

Employment Group Of The Year: Gibson Dunn

By Michael Angell

Law360 (December 4, 2020, 3:21 PM EST) -- Gibson Dunn & Crutcher LLP's employment practice has been a frequent defender of arbitration agreements, winning a series of cases for Uber, Lowe's and DoorDash related to worker classification and other wage and hour issues, and landing the firm among Law360's 2020 Employment Groups of the Year.

Gibson Dunn employment practice co-chair Catherine Conway said the group's 200 lawyers get a crack at litigation that touches some of the most important employment issues of the day, including evolving rules for the gig economy, the role of arbitration in workplace disputes, and defending against discrimination suits.

"We always have the luxury of variety and complexity of cases," Conway said.

A big focus for Gibson Dunn this year has been the challenges that ride-sharing giants Uber and Lyft face across multiple states in cases where drivers allege the companies violate the law by classifying them as independent contractors. The cases have regularly hinged on whether or not the workers had to arbitrate their claims.

The firm helped Uber score a win in July when a group of 48 drivers in California had most of their wage and hour claims against the company dismissed or sent to arbitration by a federal judge because many of the claims were covered in a \$20 million settlement Uber made in 2019 with California drivers.

Gibson Dunn also beat an attempt by Massachusetts Uber drivers to get paid sick leave for COVID-19 when a California federal judge in May refused the drivers' request for an emergency order to classify them as employees and pushed the suit to arbitration.

The firm was behind Uber's September win in the Ninth Circuit that upheld dismissal of a proposed class action from a driver alleging the company failed to protect his and other drivers' personal information from a data breach. That ruling, too, came down to Gibson Dunn being able to convince the court that arbitration was appropriate.

Conway said the successful outcomes in these cases were the result of Gibson Dunn's arguments that



arbitration agreements applied to these workers, who had claimed they were exempt under the Federal Arbitration Act.

Conway said despite these wins, plaintiffs attorneys remain on the hunt for ways they can circumvent arbitration agreements in bringing lawsuits.

"Even though the Supreme Court has spoken loud and clear about arbitration being the preferred way of resolving claims, we continue to have pushback on enforcement of arbitration agreements and class waivers," Conway said.

Even less explicit types of agreements between employers and employees can also form the basis for a successful defense, Conway said.

For example, the firm showed a North Carolina federal court that two Lowe's employees who were part of a proposed class action involving overtime pay allegations had already conceded to arbitration in a different action, prompting the court to kick their claims to arbitration in June.

The Gibson Dunn team was also able to get overtime claims from sales representatives of online ad firm Quantcast moved to arbitration in December 2019 when it successfully argued that the offer of employment letters the sales representatives received contained binding arbitration clauses.

And Gibson Dunn was behind DoorDash's victory in August when a proposed class action from a customer over the company's tip policy was moved to arbitration. There, the firm prevailed in its arguments that DoorDash's terms and conditions for using its app included a valid arbitration agreement.

Conway said the cases show the increasing creativity of plaintiffs attorneys in trying to circumvent arbitration agreements and find ways to bring claims against an employer.

"Once something seems settled, [plaintiffs attorneys] find a new way around it," Conway said. "There's always the potential for other claims. We always have to remain vigilant."

The year has also been marked by employers having to reckon with gender and racial disparities in their workplace. According to Jason Schwartz, co-chair of Gibson Dunn's employment practice, the firm has seen an uptick in discrimination cases as workers and government agencies are now more primed to file that type of suit.

Gibson Dunn's work has focused on both sides of the issue. It represented video game maker Riot Game, which settled a proposed class action late last year brought by female employees for claims of workplace harassment.

Schwartz said his firm aims to help clients make their workplaces fairer for all employees. At the same time, the firm is defending employers against what he sees as overreach from government agencies in trying to correct those wrongs.

"We've got lots of employers making sure they are doing the right thing," Schwartz said. However, "agencies can be overzealous and overreach where a case doesn't exist."

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