Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Employment Defense Firms Of The Year

By **Nick Brown**

Law360, New York (January 1, 2010) -- For labor and employment defense attorneys, 2009 was a big year, highlighted by five game-changing decisions from the U.S. Supreme Court, the reversal of a massive verdict in a seminal tip-pooling case and the defeat of one of the largest Title VII classes ever certified among the litigation to grab headlines.

Law360's top employment defense law firms of 2009 — Sidley Austin LLP, Proskauer Rose LLP, Akin Gump Strauss Hauer & Feld LLP, Reed Smith LLP, Gibson Dunn & Crutcher LLP and Seyfarth Shaw LLP — stood out for their work on some of the year's major cases.

Sidley Austin LLP

Sidley Austin nabbed a spot on Law360's list of standout management-side employment firms in 2009 for its work on two cases that resulted in key, pro-employer decisions by the U.S. Supreme Court last term.

The firm successfully defended FBL Financial Services Inc. after arguing for a heightened pleading standard under the Age Discrimination in Employment Act and represented AT&T Corp. in a case that defined the scope of the Lilly Ledbetter Fair Pay Act.

In Gross v. FBL, the high court ruled that employees asserting ADEA claims must show that age was the determining factor in the allegedly discriminatory action and not just one of several motivators.

The justices dismissed a challenge by an FBL employee who alleged his demotion was age-related and rejected the burden-shifting analysis typical of Title VII claims. Sidley teamed up with Nyemaster Goode PC in representing FBL.

“Time will tell of this case's importance, but there is some question as to whether other non-Title VII discrimination statutes may be interpreted the same way,” said Brian Gold, head of Sidley's employment and labor group.

In AT&T Corp. v. Noreen Hulteen et al., the Supreme Court rejected claims by a group of female AT&T employees that the telecommunications company shortchanged them on service credit for maternity leave taken before the enactment of the Pregnancy Discrimination Act of 1978.

The employees had invoked the statute of limitations-easing Ledbetter law in oral argument before the justices, but the majority held that the new law did not apply to the facts of the case because the plaintiffs had not been affected by a discriminatory compensation decision.

The decision reversed a 2007 ruling by the U.S. Court of Appeals for the Ninth Circuit, which found that AT&T had violated Title VII by refusing to credit the plaintiffs' pensions for time spent on maternity leave prior to the PDA.

“This was the first Supreme Court case to address arguments on Lilly Ledbetter,” Gold said. “It's clearly an important victory for AT&T, but for the greater employment law community it shows an intent on the part of the court to read Lilly Ledbetter narrowly.”

Gold said his firm took pride in representing large corporate clients on some of the most complex issues in employment law.

“Any employment lawyer who tells you they're bored right now, we couldn't relate to that,” he said.

Proskauer Rose LLP

Proskauer Rose wins a place on Law360's top employment defense firms of 2009 for its work on a case that ended with a high court ruling that held enforceable provisions in collective bargaining agreements that require arbitration of employees' statutory claims.

In 14 Penn Plaza LLC et al. v. Steven Pyett et al., the Supreme Court affirmed a ruling that a CBA between guards at a New York City skyscraper and their employer referring ADEA claims to arbitration was valid and enforceable.

“There's always this tension over whether you can preclude someone's day in court on issues of discrimination based on a CBA,” said Elise Bloom, co-chair of Proskauer's labor and employment group. “The courts have always been a little skittish about saying whether you could give up that right, and the fact that they did so here is important.”

Bloom called 2009 an exciting year for Proskauer, noting that the 18 separate practice groups within the firm's labor & employment department had been asked to handle many cutting-edge cases.

As for expansion plans, Bloom said the department was always trying to grow, though not necessarily in numbers.

“It's not about the amount of people; it's about the quality of people,” she said.

Akin Gump Strauss Hauer & Feld LLP

Akin Gump grabs a spot in Law360's list of notable management-side employment firms for its work in overturning a massive $105 million verdict against client Starbucks Corp. in what was the largest tip-pooling case in 2009.

Starbucks faced several suits from putative classes of employees accusing the coffee megachain of wrongly allowing shift supervisors to share in tips.

In In re Starbucks Employee Gratuity Litigation, a district judge in the U.S. District Court for the Southern District of New York on Dec. 16 granted Starbucks' dismissal motion, ruling that shift supervisors were not managers under New York law and therefore were entitled to tips.

Teaming with Halleland Lewis Nilan & Johnson PA in Delsing et al. v. Starbucks Coffee Shop, a Minnesota federal judge in October denied class certification to employees making the same claims, finding a lack of uniformity among putative class members.

And in June a California state appeals court ruled in Jou Chau v. Starbucks Corp. that a trial court had erred in ordering the company to pay back $105 million in improperly distributed tips.

“The Chau case in particular is interesting because it's a case where the company pursued its rights notwithstanding the challenges it knew it would face in the trial court,” said Bob Lian, head of Akin Gump's labor and employment practice.

“It made a well-considered decision to pursue the case through trial, and it was ultimately vindicated on appeal,” he said.

