

The background of the entire page is a microscopic view of COVID-19 virus particles. The particles are spherical with a textured surface and numerous protruding spike proteins. They are rendered in shades of blue and cyan against a dark blue background. The largest particle is centered in the middle of the page, with many smaller particles scattered around it.

# COVID-19 Playbook

## Employment Practices Liability

# EMPLOYMENT PRACTICES LIABILITY

## COVID-19 RELATED CLAIMS PLAYBOOK

### Introduction

Wilson Elser is pleased to present this COVID-19 employment practices liability playbook, which is designed to assist human resources personnel, risk managers and in-house counsel in navigating the uncharted waters of COVID-19 claims handling and litigation. The following guidance serves as a starting point for consideration in evaluating employment practices claims against employers with a causative link or connection to COVID-19. This playbook is not a substitute for legal counsel, and should not be construed as the rendering of legal advice. It is for information only. Also note that this playbook is not designed to be a complete claims-handling manual; we have not attempted to address every claims-handling issue and procedure that could arise. Many of those issues mirror the handling of other employment practices liability claims. Rather, we have focused on issues and suggestions that we anticipate will be unique to these types of claims.

Additional information can be obtained by directing questions to the Wilson Elser Attorney Contacts within this document or by referring to the firm's [50-state survey on Employment Issues Related to the COVID-19 Pandemic](#).

The playbook is presented in five steps, or phases. Although these phases roughly follow the progression of a claim, they are not strictly temporal; there will be times that the phases overlap or certain activities from one phase should be done earlier or later in the overall process.

The steps are:

<b>STEP 1.</b>	<b>Preliminary Investigation &amp; Evaluation</b>
<b>STEP 2.</b>	<b>Risk Transfer</b>
<b>STEP 3.</b>	<b>Early Resolution</b>
<b>STEP 4.</b>	<b>Claim &amp; Litigation Management</b>
<b>STEP 5.</b>	<b>Claim Resolution</b>

### STEP 1.

## Preliminary Investigation & Evaluation

**Step 1 Overview:** Step 1 assumes the employer (1) has notified its insurance broker and/or insurers of the claim, (2) is responsible for claims handling within a self-insured retention or (3) is self-insured, and that the employer's human resources personnel, risk managers and/or in-house legal counsel will benefit from guidance in the investigation and evaluation of COVID-19 claims. In this regard, the employer should identify and communicate with those having personal knowledge of the facts and circumstances of the claim, and identify and collect all relevant documents. The employer should review all the facts to make an initial liability assessment and identify claims that should be the subject of early resolution efforts.

### SPECIFIC ACTIVITIES:

#### Initial COVID-19 Claim Considerations

- Generally determine if the claim arose during the COVID-19 pandemic.
- Determine if state or local stay at home or shelter in place orders were activated where and when the claim arose.
- Determine if the matter arose in a state that has passed legislation regarding a claims-handling mandate.
- Determine if the claimant qualifies for any applicable statutory/regulatory priorities based on COVID-19-related issues, health, age and/or other criteria in the jurisdiction.

#### COVID-19 Operational Questions

- Determine if the employer is still viable given COVID-19-related economic downturns.
- Inquire whether the employer was operating as an "essential business" or "essential infrastructure" business at the time the claim arose.
- Inquire whether the employee was working as an "essential" worker at the time the claim arose.
- Inquire whether the employer implemented changes or additions to its procedures or policies in response to the COVID-19 pandemic. If so, acquire copies of related policies or procedures.
- Inquire whether the employer made physical changes to its work environment in response to the COVID-19 pandemic. If so, obtain details of those modifications.
- Inquire whether the employer provided employee training in response to the COVID-19 pandemic. If so, obtain evidence of employees and claimant receiving this training.

