Strategies for Employment Litigation
Leading Lawyers on Successfully Litigating and Settling Employment Claims
Understanding Key Changes in Employment Law Regulations and Their Impact on Defense Strategies

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Introduction

The downturn in the global and national economy that hit in 2008 has had a drastic impact on companies’ workforces, governmental regulation of employers, employer-employee disputes, and employment litigation. Additionally, the development of new technology and communication devices, along with the explosion in the use of social media applications, has likewise had a significant impact on the workplace, the nature of employment disputes, and the manner in which employment disputes are litigated. Finally, the attempts of federal, state, and local governments to address the changing economic climate are something that affects all employers and has led to a proliferation of new issues to be confronted in the litigation context.

The following chapter will discuss these trends, explain the significance of new developments, and provide guidance on how they can be addressed in order to minimize the litigation risks and more effectively address the litigation that does occur.

Staying Up to Date on Recent Developments in Employment Litigation

The impact of the struggling economy has been a driving factor in creating labor and employment issues, and it will continue to do so for the foreseeable future. The impact has been most significantly apparent in three primary areas:

1. Employment disputes where reductions in force or other employment losses have occurred
2. Government actions, inquiries, investigations, and compliance reviews
3. Trade secret and non-compete litigation, which has been caused by current and former employees seeking to take advantage of business opportunities and utilizing information gained during their previous employment, along with employers’ aggressiveness in protecting existing business interests

Starting in 2008, as the economy turned downward, employers were required to downsize workforces, and jobs became scarcer, incentivizing
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more employees to challenge employment decisions. Additionally, with increased large-scale reductions in force, there were more implications of Worker Adjustment and Retraining Notification (WARN) Act\(^1\) obligations, and more efforts by employee-side attorneys to raise disputes in the context of class actions (which has also resulted in increased use by employers of class action waivers). Additionally, the change of administration in 2008, along with the economic climate, has resulted in governmental agencies that are more aggressive in seeking to protect employees’ rights, including the Equal Employment Opportunity Commission and the Department of Labor. This has resulted in more governmental investigations and actions to challenge employment decisions.

Also, given the impact of the global economic climate, companies have been more aggressive in efforts to protect their confidential information, goodwill, and other business interests they see as necessary for sustainability. The government has also attempted to provide assistance to employers in this regard by enacting new legislation designed to assist in the protection of trade secrets and other confidential information. This trend, when coupled with the fact that more individuals are out of work and seeking ways to compete in their chosen industries (and with their former employers), has resulted in significantly more, and more protracted, litigation in this area. Finally, electronic discovery strategies and obligations have drastically affected the realities of, and the manner in which, employment litigation occurs. Specifically, the electronic discovery requirements have made discovery obligations much more daunting and expensive, which can have a substantial impact on an employer’s ability to litigate a case when the cost of compliance with the obligations can swallow the litigation costs. Moreover, depending on an employer’s document retention policy, there can be a wealth of potential for employees’ counsel to discover evidence supporting their case or of inconsistencies in the manner in which employers have handled employment issues, creating more risk for employers from employment litigation. Finally, for employers that failed to adequately comply with their document retention policy or issue and adhere to litigation hold directives, there can be spoliation risks that can make employment litigation more expensive and much more risky.

Frequently Litigated Employment Laws and Regulations

Exempt or non-exempt status issues under the Fair Labor Standards Act (FLSA)\(^2\) and employee versus independent contractor issues have certainly grown in number in the last few years, both from private and governmental actions. Additionally, there has been a proliferation of WARN Act and non-compete claims.

These areas are especially contentious because of the potential exposure to employers due to the number of potential individuals impacted by litigation, as well as the ramifications of the litigation on the employer’s operations generally. For example, a single individual challenging his or her designation as an independent contractor as opposed to an employee, or as an exempt employee as opposed to a non-exempt employee, can have serious ramifications for hundreds, if not thousands, of current and former individuals and result in significant back pay, tax, and benefit obligations on an employer, as well as necessitate significant changes to an employer’s operations and designations going forward.

The trends regarding more litigation in this area have been fairly constant across regions. However, in jurisdictions that have state or local regulations affecting these issues, there is often more litigation, more exposure, and thus more significant consequences for employers.

As discussed above, it is highly recommended that employers develop litigation strategies to deal with these issues prior to disputes actually arising or litigation occurring. This requires employers to be more sophisticated on the front end and apply more systematic processes in evaluating how decisions will affect potential future issues and disputes. Also, for those employers that knowingly opt to adopt less risk-averse strategies, it is important to have plans in place for dealing with litigation. All of this has resulted in employers being more prepared to combat litigation when it occurs and to be more aggressive in defending these types of cases (i.e., spending money on strategies designed to win lawsuits, as opposed to settling or putting them in the best posture for settlement).

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In addition to the types of suits discussed above, there has also been a plethora of whistleblower and retaliation type suits under Sarbanes-Oxley, which creates standards of conduct for public companies and provides protections for employees who report violations of these standards and other potentially unlawful acts. There are a number of similar laws and regulations in federal, state, and local jurisdiction, of which employers need to be aware. These lawsuits have become more common because of the increased legislation in this area, as well as the increased publicity of these types of disputes, coupled with the political and economic climate of a crackdown on companies for questionable corporate practices.

