

## Employment Practice Group Of The Year: Gibson Dunn

By **Daniela Porat**

*Law360 (January 20, 2022, 2:02 PM EST)* -- With an employment law practice that isn't siloed by specialty and emphasizes a "first principles" approach, Gibson Dunn & Crutcher LLP scored a dismissal of a COVID-19 safety suit for Amazon and reversed a \$102 million judgment against Walmart, earning the team a place among Law360's 2021 Employment Practice Groups of the Year.

Gibson Dunn defended major employers through unique challenges spawned by the pandemic and continued to contend with the defining employment law issues of this moment, including securing Uber a victory at the Ninth Circuit, which found that drivers are not exempt from federal arbitration requirements.

The firm's appellate practice also earned recognition in Law360's Appellate Practice Groups of the Year

"We have at Gibson a strong team approach that draws on our employment, class action, and appellate strengths all together," said Katherine Smith, a partner and co-chair of the firm's labor and employment practice group. "Complaints aren't siloed, our practice isn't siloed."

Gibson Dunn attributes its success in part to its "well-rounded" attorneys, who have expertise in different areas of employment law and not just one area such as wage and hour or discrimination, Smith said.

"Just one case ... or challenge facing our clients in the context of COVID can implicate worker safety, it can implicate wage and hour, it can implicate harassment and discrimination, all at the same time," she said.

This integrated approach also means that the firm's appellate practice gets involved at the outset.

"We start each case by looking at how we will win not only at the trial court, but also at the appellate level," Smith said.

Another key to the employment practice's victories is a "first principles" strategy, meaning attorneys don't rely on blueprints from previous cases to determine the legal strategy for the case at hand, she said.



Gibson Dunn also tries to challenge conventional interpretations of the law, said Jason Schwartz, general counsel and also a co-chair of the labor and employment practice group.

"Let's just read this statute. What does it say? What arguments might that give us that maybe haven't been presented that way to a court before?" he said. "Even if the conventional wisdom is, 'You could never succeed with X, Y or Z,' well, why not? Let's try it."

This approach was behind the practice's Ninth Circuit victory vacating a \$102 million class action judgment against Walmart in May.

A three-judge panel found that the retail giant did not commit pay stub violations and notably that the lead plaintiff in this Private Attorneys General Act case lacked standing to bring meal break claims because he didn't personally experience that injury.

"You're going back to the basics of Article III and the fundamental principles of what it takes to be in federal court," Smith said. "PAGA is not a get out of jail free card. You still have to establish standing."

Another lesson from that lawsuit was the growing resistance of courts to "gotcha" lawsuits, Schwartz said. In this instance, however, there wasn't even a technical violation to begin with, according to the decision.

In reversing the pay stub judgment, the panel focused on the language of Section 226 of the California Labor Code, which states that pay stubs must reflect the hourly rate "in effect" during a given period. Because the quarterly bonuses that retroactively affected hourly rates were not in effect during that period, Walmart complied with state law, the panel said.

"There's a big difference between that and a case where somebody is knowingly not paid the amount that they're owed," he said. "I think the courts are increasingly growing unreceptive to that kind of lawsuit which I think is a positive development."

Gibson Dunn's success in dismissing a suit in New York federal court against Amazon over its COVID-19 safety protocols was a lesson in the limits of the legal system.

"Courts are not the right place for every workplace problem," Schwartz said.

U.S. District Court Judge Brian Cogan said in his November 2020 decision that it's the place of the Occupational Safety and Health Administration, not the courts, to decide whether Amazon is doing enough to protect workers at a Staten Island fulfillment center.

Gibson Dunn argued that a primary jurisdiction doctrine should apply.

"If there's an agency with technical expertise that can keep up on the day-to-day science of what is happening in the pandemic, well, that's a lot better forum for questions of workplace safety in a once-in-a-lifetime pandemic, than asking a court, a judge and a jury to figure that out case by case in a gazillion courts all over the country," Schwartz said.

Looking ahead, Smith said employers need to be both prepared and flexible as the pandemic continues to force businesses to change their planned courses of action at the last minute.

"It does seem like work from home is here to stay in a very real way regardless of COVID," she said.  
"That's going to change the employment law landscape in pretty much every way."

--Additional reporting by Braden Campbell and Craig Clough. Editing by Adam LoBelia.

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