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**Richard D. Alaniz** • Jul. 30, 2020



The devastating loss of jobs and permanent business closures, which may not yet be over, are clearly the most significant but not the only bitter products of the Coronavirus pandemic affecting U.S. workplaces. The widespread unemployment it has created, as well as cost-cutting measures taken by businesses to survive, could lead to a sharp rise in claims of employment discrimination in the near future.

The possibility of such claims has likely been exacerbated by the recent national focus on actual or perceived social and racial injustice in our society in general. Any

one of these unrelated circumstances could create the potential for claims of

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number of such charges filed. The decline coincided with the dramatic growth in employment during that same period.

Full employment, with people working all of the hours they want and then some, understandably pushes concerns about perceived unfair or discriminatory treatment to the back burner. The correlation between the level of employment and the number of discrimination charges filed was also seen in the years immediately following the "Great Recession" of 2008 and 2009.

The years 2010, 2011, and 2012 had the highest number of charges of discrimination filed in the prior 18 years, as well as some of the highest unemployment rates seen in recent years.

The loss of jobs as the direct result of the Coronavirus pandemic is unprecedented, and reminiscent of the conditions during the Great Depression. Current estimates are that perhaps up to 30% of all restaurants in the country have closed or will close. It is also estimated that perhaps 25% of all retail operations will also be permanently shuttered. Some were already struggling as the result of the tremendous growth of on-line shopping, especially the use of Amazon.

Businesses that survived and those attempting to reopen have done so with reduced staff in most cases. Job eliminations, combinations and consolidations, operational restructuring and similar changes are likely to become permanent for many employers. Since the majority of today's workforce falls within a protected category under Title VII, there will be cases where an employee within one or more of the various protected categories will be passed over for recall or not recalled due to job elimination.

While potential claims of discrimination based upon race, gender, national origin, or disability are always possible in such circumstances, perhaps the most potential

lies in claims of age discrimination under the Age Discrimination in Employment Act

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therefore potentially the first casualties in a workforce reduction.

The impact of the extended employment and income loss, as well as the devastation of 401k retirement accounts as a result of the pandemic, will force many near-retirement employees to want to keep working. Many were already considering this partially as a result of the significant losses to retirement plans incurred in the 2008-2009 recession. Knowing the difficulty of finding suitable employment when a person is 50 or 60, or perhaps even older, they will desperately want to hang on to their pre-pandemic jobs. Therefore, if theirs are the jobs eliminated the potential for claims of ageism could be significant.

### **Discrimination at Work**

In a recent study on "Ageism in the Workforce" by global specialist insurer Hiscox, it was noted that of the 400 full-time U.S. workers, equally divided between men and women over the age of 40 that they surveyed, 67% responded that they planned to continue working after they turn 66.

The study also noted that workers age 55 and older will soon comprise at least 25% of the nation's workforce, with the fastest growth among persons aged 65 and older. Medical science has enabled many to enjoy good health and in some cases their work in their one true passion.

Given the very real concerns of this segment of the workforce with continuing to work that were already present prior to the impact of the Coronavirus pandemic, they can be expected to challenge even the appearance of discriminatory treatment.

While potential age discrimination claims pose a particular problem, race, gender, and disability claims are obviously possible as well. Employees with underlying medical conditions which could pose a higher risk of serious illness from COVID-19

exposure, are entitled to reasonable accommodation for their disabilities under the

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who to recall or retain, employers must tread cautiously. The unique circumstances of each individual case must be carefully evaluated. Is the decision based upon defensible objective criteria, such as needed critical skills? Is the person chosen to remain employed demonstrably the better candidate for retention?

Have all reasonable alternatives to avoid termination been fully explored and documented? Does the employee to be terminated have any legitimate basis for a possible claim of discrimination or retaliation? These and similar questions should all be satisfactorily addressed and documented during the decision stage rather than in response to a subsequent charge of discrimination.

Anticipating the potential for claims of discrimination to arise, and being fully prepared to provide the objective bases for a failure to recall an employee, or for termination is perhaps the most effective means of defending against any such claims.

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*Richard D. Alaniz is a partner at Alaniz Law & Associates, a labor and employment firm based in Houston. He has been at the forefront of labor and employment law for over forty years, including stints with the U.S. Department of Labor and the National Labor Relations Board. Rick is a prolific writer on labor and employment law and conducts frequent seminars to client companies and trade associations across the country. Questions about this article, or requests to subscribe to receive Rick's monthly articles, can be addressed to Rick at (281) 833-2200 or [ralaniz@alaniz-law.com](mailto:ralaniz@alaniz-law.com).*

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