**FLSA Litigation**

Recent Federal Judicial Caseload Statistics indicate that the number of FLSA cases filed in 2011 increased more than 15 percent from the previous year. The continuously high number of FLSA cases filed each year can be attributed in part to the potential recovery of liquidated damages, making such cases particularly attractive to plaintiffs’ attorneys. In turn, many plaintiffs’ attorneys have adopted aggressive marketing efforts to retain more clients with FLSA claims. Additionally, the FLSA regulations leave ambiguity as to whether certain positions qualify as exempt or non-exempt from overtime rules. Moreover, due to the poor economy, employers have been careful in expanding their workforce, leaving many employees to work longer hours with added responsibilities. In turn, the employees often feel that they are not being properly compensated for all time worked.

Taken together, these factors have led to an increase in litigation. The banking sector is one of the industries frequently involved in FLSA litigation following a 2010 Department of Labor administrative interpretation concluding that the administrative exemption to overtime pay does not apply to loan officers. However, other exemptions may apply depending on the facts of the case, leading courts to reach inconsistent rulings on loan officers’ exemption status and unremitting litigation in this field.

A recent US Supreme Court decision demonstrates the type of litigation in this area, and the aggressiveness with which employers, the Department of Labor, and employees are approaching these issues. On June 18, 2012, the
Supreme Court issued its decision in *Christopher v. SmithKline Beecham Corp.*, holding that pharmaceutical sales representatives are exempt from the FLSA under the “outside sales” exemption. Significantly, in reaching its decision, the Supreme Court disregarded the Department of Labor’s attempt to interpret regulations via amicus briefing submitted in similar actions instead of utilizing the ordinary notice-and-comment process. The court also emphasized that the plaintiffs earned more than $70,000 per year, had flexible schedules, were hired because of their sales experience, worked away from the office with minimal supervision, and were “hardly the kind of employees that the FLSA was intended to protect.” While the *Christopher* decision will unquestionably impact FLSA litigation in the pharmaceutical sales industry, its effects may be far-reaching since the court adopted a broad interpretation of the “outside sales” exemption while bridling aggressive Department of Labor tactics.

**Types of Employment Cases Won by Employers and Employees**

Generally, employers have been more successful in defending discrimination and class action litigation, specifically, because employers are more sophisticated in terms of documenting employee issues and making individual or company-wide decisions on legitimate bases that can be supported by business justifications and demonstrable evidence. Additionally, harassment discrimination and other workplace sensitivity training is more prevalent these days, resulting in reduced cases of overt discrimination or cases where there is clear evidence of direct discrimination. Employers also have more success in enforcing non-compete agreements and trade secret and other confidentiality rights, to the extent they are willing to spend the resources on litigation of these disputes. This is a direct result, again, of employers being more sophisticated in terms of taking steps to protect and document their trade secrets and confidential information, and being more proactive in enforcing their rights quickly and consistently.

Employees have been more successful in winning wage and hour, exempt/non-exempt designations, and independent contractor/employee

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designation cases. The factors favoring employees include the nature of the laws and regulations themselves, which are generally very favorable to employees and place burdens in litigation on employers that they are often not prepared to handle. Additionally, the employee attorneys in these areas are becoming more sophisticated and coordinated in their efforts to enforce these rights, and the government has increased their involvement, which provides more resources for employees in these areas.

**Notable Court Decisions**

The Supreme Court has recently issued several opinions that will certainly affect employment discrimination litigation. For example, in *Kasten v. Saint-Gobain Performance Plastics Corp.*, the Supreme Court found that the scope of the statutory term “filed any complaint” for purposes of the retaliation protections of the FLSA includes oral complaints about timekeeping procedures. Specifically in this case, the oral complaint was in regard to the placement of time clocks for use in “punching in.” This decision is obviously significant, because it could substantially increase the breadth of employees claiming protection under the anti-retaliation provisions of the FLSA.

In *Hosanna–Tabor Evangelical Lutheran Church & Sch. v. Equal Emp’t Opportunity Comm’n*, the Supreme Court recognized a “ministerial exception” to employment discrimination laws. In doing so, the court reasoned that intruding on a church’s ability to make employment decisions with regard to persons hired to “preach their beliefs, teach their faith, and carry out their mission” violates the First Amendment’s free exercise and establishment clauses. While the case does not definitively identify the employees who are covered by the ministerial exception, it does provide religious institutions with a great degree of protection when making employment decisions. However, the ruling will not entirely foreclose employment discrimination litigation in the religious sector, since the scope of its applicability is a lingering question that will certainly be considered by lower courts.

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In Walmart Stores, Inc. v. Dukes, the Supreme Court held that a certification in the nationwide class of female employees was not consistent with the procedures required under Rule 23, requiring that a class have common questions of law or fact of such a nature that it is capable of class-wide resolution. Essentially, the court found that there was no evidence that the policies being challenged by plaintiffs would be appropriate for resolution on a class-wide basis because, ultimately, the challenged decisions occurred over time, throughout a wide geographic base with a wide variety of supervisors and individual decisions. The court also held that the claims for back pay were improperly certified because claims for monetary relief are inappropriate for certification when the monetary relief is not incidental to requested injunctive or declaratory relief.

In Thompson v. N. Am. Stainless, LP, the Supreme Court held that firing an employee’s fiancé in response to the employee filing a sex discrimination charge against the employer violated Title VII. This decision demonstrates that the prohibition against retaliation for engaging in protected activity reaches beyond the employee who lodged a complaint. Of course, this decision opens the door to other potential claimants and will perpetuate the recent trend of increased employment retaliation cases.

