



Special Report: Impacts of COVID-19 on Employment Litigation in Federal Court

Watch a 30-minute recorded webcast to hear a discussion of our special report, Impacts of COVID-19 on Employment Litigation. We were joined by Tom Gies, partner at Crowell & Moring, and Jim Swartz, partner at Seyfarth Shaw, along with Rachel Bailey, legal data expert at Lex Machina. The speakers examined how to get data-driven answers to questions about employment litigation in this unprecedented time.

Topics that were discussed in this webcast were:

- Court activity
- Filing trends
- Significant developments in employment litigation due to the pandemic

Speakers:



Rachel Bailey
Legal Data Expert
Lex Machina



Tom Gies
Partner
Crowell & Moring



Jim Swartz
Partner
Seyfarth Shaw

Rachel Bailey ([00:03](#)):

Hello, everyone. Welcome to Lex Machina presentation on the impact of COVID-19 on employment litigation in federal court. I have two wonderful guests today. First, I want you to give them a few housekeeping notes. This will be a 30 minute presentation with some time for questions included in that time. There is a Q & A box on your screen. So you can ask questions anytime during the presentation. And if you have any questions that we don't get to during the presentation, we will follow up with you. The presentation includes both slides and then the speakers on audio and the platform has everything in separate boxes so you can move those around and resize them as needed.

Rachel Bailey ([00:48](#)):

A little about Lex Machina, we are a legal analytics company that helps users win. Winning cases, winning negotiations, winning business. And everything that you see in this presentation and that the report is available on our platform. I'm Rachel Bailey, I am a Data Relations Manager and I work on all of Lex Machina and those reports. Today, I'm located in my home office in New Orleans. So we did have a little last minute switch with technical difficulties. I actually do not have power, but luckily everything is okay, no flooding so we're good. We've got wonderful guest today, Tom Gies from Crowell & Moring and Jim Swartz from Seyfarth Shaw. Could you each introduce yourselves and say a bit about your practice, including how it's been impacted by COVID-19 talk. Tom, You can go first.

Tom Gies ([01:44](#)):

Thank you, Rachel. Hello everybody, on Tom Gies. I'm based in Washington, D.C. office. I've got 35 years plus of employment and labor relations litigation and counseling. I [Jokes 00:01:56] that I think I've gotten a lot of people on this program. And involuntary master's degree in epidemiology. And during the COVID, since it began. But my work includes litigation in all aspects of employment matters, including the issues specifically raised by COVID. And I'm happy to be part of this presentation today. So thank you Rachel.

Jim Swartz ([02:19](#)):

Thanks Rachel. I'm Jim Swartz, I with Seyfarth Shaw Atlanta, Georgia. I've been in Atlanta and practicing employment law for about 20 years. My practice is primarily helping clients with systemic issues related to employment. Everything from class cases arising out of gender and race discrimination issues and wage and hour class actions. And during the pandemic, we have been intensely focused on helping clients. Number one, manage a newly remote workforce helping them reopen facilities and get workers back in the workplace. And also for more public facing companies, such as retailers and healthcare clients, helping them with their workers in a safe environment so they continue to serve their constituents.

Rachel Bailey ([03:08](#)):

Thanks for joining us today. Today we will look at case filings, findings, timing, cases caused by COVID-19 specifically, and then the top districts where we are seeing those cases. And then we'll have some time for Q & A at the end. So starting off with the big picture, Lex Machina, defines an employment case in our employment module specifically as those cases alleging a federal employment law violation, including discrimination, harassment, retaliation, wage and hour claims under the SLSA and interference and retaliation claims under the FMLA.

Rachel Bailey ([03:51](#)):

So again, specifically, we're looking at cases in federal district court with those federal statutes and labor laws are separate. So those aren't in our practice area, that's not the numbers that we're looking at today. And we might talk a little bit about the CARES Act in Horn, which are not specifically tagged in the report because it's so new. But those are important and they are in Lex Machina database. This, what you're looking at now is a baseline, look at the last decade. So it's employment filings from 2010 through 2019, and employment is one of the most steady practice areas that I've seen in Lex Machina. It's about 21,000 to 23,000 cases per year filed in federal district court. So now, if we look at the cases by quarter, this is 2018 through 2020, going into Q3. We can see this particular downturn in Q2 and Q3 of 2020. And so want to talk a little bit about what's leading to that downturn. Jim, could you talk a little bit about what you think is going on there?

