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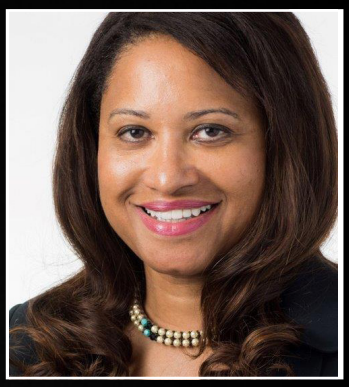
Session 803

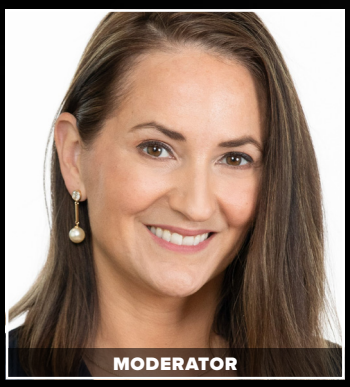
EMPLOYMENT LAW LITIGATION ISSUES IN 2022

Rodney Gregory Moore
Dentons US LLP

Eric Akira Tate
Morrison & Foerster LLP



Stephanie Wilson
Reed Smith LLP



Erin Everitt
McKinsey & Company

EXECUTIVE SUMMARY

Employment Law Litigation Issues in 2022

MODERATOR:

Erin Everitt, *Partner, Deputy General Counsel,* McKinsey & Company

PANELISTS:

- **Rodney Gregory Moore,** *Partner,* Dentons US LLP
- **Eric Akira Tate,** *Partner,* Morrison & Foerster LLP
- **Stephanie Wilson,** *Partner,* Reed Smith LLP

OVERVIEW

A panel of lawyers with expertise in employment law offered insights into trends and recent developments. Continued effects of COVID-19 on the workplace include issues related to back-to-work protocols and how to ensure safety without appearing too stringent. Greater awareness around sexual assault in the workplace has resulted in restrictions in the use of non-disclosure agreements as part of settlements. States are also narrowing non-compete agreements, placing caps on their duration. The panel also discussed the imperfect use of AI in hiring, and the importance of being vigilant when drafting terms and conditions in arbitration agreements.

KEY TAKEAWAYS

In the continuing aftermath of the pandemic, employers are seeking advice on the most effective back-to-work protocols.

Amid a tight job market, employers are interested in identifying the best way to help employees ease back into work. Employers struggle with competing measures in terms of wanting employees to return but not wanting to come on too strong with rules around mandatory vaccines, testing, and masking.

Initially during COVID, lawsuits were filed, especially by healthcare workers, claiming employers were not doing enough to protect their safety. Later during the pandemic, suits were filed by employees against vaccine mandates claiming "sincerely held religious beliefs."

BIG IDEAS

- **Back-to-work protocols are a focus for employers.**
- **There is a move toward narrowing and restricting non-disclosures in settlement agreements, as well as capping the duration of non-compete agreements.**
- **AI in the hiring process, while designed to remove bias, has proven problematic.**
- **Employees must have fair notice of arbitration agreements; language in arbitration agreements should be clear on choice of law and compelling third-party discovery.**

Over the next few years, Rodney Moore expects to see more unionization attempts and more National Labor Relations Board claims. There is also likely to be an increase in Fair Labor Standards Act cases, with employees claiming they worked excessive hours remotely and were not compensated for the extra time.

"Despite the evolving laws surrounding COVID-19, much of the COVID-related litigation is covered by existing legal theories such as religious accommodation and fair labor issues in remote work. While remote work issues are related to COVID, they are not dependent on a pandemic."

— Erik Akira Tate, Morrison & Foerster LLP

Confidentiality and non-disclosure agreements (NDAs) are increasingly controversial when included in settlement agreements.

Growing out of the "Me Too" movement, a number of states passed laws that restricted the ability of employers to include and require confidentiality and non-disclosure agreements in the context of sexual assault settlements.

In 2018, New York passed a "for preference" law allowing employers to include confidentiality provisions if the employee was provided with the language 21 days in advance. If the employee allows the provision to be included, they still have seven days to rescind. The following year, that requirement was expanded to all forms of employment discrimination settlements.

