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NEWS

PRACTICE TIP—Jackson Lewis holds class action 'boot camp'

In just the past few months, the class action pendulum has begun to swing.

A telling example of the post-Scalia U.S. Supreme Court was its May 16 decision in *Spokeo, Inc. v. Robins*, which offered an outcome very different from that predicted when the Court first granted cert. The Court punted back to the lower court the essential question, in a class action case with clear implications for employers that rely on consumer reporting agencies to run background checks, whether a "bare" procedural violation of the Fair Credit Reporting Act was a sufficiently concrete injury to confer standing. While "bare" procedural statutory violations will not automatically confer standing, they may be enough in certain circumstances where there is a risk of real harm.

Another case in point: *Tyson Foods Inc. v. Bouaphakeo*, a March decision upholding employees' right to use representative evidence in an FLSA donning and doffing case. The 6-2 decision, handed down a month after Scalia's death, represented a palpable shift in the law on this point.The divided Court rejected Tyson Foods' challenge to the use of representative statistical sampling by plaintiffs to secure class certification of their "donning and doffing" wage suit. The use of a representative sample can't be deemed improper merely because the claim is brought on behalf of a class, the majority held. Consequently, a district court did not err in certifying (and maintaining) the class, and the Eighth Circuit properly upheld the lower court's decision.

And, in a significant victory for the NLRB—one that creates a split with the Fifth Circuit over the Board's much-maligned *D.R. Horton* decision—the Seventh Circuit agreed that a software company violated the NLRA by imposing a mandatory arbitration agreement that barred employees from seeking class, collective, or representative remedies to wage-and-hour disputes (*Lewis v. Epic Systems Corp.*, May 26, 2016).

Class action training program. These three decisions, as well as many others, such as the proposed $100 million Uber misclassification settlement, suggest strongly that class litigation isn't going away any time soon. What makes employment class action practice so unique? Jackson Lewis' first-ever Class Action Training Program, which was held in Chicago April 14-17 and led by the firm's Class Action Practice Group Leaders Will Anthony and Stephanie Adler-Paindiris, shone a spotlight on the firm's class action practice.

The law firm's training program offered participants deeply substantive information about the legal and strategic issues in class actions. "The goal of the training was to 'strengthen our bench,'" the leaders stressed, and to that end, topics included but were not limited to initial case strategy, gathering evidence through blitzes or other electronic means, pleadings, motions to dismiss, motions for conditional certification, data analysis, mediation, motion for decertification, and trial. "Ultimately, our goal was to ensure Jackson Lewis attorneys will continue to consistently practice at the highest level in this very dynamic area of our practice," said Anthony and Adler-Paindiris.

The stakes are high. Looking back on the training program's successful completion, Anthony and Adler-Paindiris spoke with Employment Law Daily about the biggest misconception attorneys who lack class action expertise have with respect to class action practice.

Anthony initially identified a few obvious differences. The stakes are significantly higher than cases involving single-action plaintiffs. And although many attorneys may be well versed in the substance of the litigation, the procedural overlay of the class action requires its own skillset so counsel who have the substantive knowledge don't get tripped up by the procedure.

Other aspects of class action litigation may hit the defendant employer particularly hard, continued Adler-Paindiris. When a company faces a class action, it isn't just the financial exposure of being subject to multiple claims—as breathtaking as that may be—that is so significantly different: The case may be a "bet-the-farm" kind of case. For example, misclassification cases may challenge a defendant's entire business model and hence its very existence.

Further, clients may fear they will not receive due process in a class action. They perceive all these people, with different facts, different locations, different supervisors, and in the employer's eyes, different claims. They may wonder how they can possibly defend themselves, said Adler-Paindiris.

In addition, there is a clear trend among the agencies to push all their litigation towards class or pattern-or-practice claims, she pointed out.

Strategic plan. Considering these high stakes, defendants are looking at potentially devastating effects of a class action on their business. This requires a higher-level strategic plan because, in the class action context, identifying what a "victory" looks like can be very different.

All these factors—and the trend towards more class actions—suggested to Jackson Lewis that it was wise to strengthen its bench so that the firm could continue its winning recipe of protecting clients with competent and strategic representation.

The Training Program's structure. Participants initially were provided with extensive pre-work materials, including white papers from the firm, key case law, sample briefs, motion responses, RFPs, and sample complaints for motion practice, Anthony said.

The program itself ran 10 hours a day for two days and included panel discussions, breakout sessions, and informal discussions at both lunch and dinner. All different types of employment class actions were reviewed: wage hour (Rule 23 and collective actions), discrimination, FCRA, and ERISA, for example.

On the program's final day, the participants broke into teams and spent the morning arguing motions, pitching cases, and presenting opening statements at mediation in front of a bench composed of Jackson Lewis experts.

The program was designed to build a consistent, thoughtful and strategicanalytical approach among the participants, Anthony said. Class action strategy varies tremendously depending on the facts of a case, so there is no cookie-cutter approach, but a consistent analytical approach helps clients think through issues, and use experts and data more effectively.

Selection of participants. About 115 attorneys participated in the boot camp, which was hosted by approximately 15 faculty members composed of senior Jackson Lewis litigators. Almost every Jackson Lewis office was represented. A lot of thought went into who was chosen, Adler-Paindiris emphasized. Jackson Lewis chose participants who would commit to the Class Action Practice Group and who would pitch in and help around the country, as needed, and wherever needed.

Participants would have to be "all-in," Adler-Paindiris said. "This was no party—this was a mental boot camp," she quipped. Participants' experience levels varied, but all shared an intense and exhausting experience (complete with "T-shirts and a dorky group photo," she noted) and came away with a greater sense of cohesion and loyalty than before.

This is why Jackson Lewis believes it is different, Adler-Paindiris said, in how the firm collaborates by sharing information and expertise, and by reinforcing its ethics and overall excellence: "We don't do this alone."

Training Program topics. Sessions focused on topics such as ethical considerations in class litigation (including class member communications), Supreme Court trends, unique issues involving California law, deposition nuts and bolts, and Rule 23 vs. collective actions. The over 20 hours of substantive instruction included:

- **Initial Case Evaluation** (To blitz or not? What is the realistic exposure to the company? What is the strategy for winning or ending the case?)
- **Data Analysis** (Uses of data; strategic benefits to conducting a damages analysis early on; Top 3 Things "Experts" Get Wrong)
- **Mediation of Class Claims** (Where and when to mediate; how to prepare)

Attorneys also participated in mock pitches, oral arguments and opening statements under the tutelage of a faculty comprised of senior Jackson Lewis litigators.

Based on the dozens of emails and calls received by the practice group co-chairs, the participants felt it was a tremendous opportunity and a valuable experience. They felt honored to attend and appreciated the firm's investment in them. It also helped them understand the firm's capabilities. Anthony noted he was "blown away by the level of talent" throughout the firm as represented by the program's participants. He reported to the Board: "Our future is bright."

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