



JUNE 2021

# COVID-19 and employment litigation

## A survey of recent developments from discrimination and retaliation to disability accommodation and vaccination

BY WILLIAM JHAVERI-WEEKS AND ALLY GIROUARD

The COVID-19 pandemic upended workplaces as we knew them, causing layoffs, an unprecedented shift to remote work, and the exposure of some workers to a potentially fatal virus. Lawmakers at all levels of government responded with a range of emergency laws and rules regulating workplace safety, sick leave, and the rights of laid-off employees to reinstatement. With vaccines now reaching near-universal availability in California, the landscape is poised to shift again. This article surveys the current state of key areas of employment litigation related to the pandemic.

### Cal/OSHA violations: Injunctions and PAGA penalties

California's Division of Occupational Safety and Health ("Cal/OSHA") has been at the center of workplace safety during the pandemic, promulgating workplace safety standards and guidance, and investigating worker complaints of hazards related to COVID-19. The portion of the Labor Code and regulations enforced by Cal/OSHA generally does not provide a general private cause of action, but for employees confronting workplaces violating Cal/OSHA safety requirements, courts may provide relief under the Unfair Competition Law ("UCL") (Bus. & Prof. Code, § 17200) and the Private Attorneys General Act ("PAGA") (Lab. Code, § 2699 et seq.).

In January 2021, the United Farm Workers successfully obtained a preliminary injunction under the UCL to force a meatpacking plant to comply with basic COVID safety regulations. (See *United Farm Workers of Am. v. Foster Poultry Farms*, 20-CV-03605 (Merced Cty. Super. Ct.)) The court directed the defendant to take twenty specific steps at the plant to improve COVID-19 safety, but rejected the plaintiff's alternative public nuisance theory, citing the defendant's evidence that the COVID-19 infection rate at the plant was lower than the overall county rate. The UCL does not provide for attorneys' fees, although a plaintiff might recover fees under Code of Civil Procedure section 1021.5. The right to bring UCL claims for violations of Cal/OSHA requirements was confirmed recently in *Sobus Industrial Innovations, LLC v. Superior Court* (2018) 4 Cal.5th 316.

PAGA allows aggrieved employees to sue on behalf of the State for violations of the Labor Code, including OSHA provisions of the Labor Code that require employers to provide a safe and healthful workplace, among other similarly broad requirements (Lab. Code, §§ 6400-03). A recent Court of Appeals decision confirmed that violations of the OSHA provisions support PAGA claims. (See *Sargent v. Bd. of Trustees of Cal. State Univ.* (2021) 61 Cal.App.5th 658.) The procedure for pursuing



PAGA Penalties based on the OSHA portion of the Labor Code differs from that of non-OSHA PAGA Penalties – for example, instead of providing notice to the Labor and Workforce Development Agency ("LWDA"), the employee provides notice to Cal/OSHA, with a copy to the LWDA. Cal/OSHA may inspect or investigate the violation, and the employer may have an opportunity to cure. (See Lab. Code, § 2699.3, subd. (b).)

### Retaliation for complaints about COVID-related safety

As employees returned – or resisted returning – to in-person work during the pandemic, many voiced concerns about COVID-related safety, creating situations in which subsequent adverse action toward those employees was potentially unlawfully retaliatory. Labor Code section 6310 prohibits discharge of an employee for making a bona fide complaint of unsafe working conditions and provides a right to reinstatement and lost wages.

Similarly, Labor Code section 1102.5 prohibits retaliation against an employee for disclosing to supervisors (among others) information that the employee reasonably believes discloses a violation of a state or federal statute or noncompliance with a local, state, or federal rule or regulation. Effective January 1, 2021, Labor Code section 1102.5 provides for one-way attorneys' fee-shifting to prevailing employees. Given the number of local, state, and federal rules and regulations implemented to ensure workplace safety during COVID-19, it is likely that many employee safety complaints will fall within these anti-retaliation provisions.



JUNE 2021

Our review of recent case filings suggests that many such claims have been asserted.

