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Q&A With EpsteinBeckerGreen's Michael Kun

Law360, New York (November 11, 2009) -- Michael Kun is a shareholder in EpsteinBeckerGreen's Los Angeles office and national co-chair of the wage and hour, individual and collective action group. He has practiced labor and employment law for more than 20 years, exclusively representing management.

While he regularly handles a variety of employment litigation, Kun has also defended more than 40 class actions and collective actions, including cases alleging discrimination and wage-hour violations. Kun regularly writes and speaks on a wide array of employment subjects. He has also written four novels and has co-authored two sports books. He is a graduate of The Johns Hopkins University and The University of Virginia School of Law.

Q: What is the most challenging case you've worked on, and why?

A: About a decade ago, at my prior firm, I was asked to step in and handle a two-week jury trial in the Midwest only five days before trial was to commence. It was a disability discrimination/retaliation action where the plaintiff would be seeking more than $2 million at trial.

I had never heard of the client before, nor of the plaintiff. I hadn't seen the discovery. I didn't know who the witnesses were. I wasn't even admitted in the court. And the attorney who was assigned to second chair the case with me knew as little about it as I did.

To say it was a challenge for us to review two years' of discovery, interview and prepare witnesses, create a theory of the case, and prepare demonstrative exhibits, witness examinations and an opening statement — all in five days — would be an understatement. But it was an important reminder to me of the reason I had chosen to enter the profession in the first place.

The trial itself presented a number of unusual evidentiary issues, and issues regarding jury instructions, at a time when the Americans with Disabilities Act was not as developed as it is today.

It also presented what I suspect was a unique dilemma. In a very cramped courtroom, with the plaintiff seated directly behind me as I gave my closing argument, the plaintiff muttered under his breath that he was going to kill me.

Perhaps I should have mentioned earlier that the plaintiff had spent 10 years in a federal prison for kidnapping an elderly couple at gunpoint.

Instead of bringing the threat to the judge's attention and risking a mistrial in a case that appeared to be going our way, I decided to ignore it and complete the closing argument.

It proved to be the right decision. As you might imagine, I wouldn't have shared this story had we not prevailed — the jury returned a complete defense verdict within 15 minutes.

And if you think the plaintiff shook my hand afterward, you're wrong.

Q: What accomplishment as an attorney are you most proud of?

A: As readers of EmploymentLaw360 know, the wage-hour class action epidemic has hit employers especially hard in California. Restaurants and retail establishments were among the first hit; after all, they are some of the few industries that literally open their doors every day and make their employees available to the public, including plaintiffs' lawyers.

After the larger restaurant chains had survived these cases, a few plaintiffs' firms began to focus on smaller chains or individual restaurants. Of course, the resources to defend a class action or pay a settlement are much smaller for these companies, and these actions can threaten their very existence, even where the claims have no merit.

Last year, a very small, family-owned restaurant chain in California was hit with a wage-hour class action. Putting aside the merits of the case, win or lose the lawsuit itself was likely to put the chain out of business after 30 years of operation. The family was distraught.

The family only had a relatively small sum of money to defend the case, and we worked with that shoestring budget with the simple goal of trying to save the company. We were able to craft some compelling arguments to convince the plaintiffs' counsel that they would have great difficulty certifying a class and would recover nothing if they did. After a year of litigation, and still within our limited budget, we reached an inexpensive settlement with the named plaintiff alone.

I am glad to say that the restaurant chain is still in business as a result.

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

A:Virtually every aspect of wage-hour collective actions (and, in California, class actions) needs to be reviewed and revamped.

It's no secret that these actions have little to do with the facts — or an attempt to uncover the facts — and are driven instead by their in terrorem effect and the awards plaintiffs' counsel seek for themselves. Cases settle for large amounts not because they deserve to, but because employers are rightly concerned about legal fees and worst-case-scenarios. Plaintiffs' counsel pocket multimillion-dollar fee awards, sometimes for doing as little as filing a complaint and showing up at a mediation.

Where to start reform?

It's too easy to obtain conditional certification in a Fair Labor Standards Act collective action. The bar needs to be raised.

And, under California state law, there isn't enough guidance for the courts on the standards for certification in a wage-hour case. Great judicial discretion, coupled with little guidance, often means that these high exposure cases come down to the luck of the draw: Where one judge might not certify the case, the judge in the courtroom next door might.

Additionally, if these actions are truly about employees not being paid lawfully for their work, then more measures need to be taken to keep plaintiffs' counsel from keeping huge portions of settlements for themselves. While the Class Action Fairness Act was a step in the right direction, it was just a step.

Q: Where do you see the next wave of cases in your practice area coming from?

A: BlackBerrys, Treos, iPhones and every other portable communication device may well be the basis of the next wave of wage-hour class actions and collective actions.

It used to be the case that employees left their work at the office (or the plant, or the factory).That was especially true of nonexempt employees. Now, because these devices are so omnipresent, employees at all levels take their work home with them in their pockets.

It's only a matter of time before employers start facing class actions from non-exempt employees claiming that they were not paid for their time at home checking their Blackberries and responding to emails, text messages and other communications.

And it's only a matter of time before class actions start being filed on behalf of exempt employees who will claim that because they responded to e-mails while they were on vacation or unpaid leave, they were in fact working that week and are entitled to be paid their salary.

Q: Outside your own firm, name one lawyer who's impressed you and tell us why.

A: Richard Hafets of DLA Piper in Baltimore. Rich is a skillful lawyer with great knowledge of the substantive law, and an excellent strategist. What has always impressed me the most about him, though, is how even-tempered he is in an area of law not always known for people with even tempers.

Just don't ask me what I think of the rough draft of a novel Rich once sent me to comment on.

Q: What advice would you give to a young lawyer interested in getting into your practice area?

A: There is a mistaken belief that wage-hour defense is somehow less thoughtful or creative than other types of employment defense work, and that the same approach can be taken in each case. Don't believe it. Taking a boilerplate approach to defending these cases does a disservice to your client. Each client is different, each plaintiff is different, each workplace is different, and each case is different — and each one deserves a unique approach, as well as your creativity.