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- Preventive Legal Medicine: The Dangers of Class-Actions Call for Experienced Counsel, with Allen King
- Opportunities in Diversity, With David Casey
- Defense for the Benefit-Plan Lawsuit, with Steven Friedman

LITTLER MENDELSON, P.C.

as seen in CHAIN STORE AGE
THE NEWSMAGAZINE FOR RETAIL EXECUTIVES

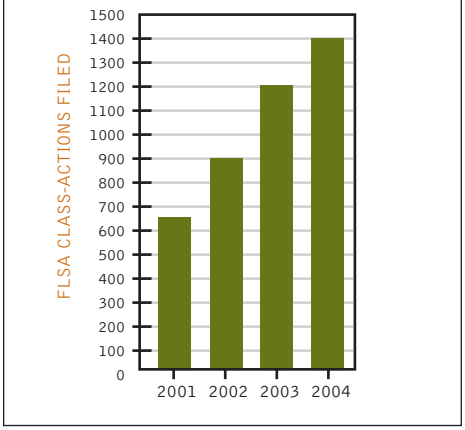
Preventive Legal Medicine

The Dangers of Class-Actions Call for Experienced Counsel

In the last four years, employment class action lawsuits related to the Civil Rights and Fair Labor Standards Acts have risen dramatically, from less than 700 in 2001 to nearly 1,500 in 2004. These are alarming statistics for retailers. Not only are the potential damages multiplied tremendously by the formation of class litigation, but the retailer is particularly vulnerable to damage in the court of public opinion. Aggressive lawyers understand that a chain store embroiled in a massive class action discrimination or wage-and-hour lawsuit risks losing the loyalty of their mass-market customers.

The media is such an effective weapon wielded by litigators that "some lawsuits are even kicked off by a press conference," said Allan King, co-chair of the class action defense practice of Littler Mendelson, the nation's largest employment and labor law firm. According to King and other experts at Littler Mendelson, not only are detailed, preventive steps the best defense to class action lawsuits, the same preventive steps are powerful tools for defense lawyers in the event of litigation.

Nearly 1,500 Employment Class-Actions Are Filed Each Year



The best-case scenario, of course, is to stay out of the courts in the first place. Among Littler Mendelson's strengths is its ability to address — through a thorough, organization-wide review of hiring, pay and promotion policies and practices (or Class Action Audit) — effective prevention policies and alternative dispute-resolution strategies, the goal of which is to choke potential disagreements before they take root.

"It's more effective to catch problems before they become expensive, rather than rush in after the fact," said King. The firm's Class Action Audits have the purpose of doing just that. In both discrimination and wage-and-hour disputes, subtle distinctions demand careful analysis. Littler Mendelson is experienced in helping companies examine their hiring, pay and promotion practices in a way that highlights potential problems and offers advice to deter lawsuits.

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—Allan King, co-chair of the class action defense practice of Littler Mendelson

But the firm is arguably best known for its litigation skill. In fact, Littler Mendelson's Appellate Group in the last five years has worked on numerous cases that have changed, or reaffirmed, workplace law for the benefit of the firm's clients. "The objective is to act in time to head off a claim. But if it comes to litigation, we feel we're at an advantage because we've been in the trenches with these companies and can use that experience to develop defenses that make certification less likely," said King.

One of the key skill sets for defense attorneys in today's complicated world of class action lawsuits is the ability to understand and present statistics that purport to characterize a large class of employees. These statistics are subject to interpretation — and the case often rests on them.

"In our experience, the response to a class action lawsuit is never, 'Oh, they found out,'" said King. "It's a gray area. And the statistics can be manipulated to portray a pattern of misconduct where none is intended and may not truly exist."

The role of statistics in class action lawsuits is what first drew King to the legal profession. As an economist and former University of Texas professor, King played the role of expert witness with an ability to explain why certain numbers are important and others are misleading.

"The firm has years of experience presenting and attacking this kind of statistical evidence," he said.

Littler Mendelson, in fact, defended clients in 200 class action lawsuits last year. That experience, in concert with its success in preventing lawsuits, can provide a strong measure of protection against the tactics utilized by plaintiffs' attorneys in today's litigious environment.

Opportunities in Diversity

The question facing forward-thinking retail executives today is not, "Should corporate diversity be encouraged?" it's, "How should corporate diversity be encouraged?"

"Corporate America is more invested in diversity than ever," said David Casey, co-chair of the diversity practice of Littler Mendelson, the nation's largest employment and labor law firm. "Quite simply, leading executives today understand diversity as a corporate strategy to penetrate new markets."

The appeal of a diverse workforce is obvious in a changing America. The growth of the Hispanic market in the United States has led to several new retail concepts among grocery chains, including Lakeland, Fla.-based Publix Supermarkets' Sabor prototype. Atlanta-based The Home Depot earlier this year partnered with several Hispanic organizations to improve the chain's recruitment of Spanish-speaking employees to better serve customers.

Strategic diversity extends well beyond the retail sector. A 2004 Harvard Business Review article detailed how IBM made diversity a corporate strategy backed by commitment from all levels of the company and designed to generate real growth.