### Discrimination claims

COVID-19 has implicated workplace anti-discrimination laws in a number of ways. Given the massive job losses caused by the pandemic, employers were forced to pick and choose among employees when deciding whom to terminate, creating the potential for employees to be selected for termination based on their membership in a protected class. On the one hand, this has resulted in an increased number of instances in which employees may fear that they were terminated due to a discriminatory motive. On the other hand, the pandemic provides employers in many cases with an obvious “legitimate, non-discriminatory reason” for terminating employees in the first place. Thus, the focus in discrimination claims during COVID-19 is likely to be comparing the terminated employee to similarly situated employees who were retained, or the often difficult showing that the pandemic was a pretext for terminating an employee.

The physical implications of contracting COVID-19 have raised questions concerning disability discrimination and reasonable accommodations. Workers whose disabilities made them particularly vulnerable to COVID-19 had a right to request reasonable accommodations, and lawsuits have been brought by employees terminated for refusing to return to work based on disability-related concerns. (*Cf. Lobo v. Air-India Ltd.*, 2021 WL 254312 (N.D. Cal. Jan. 26, 2021) [dismissing with leave to amend claim of FEHA discrimination for denial of request to work from home during COVID-19].) The question of whether COVID-19 itself qualifies as a disability may depend on the presence of longer-lasting effects. One possible lasting impact of COVID in the area of disability discrimination is that employers will have difficulty showing that it would be an undue burden to permit an employee to work remotely as a reasonable accommodation.

### Efforts to avoid the workers’ compensation exclusive-remedy rule

What about suits against employers for the physical injury of contracting COVID-19 at work? Workplace injuries are usually limited to the workers’ compensation system, with narrow exceptions including uninsured employers and employers engaging in fraudulent concealment of a known danger. Plaintiffs appear to be having little success in obtaining relief outside the workers’ compensation system for contracting COVID-19 at work. A federal district court recently granted a motion to dismiss a former employee’s claim that non-compliance with COVID-19 regulations removed UPS from the protections of workers’ compensation exclusivity. (*Hess v. United Parcel Service Inc.*, 3:21-cv-00093 (N.D. Cal.)) A similar case dismissed claims by a plaintiff claiming that she contracted COVID-19 from her husband, who had contracted it due to unsafe practices by his employer. (*Kuciamba v. Victory Woodworks Inc.*, 3:20-cv-09355 (N.D. Cal.)) There, the court held that tort damages were barred by workers’ compensation exclusivity, and that the employer’s duty to provide a safe workplace did not extend to the employee’s spouse.

### Sick leave retaliation

In the early days of the pandemic, the federal Families First Coronavirus Response Act provided sick leave for certain employees impacted by COVID-19. California enacted supplemental paid leave providing two weeks or 80 hours of paid leave to public and private sector employees who work for employers with more than 25 employees. Covered employees are protected from retaliation for using sick leave, creating another area for potential wrongful termination claims.

### Right to recall

On April 16, 2021, California enacted a right-to-recall law, effective through December 31, 2024, requiring employers of certain sizes in certain industries to offer laid-off employees

positions that become available. (See Lab. Code, § 2810.8.) If multiple employees are interested in a newly available position, preference is based on seniority. Employees may report violations to the Labor Commissioner and may be entitled to reinstatement, back pay, front pay, and lost benefits. Several similar local laws, including in Los Angeles and Long Beach, provide a private right of action.

### Vaccination

The expanded availability of COVID-19 vaccines will raise a variety of legal issues in the workplace. If employers mandate vaccination, or if they restrict un-vaccinated employees in ways that vaccinated employees are not restricted, they may be required to provide reasonable accommodations to employees who have disabilities or religious beliefs that prevent them from being vaccinated.

*Bill Jhaveri-Weeks, is the founder of The Jhaveri-Weeks Firm, a San Francisco-based law office representing organizations and individuals in civil litigation, including class actions, employment claims, commercial disputes, and appeals. Mr. Jhaveri-Weeks frequently speaks and writes on developing issues in litigation, particularly in the areas of class actions and employment law. He clerked for a U.S. Court of Appeals judge, and graduated from Yale College and New York University School of Law.*



Jhaveri-Weeks

*Ally N. Girouard is an associate at The Jhaveri-Weeks Firm. She is a civil litigator, with a focus on employment law. She previously was a fellow at Legal Aid at Work. At UC Hastings College of the Law, she was an editor of the Law Journal and won several academic awards.*



Girouard