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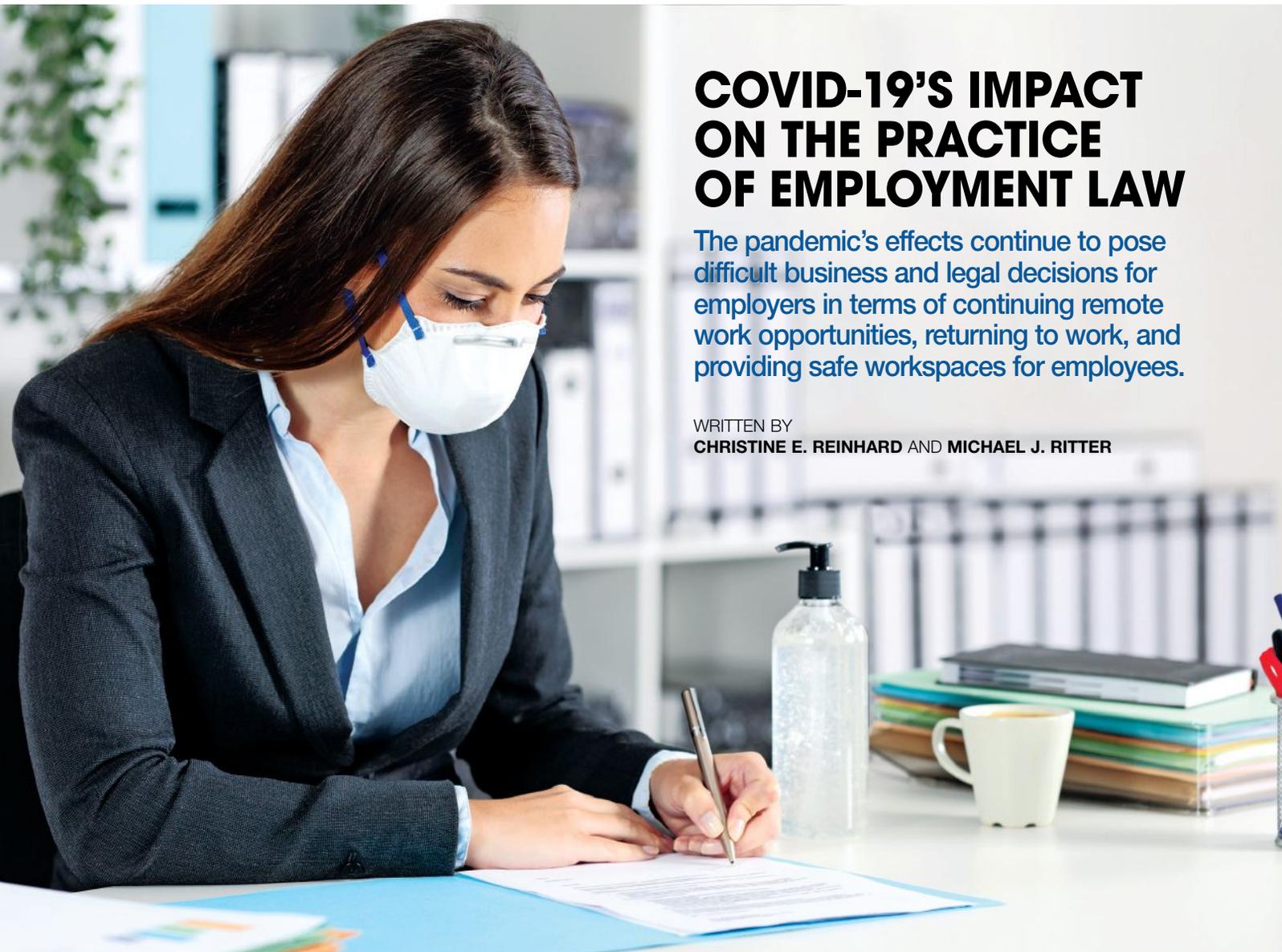
THE TEXAS BAR JOURNAL

## LABOR AND EMPLOYMENT LAW

A LOOK AT COVID-19'S IMPACT  
ON THE PRACTICE OF EMPLOYMENT LAW,  
WHAT EMPLOYERS SHOULD KNOW  
ABOUT THE COVID-19 VACCINE MANDATE,  
AND ENFORCEABILITY OF  
COLLECTIVE ACTION WAIVERS  
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# COVID-19'S IMPACT ON THE PRACTICE OF EMPLOYMENT LAW

The pandemic's effects continue to pose difficult business and legal decisions for employers in terms of continuing remote work opportunities, returning to work, and providing safe workspaces for employees.

