

Q&A With Akin Gump's Gary McLaughlin

Law360, New York (March 06, 2013, 1:59 PM ET) -- As a partner at Akin Gump Strauss Hauer & Feld LLP, Gary M. McLaughlin focuses on the representation and counseling of employers in labor and employment matters, including wage and hour issues, discrimination, harassment, wrongful termination, public policy violations and employment contracts, with a focus on class actions and other complex matters. He spends much of his time counseling those in the retail, restaurant, insurance and financial services industries.

Q: What is the most challenging case you have worked on and what made it challenging?

A: Probably the most challenging case I have worked on was a class action for Starbucks involving the tipping practices at their cafes. The plaintiffs claimed that only one group of employees should receive the tips, even though the other group sharing in the tips spent the vast majority of their time performing the same customer service work. A lot was at stake, and the client strongly believed in the inherent fairness of its policy. But there was not much authority interpreting the statute at issue, and it was evident pretty early on in the case that the judge did not agree with us on the law.

This was not lost on plaintiff's counsel, who dismissed their labor code claim and proceeded solely on their Unfair Competition Law claim, which ensured them a bench trial before the same judge. We knew the trial would be an uphill battle and were not overly surprised when the judge ruled against us. But we were confident in our position and were able to build a strong enough record to eventually win on appeal and obtain a complete victory for the client (with the help of some of the great appellate lawyers at the firm).

Q: What aspects of your practice area are in need of reform and why?

A: One area I think is in need of reform is the overtime laws, particularly with respect to overtime exemption laws. The laws are antiquated and developed during a different time when the classification of workers was simpler, and there was a clearer dichotomy between which positions should be exempt or not. Most of these overtime laws are no longer suited for a modern economy and workforce.

The standards lack clarity, with few bright line rules, so determining who is and who is not exempt involves a lot of guesswork. Although there are some minimum salary requirements, the application of the exemptions usually has little to do with how much the employees are paid. You have cases with employees making \$100,000 a year claiming they should have been paid overtime.

Exemption cases do not dominate the wage and hour scene quite as much as they used to, as claims regarding things such as meal and rest breaks and off-the-clock work have become more prevalent, but exemption issues are still a headache for employers. A clearer set of rules would benefit both employers and employees.

For example, a bright-line rule based on sufficiently high compensation would provide certainty for employers, while, at the same time, likely increase the compensation of many employees near the threshold as employers would be willing to pay extra in return for certainty and avoiding litigation. Many employees also enjoy the status of being a salaried employee who does not have to “punch a time clock.”

Q: What is an important issue or case relevant to your practice area and why?

A: The enforceability of arbitration agreements and class and collective action waivers for employment claims is a huge issue that is rapidly developing, especially since the *AT&T Mobility v. Concepcion* case a couple years ago, in which the U.S. Supreme Court found that the Federal Arbitration Act preempted a California rule classifying most class arbitration waivers in consumer contracts as unconscionable. The law will continue to evolve over the next several years as a number of competing theories regarding the vindication of nonwaivable statutory rights, concerted action under the National Labor Relations Act, unconscionability and preemption get thrown around at both the state and federal level.

In California, for example, an important question is whether the *Concepcion* case overrules *Gentry v. Superior Court*, in which the state Supreme Court held that class action waivers should not be enforced under certain circumstances involving nonwaivable wage claims. These developments have the potential to dramatically shape the class action landscape and impact the viability of employment class actions, a primary vehicle for wage and hour claims.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: There is a mediator I have worked with a number of times, David Rotman of Gregorio Haldeman & Piazza in San Francisco, who has impressed me. He has a knack for resolving difficult cases, and I have never failed to reach a settlement with him. He is very low-key but tough at the same time and comes well-prepared and with a good understanding of employment law. I think he is well-respected by both the plaintiff and defense bar.

Q: What is a mistake you made early in your career and what did you learn from it?

A: When I first started out, I was very focused on getting the work done and doing it well, but without always remembering to focus on the client. In particular, there was a time when I was preparing discovery responses, but forgot to send them to the client to review until the day they were due. Needless to say, the client was not pleased with the resultant fire drill, even though we were able to serve the responses on time.

That incident helped me learn an important lesson about the need to keep the client informed and always leaving sufficient time for the client’s review of work product and more generally, being proactive in responding to the client’s needs. It also helped me realize that even as a very junior attorney, the partners and client were expecting me to be on top of things without having to be reminded. I now try to impress this upon the young associates who work with me.

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