**Focus on**

**General Employment Litigation**

Federal, state and local employment laws impose legal obligations and their attendant risks on every employer, creating the need for a well-informed management team with access to specialized workplace law resources. For many employers, Jackson Lewis is the "go to" firm for defending management in employment-related lawsuits, as well as guidance on legally compliant policies and practices.

Leveraging the Firm’s geographic and substantive reach, the General Employment Litigation practice offers clients strategic advice and representation across the business spectrum.

Jackson Lewis employment litigators assess risk and evaluate settlement early in litigation. They seek to dispose of cases before trial, but when necessary, present cases in a manner persuasive to judges and juries. The Firm has been honored by in-house counsel as both a “Powerhouse” and “Standout” in the annual BTI Litigation Outlook 2013.

**Q** What are among the most common litigation issues employers have dealt with in the past several years?

**A** (MS. ACKERSTEIN) Employers continue to encounter difficulties defending applicants’ and employees’ discrimination claims, even when a well-documented file supports a legitimate reason for the employer’s action. One recurring issue is the increased pressure on employers to produce a wide range of pre-trial discovery, including electronic documents. These requests can be time consuming and costly because it may be necessary to review massive quantities of electronic data, including e-mail, voicemail and text messages.

Increased litigation brought on behalf of co-workers who claimants allege are similarly situated is another current issue. An employee claiming she is owed overtime pay, for example, often brings an action on behalf of herself and other employees with the same job title or duties, compelling the employer potentially to defend against a class of employees. This may make the case more complex and increases the exposure significantly. With the lure of astronomical damages, class actions and multiple plaintiff litigation have captured the interest of plaintiffs’ lawyers, the media, and the general public, posing a significant threat to a business’s financial stability and reputation.

**Q** What litigation trends have been the most troublesome for employers generally in the past several years?

**A** (MS. ACKERSTEIN) Two of the most troublesome trends for employers relate to claims of disability discrimination and retaliation. With the former,
employees are claiming employers not only failed to reasonably accommodate their disabilities, but also failed to engage in an interactive process and concluded too quickly that the accommodation requested could not be provided.

Where accommodation is an issue in litigation, employees in discovery seek documents relating to the employer’s consideration of their requests. These may include notes of conversations with the employee and requests for further information from the health care provider. For that reason, it is important that managers, supervisors and health care professionals be trained to engage when presented with requests for accommodation, even if the request seems extreme. A request for accommodation may be unreasonable, but the employer must consider it, look for alternatives, and have documentation to support the decision if the employee is not accommodated.

We see an increase in retaliation claims accompanying discrimination claims, where an employee contends he or she was terminated after making a work-related complaint. Historically, employees have the highest success rates on claims of retaliation. They can prevail even where they do not succeed on the underlying discrimination claim.

It is important for employers to take every work-related complaint seriously. They should conduct an investigation, and document the results and any action taken for later production in litigation, should that become necessary. Before taking adverse action against an employee, an employer first should review the employee’s history of workplace complaints. When a complaint is followed quickly in time by an adverse action, such as termination of employment, defending a claim of retaliatory discharge can be challenging. A successful defense is more likely when there is a clear, legitimate, and documented reason for the action.

Another litigation trend is the continuing focus of the EEOC on cases it believes show a pattern or practice of discrimination by an employer. This focus might have a broad impact on a particular industry, profession, company or geographic area. In pursuing these cases, the EEOC is looking closely at employer practices involving employee background checks and per se leave policies, among others.

Q How have attorneys in your practice area handled the big litigation issues and how would you evaluate the outcomes from the client’s perspective?

Managing and Marshalling Data by the Terabyte

E-discovery demands may swamp a corporate legal department, IT personnel, human resources, and even senior management. Even before litigation commences, employers have legal obligations to preserve electronic data that may be sought during discovery. They must anticipate that possibility with a program of e-discovery readiness, litigation preservation, search and review, and production.

To meet their obligations, many employers consider outsourcing litigation support tasks. Outsourcing can be a cost-effective response to the demands of constantly changing technology.

See, Handling Nonlegal E-Discovery Demands with Outside Litigation Support

- **Resources** of Jackson Lewis e-Discovery Practice:
  - Jackson Lewis attorneys work with clients to project costs, develop case strategies, and satisfy document retention and production obligations. In addition, the Firm helps employers develop electronic information retention and destruction policies, employee technology and social media policies, and formal litigation hold procedures.

- Visit our [E-Discovery Law Today blog](#) to keep up with the latest changes, developments and trends.

- View our free webinar on [e-Discovery Readiness](#).
The biggest litigation issue for our attorneys is completing an accurate and speedy assessment of the client’s case. The stages of case assessment include determining the likelihood of the applicant’s or employee’s chances for success, projecting possible and desired outcomes, and planning the strategy to achieve the best possible result in the most cost-effective manner.

To address these issues, we do an initial case assessment, collecting the relevant documents (such as personnel file, policies, comparator information, and e-mails), identifying the relevant witnesses (supervisors, managers, and human resources professionals), understanding the legitimate reasons for the employer action, and assessing whether the documentation supports the decision. We then assess the likelihood of the claim’s success, the potential for obtaining summary judgment before trial, and the risks and exposure to liability at the trial stage.

