



## Webcast: Releasing Lex Machina's Latest Employment Litigation Report

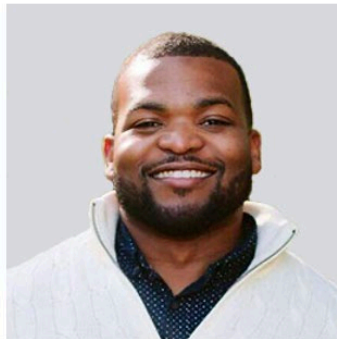
In this webcast, Greg Brumfield (author of the report and Lex Machina's Employment Legal Data Expert) and Rachel Bailey (Data Relations Manager and Legal Data Expert) discuss federal employment litigation trends over the last three years and offer insights on judges, parties, law firms, case filings, findings and resolutions, timing, damages, and more.

The webcast includes a look at emerging trends in Title VII, ADA, FLSA, and FMLA cases, as well as appellate outcomes in federal employment litigation.

### Speakers:



Rachel Bailey  
Data Relations Manager  
Legal Data Expert  
Lex Machina



Greg Brumfield  
Legal Data Expert  
Lex Machina

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

Welcome to our presentation this morning, we will be talking about the Employment Litigation Report 2022. We are recording today. This will be a 25 minute presentation followed by a Q&A. And please share your questions at any time in the Q&A box and we'll review them together at the end.

Rachel Bailey ([00:19](#)):

A little about Lex Machina. Lex Machina is legal analytics. It's our focus. Lex Machina provides legal analytics to companies and law firms enabling them to craft successful strategies when cases and closed business.

Rachel Bailey ([00:35](#)):

I'm joined today by my colleague, Greg Brumfield. He is a seasoned labor and unemployment attorney who has worked in the public and private sector. He joined Lex Machina after a successful career with the federal government where he litigated trials on behalf of federal agencies. Welcome, Greg.

Greg Brumfield ([00:54](#)):

Thank you.

Rachel Bailey ([00:57](#)):

And I'm Rachel Bailey. I am our data relations manager. I work on all of our reports at Lex Machina. I was previously a trademark lawyer, and then I worked at a law firm that helped small businesses before joining Lex Machina. Just quickly today, we're going to go through a lot of information from the employment report; filings, court, judges, parties, law firms, case resolutions, findings, and damages. And just a reminder, all of this information is in the Lex Machina software. So if there's something that interests you can dig in the software. And then we'll talk about how to get the report at the end.

Rachel Bailey ([01:36](#)):

So let's look at employment case filings. These are case filings overall from the last 10 years. Very, very steady chart, except for the last couple years. Greg, why do you think this is?

Greg Brumfield ([01:47](#)):

Well, this can be reasonably tied to the pandemic and the court slow down. So if you can see in 2020 and 2021, it's gone down a little bit. But what was going on in that time is the pandemic. There were closures, delays. And many of these cases need right to sue letters from the agencies they go to. Depending on the region they were, the regional offices could have been closed or in fact, you needed an appointment to actually go there to go on the next steps.

Rachel Bailey ([02:16](#)):

That makes sense. And now we're looking at discrimination case filings. So Lex Machina tags cases with certain claims or characteristics so that you can filter to those cases and see cases that are like yours or exclude cases that are not like yours. And so with this one, we've used the discrimination tag, the ADA tag as well, retaliation, and harassment. So this is a group of tags, but you could separate each of those out. Greg, could you tell us a little bit about this chart?

Greg Brumfield ([02:51](#)):

Absolutely. You can see that the discrimination cases on filings are steady. These cases aren't going anywhere. They're being filed across the federal landscape year after year. And we're here to monitor that year after year as well.

Rachel Bailey ([03:07](#)):

Another steady chart, we've got our FMLA filings. What's going on with FMLA right now?

Greg Brumfield ([03:16](#)):

This is exciting because FMLA filings have actually gone off a little bit in the last year. And what you see from this is that it's directly tied to our pandemic tags as well. FMLA filings are an indicator of the current hotbed of litigation that's going on. So someone gets sick, someone gets COVID, they aren't able to come back to work. They could get fired. They could not return back to work. And those things can also go on the other side. Employee is afraid to go back to work. They don't have anymore FMLA time to go, and therefore, they are no longer with the company. These things that we're tracking is going on in the workplace currently and it's super exciting.

Rachel Bailey ([04:06](#)):

You just touched on this, our COVID-19 tag. So we actually look at pleadings and determine if a case is related to the pandemic. Our case tag definition is that the case was filed before the pandemic or if the circumstances were exacerbated by the pandemic. And these cases are not going away. So I see this in lots of practice areas. Some have dropped off, but not in employment. So tell us a little bit about what's going on there.