In AT&T Mobility, LLP v. Concepcion, the Supreme Court considered a Ninth Circuit’s finding that class action waivers in arbitration agreements were unconscionable and that the Federal Arbitration Act did not preempt state case law because the unconscionability analysis underlying the decision was applicable to all contracts. The Supreme Court disagreed with the Ninth Circuit. The Supreme Court recognized that there is a “liberal federal policy favoring arbitration” and held that California’s law prohibiting class arbitration waivers is at odds with the Federal Arbitration Act. The immediate repercussions of the ruling resulted in employers evaluating whether arbitration agreements should be adopted in their workforce, since doing so could possibly preclude class actions by

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7 FED. R. CIV. P. 23.
9 AT&T Mobility, LLP v. Concepcion, 131 S. Ct. 1740 (2011).
disgruntled employees. However, the viability of the Concepcion ruling in the employment law spectrum is uncertain. Following the decision, Senator Al Franken introduced the Arbitration Fairness Act of 2011, which would deem arbitration provisions in the employment context invalid and unenforceable. Additionally, earlier this year, the National Labor Relations Board issued an order in D.R. Horton, Inc. v. Cuda, which held that arbitration agreements violated the National Labor Relations Act. D.R. Horton Inc. subsequently filed a notice of appeal, which is pending with the US Court of Appeals for the Fifth Circuit.

In addition to the significant Supreme Court rulings, several noteworthy decisions have been issued in other courts. In Dediol v. Best Chevrolet, Inc., the Fifth Circuit recognized a hostile work environment claim under the Age Discrimination in Employment Act for the first time. The case is significant because it allowed an age claim based on a series of age-based slurs, but with no tangible employment action beyond a constructive discharge. While this case was a logical extension of Title VII and other statutes that recognize hostile work environments, it does provide a new cause of action for those raising age discrimination in employment.

In Norton v. Assisted Living Concepts, Inc., a court found that an individual suffering from cancer was disabled for purposes of the Americans with Disabilities Act, even though the cancer was in remission. The court specifically found that the cancer affected the individual’s cell growth, which it ruled was a major life activity. This case is significant because it is another example of the breadth with which the Americans with Disabilities Act can be interpreted and applied.

In NAFTA Traders, Inc. v. Quinn, the Texas Supreme Court held that the Texas General Arbitration Act does not exclude agreements expanding

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18 NAFTA Traders, Inc. v. Quinn, 339 S.W.3d 84 (Tex. 2011).
judicial review of an arbitration award for reversible error. In effect, parties may mutually agree to have recourse from an erroneous arbitration award by appealing the matter to a court for review. In light of the ruling, parties presented with an arbitration agreement should consider whether the opportunity for judicial review of a decision trumps privacy advantages and other arbitration benefit considerations.

Understanding Key New Employment Regulations

Recent Changes to the Family and Medical Leave Act

The Family and Medical Leave Act (FMLA)\(^{20}\) added two significant changes in 2009, providing military family leave to care for a covered family member with a serious injury or illness, or to provide leave for qualified exigencies arising from impending call or order to active duty. The qualified exigency leave is an issue many employers have probably been facing over the last several years with the increased number of individuals serving in the military. With active military operations winding down to some extent, while it is important for employers to be aware of these regulations, this provision may not have as significant an impact as the leave to care for covered service members with serious injury or illness. Specifically, the new regulations provide for up to twenty-six weeks of unpaid leave during any twelve-month period for an employee who is the spouse, child, parent, or next-of-kin of a serviceman or woman who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is on the temporary disability or retired list for a serious injury or illness.

Because of the newness of these regulations, there is a significant amount of uncertainty with respect to how they will be interpreted, and it is extremely important for employers to be aware of them and their potential ramifications and impact in the workplace. The application of these regulations should not vary significantly by industries, and employers in all industries should educate themselves on the provisions of these regulations and adopt them into their policies, handbooks, and human resource training. Furthermore, because of the uncertainty with respect to the

\(^{19}\) TEX. CIV. PRAC. & REM. CODE §§ 171.001-.098 (1997).

ultimate interpretation of these regulations and the political climate, it is very likely that these regulations will be interpreted in an employee-friendly way in order to take care of perceived needs of those serving in the military and their families. Accordingly, employers should be very cautious about undertaking litigation of these changes.

Also, at the time these regulations were enacted, the regulations clarified some of the notice and other provisions of the FMLA. Specifically, regulations provide that the employer must notify the employee within five days (which has been increased from two days) after obtaining information sufficient to designate leave that absence is “designated as FMLA leave,” and the regulations require written notice. Additionally, the employer must include the number of hours, days, or weeks designated as FMLA leave, and the employer must provide an updated designation notice and amount of FMLA leave designated every thirty days if requested by the employee. The regulations clarified that an employee must provide thirty days’ notice or as soon as practicable of foreseeable leave, and requires an employee to provide information as to why it is not practicable to give thirty days’ notice if not foreseeable. Regulations also provide that notice will be deemed practicable if given on the day the employee becomes aware of the need for leave or the next business day. For unforeseeable leave, the employee must provide notice in the time prescribed by the employer’s usual and customary notice requirements applicable to such absences. Further, an employee must provide an employer with sufficient information for the need for leave, including information indicating that the condition renders the employee unable to perform job functions, and simply calling in sick is not sufficient notice. The employee must use the procedures for calling in or notifying employers of general absences for complying with FMLA notice. Significantly, if the employee does not comply with these provisions, the FMLA leave may be delayed or denied completely.

