SPECIALTY PRACTICES

Exotic Subject Matter, Basic Employee Rights

Dancer employment law creates niche practice for civil rights firm

BY **JULIA CARDI**
LAW WEEK COLORADO

When Mari Newman first began taking on cases on behalf of exotic dancers, she thought the primary fight in the cases would be for fair labor practices in pay and conditions of their employment. She hadn't imagined she would end up fighting for their most basic ability to challenge the conditions of their employment in court. As niche and salacious as litigating on behalf of exotic dancers might seem, she came to realize that at their most fundamental, the cases are about employees fighting for pay for the work they do.

"The salacious part of it is that it's dancers," Newman said. "The basic part is that it's about exploitive employers that use the same tools as other oppressive work environments."

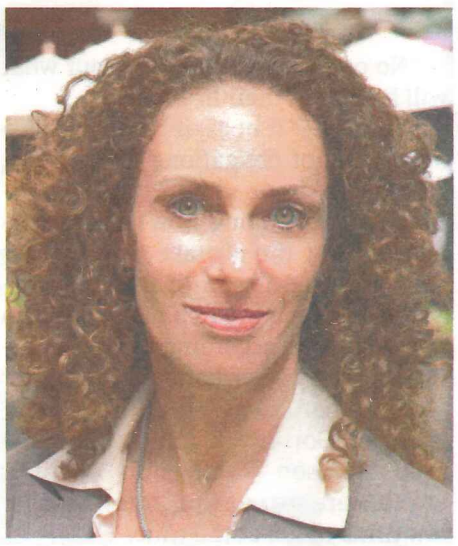
Newman sees the cases she has taken on as aligning with her whole practice's goal of representing the underdog against corporate or government abuses of power. She has two current cases pending in U.S. District Court against adult entertainment establishments in which she has filed for class action certification — one against Shotgun Willie's and the other against national companies that own clubs across the country including PT's Showclub, La Boheme, Diamond Cabaret and Penthouse in Denver. Failure by the establishments to pay wages under the Fair Labor Standards Act and the Colorado Wage Claim Act comprises an essential claim in the cases.

Newman said the structure under which the dancers work as independent contractors rather than employees, which has included not paying dancers wages, charging them house fees to dance and requiring them to share tips, has been challenged in courts across the U.S. The cases date back to at least 1987, with Jeffcoat v. State, Department of Labor in Alaska. Dozens of state and federal district courts, as well as the 4th and 5th Circuits, have found that dancers at adult entertainment clubs are employees according to wage laws.

Newman herself won a 2015 summary judgment in Mason v. Fantasy, LLC., against Fantasy Gentlemen's Club in Fort Collins for violations of the FLSA and the Colorado Minimum Wage Act.

The suits Newman has been working on have brought attention to a key issue increasingly scrutinized across a host of industries — that of binding arbitration clauses. Their use recently received attention in October when the U.S. Senate voted against a rule banning financial companies from using forced arbitration clauses to block class actions.

Newman said exotic dancers she has represented are required to sign contracts that include mandatory arbitration provisions and class action waivers and said this keeps the dancers from challenging their employment classification in court.



MARI NEWMAN

"What it means is that primarily low-income women are required to pay the same amount as these massive corporations (for arbitration) in order

