

Employers Likely to Face a Wave of COVID-19 Class Action Litigation

As the ongoing COVID-19 pandemic continues to drastically impact the U.S., class action lawsuits have been on the rise. Despite court closures, class action filings have increased and are expected to continue.

The risk to companies of class and collective action proceedings has been amplified. Below are the key areas that have already flooded the court system as well as issues that we expect to drive class action litigation arising from the pandemic:

Wage and Hour: Under the Fair Labor Standards Act (FLSA), nonexempt employees must be paid for all time worked including overtime rate for any hours over 40 in a given work week.

- Off-the-Clock Safety Precautions: Due to the impact of COVID-19, many employers require new tasks before or after work, including, but not limited to: temperature screening, health assessments and/or cleaning of workspaces. Class action litigation has been filed about whether time taken for these precautions is compensable time.
- Off-the-Clock Work from Home: Many employees are now working remotely, which means they may be working outside of regular business hours. Again, there is a risk of class action litigation should employers fail to accurately record and pay for this time worked including work performed during any unpaid meal or break periods.

Worker Classification: Independent contractors are generally not eligible for unemployment compensation or state-mandated paid leave during the pandemic. This has caused some workers and state governments to challenge independent contractor classification so these workers may obtain benefits.

- For Example: Rideshare drivers have filed class action lawsuits against Uber Technologies and Lyft Inc. alleging that they have been misclassified and are owed pandemic related paid leaves or unemployment compensation.

Disability Accommodation and Discrimination: Class claims that relate to reopening businesses may include disability discrimination claims, retaliation claims, whistleblower claims and privacy matters relating to COVID-19 diagnoses.

- Employer Considerations: Employers must evaluate the legal implications as well as how their actions might be viewed in the “court of public opinion.”

WARN Act: The federal Worker Adjustment and Retraining Notification Act (the WARN Act) requires advance notice to employees in instances of mass layoffs and qualified plant closings. Mass layoffs due to the devastating effects of the pandemic may lead to class-action suits.

While employers have the ability to assert the “unforeseeable” exemption to the law’s notice requirements, the exemption remains untried in federal courts in the context of COVID-19. Further, it will only become more difficult for employers to avail themselves of the unforeseeable business circumstances defense as more time passes since the novel coronavirus hit the U.S. in March.

Though it may be a challenge for plaintiffs to obtain class certification, once a case becomes certified, class action lawsuits have the power to inflict severe damage to businesses. Employers should take immediate action to reduce risk and exposure by reviewing wage and hour practices, record keeping procedures, contracts, handbooks and other policies to ensure that they are in compliance.

Please contact any [attorney](#) in Bond's [Class and Collective Action Litigation practice](#) if you have any questions or would like additional information regarding the potential scope of exposure, mitigation and/or other legal developments arising from class action litigation.



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