lack of social distancing, etc. Many such cases are filed under the Conscientious Employee Protection Act. Another type of case recently seen involves discrimination based upon alleged COVID-19 infection.

While not every complaint about workplace conditions and COVID-19 will be actionable, these lawsuits highlight the need for employers to take stock of the federal, state and local guidelines regarding COVID-19, including those from the CDC. Confusion is likely to arise as COVID-19 guidelines change, given the novel nature of the disease.

And we are seeing only the tip of the iceberg in terms of COVID-19 lawsuits. Another emerging area is claims asserting fraud and abuse in relation to misuse of COVID-19 relief funds. And while many are hoping for a vaccine, issues surrounding vaccine safety, who gets the vaccine first, and whether people will be required to get the vaccine, are likely to spark more lawsuits.

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