

## Employment Group Of The Year: Akin Gump

By **Abigail Rubenstein**

*Law360, New York (January 24, 2014, 7:25 PM ET)* -- Attorneys in Akin Gump Strauss Hauer & Feld LLP's labor and employment practice group secured a series of impressive victories in 2013, helping clients beat back cutting edge legal claims over their tipping, arbitration and background check policies and landing the firm a spot among Law360's Employment Practice Groups of the Year.

Among its accomplishments in the past year, the firm managed to fend off challenges to Starbucks Corp.'s tip-splitting policy, convince two federal appeals courts to enforce Ernst & Young LLP's individual arbitration agreement in proposed wage class actions, and get the U.S. Equal Employment Opportunity Commission's suit over the Freeman Co.'s hiring screens tossed.

The firm's list of high-profile wins is even more impressive considering the labor and employment group's relatively small size. The firm has about 37 seated in its labor and employment practice and their number balloons to closer to 50 once the appellate lawyers who frequently work with the group are factored in, according to Robert G. Lian Jr. the head of the labor and employment group.

"When you look at the labor and employment marketplace, there are firms that have grown in this practice area to be larger than our entire firm, and it has not been our strategy to try to be the biggest," Lian told Law360. "What we've really tried to focus on is helping companies deal with labor and employment matters that are consequential to them where they are not looking for a cookie cutter strategy but are instead looking for a novel and creative approach to a significant and potentially problematic case."

The firm's victories over the past year include precedent-setting developments that bear out the creativity that Lian touts.

In *Barenboim v. Starbucks Corp.* and *Winans v. Starbucks Corp.*, a pair of appeals stemming from lawsuits brought by a class of baristas and a class of assistant store managers, the firm won a ruling from New York's highest court in June that Starbucks' tip-splitting policy — which left out certain full-time employees and included others — struck the right balance and was completely lawful.

The cases were closely watched by hospitality industry employers, and the decision set a standard that will impact a slew of businesses across the state.

"The ... handling of tips has been a very hot legal issue in the restaurant and food retail industry, and Starbucks being a very high-profile and well-regarded employer is an obvious target," Lian said. "This

decision is important because in many respects they become markers for the rest of the employer community and the bar in the sense that a win can have a significant impact on whether employers in the same industry will wind up seeing more litigation.”

Meanwhile, in cases where the firm represented Ernst & Young, it managed to obtain a pair of significant appeals courts rulings on another hot-button legal issue, namely, the enforcement of arbitration agreements containing class waivers in wage-and-hour suits.

In *Sutherland v. Ernst & Young*, the Second Circuit issued a landmark ruling on Aug. 9, holding that the Fair Labor Standards Act does not prohibit the enforcement of a class action waiver in an arbitration agreement.

Finding that the wage law does not contain a contrary congressional command that would prohibit the enforcement of class action waivers, the court overturned a New York federal judge's refusal to enforce the accounting giant's arbitration agreement, which requires employees to individually arbitrate their claims, in a proposed collective action accusing the firm of misclassifying its accountants as exempt from the FLSA's overtime requirements.

And in a similar case in California, the firm won a ruling from the Ninth Circuit enforcing Ernst & Young's arbitration agreement in *Richards v. Ernst & Young LLP*.

In that case, the appeals court rejected the plaintiffs argument that the firm had waived its right to force arbitration by heavily litigating the case before requesting that it be sent to arbitration in the wake of the U.S. Supreme Court's pro-arbitral decision in *AT&T Mobility v. Concepcion*.

“Like the Starbucks decision we got in regard to the tipping issue, the decisions on the arbitration issue that the firm secured for Ernst & Young are really going to be important over all on the broader legal issue,” Lian explained.

And taking on yet another headline-grabbing case on a hotly contested legal issue, the firm also convinced a Maryland federal judge in August to grant summary judgment to event promoter Freeman in the EEOC's lawsuit claiming that the company's use of credit and criminal background checks in its hiring process discriminated against candidates based on race and gender tossed.

The judge found that the suit, which was one in a series of cases filed by the agency over hiring screens, could not be supported by the evidence the EEOC presented, saying, “The story of the present action has been that of a theory in search of facts to support it. But there are simply no facts here to support a theory of disparate impact resulting from any identified, specific practice of the defendant.”

The EEOC has appealed the dismissal to the Fourth Circuit, where the appeal remains pending.

The ruling was considered a groundbreaking win for employers in the face of the agency's recent focus on whether background checks can create a disparate impact that violates Title VII. And like the Starbucks and Ernst & Young cases, it will likely be viewed as standard-setting.

“We have some incredibly creative lawyers trying to not do what everybody else does in terms of how we approach cases,” Lian said. “And as we did in Freeman, we take what I'd call a fearless approach to challenging legal issues and to not accepting that the way things have always been done is the way that they should be done or must be done.”

“We go after legal issues with a novel and innovative approach that accepts the reality that we're going to be making law in many cases,” he said.

--Editing by John Quinn.

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