In 2021, California followed suit but stated that, if the employee agrees to the incorporation of the NDA, a disclaimer must make clear that nothing in the agreement prevents the disclosing of unlawful acts in the workplace. The addition of the disclaimer diluted the objective of NDAs.

In 2022, the state of Washington passed a law saying that NDA provisions cannot be included in settlement agreements. If an employer includes such a provision, it triggers a private right of action, a $10,000 fine, attorney fees, and other civil remedies.

Over the years, states have been steadily passing laws that restrict and narrow the scope of non-compete agreements.

In a move toward narrowing non-compete agreements, states are restricting their scope. Massachusetts passed a law capping non-compete agreements at 12 months. The law also requires that employers provide employees with at least 10 days' notice before a non-compete can be enforceable. Washington state has a similar statute that caps non-competes at 18 months.

In the case of laid-off employees, if employers want to force a non-compete, they may have to provide pay. These restrictions on non-competes appear to be trending and are likely to continue in the direction of narrowing the scope.

The intersection of AI and employment law appears likely to be a focal point for years to come.

As the science behind artificial intelligence evolves, so will laws that provide more guidance and governance. The EEOC estimates that 90% of Fortune 500 companies are using AI in their recruitment and application processes. The intention is that AI will minimize the risk of implicit/explicit bias associated with human decision making. Additionally, companies hope to reduce time and costs of sifting through thousands of resumes.

However, these expectations around AI remain aspirational. Much depends on the data fed into the algorithms, which could result in disparate impact. Studies have shown that the data itself is often problematic.

For example, seeking to expand its geographic reach for IT applicants, Amazon used AI algorithms to identify new applicants who fit the profile of its existing IT employees. Unfortunately, this resulted in the algorithm prioritizing men because Amazon's IT department was largely male. Therefore, if an applicant noted that she went to a women's college, she was weeded out of the application process.

"AI is an exciting technology and being used well in some areas, but it is important to thoroughly interrogate the data feeding the algorithm to ensure quality input."

— Stephanie Wilson, Reed Smith LLP

Arbitration agreements are being challenged in two key areas: execution and discovery.

Execution issues in arbitration typically come into play when an employee files a lawsuit despite an arbitration agreement being in place. While a signed contract is traditional, the Federal Arbitration Act does not explicitly require a signed contract—just that a contract was entered into by the parties. This can be proven by a showing that arbitration was included within an employee manual.

Over the last several years, electronic signatures have also gained in popularity. In addition to traditional electronic methods such as DocuSign, employees are given access to an employer or third-party vendor portal where they can view and electronically sign employment documents during onboarding. Additionally, during an online new hire orientation, the employee can be required to acknowledge the arbitration agreement as a term and condition of employment.

While any one of the above methods of acknowledgment is sufficient under law, best practice is to have at least two of the above methods in place as proof of agreement. This can be helpful if, for example, an employee disavows the electronic signature.

Another emerging development in arbitration is around third-party discovery subpoenas (under Section 7 of the FAA). The Second, Third, Ninth, and Eleventh Circuits require non-party document disclosure to take place only when the non-party appears at a hearing before the arbitrator(s); the Sixth and Eighth Circuits authorize arbitrators to subpoena pre-hearing document disclosure from non-parties; and the Fourth Circuit generally allows discovery subpoenas where a "special need" exists.. District courts will typically follow the lead of their circuit.

"It is very important, when drafting arbitration language, to be clear on the venue/choice of law and the type of discovery the parties are agreeing to authorize for consideration by an arbitrator."

— Rodney G. Moore, Dentons US LLP

BIOGRAPHIES

MODERATOR

Erin Everitt

Partner, Deputy General Counsel,
McKinsey & Company

Erin Everitt is a partner and deputy general counsel of McKinsey & Company, where she leads the ~40 members of the global Employment Law Team and the global Immigration Law Team. As deputy general counsel, she oversees all global personnel-related litigation of ~40,000 employees, to include discrimination, retaliation, trade secrets, and restrictive covenant litigation. Prior to joining McKinsey, Erin was an Assistant United States Attorney with the U.S. Attorney's Office of the Department of Justice, where she successfully tried federal jury and bench trials with both the Criminal and Civil divisions. She began her career in the Antitrust Practice group of White & Case LLP after graduating with a J.D. from Southern Methodist University and an LL.M. from Georgetown University Law Center.

