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Employment Hot Topics: Class Actions, IP Protection, E-Discovery Impacts

The Editor interviews ***Michael J. Gray****, Partner, Jones Day.*

Editor: Mr. Gray, would you tell our readers something about your professional experience?

Gray: I am a partner at Jones Day in the Chicago office, where I specialize in complex employment litigation. I came to Jones Day primarily as a consequence of its outstanding reputation for expertise in labor and employment matters. I was also very impressed by the one firm concept that Jones Day utilizes. Our labor and employment practice, for example, is spread across many different offices, both domestic and overseas, but it works together as a single group. The same holds true for working with other practices, either here in the U.S. or abroad.

Editor: Please tell us about your practice. How has it evolved over the course of your career?

Gray: As a complex employment litigator, my practice has evolved in tandem with the developments faced by our clients. Over the past 10 years, for example, we have seen an extraordinary increase in the volume and the types of class action litigation confronting employers. Most recently, there has been a significant up-tick in the number and scope of wage and hour class actions against employers.

In addition, many of the labor and employment issues have become national and international in scope, and we encounter them almost as a matter of course today in our representation of some of the world's largest companies. These employers are now engaged in activities all across the U.S. and the globe, and we are routinely called upon to respond to problems wherever they arise. That has been a significant development in my practice. So today I may be in Los Angeles and tomorrow in Houston or New York.

Michael J. Gray

Editor: What are the trends in labor and employment litigation today?

Gray: There are two significant trends. One is the growth of wage and hour class action litigation. This started in 2001 with the *Farmers* litigation, and it continues to be a significant problem for employers throughout the U.S. Within this trend we are seeing a variety of class and collective actions. For example, there are exemption lawsuits, which concern a particular job category, say an outside sales force or a particular group of managers, or off-the-clock time, involving allegations that the company is not paying for all the time worked. Most recently, we have seen meal and rest break cases in which compensation for missed breaks is at issue. Overtime issues continue to progress into new areas of today's workplace.

The other significant trend involves litigation to protect the company's intellectual property. In the employment arena, this comes up in a number of ways, among them confidentiality, non-disclosure and non-compete agreements. As the American economy becomes more of a service and technology-based economy what is in the mind of an employee is increasingly crucial to the company's success. We are engaged in helping the company take proactive steps – often in the form of enforceable agreements – to protect IP and trade secrets to which the company's employees have access. We also have seen an increase in litigation with respect to the protection of IP where the employee looks to join one of the company's competitors.

There are reasons why we are seeing an increase in disputes in these two areas. In the wage and hour field we have laws that have been on the books for decades and simply do not address the issues of the modern workplace. It is the application of these laws that has resulted in many of these disputes. People with access to technology are working as telecommuters, for instance, and the old rules governing when people are working are very difficult to apply. Similarly, in today's world of BlackBerrys and PDAs, how do you determine when a person is working and how long? In the trade secret area, protection of technology is crucial to the corporations driving the global economy, and that, in turn, has resulted in an increase in litigation.

Editor: What do you tell general counsel to watch out for in this environment?

Gray: In the wage and hour arena, it is important to be proactive. That means looking at how the workplace is structured *before* the company is sued. The workplace is constantly changing, and that entails being ready to implement new procedures

Please email the interviewee at mjgray@jonesday.com with questions about this interview.

or revise existing ones on an ongoing basis. There is a predictive aspect to wage and hour litigation, and competent employment counsel should be able to walk corporate counsel through the issues.

Similarly, when the company is rolling out a new business strategy and one of the top executives leaves for a competitor, that is *not* the time to consider whether a non-compete or non-disclosure agreement is in place. These are things that should be dealt with on the front end. *And*, it is essential that general counsel ensure that these agreements are enforceable, which usually means calling upon expert outside counsel before the time to enforce arises.

Editor: You have spoken and written about the multitude of wage-hour class actions. Has the enactment of the Class Action Fairness Act provided any respite?

Gray: As a result of CAFA, we have certainly seen results in getting some of these cases removed from state court to federal court, where a more consistent approach to handling them is available. We may see a development in which it is more difficult to get a class certified in at least some federal courts than it is in state courts. CAFA is not the Promised Land, however. Rather, it represents a step in the right direction.