Jim Swartz ([05:08](#)):

Sure. There's obviously the effects of the pandemic have been felt in federal court filings, in two ways that we have primarily identified. The first relates to the pace of agency action, that frequently underlies federal employment cases, such as cases filed under title seven that require EEOC administrative exhaustion. The commission ceased issuing charge closure notices rights to sue in March, and that continued until early August, 2020. So litigants who had initiated a charge filing with the EEOC did not really even have to move on their cases until after August 3rd. That's One, the second is that we saw a shift to some degree to cases filed in state court, particularly cases that arise at a creative pleading approaches to address workplace safety issues. Or other state law towards claims that might arise out of a pandemic impact at workplace.

Rachel Bailey ([06:23](#)):

Tom, would you like to add to that?

Tom Gies ([06:25](#)):

I will just briefly, our experience is the same as Jim's. I guess a couple of other things that we've seen in our work. I think there is a... I would just call it maybe employment security issue, and some employees may be concerned about filing claims. They're more concerned about since you're getting through the pandemic day to day and keeping their jobs. That's one thing that's not really a quantifiable for seeing it anecdotally. There's some support for that.

Tom Gies ([06:54](#)):

And then the other thing to do, other than the two, just echo something Jim said is, with respect to claims involving workplace safety. We're not seeing a downturn in those. I know they're not captured in this report some are file under in federal court and the other statutes. And as Jim says, some are filed in state court. And the other thing to consider is that for a lot of claims that don't require administrative exhaustion. Many plaintiffs wait until the statute of limitations is about to expire. And most of the claims from Statutory and Tom law that we see the statutes that have not yet run. So that's another data point worth considering regarding this downtick and for us to [inaudible 00:07:40].

Rachel Bailey ([07:44](#)):

Thank you. That makes sense. Now we'll look at another chart. This has a lot of information on it. So now we're looking at the comparison of employment case filings by tag and we've got several different tags in Lex Machina and subsets. The right-hand columns are 2020 data. And so we want to compare

that to the left-hand column 2019 and 2018. And this in report we're going to highlight a few things. Specifically, harassment claims are down and then ADA claims are down as well. We look at the data, but we don't know the practice area as much. So we thought maybe this had to do with the moving away from office settings or. But really that's only part of it. Tom, could you discuss what you're seeing, in specific types of cases?

Tom Gies ([08:35](#)):

I'm going to start with accommodation in ADA that are two separate line items on this chart. We're seeing very interesting and difficult ADA issues because people were forced to work from home. And then, when companies want people to return to works, people have been working from home and then they had disabilities. The traditional viewpoint that you can insist on somebody to come to work in the office, or they're out of the work site on a daily basis. That's a harder case to make now because people presumably have been working more or less successfully from home now for six or seven months. So we're seeing a lot of interest in difficult cases under the ADA. And I'm going to not say much more, but accommodation is most everybody knows is a part of ADA.

Tom Gies ([09:22](#)):

These direct discrimination claims and failure accommodate. The other thing to briefly mention the is retaliation. Those numbers aren't down as much as some of the others. And what we're seeing is a lot of plaintiff's claiming that companies are using COVID as an excuse to clean shops, save money, whatever. And that particularly in the early months of the pandemic, when companies were concerned about adverse publicity and concerned about employees not being too concerned or fearful to come into work. There's been a lot of cases filling. A file planning essentially that the company that retaliating against somebody for wanting to go public or asking the company to do something that they should have been required to do under a State and Federal Regulations. So those are a couple of things. Jim, you want to add to that?