Greg Brumfield ([04:37](#)):

I've never seen so many cases filed on so many different grounds directly influenced by a specific event, and that specific event is the pandemic. And you'll see the same fact patterns and it's filed of the Family First Act or the ADA, the EPSLA. These things are just showing an explosion in pandemic related cases. And from the quarters, you see that these things are arising and this is crucial data that we're able to bring to you, real time.

Rachel Bailey ([05:11](#)):

Definitely. Our last filing chart today, we've got something new and exciting for Lex Machina. We've got cases that originated as employment cases in federal district court, but these are the appeals. So this is the year that the appeal was docketed in one of the 13 circuits. And we can see how many employment cases were appealed. It might not be appealed. It might be a procedural appeal or something like that, but still great information. And then we can see it follows a similar trend as overall cases. Greg, why don't you talk a little bit about this?

Greg Brumfield ([05:47](#)):

Sure. This is also exciting, because we're able to see cases all the way through. We haven't been able to do that before this year and this just takes the next step in anyone's employment practice, whether that's from the plaintiff or the defendant's side. You can see where this court not only typically rules, but how they fare on the next level, on the appeals court level. That goes super, super far, whether in

settlement discussions or litigation strategy and litigation planning. This is the type of information you need to have.

Rachel Bailey ([06:18](#)):

Definitely. I know this appeal stuff is really exciting and we're going to show some other appeal stuff later in the presentation as well. I'm just going to go really quickly through this. These are the most active districts. And so we've got the districts listed on the left here and then it's by the total in the last three years from 2019 to '21 total cases. And these are just big population centers. Similarly, the top circuit. So again, we have those appeals and where they're docketed. And so the ninth circuit is very active circuit court, very populous area.

Rachel Bailey ([06:54](#)):

So we'll just move along there. Most active defendants. And what we see here is that Walmart are the top two entities for employment cases filed in the last three years. And I think it's interesting. Lex Machina tracks parties, but you can see that different related entities might get named together, they might get named separately in different cases. And this really mirrors just how the real world works.

Rachel Bailey ([07:25](#)):

One other thing I want to mention too that's in the report is that the top party, Walmart, Inc., this is less than 1% of all employment litigation. So this is in some practice area where the same people are being sued over and over again. Nonetheless, it is some interesting stuff going on here. Greg, could you comment on what you see?

Greg Brumfield ([07:47](#)):

Absolutely. It's incredible how similar the industries are, whether they're big box retailers or government entities that have a bit of a warehouse component to it or just a bigger workforce that has some turnover. But what I did find interesting was Wells Fargo Bank being at the bottom of it. They have nothing in common with the other defendants and it's hard to explain unless there's a culture there that is the stem for the filings. So that's something that just popped out to me when I saw this chart.

Rachel Bailey ([08:22](#)):

Right. Yeah. I guess you and I will have to dig in and see which tags are on those Wells Fargo cases. See what's going.

Greg Brumfield ([08:28](#)):

Absolutely will.

Rachel Bailey ([08:31](#)):

Now we're looking at everybody's favorite two slides, the most active law firms. Oh, I skipped one. Here we go. The most active law firms representing plaintiffs and the top law firm was Morgan & Morgan, followed by Spitz Law Firm and Sanford Law Firm. And then very different set of law firms. The firms that represent plaintiffs in this practice area are different than the firms that represent defendants, which isn't the same in all practice areas. But for defendants, we see Littler Mendelson had the most cases in the last three years, followed by Jackson Lewis and then Ogletree. Greg, could you talk a little bit about how attorneys use this law firm data?

Greg Brumfield ([09:15](#)):

Absolutely. It's so important. It's super important to know who you're going against as far as when you get a lawsuit or you're responding to a lawsuit. How have they planned to go about their litigation strategy, especially in front of a particular judge, which Lex Machina can show you? Around what time do they file a 12(b)(6) motion or summary judgment and what kind of approach that they will go with? Those things that you can prepare for on the front end with our product, with our software.

Rachel Bailey ([09:44](#)):

Definitely. These are some timing box plots. So just overall timing information for employment cases. And so we are looking at the box here is 50% of cases. And then each of these, we call them whiskers, is 25% of cases. And so that gives you an idea of roughly where the timing will be. And this is just a huge set of cases, all employment cases terminated in the last three years. You could look at your judge or your court. I will hone in on something here. The median time for a summary judgment was 611 days. The median time to trial was 820 days. And the median time to determination was 311 days. We also have timing data for appeals. So those employment originating cases, the cases that were originally employment in federal district court, the appeal from the time it was docketed in the circuit court until it was terminated, had a median of 266 days. Greg, can you talk about how attorneys use timing data?

