Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Q&A With Fox Rothschild's Nancy Yaffe

Law360, New York (April 01, 2013, 12:38 PM ET) -- Nancy Yaffe is a partner in the Los Angeles office of Fox Rothschild LLP. She focuses her practice on labor and employment law counseling and litigation with an emphasis on problem prevention. She discusses a wide variety of legal challenges faced by California employers, including class actions, wage and hour compliance, discrimination, harassment and privacy issues, on the firm's California Employment Law blog.

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

A: One of my most challenging and personally rewarding cases involved a single plaintiff represented by a prominent attorney in Los Angeles known for his refusal to settle cases, for taking them to trial and for often securing big verdicts. I reached out to my network of employment defense lawyers to learn the tactics that work best with this attorney, as well as the tactics that had failed. Their input was invaluable. The plaintiff in this case was terminated by his employer after complaining close to 40 times.

A case involving that many complaints is expensive to litigate and difficult to dispose of on summary judgment. To gain some leverage, we subpoenaed records from his subsequent employers and hit the jackpot. We discovered the plaintiff had engaged in the exact same disruptive behavior and was fired for it again. We could now argue that at least two employers found him to have acted improperly. We also secured a witness statement stating the plaintiff had offered thousands of dollars to help him sue the company, and the plaintiff unwittingly testified in direct contradiction to that statement at his deposition.

We pressed for a mediation, and when opposing counsel refused to pay half of the mediator’s fee, we scheduled it anyway. We prepared a summary judgment motion to use as a mediation brief and succeeded in using the mediation time to plant the seed with opposing counsel that this was not a good case for him to take to trial. The case settled, and, to date, I am the only attorney I know to settle with this opposing counsel before summary judgment.

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

A: When my favorite teenager worked a minimum-wage job for four hours and was let go when the company decided it could not accommodate his school schedule, he was never paid his $32, even though he asked for it several times. I showed him how to file a complaint online with the Labor Commissioner and explained to him how that $32 was now worth $960. Even better, his former employer had absolutely no defense. He was giddy, thought I was super cool and bought me a pair of skater shoes with his windfall. Good for him certainly, but was it fair? Was it helpful to the small business that hired him and simply forgot to pay him?

The penalties and damages available in California for inconsequential wage-and-hour violations is an ongoing nightmare for employers and in need of reform. I have clients who want to pay overtime at the accurate "regular rate" as the law requires but cannot find a payroll company to do the calculations correctly for them. One mistake, worth pennies, can (and often does) result in 30 days of waiting time penalties for hundreds or thousands of former employees, making that de minimis error a major financial hit.

Moreover, the ease with which a former employee, fired for good reason, can allege baseless wage-and-hour violations, on behalf of a purported class of other employees he doesn't even know, is outrageous by any employer's standards. And once again, the economics of a class action incentivize a plaintiff's attorney to make unfounded allegations, drive up litigation costs and negotiate a settlement. My colleagues in other states have some of this craziness, but not nearly as much as we do in California.

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

A: One issue that is creeping up a lot lately in my practice is the improper classification of independent contractors. I have seen challenges to contractor status from the IRS and the Employment Development Department more in the last year than in 18 years of practice. And goodness, fighting with the EDD is a headache. Even if you win, the EDD appeals, an audit is triggered, your client is hit with an assessment, and the petition for reassessment sits for months and months while penalties accrue. And there is no way (at least that I have found) to speed up the process.

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

A: I was lucky to have a wonderful mentor, Lisa van Krieken, now at Folger & Levin in San Francisco. We worked together for 15 years. Lisa taught me that practicing law can be fun. I learned to help clients proactively and that I could add value to their business by helping them be compliant. She showed me that you can treat opposing counsel with respect and still be respected. She role-modeled for me that reasonableness and good judgment can prevail and that clients appreciate directness and honesty. I learned how to give options to clients instead of saying no, and to let clients make their own decisions based on the risks explained to them. Even though our prior firm dissolved and we no longer work together, there are many days I find myself asking, "What would Lisa do?" And then I do it.

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

A: Two lessons I learned inform the way I practice law today.

First, never lose sight of who your client is. I made this mistake once by staying too focused on the needs of my daily contacts at the Human Resources level. That lack of deference to the corporate level cost me a significant client at a critical point in my career.

Second, always speak your truth. I was an associate working with a senior partner and seasoned trial attorney who thought the plaintiffs had no case and we would win at trial. He secured the case by espousing that view to the client. I deferred to this partner on strategy and followed his directions to the tee. I pushed aside my nagging concerns that even if the plaintiffs were not discriminated against as they alleged, their concerns might resonate with a jury and we might be overstating our chances to the clients and carrier.

When the verdict came in against our client, I was devastated. I understood that litigation was a risk the client accepted in going to trial, but for a long time afterwards I dwelled upon my failure to speak my truth to the partner. I was focused on the legal arguments and what should happen. I kept thinking that maybe if I had spoken up, things could have turned out differently. I vowed that moving forward, I would always advise my clients of the risks of litigation, realistically describe the costs of litigation (both economic and noneconomic), be pragmatic about risks, give my clients choices and above all, speak my truth.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.