

Live from CCC2023 Ep. 8: What Employers Need to Know About Employment Litigation

By Matthew J. Camardella, Richard J. Mrizek, Stephanie L. Adler-Paindiris, Mia Farber, Nicky Jatana, Kirsten A. Milton, Adrienne L. Conrad &

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Details

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Welcome and thank you for joining us for this special edition of We Get Work, live from Jackson Lewis' Corporate Counsel Conference, CCC2023, at the Waldorf Astoria Monarch Beach resort in Orange County, California. What follows are high level conversations on conference programs and why they were important topics to present now.

Jackson Lewis P.C. · Live from CCC2023 Ep. 8: What Employers Need to Know About Employment Litigation



Transcript

Alitia Faccone:

Welcome and thank you for joining us for this special edition of We Get Work, live from Jackson Lewis's Corporate Counsel Conference, CCC 2023, at the Waldorf Astoria Monarch Beach Resort in Orange County, California. What follows are high-level conversations on conference programs and why they were important topics to present now. In this episode, we explore what employers need to know about employment litigation. Jackson Lewis lawyers Stephanie Adler-Paindiris, Mia Farber, and Nicky Jatana discuss "Class and Collective Actions: A View Through 2023's Cultural, Regulatory, and Political Goggles." Matt Camardella, Rich Mrizek, and Melanie Paul provide insight into "Litigating Against the Government: From Agency to Federal Court," and when employers find themselves in litigation, Adrienne Conrad and Kirsten Milton help you come up with a plan during their program, "Settlement Agreement Strategy: Know When to Hold Them, Know When to Fold Them."

I'm here with Nicky Jatana, Mia Farber, and Stephanie Adler-Paindiris. Ladies, can you tell our audience a little bit about yourselves, where you're

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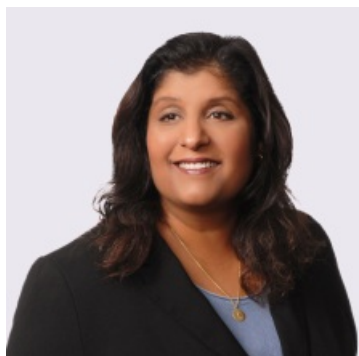
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from, and your practice at Jackson Lewis? Nicky?

Nicky Jatana:

Good afternoon. Thanks, Alitia. This is Nicky Jatana, and I am a principal out of the Los Angeles office. I would say more than 50% of the work that I handle involves class actions in some fashion or another, whether it's wage and hour privacy, FCRA, class actions and the like. So I cover a little bit of the gamut of those areas, and thank you for having me today.

Alitia Faccone:

Mia.

Mia Farber:

Hi, I'm Mia Farber. I'm also a principal in the Los Angeles office, and most of my practice, if not all, is class and PAGA, and now we're seeing a lot more FLSA collective work in California, based off the Bristol Meyers Squibb decision, where you need to sue, where a company is incorporated.

Alitia Faccone:

Thank you, Stephanie.

Stephanie Adler-Paindiris:

Hey, thanks, Alitia. It's great to be here. I'm Stephanie Adler-Paindiris, and I'm a principal in the Orlando, Florida office, and I co-lead the firm's litigation practice group. And I would say probably 70% of my practice is class and collective actions, actually, all over the country, dealing with both wage and hour, Fair Credit Reporting Act, and Title VII work. So I'm super excited to talk about this today.

Alitia Faccone:

Thank you. The title of your presentation was "Class and Collective Actions: A View Through 2023's Cultural, Regulatory, and Political Goggles." Stephanie, can you share with our listeners what your program is about, what you covered, and why you thought it was important to cover this topic at CCC 2023?

Stephanie Adler-Paindiris:

Yeah, we were really excited to talk about this, because Mia, Nicky, and I really talked about what's new in class and collective actions, and we thought about the unique cultural moment that we find ourselves. We have this post-pandemic economy, a very fractured political climate, a very aggressive and new regulatory state, a deeply conservative US Supreme Court, and of course, technological advances that has really profoundly affected our workplace. And all of those combined have really shaped the kinds of class and collective actions that employers are facing. Of course, our clients are facing the mainstay class and collective actions, like off-the-clock and misclassification, but we're really seeing new claims, claims that are unique to the time that we're in, claims, obviously, that are very much related to the pandemic, whether that be

vaccine-related. We talked about anti-woke class actions, like reverse discrimination, data privacy, aggressive agency actions, what the Plaintiffs Bar is doing, and then of course, as Mia said, how the jurisdictional issues are impacting class and collective actions. So we covered quite a bit of information to really talk about what employers need to know today.

