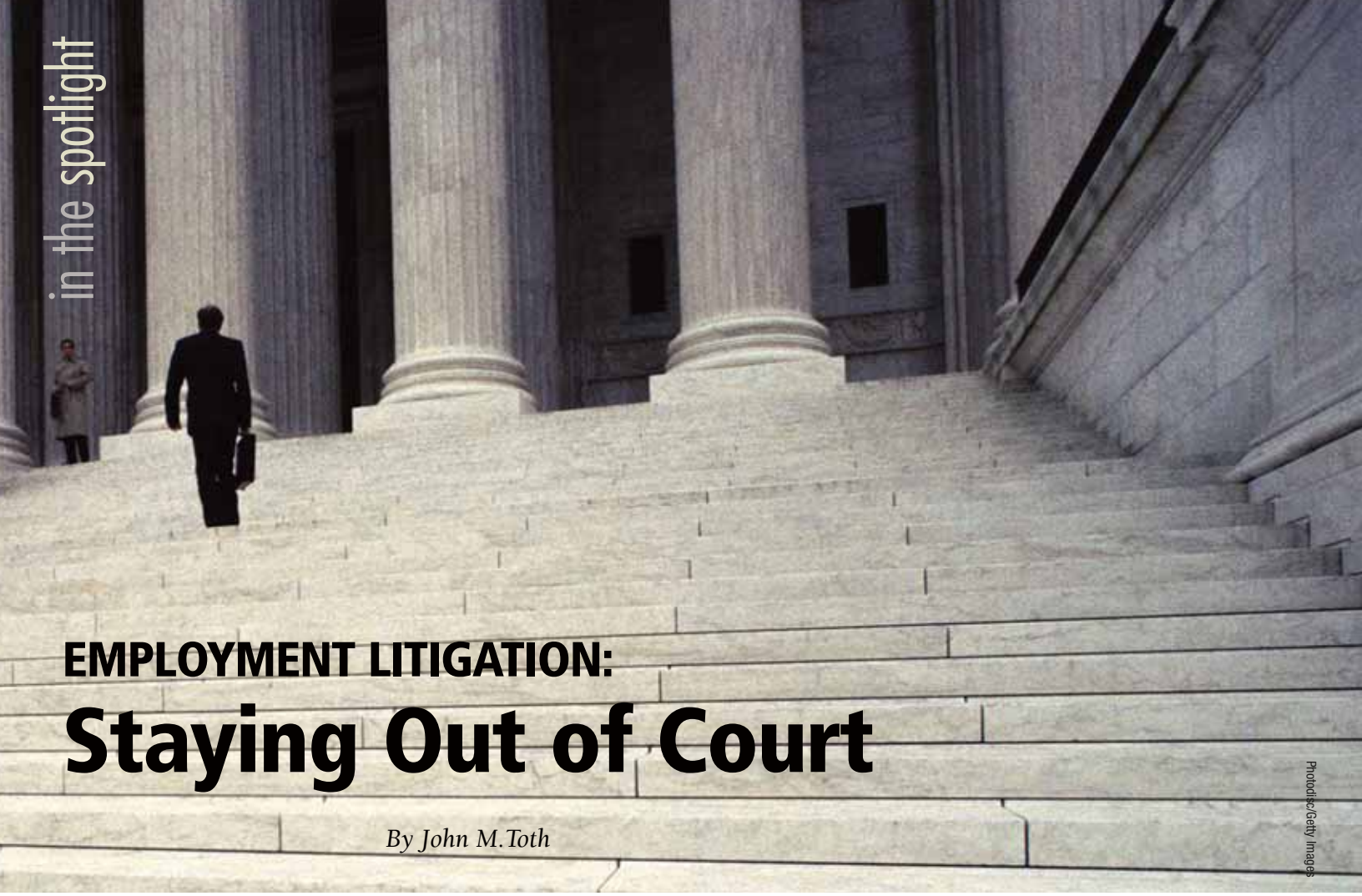

EMPLOYMENT LITIGATION: Staying Out of Court

By John M. Toth

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Employment litigation alleging race, sex and disability discrimination has declined since the 1990s. According to W. R. "Randy" Loftis Jr., managing member and litigation practice head at Constangy, Brooks & Smith, LLC, this decline is in part due to an effective Equal Employment Opportunity Commission mediation program that settles many such claims without trial.

However, claims alleging age discrimination, wage and hour law violations, and improper denial of health benefit coverage have the potential to increase dramatically. Lawsuits over these issues will likely continue to grow. Examining these types of claims reveals the key concerns for employers as well as the proactive steps that can help reduce litigation risk.

