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Employment Practice: Duane Morris

Law360, New York (September 08, 2008) -- As the economic downturn and a less employer-friendly U.S. Supreme Court results in more employee lawsuits being filed, careful counseling could mean all the difference between a simple summary judgment or a long and protracted trial, lawyers at Duane Morris LLP said.

Thomas Servodidio, chair of Duane Morris' employment and immigration practice group who has been with the firm since graduating law school in 1987, said that as the economy slows and jobs grow more scarce, employees are more likely to bring any type of suit they can.

"The nature of an employment practice, especially the litigation part, is that it can be somewhat counter-cyclical to the economy. When we're in uncertain economic times, folks who were recently laid off may feel like they have nowhere else to turn for income besides the courts," Servodidio said.

"At the same time, companies are tightening their belts and have less safety nets for employees that are built into their business. As a result, people don't have help in that transitional period between jobs and they get more litigious," he said.

It hasn't helped matters that the downturn has come at a time when much of the U.S. population is aging into a protected class. Baby boomers, who make up 26 percent of the population, are quickly entering what used to be retirement age.

"I have definitely noticed that there's been a large increase in age discrimination claims — probably about 30 percent of what I do now is age discrimination," said Annette Idalski, a labor and employment litigator at the firm.

Idalski spoke of a recent case she litigated on behalf of plastic packaging company Consolidated Container Co. in California. An older employee had been fired for not following protocol, and brought a Title VII age discrimination suit and whistleblower claims.

An employee who was over 60 was fired after not locking down a machine before trying to fix it. He brought an age discrimination suit, but the company had specific policies about locking down machines before working on them. The company won the suit and was granted attorneys' fees.

Idalski said the victory was because Duane Morris had helped Consolidated Container put its very clear policies in place. The company had sessions with employees about the rules and had them sign affidavits ensuring that they understood them.

“Even if they do end up in litigation, the clients and companies that fare the best are the ones that followed steps to proactively prepare for it. ... The company did what it was supposed to do, and that's the way companies need to protect themselves,” Idalski said.

Advance preparation is especially important because of the renewed movement to establish union representation and the increase in wage-and-hour actions, Servodidio said.

“For a while, you saw a dip in traditional labor law because there were fewer workplaces with unions in place. But there has been an increase in organizing activity in a number of industries,” Servodidio said. “Luckily, it's an expertise that our firm has maintained since we first started. We have folks that are experienced in counseling clients in maintaining a union-free workplace,” he said.

In May, the firm was able to help [Fresenius](#) USA Manufacturing Inc. overturn an administrative law judge's ruling in front of the National Labor Relations Board.

Fresenius had argued that it was improperly denied the opportunity to monitor a colored-ballot union election that was being overseen by a colorblind man, who, the company said, could not differentiate between the colors of the ballots, failed to use separate ballot boxes for two voting units, and took the ballots home over a weekend where they were not monitored by an independent party.

The NLRB panel ordered a second election to be held.

“Based on this decision, it may be somewhat easier for employers to challenge the results of an election based on board agent conduct,” Servodidio said at the time.

Servodidio also said his clients were worried about a recent wave of wage-and-hour litigation, especially class action claims, which, Servodidio said, “can be very high profile and expensive to defend.”

Though it is impossible to completely stave off that type of lawsuit, companies could limit their impact by using a self-audit, he said.

“Employment counseling is the bread and butter [of the practice] — the day-to-day conversations you're having with employers about hiring, employee discipline,

investigations of misconduct,” Servodidio said, noting that Duane Morris devotes a significant portion of its time to offering advice to its clients.

“Our business model is to have lawyers on the ground throughout the country and internationally to provide prompt service to our clients. We can provide one-stop shopping, wherever national clients may have employees,” Servodidio said.

Servodidio also said, “We will go into [clients’] businesses and train employees, in a proactive attempt to change the way they hire people, discipline misconduct and so on, which helps minimize the likelihood that claims will be brought because of mistakes on their part.”

Keeping clients abreast of changes in the law helps them prepare for shifts in the types of lawsuits that are filed because of recent U.S. Supreme Court decisions.

Idalski said, “The Supreme Court absolutely does dictate trends in employment law,” noting Burlington Northern Santa Fe Railroad v. White in 2006. In that case, the Supreme Court held that Title VII retaliation claims could be brought even if the allegedly retaliatory actions were not linked to employment.

The decision came the same day that the Supreme Court ruled in CBOCS West Inc. v. Humphries that retaliation claims are permissible under Section 1981, a discrimination law passed in 1866 that prohibited discrimination specifically based on race or color.

In June 2008, the Supreme Court ruled that if an older employee claims a company's decision led to a disparate impact under the Age Discrimination in Employment Act, it is up to the employer to prove that its action was based on a reasonable factor other than age.

“It's become much easier for employees to bring certain types of claims, and much harder for employers to knock them out in a dispositive motion because of these Supreme Court decisions,” Servodidio said, adding that one of the few exceptions was Ledbetter v. Goodyear, in which the Supreme Court ruled that Title VII pay discrimination claims are subject to a six-month statute of limitations.

Servodidio said that with all that is going on in the field, the employment practice will continue being a staple of the company.

The practice manages a rate structure to be “reasonably priced for clients,” Servodidio said, while focusing strongly on “cross-selling and cross-marketing.”

“Employment law is an easy sell because every business has employees, and thus they have a need for employment counseling and services. Some large firms don't have the same competitive advantages and end up pricing themselves out of the market,” Servodidio said.

“Because of these factors, the individual partners are able to maintain strong client bases. Based on this cross-selling we've been able to sell this strong employment practice to set ourselves apart from the competition,” Idalski said.

--By Elaine Chow; Additional reporting by Ron Zapata, Erin Coe and Erin Marie Daly