Alitia Faccone:

Thank you. Mia, given the very long list of issues and types of claims Stephanie just mentioned, what were some of the really important issues that resonated with our attendees during the program today? What did they really want to know?

Mia Farber:

They seemed very interested in what the Plaintiffs Bar is up to. What are the new claims we're seeing that we haven't seen previously, and the creative claims that the plaintiffs appear to be trying to bring, and what they need to know to avoid those claims. They also, I think, were interested in hearing about how, whereas the Plaintiffs Bar used to be very homogenized and would never file over each other, now it's a little bit of a shark frenzy, where Plaintiffs Bar, they're filing claims over each other, they're objecting to each other's settlements, and so, as an employer, you're sort of held hostage when you're trying to resolve a class action and now you have other plaintiffs challenging that class action.

Alitia Faccone:

Nicky, what do you believe are some key takeaways employers should keep in mind when faced with any kind of litigation or a particular class action?

Nicky Jatana:

Sure. So I focused my presentation today on what Illinois is doing, really, now as a leader in the country with respect to information privacy actions under BIPA. And the reason we focused on that is because we see that these claims are getting filed very frequently now, even though the law has been around since 2008, we're seeing an uptick there, but we do think that that is going to set the stage for the rest of the country and that's going to expand. So in terms of key takeaways, what I really focused on today with our attendees had to do with making sure that they know what their technology is and what information it actually collects and what information the organization, employer, or company is actually utilizing from gathering that data.

Alitia Faccone:

Thank you. Stephanie, how are you and Mia and Nicky and your Jackson Lewis colleagues providing assistance to organizations who are facing these issues?

Stephanie Adler-Paindiris:

That's a great question, Alitia. I think one thing that we do really well here at Jackson Lewis is we anticipate the trends and what's happening. We're very

quick to put teams together, multidisciplinary teams. So for instance, we have probably more Covid vaccine litigation, I think, than probably any firm in the country. And we really have a teamwork approach where we put together lawyers from all over the country who are really experts in the kinds of cases that we're looking at. And then we work together to ensure that we're always staying ahead of the curve. So as Nicky said, we do that with BIPA. We have an incredible BPA team that really is, in my opinion, the best in the country. We've got a team of people doing vaccine litigation. Nicky and Mia are also experts on independent contractor litigation.

So what we really try to do for our clients is to make sure that we're always thinking ahead, that we're seeing what's coming around the corner, and then we're being proactive about putting the resources together, so that when they get hit with it or they have a question before, so we're in a position to really offer the expertise that they need, and so I'm super proud of that for our group.

Alitia Faccone:

Stephanie, Mia, Nicky, thank you so much for joining us behind the podcast mic today, and enjoy the rest of the Corporate Counsel Conference.

Stephanie Adler-Paindiris:

Thanks, Alitia.

Nicky Jatana:

Thank you.

Alitia Faccone:

I'm here with Melanie Paul, Matt Camardella, and Rich Mrizek. Can you tell us a little bit about you, where you're from, and your practice? Melanie, I'll start with you.

Melanie Paul:

Yes, good afternoon everyone. I'm Melanie Paul. I am co-head of the Workplace Safety and Health Practice Group. I'm based out of Jackson Lewis's Atlanta office, and I have been with the firm for four years now, and my specialty is OSHA compliance defense. And in my former life, I was a senior trial attorney with the US Department of Labor, Office of the Solicitor, where I prosecuted the cases that I now defend.

Alitia Faccone:

Thank you, Melanie. Matt?

Matt Camardella:

Welcome, valued listeners. My name is Matt Camardella and I co-lead the firm's Affirmative Action, OFCCP, and Government Contract Compliance Group. I have been with the firm for 27 years. I'm a lifer, and I am based in the firm's Long Island, New York office. So our practice group supports federal

government contractors and subcontractors in complying with the litany of requirements under the affirmative action obligations. And we primarily provide three services: Affirmative Action Plan preparation, OFCCP defense, and advice and counsel relating to the technical compliance obligations under those regulations. We also perform dozens of pay equity analyses, both from a compliance standpoint and a preventative standpoint, each and every month.

Alitia Faccone:

Thanks. Rich?

Richard Mrizek:

Hi, I'm Rich Mrizek. I'm in Jackson Lewis's Chicago office, and I've come to Jackson Lewis after 20 years as a trial attorney with the EEOC, where I litigated cases and assisted in investigations and brought many cases to trial and worked on nationwide class relief cases with the EEOC. My practice focused on bringing that experience to Jackson Lewis and its clients to help them navigate the ins and outs of EEOC litigation and how to best limit and avoid liability.

