Proskauer's Anthony Oncidi: Practising at the cutting edge

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Even after an almost 40-year career in major West Coast law firms, Anthony Oncidi, co-chair of Proskauer's more than 140-lawyer-strong global labour and employment group, will never forget his first assignment straight out of law school. Then a young attorney at a large Los Angeles law firm, a restauranteur client posed an eyebrow-raising question: "Can we inspect the legs of our male waiters in order to determine if they have AIDS?"

"The partner I was working with said, 'No, that would be a really bad idea. Don't do that.' But the client was insistent. This was in the mid-1980s, before there were any effective treatments or even a reliable test to determine HIV status, and, of course, there was also absolutely no evidence to suggest somebody with HIV could transmit it in a restaurant environment – or that inspecting someone's legs would in any way lead to an informal but reliable diagnosis of the disease. So, my first assignment was to figure out the legal reasons behind the logical and instinctive answer that the partner had already provided."

Oncidi found himself calling the Los Angeles health department for up-to-the-minute clinical advice while also reading every newspaper article he could find on the deadly new virus that was sweeping the globe. In fact, he was reading everything but a law book. "These issues had yet to be decided by any court, or the state or federal government. The ways in which people who had disabilities, including HIV, were being accommodated in workplaces and society at large was at the cutting edge of what people were just beginning to think about at the time. Indeed, back then, sexual orientation was not a protected status under the law, and Congress would not enact the Americans with Disabilities Act for another six years, all of which created even more nuances that had to be considered."

Nowadays, clients tend to be more sensitive about such matters, Oncidi believes. But the lesson he learnt from that first case has stuck with him nonetheless. "It taught me that there is no more topical, interesting and cutting-edge area of the law than what I do every day in the labour and employment field."

He also learned that: "One of the most challenging parts of being a lawyer is asking the client to think again when you know they really want to do something that may not be in their long-term best interests," he says. "It comes up all the time, for example, in the context of whether the client should settle or fight a case. You have cases where the client feels very strongly that they did nothing wrong and that they're being taken advantage of by an employee – all of which may be true.

"So, you've got at least two roles. One is to work to achieve the client's immediate and long-term objectives, but you also can't lose sight of what you know will be best for the client in the long run. And it may not be the best strategy to lead a client further down the road to litigation if the case can be terminated early, and more inexpensively, by way of a significantly discounted settlement. And this is true,

especially, if the case is destined to be decided by a jury – in many cases, that's not where a good defence lawyer should be leading their clients. I'm not saying you can't win those cases – an employer surely can – but it's becoming increasingly more challenging in today's environment," he says.

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Recent surveys show that at the outset of jury trials in California, for example, most jurors are predisposed to find for the alleged whistleblower plaintiff or victim of alleged harassment or discrimination. "The only thing the jurors know is that somebody was fired or harassed and is claiming to have financial difficulties and severe emotional trauma as a result of that termination. Without knowing anything more, most jurors (especially since the pandemic) will be inclined in favour of the employee. Now, obviously, once they hear the employer's side, the needle will move the other way, and often substantially so. But in some cases, you're just not going to end up with a massive pro-employer swing during the course of the trial."

Adding further jeopardy to employers is the ability of a jury to award basically uncapped damages in most cases. "In California, juries have essentially unlimited discretion to grant hundreds of millions of dollars to a single plaintiff who claims to have been harassed at work – you don't have that in the UK, on the continent, or in any of the other more civilised jurisdictions around the world!" he adds.

"In the last six months in California, we've had some absolutely gargantuan employment verdicts." Oncidi points to the $155m awarded by a jury last December to Andrew Rudnicki, the former chief in-house lawyer at Farmers Insurance, who claimed to have been a whistleblower terminated in retaliation for assisting in the settlement of a $4m discriminatory pay class-action lawsuit against his employer.

And who could forget last October's headline-making $137m verdict against Tesla for the alleged racial harassment of Owen Diaz, a black contractor at the company's Fremont, California factory. Despite acknowledging that the jury heard how the Tesla plant "was saturated with racism" and that Diaz's co-workers had used racial epithets against him, US District Judge William Orrick reduced the award against Tesla to $15m in April.

"That is still a huge amount of money for a short-term employee who was not terminated," says Oncidi. "But if you're walking your clients into situations where they could end up facing jury verdicts like that … it definitely is cause for reflection."