Rodney Gregory Moore

Partner, **Dentons US LLP**

Rodney Moore is an employment litigator with Dentons. He has represented employers across the US, and especially enjoys representing employers that seek to foster a workplace environment that is respectful of all cultures. If and when they have fallen short of their core values, he works with clients to design a restorative remedy that reinforces their core values and resolves the litigation in an efficient manner. Rodney has represented employers as lead or co-counsel in federal and state court litigation, including single-party litigation and class or collective actions for overtime and other wage-and-hour claims under the FLSA, Title VII, FMLA, and ADA, as well as due process claims brought by unions and/or public employees. Most recently, Rodney successfully compelled mandatory arbitration over two plaintiffs' objections challenging the authenticity and enforceability of their electronically executed signatures; defended a claim of wrongful termination arising out of termination of an IT professional based on a background check; defended a COVID-19-related lawsuit arising out of layoff (failure to accommodate and retaliation); defended claims brought by a terminated insurance agent alleging misclassification (as an independent contractor) Title VII discrimination and Title VII retaliation; and defended claims of discrimination and retaliation by a high-level technology employee who surreptitiously recorded secure workplace conversations with a supervisor.

Rodney Gregory Moore
Dentons US LLP
rodney.moore@dentons.com

Eric Akira Tate

Partner, **Morrison & Foerster LLP**

Eric Akira Tate co-chairs Morrison Foerster's Global Employment and Labor Group. He represents technology and other companies in bet-the-company trade secrets and employee mobility cases. Eric also represents boards of directors in #MeToo and other sensitive internal investigations and disputes with executives, and companies in whistleblower, wrongful termination, discrimination and harassment, wage-and-hour, and other employment litigation. In addition, Eric counsels companies on employment law compliance and transactional matters, including enforceability of restrictive covenants and other personnel policies and procedures, employment aspects of mergers and acquisitions, and collective bargaining and traditional labor relations. Eric is a leader in the American Bar Association's (ABA's) Labor and Employment (LEL) Section and LEL's Employment Rights and Responsibilities (ERR) Committee, serving as co-chair of the Covenants Not to Compete and Trade Secrets Subcommittee. Eric also serves as a mediator for the Northern District of California's Alternative Dispute Resolution Program, handling trade secrets and employee mobility, wage-and-hour, employment discrimination and harassment, and traditional labor relations matters. Eric is a member of the INROADS Alumni Association and the 100 Black Men of the Bay Area, Inc., and has served as a mentor for students in the Level Playing Field Institute's IDEAL Scholars Program.

Eric Akira Tate
Morrison & Foerster LLP
etate@mofo.com

Stephanie Wilson

Partner, **Reed Smith LLP**

Stephanie Wilson is a partner in Reed Smith, LLP's Financial Industries Group. Ms. Wilson is a skilled advocate and negotiator for national and international financial services clients in merger and acquisitions, all legal and administrative aspects of employment law, risk assessment and business insulation, contract negotiations, and regulatory compliance. In this regard, Stephanie litigates and tries cases on federal, state and administrative claims concerning discrimination, whistle-blower allegations, retaliation, and unfair competition. Additionally, Ms. Wilson provides training, counseling, and advice on compliance issues, diversity, equity and inclusion programs, implicit bias, and internal investigations of complaints. She speaks and writes frequently on current employment issues, such as algorithmic bias. Ms. Wilson was inducted recently as a fellow in the College of Labor and Employment Lawyers, is first vice chair of the Labor and Employment Law Section of the New Jersey State Bar Association, and holds a bachelor's degree from Yale University and a JD from Columbia University School of Law.

Stephanie Wilson
Reed Smith LLP
swilson@reedsmith.com