Accordingly, it is important for employers to be aware of specific timing and notice procedures and consistently apply their policies and practices. Again, this requires self-education, clear and consistent policies and practices, and human resources/supervisor training. The benefit to employers is that these new regulations provide some level of specificity and certainty; and if the facts are on the employer’s side in this regard, the
employer should be more comfortable with litigation of FMLA issues than pre-regulations. However, employers must be wary of the intent of the law, especially when the employer may not have promulgated or followed a consistent policy.

The Whistleblower Bounty Program

The whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act21 create monetary awards for individuals who provide original information to the Securities and Exchange Commission (SEC). Specifically, these individuals can receive a “reward” when information results in monetary sanctions exceeding $1 million in civil or criminal proceedings. The SEC has the discretion to determine the amount of the award, which generally ranges from 10 to 30 percent of the amount recouped. The SEC will consider the amount recovered, the significance of the information provided by the individual, the nature of any other involvement or benefit provided by the individual to the SEC, and the perceived deterrent value or encouragement the SEC deems appropriate to provide to other individuals. If the amount awarded is less than 10 percent the amount recouped, the individual has the right to appeal the determination through an SEC administrative process.

The Dodd-Frank Act does not provide a private right of action to whistleblowers to prosecute SEC violations on their own, but does create a private right of action for employees who have suffered retaliation “because of any lawful act done by the whistleblower in providing information to the SEC…in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the SEC…; or in making disclosures that are required or protected under the Sarbanes-Oxley Act.” The act also creates whistleblower protections under the Commodity Exchange Act22 with respect to the Commodities Futures Trading Commission, and retaliation protections for employees in the financial services industry who suffer retaliation for disclosing information about fraudulent or unlawful conduct related to the offering or provision of a consumer financial product or

service. Finally, the act also strengthens whistleblower protections under Sarbanes-Oxley, specifically broadening the scope of coverage, increasing the statute of limitations, exempting Sarbanes-Oxley whistleblower claims from mandatory arbitration, and clarifying the right to a jury trial.

Certainly, publicly traded companies need to be cognizant of issues with the SEC regulations and aware of their Sarbanes-Oxley obligations, and need to have clear and effective internal policies and procedures for handling any complaints that could create liability under the whistleblower and anti-retaliation provisions created and strengthened by the Dodd-Frank Act. There has been an increased amount of litigation under Sarbanes-Oxley in the last couple of years, and it appears that the Dodd-Frank Act is only going to strengthen this trend. Similarly, I would expect the litigation under the other whistleblower and retaliation provisions to grow as public understanding and familiarity with these laws grows. There are certain areas with high risk to employers that employers need to evaluate and become familiar with, and they need to assess how they will handle issues as they arise.

The Genetic Information Non-Discrimination Act

The Genetic Information Non-Discrimination Act\(^\text{23}\) became effective on November 21, 2009, and prohibits employers from acquiring certain genetic information about their employees. The act includes a very expansive definition of the term “genetic information,” which includes not only the results of genetic testing, but also family medical history information. Employers need to be aware that although medical examinations are permissible in certain situations under the Americans with Disabilities Act, those examinations may uncover information that employers are not now allowed to have under this act. For example, when requesting medical information from an employee, it is permissible under the Age Discrimination in Employment Act to determine the existence or extent of a disability, the information provided to the employer can include general health information of the employee, or the employee’s family medical history, which, to the extent it goes beyond information the employer

directly needs to evaluate the existence of and limitations caused by an employee’s disability, may be prohibited information under the Genetic Information Non-Discrimination Act. This is perhaps the most problematic area of the law, especially with employers that are attempting to engage in the statutory required accommodation process, which necessarily requires the gathering of information regarding an employee’s medical condition and limitations. The Equal Employment Opportunity Commission has proposed in its guidelines that any inadvertent disclosure of genetic information through the Americans with Disabilities Act accommodation process would not constitute a violation of the Genetic Information Non-Discrimination Act. However, this regulation is far from a safe harbor.

The statute also amended the Employee Retirement Income Security Act to expand genetic non-discrimination protection under group health plans. This is certainly something employers need to be aware of in acquiring group health plans, especially for employers who serve as administrators of their plans.

*The Patient Protection and Affordable Care Act*

On June 28, 2012, the Supreme Court issued its landmark decision upholding the individual mandate of the Patient Protection and Affordable Care Act (PPACA), which requires most Americans to maintain “minimum essential” health care coverage beginning in 2014. In *Nat’l Fed’n of Indep. Bus. v. Sebelius*, the Supreme Court held that penalties assessed for failing to maintain minimum essential coverage are essentially taxes and proper pursuant to Congress’s power under the Constitution’s taxing clause. Although the new health care law is complex and ambiguous, one thing is certain: employers must brace themselves in light of the significant changes that will certainly affect the workplace in light of this decision.