Arbitration is imperilled

For Oncidi, the only reliable protection employers have against those kinds of Black Swan events – eight and nine-digit verdicts – is arbitration. However, Oncidi is concerned that even that antidote might not be available much longer. "Arbitration is under assault across the United States. Congress and President Biden just made arbitration illegal in the context of sexual harassment and sexual assault claims, and many states, including California, have been trying for years to outlaw it for all employment-related claims. Arbitration is imperilled nationwide," he says.

"Characteristic of these anti-arbitration laws is the false suggestion that there is something about arbitration that is 'unfair' to employees. There isn't. They enjoy just as much due process as they do in a civil action and no less than is accorded the employer. However, what is different about arbitration is that you won't get a runaway jury, acting out of passion and prejudice, which might award $155m to a single employee. It's rare that one hears of a 'runaway arbitrator', which is precisely why plaintiffs' lawyers don't like arbitration."

He continues: "Of course, plaintiffs' lawyers can't come out and say they want to hit the lottery (or as they say, 'ring the bell') with these cases. So, instead, they complain that 'Arbitration is a closed-door, star-chamber proceeding and nobody from the press or public knows what's happening there.' Of course, they rarely admit that employees have just as much choice over the selection of the arbitrator as the employer does, or that these are generally fair and impartial proceedings administered by very well-established professional alternate dispute resolution companies that have panels of the most experienced and respected retired judges in the country."

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Oncidi contends that the absence of arbitration – if it does come to that – will have a huge impact in ways legislators, employees, and employers don't yet understand. "Plaintiffs' lawyers and their lobbyists are doing a good job of influencing governors and legislators to amend laws and appoint judges who don't see any basis for ever dismissing anything pre-trial. Essentially, every claim that gets filed, whether it's legitimate or not, becomes destined for a jury trial," he predicts.

"Probably 90% of these cases will go through some form of mediation or settlement conference in which a retired judge or practitioner will attempt to settle the case by trying to negotiate a bridge in the monetary gap between the parties. Up to this point, one of the most effective weapons employers have had in mediation (or any settlement discussion) is a signed arbitration agreement. The mediator can use that as a bludgeon in the other room to say, 'You're never going to a jury. Don't think you're going to win the lottery.' Plaintiffs' lawyers hate that, of course, which is partly why arbitration is under assault by their many friends and admirers in legislative positions all around the country.

"This all means that settlements are going to go up significantly, even for relatively weak claims. Plaintiffs are going to say, 'You don't want to settle today? That's fine. We'll go to trial in a year, and we'll see if we can get one of those $100m jury verdicts that they've been handing out.' Now, they're not going to get anything close to that in every case, but it's a far more credible threat if there is no arbitration agreement standing in the way. After all, there's a reason that in unguarded moments, the plaintiffs' lawyers in Los Angeles refer to the downtown courthouse as 'The Bank'.

"So settlement values will go up, but by what percentage is incalculable at this point. I don't think employers or business-friendly legislators are watching this as carefully as they should be. I feel a bit like a canary in the coal mine on this one."

State politics

Oncidi also worries that overly employee-friendly laws could have long-term implications for corporate investment in individual states – especially California. "Everything we do in the labour-employment area has a political dimension to it. It's a fact that 48 hours after the $137m verdict came out last year, Elon Musk announced that Tesla's headquarters was moving from Northern California to Austin, Texas. I suspect that was already in the works, but I don't think anything that happened in that trial made him second-guess that decision," Oncidi says.

"Every two-to-three months there is news about major companies leaving California. It's not just the regulatory burdens and the tax burden – we do have the highest taxes and cost of living in the US – it's that the state has become increasingly unfriendly, indeed hostile, toward business. Employers are realising that it's not so bad in some neighbouring states. I saw a recent study showing that close to 300 companies have moved from California to other states in recent years. At some point, the cost of doing business in California simply outweighs the benefits. I hear it from clients all of the time."

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One good example of the increased regulatory burden is the plethora of minimum wage laws that have sprung up in just about every city and county across the Golden State. "For years, there was just the federal minimum wage and usually a somewhat higher state-mandated minimum wage. But then local politicians decided to get in on the action, presumably on the theory that this is a goodie that can help them get reelected in a year or two.' So now, instead of having just different minimum wage amounts at the federal and state levels, practically every county, small city, town, and hamlet in California has its own minimum wage requirement – much to the consternation and confusion of employers who are just trying to follow the law," explains Oncidi.