These examples just scratch the surface of corporate diversity initiatives. And according to Casey, diversity in the boardroom brings strategic advantages every bit as real as diversity on the sales floor. "Companies need to think in new ways to reach new markets," he said. "More diversity brings more ideas."

Promoting diversity within an organization, however, is easier said than done. And some of the major challenges are legal. For instance, there are laws against hiring or promoting employees on the basis of race. Additionally, the internal research that is crucial to measuring the level of diversity —and attitudes toward diversity—that exists within an organization is clearly protected by attorney-client privilege when conducted by a law firm. This is not necessarily the case when an outside consultant performs the review. If the purpose of internal research is to gain a truthful assessment of conditions inside a company, then the attorney-client privilege could serve as a crucial tool. But more than that, there's a need for legal protection.

"Partnering with a legal firm to pursue a diversity strategy is a step toward thinking proactively. It also brings in statisticians who know how to perform the analysis, and of course, legal experts who know the law."

-David Casey, co-chair of the diversity practice of Littler Mendelson

"If the consultant is not an attorney, research can serve as a blueprint to be used against the organization in a lawsuit," Casey said.

Littler Mendelson's diversity practice provides an integrated suite of services designed for Fortune 500 companies. Included in the program is a diversity and discrimination training program, engineered by experts in discrimination law.

Littler Mendelson practices what it preaches in terms of corporate diversity. In the recent "The Vault Guide to the Top 100 Law Firms," the firm was ranked No. 3 in "Best in Diversity" category.

The Littler Mendelson diversity practice grew out of the firm's expertise in preventing and defending class action lawsuits dealing with corporate hiring, promotion and pay practices. But the overriding goal of the program is to promote a proactive diversity strategy that allows corporations to benefit from a diverse pool of decision makers.

"Partnering with a legal firm to pursue a diversity strategy is a step toward thinking proactively," said Casey. "It also brings in statisticians who know how to perform the analysis, and of course, legal experts who know the law."

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Defense for the Benefit-Plan Lawsuit

The inescapable risks of investing in financial markets are well-publicized. But that doesn't protect companies from lawsuits launched by angry 401(k) plan participants.

In fact, lawsuits alleging mismanagement or breach of fiduciary responsibility related to company benefit plans are on the rise, causing concern not just for corporate plan administrators, but also for corporate officers.

Lawsuits related to poorly performing benefit plans are a relatively new corporate concern, and a case involving Enron serves as the legal milestone. The energy firm's spectacular implosion in 2000 — which decimated employee 401(k) plan balances heavily invested in Enron stock — will serve for years to come as the textbook case of 401(k) failure, and the legal implications continue to play out in the courts.

But it doesn't take a melt down of historic proportions to trigger a class-action lawsuit from employees.

"The 401(k) had a good ride up until 2000," said Steven Friedman, chair of the employee benefits practice of Littler Mendelson, the nation's largest employment and labor law firm. "But there are clearly a lot of companies out there that will be in hot water if they haven't paid sufficient attention to their programs."

For example, disappointing benefit-plan returns have spurred employee lawsuits at several large and prestigious companies in recent months. In most cases, the falling price of company stock — which factored into the company's benefits plans — precipitated allegations of mismanagement and breaches of fiduciary responsibility.

"We see a trend here that is still in its infancy," said Friedman. "There are going to be a lot of employee lawsuits grounded in ERISA."

ERISA — the Employee Retirement Income Security Act — is the federal law that emerged in 1974 to provide minimal standards of protection for individuals who participate in retirement and health plans.

"Companies are finding they're under a microscope more than ever before... Executives have to ask themselves: what is the company doing on a regular basis that makes it a prudent administrator of benefit plans."

-Steven Friedman, chair of the employee benefits practice of Littler Mendelson

Benefits programs have emerged as an area of increased scrutiny among regulators, shareholders and employees. In this environment, retailers are being forced to become acquainted, or perhaps reacquainted, with fiduciary responsibilities related to the management of corporate benefit plans, Friedman said. Waiting for trouble to strike first is a poor strategy.

Companies need to take steps to protect not only the investments of the company employees, but also to protect the company in the event of a lawsuit.

For example, in today's litigious environment, companies should form a benefits plan committee staffed by the appropriate executives, Friedman said. The committee would exist primarily to analyze the investments available to plan participants — to compare peer-group performance among funds as well as conduct long-term performance reviews of investments. The committee should also consider hiring a registered investment advisor to assist with the review.

Most importantly, companies need to create an investment policy statement — and make investment decisions in accordance with the statement. Such a policy provides the kind of corporate openness regulators seek to promote and is a strong defense against charges of mismanagement.

"Those who offer plans, under which employees direct their investments, have a duty to ensure that investments offered are 'prudent,'" said Friedman. The definition of "prudent" can be complex, but a key to living up to the standard is regular research on the offerings available to those in the benefit plan. Performing one-time due diligence isn't enough.

"Companies are finding they're under a microscope more than ever before," Friedman said. "Executives have to ask themselves: what is the company doing on a regular basis that makes it a prudent administrator of benefit plans."