Jim Swartz ([10:16](#)):

The one point, I'll tail off the last point you made about retaliation. Part of the reason those claims aren't at down quite as much as others is that, there are retaliation components that are so many of these statutes. We're seeing retaliation claims alleged under the Fair Labor Standards Act, under your traditional Title VII matrix. As well as a state whistleblower type litigation in States that permit direct whistleblower actions as well. So for instance, workers who are working in new environments are making complaints to employers about the time for which they should be paid. And it subsequently they employee is subject to a layoff or some other reduction in force. Frequently we'll see a retaliation claim brought as an FLSA retaliation claim. So that's just one example of how retaliation dovetails with all of these.

Jim Swartz ([11:11](#)):

I also agree that the accommodation issue, as well as the leave issues are going to be increasingly contentious over the next several months, certainly through the end of the year. Because we have some smaller employers who are also dealing with the CARES Act and trying to understand how that applies to its employees and what types of leave are permissible and required under that law.

Rachel Bailey ([11:37](#)):

Thank you. We've definitely seen in the report that retaliation claims and FMLA claims, I believe have the most overlap in the database. But it's changing depending on whether the cases are caused by COVID et cetera. Let's look at case activities specifically. So we wanted to know how court activity is being affected by the pandemic, not necessarily the facts themselves, but what's going on with the court system. And so this is a similar chart. But the roads are findings at a specific event. So this is one way to think of court activity being down due to COVID-19. Again, 2020 is on the right-hand side, trials have decreased the most. I don't think that's really surprising. They've decreased by 61%. Another metric to look at case activity. And what we're seeing with the court system is the timing to certain events. And so in order to determine if there was a slowdown in case activity, we looked at timing for 2019 versus 2020.

Rachel Bailey ([12:47](#)):

And so right now you're looking at summary judgment, time to trial and time to termination for cases terminated in Q1 or Q3 of 2019. So this is the baseline from last year. And if we look closer, the median time to trial was 721 days in those 2019 cases. Looking at 2020, the median time to trial was over a hundred days longer. So 859 days, I don't think it's surprising anyone that we're clearly seeing some float out. However, those other two metrics time with summary judgment and time to termination haven't moved too much. We are watching because obviously things are evolving but. Jim, could you talk a little bit about your experience with the courts in light of COVID-19?

Jim Swartz ([13:36](#)):

And your point is right on the money, Rachel, that this is entirely expected given the impact that the courts felt with the pandemic. Many were required to change operations in really material ways. Not having court personnel in the building, focus entirely on criminal dockets. So civil cases for a period of time, certainly in this in the spring and early summer were brought to a standstill in matters that required the interaction with the public. So jury trials. Courts are still trying to figure out how to do that in a safe way, particularly in places where the pandemic has had significant upticks through the summer months or now again in the fall. So that's an area that we expected to be way down.

Jim Swartz ([14:23](#)):

Courts didn't seem to make a pretty sensible move, to find cases that have been pending for a long time where summary judgment had been filed maybe in late 2019 or early 2020. To try to get those cases disposed of so that when things creep back up more full speed, that they can focus on jury trials and other things that require more involvement from court personnel and public staff. So these are pretty consistent with our experience in our practice in terms of the duration of cases. But most of the cases that are moving towards summary judgment and in a few places where trials are actually happening on a relatively consistent basis and civil cases. Those are cases that have been pending for a long time.

Rachel Bailey ([15:10](#)):

That makes sense. Tom, do you want to add to that?

Tom Gies ([15:14](#)):

Just a couple of things. Our experiences is the same as what Jim has reported. But the part of this is, watching folks track and what is not traceable. I just mentioned two things. This data does not reflect motions to dismiss. In our experience that aspect of litigation has slowed down the least because those can be directly adjudicated by on the papers or by Zoom hearings or whatever. And so I haven't seen

any data on time for resolution of, let's say a motion to dismiss. And anecdotally the time has slowed like the other things that are in your study. The two other things, some of you know who are litigator. Many federal courts around the country issuing scheduling orders for all cases. And those ineffectively slowed everything down, Jim suggesting if you're depending on your jurisdiction, you should look to see whether or not your court has issued scheduling orders, court wide or some judges have issued their own. And then the last point, it should be mentioned here again, it can't be captured...

