INSIDE THE MINDS™

STRATEGIES FOR EMPLOYMENT LITIGATION

LEADING LAWYERS ON SUCCESSFULLY LITIGATING AND SETTLING EMPLOYMENT CLAIMS

ASPATORE

D. Katz, Andrews Kurth LLP; Sean F. Crotty, Honigman Miller Schwartz and Cohn LLP
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Scott Callen, Foley & Lardner LLP; William C. Zifchak, Kaye Scholer LLP

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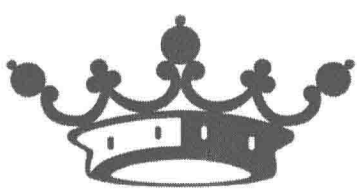

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CONTENTS

Marc D. Katz 7
***Chair, Labor and Employment Section,* Andrews Kurth LLP**
UNDERSTANDING KEY CHANGES IN EMPLOYMENT LAW REGULATIONS AND THEIR IMPACT ON DEFENSE STRATEGIES

Sean F. Crotty 35
***Partner,* Honigman Miller Schwartz and Cohn LLP**
ADVISING CLIENTS ABOUT RESTRICTIVE COVENANT AND TRADE SECRET LITIGATION

Thomas B. Allen 51
***Member,* Frost Brown Todd LLC**
STORYTELLING: MAKING IT PERSONAL IN EMPLOYMENT LITIGATION

Robert A. Cocchia 61
***Partner,* McKenna Long & Aldridge LLP**
SUCCESSFUL STRATEGIES FOR TODAY'S EMPLOYMENT LAW ATTORNEYS

Aaron R. Gelb 75
***Shareholder,* Vedder Price PC**
BUILDING AN EMPLOYMENT CASE THAT YOU CAN FEEL CONFIDENT TAKING TO TRIAL

Scott Callen 93
***Partner,* Foley & Lardner LLP**
KEY COMPONENTS OF DEFENDING EMPLOYER CLIENTS IN LITIGATION

William C. Zifchak
***Partner,* Kaye Scholer LLP**
MODERN CHALLENGES TO EMPLOYERS IN EMPLOYMENT LITIGATION 105

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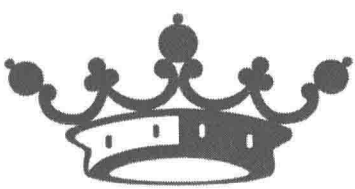

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Understanding Key Changes in Employment Law Regulations and Their Impact on Defense Strategies

Marc D. Katz
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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

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.

[1] 29 U.S.C.A. §§ 2101-2109 (West 2012).

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).

[2] 29 U.S.C.A. §§ 201-219 (West 2012).

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.*,[3] 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 designation cases. The factors favoring employees include the nature of the

[3] *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012).