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LITIGATION DEPARTMENT OF THE YEAR

WINNER: LABOR & EMPLOYMENT



(L-R) JASON SCHWARTZ, EUGENE SCALIA, MYLAN DENERSTEIN, ZAINAB AHMAD AND KATHERINE SMITH

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—Theane Evangelis

WRITING THE PLAYBOOK

With novel labor and employment issues swirling, Gibson Dunn's litigators set standards and settle the law.

By Jessica Mach

IN THE SECOND HALF OF 2020, when much of the country was still under lockdown, essential workers at restaurants, meatpacking plants and delivery companies began challenging their

employers using a long-established legal tool: public nuisance lawsuits.

Traditionally used to fight conduct that plaintiffs believed was harmful to the public, these lawsuits had suddenly become a way for workers to demand more safety

measures, ones they said would slow the spread of COVID-19 both inside and outside the workplace.

Last June, workers at an Amazon fulfillment center in Staten Island, New York, joined these plaintiffs with their own

federal lawsuit against the online retail giant. The attorneys on Gibson, Dunn & Crutcher's labor and employment team, which represented Amazon, knew a win for the workers would set a problematic precedent for employers.

U.S. District Judge Brian Cogan of the Eastern District of New York ultimately sided with the firm's argument that the U.S. Occupational Safety and Health Administration—not the courts—was the right venue for the complaint. He dismissed the case.

"The judge agreed with us that a federal district court, or any judge for that matter, is not really in a position to evaluate the changing scientific conditions of a pandemic and then prescribe on a case-by-case basis what the appropriate safety measures should be," says Jason Schwartz, a litigation partner in the firm's Washington, D.C., office, as well as the firm's general counsel and labor and employment co-chairman. "That's just beyond the proper role of a judge."

The case was, in several ways, typical for Gibson Dunn's labor and employment team. It was high-profile, having garnered national news coverage as well as amicus briefs by the New York attorney general, unions and members of Congress, including Bernie Sanders and Alexandria Ocasio-Cortez. It was cutting-edge, being one of the first cases in the country to test the argument of workplace safety as a public nuisance issue.

It was also a victory.

"We love to win," says partner Theane Evangelis, who has handled cases on behalf of the country's largest gig companies, including Uber. "We are creative and tenacious, and we're ready to tackle these challenges. The fact that the law is unsettled and there's no playbook, we love to write that playbook."

The pandemic offered plenty of opportunities to chart new legal territory. Mass layoffs, a large-scale shift to remote work, a highly contagious virus, and rapidly changing workplace regulations all fueled worker unrest and exposed employers to new types of

liability. Many of them turned to Gibson Dunn for help.

Enterprise Rent-A-Car hired the firm when workers hit the company with a nationwide class action lawsuit under the federal WARN Act. The case was one of the first to test whether employers had violated the act by laying off workers during a global pandemic without first giving them 60 days' notice.

When Amazon faced another novel pandemic lawsuit, this time alleging the company did not properly compensate workers for the time they spent getting screened for COVID-19 before their shifts, the company once again called Gibson Dunn.

The team tackled plenty of cases that weren't related to COVID, too.

One of the biggest involved its representation of Uber. Last October, just days before California voters were set to consider a ballot measure that would have essentially guaranteed that Uber drivers would remain independent contractors rather than employees, the team scored a favorable order from San Francisco Superior Court Judge Richard Ulmer Jr., who denied a preliminary injunction request from Uber drivers that would have blocked Uber's campaign supporting the measure. California residents ultimately approved the measure, known as Proposition 22.

At the appellate level, the team last spring persuaded the U.S. Court of Appeals for the Eighth Circuit to decertify a class of more than 7,000 current and former Union Pacific workers with claims under the Americans with Disabilities Act. Because the class encompassed workers across 650 different railroad jobs, alleging a variety of disability claims, the district court's decision to treat them as a single class had stunning implications for employers across the country. Gibson Dunn successfully argued that the plaintiffs had too many individualized claims for the lawsuit to proceed as a class action.

Gibson Dunn's labor and employment attorneys credit one particular strategy for much of their success. "Pretty much every major case we

handle, we involve our appellate lawyers from the very beginning," says Katherine Smith, a partner and co-chairwoman of the labor and employment practice group.

That approach is a differentiator for the firm, Schwartz says.

"You've got fresh thinking about the problem from first principles. Not necessarily from a labor and employment perspective or any specialist perspective, but just more generally, what are the right arguments to make here?" Schwartz says.

Unlike the labor and employment practices at some firms, Gibson Dunn also makes sure its attorneys are well-versed across a range of issues in the field, instead of specializing in just one.

"We do not have just wage-and-hour lawyers, or just discrimination lawyers," Smith says. "Our lawyers are working on all kinds of employment matters and often matters beyond the employment context as well ... [which] allows us to compare and contrast what's worked, even outside of the employment context."

The challenges the team saw during the pandemic confirmed this strategy is effective, Smith says.

"So many of the issues that our clients have been facing do not fit neatly in any practice," she says. "COVID showed us problems that involved health and safety as well as wage and hour, and that was all happening at the same time the social justice movement implicated discrimination laws."

Where a wage-and-hour litigator might not think about WARN Act or OSHA issues implicated by a complaint, Gibson Dunn's attorneys keep it all in mind, Smith says.

But strategy isn't everything. It helps that the firm's lawyers love what they do.

"We love to dive into our clients' businesses and understand what's important to them, how their company works ... really to live and breathe it, to stay up at night worrying the case to get it to the right outcome," Schwartz says. ■