Rachel Bailey ([16:26](#)):

Nope. I think we lost Tom.

Tom Gies ([16:28](#)):

Oh no, okay.

Rachel Bailey ([16:33](#)):

We'll see if we hear him again. I know he was having some technical issues. Let's see, we'll go onto cases caused by COVID-19. And so there's a lot of information in this slide. And first off, I recognize we have been tracking what's going on with the pandemic. And we created a case tag that we use over all of our cases in federal district court. Which includes all of PACER except for our prisoner positions and Social Security. So you can look at cases caused by COVID in any practice area, not just employment. And so then that's where you'll find some of the cases that they mentioned, towards claims as well, related to the workplace might be in torts, et cetera.

Rachel Bailey ([17:27](#)):

But specifically in order for a case to be caused by COVID-19 that we're tracking. We have our legal analysts look at the facts of the case, it has to be filed. It would not have been filed except for COVID-19 or the facts of the complaints have to be exacerbated by COVID-19. So this isn't procedural issues don't count as this tag definition. And so the top row is employment cases overall, and then each of the different subtypes are listed and there can be some overlap. So 74% of these 309 cases have retaliation claims, 46 of them have FMLA claims. And as we discussed earlier, a lot of those overlap. 309 cases out of what we thought earlier was 14,000 cases filed in the first three quarters. That's all really small subset. People were really predicting a flood of employment litigation because of COVID. Do you think that cases will be rising in the upcoming months? Or what do you think of this discrepancy or not really determining proportion of cases caused by COVID-19?

Jim Swartz ([18:40](#)):

Yeah I do. I think that we're seeing a tip of the iceberg. These are the leading cases, cases where in many cases, as we discussed before, plaintiff's got rights to sue from the EEOC, for example, in the very early part of the year before the EEOC stop issuing rights to sue. Especially in areas where plaintiffs have to exhaust administrative remedies, we'll see an uptick between now and the end of the year on those matters. On the other front, the other piece was that, there's been some thought that some of the decrease in claims was because people were not in the workplace, they were working remotely. And that some of the issues related to things like wage and hour under the FLSA, things like harassment and retaliation, we might see an uptick in some of those things. As we get into businesses, bringing more workers back into the workplace.

Jim Swartz ([19:45](#)):

Or workers becoming more accustomed in getting more settled in remote working environment. So that they can identify areas where they might have a claim, whether it's wage and hour, whether it's some manner of discrimination or even harassment that's done by virtual beings. Or something that as has been publicized relatively recently become visible on a Zoom call or something like that. We'll see some things like that. Tom, are you back with us?

Tom Gies ([20:15](#)):

I am, yes. [inaudible 00:20:16] I agree with what Jim said. I'll add just a couple of thoughts. Part of this, again, what Lex Machina tracks and doesn't track in these reports. We're already seeing and we expect to see more cases in some categories of Employment law and not reflected in this report. And Rachel mentioned something at the beginning, but just to be a little more specific. One cases, particularly if there was another round of shutdowns there will be CARES Act and Leave and other leave cases as Rachel indicated. Traditional labor law cases, we're seeing quite a number of grievances bubbling up and arbitrations and threatened strikes all about issues related to employees and the unions being concerned that employees won't be safe at work.

Tom Gies ([21:03](#)):

So you're starting to see some of those. And then we haven't talked yet about other employment related claims non-competes and other post-employment restrictions. Those aren't captured in this study, understandably, but we're going to see more of that. We'll see more benefit claims, we'll see more fiduciary duty claims under our list of plans. And that's because as Jim suggested. Once people get back, if we ever get back to something or when I should say we get back to something approaching normal, then people are going to get back to normal. They're going to have the same questions that they would have had earlier. And then we're all sort of postponed because of everybody who's trying to get through the day, so to speak with regard to the pandemic. So that's my crystal ball about what to expect. Rachel?

