

# PREVENTIVE

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## The Serious Business of Employment Litigation

Employment litigation in the United States continues to be one of the fastest growing areas of all civil litigation. According to [Federal Judicial Caseload Statistics of U.S. District Courts](#), of the more than 285,000 civil lawsuits commenced in 2012, nearly 33,000 arose out of the employment relationship. Continuing an upward trend, the [Equal Employment Opportunity Commission](#) logged nearly 99,500 new charges in 2012, with state fair employment practices agencies receiving almost as many.

### Complex, Wide-Ranging and Dynamic Legal Landscape

Employment litigation ranges from claims of discrimination, sexual harassment, and violations of equal pay and wage and hour laws, to allegations of wrongful discharge, defamation, breach of contract, retaliation, employee privacy violations, and interference with employee benefits. Cases are filed by individual plaintiffs – current, former and prospective employees – and multiple plaintiffs in collective and class actions.

The complexity of laws and regulations governing the employment relationship can be daunting. In addition to defending lawsuits and responding to agency charges, employers often require the aid of employment counsel to secure confidential and proprietary information, trade secrets, and business relationships, to conduct independent investigations of alleged workplace misconduct, and to help educate management and employees about equal employment opportunity and workplace diversity.

Within the field of workplace law, employment litigation trends reflect larger societal and cultural advances. Technology that has streamlined communications and enabled the growth of global commerce also has necessitated new rules for managing and marshalling data and has made class action litigation more feasible. Expansion of protections for disabled workers has shifted the enforcement focus to the reasonable accommodation interactive process. Increased emphasis on litigating civil rights violations has resulted in a surge in retaliation claims and systemic discrimination prosecutions. The baby-boom generation has swelled the ranks of older workers and the potential for age discrimination, while the explosion in social media challenges traditional boundaries of permissible and impermissible workplace conduct.

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THIS ISSUE OF *Preventive Strategies* TAKES A CLOSER LOOK at the Firm's [General Employment Litigation](#) practice. The majority of Jackson Lewis attorneys devote their practice to defending management in employment-related lawsuits, having litigated more than 10,000 individual and class action employment cases over the past five years.

## 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, including:

- *Litigating in state and federal courts, discrimination, defamation, and whistleblower claims, employee privacy issues, qui tam actions, and wage and hour matters, including collective and class actions.*
- *Handling administrative charges before state and federal agencies.*
- *Protecting employers' confidential and proprietary information, trade secrets, and business relationships from misuse or interference.*
- *Maintaining actions on behalf of employers arising from fraud, theft, and other related misconduct.*
- *Conducting independent investigations of allegations of inappropriate employee behavior running the gamut of workplace issues, including discrimination, harassment, and improper business practices (such as issues arising under the Sarbanes-Oxley Act).*

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](#).



National Director of Litigation, [JOAN ACKERSTEIN](#), coordinates this robust and diverse area of the Firm's practice. Ms. Ackerstein is a Partner in the Boston office, where she managed the litigation practice for 20 years, and is a member of the Firm's Management Committee. She concentrates her practice in employment litigation and counseling management on workplace issues.

**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

**EDITORIAL BOARD** Roger S. Kaplan Mei Fung So Margaret R. Bryant This bulletin is published for clients of the firm to inform them of labor and employment developments. Space limitations prevent exhaustive treatment of matters highlighted. We will be pleased to provide additional details upon request and discuss with clients the effect of these matters on their specific situations. | Copyright: © 2013 Jackson Lewis LLP. Reproduction in whole or in part by any means whatsoever is strictly prohibited without the advance written permission of Jackson Lewis. | This Bulletin may be considered attorney advertising in some states. Furthermore, prior results do not guarantee a similar outcome.

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](#).



“During pre-trial discovery, employers are under pressure to produce a wide range of electronic data.”

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

## Moderating Class Action Mania

Two recent U.S. Supreme Court decisions may bolster employers’ defenses in class action suits. Reaffirming its 2011 landmark decision in *Wal-Mart Stores, Inc. v. Dukes*, the Court by a 5-4 vote emphasized that lower courts must conduct a “rigorous analysis” to determine whether damages can be proven on a class-wide basis, imposing a high standard on plaintiffs in class action litigation. [Comcast Corp. v. Behrend](#), No. 11-864 (2013).

In the second decision, the Supreme Court ruled unanimously that class action plaintiffs cannot evade a procedural requirement under the Class Action Fairness Act that claims exceeding \$5 million be adjudicated in federal court by claiming a damages cap of less than that amount for a not-yet-certified class. A nonbinding stipulation to limit damages, the Court said, could not serve to defeat federal jurisdiction under the CAFA. [Standard Fire Insurance Company v. Knowles](#), No. 11-1450 (2013).

