



COVID-19 Risk Management for SNFs – Employment Litigation

This Article is Part 3 of 5 in EVOLVE's series on COVID-19 risk management for SNFs. Here, we review some of the potential liabilities facing SNFs as employers and identify key points for limiting those risks.

SNFs need to consider employment issues as they confront the many operational and care-related challenges related to COVID-19.

The convergence of several factors may lead to increased claims against SNF employers relating to the pandemic experience. First, employee uncertainty and fear of infection has led to attendance issues and potential disciplinary actions. Second, there is a heightened risk of claims whenever employers and employees must grapple with health/work issues – and this will likely be magnified by the unprecedented nature of the COVID-19 public health emergency. Finally, terminated employees often are more likely to bring claims during times of economic downturn when it is more difficult to secure alternate employment.

SNFs may face a variety of employment claims relating to COVID-19.

We are already seeing claims being filed, and in the coming months we expect to see more of the following types of claims, all of which may impact SNFs:

- Whistleblower and retaliation claims from employees who raise concerns about a facility's compliance with COVID-19 related procedures.
- Claims against employers for failing to comply with the federal Families First Coronavirus Response Act (FFCRA).
- Claims under the Family and Medical Leave Act (FMLA) relating to employee requests for leave relating to an employee's serious health condition (or that of a covered family member).
- Disability discrimination claims relating to employees' requests for accommodation in connection with COVID-19.
- Claims under the federal Occupational Health and Safety Administration Act (OSHA) relating to failure to follow applicable guidelines relating to controlling infectious diseases.
- Claims under OSHA relating to failure to follow applicable guidelines relating to implementation of respirator policy and use of N95 respirators.
- Workers' Compensation claims from employees who contract COVID-19 while at work.

ABOUT EVOLVE

Evolve Legal Solutions LLC (EVOLVE) harnesses the power of technology to provide self-service, subscription-based legal solutions to SNFs. Subscribers to EVOLVE have access to manuals, policies and procedures, training modules, protocols, and other tools. EVOLVE has currently suspended charges for its COVID-19 SNF Legal Hub, containing practical resources on COVID-19 legal and risk management issues.

- Potential negligence, intentional tort and/or wrongful death actions arising from actions arising from COVID-19 infection.
- Administrative actions for failure to test staff for COVID-19.

Proactive Risk Management Strategies – Employment Litigation

SNFs will not want to wait until a claim is filed or an issue arises to start thinking about their risk management. Consider the following key tactics when developing your own plans for mitigating risk:

☐ ***Follow disciplinary policies and document the reason for employment-related decisions.***

As is always the case, one of the most significant risk management strategies for preventing employment claims and/or being prepared to defend such claims is to follow your disciplinary policy and document the reason for your decisions.

Employment discrimination and retaliation claims are premised upon the allegation that an employer has taken an adverse action against an employee and had an unlawful motivation (*e.g.*, disability, race, age, whistleblowing, etc.). The single best defense to such claims is to be able to establish that the employee was treated the same as other similarly situated employees who were not in the protected class. In order to establish such a defense, the employer will want to demonstrate the legitimate non-discriminatory/non-retaliatory reason for an employee's discharge. The best way to accomplish this is to be able to identify the rules and/or policies that the employee violated and to show the training and disciplinary history of the employee leading up to the adverse employment action. Similarly, it is helpful to show that other employees who engaged in the same or similar conduct were treated comparably. In short, be able to document the reason for the employment decision.

☐ ***Increase training and focus on infection control.***

There is no way to get around the fact that in order to minimize and/or control risk associated with various regulatory issues relating to COVID-19, SNFs must work to stay updated and educated on the current applicable regulatory guidance. SNFs should be knowledgeable of regulations relating to infection control procedures, appropriate use of PPE, cleaning products, etc. Then, once educated, SNFs must take care to constantly train staff so that they will follow appropriate procedures. As always, training should be carefully documented with sign-in sheets and retention of the materials that were presented.