Greg Brumfield ([10:51](#)):

This is so great in client education and younger associate education as well. So when your client comes in saying, "I have this situation" or "I'm going to be defending this type of lawsuit that just was filed against us," you can sit down. One of the questions they're going to ask are, "Well, how long will this last? How long do these things typically last and what's going to happen?" With our box plots, you can show them, these are the median times on. If we think this is a strong case and we can get out on summary judgment, these are the times that we think we can get out of this case or it may last as long as this if we go to trial. Those things can not only help put your clients at ease, but let them know that you are on top of these things and know exactly our litigation strategy and where to strike and position ourselves for the best outcome.

Rachel Bailey ([11:43](#)):

Definitely. Now we've got a slide with a lot of information, this figures in the report. So I'll point out a couple things. On the right hand side, we have likely settlement, 73% of the employment cases terminated in the last three years settled, that's how they've resolved, with a settlement. And then 14% resolved with a procedural resolution. And then on the left hand side, we've got our claimant wins at the top here and really with employment, we're looking at these claim defendant wins. This is unique to this practice area. 10% of cases resolved with a claim defendant win, particularly on judgment on the pleadings. Those are usually 12(b)(6) motions. And then summary judgment, just a huge number of cases resolved on summary judgment. Greg, can you talk about how these claim defendant wins affects practice?

Greg Brumfield ([12:40](#)):

Absolutely. So when you look at these charts, okay, the employer defendant is winning the cases via summary judgment or judgment on the pleadings. So these cases are ruled on primarily by the employer defendants on writing. So they're writing, they're getting summary judgments in front of the court. And that's why, again, it's really important to understand what kind of approach that is coming. So going before these cases, if you are not likely to settle, you have to expect some type of motion to be written

and battling it out, because more than likely it's not going to reach the trial phase. It may not reach the trial phase.

Rachel Bailey ([13:24](#)):

Right. Similar now, we've got our case resolutions for appeal. So this is very exciting. Again, on the right hand side, 15% of appeals settled before there's a decision. And then we wanted to look at these affirmed cases. And so 47% of employment cases terminating in the last three years, again, were affirmed on appeal. And then I'll let you dig in a little bit on this. Greg, can you talk about how this affects appeal strategy?

Greg Brumfield ([14:01](#)):

Absolutely. And again, this is exciting. We have these numbers for the first time to see, now not only the district court level, but going to the appellate court and the appellate court is affirming these decisions. They rarely want to disturb what the district court has done. So that in fact goes more towards strategy again, whether you want to try to settle it or are balking at a settlement offer. You can look at the specific court, specific circuit and see how many times they reverse the decisions and how many times they affirm these decisions. Those things are critical in litigation strategy.

Rachel Bailey ([14:39](#)):

For sure. Actually digging into we've got another figure where we can dig into just these cases at the top here, cases that had a decision on the merits of reversed and reversed in part or affirmed. And then that's how we get our reversal rate. And so at the end of the day, a lot of the times people are like, "Give me that reversal rate number." And so when you're only looking at things that ended with some decision, then the firm rate is 80% reversal rate. Affirmance rate is 80. Reversal rate is 20%. And I will say that of all the practice areas in Lex Machina, the overall rate is 23%. So employment is just slightly lower. I don't know if you have anything else to add here.

Greg Brumfield ([15:32](#)):

Again, it's so important with client education saying, "This is what we're up against. We have a 20% reversal rate." But it also allows you to go to those cases specifically in our software and see what cases work in that particular time and be able to hone in on your own strategy to hopefully move forward.

Rachel Bailey ([15:52](#)):

Yep. Now, we're looking at specifically FLSA cases. So we looked at the FLSA cases that terminated in the last three years, we've put that tag in, and then looked at findings in those specific cases. So this is findings of willfulness or no willfulness in an FLSA case, as well as FLSA violation or no FLSA violation. And I'll let you talk us through what's going on here.

Rachel Bailey ([16:22](#)):

Oh. And lastly, I'll say at the top, what we see is the different events. So this is a little bit different than case resolutions where you could have a decision at summary judgment and then another decision at trial. And so you could have many of these different decisions. It doesn't necessarily add up to any judgment event. But Greg, I'll let you talk more about findings.

Greg Brumfield ([16:49](#)):

Sure. If you look at this chart, the thing that pops out is the FLSA violations and you see the number on the right is 1246. But you can look at the default judgements and the consent judgements. What default judgements is telling me with 798 is that employers are just not showing up to court. And it's super important that when clients get lawsuits, they respond to them immediately. You don't want to be in a position where you have a default judgment and they're taking next steps and there's no way to defend yourself.

Greg Brumfield ([17:23](#)):

And the next part of it is you can see consent judgments. And what FLSA, 233, what that is popping out to me is you're getting sued by a federal agency and instead of settlements, they typically do consent judgments. So those are really, really knowledgeable things you can just go to in our product. So if you get sued by a federal agency, you can go straight to one of those cases and understand what kind of position that you may be in going forward.