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### Statutory Leaves

- Inquire whether the employee participated in any paid or unpaid leave of absence connected with the COVID-19 pandemic, including emergency paid sick or family leave under the Families First Coronavirus Response Act (FFCRA), leaves under the Family and Medical Leave Act (FMLA) or state family medical leave statutes or the Americans with Disabilities Act (ADA) or state disability statutes. If so, obtain details of the leave and related documents.

### Workplace Exposures

- Inquire whether the claimant was involved in a work-related injury or exposure connected to COVID-19. If so, obtain any relevant documents, including injury and illness reports, internal investigation materials, communications with federal or state OSHA offices or departments of public health.

### Reductions in Force and Furloughs

- Inquire whether the employee was included in a reduction in force or furlough as a result of business slow-downs occasioned by COVID-19. If so, obtain documents relating to the planning and communication of the reduction in force or furlough.

### Employee Recalls

- Inquire whether the employee was included in an employee recall program following a full or partial closure or reduction in hours connected to COVID-19. If so, obtain documents relating to the planning and communication of that recall program.

### Termination

- Inquire whether the employer separated the employee or the employee resigned in connection with a workplace safety issue, exposure or closure. If so, obtain copies of the termination notice.

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### Key Employment Documents

- Ask employer to provide key documents, including:
  - Any COVID-19- or pandemic-related policies or safety manuals
  - Copies of any relevant internal communications, including emails, such as:
    - Pandemic Preparedness Plans and related documents concerning adjustments to policies and workplaces, employee safety training and return-to-work programs
    - Communications where the claimant discussed COVID-19-related concerns or needs
    - Any communications wherein the company discussed time off, benefits or potential accommodations for the COVID-19 issues
    - Any personnel or medical files relating to COVID-19 medical treatment or leaves
    - Internal investigation files or communications with government agencies regarding investigations into complaints or workplace exposures.

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### STEP 2.

## Risk Transfer

**Step 2 Overview:** During this phase the employer's human resources personnel, risk managers and/or in-house legal counsel should assess opportunities to transfer all or part of the risk to other parties. Appropriate tenders should be made and defense counsel should be instructed to pursue legal action to enforce tender rights when necessary.

### SPECIFIC ACTIVITIES:

#### Risk Sharing

- Identify potential sources of shared liability, including:
  - Additionally named parties on the claim
  - Potential "joint employers" of claimant with insured, including staffing companies and franchisors
  - Potential indemnity agreements between employer and third parties
  - Other applicable insurance policies for the employer, including CGL, D&O and workers' compensation
  - Other applicable insurance of third parties, including policies where employer is named as an "additional insured."
  
- To the extent other sources are discovered, consider:
  - Potential for tolling or joint defense agreements
  - Potential for tendering defense.

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### STEP 3.

## Early Resolution

**Step 3 Overview:** This step involves determining the claims settlement value, formulating a settlement strategy and entering into negotiations. Mediation and arbitration should be considered, particularly in multi-party situations.

### SPECIFIC ACTIVITIES:

- Early resolution should proceed as is customary in employment practices liability cases. However, consideration should be given to the answers to the questions raised in Steps 1, 2 and 4, which may indicate that a particular emphasis should be placed on early resolution. Factors that may argue in favor of early resolution include:
  - A federal, state or local agency determined that the employer violated COVID-19-related guidelines.
  - There are no applicable federal or state defenses or immunities.
  - Employer terminated an employee's employment in response to a workplace safety complaint.
  - Employer did not comply with FFCRA.
  - Employer did not comply with state specific wage-and-hour issues.
  - Employer did not comply with Worker Adjustment and Retraining Notification (WARN) & mini-WARN acts.
  - Employer has no basis to pursue contribution or indemnification claims against third parties.
  - There are no other carriers that would owe the employer coverage for the incident.
  - Case is of nuisance value.
- This section may be updated as the industry obtains more data and claim experience.

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### STEP 4.