Editor: What can employers do to mitigate their exposure to this kind of liability?

Gray: Mitigation is a combined effort and involves the participation of a variety of people, most particularly the members of the law department, outside counsel and human resources professionals. I hasten to add, it is not necessary or appropriate for the lawyers to take over. Extremely conservative and overly protective procedures and policies on when, how and where employees work can have an impact on the substance of a company's business, and that is not a good thing. One of my themes as a practitioner in this area is to try to avoid being so caught up in process that the company loses sight of substance. In advising employers, I try to keep in mind that it is important that mitigation efforts do not become so invasive that business operations are adversely affected. That kind of mitigation accomplishes very little in the long run.

By being proactive – and working with professionals whose business it is to configure and define a particular job within a specified legal framework – an employer can free up its employees to carry on the business of the company with as little exposure as possible in these litigious times.

Editor: What about the future? Is there anything on the horizon – legislative, judicial or otherwise – that might give employers some hope that this is going to be overcome?

Gray: I do not believe that there is anything on the horizon that constitutes a silver bullet. However, the class action issue has reached the point where the general public – and not just corporate America and the lawyers who serve it – is aware of the damage being done. I am hopeful that, with the passage of time, some sort of sanctuary appears in cases where class action status is denied. If that occurs, many of these cases will go from the front page to being just another lawsuit. That, and the preventative measures we have discussed, will serve to undercut the incentives given the plaintiffs' bar for these cases.

Editor: While on the subject of class actions, would you tell us something about the resources that Jones Day brings to this particular arena?

Gray: Jones Day has approximately 125 labor and employment lawyers throughout the globe who work on these matters on a full-time basis. Another 50 to 60 spend a significant portion of their time in this arena. Within this group we have a dedicated group – located across all of our U.S. offices – who focus on class action employment litigation. We are well positioned to help in both state-specific and federal cases.

Editor: Who are the clients? Are there particular industry sectors that are more susceptible than others to class action suits?

Gray: Class actions have evolved from the insurance claims area and spread through retail, financial services and the technology sector. Recently we have seen more cases in the pharmaceutical industry. The restaurant industry has also seen considerable activity. Large national and global enterprises provide attractive targets for plaintiffs' lawyers seeking certification. Today, just about any company with more than 50 employees is a potential target.

Editor: Please tell us about some of the matters you have handled in this arena.

Gray: As a matter of public record, I have recently been lead counsel or co-lead counsel on putative class action lawsuits against McDonalds, CareerBuilder, Boston Market, Fleetpride and Wal-Mart. The variety of companies is indicative of the fact that everyone has been hit in one way or another.

Editor: You have also written about electronic discovery and the use of technology in complex litigation. What are the trends here?

Gray: The big news is the implementation of the amendments to the Federal Rules of Civil Procedure at the end of 2006. As a consequence of the lengthy discussion concerning these amendments over the past couple of years, we are beginning to see uniform standards adopted at the state level as well.

Electronic data has been a prominent feature in employment lawsuits for a long time, and you encounter it in a multitude of settings. The sexual harassment suit where the plaintiffs are trying to get to e-mails and the wage and hour suit where log-in time and clock-in time are different are but a couple of the many examples where technology is having an enormous impact on employment litigation.

In the trade secrets area, technology enables you to see what people did prior to, say, leaving for the competition. If they downloaded confidential information, it is possible to track their actions. Electronic discovery has become a critical component across a wide range of cases, and any litigator who expects to effectively represent his or her clients must be fully conversant with it.

Editor: What about the future? Today we are in the middle of a technological revolution that was undreamed of only a few short years ago. What's next?

Gray: The FRCP amendments anticipate changes in technology, and that allows for discovery of information that is inaccessible today but may be accessible in the future. The days of reviewing file drawers of documents in a conference room are gone. We review electronic data in PDF and TIFF files, and now in native format. Whatever the future may hold, it is essential that practitioners be well versed in all aspects of electronic discovery.