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Employment Group Of the Year: Jones Day

By **Martin Bricketto**

Law360, New York (January 12, 2015, 4:14 PM ET) -- Jones Day in 2014 not only secured critical U.S. Supreme Court decisions on the donning and doffing of workplace outfits and recess appointments to the National Labor Relations Board but also helped Detroit resolve a web of labor matters in its historic bankruptcy, landing the firm among Law360's Employment Practice Groups of the Year.

Jones Day was lead counsel for Detroit on all labor and employment matters in the city's Chapter 9 bankruptcy, the largest municipal insolvency in U.S. history. That has meant representing the city in reorganizing its workforce and departments as well as negotiations with 47 bargaining units of city employees and revamping benefits for current workers and retirees. That work paid off in November when U.S. Bankruptcy Judge Steven Rhodes approved the city's bankruptcy exit plan.

“I think public entities — states and local governments — were given a bit of a wake-up call, but I think there are a whole bunch of more immediate lessons,” said Lawrence C. DiNardo, the firm's global labor and employment practice leader. “If you bring to bear very talented people of good will on both sides, these problems can be fixed."

With 130 full-time labor and employment attorneys, Jones Day, the largest law firm in the U.S., prides itself on a long-standing commitment to those areas of the law, which practice group leaders say has led to the firm's role in ground-breaking decisions like Sandifer v. U.S. Steel Corp. and Noel Canning v. NLRB and established it as a go-to shop for high-stakes litigation.

“This isn't something where we have dipped into the area of labor and employment law,” DiNardo said. “The clients, the people who are looking for first-class representation, they're conscious and aware of this. There have been firms who have withdrawn from the practice in recent years and, to me perhaps most interestingly, there have been firms who have withdrawn then attempted to reenter. They haven't been as involved in the development of the law and as involved in as many of the leading projects as we have.”

Labor and employment remains one of the largest practices at the firm, which devotes significant time to developing talent in the field, according to Michael J. Gray, who leaders the labor and employment practice in the firm's Chicago office. The reach of the firm and its 41 offices worldwide and a culture of cooperation have also been crucial ingredients to its success, Gray added.

“We talk about one firm worldwide. It's not a motto. It's the fundamental nature of Jones Day,” Gray said. “As the world has gotten smaller, we continue to see a growth of large, material, complex labor and employment matters. Our structure and culture allow us to deploy the right people and the right talent.”

The field in recent years has been characterized by heightened scrutiny from government regulators on employer practices that might have been acceptable in the past as well as increasingly targeted and complex private actions, according to Gray. Much of what employers are confronting stems from the evolving nature of work in the 21st century, added DiNardo, who is also based on the firm's Chicago office.

“We do business differently than we did in 1938 when the Fair Labor Standards Act was passed,” DiNardo said. “People didn't have smartphones, they weren't doing email from home, they weren't working at home, you weren't signing on to a computer that left a time stamp. These are all new practices that didn't exist in the past and they're all being tested.”

The U.S. Supreme Court's decision last January in the Sandifer case hinged on what constitutes “changing clothes” under the FLSA, with the justices unanimously deciding that U.S. Steel workers weren't entitled to pay for time spent donning and doffing work gear.

Jones Day scored district court and Seventh Circuit victories for U.S. Steel leading up to the unanimous opinion from the justices, who staked out a middle ground between the competing definitions that plaintiffs and the company offered for “clothes” in Section 203(o) of the law. That section holds that time spent changing clothes or washing at the beginning or end of each workday is excluded from compensable time if it is treated as nonwork time by a collective bargaining agreement.

In weighing such disputes, courts should look at whether the vast majority of the time period at issue is spent on changing clothes and washing that falls under Section 203(o) or on putting on and taking off nonclothes items, the justices held.

The decision represents a call for moderation instead of extreme applications of the wage-and-hour law, according to DiNardo.

“These sorts of peripheral things that are done on the edges of the day — whether it be putting clothes on or taking clothes off, or whether it be walking through security to get to where you work, or starting a laptop in the morning — I think the courts are going to take a more practical, real-life, sensible and not technical or petty view of what is a principal activity, what is really party of your job and what is not,” DiNardo said.

About six months later, Jones Day won another unanimous ru**ling** from the high court on behalf of soda bottler Noel Canning that three recess appointments that President Barack Obama made to the National Labor Relations Board in January 2012 were unconstitutional.

The appointments of Terence Flynn, Richard Griffin and Sharon Block ran afoul of the Constitution's Recess Appointments Clause because the Senate was not actually in recess when they were appointed. At the time, the Senate was holding “pro forma” sessions every three days.

The decision has forced the NLRB to revisit and issue new decisions in cases that involved those board members but it also sheds additional light on how the court will handle issues of constitutional interpretation, according to DiNardo.

“Certainly this Supreme Court is going to give its due to the constitutional language and stretched constructions of the Constitution are not going to be approved by this Supreme Court," DiNardo said.

--Additional reporting by Andrew Scurria and Ben James. Editing by Patricia K. Cole.