WRITTEN BY  
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**T**he COVID-19 pandemic has changed the practice of law in many ways. The practice of employment law is no exception. The pandemic has not only changed day-to-day practice, but it also has resulted in many new laws and regulations affecting the workplace.<sup>1</sup> Economic and societal changes during the pandemic have also increased demand for client counseling and representation in administrative and judicial proceedings. This article addresses some of the pandemic's most significant impacts on the practice of employment law.

## Workforce Changes

The early pandemic shutdowns “generated a wide array of unique challenges for employees and employers,” and those challenges continue today.<sup>2</sup> Employers in certain sectors laid off employees when working from home was impractical. Conversely, lifestyle shifts during the pandemic increased service demands that led employers in other sectors to hire more employees. Employers and employees alike have become more accustomed to using technology to collaborate. Although increased reliance on technology enabled work to continue, it also has increased employers' exposure to cybercrime and ransomware attacks, which increased significantly in 2020 and 2021.<sup>3</sup>

The pandemic has also taken a significant psychological toll on the workforce. Many employees who were laid off and unable to work, or who worked in isolation for years, have experienced adverse mental health effects, which has impacted work performance and created “a distant attitude toward work.”<sup>4</sup> Consequently in some cases, the social impacts of isolation have adversely affected employee productivity, as well as employment relations, and have been an underlying contributor to many employment disputes.

More recently, nearly all sectors are being impacted by the “Great Resignation,” a term used to describe the many people who left the workforce during the pandemic, with many employers struggling to fill positions. Because the labor market presents employees with more options, employees feel better positioned to make demands or complaints about working conditions.<sup>5</sup> These latest trends have resulted in further need for employment counsel, whether in the negotiation of contracts for professional employment or departure, and have increased retaliation claims by employees who brought their complaints forward.

### **The EEOC**

Whether due to layoffs, reductions in force, or decreased job satisfaction, employment disputes involving alleged unlawful employment practices, such as discrimination and retaliation, have noticeably increased. Such claims generally must be administratively exhausted through either the U.S. Equal Employment Opportunity Commission, or EEOC, or its state-agency equivalent before suit is filed. These agencies, however, have also been impacted by the COVID-19 pandemic. At the beginning of the pandemic, the EEOC, for instance, temporarily halted the issuance of right-to-sue letters. Upon resuming the issuance of right-to-sue letters in August 2020, the EEOC’s outflux of right-to-sue letters increased new filings in late 2020, which could potentially overburden the courts.<sup>6</sup>

The EEOC also experienced increased delays in responding to Freedom of Information Act, or FOIA, requests for information regarding EEOC charges. The EEOC’s backlog of FOIA requests has increased due to the loss of staff, a rise in overall requests and more complex requests, and “the constraints resulting from EEOC being in 100% telework status since March 16, 2020, due to the COVID-19 pandemic.”<sup>7</sup> Although the EEOC implemented a new online portal for FOIA requests in February 2021, employment attorneys continue to face significant delays in obtaining EEOC records, which are often essential in subsequent litigation.

Throughout the pandemic, the EEOC has issued guidance on how existing federal statutes apply to evolving workplace issues involving COVID-19. As examples, the EEOC issued guidance on how much information, under the Americans with Disabilities Act, an employer may request from an employee calling in sick and guidance on requirements for employees to maintain workplace safety, by wearing protective gear or getting vaccinated.<sup>8</sup>

### **Litigation**

Employment litigation did not stop during the pandemic.<sup>9</sup> But, for approximately a year after the initial shutdowns and shelter-in-place orders, many state and federal courthouses did not permit in-person hearings or jury trials. Judicial backlog thus has accumulated on pending cases, which in turn has caused a longer trajectory for the resolution of newly filed cases. These backlogs were exacerbated by courts granting parties additional extensions for filings and hearings out of necessity.<sup>10</sup>

Fortunately, court closures have not precluded the prosecution of cases in pre-trial stages. Employment attorneys have remained able to e-file pleadings and motions with

courts, collect documents and respond to written discovery electronically, and take depositions over recorded videoconferencing. Consequently, the initial courthouse closures in 2020, and subsequent closures from spikes from variant infections in 2021 and 2022, have not completely impeded the resolution of employment disputes in litigation.

### **FFCRA/EPSLA/EFMLEA**

One significant federal law passed during the pandemic was the Families First Coronavirus Response Act, or FFCRA, which included the Emergency Paid Sick Leave Act, or EPSLA, and the Emergency Family and Medical Leave Expansion Act, or EFMLEA. The FFCRA mandated emergency paid sick leave for employees exposed to COVID-19 and leave for employees who could not work due to childcare needs, such as a child subject to quarantine, a child’s school closing because of COVID-19, or a child experiencing “a substantially similar condition.”<sup>11</sup> The EPSLA also prohibited employers from interfering with employees taking paid leave or retaliating against employees who took such leave.

