NCRC WEST COAST RESOLUTION GROUP

MEDIATING WORKPLACE DISPUTES: NOVEL CORONAVIRUS CLAIMS

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The coronavirus (COVID-19) pandemic has dramatically changed the American workplace. Shifting to remote work, defining essential workers and businesses, balancing work with school closures, a rise in workplace safety concerns, and caring for ill family members, have impacted our workforce like never before. New laws have recently been implemented and novel legal issues are being asserted to define workers' rights and employers' responsibilities. Like most employment claims, these COVID-specific claims can benefit greatly from efficient and effective mediated resolutions.

As the pandemic continues, some businesses are re-opening and returning employees to onsite work, while other businesses are maintaining their employees' remote work status. During this complicated time, we can expect a multitude of varied and complex coronavirus workplace disputes, some based on new and expanded laws (Families First Coronavirus Response Act and California Family Rights Act) and others based on new legal theories under existing laws (Americans with Disabilities Act, Fair Employment and Housing Act, and the California Labor Code). Such disputes are likely to include claims of discrimination based on disability, age, and pregnancy; health and safety concerns; whistleblower retaliation claims; leave and accommodation issues; and wage and hour and other labor code claims.

A discrimination claim already causing some head-scratching is whether COVID-19 is considered a disability under the Americans with Disabilities Act (ADA) and the California Fair Employment and Housing

Act (FEHA). Discrimination claims related to bringing employees back (if furloughed) and re-hiring employees (if terminated) will be brought. The bases likely to be raised will be age or pregnancy disability (if not brought back or if forced to come back triggering enhanced vulnerability or accommodation issues), medical condition, those considered to be "at risk" based on underlying health conditions, and accommodation requests (leave of absence issues, remote work continuances, interactive process claims, and health check issues).

With employees returning to work, health and safety disputes will likely be varied and arise over issues such as adequate personal protective equipment (face masks, face shields, and plastic barriers), violation of company or legal safety protocols (physical distancing and cleaning protocols), and exposure to the coronavirus at the workplace causing illness or death. We have already seen some of these claims being asserted. Whistleblower retaliation claims can also be expected stemming from complaints over lack of personal protective equipment and exposure issues.

With some employees continuing to work from home, and employers granting remote work accommodations to certain employees, health and safety claims, wage and hour and other labor code disputes are likely to rise. These include claims alleging improper infrastructure set-up, unpaid hours and/or overtime worked, meal and rest break violations, and non-reimbursed reasonable business expenses necessary to fulfill the work, such as cell phone, internet, and supplies.

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While new coronavirus laws have brought about more protections for workers, they are likely to enable new claims as businesses work to interpret and apply them in their workplaces. Concerns over leave and failure to accommodate claims stemming from the Families First Coronavirus Response Act (FFCRA) have already been reported. The FFCRA is a new law that provides emergency paid sick leave for certain employers, including up to two weeks (80 hours) of paid sick leave for COVID-19 related reasons, and up to an additional ten weeks leave (at two-thirds pay) for childcare due to school closures for COVID-19 related reasons.

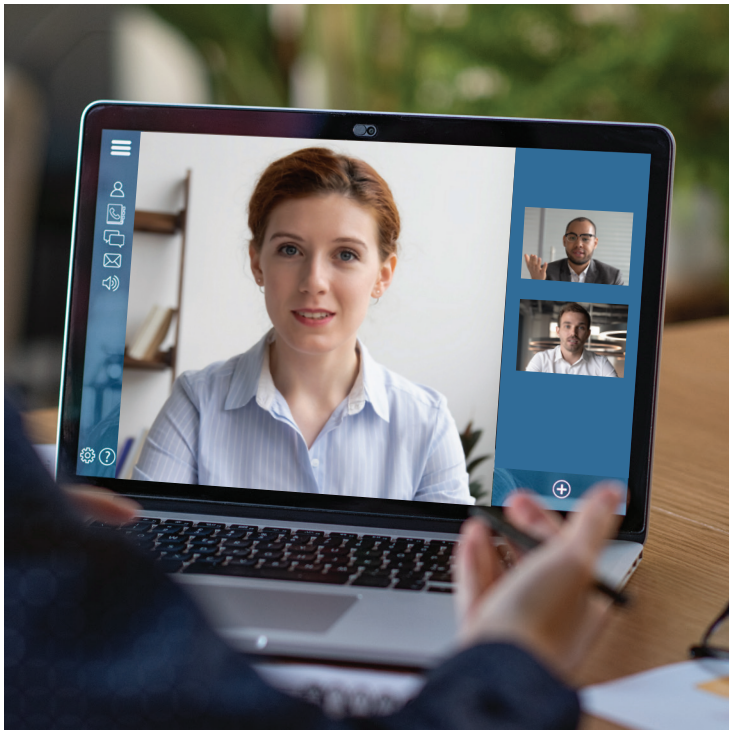
In addition to the FFCRA, on September 17, 2020, Governor Newsom signed a large expansion to the California Family Rights Act (CFRA) proposed by the California Legislature under Senate Bill 1383, which like the FFCRA, will likely bring about more complex and novel issues, and because of a specific component, will necessarily prompt more mediations. This CFRA expansion will go into effective on January 1, 2021 and will