The PPACA requires that most Americans maintain minimum essential coverage or a benefits package offered by a “grandfathered plan.” A grandfathered plan is a health care plan in which an individual was enrolled on March 23, 2010—the date of the PPACA’s enactment. Grandfathered

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plans are exempt from many, but not all, of the requirements otherwise imposed by the PPACA. However, regulations place limitations on the amount of changes that may occur before grandfathered status is lost. For example, grandfathered plans cannot, when compared to the policy in effect on March 23, 2010:

1. Eliminate all or substantially all benefits to diagnose or treat a particular condition
2. Raise co-insurance rates
3. Significantly increase deductibles or out-of-pocket limits
4. Significantly lower employer contributions by more than 5 percent

Additionally, changes to annual limits paid by an insurer could also run the risk of causing a forfeiture of grandfathered status. Furthermore, in certain circumstances, a plan will also lose grandfathered status if an employer purchases insurance from a different insurance company.

The practical implication of the PPACA will boil down to whether employers will choose to provide benefits to their employees or opt to pay penalties instead. After conducting a cost and benefit analysis, an employer may determine that the best business decision for the company is to pay penalties rather than directly providing benefits, if possible. This will effectively affect the method through which employers negotiate employment agreements and severance matters. Specifically, the employer may deem that it is more efficient to increase salaries so that employees can obtain private insurance rather than providing benefits to its workforce as a whole.

**Helping Clients Understand the New Employment Regulations**

Lawyers in this practice area should assist their clients in developing written policies and training for human resources personnel and supervisors. In addition to providing education to clients about these regulations, it is vital that lawyers stay abreast of the interpretation and developments of these laws and regulations, as there is a great deal of uncertainty as to how they will be applied. Additionally, lawyers should assist clients in adopting written policies that provide the necessary provisions to comply with these laws and the flexibility to adhere to them as they develop. For example, with the new changes to the Family Medical
Leave Act\(^{27}\) and the new requirements of the Genetic Information Non-Discrimination Act,\(^{28}\) there are a variety of regulations that need to be interpreted by courts before employers will know the exact limitations or specifications of these laws. However, it is important that employers have policies that attempt to comply with the laws as best as they can be understood at this time, but also that employers have policies that can be flexible as these laws develop over time.

**Investigating the Case and Developing a Litigation Strategy**

*Litigating Challenges to Employee Independent Contractor/Exempt/Non-Exempt Designations*

As discussed above, issues regarding proper designations of workers as employees or independent contractors, as well as exempt or non-exempt employees, have been the subject of a substantial amount of litigation over the past several years. Therefore, it is extremely important for employers to understand the various regulations and tasks for determining whether a worker is an employee or independent contractor, and if they are an employee, whether they are exempt from the overtime and minimum wage obligations of the Fair Labor Standards Act and any corresponding state or local laws or regulations.\(^{29}\) In this area of the law, it is especially important for employers to have a precise understanding of these laws and regulations and how they apply to the realities of the employer’s workforce, as litigation and a determination, or even a settlement, with respect to one worker can have an enormous impact with respect to an employer’s entire workforce.

Additionally, employers need to have a solid understanding of the job descriptions at issue in any dispute and the realities of what workers are actually doing before deciding whether they can successfully litigate. An unsuccessful litigation attempt can result in the need to reclassify workers and face potentially significant liability for back pay, overtime pay, unpaid benefits, unpaid taxes, as well as other liabilities. These cases can be especially challenging to litigate, because it is often impossible to settle or


otherwise resolve the cases once in the middle of litigation because of the impact on the employer’s workforce across the board. Accordingly, these are all issues an employer needs to strongly evaluate before determining a litigation strategy. The recommended best practice for employers is to conduct an audit of their workforce and their job descriptions to determine if the job descriptions are accurate, are being followed consistently, and are in compliance with the applicable laws and regulations in this area.

Litigating Misappropriation of Trade Secrets, Unfair Competition, and Defamation Claims

An employer litigating trade secrets or other confidential claims must be aware of what information they are contending constitutes trade secrets or confidential information, and evaluate this issue on the front end. This process involves evaluating not only the value of the information, but the steps the employer has taken to treat it as confidential and protect it, and how the employer will demonstrate that to a court, arbitrator, or other decision maker. Additionally, it is very important that if employers are going to protect this type of information, they move quickly. Any substantial delay in protecting rights with respect to trade secrets or other confidential information can potentially be deemed a waiver of the rights to protect the information. This often requires forethought and the development of a preparatory plan prior to any litigation issues arising. Finally, employers need to be aware of and plan for the eventuality of litigation with respect to the use and disclosure of information. It is often tricky to litigate trade secrets and misappropriation cases without disclosing the very information the employer is seeking to protect.

Many of the issues discussed above with respect to litigation of trade secrets and confidential information applies to unfair competition claims as well. There is the added issue that often in unfair competition claims the employer’s customers, clients, and third-party contractors are the key witnesses in the case, and seemingly dragging these parties into the litigation process often has a significant negative impact. Additionally, a number of states have very specific laws to deal with non-competition and other unfair competition rights, and it is important that employers are aware of these laws as they apply to the employer’s operations. With respect to both trade secret and confidential information claims and unfair competition claims, employers should develop written policies and contracts to comply with the
specifics of the applicable laws and regulations and the particular issues involved with litigating these claims.

**Determining the Legitimacy of an Employment Law Case**

When employers get into potential disputes, it is very important that they seek out counsel they trust to give them a credible opinion on the front end about what the employer’s rights are, the avenue for enforcing these rights, the monetary costs in pursuing their rights, the business implications of pursuing litigation, and the likelihood for success.

The second step, which is often intertwined with the first, is conducting a thorough investigation of the facts underlying any potential case. This is much easier when the employer has clear and consistent operating policies, record-keeping requirements, and supervisor training, because all of these practices will allow the issues to be investigated more quickly and efficiently, and with a higher degree of certainty as to the legitimacy of the results of the investigation.