## Claim & Litigation Management

**Step 4 Overview:** During this step the employer retains counsel (or is assigned one by the insurer) and provides them with claim information and investigation results. The employer also should provide litigation management guidelines, and work with counsel to develop a litigation plan and budget. The process is continued by working with counsel toward an early assessment of the impact of the information received, periodically reviewing the plan and budget, exploring opportunities for early resolution, and making sure counsel prioritizes the discovery necessary to move the case toward the preferred resolution.

### SPECIFIC ACTIVITIES:

- Request defense handling in keeping with mandated or recommended social distancing mandates or principles.
  - Request defense counsel conduct witness interviews, deposition and other matters in keeping with federal, state and local mandates and Centers for Disease Control and Prevention (CDC) and public health guidelines.
- Discuss defenses and defense strategy taking into consideration applicable laws and statutory considerations for the specific jurisdiction.
  - Potential Claims

There are various federal, state and local regulations that will shape the defense strategy for these claims. Some may be expressly made, while others may exist as potential claims not yet asserted. Below is a brief overview of various laws that may come into play. While some of these regulations predate the COVID-19 pandemic others have been implemented recently in response. A more detailed state-specific guide can be accessed [here](#).

#### *Americans with Disabilities Act (ADA) and Similar State Laws*

- The Equal Employment Opportunity Commission (EEOC) makes clear that it does not interfere with or prevent the employer from complying with guidelines and suggestions made by the CDC or state/local public health authorities. In fact, the EEOC has relied on guidance it issued in the Pandemic Preparedness in the Workplace and the Americans with Disabilities Act that was originally published in response to the H1N1 outbreak and since updated as of March 21, 2020, in relation to COVID-19. These guidelines are important because they regulate common disability-related inquiries and medical examinations during the hiring process and during employment.

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### *OSHA/Whistleblower Retaliation*

- OSHA has issued specific COVID-19-related guidance with respect to the workplace that sets the standard for workplace safety during COVID-19. An employee who is disciplined, demoted or had his/her employment terminated for raising concerns about COVID-19-related safety issues may have a claim for retaliation.

### *Families First Coronavirus Response Act (FFCRA); Emergency Paid Sick Leave Act; Emergency Family and Medical Leave Expansion Act; State and Local Paid Sick Leave Laws; and State Family and Medical Leave Laws*

- Employers' reasons for failing to allow employees to take this paid sick leave may come into play where there is a question as to whether certain employees qualify under one of the six qualifying criteria. Moreover, employers' confusion as to its availability for those employees who are able to telecommute may give rise to claims in light of various state and local stay at home orders. Additionally, the confusion as to whether these emergency leaves are available given various stay at home orders where work is still available also may give rise to claims. Employers may be confused as to their obligations to also offer state and local paid sick leave to their employees even though they complied with the FFCRA emergency paid sick leave.

### *Wage and Hour Issues*

- The issues can come into play with reductions in pay and furloughs. A handful of states have wage theft laws requiring notice before reductions in pay can be made. In addition, changes in pay for exempt employees may give rise to misclassification claims. Further, the question of whether employees need to be paid out for earned but unused paid time off (PTO) at the time of furloughs or temporary pauses in operations is usually state-specific.

### *Federal and State Worker Adjustment and Retraining Notification Act (WARN) Compliance*

- WARN and mini-WARN Acts require employers to provide notice for mass layoffs or reduced hours or other employment loss. Most employers will likely use the unforeseen business circumstances exception for not providing required notice under WARN. While this may apply in light of COVID-19 pandemic concerns, the fact-specific nature of this exception may lend itself to challenges giving rise to litigation. Further, some states have mini-WARN acts that may require greater notice and have different requirements regarding what triggers a WARN notice. Additionally, some states such as California have relaxed the notice requirement in light of the COVID-19 pandemic.