cover small employers (those employing 5 or more) and provide family medical leave rights to care for siblings, grandparents, grandchildren, and domestic partners, in addition to the employee's own serious health condition, and children (including adult children), parents, and spouses. In addition, on September 11, 2020, the Governor signed Assembly Bill 1867, legislation related to SB 1383, which creates a pilot mediation program for employers with between 5 and 19 employees. Under the proposed law, an eligible employer may (within 30 days of receipt of a Department and Fair Housing (DFEH) right-to-sue letter) require non-binding mediation through the DFEH before the employee can pursue a lawsuit. This mediation-exhaustion requirement and the pilot mediation program is scheduled to end on January 1, 2024.

With the new crop of workplace coronavirus disputes, workers and businesses alike can benefit greatly from mediated resolutions. The reason is three-fold: (1) the problematic time uncertainty of court outcomes, (2) the unpredictability of these untested claims, and (3) the fact that the parties are provided effective and efficient closure under their own defined terms.

Due to court and trial delays, the workplace coronavirus claims will likely remain untested in the courts for years. Our court closures have caused serious backlogs with civil matters. Civil hearings are delayed, and civil trials will not be offered for the remainder of 2020. Newly filed civil cases will likely not be tried until 2022 or later. Like the coronavirus itself, these workplace coronavirus claims are likely to remain uncertain in their outcome for an undefined period, potentially causing emotional, financial, and other detrimental effects on the parties. Early mediation, whether pre-litigation or pre-discovery, can help the parties move past these disputes and find closure during this time of challenge and crisis.

Moreover, the new coronavirus laws and the novel coronavirus theories are vastly untested. Unprecedented issues are risky for both sides of a dispute and can lead to unpredictable results. No one knows for sure how they will be resolved by a judge, arbitrator, or jury. Still further, no one knows who will garner sympathy with the decision-makers and on what issues, since just about everyone is struggling during this pandemic – workers, families, and businesses alike.



Mediating disputes removes the risk of a decision made by someone else and provides the parties with a path to define the contours of their own resolution. Mediating online during this pandemic is our new normal. Physical distancing

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requirements and being socially responsible to keep each other safe and healthy requires all of us to embrace technology and make online dispute resolution a reality. **Online dispute resolution** is proving successful in resolving matters. It offers the norms experienced during in-person mediation, such as confidentiality and security (through locking features and waiting rooms to ensure only invited participants are let into the mediation), privacy for one-party-only caucus sessions (via break-out rooms), and settlement agreement execution (using electronic signature methods like DocuSign and PDF). Mediating online also offers additional benefits, such as the added convenience of mediating from anywhere without having to travel (meaning key players are more accessible), and the parties are able to experience the mediation from the comforts of home (adding a relaxed feeling to mediations).

Workplace COVID-specific claims will benefit from mediated resolutions. As discussed, these claims will undoubtedly raise unique legal issues and concepts and initially they will have little to no underlying case law to provide guidance. Thus, if you are looking to mediate a workplace coronavirus claim, your chosen mediator should be one who understands employment laws, regularly mediates employment claims, and (if applicable) can employ a pre-litigation or early dispute mediation strategy. In preparation for mediating your workplace coronavirus claim, be your best mediation advocate and work with your mediator to tailor the mediation to fit the needs of the case to find its resolution.

KRISTIN RIZZO, ESQ. | MEDIATOR

Kristin Rizzo is an experienced dispute resolution professional. She mediates all types of employment matters (including internal workplace disputes, pre-litigation, and litigated matters from single plaintiff claims to representative matters), statutory housing claims, contract issues, business disputes, and emotionally charged matters. Kristin has been recognized as a San Diego Super Lawyer in Employment Litigation and Alternative Dispute Resolution. She provides remote mediation sessions. Kristin offers a full complement of tailored services that start prior to the mediation and may continue post-mediation, depending on your needs.

For more information or to schedule a case, please contact Kathy Purcell at kpurcell@westcoastresolution.com or (619) 238-7282.