



October 2009

## EMPLOYMENT CLASS ACTIONS BY THE GOVERNMENT ARE COMING BACK

### CLIENT ALERT

The Obama Administration is gearing up to investigate and file discrimination and employment compensation class actions far beyond what we've seen in the last eight years. Consider the following:

- The Equal Employment Opportunity Commission, tasked with enforcing the nation's civil rights employment laws in the private sector, has included in its proposed 2010 budget an additional \$13 million for the hiring of 224 employees to address, among other things, the Lilly Ledbetter Fair Pay Act. [www.eeoc.gov/abouteeoc/plan/2010budget/index.html](http://www.eeoc.gov/abouteeoc/plan/2010budget/index.html). That Act will make it easier for employees to sue for gender discrimination in pay.
- Attorney General Eric H. Holder, Jr. recently announced plans to add as many as 50 lawyers to the 350 lawyers of the Civil Rights Division of the Department of Justice via a 2010 proposed budget increase of \$22 million to bring a new round of high-impact, high-profile discrimination cases against state and local government employers that were largely absent from its docket under the previous administration. <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/25/AR2009092502151.html> and <http://www.nytimes.com/2009/09/01/us/politics/01rights.html>
- The Wage and Hour Division of the Department of Labor, charged with enforcing the Fair Labor Standards Act against private employers, stands to gain an additional 288 employees (through a proposed budget increase of \$30 million) who will be responsible for enforcing wage and hour standards. <http://www.dol.gov/dol/budget/2010/programchanges.htm>

The prospect of these additional resources, coupled with a greater ideological commitment to bringing such suits, creates a scenario where these federal actors soon will be suing more companies and state and local governments in bigger lawsuits. The time to prepare for such a lawsuit is before you get sued. Proper preparation includes at least three components.

- First, the time is ripe for increased attention to your compliance programs.
  - Are your managers, supervisors and human resource professionals properly trained to investigate employee complaints of harassment and discrimination?
  - Have your employee handbooks and personnel policies recently been reviewed?
  - Are your classifications of employees as exempt or non-exempt from the overtime pay requirements of the Fair Labor Standards Act correct?
- Second, prudent companies will determine *before they are sued* whether their litigation counsel is equipped to handle mass employment claims in a cost effective fashion.
  - How much experience does your outside counsel have with large-scale litigation involving federal and state legal issues?
  - Does your outside counsel use innovative staffing techniques to manage and conduct high-volume discovery activities in a cost effective manner?

*This Client Alert provides only general information and should not be relied upon as legal advice. For more information, contact your Patton Boggs LLP attorney or one of the authors listed below.*

Douglas B. Mishkin  
202-457-6020  
[dmishkin@pattonboggs.com](mailto:dmishkin@pattonboggs.com)

Scott Louis Weber  
973-848-5630  
[sweber@pattonboggs.com](mailto:sweber@pattonboggs.com)

[WWW.PATTONBOGGS.COM](http://WWW.PATTONBOGGS.COM)

- Does your law firm have the technology and the trained staff to be able to operate electronically as a partner with your company to facilitate the sharing of millions of documents while preserving their security?

With the proliferation of email and other electronic forms of communication and information sharing, the use of technology to enhance efficiencies is pivotal to the successful defense of a large litigation. Having a relationship with a litigation firm with this experience and these capabilities *before you are sued* will enable you to respond more promptly and vigorously upon receipt of the complaint.

- The third component may be the least obvious but is as important as the first two. The upcoming round of class action employment litigation is a product of politics and the change in public policy resulting from the last election. Any prudent litigation defense strategy must take that into account. An aggressive defense strategy includes many elements beyond the motions and arguments asserted in court.
  - Do the government's litigation arguments conflict with other policies being promoted by other government agencies or by Congress?
  - What constituencies outside of your company have interests that may be affected (negatively or otherwise) by the lawsuit?
  - What role will press coverage play?

Decisions to approve the filing of these lawsuits ultimately must be approved by political appointees whose judgments are influenced by, or are subject to, these and similar factors. Your law firm should have the public policy expertise to understand and anticipate the thinking and motivations of those decision-makers, and thereby integrate these factors into your litigation defense strategy.

Patton Boggs offers a unique combination of the employment, class action and public policy expertise your company will need when it is on the receiving end of one of these class actions. We would be happy to talk with you – now, before you've been sued – to discuss the possibility of working with you.

---

This Alert provides only general information and should not be relied upon as legal advice. For more information, contact your Patton Boggs LLP attorney or one of the authors listed below.

**Douglas B. Mishkin**  
202-457-6020  
[dmishkin@pattonboggs.com](mailto:dmishkin@pattonboggs.com)

**Scott Louis Weber**  
973-848-5630  
[sweber@pattonboggs.com](mailto:sweber@pattonboggs.com)

WASHINGTON DC | NORTHERN VIRGINIA | NEW JERSEY | NEW YORK | DALLAS | DENVER | ANCHORAGE |  
DOHA, QATAR | ABU DHABI, UAE