"Think about it: if you're a large employer with offices and stores everywhere, you may now have 20 or 30 different minimum wage requirements, each of which is different by maybe a nickel, a dime, or 25 cents, any one of which may increase at various times during the year. Nobody seems to care what this is doing to employers. And, from an administrative standpoint, it really is a very problematic situation for companies. But few if any legislators have any appreciation or care for the way in which conflicting rules like this might affect the business community."

Covid masking rules are yet another example of politics placing an administrative burden on workplaces, observed Oncidi. "There are so many conflicting and inconsistent rules that, at some point, it just results in paralysis. California has so many overlapping rules and regulations, few companies can keep track of them. People have businesses to run, and even big companies don't have a legion of people to do nothing but wait around for the next rule to be issued by the government. So, almost inevitably, employers are going to be out of compliance with these things – and at the most basic level, it breeds contempt for the law."

Indentured servitude

Throughout his career, Oncidi has represented employers and management in all aspects of labour relations and employment law. More recently, he has become a go-to advocate in cases involving non-compete and non-solicitation issues as well as disputes concerning the misappropriation of trade secrets – areas of law that have become particularly prevalent in the post-covid and Great Resignation eras, and especially so in the entertainment industry.

Most notably, Oncidi recently represented Viacom in an action against Netflix over the latter's poaching of talent. As it has ramped up production of its own content, the streaming giant has developed a reputation in recent years of raiding its Hollywood rivals' executives even those who are still under contract. Countering its critics, Netflix has argued that the industry standard of successive two- and three-year employment contracts between executives and studios effectively amounted to "indentured servitude".

"There is an argument, that some lawyers have made, that if an employee has never ceased being under contract for any period of time – even though there have been successive, separately negotiated contracts in between – that employee has essentially been 'imprisoned' under contract to the current employer for too long. And, in California, we have a statute that says you cannot have an employment contract for more than seven years, the obvious intent of which is to prevent an employer from locking up an employee in a contract for more than seven years without renegotiating it," explains Oncidi.

"The argument continues that if the total number of years the employee has been employed under successive contracts exceeds seven, then the last contract in the series is voidable at the option of the

employee. So, lawyers who are representing companies that are trying to hire these contracted employees like to suggest that they are in some way 'liberating' them from these 'oppressive' contracts, even though each one of those contracts was separately negotiated – in fact, in many cases the employees were represented by lawyers of their own choosing who negotiated the deals for them."

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In December 2020, Los Angeles Superior Court Judge Jon R Takasugi granted an injunction in favour of Oncidi's client, and against Netflix, which bars the streaming giant from hiring or soliciting Viacom's employees who are under contract. Although Netflix initially appealed the ruling, it later voluntarily dismissed the appeal and the injunction remains in place. The decision followed a separate ruling against Netflix's poaching tactics, won by 20th Century Fox in December 2019, and which was upheld on appeal at the end of 2021 (Proskauer was not instructed in that case).

"These executives aren't really the type of employees who were intended to be protected by the seven-year rule. The entertainment industry does still have term-employment agreements for certain executives at the highest levels – and some mid-levels – and these cases called into question the whole process by which Hollywood hires and retains executives," he explains.

"Ultimately, I think it would have been bad not only for employers but also for long-term employees if the Viacom or Fox cases had gone the other way, in favour of Netflix. Most of these situations are ones in which employees want the peace of mind and the predictability of having a contract for a two- or three-year period and often for longer periods of time. I've never heard of any employee who said they hoped that after a few contracts, the studio would automatically stop offering them new contracts because the total number of years under contract happened to exceed seven. The Viacom v Netflix case was quite cutting edge because there was no clear California guidance on this. And we think the way these cases came out cleared up some very important issues, especially in the entertainment industry."

From HIV discrimination to the arbitration wars, wage and covid regulations, and bitter Hollywood disputes, the work Oncidi has been involved in these past four decades has only reinforced his decision, made early in his career, to become an employment lawyer. "In a word, it's the topicality, the very current nature of employment law that I enjoy the most. It's the relevance it has to people's everyday lives. When something new happens in this area (and that's just about every week), it's on the front page of every newspaper and website in America," he says.

"People are talking about it, and I'm lucky enough to have a little bit more insight into it because that's what I do every day. These are some of the most interesting, cutting-edge issues from an intellectual and practical point of view. So, I'd never want to practise any other kind of law."