**The Importance of Employment Clauses and Jurisdiction**

Employment clauses are important when protecting employers’ rights, but they must be evaluated in light of the applicable jurisdiction’s laws. For example, almost every jurisdiction allows common law and/or statutory rights to protect trade secrets and other confidential information. However, the rights and logistics of protecting the information through common law or applicable statutes may be different from protecting those same rights through a contract.

Many of the issues discussed above with respect to pursuing misappropriation of trade secrets and other confidential information claims can be addressed through effective arbitration provisions—which certainly requires implementing a contractual provision. While there are many reasons within general employment litigation to shy away from arbitration agreements, this is one area of the law where an arbitration agreement may provide a substantial benefit to an employer in seeking to protect its rights. For example, there are limited rights to appeal arbitration awards; arbitration agreements can cause a proliferation of litigation, as they may
not be perceived by employees as a significant impediment to litigating as compared with the filing of a lawsuit in court; arbitrators can be reluctant to grant summary judgment-type relief; the additional cost placed on employers by having to bear the cost of the arbitrator; and the tendency of arbitrators to provide middle-of-the-road decisions. Conversely, most arbitration provisions do not allow for expedited injunctive relief inside the arbitration context (and some do not allow it at all). Often in protecting trade secrets and other confidential information, expedited injunctive relief is the only way to adequately provide protection.

**Key Steps in Litigating Employment Contract Violations**

The first step in litigating employment contract violations is to thoroughly read the applicable agreement while keeping the applicable jurisdiction’s law at the forefront of the analysis. Unfortunately, determining the applicable law may not be an easy task. Although the agreement will likely contain a “choice of law” provision, a court may find that the agreed-upon state’s law should not govern the dispute at hand. This is especially the case in employment litigation because employers often try to streamline their workforce and employment-related disputes to one location. However, courts often find that a different state (for instance, the state where the employee resides) has a greater interest in the litigation and will invalidate such provisions. Accordingly, determining the applicable law will ultimately rest on a choice of law analysis.

The next step in employment litigation will largely depend on the context of the case. For example, litigation relating to trade secret and other confidential information protection is usually fast-tracked, since a delay by the employer could lead to an argument that it waived the rights it is seeking to protect. Moreover, if non-competition and non-solicitation provisions are at play, and a tolling provision extending the period of enforcement for each day the employee is violating the agreement is not included in the agreement, an employer should vigorously move forward with the enforcement of such provisions; otherwise, the terms may expire and the litigation process will be futile. Of course, doing so will require a determination as to whether the applicable restrictive covenant is enforceable and involves considerable costs in preparation of preliminary injunction hearings. In a matter involving the representation of an
individual, counsel should consider the underlying facts to determine whether it is in the employee’s best interest to pre-emptively file a declaratory judgment action seeking a ruling that the applicable covenant is unenforceable. Doing so will naturally place the employer in a defensive position, but will require more up-front costs by the employee. In either case, an early success, be it successfully obtaining a temporary injunction or defending a request for such relief, will generally set the tone and momentum for the litigation.

The other type of employment contract matters frequently litigated involve alleged violations of an agreement’s compensation or benefit terms. Such cases generally proceed in a standard litigation timeline and do not involve the same substantial up-front fees and costs involved in trade secret litigation. They also provide additional time for the parties to explore potential settlement terms, prior to litigation being instituted.

Once a party decides to move forward with filing its claim, the parties should determine the appropriate venue and whether an arbitration provision is at play. Non-competition and non-solicitation cases often include carve-out provisions that allow employers to seek injunctive relief relating to an alleged violation in a court of law. In such cases, the injunctive proceeding will proceed in court while related causes of actions through which an employer seeks monetary relief will move forward before the arbitrator(s).

Moreover, care should be taken when drafting the initial pleading, since the opposing side may try to lock you down to a version of events previously alleged, despite the fact that the pleading has been subsequently amended. Also, while certain jurisdictions may permit a defendant to generally deny the allegations, a defendant should consider specific defenses available to it. For example, the facts may establish that the employer initially breached the subject agreement by failing to pay the agreed-upon salary. A subsequent breach by the employee may be excused due to the employer’s material breach of the contract. Utilizing these facts might serve as a complete bar to the plaintiff’s recovery of damages, and would certainly serve as leverage in settlement negotiations.
Discovery in cases involving alleged violations of confidentiality or trade secret provisions often involves expedited discovery and complex electronic discovery issues. As in any other case, it is crucial that attorneys discuss preservation obligations with their clients and advise them of potential sanctions and spoliation risks if they fail to abide by such obligations.

As the case progresses, counsel should evaluate the appropriateness of a motion for summary judgment. Questions regarding the enforceability of a restrictive covenant may prove to be particularly fitting for the court’s consideration through a dispositive motion, and may lead to an easy and early dismissal of the matter. However, breach of contract cases often involve questions of fact, and filing a motion for summary judgment would serve no purpose other than annoying the court with an improper motion. If summary judgment is either inapplicable or not granted, the case will generally proceed to trial, and preparations should be taken as in any other matter.