After the FFCRA expired at the end of 2020, Congress gave employers the option to voluntarily continue providing paid sick and family leave. To incentivize voluntary participation, Congress extended tax credits to participating employers. However, despite the expiration of the FFCRA’s mandate at the end of 2020, employers are now facing litigation relating to remote work, leave conflicts, and wage and hour issues arising due to COVID-19. Notably, lawsuits involving leave or wage and hour issues have made up nearly a third of employment cases that were a direct result of the pandemic.<sup>12</sup>

### **Working Remotely**

The shift to remote work has raised numerous questions about the applicability of various employment laws. One such question is the applicability of worker’s compensation laws for employees who are injured while working from home. Such legal issues have been more complex for employers with remote workers who have either moved to another state or performed a significant amount of remote work in another state. Different states have different laws governing minimum wage, paid leave, taxes, unemployment benefits, and protections regarding discrimination and retaliation. When employees work remotely in another state, challenging issues can arise as to the applicable state law and the proper venue for filing employment suits. As a result, many employers and employees alike are reaching out for advice and guidance on how to navigate the evolution of remote work.

### **Return to Work**

As states have reopened their economies, many employers have been requiring employees to return to work at their employer’s physical offices. Given the ready availability of vaccines and COVID-19 tests, and laws requiring employers to provide safe workspaces for employees, employers have been confronted with the difficult challenges of navigating not only employees’ desires and comfort levels but also laws that require employers to not unduly expose their employees to COVID-19. This difficult navigation is further complicated by, in some

states, conflicting federal and local laws limiting employers' options for preventing workplace exposure to COVID-19. Some attempts to limit employee exposure, such as mandatory vaccine programs, have been successfully challenged in litigation, and this area of employment law remains in a state of constant evolution.<sup>13</sup>

### Conclusion

During the COVID-19 pandemic, employers have had to overcome numerous challenges. As the nation continues to adjust, the pandemic's effects continue to pose difficult business and legal decisions for employers in terms of continuing remote work opportunities, returning to work, and providing safe workspaces for employees. Notwithstanding the unique challenges the COVID-19 pandemic has presented, employment lawyers on both sides of the bar have been able to effectively counsel clients in times of uncertainty and to achieve resolution during most difficult times of the pandemic. **TBJ**

### NOTES

1. See *ESI/Employee Sols. v. City of Dallas*, 450 F. Supp. 3d 700, 739 (E.D. Tex. 2020).
2. Kevin M. Kniffin et al., *COVID-19 and the Workplace: Implications, Issues, and Insights for Future Research and Action*, 76 Am. Psych. Ass'n 63-77 (2021), <https://psycnet.apa.org/fulltext/2020-58612-001.pdf>.
3. *Why ransomware attacks are on the rise—and what can be done to stop them*, PBS NewsHour (July 8, 2021), <https://www.pbs.org/newshour/nation/why-ransomware-attacks-are-on-the-rise-and-what-can-be-done-to-stop-them>.
4. See *supra* note 2, at 68.
5. Mike Jennings, *What are the biggest trends in the job market in 2022?*, TechRadar (Feb. 19, 2022), <https://www.techradar.com/features/what-are-the-biggest-trends-in-the-job-market-in-2022>.

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7. *EEOC 2021 Chief FOIA Officer Report*, U.S. EEOC, <https://www.eeoc.gov/eeoc-2021-chief-foia-officer-report>.
8. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EEOC (Dec. 14, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.
9. Fisher Phillips, *Hot COVID-19 Litigation Summer Could Foreshadow Trouble for Employers*, SHRM (Sept. 14, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-litigation-summer-2021.aspx>.
10. Jordan Ostroff, *How COVID-19 Impacts Law Firms*, Nat'l L. Rev. (Apr. 8, 2020), <https://www.natlawreview.com/article/how-covid-19-impacts-law-firms>.
11. U.S. Dep't of Labor, Wage and Hour Division, *Families First Coronavirus Response Act: Employee Paid Leave Rights*, <https://www.dol.gov/agencies/whd/pandemic/ffcr-employee-paid-leave>.
12. *COVID-19 Employment Litigation Tracker And Insights*, Fisher Phillips, <https://www.fisherphillips.com/innovations-center/covid-19-employment-litigation-tracker-and-insights.html> (last visited Feb. 23, 2022).
13. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661 (2022); see also Stacey Cho Hernandez, *Take Your Best Shot: What employers should know about the COVID-19 vaccine mandate*, 5 Tex. B.J. 338 (2022).



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