ROCHESTER BUSINESS JOURNAL
RBJ.NET
VOLUME 37 NUMBER 38 Part of the BridgeTower Media network FEBRUARY 18, 2022

# Webinar addresses potential litigation risks for businesses in 2022

By BENNETT LOUDON

Documentation and attention to detail is crucial to protect businesses from potential litigation and government investigations.

That was the message from a group of labor and employment law experts convened last week by the Rochester Business Journal to discuss current issues facing companies as the pandemic wanes and lawmakers update relevant laws and regulations.

The panel event, which was sponsored by Harris Beach PLLC and Phillips Lytle LLP, included:

- Steven G. Carling, senior counsel, Harris Beach PLLC
- Katherine S. McClung, member, Bond Schoeneck & King PLLC
- Kevin J. Mulvehill, partner and Rochester office leader, Phillips Lytle LLP
- Hinna Upal, associate, Littler

## Mask mandate dropped


McClung

McClung started by noting that Gov. Kathy Hochul announced that the state's mask mandate for businesses would not be renewed and expired on Thursday, Feb. 10.

But McClung noted that there are still separate mask mandates in place for some industries, including pre-kindergarten to grade 12 schools, some childcare providers, public transit, homeless shelters, domestic violence shelters, correctional facilities, group homes, nursing homes and some health care facilities.

"Just because the state is not extending the mask mandate, businesses are still able to require masks by policy," McClung said.

"You're not required to mandate masks, but you certainly can require masks for all employees, only unvaccinated employees, or anyone visiting your workplace, including vendors and customers," she said.

## HERO Act updated

In May, lawmakers adopted New York's Health and Essential Rights (HERO) Act, which requires employers to create a policy to protect workers from exposure to airborne infectious diseases.

State Department of Labor officials last week updated the agency's model policy on their website to reflect the new guidance about the mask mandate.

"I do recommend that you go back to your HERO Act policy that you implemented once you decide what you're going to do about masking going forward and make sure that the language that you have in that policy is consistent with your new approach to masking," McClung said.

New York state also updated rules on quarantine and isolation for people who test positive for COVID-19 or show symptoms and are awaiting test results.

Under the new rules, the duration of the isolation and any testing required at the end of the isolation period depends on factors such as whether the individual has COVID-19 symptoms or not, whether they test positive, whether they were hospitalized for COVID, whether they are immunocompromised and whether they are able to wear a mask.

## Leave Law

McClung also touched on the COVID-19 leave law, which requires employers to continue to pay workers when they can't work because of COVID-19.

One exception to the law applies to workers who traveled despite Centers for Disease Control warnings.

"This is a very narrow exception," McClung said.

The law also exempts remote workers who are not symptomatic and are not diagnosed with anything. When the law does apply, the amount of paid leave workers are entitled to depends on the size of the company.

For companies with net income of more than $1 million, the leave is five calendar days, not workdays. For larger companies and public employers, it's 14 calendar days.

"There was confusion about whether the law creates paid leave for just one governmental order, for every governmental order, or is there some cap on it?" McClung said.

According to new state Labor Department guidance, the cap is three orders, she said.

"They can get the paid leave for up to three orders of quarantine or isolation. After that, they're entitled to unpaid leave," McClung said.

For the second and third governmental order, in addition to the order, workers also will need a positive COVID test to qualify for paid leave.

State officials also clarified that, if an employee is not subject to a governmental order, but the employer tells a worker to stay home because of concerns about COVID exposure, the employer must pay the worker until they get a governmental order, McClung said.

That particular guidance is not written into any statute or regulation, "so there is a question on whether the Department of Labor has the authority to create a new category of paid leave by posting a document on their website," McClung said.

## Contact tracing ends

In January, the Department of Health stopped doing contact tracing to notify individuals of exposure. At that time, an affirmation of isolation was posted on the agency's website.

"Individuals could fill it out and it counted as a governmental order under the law, and it entitled them to paid leave," McClung said.

"Any of your employees could just go and print this out, fill it in, and say I need paid leave," McClung said.

"That caused a lot of push back with employer groups saying we're getting flooded with paid leave requests," she said.

In early February, the Department of Labor removed the link to that guidance document. There is still information about the document on the Labor Department's frequently-asked-questions page, McClung said, but Gov. Hochul is supposedly reviewing the issue and changes are expected.

## Documentation


Carling

Carling discussed the importance of documentation for disciplinary issues, the need for strong policies, and the importance of employee handbooks.

"The keys to success in a discipline or termination case are established in notice of what the conduct is, documenting not only the current situation, but whatever had been happening in the past, and consistent application of discipline so that it doesn't appear as if there's any type of bias occurring," he said.

"It's important that policies are clearly written so they can be understood by any level of employee … It's important to set expectations for behaviors but also note consequences and to be clear about what those are going to be," Carling said.

Employee handbooks should be given to employees when they are hired, and they should sign an acknowledgement that it was received. And when any significant change is made to the handbook, employees should sign a new acknowledgement.

Documentation is important for employee discipline and termination. After a conversation with a worker on an important issue, manager should follow up with an email confirming what was said.

"It's less formal than an actual memo, but it does show notice. If the employee doesn't write back and disagree it shows that they had a mutual understanding of what you're saying to them," Carling said.

A counseling memo is a formal written document. It's important that it has very clear expectations, notes what future conduct you don't want to see again and any consequences for not complying, Carling said.

Such a memo "usually ends with the phrase you can be subject to discipline up to and including termination," he said.

Written warnings are the next level of documentation.