Rachel Bailey ([21:55](#)):

That makes sense. And again, it's interesting with the pandemic and these new laws. We're working with our previous framework of what is considered an employment case. And you mentioned non-competes, those are in our contracts module versus a separate module. So this is a very specific report. And if you have questions about what we're seeing in another practice area, then definitely get in touch, particularly if you have access to the database then we can show you where these cases are and how to find more net cases or CARES Act which are very novel. And like you said, people are waiting to filed these things. What we've seen is a delay between when was passed and then people figuring out their rights and things like that. And so you mentioned one leading up to the statute of limitations, and then since it is so new. We're waiting to see what happens with a lot of that stuff.

Rachel Bailey ([23:07](#)):

I do want to show one more slide from the report. These are districts, the top districts with cases caused by COVID-19. And as you can see, it's pretty low, but it's spread out. It's not one district has all the cases caused by COVID-19. What you can see is that it closely mirrors districts that have large populations. And these are districts that tend to have employment litigation anyways, which is in the report. You can see how it mirrors a baseline of districts have with cases overall and employment. So we did want to show this chart. However, I didn't have a question on it unless you want to jump in, if you have anything about districts.

Jim Swartz ([23:53](#)):

This is Jim. I agree with you that these are the districts you would typically see, what I would call hot employment dockets to begin with. So that an interesting observation that hasn't changed a tone. There are also areas where COVID was a real relatively early driving factor and driving consideration New York and New Jersey in particular. So that could be causing some of it too. Places that follow a little further down the list like California, for example, is a state where you would expect a lot of employment related lawsuits to be in a state court to begin with. So that also accounts for some of that.

Rachel Bailey ([24:36](#)):

That makes sense. let's take our Q and A section. We've got a few minutes left. And so I'm actually going to check in with Gloria who is keeping track of the questions and see if we've gotten any questions.

Gloria Huang ([24:58](#)):

Hi Rachel. Yes. Two questions have come in. The first one is how do employment filings overall compare from 2019 to 2020? Has employment filings increased?

Rachel Bailey ([25:13](#)):

If you want to navigate back to that slide, I believe it's the second filing start with. You can see 2018, 2019 and 2020 by quarter. The report ends at the third quarter. We can see that filings are down overall in employment cases. And so we talked a little bit about that at the beginning. Jim, I don't know if you want to comment again.

Jim Swartz ([25:42](#)):

What you're seeing here on that slide. It's what file is at eight no six but you can see the filings from the last say, if you look at 2019 Q1 through present. In that Q2 and Q3 of 2020 that's driving the numbers for 2020 down. That's where courts were inaccessible in many places. The plaintiffs were simply just not filing the volume of employment cases during that period of time, as we discussed. Primarily to us, that looks like COVID interruption. But I would expect that we'll see that tick back up the last quarter of 2020, and into 2021.

Rachel Bailey ([26:30](#)):

Tom, you want to add to that at all?

Tom Gies ([26:32](#)):

This is Tom. I'll just heard Jim you mentioned it earlier, but just to underscore. This is federal courts only in our experience others have the same. The state court filings are up in many jurisdictions, not just California. So if you look at the total volume of employment law cases or disputes, my gut tells me that it's not down overall, overall as broadly defined. For all the reasons we've talked about.

Rachel Bailey ([27:05](#)):

That makes sense. Yes, we do have a few state courts as well, [inaudible 00:27:09]. That report doesn't look at that. Gloria, So there's another question?

Gloria Huang ([27:16](#)):

Yes. The second question is, what do you think is coming next?

Rachel Bailey ([27:22](#)):

Tom, I'll let you start on that one.

Tom Gies ([27:23](#)):

I'll start, my crystal balls is high like everybody else's. But here's what I've been worrying about with our clients. And that is what will the litigation implications being of a COVID vaccine and quickly we're hoping for the vaccine, obviously. For all reasons, all the polling and which is not political publicized shows 30, 44, sometimes 45% of people are going to be reluctant to get vaccinated particularly early on. A lot of people in the medical profession that I follow are concerned that the vaccine may improvise a false sense of security. At least initially the vaccine may only be effective in 55, 60% of the time. So the point of it is, to all the other things that we're required to do or encouraged to do about social distancing and mask and all the rest will need to continue.