To construct a sound litigation strategy, it is imperative that counsel include his or her client in the process, since the client (be it an individual or company representative) will either have first-hand knowledge or have the resources to obtain information that will be crucial to the development of the case strategy. In cases involving claims of discrimination or retaliation, counsel should take additional measures of interviewing lower-level employees directly, since they may have more information than they are willing to share with a high-level company representative. Additionally, an expert witness can also be an added resource when developing pointed discovery requests and deposition questions that he or she may find helpful in preparing his or her report.

**Alternatives to Litigation**

Informal settlement negotiations, mediation, and arbitration are the primary alternatives to litigation. After an evaluation of the facts, the parties may determine it is in their best interest to pursue resolution of the matter outside of the courtroom. Clients may view the privacy and confidentiality that govern such methods as a major advantage. Additionally, these methods permit parties to retain a greater sense of control of the matter while avoiding the risk that a judge or jury may side with the opposing party.
In deciding the proper avenue to litigate, the parties should weigh the benefits against the disadvantages for alternatives to litigation, especially those that accompany costly arbitration proceedings, the potential increase in contested proceedings, the perceived tendency of arbitration to provide middle-of-the-road decisions, and the difficulty of obtaining summary judgment relief in arbitration proceedings. Often, because of mixed assessments of arbitration, employers will use jury trial waivers to obtain some of the benefits of litigation, without the downside. Specifically, as discussed above, there are certain perceived downsides with arbitration, and generally, employers that favor arbitration do this out of a fear of subjecting themselves to the whims of a jury. For these employers, a jury trial waiver eliminates any perceived uncertainty of a jury trial, while maintaining the ability to seek summary judgment-type relief and the protections offered by the appellate process to any extreme decisions.

**Potential Remedies**

The remedy sought in an employment case is a fundamental consideration, since the very reason an individual institutes and proceeds with his or her claim is to be compensated or “made whole” for what they consider to be an injustice. The suitable remedies will vary depending on the factual circumstances of each particular case. Additionally, state laws may provide different protections and remedies than their federal counterparts. However, there are general guidelines that provide guidance on the typical remedies that will govern a typical case.

Title VII of the Civil Rights Act of 1964, as amended,\(^\text{30}\) as well as corresponding state laws, generally allow aggrieved individuals to seek:

1. Injunctive relief prohibiting the employer from engaging in such unlawful employment practices in the future
2. Equitable relief such as reinstatement or hiring of an applicant
3. Back pay
4. Front pay
5. Award of reasonable attorneys’ fees and costs

Moreover, the Civil Rights Act of 1991\textsuperscript{31} significantly expanded the rights and remedies of plaintiffs. Under the act, a plaintiff may be entitled to compensatory and punitive damages and a right to a jury trial, where intentional discrimination is claimed. However, such compensatory damages are subject to monetary caps. A plaintiff may recover certain compensatory and punitive damages up to a limit of $300,000 depending upon the size of the employer’s workforce. The remedies and damages under the Americans with Disabilities Act generally mirror those that are provided under Title VII.\textsuperscript{32}

Under the Fair Labor Standards Act, an employee may sue for back wages, and an employer may be liable for liquidated damages in an amount up to or equal to the lost back wages if the employer willfully violated the Fair Labor Standards Act.\textsuperscript{33} Furthermore, a plaintiff may be entitled to reasonable attorneys’ fees.

The Age Discrimination in Employment Act allows the following remedies and/or damages:

1. Injunctive relief, including reinstatement, employment, promotion, and an order to prevent future discrimination
2. Back pay for wages, salary, and fringe benefits that an employee would have earned during the period of discrimination
3. Front pay to compensate for anticipated future losses
4. Attorneys’ fees
5. Liquidated damages (where the violation is determined to be willful)\textsuperscript{34}

Unlike in Title VII cases, compensatory damages (for pain and suffering, emotional distress, humiliation, or injury to professional reputation) and punitive damages are not available remedies.

Employers who violate the FMLA may be held liable for lost wages, salary, benefits, and other compensation.\textsuperscript{35} In addition, the FMLA provides that employees may recover “any actual monetary losses

\textsuperscript{31} Id. at § 1981(a).
\textsuperscript{32} See id. at §§ 12111-12213 (West 2012).
\textsuperscript{34} Id. at §§ 621-634.
\textsuperscript{35} Id. at §§ 2601-2654 (West 2012).
sustained by the employee” up to a maximum of the value of twelve
weeks (or twenty-six weeks, in the case of military caregiver leave) of
compensation in cases where wages and benefits have not been lost.
Employees may also recover interest, attorneys’ fees, expert witness fees,
court costs, reinstatement, and an additional amount as liquidated
damages equal to the sum of lost wages or monetary losses and interest,
unless the employer acted in good faith and had reasonable grounds for
believing the act or omission was not a violation.

Common Obstacles Encountered During the Litigation Process

Currently, electronic discovery matters are a common obstacle in the
employment litigation process. This is especially challenging for companies
that must balance the duty to preserve evidence with the heavy price tag
that accompanies doing so. As expected, the hurdle is heightened in
collective or class actions, which require the preservation, collection, and
production of a voluminous amount of information. Although single-
plaintiff cases will naturally involve less data and, in turn, less costs, care
should be taken in every case to ensure the proper measures are placed to
preserve evidence relevant to a claim. A company’s adoption of a solid
document retention policy coupled with a tailored case litigation hold
memorandum will help alleviate some of the difficulties presented by the
overwhelming amount of data and information that would otherwise engulf
the litigation.