"One of the most important pieces of this is consistency. When you're going to discipline someone, it should be same act, same result. The fundamental element of what we call due process is that people are treated consistently for the same actions," Carling said.

## Classifying workers

Mulvehill talked about the use of volunteers, interns, and independent contractors.


Mulvehill

"Organizations are confused about whether they're permitted to use unpaid volunteers, whether interns need to be paid, and whether individuals are properly classified as employees or independent contractors," Mulvehill said.

Whether an organization can use unpaid volunteers depends on what type of entity it is. A private for-profit organization generally cannot use unpaid volunteers," Mulvehill said.

There is an exception for specific situations related to short-term recreational or amusement events, such as a party or game day after work hours.

"But generally speaking, you can't use unpaid volunteers," he said.

Generally, the rule is that public employers can use volunteers, except for someone who is actually employed by the organization. You can't have them volunteer to perform tasks similar to their job, Mulvehill said.

Federal law generally allows not-for-profit institutions to use unpaid volunteers, but New York state differs. In New York, there are restrictions on the type of work that can be performed by volunteers. They have to meet a six-factor test:

- A volunteer cannot replace or augment paid staff
- They can only do things traditionally reserved for volunteers
- They can't be required to work certain hours
- They can't be required to perform duties involuntarily
- They can't be under any contract, expressed or implied
- They can't be paid for their services except for expense reimbursement.

The use of interns depends on the type of organization. Private and for-profit employers generally cannot use unpaid interns. There is an exception, but it comes with a very complex set of tests, Mulvehill said.

"If you are a for-profit business and you're considering using unpaid interns, take a step back and really ensure that you're undergoing the appropriate analysis first and insure that these people are properly classified," Mulvehill said.

Public sector organizations generally can use unpaid interns, with some exceptions. It's more complex for not-for-profit institutions.

"You can't just jump to conclusions with respect to classification of individuals. You can't simply designate someone as a volunteer intern. It requires a very complex analysis in most cases. And there are significant implications to misclassifying," Mulvehill said.

Independent contractors and employee classifications "is a hot button issue for litigation," Mulvehill said.

"In general, what we look at is whether or not the prime contractor or employer is exercising control over the individual. To the extent they're exercising control, generally the individual is going to be classified as an employee," he said.

"This is not something that you should jump to the conclusion that the individuals are properly classified as independent contractors. You really need to analyze this issue and then reanalyze before making a determination of the proper classification," he said.

"Not only do you have to apply very complex tests, in certain industries the state has just come out and said there's a presumption that everyone is an employee and not an independent contractor," Mulvehill said.

Two examples of that are the construction industry and the commercial goods transportation industry.

"The ramifications of misclassifying individuals can be significant. They can include audits and investigations of your entity ... being responsible and liable for back wages, civil penalties, back taxes, interest, liquidated damages. In some cases, there are criminal penalties associated with misclassification," Mulvehill said.

## Retaliation claims

Upal ended the webinar with a discussion of changes to New York state's whistleblower law.

"Retaliation claims typically arise when an individual who engaged in protected activity is later subjected to some sort of adverse employment action, such as demotion, or denial of overtime, or promotion, or maybe termination," Upal said.

New York Labor Law Section 740 — the whistleblower law — has recently been changed and expanded.

"Previously the New York Labor Law provided for relatively narrow whistleblower rights, prohibiting retaliation against employees who complained of practices that actually constituted a substantial and specific danger to the public health and safety," Upal said.


Upal

Now the law prohibits employers from retaliating against employees, former employees and independent contractors for disclosing or threatening to disclose to a supervisor or public body any conduct that they reasonably believe violates any law rule or regulation, executive order or any judicial or administrative decision, ruling, or order, or that they reasonably believe constitutes a substantial specific danger to the public health or safety.

"Clearly the law has been dramatically expanded in favor of whistleblowers," Upal said.

"Frankly, employers are going to be lucky if they have the opportunity of notice and cure before disclosure is even made to an external public body, or a claim is made," she said.

She said businesses should expect more external complaints to government agencies and more retaliation claims.

"They're going to come from more people, not just your employees. It might be former employees ... it might be from independent contractors, and they might be about all kinds of things," she said.

To be protected from retaliation, employees only need to have a reasonable belief that the conduct is unlawful or dangerous. They don't have to be correct in that belief, Upal said.

And the law doesn't define the meaning of "reasonably believe," she said.

The changes to the law expanded the definition of protected activity, which now includes complaints about any alleged violation of law, rule, or regulation. This includes executive orders and judicial administrative decisions.

"This is very broad and it's going to be difficult to implement and get our arms around," Upal said.

Before the changes, employers had to be notified and given an opportunity to correct alleged violations before going to an external body.

"This is really no longer the case. The amended law requires only that a good faith effort is made by the individual to notify the employer of the issue," she said.

And there are five exceptions where notice is not required.

The amended law also removes the defense that notifying the company of alleged violations was part of the reporting person's job duties.

And the definition of what constitutes retaliation has been expanded from discharge, suspension, or demotion, to include actions or threats that would discriminate against an employee or a former employee.

But employers can defend a retaliation claim by showing that the retaliatory action was based on something other than the employee's exercise of their rights under the statute. That's when documentation and evidence helps the employer.

Upal added that, as of May 7, employers must notify workers when they are hired if their telephone calls, emails or internet use is monitored by the company. Employers must have employees sign an acknowledgement that they have been informed.

*BLoudon@BridgeTowerMedia.com / (585) 232-2035*