### *Federal and State Antidiscrimination Laws*

- General claims of retaliation and discrimination under state and federal laws may come into play based on how employees are selected for layoffs, furloughs, pay cuts, schedule changes and similar actions, or even for complaining about perceived unsafe practices during the COVID-19 pandemic. There likely will be an increase in harassment claims by individuals who are targeted because of their national origin or because they test positive for COVID-19, as well as disability discrimination claims surrounding physical adjustments to workplace, facemask and other personal protective equipment (PPE) policies and failures to accommodate COVID-19-related disability or leave needs.

### Potential Defense Strategies

- There are a number of potential defenses and strategies to consider, some of which are COVID-19-specific.

#### *Reliance on or Compliance with Federal, State or Local COVID-19-Related Laws or Guidance*

- Did employer rely on EEOC guidance in performing health screenings of employees entering the workplace?
- Did employer make efforts to comply with federal or state Occupational Safety and Health Administration (OSHA) regulations or guidance in allowing workers to work during or following the COVID-19 pandemic?
- Did employer comply with CDC or state or local department of health orders or guidelines in maintaining its work environment during or following the COVID-19 pandemic?

#### *Statute of Limitations*

- Determine whether state in question tolled applicable statutes of limitations during mandated shelter in place or stay at home orders or COVID-19-related court closures.

#### *Exhaustion of Remedies*

- Are there state or local requirements specific to COVID-19 on making claims, and if so, did claimant follow those procedures?

#### *Statutory Immunity or Exceptions*

- Consider whether any federal, state or local body provided immunity to the employer for actions taken in response to the COVID-19 pandemic and whether they impact the analysis of the claim.

#### *Statutory Exemptions*

- Does the employer employ relevant threshold number of employees to be covered under applicable federal or state statutes?
- For example, inquire whether the employer has more than 500 employees and made a determination it was exempt from providing benefits under COVID-19-related legislation such as the FFCRA.

### Potential Damages Considerations

- There are a number of factors to consider, some of which are COVID-19-specific.

#### *Lost Income*

- Consider whether COVID-19-related circumstances (e.g., business closures) can be argued as primary reasons for loss in wages.

#### *General Damages*

- Consider whether COVID-19-related considerations (e.g., claimant falling ill with COVID-19) can be argued as primary or contributing causes of emotional distress or other general damages.

#### *Alternative Sources*

- While it is generally difficult to argue offset for alternative payments sources such as state disability or unemployment benefit programs, there are exceptions. Consider whether to argue new programs, such as paid sick and family leave under the FFCRA or pandemic unemployment programs under the CARES Act, should be treated as offsets for claimed lost wages or general damages.

#### *Prior Settlements*

- Inquire whether the claimant participated in group severance plans and whether they bar asserted claims.

#### *Mitigation*

- Consider whether an argument can be made that stay at home orders connected to COVID-19 or COVID-19-related circumstances (e.g., an employee becoming sick) contributed to a claimant's ability to work or secure replacement employment and can be considered an offset under federal or state law.

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### STEP 5.

## Claim Resolution

**Step 5 Overview:** This step encompasses executing the litigation plan in pursuit of the preferred resolution. Upon resolution, the appropriate settlement papers should be procured.

### SPECIFIC ACTIVITIES:

- Claims resolution should proceed as customary in employment practices liability cases, including obtaining proper stipulations of discontinuance, releases and confidentiality clauses. To date, no specific COVID-19 considerations have been identified.

**Have Questions?** [Contact Our Team >](#)

# YOUR TEAM – CONTACT US WITH QUESTIONS

Employment claims issues and their financial and reputational implications will persist long after the COVID-19 pandemic subsides. **Wilson Elser is ready to help your company prepare now for the unprecedented times ahead.** Drawing on vast related experience, we know how to build consensus among key stakeholders and craft defense strategies that can withstand aggressive litigation. Our attorneys already are working with many employers to develop their COVID-19 claims response teams and prepare winning defenses.

Feel free to contact the Wilson Elser attorneys listed below to begin a dialogue and determine how we can assist you.



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