Alitia Faccone:

Thanks, Rich. Matt, the title of your presentation today was "Litigating Against the Government: From Agency to Federal Court." Can you provide our listeners with a brief summary of what was covered during your presentation and why it was important to present this topic at CCC this year?

Matt Camardella:

Sure. Well, as the title of the presentation suggests, there's something different about litigating against the government. It's a completely different animal, and very different from private litigation, which is what we wanted to focus on during this presentation. So we covered four main areas and how those areas of litigation against the government differ somewhat from any kind of private litigation. So we looked at the pre-litigation, or investigation stage, and how you can set yourself up for success down the road, should litigation occur. We talked about discovery disputes in litigation and what means and levers you had available to you as an organization in those disputes.

We talked about the various off-ramps for resolution, so how to approach settlement, who the right party was to discuss settlement with, and what levers were available in negotiations there. And lastly, when all else fails and you actually have to go to trial, what are some of the considerations at that point in the process, when you're dealing with government attorneys, in some cases jury trials, and in other cases, bench trials. Now, why the topic was important, because EEOC, OFC, CCP, and OSHA, any of the federal government agencies, frankly, have become more aggressive under the current administration, so there is a much greater likelihood of dispute. The administration's throwing a lot of resources, they are putting in leadership roles in these agencies, former litigators themselves, so we're just seeing an uptick in aggressive enforcement tactics from these agencies.

Alitia Faccone:

Thanks, Matt. Rich, given the propensity for the government to litigate these cases, as Matt just discussed, what were some of the issues that resonated with our attendees? What do they want to know? What do they need to know?

Richard Mrizek:

Many of the attendees were expressing their concerns about the fact that they were unable to stop government litigation going forward, even if they had individual resolutions with the private party that initially brought a charge or other issues to the attention of the government. And we discussed the difficulties of dealing with the government and how you need to be aware that they're looking at different things than simply the individual concerns of a single employee, but rather more systemic changes, and that the government's always going to be focused on more widespread systemic relief, and that those issues will more strongly resonate with the government than simply individual relief for specific employees.

So there was concerns about how to best to deal with that. How do you address those issues with the government? How do you approach getting resolution if you can't simply seek relief with individual employees? The other thing, I think, that resonated with the audience is that there are very specific and different processes for each of these agencies, and that having knowledge about how that works can really be an important and effective way in dealing with those agencies. So the ins and outs are going to be very different for each one of the agencies that we deal with, and having the knowledge of that process and what resonates with the agency can be really important and effective in giving people the best representation to address those concerns.

Alitia Faccone:

Melanie, what do you believe are the key takeaways employers should keep in mind when addressing these issues in their organizations?

Melanie Paul:

Well, it is of paramount importance to have experienced counsel with these agencies and in these types of investigations, inspections, or audits, to really guide companies through the process and position them to get the best results in the end, because what ends up in litigation begins at those initial stages with the agency, and so how a company responds to the agency at those early stages, whether it's interviews, document requests, is really important. There can be ways that experienced counsel understands to limit the scope of the government's inquiry or requests for documents or information, and to be able to do that while also putting the narrative forth for the client, that is important to share at that stage, because otherwise, the government will create its own narrative of the situation. And so having experienced counsel to be able to help employers do that is really important to position them for success in the end result.

Alitia Faccone:

Thank you. Matt, there's a lot of subject matter experience in this room. How is Jackson Lewis, how are your colleagues here today, helping employers deal with these issues?

Matt Camardella:

Sure. So the primary way that we keep clients and friends of the firm apprised of developments in the OFCCP enforcement space is through our award-winning blog, the Affirmative Action Advisor. So if this is a topic of interest to you and you want to stay current, we would certainly encourage you to register for that on our website.

Richard Mrizek:

Upcoming in April, we're going to be hosting a webinar with Vice Chair Jocelyn Samuels of the EEOC to provide more insight and perspective of what EEOC's enforcement priorities are and how they're addressing new legal updates and guidance from the agency. So again, we are aspiring to give the most updated information from the actual agencies themselves, to give our clients the most information to best position themselves to deal with an ever-changing employment environment.

Alitia Faccone:

Fantastic. Melanie?