Rachel Bailey ([17:53](#)):

Definitely. Yeah. Something I'll say is that we have this figure is in Lex Machina and we say that they're blue linked, so all these numbers, this 223, will be blue and you can just click on it and then look at all 223 of those cases if that's what you want to do.

Rachel Bailey ([18:15](#)):

Now, we're looking at damages by year. And if you're familiar with our reports, we've expanded this chart a little bit. And let's see. Sorry, I got a notification. Okay. We see the year on the left here, the number of cases and the amount of damages, and the reverse amount is what we recently added. So because we have appeals now, we can tell you when some damages were reversed and this is by the date of the damages award. So we could see more damages from 2021 being reversed in the future, but we have to wait and see what happens with some of those cases. But this gives you an idea of the overall damages per year and some reversal information. Greg, what does this tell you about strategy?

Greg Brumfield ([19:14](#)):

Well, one, Rachel, you did a great job of saying how we have real time data that can be effective and show up in our numbers. And this is what we're seeing. So from what I saw here, it's a little bit trending downward. And again, we think that's tied to the pandemic. But what we found interesting was in 2021, there are 1,016 cases, which were the lowest in the last three years, but the amount was higher. Now, what does that say? Again with those delays, it pushes not only the trials, it pushes the adjudications. And one of the most common damages, which we'll get to later on, is back pay. Now, just getting extended a few months or a year on trial, getting delayed a few months or a year or more, those back pays add up and that's why I think you'll see that bigger damage number. Even though there were fewer cases, there's a addition in compounding interest that shows up in those numbers, I believe.

Rachel Bailey ([20:14](#)):

Like you said, we can look at very specific types of damages as well. So on the left hand side here, we've got the different types and then the number of cases, the total, and at what point in the case they were awarded. And so I'll let you dig into a couple numbers here.

Greg Brumfield ([20:32](#)):

Oh, sure thing. We just mentioned back pay and again, that's the bread and butter as far as damages that get awarded and those numbers speak for themselves. The next thing I wanted to look at was definitely approved class action settlements. Those are rather large and again, you get class actions. You want to be on top of those things, because those numbers, they definitely speak themselves. That's a very, very big number. I'm not even going to try to say that one.

Greg Brumfield ([21:01](#)):

And the next one is the EEOC class settlement, which is again one of the primary governmental agencies that consume an employer on behalf of plaintiff employees. And they're really good. They have a fantastic win record. And typically when you get those type of cases, you want to be on top of it. And those class settlements speak for themselves as well.

Rachel Bailey ([21:26](#)):

Definitely. So that actually concludes all of our slides. And we have a couple quick questions. Will the slide deck be shared? So we don't actually share the slide deck, but everything in here is in the report. So when you get the report, then you can dig into that and the report has explanations on everything.

Rachel Bailey ([21:48](#)):

And then also will the recording be available? Yes. We'll be sending out an email after this with the recording. Share it with your colleagues and other folks can watch the recording for years to come.

Rachel Bailey ([22:06](#)):

And then let's see. Oh. Last, we want to ask Greg, what do you think is coming next?

Greg Brumfield ([22:11](#)):

Oh. Unfortunately, it's going to be continuing a monitoring of the employee workplace with the pandemic and then more coming. The current administration has already come out and said that there'll be more pandemics, unfortunately. And the last few weeks have been filled with state of emergency declarations. And by the end of the year, I would not be surprised if there were employment filings surrounding monkeypox or any other kind of pandemic. These things that employees need to know about because it's just not going anywhere. And they need to be on top of not only accommodation standards, FMLA standards. Teaching younger supervisors to understand what they need to see in the workplace and if someone's not showing up. And also the back end of it. Some people may not want vaccines and there's just going to be a never ending fight that I see for the foreseeable future. Luckily, we're on top of it here.

Rachel Bailey ([23:13](#)):

Yes. I know that seems like a downer note, but there's a lot of interesting stuff going on. So we just have to see what happens. I want to thank everyone for joining us today. Really quickly, if you already have Lex Machina, if you have a login, then you can log in and find the report in the help center right now. Go up to your name on the upper right hand corner and the help center is in that menu. And then if you are not a customer... Well, if you're on this webcast, you'll receive an email with follow up information as well. If you are not a customer, we do ask that you spend some time with one of our experts before receiving the report. And today, I want to thank Greg for all your expertise. Thank you so much.



Greg Brumfield ([24:05](#)):

I appreciate it, Rachel. Thank you for getting us through all this information.

Rachel Bailey ([24:09](#)):

All right. Take care, everyone.