Q&A With Seyfarth Shaw's David Baffa

Law360, New York (March 19, 2013, 2:13 PM ET) -- As chairman of Seyfarth Shaw LLP's workplace counseling and solutions practice group, David Baffa focuses his practice on delivery of proactive solutions to help clients avoid mass litigation and develop internal compliance initiatives. He has led global clients on centralization and process-mapping of compliance initiatives, including matters involving pay equity, leave and accommodation management, promotion and diversity, hiring and testing and other initiatives.

Baffa is also co-chairman of the employment litigation practice group. Baffa conducts training and coaching through Seyfarth Shaw at Work.

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

A: For me, the most challenging was not any particular lawsuit or due diligence exercise but my first major foray into a full-scale proactive consulting project using Lean process-mapping and other Six Sigma-inspired techniques that Seyfarth has adapted for the legal services industry over approximately the prior eight years.

In 2007, I secured a major overhaul of a large corporation's entire leave management and accommodation systems. It was among the firm's earliest client-facing applications of SeyfarthLean process-mapping techniques and included the development of automated, integrated template documents, decision trees and related tools to address all types of leaves and all workplace accommodation issues.

Adding to the challenge was the fact that the new system was built in response to, and to help fend off, a major government agency inquiry, and our work succeeded in helping keep that investigation out of the public spotlight. The engagement was a unique challenge because it went far beyond the practice of law and deep into the consulting space.

Bringing any group of lawyers — our own and those of our clients — to a new way of thinking and delivering solutions was a real challenge, particularly back in 2007. But the experience opened up a new type of partnering with clients that permanently changed my practice, and our work drove the creation and delivery of a slew of new and innovative SeyfarthLean processes in the labor and employment space that we routinely build now together with clients.

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

A: From my vantage point, employers strive to follow the law and to do the right thing but often are stung by illogical extensions of the law or burned on minor technicalities that give rise to undeserved lawsuits in which only attorneys benefit. My practice is focused largely on developing compliance solutions. It is fueled, on the one hand, by confounding, overlapping and even contradictory federal and state laws, administrative rule-making and judicial interpretations and on the other hand, by the plaintiffs' bar industrial machine driving massive class and collective actions.

So, opportunities for reform are everywhere. California wage and hour and labor code compliance, and the ease with which the most picayune requirements can be leveraged into massive class or collective action exposure, is high on the list. Differences between federal and

state-by-state overtime exemptions and exceptions confound companies that seek consistent nationwide approaches and skyrocket the cost of compliance. Dozens of different tests exist for determining whether a worker is a legitimate independent contractor.

Outside of wage-hour, the Equal Employment Opportunity Commission has pushed "barriers to hiring" and hiring-based initiatives to the top of its investigative agenda but relies upon the uniform guidelines on employee selection procedures from 1978, three years before the introduction of the personal computer.

The agency also relentlessly pursues employers who consistently screen out applicants with criminal backgrounds based on decision trees or other matrices, leaving no realistic plan in place for employers that hire in large numbers and forcing employers to choose between facing down either the EEOC on the one hand or negligent hiring claims on the other.

And the National Labor Relations Board has found itself at the highest levels of political dysfunction after two years of troubling pro-labor decisions have now been called into question over challenged recess appointments. It is no wonder that employers struggle with compliance!

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

A: There are many, but among the seemingly least-watched but most important issues relevant to the employment law world is the fate of mandatory class action and collective action waivers. After the U.S. Supreme Court's decision in *AT&T v. Concepcion*, and a series of pro-arbitration decisions from the Supreme Court that followed, we saw, case after case, where alleged class and collective actions were dismissed outright in favor of single-plaintiff arbitration, and we saw company after company take serious steps to consider moving to a mandatory arbitration litigation platform.

While California state courts continue to struggle with the idea that the U.S. Supreme Court can tell them what to do, most expect California state court decisions eventually to line up with California federal courts and the U.S. Supreme Court and allow class and collective action waivers along with appropriate contractual protections.

But two decisions outside of California really put the brakes on the *Concepcion* movement: the NLRB's decision in D.R. Horton, in which it claimed that class action waivers violate Section 7 of the National Labor Relations Act, and the Southern District of New York's decision in *Raniere v. Citigroup*, which, contrary to now dozens of other federal courts around the nation — including not only California federal courts but even a sister courtroom within the S.D.N.Y. — held that the right to proceed collectively under the Fair Labor Standards Act may not be waived.

Those decisions — Horton and *Raniere* — are before the Fifth and Second Circuits, respectively, and if they ultimately go the way of employers and uphold the Supreme Court's clear mandate that class and collective actions may be waived under the Federal Arbitration Act, employers would have the opportunity to turn the labor and employment industry on its head.

While private industry arbitration practice could surge, the class and collective action industry could see steep declines. Court dockets that today are chocked with employment cases could see a sharp drop in case filings. These changes may not happen overnight, but just as the collective action wave swept the nation roughly 10 years ago, we may look back 10 years from

now on the reversal of these FAA-backed cases as the moment when the tide of employment class and collective actions finally receded for good.

Of course, that means we might see a lot of big firms, and even big companies, conclude that they have too many employment lawyers, both class action lawyers and counselors alike. For after all, if the threat of big-case exposure drops, the incentive to ensure compliance drops, too.

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

A: Doug Darch, Employment Law360 board member, formerly of Seyfarth, now at Baker [& McKenzie LLP has impressed me]. He is a terrific mentor; he has always taken the time to bring along others — particularly junior lawyers — and celebrate their successes. As a litigator and counselor, he never gives up and isn't afraid to pursue new theories or ideas. He is what we used to call an outside-the-box thinker, until we learned there is no box.

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

A: [There have been] plenty of mistakes, but one was letting myself fall out of touch with friends from earlier walks of life (college, law school, even high school) and becoming reactive, rather than proactive, about growing and maintaining those relationships. The best advice I can give to younger lawyers is to work at staying proactive with your friendships, nurturing relationships and connecting people together for their mutual benefit. Later in your career, they'll call that marketing. Make it come naturally.

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