Akin Gump also earned a significant win for home improvement chain Home Depot USA Inc. in August, teaming up with EpsteinBeckerGreen in Novack v. Home Depot USA Inc. to defeat a bid for class certification by a group of employees alleging the company purposely miscategorized them as managers to avoid paying overtime.

Lian said continuing his firm's success in 2010 will mean working hard to keep clients up to date on potential changes, particularly regarding federal regulation of labor law.

“For many years it was states emerging as the lead regulatory force in labor and employment,” Lian said. “That has continued, but we're also seeing a resurgence of the federal government pushing for regulation in pension laws, workplace safety and other areas.”

Reed Smith LLP

Reed Smith earns a nod for its work as co-counsel for UPS Inc. in the successful appeal of certification of the largest-ever employee class under the Americans with Disabilities Act.

The class in Hohider v. UPS Inc., estimated at more than 36,000, claimed that UPS' policy requiring workers on disability leave to be 100 percent healed before returning to work wrongly barred them from resuming work in other capacities.

A district court certified the proposed class after ruling that the plaintiffs did not need to show their qualifications under the ADA at the certification stage, but the U.S. Court of Appeals for the Third Circuit reversed that decision in July.

Proving ADA eligibility was a basic requirement for ADA class status, the Third Circuit said.

Karl A. Fritton, leader of Reed Smith's labor and employment group, said the firm took on a diverse array of clients but that its attorneys had the versatility needed to serve them all.

“You have to stay very close to your clients, anticipate what they're going to need, get out in front of rate and fee issues, and basically know their business as well as they do,” Fritton said. “Think like you're an extension of their in-house staff.”

Fritton added that the practice group would continue to grow in 2010 with the planned addition of several lateral hires.

Gibson Dunn & Crutcher LLP

In addition to its work as defense co-counsel in Hohider v. UPS, Gibson Dunn makes Law360's list of top employment defense firms for its successful bid to the U.S. Court of Appeals for the Ninth Circuit for an en banc rehearing of a massive class action accusing client Wal-Mart Stores Inc. of a companywide policy of sex discrimination.

The class, certified first by a district court and then by the Ninth Circuit, comprises about 1.5 million female employees — one of the largest classes in U.S. history. The plaintiffs allege that about two-thirds of Wal-Mart's employees but only one-third of its managers are women.

The full bench of the Ninth Circuit heard argument in the case last year but has yet to issue its en banc decision.

Bill Kilberg, Gibson Dunn's most senior labor and employment practice partner, expressed confidence that Wal-Mart ultimately will prevail.

“What you're seeing is a transformation of plaintiffs attempting to use the class action device as a means of terrorizing defendants,” he said. “They say, 'If we can get the class certified, we never have to prove the case, because the defendant will settle because of the threat of so much liability.'”

But new trends are not uncommon in employment litigation, and part of building a successful practice is learning to adapt, according to Gene Scalia, co-chair of Gibson Dunn's labor and employment group.

“Employment law is always evolving, and entirely new statutes or causes of action can come to the fore in a small period of time, be dominant for a bit and then recede,” Scalia said. “We're finding we have to have expertise in dozens of areas, and we need to be able to have people in our firm to turn to for those areas.”

Seyfarth Shaw LLP

Seyfarth Shaw also earns a spot on Law360's list of standout management-side employment firms for several big wins in 2009.

The firm in September helped the city of Fort Lauderdale, Fla. prevail in a case brought by several police officers who challenged the legality of a pension plan allowing city employees to collect retirement benefits while still working, in exchange for mandatory early retirement.

In Steven Lerman et al. v. City of Fort Lauderdale, the U.S. Court of Appeals for the Eleventh Circuit rejected the plaintiffs' appeal that the Lilly Ledbetter Fair Pay Act allowed for claims under the ADEA to survive a voluntarily release form shielding the city from liability under employment discrimination laws.

In August Seyfarth earned Hillsides Inc. a victory in the California Supreme Court, which ruled in Hernandez et al. v. Hillsides Inc. that plaintiff employees at a home for abused children had not suffered an invasion of privacy when their boss secretly monitored them to catch an employee suspected of looking at pornography on workplace computers.

The decision established that, while employees were entitled to an expectation of privacy, exceptions could be made in special circumstances, according to Camille Olson, a member of Seyfarth's national labor and employment law steering committee.

In July Seyfarth defended Countrywide Home Loans Inc. in a putative class action by employees who challenged the company's overtime wage policy.

In Vinole et al. v. Countrywide, the U.S. Court of Appeals for the Ninth Circuit said a lower court had not abused its discretion by granting Countrywide's preemptive motion to deny class certification before the plaintiffs ever moved to certify.

And in March Seyfarth partnered with O'Melveny & Myers LLP to convince the U.S. Court of Appeals for the Seventh Circuit to uphold a ruling in United Air Lines Inc. v. Air Line Pilots Association International that a pilots union had violated a collective bargaining agreement by initiating a work slowdown when the airline refused to renegotiate terms.

Olson said Seyfarth prides itself in taking an aggressive approach to litigation, as in Vinole.

“It's regularly a part of our defense strategy to not wait and see what the plaintiffs are going to do, but to make motions as quickly as we can where it's appropriate,” Olson said. “That's especially important now, when time is money, and clients want swift resolution. Don't let the clock tick.”