

## Employment Group of the Year: Morgan Lewis

By Jocelyn Allison

Law360, New York (January 7, 2011) -- In a case with wide implications in the retail industry, Morgan Lewis & Bockius LLP convinced a federal appeals court in September that NutriSystem Inc.'s sales commissions need not be based on percentages for employees to be exempt from federal overtime law, one of many reasons it has earned a spot among Law360's Employment Groups of 2010.

The U.S. Court of Appeals for the Third Circuit adopted Morgan Lewis' argument that commissions should be considered "bona fide" under the Fair Labor Standards Act if they are unrelated to hours worked and incentivize employees to be efficient.

The plaintiffs, former and current sales associates of a NutriSystem call center, had argued that because their commission payments were flat-rate — rather than based on a percentage of the transactions they made — they did not qualify as bona fide under the FLSA's retail services exemption.

"We won not only at district court level, but the Third Circuit agreed with the validity of the defense we had asserted on behalf of Nutrisystem, and that has broad implications for call centers and sales associates who work at call centers," said Joe Costello, head of the firm's labor and employment practice.

The wage-and-hour group that scored the landmark victory for NutriSystem is one of four teams that make up the labor and employment practice group at Morgan Lewis, which includes 225 attorneys spread out among 16 of the firm's 23 offices worldwide.

The group also has teams that focus on litigation under the Employee Retirement Income Security Act, complex employment discrimination, and traditional labor, which was the foundation of the firm's employment practice in the late 1950s.

Morgan Lewis secured successful outcomes for clients across all areas of the practice in 2010, including a high-profile resolution in a group of cases accusing CBS Corp. and several other networks, production studios and talent agencies of age discrimination against television writers.

The firm, which represented CBS in four of 23 cases in California state court, helped negotiate an agreement that led to the \$70 million settlement of 19 of the original cases against companies including CBS, Fox Entertainment Group Inc. and National Broadcasting Co. Inc.

The settlement, announced in January, involved more than a dozen entities, and serves as an example of how a successful outcome for a client doesn't always come in the form of jury verdict or court ruling, according to Costello.

"Ultimately the objective here was to negotiate a settlement in extraordinarily challenging circumstances, a settlement that would have to deal with all of the complexities inherent in a dispute like this involving multiple parties," Costello said.

"We were instrumental in reaching a global resolution of that dispute consistent with our client's business objectives," he said. "It's not always about winning litigation, you've got to consider: What do our clients want to achieve?"

For many clients in 2010, success meant winning in the courtroom, and Morgan Lewis delivered.

In April, the firm won summary judgment for Unisys Corp. in one of several 401(k) fee cases pending against Fortune 500 companies across the U.S., successfully convincing the court that the plaintiffs could not hold the company liable for allegedly excessive fees charged as part of their retirement plans.

In finding for Unisys, the U.S. District Court for the Eastern District of Pennsylvania adopted an argument that Morgan Lewis had pursued successfully the previous year in the U.S. Court of Appeals for the Seventh Circuit in the 401(k) fee case *Hecker v. Deere & Co.*

The district court found that Unisys could rely on a defense under Section 1104(c) of ERISA because it had provided employees an opportunity to exercise control over assets in their individual accounts and because it had offered them an ability to choose from a broad range of investment alternatives.

"In summary, even assuming for argument's sake that Unisys defendants breached a fiduciary duty by selecting overly expensive funds, Unisys is entitled to summary judgment," Judge Berle Schiller wrote in the opinion.

Quoting from the *Hecker* case, he said that "if particular participants lost money or did not earn as much as they would have liked, that disappointing outcome was attributable to their individual choices" because they were offered a range of investment options.

The case is currently on appeal to the Third Circuit, and the U.S. Department of Labor has submitted arguments urging the court to adopt a narrower interpretation whereby the defense in 1104(c) would not apply to such cases.

Costello expressed confidence in the firm's ability to win over the Third Circuit based on its success in the *Hecker* case before the Seventh Circuit and other 401(k) fee cases, as well as the overall strength of its ERISA litigation team.

"I think our ERISA litigation team has become the team of choice for bet-the-company ERISA litigation matters," Costello said. "I think you'll hear that not only from employers, but also from the fiduciary liability insurers who insure these cases for fiduciary liability."

In addition to the four main sections of the practice, Morgan Lewis also has lawyers focusing on immigration, unfair competition and trade secrets, whistleblower and workforce change, which helps employers navigate restructurings in their business due to mergers and acquisitions or downsizing.

In the area of trade secrets, the firm scored a major win for Bimbo Bakeries USA Inc. on July 27 when the Third Circuit affirmed a summary judgment ruling preventing a former Bimbo vice president from going to work for Hostess Brands Inc., a Bimbo competitor.

Bimbo feared the executive would disclose the closely held recipe for Thomas' English Muffins — known for their proprietary nooks and crannies — and Morgan Lewis successfully argued the case on a theory of inevitable disclosure, which is usually viewed narrowly by the courts, Costello said.

"The Third Circuit adopted an even broader interpretation of the inevitable disclosure theory than we adopted, so it was a tremendous victory for Bimbo," Costello said.

The firm scored another trade secrets win for Dean Foods Co. in August against a former executive who had violated his noncompete agreement after going to work for a competitor. Morgan Lewis not only secured an injunction against the defendants, but a dismissal of their antitrust counterclaims.

In another win that month, Morgan Lewis helped American Airlines Inc. avoid millions of dollars in potential actuarial adjustments to benefits for pilots who fly past the normal retirement age of 60 in a dispute with the Allied Pilots Association.

The union had claimed in a presidential grievance that the pilots were entitled to the adjustments and that American Airlines' position constituted a prohibited diminishment in retirement benefits under the collective bargaining agreement.

The grievance led to an ERISA action, which Morgan Lewis tackled by combining the skill of the firm's employment litigators with the expertise of its traditional labor lawyers in the Railway Labor Act. The firm prevailed on cross-motions for summary judgment Aug. 10.

In another case, Morgan Lewis defeated class certification in a gender discrimination case against Rolls-Royce Corp. that could have included more than 500 women, pulling the rug out from under the plaintiffs' attempt to advance a novel theory for class-wide liability based on the Lilly Ledbetter Fair Pay Act.

The suit claimed Rolls Royce paid women less than men for similar work, then perpetuated the pay disparity over time by failing to equitably adjust the female workers' salaries. But the U.S. District Court for the Southern District of Indiana found March 12 that the plaintiffs' statistical analyses did not support class certification.

The case demonstrated the role of Morgan Lewis' complex discrimination team as thought leaders in matters involving large pattern and practice discrimination claims in gender equity pay cases and statistically based claims of discrimination, Costello said.

From complex discrimination to the Railway Labor Act, Morgan Lewis' successes in 2010 show the breadth of the practice and the firm's ability to tackle whatever problem an employer may face, in the courtroom or out, from coast to coast and office to office, Costello said.

"I think what separates our practice from others is that we have not only extraordinary geographic scope but we have a depth of talent in all of the critical substantive areas that are of concern to employers, and I think that gives us an competitive edge," Costello said.