

Employment Group Of The Year: Gibson Dunn

By **Abigail Rubenstein**

Law360, New York (January 16, 2013) -- From steering the Third Circuit toward a new test for determining joint employer relationships to preventing class certification in wage suits against Tenet Healthcare Corp. and Sunrise Senior Living Management Inc., Gibson Dunn & Crutcher LLP's labor and employment practice group scored an impressive series of wins in 2012 that earned the group a spot on Law360's list of Employment Groups of the Year.

Gibson Dunn's employment team also displayed its versatility in 2012 by securing a favorable outcome for Capital One Financial Corp. in a high-profile noncompete dispute and getting a California federal judge to send a proposed wage-and-hour class action against Northrop Grumman to individual arbitration.

"It is not mere coincidence that clients come to Gibson Dunn for their most significant employment matters," practice group co-chair Eugene Scalia told Law360. "General counsels and even board members find it reassuring that we bring across the board quality and effectiveness as litigators as well as employment lawyers."

And the firm's 2012 track record shows that such faith in the firm is not misplaced.

In the Third Circuit case, the firm not only secured a significant victory for its client Enterprise Holdings Inc. but also helped guide the appeals court toward a new standard for determining whether the for determining joint employer status under the Fair Labor Standards Act, dubbed the "Enterprise Test."

The test calls for courts aiming to decide whether a joint employment relationship exists under the FLSA to consider: the alleged employer's authority to hire and fire the relevant employees; its power to promulgate work rules and assignments and to set the employees' conditions of employment; its involvement in day-to-day employee supervision, including employee discipline; and, finally, its actual control of employee records, such as payroll, insurance or taxes.

After applying the new standard, the appeals court affirmed a Pennsylvania judge's finding that Enterprise, the parent corporation of 38 Enterprise Rent-A-Car operating subsidiaries throughout the country, was not a joint employer of the subsidiaries' assistant managers.

"I think that the case will be the leading case on the hot button issue of joint employment not only in the Third Circuit but also nationwide," Scalia said.

In another case that is likely to be cited by employers moving forward, the firm convinced a California appeals court in October to affirm the denial of class certification in a lawsuit accusing Tenet Healthcare of denying statutory compensation to employees who did not take their meal periods and failing to provide rest breaks.

The appeals court was reconsidering the matter in light of the California Supreme Court's landmark decision on meal breaks in Brinker Restaurant Corp., and concluded that substantial evidence supported the trial court's decision that individual issues predominated, particularly under the recently clarified requirement that employees make meal breaks available rather than ensure that they are taken.

"Everyone thought that Brinker would resolve all the questions about meal and rest breaks, but unfortunately we are still seeing these cases," Catherine Conway, who co-chairs the practice group, said. "And as we continue to litigate meal and rest break cases, Tenet will be looked to for its further refining of what Brinker really meant."

The firm also helped Sunrise Senior Living avoid having to face class claims in a meal and rest break suit, this time in federal court. In February, the court denied a motion for class certification in the case against Sunrise, citing the Supreme Court's decision in Wal-Mart v. Dukes — another Gibson Dunn victory.

These and other 2012 victories added to a pile of major wins from previous years, including the Supreme Court win in Dukes that decertified the largest class in history and getting the NLRB's headline grabbing case over Boeing Co.'s decision to open a new plant in South Carolina.

And the firm's strengths leave it poised to be positioned on the cutting edge of labor and employment law in 2013 as well, as Scalia and Conway tell it.

"What we're able to offer our clients — and not many firms can — is both absolutely top-notch expertise in labor and employment law but also one of the country's most admired litigation groups as a whole," Scalia said. "We work very closely with all the firm's litigators and appellate lawyers."

The involvement of appellate lawyers from the get go is part of the firm's signature, according to Conway, allowing the firm to develop key themes and strategies early in the case that can ultimately carry the day at the appellate level and that bring an added depth to the firm's representation of its clients at the earlier stages of a case.

And whatever unique challenges a particular case presents, the firm is ready to adapt, she said.

"There is no cookie-cutter approach to how we represent our clients," Conway said. "Each time we have a wage-and-hour case or a unique regulatory issue, we bring to bear a team of lawyers that will think outside the box and come up with a solution while partnering with the client to make sure we get best possible result for the client's business."

--Editing by Katherine Rautenberg.

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