See, [Supreme Court Decisions May Bolster Class Action Defense Theories](#).

■ **Resources** of Jackson Lewis [Class Actions and Complex Litigation](#) practice:

*Jackson Lewis attorneys 1) assess vulnerability; 2) identify early warning signs of group activity; 3) plan a comprehensive litigation strategy; 4) identify and engage subject-matter experts; 5) assist with internal and external communications; and 6) monitor the process for efficiency and cost control.*

- Click here to view or download our free webinar, [“Employment Class Actions in 2012 and Beyond Is Your Company Ready?”](#)



“A request for accommodation may be unreasonable, but the employer must consider it and have documentation to support its decision.”

## More Reasons to Make Interactive Process Meaningful

The Americans with Disabilities Act Amendments Act, enacted in 2008, expanded the class of individuals protected against disability discrimination. It also shifted the enforcement emphasis to whether employers are meeting their obligations not to engage in “discrimination on the basis of disability” and whether they are making reasonable accommodations.

The EEOC reported that in 2012 it received more than 22,850 new charges under the Americans with Disabilities Act, as amended by the ADAAA. The litigation focus is on employers’ efforts (or lack of efforts) to consider reasonable accommodations and to engage in the interactive process.

Employers must understand their obligations with regard to the interactive process and prepare management staff to respond appropriately and promptly when they are presented with requests for reasonable accommodations. The EEOC’s guidance for [Small Employers and Reasonable Accommodation](#) explains that once an accommodation is requested or suggested, the employer and the individual with a disability should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation.

- **Resources** of Jackson Lewis [Disability, Leave and Health Management](#) practice: *Management should be trained regularly on recognizing and responding to protected individuals and their accommodation requests. Jackson Lewis attorneys offer imaginative solutions to the legal and operational problems in managing such requests. We work with clients to review and create reasonable accommodation guidelines, including facilitating the interactive process.*
- Visit the Jackson Lewis [Disability, Leave & Health Management Blog](#).
- Read and download our special report, [Excusing Absences as a Reasonable Accommodation Part I](#) and [Part II](#).

## When What Remains is Retaliation ....

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](#).

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?*

**A** (MS. ACKERSTEIN) 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.



By 2016, the EEOC projects that nearly 25% of its cases will involve systemic discrimination.

## The EEOC's Self-Fulfilling Prophecy

In 2006, the EEOC adopted an initiative, described in its [Systemic Task Force Report](#), for making the identification, investigation, and litigation of systemic discrimination cases – pattern or practice, policy, or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area – a top priority. The Commission's [Draft Strategic Plan for Fiscal Years 2012– 2016](#) called for the establishment of a baseline for systemic cases through FY 2016, by which time the agency projects that 22%-24% of cases on its active litigation docket will be systemic.

According to its own reporting, in FY 2012, the EEOC resolved 240 systemic investigations and secured monetary benefits of \$36.2 million, a four-fold increase over FY 2011. In 2012, the agency issued "cause findings" in 94 investigations of systemic charges, filed 12 new charges, and successfully conciliated 46. (A "cause finding" is the EEOC's written determination that unlawful discrimination has occurred in the workplace.) Through its pre-determined effort, the number of completed systemic investigations has grown 32% over FY 2010 levels, increasing the pool of cases for conciliation or litigation.

New systemic cases filed in FY 2012 challenged a variety of employer practices. These included patterns of hiring and promotion among women and African-Americans, leave policies under the ADA, benefits policies under the Age Discrimination in Employment Act, as well as a policy applying to pregnant employees and a restrictive language policy. There are more systemic discrimination cases on the EEOC's active docket than ever. The [EEOC Home Page](#) features several ongoing litigations and invites individuals to contact the agency if they believe they were subject to the challenged practices and actions.

See, [Results Achieved in FY 2012 Under Strategic Plan Performance Measures](#) and [Selected List of EEOC Systemic Hiring Resolutions and Filings Since 2005](#).

- Resources of Jackson Lewis [Systemic Discrimination](#) practice:

*Jackson Lewis attorneys have experience helping employers avoid systemic discrimination allegations and, when necessary, defending against class actions and other large-scale discrimination cases, both at administrative agencies and in court.*

- View or download our **free webinar**, [Systemic Discrimination Enforcement and Criminal Background Checks in President Obama's Second Term](#).



“When restructuring or making other employment decisions, employers must be especially mindful of how they impact older workers, now a significant portion of the workforce.”

## 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](http://www.eeoc.gov).

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.

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

**A** (MS. ACKERSTEIN) 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.

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.

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**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.