Tom Gies ([28:16](#)):

Even if the vaccine becomes widely available that on employment front I can imagine situations where companies will feel pressured, obligated, maybe even required to require vaccines. We're already seeing that with flu vaccine this year, and that's going to raise some potential litigation from a variety of sources. And so that will be another thing. Most of our clients are taking a wait and see approach, but to the extent that everybody thinks we can decide, and I draw a big draft and go back to normal, once a vaccine comes online. I don't think it's going to be that easy at all. And because things are complicated and because it will still be unclear, you're going to see a spate of litigation around that set of issues. Jim, what are your thoughts on that or anything else in your crystal ball?

Jim Swartz ([29:06](#)):

I think that those are great points and one thing that'll flow from that. And then one other thought. The first thing is that we'll see a number of discrimination claims. Particularly in the age and disability and potentially gender areas. Where employees who are impacted and continue to be impacted by COVID effects are closed off from certain opportunities in the workplace, whether it's travel, whether it's requirements that you see clients in person. Those are where companies need to be very careful in terms of whether they are dictating that certain people, for instance, for as older workers, can't do certain things because of the potential for bad outcomes if they're exposed to COVID. So that's an area where I could see some additional activity.

Jim Swartz ([30:03](#)):

The other thing is in the wage and hour space. As workplaces get readjusted. We're going to see a reconfiguration of a lot of workplaces where people who might ordinarily be supervising people, aren't supervising as many people any longer. And there're some opportunities there that companies should be aware of that they have to make considerations about for instance, exemption classifications. To account for their changing workplaces, because they just don't have as many people working together any longer. So that's two areas where employers need to have, their antennae up and be conscious of areas where the COVID adjustment to the workplace could impact the claims that are brought in the classification of workers.

Tom Gies ([30:51](#)):

So this is Tom again, because I'm based in Washington. I would be remiss if I didn't mention your election is coming up next week. but if there's a Biden administration. I think you're going to see

substantial changes across the range we are talking about today and change and then certainly across all this bridge litigation.

Rachel Bailey ([31:14](#)):

Thanks for looking into your crystal ball and we'll be watching to see what happens as well. And we'll be giving you more data to explain and figure out what's going on. I'll give you one more minute. If you want to conclude or say anything else about, how you use Lex Machina. Really appreciate you both joining us today.

Jim Swartz ([31:37](#)):

Rachel this is Jim. I'll say this, we use Lex Machina on a regular basis to keep track of in particular, our practices that are heavily focused in federal courts. There's a wealth of information on there. It's not going to give you all perfect answers for a crystal ball, but it certainly can help lawyers and companies identify parts of the country that have significant activity in a particular area or industry or type of claim. And I always tell clients that they should use these resources that are available to them. Including through their lawyers, to help them frame decisions so that they can make intelligent decisions for how they structure their workforce and how they get their workforce working in a productive way.

Tom Gies ([32:29](#)):

I'll echo that very quickly. What we find in our work most valuable about Lex Machina is to be able to drill down relatively quickly and see patterns by particular judges. And or other judges in your particular court that you find for a lot of our clients who are data and analytics worried unlike everybody else these days to be particularly valuable. So we're fans of Lex Machina.

Rachel Bailey ([32:56](#)):

Thank you. We love to hear that. These are some of the insights in the report. And we hope you check it out. If you're on the call today or be tied up, some people might listen to the recording later, you will receive an email that will explain how to get the report. If you're a customer, then the report will be in the help center today. And so if you have our software platform, you can go up into the upper right-hand corner and go to the help center, find the reports. Thank you again. So much to our speakers and everyone have a wonderful day.

Jim Swartz ([33:29](#)):

Thanks Rachel. Good luck down in New Orleans.

Rachel Bailey ([33:31](#)):

Thanks.

Tom Gies ([33:33](#)):

Thanks for having us. Bye now.