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Q&A With Sheppard Mullin's Jonathan Stoler

Law360, New York (March 27, 2013, 1:44 PM ET) -- Jonathan Stoler is a partner in Sheppard Mullin Richter & Hampton LLP's New York Office. He serves as co-chairman of the firm's global labor and employment practice group and the national noncompetition and trade secrets team.

Stoler represents corporations and management in single-plaintiff and class action litigation involving claims of discrimination, wrongful discharge and wage and hour violations, in addition to noncompetition, breach of contract, whistleblower and related claims. Stoler counsels clients regarding the preparation and administration of personnel policies and provides advice regarding reductions-in-force, discipline and discharge, employee disability and leaves of absence issues. He also advises management on the labor aspects of mergers and acquisitions and the extraterritorial application of U.S. laws.

Q: What is the most challenging case you have worked on and what made it challenging?

A: One of my first clients as a partner was a small, family-owned construction business involved in a noncompete and trade secrets case. Our client was being sued by a much larger and better-financed company. While this was the first of many "bet the company" type cases I would be handling over the course of my career, this case proved all the more critical, given the relationships I formed with these family members and the possibility of their losing everything. We successfully represented our client at the preliminary injunction trial and ultimately defeated the competitor's attempts to enforce the noncompete agreements at issue.

More recently, a case that comes to mind is our representation of a national sporting goods retailer in a multidistrict Fair Labor Standards Act hybrid collective/class action. Cases of this size and scope are always challenging particularly when considering the multiple jurisdictions involved, the intersection of federal and various state wage-hour laws and navigating the conflict between FLSA Section 216(b)'s opt-in mechanism and Federal Rules of Civil Procedure 23's opt-out mechanism.

Q: What aspects of your practice area are in need of reform and why?

A: The two-step FLSA certification process currently relied upon by courts today is flawed. Courts typically apply a "light scrutiny" standard when determining whether to certify a class at the conditional certification stage. The problem with this standard of review is that it can prematurely allow more employees to join a litigation before determining whether representative adjudication is even possible.

In fact, what many people fail to realize is that the FLSA itself does not provide for a two-step certification process, much less the lenient standard that the courts have created for conditionally certifying FLSA collective actions.

The correct standard that courts should be using in determining whether to certify an FLSA collective action is the "similarly situated" standard. This is the explicit statutory standard under the FLSA for collective actions and should be the uniform standard interpreted in terms of the issue to be addressed in the particular FLSA case.

Q: What is an important issue or case relevant to your practice area and why?

A: Notwithstanding the U.S. Supreme Court's rulings in Stolt-Nielsen v. Animalfeeds International Corp. and AT&T Mobility LLC v. Conception, the enforceability of class arbitration waivers, particularly within my home state of New York, remains an important issue for the management-side employment bar that is still in flux.

In that connection, a case that I'm closely watching is Raniere v. CitiGroup Inc., which is currently up on appeal before the Second Circuit. In Raniere, a district court judge in the U.S. District Court for the Southern District of New York held that FLSA collective action claims cannot be compelled to individual arbitration based on the court's conclusion that the FLSA includes the substantive right to proceed collectively.

However, other district courts to consider the issue, including several sister courts in the Southern District of New York, have held that FLSA claims and collective actions may be compelled to single-plaintiff arbitration. I'm hopeful that the Second Circuit will reverse Raniere and make clear that employers may effectively use class arbitration waivers as a means of avoiding costly FLSA collective actions as well as other employment-related class actions.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: I've been lucky to have several mentors over the course of my career from whom I've tried to model my legal practice and my approach to client service. Ken Kirschner of Hogan Lovells LLP and Jack Kiley of Kelley Drye and Warren LLP particularly come to mind. They are both excellent legal practitioners who taught me long ago that to effectively serve your clients, you need to minimally provide them with three things: a clear understanding of the law at issue; options for practically applying the law to the matter at hand; and your definitive position as to the legal strategy that should be employed.

Q: What is a mistake you made early in your career and what did you learn from it?

A: Not taking on pro bono matters at an earlier stage in my career. As a junior associate, my work was focused exclusively on billable matters for corporate entities. I was drawn to pro bono work later in my career because I believed that I could make a positive difference in the lives of real people. I also came to learn that through pro bono work, I gained access to professional development opportunities, such as learning other practice areas and acquiring more practice and case management skills.

Today, even as a partner in a large firm, I've continued to build on these experiences as a board member of the New York Lawyers for the Public Interest. It's important to remember that while a law firm is certainly a business, the practice of law is a profession. And in our profession, it follows that pro bono work is among the noblest of things we, as lawyers, can do.

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