The law is unsettled as to how an employer may obtain and use information from social media sites when making employment decisions.

## Social Media, Friend or Foe?

Along with creating opportunities for enterprise, social media enables individuals to engage in negative or counterproductive behavior, such as harassing co-workers, criticizing their employers and business partners, revealing confidential information, [endorsing products or services without proper disclosure](#), and engaging in criminal conduct with ease. Postings on social networking sites or blogs may be used as evidence in employment claims. Individuals posting personal information may later claim an employer unlawfully accessed or used that information in hiring or other employment decisions.

Other issues arise when employers ask or permit employees to use their own personal digital devices for work. These include control over the device, reimbursement for phone charges and other personal usage, and restrictions on installing apps and other programs. The federal government is preparing "[Bring Your Own Device](#)," or BYOD, guidelines based on pilot projects at federal agencies. At the EEOC, for example, employees who use their own smart devices for work agree to have third-party software installed so the agency can manage security settings and remotely wipe devices clean of certain government data if the devices are lost or stolen.

- Resources of Jackson Lewis [Privacy, Social Media and Information Management](#) practice:

*As more organizations adapt the power of social media for business purposes, it becomes imperative to develop clear guidelines for employees' acceptable use. An effective program clearly explains the purposes, expectations and risks, and permitted uses of social media and other forms of digital communications both on and off the job. Jackson Lewis attorneys regularly advise clients as to: 1) whether and how to monitor and regulate employees' social media use; 2) the use of information obtained through social media in hiring, promotion, discipline and other decisions; and 3) the challenges of social media in litigation.*

- Visit [JacksonLewis.com](#) to learn more about social media issues, such as [Question of Social Media Account Ownership Need Not be a Problem for Employers](#) and [New Mexico, Utah Curb Employers from Demanding Private Social Media Information](#).
- Check the latest **blogs**, such as [Deletion of Facebook Page = Spoliation](#), and special reports, [Social Media in the Workplace](#) and [Preventive Strategies on Social Media](#).



## Marijuana Legalization Causes Confusion for Drug-free Workplace Initiatives

In November 2012, Massachusetts became the 18th state to put some form of a “medical marijuana” law on the books. The other states include Alaska, California, and Delaware. Colorado and Washington voters passed historic measures to legalize marijuana for recreational use by adults in their respective states. The legalization measures appear to conflict with the federal Controlled Substance Abuse Act, which defines marijuana as an illegal drug. Courts around the country are issuing decisions. How are employers to react?

The [Washington](#) law does not contain any express employment protections for marijuana users, although the Washington Supreme Court previously held that similar protections from criminal and civil liability under Washington’s Medical Use of Marijuana Act (MUMA) did not prohibit an employer from discharging an employee for failing a required drug test nor impose a duty to accommodate an employee’s medical marijuana use.

The [Colorado](#) constitutional amendment explicitly states that employers are not required “to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growing of marijuana in the workplace or to affect the ability of employers to have policies restricting the use of marijuana by employees.”

Employers in affected states may anticipate increasing issues with marijuana use by applicants and employees. Employers should consider creating policies to address substance abuse that impacts employees’ conduct or work and review existing policies about drug-testing, safety, and substance abuse, in compliance with applicable federal and state laws prohibiting disability discrimination or regulating drug testing. Unionized employers must take into account any collective bargaining obligations associated with these subjects. Employers with multi-state operations should continue to monitor developments across the nation.

See, [Michigan Medical Marijuana User Fired for Positive Drug Test Lacks Claim against Employer, Appeals Court Affirms](#). For assistance, please contact the Jackson Lewis attorneys in the [Drug Testing and Substance Abuse Management](#) practice.

## Jackson Lewis News

Jackson Lewis LLP is pleased to announce its [Atlanta office](#) was named the

### LAW FIRM LITIGATION DEPARTMENT OF THE YEAR

for labor and employment in a survey conducted by the *American Lawyer* publication, the *Daily Report*



The Atlanta attorneys were recognized for the results they won for clients in 2012, whether in “favorable verdicts, dismissals, settlements or other actions that protected clients’ interests.

[DAVID L. GORDON](#), Atlanta office Managing Partner, added,

*“Winning in the employment litigation category is a testament to the talented lawyers we have in our office. While our number one goal has always been to provide premier client service, it is gratifying to be recognized for the results of our hard work.”*

## Jackson Lewis Opens Third Ohio Office in Dayton

Jackson Lewis LLP is pleased to announce the opening of its newest location in [Dayton](#), Ohio. [KAREN T. DUNLEVEY](#) joins the Firm as a Partner, and Managing Partner [SCOTT A. CARROLL](#) of the [Cincinnati](#) office will serve as Dayton Managing Partner.