Melanie Paul:

Well, OSHA has recently issued a number of guidance memos to the field for the issuance of more citations and more penalties. So we are expecting to see an uptick of that, and as a result, an uptick in litigation. And this is going to be really important for companies to, early on, identify somebody who can help them navigate through this. And so we are putting out a lot of information via blogs, via articles, and most recently there's a podcast on these new enforcement initiatives from OSHA regarding instance-by-instance citations and the anti-grouping of citations, if you will, all of which are going to result in greater penalties and potentially greater litigation amongst employers. And so look out for those.

Alitia Faccone:

Melanie, Matt, Rich, thank you for joining us behind the podcast mic today, and enjoy the rest of the conference.

Richard Mrizek:

Thank you so much.

Alitia Faccone:

I'm here with Adrienne Conrad and Kirsten Milton. Can you each tell us a little bit about yourself, where you're from, and your practice at Jackson Lewis?

Adrienne Conrad:

I'm Adrienne and I am from our San Diego office. I'm a principal there, and my areas of practice are unfair competition litigation, as well as internal investigations and HR operational audits.

Kirsten Milton:

I'm Kirsten. I'm a principal in our Chicago and Las Vegas offices. I primarily do class and collective action work, but I certainly have a smattering of single plaintiff and multi-plaintiff litigation discrimination retaliation claims.

Alitia Faccone:

Kirsten, the title of your presentation today was 'Settlement Agreement Strategy: Know When to Hold Them, Know When to Fold Them.' Can you tell our listeners a little bit about your program, what you covered, and why it was important to present this topic this year at CCC?

Kirsten Milton:

One of the big things that we covered during our presentation were restrictions on confidentiality. That was the majority of our presentation, and it was important to cover because we've certainly seen the most recent NLRB decision, which we'll talk about in a minute, but also the fact that states are starting to have very specific requirements in terms of non-disparagement, non-disclosure in requirements in their settlement and separation agreements. We also talked about issues related to insurance coverage and things to think about when putting together settlement agreements. Certainly tax and how to tax settlement amounts were a big part of our presentation. And then we'd had just some other considerations at the end, liquidated damages, mutual agreements, things like that.

Alitia Faccone:

Adrienne, what were some of the issues that really resonated with your attendees during the presentation? What did they really want to know about this topic?

Adrienne Conrad:

Well, specifically with regard to confidentiality provisions and non-disparagement provisions, many of the attendees were having a lot of questions around, well, if we're going to settle with someone and pay them a large sum of money, but we can't make it confidential, isn't that going to stifle settlements? And that certainly is the case. So one of the things that the questions were really centered around was what can we do to try to get around this? How can we still have some form of confidentiality? And so we talked through some potential alternatives to address that.

Kirsten Milton:

So some of the things we talked about from a conservative approach to settlement agreements, the first recommendation in light of the NLRB decision would be to remove confidentiality completely. But as Adrienne was talking

about, many of our clients clearly do not want to do that. So another option is to put a disclaimer in the settlement agreement, such that you make very clear that the individual is not waiving any rights with respect to their rights under the NLRA. So with respect to the longer disclaimer, it again lets the employee know that they're not waiving their rights under the NLRA, but then it also provides a more detailed list of what those rights are under the NLRA.

Alitia Faccone:

Adrienne, given all the questions that were asked and the concerns that were raised, what do you believe are some key takeaways employers should keep in mind when addressing these issues?

Adrienne Conrad:

Well, one of the most important things is for them to review any current confidentiality and non-disparagement provisions that they may have in any of the agreements that their employees are signing, and to assess their risk level on whether to take that all together in order to have the lowest risk, particularly if they're in a state or they operate in states that have even more restrictions on confidentiality or non-disparagement agreements than under the federal law. And in addition to that, to have them reviewed by outside counsel and to just take a look to see, okay, if we're going to take the risk to have some sort of work around the restrictions, to know that that's a potential they could be a test case, and do they really want to go down that road?

Alitia Faccone:

Kirsten, how are you and Adrienne and your colleagues at Jackson Lewis providing assistance to organizations on the issues in this area?

Kirsten Milton:

So because Jackson Lewis has so many different offices in so many states, we're really able to provide our clients with settlement agreements, separation agreements, in an efficient manner that ensures that those agreements are consistent with what federal law and particular state law requires. And with confidentiality, we're not talking about just whether it can be in the agreement or not. There are a lot of states where, if you're going to include it, you also have to have very particular language, and so we know what that language is. We keep up to date on the law, and we are able to very efficiently update our template agreements for our clients.

Alitia Faccone:

Kirsten, Adrienne, thank you so much for joining us behind the We Get Work podcast mic today, and we hope you enjoy the rest of the conference.

Adrienne Conrad:

Thank you.

Kirsten Milton:

Thank you.

Alitia Faccone:

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