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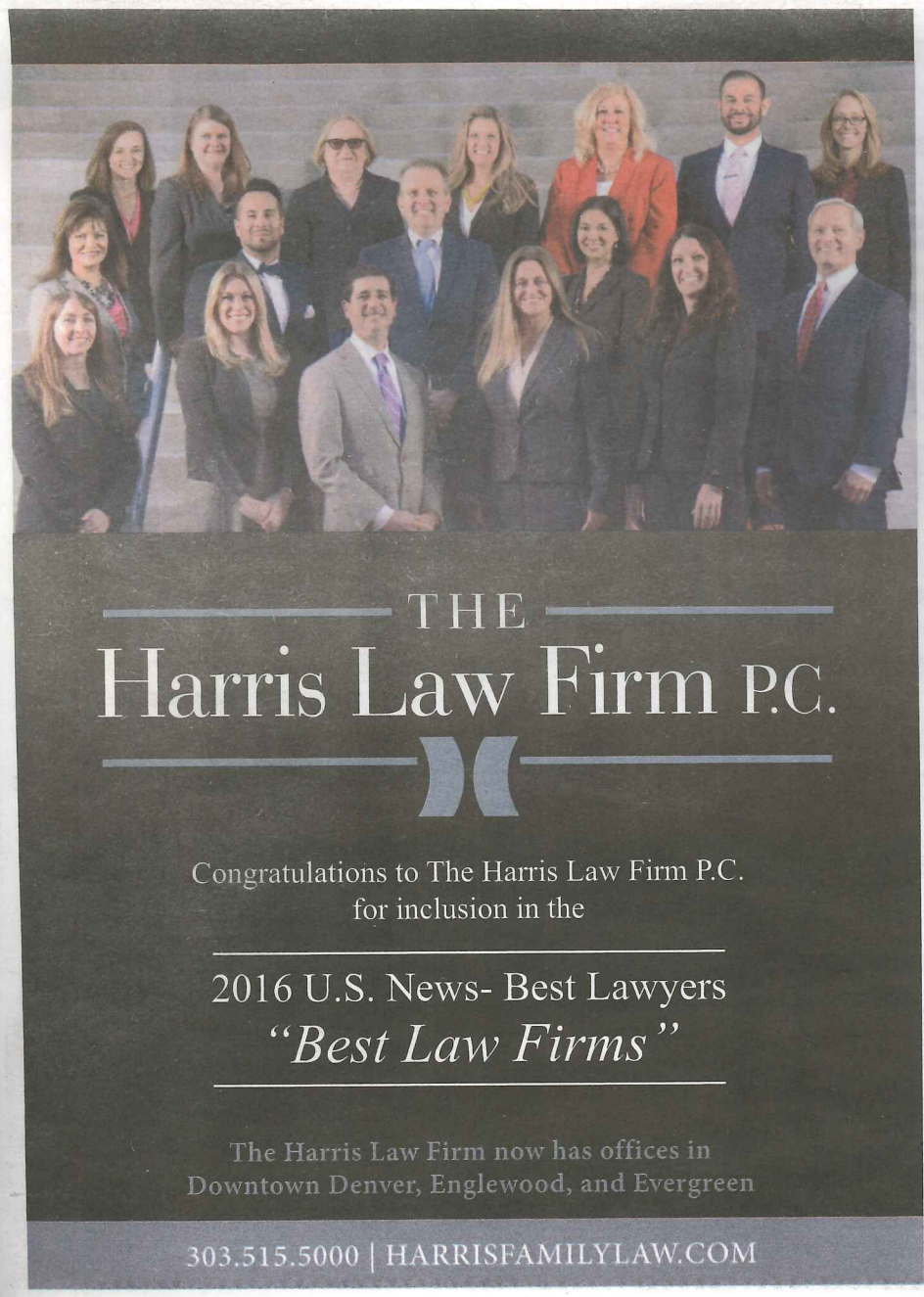

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MEDIA PRACTICE
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Donald Trump and other prominent figures as well as Southwest Airlines and TripAdvisor have looked at the medium of Twitter and to what extent that informs certain types of doctrines about when a court find something to be actionable defamation versus when is it considered to be rhetorical hyperbole.

Zansberg sees issues of data access as another prominent topic within media law currently. He said that present models for requesting information just aren't working.

Zansberg serves as the president of the Colorado Freedom of Information Coalition, which comprises several media entities, organizations and individuals and helps them understand and utilize the state's open records laws. Last session, the coalition succeeded in amending the Colorado Open Records Act to ensure access to digital records in digital formats.

"With the shrinking of the mainstream media, they simply can't be as aggressive and robust as they have in times past, so it really has fallen on public interest groups and other people to monitor the conduct of the government," Zansberg said.

"IT APPEARS WE'RE GOING TO SEE THE MEDIA BEING SUED MORE FREQUENTLY, SO WE'RE VIEWING THIS AS A ROBUST PRACTICE AREA FOR THE FORESEEABLE FUTURE."

— Steve Suflas, Ballard Spahr Denver office managing partner

He said government entities were sending entire printouts of databases or lengthy PDFs that were not searchable, or would simply say a request can be fulfilled if someone wants to come and scan thousands of pages of records.

"We're swimming in more information, in particular government information, than ever before, as a result of the digital revolution," he said. "Ironically, many of the laws haven't kept up have made it more difficult to access government records."

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EXOTIC DANCER LITIGATION
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to try to get the law enforced on an individualized basis," she said. "And they can't do it collectively." Newman emphasized the establishments' efforts to keep challenges to employment classification out of court show they know their treatment of dancers is illegal.

Critics of arbitration clauses have pointed to the right to sue "enshrined" in the Constitution. From a bird's-eye perspective, Newman said she believes arbitration agreements do not belong in employment disputes because the employer always has significantly more power than the worker.

"It's a pretty fundamental issue in terms of the three-pillar system of government we have that's being encroached upon when parties lose their right to have legal claims heard by the judiciary," she said. She explained arbitration might have more of a place when there is not a significant power disparity between the sides.

