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Q&A With Morrison Cohen's Keith Markel

Law360, New York (June 14, 2013, 2:09 PM ET) -- Keith Markel represents businesses and individuals in a range of employment litigation matters, including state and federal court actions against discrimination claims (from sexual harassment to discrimination on the basis of race, age and disability), constructive discharge, breach of contract, employee misclassification and wage and hour violations. He also represents employers in administrative proceedings (including before the Equal Employment Opportunity Commission, the U.S. Department of Labor and state and local human rights agencies).

Markel handles employment arbitrations before the Financial Industry Regulatory Authority, among other forums, for claims arising out of breach of contract, promissory estoppel, tortious interference, quantum meruit and unjust enrichment and other alleged violations of federal and state labor laws. He has litigated various matters involving restrictive covenants and related employee loyalty claims and counsels clients with respect to anticipated litigation arising out of the employment relationship.

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

A: There have been many cases during my career that could be described as “challenging” for various reasons. Some because of the nature of the claims and others based on the facts or parties involved in the dispute. In a recent sexual harassment case, a celebrity client was facing various discrimination claims brought by multiple plaintiffs that had each corroborated the other’s allegations of discrimination. The complaint contained various salacious details as could be expected in a typical sexual harassment lawsuit.

In this case, however, there were limited employment records, and all of witnesses to the alleged events were no longer employed to dispute the allegations. It was a quintessential “he said, she said” case. We spent several months tracking down former employees and obtaining employment and medical records that refuted plaintiffs’ claims and corroborated our defense.

In addition to having to track down all of the evidence from multiple third parties, the challenging aspect was that plaintiffs’ counsel had set up roadblocks to prevent us from discovering information at every turn in the litigation. Rather than complying with their disclosure obligations, plaintiffs tried to leverage the allegations in the complaint by using the press to obtain a large settlement.

There were multiple motions filed with respect to discovery, which ultimately led us to seek various penalties pursuant to Civil Practice Law and Rules § 3126. As a result, the court issued an order precluding plaintiff from presenting evidence to support their damages claims at trial. The case was subsequently dismissed.

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

A: In recent years, my litigation practice has been centered in arbitration. Unlike federal or state courts that are guided by long-standing legal precedent, rules of evidence and civil procedures, arbitration forums typically follow their own set of rules and guidelines. Unlike judges and juries that are bound by the law or legal instruction, arbitrators are typically left with discretion as to whether to follow legal precedent, rules of evidence or be guided by equitable considerations.

There are limited grounds for which an arbitration award can be overturned, and most arbitration decisions are not explained in any detailed fashion, let alone provide a legal basis or opinion. As a result, there is a great deal of uncertainty in the arbitration decision process for both employees and employers.

While arbitration guidelines are focused on principles of fairness and efficiency, arbitration decisions are nonetheless notoriously inconsistent on their face. Although as a whole, the arbitration process is well intentioned, by not providing specific guidelines to arbitrators to follow and providing participants with comprehensive written decisions, outcomes for otherwise standard employment claims remain unpredictable. A detailed framework for arbitration decisions would assist in ensuring that arbitration is an efficient and consistent process of adjudication.

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

A: An issue that seems to repeat itself again and again in my practice is whether bonus compensation is considered wages under New York Labor Law. Courts have stated that incentive compensation is not deemed to be "wages" unless it is "earned." See Truelove v. Northeast Capital & Advisory Inc., 95 N.Y.2d 220, 225 (2000).

Accordingly, disputes over an employee's entitlement to incentive compensation often turn on whether a particular bonus or other type of incentive compensation has been earned and thus constitute "wages," which is not subject to withholding or forfeiture without penalty under New York Labor Law. New York Labor Law provides greater remedies than common law theories of breach of contract. Indeed, New York has a Wage Theft Prevention Act that provides for liquidated damages (double the amount), attorneys' fees and interest for employers found liable for withholding wages.

Recently, the New York Court of Appeals upheld a lower court's finding that an employer's failure to pay a bonus was a failure to pay earned wages subject to recovery under New York Labor Law, along with the statutory attorneys' fees and interest. Ryan v. Kellogg Partners Institutional Servs., 2012 N.Y. (N.Y. Mar. 27, 2012). In Ryan, there was an alleged promise to pay a bonus to an employee of a broker-dealer, which the jury found binding on the employer. The court then reasoned that because the bonus was earned, the failure to pay it violated New York Labor Law.

Although entitlement to incentive compensation such as bonuses continue to revolve around principles of contract law, the labor law issues implicated continue to be relevant to how these disputes get resolved. As New York courts continue to address the issue of incentive compensation as wages, employers and employees should tailor their employment compensation agreements accordingly.

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

A: Deborah Kelly is a former colleague and mentor at Dickstein Shapiro LLP in Washington, D.C. We worked together for 10 years, and she taught me to take a practical approach to assisting clients with employment issues. No one wants a 50-page legal research memo; clients want the "down and dirty" (as she liked to say) on how to handle an employment situation. I have adopted that approach in my practice, and I am grateful to her for imputing her employment experiences on me over the years we worked together.

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

A: As an attorney fresh out of law school, I was eager to impress people with my understanding of the law. However, I soon realized that being a good advocate means not only understanding the law but also knowing everything about your case.

I learned this the hard way during my first year when a judge asked me about a fact concerning my client's business that I couldn't answer. Needless to say, the judge was unimpressed. Since I was focused on the legal issues, I did not ask the appropriate questions of my client. In hindsight, I was not 100 percent prepared. Since then, I have been guided by the philosophy that the best lawyer is always the one that is the most prepared.

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