☐ ***Create comprehensive and organized documentation of policies and communications.***

Similarly, for purposes of demonstrating compliance with OSHA standards, SNFs should keep copies of all policies, communications and training programs relating to infection control and use of PPE. If policies are modified in response to changes in regulatory guidance, prior versions should be retained along with relevant dates so that SNFs can document which version of a policy was in effect at any particular time. Consistent enforcement of policies and procedures is also important and documentation of such is an important element of a successful defense.

□ **Carefully document PPE use and efforts to obtain supplies.**

SNFs should also carefully document their inventory and “burn rate” for PPE to establish their efforts to protect the safety of their staff. Although we understand that the PPE shortages have, for the most part, been alleviated, facilities should document any efforts they make to procure PPE in case they have insufficient stock in the future. SNFs should also ensure that they are using PPE that meets the most current standards and that if they are using N95 respirators they are in compliance with OSHA’s regulations relating to such use.

□ **Make careful determinations about attendance policies and related discipline.**

One of the most complicated situations facing employers, particularly health care providers, in the COVID-19 pandemic is securing their employees’ attendance at work. Employees are missing work for a variety of reasons, including illness, quarantine following potential exposure to coronavirus, underlying health conditions placing the employee at higher risk, child care issues, fear of contracting COVID-19, etc. SNFs must carefully consider each case individually and determine the best course of action. Key considerations include:

- Does the employee have an underlying health condition that *prevents* the employee from working? If so, the employee may be eligible for leave under FMLA and the employer should follow its usual FMLA procedures (*i.e.*, obtain certification from health care provider; provide notice; etc.).
- Does the employee have an underlying disability that might not *prevent* him or her from working, but might cause a health care provider to suggest that he or she avoid working? If so, be aware of the obligation to offer the employee a reasonable accommodation under the ADA. You should engage with the employee to understand the disability and to identify the most appropriate accommodation (*e.g.*, teleworking, leave of absence, revised schedule, etc.). Such employees may be eligible for unemployment compensation under the expanded programs currently in place.
- Is the employee merely afraid to come to work due to the risk of contracting COVID-19? If so, you are permitted to apply your attendance policy and discipline this employee for attendance issues. Unless there is an underlying condition (*e.g.*, age or high-risk condition), such employees likely will not be entitled to unemployment compensation.

□ **Ensure employees understand to stay home when they are sick.**

Another key risk avoidance factor is to educate employees on the importance of staying home if they are experiencing any symptoms of COVID-19. This includes fever, coughing, and shortness of breath, as well other less common symptoms such as loss of sense of taste or smell, diarrhea, intestinal symptoms, etc. It is important that the SNF can demonstrate that they have clearly and unequivocally advised employees on this point. In conjunction with this, SNFs should advise their employees that if they stay home because they experience symptoms of COVID-19, they will not be subject to disciplinary action. Many SNFs may need to modify their attendance policies in order to ensure that employees are not punished for exercising care and judgment in this regard.

□ ***Acknowledge the sacrifices and hard work of employees on the frontlines.***

Employees who have good feelings about their employer are generally less likely to file an employment claim. A key consideration in harnessing goodwill is to recognize employees for putting their health, and even their lives, on the line to continue to come to work during the pandemic. Recognition can be made in the form of positive public relations (e.g., bulletin boards, social media, yard signs, etc.), a pandemic pay bonus, handwritten note, etc. We believe that knowing that their employer recognizes and appreciates what they are doing can cultivate employee support.

□ ***Create open lines of communication with employees and be responsive to concerns.***

We also believe that employees are more likely to feel favorably towards an employer that is open and honest with them about COVID-19 being present in their building, the steps that they are taking, and more. In addition, they may be less likely to file claims against an employer who they feel is taking their concerns seriously. Fostering effective lines of communication is key to creating positive relationships with staff.

□ ***Make employee mental health a priority.***

Consider what you can do to help improve your employees' mental health. Keep in mind that SNF employees are working through a difficult time and facing stresses not only at work, but at home as well. Like everyone else, they are struggling to homeschool children and deal with navigating the realities of a pandemic. All of these efforts are causing feelings of stress, isolation, and burnout, all of which can lead to an employee being more likely to make a claim against their employer. Acknowledging these stresses and offering assistance, however, can go a long way in creating goodwill among employees. For example, consider offering mental health counseling or education, plan a relaxation event, etc.

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