Additionally, counsel for all parties should discuss anticipated electronic
discovery matters in an effort to streamline the process. The Federal
Rules require counsel to meet and confer regarding initial case matters,
including electronic discovery issues. Counsel should capitalize on the
opportunity to discuss things such as possible search terms and relevant
time periods with the purpose of narrowing the amount of potentially
responsive information, and ultimately cutting costs. This is also the time
to discuss claw-back agreements that permit parties to retract production
of privileged materials, which may be especially helpful in matters
involving voluminous documents.

Furthermore, it is crucial to have frank discussions with clients regarding
their obligations to preserve evidence. Courts may impose significant
sanctions, and in egregious cases hold parties in contempt, for their failure to do so. Parties should be made aware that it is easy to track their electronic activities, including their deletion of relevant information.

**Investigating Allegations when Putting Together a Defense Strategy**

Most employment cases will follow a general framework of investigating the allegations, evaluating potential defenses, conducting and responding to discovery, and ultimately preparing the case for trial. Thoroughly investigating the allegations is of critical importance in developing a defense strategy for any employment case, because doing so will help identify the key facts that will either bolster a case or reveal weaknesses. After evaluating threshold matters (e.g., whether a certain statute applies to a small employer or whether the plaintiff exhausted his or her administrative remedies), counsel should proceed with a factual investigation of the matter. Speaking with key witnesses early in the case will provide counsel with a high-level understanding of the case. If possible, counsel should interview witnesses instead of relying on the company’s investigative notes, since witnesses may be more forthcoming than they would be with a human resources representative or upper-level management member.

Counsel should also work with in-house counsel or the client contact in ensuring that evidence is properly preserved and gathered in anticipation of discovery requests. Personnel files, payroll documents, investigation notes, and e-mail communications with the plaintiff are particularly important and frequently requested by the opposing party. Further, while discrimination and harassment cases often turn on witness credibility and testimony, wage and hour litigation is heavily driven by payroll documentation. Therefore, it is especially critical to gather applicable policies and documents demonstrating time worked by the plaintiff(s).

Following the initial interviews and review of relevant documentation, counsel will have a more meaningful sense of the case and will be able to thoroughly develop a defense strategy. A key part of doing so will include the development of a case theme that will resonate with a judge or jury. With a theme in mind, discovery and deposition questions can be crafted in a manner that will build the story that will be told through a motion for summary judgment or at trial.
As mentioned above, conducting witness interviews and preserving and collecting key documents early in the case are especially important factors when evaluating a plaintiff’s allegations. It is critical to learn all facets of the case, even if that includes learning unfavorable information from witnesses. For example, the plaintiff’s former colleagues may corroborate some of the plaintiff’s information. However, having this information ahead of time is helpful, since it will inevitably be revealed at some stage of the litigation. Obtaining it early is of critical importance to evaluate the appropriateness of settlement negotiations or conduct further investigation into the matter.

The client plays an indispensable role in the development and performance of a defense strategy. Specifically, in-house counsel or another client contact will vocalize the company’s objective in the litigation and provide counsel with the means to learn the underlying facts of the case, which are necessary for developing the theme of the case. Additionally, it is important to build trust with the client. Doing so will enable the client to have confidence in your judgment so you can develop the case with the client’s ultimate objective in mind.

The most common challenges in building a defense strategy stem from discovery matters. For example, the opposing party’s unwillingness to produce documents or cooperate with other discovery matters, such as the scheduling of depositions, may prevent the parties from learning all relevant facts of a case. In turn, this leads to added fees and expenses, through otherwise unnecessary motions to compel.

**Conclusion**

The dismal economic climate has been accompanied by an increase in employment litigation. Recent Supreme Court cases, which expand anti-discrimination and retaliation laws, will likely perpetuate this trend. Employers subject to such laws will be affected by the litigation landscape across the board, since they will have to take additional measures to ensure their employment practices and decisions are made in line with the governing rules.

Lawyers should assist their clients in taking preventative measures, including developing policies and conducting regular training, in light of
the continuous increase in employment litigation. Being prepared on the front end will help develop a tight defense strategy if a meritless claim should arise.

Because employment regulations and interpretations are ever changing, it is particularly important to stay abreast of those changes through continuing law education seminars that are specifically tailored to this area of the law. Additionally, there are numerous resources, including newsletters, local employment bar sections, and case updates from several available sources, to keep you updated on new developments.

**Key Takeaways**

- Assist employment law clients in taking preventative measures, including self-education, developing clear and consistent policies and practices, and human resources or supervisor training. Also assist clients in adopting written policies that provide the necessary provisions to comply with the laws and the flexibility to adhere to them as they develop.

- Give clients a credible opinion on the front end about what their rights are, the avenue for enforcing these rights, the monetary costs in pursuing their rights, the business implications of pursuing litigation, and the likelihood for success.

- Discuss preservation obligations with clients and advise them of potential sanctions and spoliation risks if they fail to abide by such obligations. Build trust with the client so you can develop the case with the client’s ultimate objective in mind.

- Thoroughly investigate the allegations against the client. After evaluating threshold matters (e.g., whether a certain statute applies to a small employer or whether the plaintiff exhausted his or her administrative remedies), proceed with a factual investigation of the matter. Speaking with key witnesses early on will provide you with a high-level understanding of the case.

- Develop a case theme that will resonate with a judge or jury. With a theme in mind, discovery and deposition questions can be crafted in a manner that will build the story that will be told through a motion for summary judgment or at trial.
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