Completing the case assessment allows us to be proactive – rather than reactive – with the client, focusing on the desired outcome and strategy for defending the case. The plan may change as the evidence unfolds, but we always start with a strategy based on an initial assessment of the strengths and weaknesses of the case and the desired result.

What litigation challenges do you foresee for employers in the coming year or two?

Employers will face a number of litigation challenges, including increased regulatory scrutiny, a possible increase in claims of age discrimination, and the evolution of claims involving social media.

With regulators intent on prosecuting “pattern and practice cases,” it is doubly important for employers to review their workplace policies and practices to ensure they are in compliance with federal and state law. Policies on leaves, background checks, electronic communications, and social media should get particular scrutiny to ensure they are legally compliant and not overly broad. Before applying a policy or practice that results in adverse action against an applicant or employee, an employer must be sure that action will be defensible if it triggers a claim of discrimination or retaliation.

Another challenge for employers in the next few years will be managing an older workforce, as more employees work to age 65 and beyond. When restructuring or making other employment decisions, employers must be especially mindful of how they will impact older workers, who are now a significant portion of the workforce. The demographics of an older and more diverse workforce – protected by federal, state and local fair employment practices laws – underscore the need for well-considered and well-documented employment decisions and actions.

Laws prohibiting workplace discrimination also prohibit retaliation – even if the underlying charge of discrimination is unsuccessful. More than one-third of all claims filed with the EEOC in 2012 were for retaliation – nearly 38,000.

Two recent decisions offer examples of retaliation claims surviving the dismissal of underlying discrimination claims. A California federal appeals court found offensive conduct of a sexual nature not severe or pervasive enough to create a hostile work environment under Title VII of the Civil Rights Act; however, the court found the employee had raised sufficient factual questions about whether her termination was in retaliation for her complaints. Westendorf v. West Coast Contractors of Nevada, Inc., No. 11-16004 (9th Cir. Apr. 1, 2013). In another case, a New York federal appeals court ruled that a graduate student who worked at the university failed to support her claim of unlawful workplace sexual harassment, but could pursue her claim that the university had fired her in retaliation. Summa v. Hofstra Univ., No. 11-1743 (2d Cir. Feb. 21, 2013).

See, Title VII Retaliation Suit to Proceed Despite Failure of Underlying Hostile Work Environment Claim, Federal Court Rules and Grad Student Could Not Pursue Sexual Harassment Claim against University, But Retaliation Claim Allowed.
Age Discrimination Comes of Age

The number of age discrimination charges filed with the EEOC has increased by 50% since 2000; nearly 23,000 charges were filed in FY 2012. The EEOC has published a final rule on the "reasonable factors other than age" defense to a charge that an employment policy or practice has a disparate impact on individuals protected under the ADEA.

With the aging of the workforce, business decisions relating to hiring, firing and other employment actions must be scrutinized carefully to avoid unintended, but unlawful, impact on older individuals. The EEOC's ongoing lawsuit alleging a pattern or practice of age discrimination in hiring by a national restaurant chain provides a cautionary tale. The complaint alleges that the employer discriminated against applicants age 40 and older for "front of the house" and other public, visible positions, such as servers, hosts, and bartenders, by failing to hire them because of their age.

See the EEOC's Facts About Age Discrimination at www.eeoc.gov.

Finally, we can expect claims involving social media to continue to evolve. Employees increasingly are using social media in work-related contexts. They occasionally are making negative comments about their employer, co-workers, supervisors or the employer’s products or services. The law is unsettled when it comes to disciplinary action for such behavior. Whether an employer's actions are lawful will depend on the particular facts and on the forum and state in which the case arises. We will to see more litigation over the content of social media, its ownership, and permissible uses. How an employer obtains and uses information from social media sites during hiring and other phases of the employment relationship will come under scrutiny.

Q Are there any legal reforms – in the works or being discussed – that you see affecting employers either positively or negatively as they avoid and/or defend employment claims?

A (MS. ACKERSTEIN) Employment litigation shows no signs of slowing, and multi-plaintiff and class action litigation is becoming more commonplace. Legal reforms that would include congressional action may be unlikely. However, we have seen a greater involvement by judges and magistrates in assisting litigants to resolve disputes, either at the beginning of a case or after some discovery has been taken, and the parties have a better idea of what the evidence will demonstrate. Many courts now have mandatory settlement conferences at some point during the life of a case. Where they are not mandatory, judges often will build a settlement conference into the schedule.

The movement towards dispute resolution, either through court intervention or acceptance of private dispute resolution processes, indicates recognition on the part of courts and judges that litigation is time-consuming and expensive, and that encouraging parties to settle their differences and move on may be advantageous to everyone. Indeed, statistics confirm that in many courts, the number of trials is down, despite the steady influx of cases, leading to the conclusion that more cases are resolved before trial through summary judgment or private settlement.

In 2013 and beyond, it is vitally important that employers stay up-to-date on the rapid changes taking place in and around their workplaces. The Jackson Lewis General Employment Litigation practice helps employers focus on core business objectives by empowering their response to the evolving law of employment litigation and employee relations.