

Employment MVP: Akin Gump's Daniel Nash

By **Bill Donahue**

Law360, New York (December 03, 2013, 3:54 PM ET) -- In winning huge appellate court victories this year for big-time employers Starbucks Corp. and Ernst & Young LLP in complicated labor class actions, Akin Gump Strauss Hauer & Feld LLP's Daniel Nash also won himself a spot on Law360's list of Employment MVPs.

Nash, a 30-year veteran of the firm and the former co-chair of its labor and employment group, also handles athlete-team disputes for major sports leagues and a variety of other work for other big employers, but it was the Starbucks and Ernst & Young litigation that really stood out in 2013.

That's because both cases dealt with potentially thousands of employees, working for two of the most recognizable corporations in the world, and both ended up before appeals courts on important questions of law. Perhaps most importantly, both also ended up going Nash's way.

In the litigation against Starbucks, two groups of former employees sued over how tips were being allocated at the company's coffee shops. One was a group of register-manning baristas, who claimed that hourly "shift supervisors" shouldn't be allowed to share in the proceeds from the tip jar; the other was from higher-up, full-time "assistant managers" who said they had been wrongly deprived of a cut themselves.

Both sides were arguing that Starbucks had run afoul of New York's labor laws by placing the cutoff for tip eligibility where it had, and New York courts hadn't really decided how a communal tip jar in a quick-service establishment like Starbucks should work.

Handling the case for Starbucks, Nash took that issue of first impression and built his case around the legislative intent behind New York's tipping laws, arguing that Starbucks had done just what the lawmakers wanted when they created the rules.

"The tips law was written at a time when they didn't maybe anticipate this, and so we looked at the legislative history and the intention behind the statute," Nash said.

"The [baristas] were arguing that they were being deprived tips. We said, 'No, you're actually the ones trying to deprive the hourly shift supervisors of tips they have earned,'" Nash said. "It would be completely unfair and would turn the statute on its head, because it was clearly designed to protect hourly workers."

Eventually, New York's top court agreed, finding that shift supervisors qualified as tip-eligible employees and that the assistant managers didn't. Late last month, the Second Circuit affirmed those findings in favor of Starbucks.

In the litigation against Ernst & Young LLP, Nash was facing two separate collective actions, one in California and one in New York, that claimed the accounting firm had violated the Fair Labor Standards Act by misclassifying its junior accountants as exempt from overtime.

Lower federal judges in each case ruled Ernst & Young was barred from enforcing its individual arbitration agreements with the plaintiffs, allowing their proposed collective actions to continue, and E&Y and Nash appealed both rulings.

In August, the Second Circuit and the Ninth Circuit each said E&Y was allowed to enforce its class-waiving arbitration provisions, namely in light of recent high-profile Supreme Court cases on the subject.

"The basic argument is that the collective action provisions under the FLSA are a procedural method, not a substantive right," Nash said of the E&Y cases. "That cannot override the [Federal Arbitration Act's] policy of promoting arbitration."

Though Nash is the MVP, he's quick to note that taking a big client like Starbucks or Ernst & Young from trial courts to appeals courts and back again is the work of many more than just one partner.

According to Nash, who has counseled companies on employment issues for roughly 30 years, much of his success comes from the particular way Akin Gump's appellate practice is highly integrated with his fellow labor litigators, setting up attorneys on both teams for big-picture success.

"One of the things we do is work closely with our appellate lawyers, especially in some of the more complex class cases like these, but also other cases where we think there are going to be important issues of law," Nash said.

It's also attributable to the next generation of MVPs over at Akin Gump, Nash said.

"I think my biggest accomplishment is just seeing the number of young partners working on these cases who are really terrific," Nash said. "We have just a great team of younger partners who are really making a name for themselves."

--Editing by Katherine Rautenberg.