"Where you're dealing with a conflict between two parties of equal strength, when there's similar bargaining power, then it might be an appropriate and efficient way to get conflicts resolved," Newman said. "That could not be further from the truth here, where the conflict is between large corporations with teams of lawyers and the low-income women they are exploiting."

"The salacious part of it is that it's dancers. The basic part is that it's about exploitive employers that use the same tools as other oppressive work environments."

—Mari Newman, civil rights attorney

She said she believes the agreements are not enforceable, in part because they contain punitive measures to stop the dancers from challenging their employment terms. Newman explained the dancers also often receive them after drinking or while still undressed.

For a contract to be enforceable, the parties must have the appropriate legal capacity to enter into it.

"It is fundamentally an illegal contract to begin with because they're treating them as employees under the law, but then calling them 'lessees' or 'licensees,' in order to avoid paying them the wages they are entitled to as employees," she said. "And then they present the contract in a way that's coercive and in a way that's designed so that the dancers in that moment don't have the requisite legal capacity to contract."

In addition to perpetuating the opportunity for exploitation of the dancers, Newman said she believes keeping the cases out of court perpetuates the stigma surrounding sex work in general. But she reiterated the cases she has taken on are truly about basic employment principles.

"My perspective is these are women doing legal work and they deserve to get paid for it," she said. "The goal of the cases is to allow their legitimate legal claims to be heard in a public court in order to get them paid and in order to change the conduct of clubs locally and nationally." •

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LAW FIRM BREAKUPS
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CFO, and convince them to stay on and assist with at least part of the liquidation, Seserman said. That entails negotiating compensation deals that incentivize them sticking around and turning down job offers they might have in hand elsewhere.

TAKING CARE OF THE CLIENTS

One of the primary tasks in winding down a firm is notifying clients of the closure and returning their files to them when necessary. That can be a monumental task: in the Gorsuch Kirgis dissolution, the firm had 16,000 Bankers Boxes of stored client files that staff had comb through and then notify those clients at their last known addresses, Seserman said.

Since then, Colorado has adopted ethics rules dictating firms' responsibilities for document retention, and today firms must also account for the vast amount of electronic files they have and deal with them accordingly.

"One of the things that we as lawyers and companies have to remind ourselves of occasionally is, if you have a document retention policy that says a client file is to be destroyed two years after the matter has closed ... that applies to electronics too," Seserman said.

There's also the question of continuity and making sure that clients' matters aren't dropped. Sometimes a departing attorney will keep an active case, but other times the firm will have to find "a new home" for the case, Seserman said. "What if a lawyer says, 'I don't want that case to come with me?' Then who's the lawyer? The firm is. You've got to make sure the ball isn't dropped." The firm must notify clients in active litigation that their lawyers have gone elsewhere and what their options are.

MANAGING THE CREDITORS

When a firm has to close, odds are it doesn't have money to pay off all of its creditors. And that's where the firm has the highest risk of a lawsuit, Seserman said. "Creditors by and large are going to get aggressive."

The lease on office space is often the largest exposure, as firms typically sign expensive multi-year terms. Isaacson Rosenbaum had seven years left on its lease at the time it was shutting down, Seserman said. Law firms try not to sign a lease with a personal guaranty, which would put them on the hook when they break the lease, but most of them end up with guaranties on their lease agreements, he said.

Making the landlord unhappy during liquidation can lead to a host of worst-case scenarios for a law firm because it often has the power to lock a firm out of its office, denying access to files and computers. Could the landlord be liable if a case is about to go to trial, but gets dismissed because it prevented the lawyers from accessing their case files? That might be negotiable on the front end, Seserman said.

Many firms sign multi-year terms with office equipment leasing companies, as well, and breaking those leases can likewise bring unexpected issues. A five-year, $300-a-month lease for printers and copiers, for example, "may very well say ... in the event you stop making payments or otherwise breach, all of the remaining payments are accelerated and you're responsible for shipping the equipment back to [the leasing company]," Seserman said.

The closing firm could have many outstanding balances with smaller vendors besides, owing money to a web developer for work on the website, for example, and may try to prioritize one creditor over another.

Then there's the decision on whether to declare bankruptcy. "It provides a lot of protection on the financial side, but it also costs a lot of money," Seserman noted. Bankruptcy also entails giving up control over the disposition of assets and client files. Gorsuch Kirgis and Isaacson Rosenbaum didn't end up going bankrupt, he added. •

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From representing exotic dancers in labor disputes to defending newspapers in libel suits, attorneys fill any niche needed. We talk to a handful of attorneys whose specialized practice areas might be otherwise lost in the fine print.