An Aging Work Force

Over 40 percent of the U.S. work force will reach age 65 before the end of this decade. Constangy Managing Member Kathy Perkins says, "The Age Discrimination in Employment Act (ADEA) uniquely creates a protected class for which everyone eventually qualifies, and with the baby boomer bulge moving toward retirement, we can expect more age discrimination claims." Perkins notes that as employers are called upon to address attributes of an older work force—physical and mental changes that affect job performance, retirement date planning, conflicts with younger supervisors—some older workers may see the intervention as discriminatory. The ADEA sets a higher standard to prove discrimination than Title VII of the Civil Rights Act, providing an employer defense that an adverse action was based on "reasonable factors other than age." However, it's easy for jurors to empathize with ADEA claimants.

> **"If employers take actions which cause older workers to feel valued and respected, they will earn trust and credibility that helps reduce the likelihood of claims."**

Perkins urges employers to be proactive in creating an "age friendly" culture. They can show that older workers are valued by offering long-term care insurance, including age issues in supervisor training, actively recruiting older workers and creating part-time or other flexible work options. Other steps to prevent a rise in ADEA claims as baby boomers age include:

- Routinely assess all employees' future plans to gather information about workers' plans to retire without asking directly.
- Create visible and active roles for older workers.
- Establish a strong internal process to address claims.

"If employers take actions which cause older workers to feel valued and respected," explains Perkins, "they will earn trust and credibility that helps reduce the likelihood of claims."

On or Off the Clock

Employees' Fair Labor Standards Act (FLSA) claims typically allege that employers wrongfully classified employees as exempt from overtime pay or that the nonexempt workers were not compensated for hours worked "off the clock." Constangy Managing Member James M. Coleman sees two groups of FLSA claims posing risks for employers. In class action claims premised upon state wage and hour laws, under Rule 23 of the Federal Rules of Civil Procedure, each member of a court-certified class is included in the litigation unless he or she chooses to opt out. However, Section 16(b) collective actions, which are unique to the FLSA, are growing rapidly. When the court certifies a case for collective action status and orders notice be sent to putative members of the class, employees must submit a consent to opt in; otherwise, they will not be affected by the case. In either situation, an employer's potential liability can change drastically depending upon whether the court allows the case to proceed as a class or collective action.

"Employers win or lose their case when the court decides to certify a class or authorize a collective action notice," says Coleman. It is then that employers must demonstrate that their compensation, classification and timekeeping procedures were proper. Despite variations among judges, the plaintiffs' threshold of proof to secure a collective action notice is much lower than that required in a traditional class action. Coleman concludes, "Because successful FLSA claimants generally receive liquidated damages in addition to back pay, effectively doubling liability, a court ruling that a case can go forward on a class or collective action basis generally shifts the employer's focus to settlement."

Battles Over Benefits

Many employers believe that plaintiff claims are less likely under the Employee Retirement Income Security Act (ERISA) for denial of health and disability benefits, because courts can only award coverage and not damages. However, as Constangy Managing Member Carl Cannon warns, "More plaintiff attorneys are taking such claims on contingency, because health care benefits cover extremely expensive procedures, and long-term disability payments can equal 60 percent of employee pay." Companies that self-insure their benefit coverage regularly face allegations that in-house plan administrators put company profits above their ERISA fiduciary duty to beneficiaries by denying coverage. Third-party administrators who make initial coverage decisions often require hold-harmless provisions that indemnify their actions.

"Although most summary plan documents say that the detailed plan governs, many courts have awarded coverage to employees based on language in poorly drafted plan summaries."

Cannon holds that many employers overlook opportunities to reduce their ERISA liability by failing to purchase fiduciary insurance, keep accurate and current records on dependents of beneficiaries and ensure that summary plan documents are well-written and fully reflect plan coverage details. "Although most summary plan documents say that the detailed plan governs," he cautions, "many courts have awarded coverage to employees based on language in poorly drafted plan summaries." Such ambiguities are at the heart of much ERISA liability, and employers should seek to eliminate them.

Settlement Versus Trial

"Perhaps only 5 percent of all employment cases filed are tried to resolution," Loftis contends, "and an employer's decision to settle generally comes down to economic considerations." Given that employers typically encounter juror mistrust and skepticism when age discrimination or wage and hour claims come to trial, Loftis urges corporate counsel to understand the issues driving the potential litigation increase in these areas and to take proactive steps that avoid trial. "Once an employer is in the courtroom, there's no guarantee of results," he observes. "Unless there's an overriding reason to the contrary, settlement is typically the best option for employers."

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