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Recession Boom

California attorneys say a predicted 2009 employment litigation boom is coming true.

By Dhyana Levey

SAN FRANCISCO - As a rare silver lining to the recession, attorneys handling labor and employment litigation reported a boom in business during 2008 and predicted an even stronger flow of work for 2009.

While preliminary state numbers actually show a slight dip in employment-related filings at the beginning of this year, California employment attorneys on the plaintiffs' and defense sides say their work has skyrocketed.

Mass layoffs and the poor job market have led to the recent rush of people seeking legal counsel for wrongful termination suits, said Patrick M. Glenn, a San Francisco partner at Hanson Bridgett who heads the firm's labor and employment group.

Glenn, who defends employers, said his office has seen its employment cases spike this year by as much as 25 percent.

"In the past they got back on their feet," he said of employees. "Now people are having a hard time finding jobs, so they are suing employers that laid them off."

Whether or not the lawsuits are actually valid remains a question, said D. Gregory Valenza, a San Francisco partner at Shaw Valenza, which defends employers. He also reported a high volume of employment-related work.

"There's a lot of scared people who get fired," he said. "It equals more visits to plaintiffs' lawyers. ... Maybe they felt the employer used the economy to get rid of people they don't like."

Kathleen "Kay" M. Lucas, a San Francisco employment plaintiffs' attorney from The Lucas Law Firm, said age discrimination has become the top problem when employers implement layoffs. She said employers need to seriously consider why they're getting rid of a certain group of people in the scramble to save money, because higher-earners are often the oldest.

"It's very sad to see these baby boomers anticipating working into their 70s, but now they've lost their investments and their jobs," said Therese Lawless of San Francisco's Lawless & Lawless, which represents employees. "Employers seem much more willing to replace them with younger employees. That is a great tragedy in this culture."

However, preliminary numbers from the state Department of Fair Employment and Housing don't entirely agree with the reported trend.

While discrimination-related wrongful termination complaints filed with the state department rose from 5,096 during the last half of 2007 to 5,735 in the first half of 2008, they actually dropped slightly to 5,652 in the last half of 2008 to 4,855 in the first half of 2009.

Preliminary numbers from the California Department of Industrial Relations found wage-and-hour claims also dropped, to 17,958 filed statewide from January through May of this year compared to 18,531 during the same period last year.

Anmarie Billotti, associate chief deputy director of the fair employment department, said her numbers don't necessarily indicate less people are pursuing wrongful termination suits. An employee has a year from the date of their layoff to file with the department and, while they might already be meeting with attorneys, some wait until the last minute to file.

San Francisco County Superior Court records, on the other hand, show a slight uptick in employment filings. Wrongful termination lawsuits brought between January and June rose to 74 this year from 61 filed during the same time period last year. Other employment-related filings rose from 28 during the first half of 2008 to 37 in the same period of 2009.

Debra L. Fischer, a partner in Bingham McCutchen's Los Angeles office, said she's noticing more wrongful termination suits, but they aren't necessarily strong cases because the employees were let go as part of mass layoffs. That's caused plaintiffs' attorneys to seek fresher ways to bring employment suits, she added.

Valenza agreed. He said certain types of discrimination cases become a "flavor of the month," the most recent example being familial status discrimination.

Those cases evolve from employers allegedly favoring childless employees in the belief that they are better workers because they aren't dealing with child care issues. More women and men lately have said they were chosen for layoffs because they had just returned from maternity or paternity leave, Valenza said.

He also said he's seeing more employment suits brought by employees claiming they weren't properly compensated for on-call work or provided with an adequate workplace environment.

California Wal-Mart cashiers, for example, filed a class action in Alameda County Superior Court in June accusing their employer of violating a state labor code by refusing to offer them suitable seating. *Brown v. Wal-Mart Stores*, RG09457009.

"I think there are ebbs and flows in all sorts of lawsuits," said San Francisco employment plaintiffs' attorney Todd M. Schneider. "Employers get more creative in the ways they break the law."

Schneider, a partner at Schneider Wallace Cottrell Brayton Konecky in San Francisco, says his office hasn't experienced a notable jump this year in wrongful termination suits but has brought more wage-and-hour cases.

Employers often get into trouble when they don't give their employees proper notice for mass layoffs, he said. Also, as employers try to cut costs, some don't properly compensate their employees for rest breaks and overtime.

Wage-and-hour class actions have been especially popular in 2009, agreed Glenn, a defense lawyer. Many cases originate when people see plaintiffs' attorneys about their layoffs and attorneys ask them about the hours they worked and how much they were paid.

Although employers are trying to cut their legal budgets, the influx in litigation means a bump in work for employment and labor lawyers, said Kenneth D. Sulzer, a Los Angeles partner with Seyfarth Shaw and head of the firm's California labor and employment practice.

"Despite tighter budgeting and so forth, our work is still growing in labor and employment law," he said. "I believe that is true for most of the larger firms in California that have a substantial specialty in this area."

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