

As Firms Centralize Management, Are Equity Partners Employees?

Lawsuits against Proskauer Rose and Norton Rose Fulbright highlight an issue that has grown increasingly complex with the management advances at law firms--should equity partners now be considered employees?

By Scott Flaherty | September 01, 2017

At the center of two closely-watched lawsuits accusing Proskauer Rose (<http://www.americanlawyer.com/id=1202794379771>) and Chadbourne & Parke (<http://www.newyorklawjournal.com/id=1202794701972>) of discriminating against woman lawyers is a question that goes to the nature of Big Law partnerships today. Given the business realities of large law firms, should partners be treated as employees, even if they hold an ownership stake in their firms?

The suits, both seeking millions of dollars in damages, generally allege that the law firms unfairly paid women partners less than their male counterparts. And in both cases, the firms have argued that the claims are improper because the lead plaintiffs—former Chadbourne partner Kerrie Campbell and an unnamed Jane Doe plaintiff in the Proskauer suit—fell within the equity partnership ranks at the time of the alleged discrimination. (Following its recent combination with Chadbourne, Norton Rose Fulbright is also named a defendant in Campbell's suit.)

As equity partners, the firms have maintained, the women were partial owners of their law firms and don't qualify for the types of employment protections laid out in the Equal Pay Act and Title VII of the Civil Rights Act of 1964. Those laws, Chadbourne and Proskauer have argued, aim to cover employees, not business owners.

The argument has presented a hurdle for the women who have sued the firms, tying the early fate of their cases to the question of whether partners can be considered employees, at least in the context of federal employment laws. In June, the Manhattan federal judge hearing the Chadbourne case declined to dismiss it, instead ordering limited discovery as to whether Campbell and the other female former Chadbourne partners "are 'employees' under the relevant federal statutes and therefore protected within their ambit."

Proskauer, meanwhile, has brought the question to the fore in its effort to have the case against it dismissed from federal court in Washington, D.C. In response, lawyers for the Doe plaintiff argue that the firm is closely controlled by its executive committee, while "rank-and-file" partners effectively function as employees and deserve protection from bias.

It remains to be seen how judges come down in the Chadbourne and Proskauer suits, but this isn't the first time the courts have mulled whether partners can be employees in the context of anti-discrimination laws. The issue previously came to a head in connection with an early-2000s case in which the U.S. Equal Employment Commission challenged Sidley Austin's mandatory retirement policy on the grounds that it constituted age bias.

Sidley eventually resolved that suit in 2007, agreeing to a \$27.5 million settlement without admitting to any wrongdoing. But the settlement came after a 2002 federal appeals court decision in the case, clarifying that partners can be considered employees in certain circumstances.

"The law is settled to the extent that courts will not accept the mere designation of equity partnership or a nominal interest ... in profits as a bar to an inquiry of whether those partners are employees or not," says Ronald Shechtman, managing partner of Pryor Cashman and chair of the firm's labor and employment group. (He is not counsel in either the Proskauer or Chadbourne suits.) "It's a factually intensive analysis."

That analysis—which includes whether a partner can hire or fire other staff members or reports to someone higher up the chain, among other factors—depends on the structure of a given law firm, and the nature of being a "partner" there, according to Shechtman. A court may also look at the firm's structure to determine if most of the day-to-day operations are dictated by a management or executive committee, or if all equity partners truly have a say in the firm's business decisions.

When the judges in the Chadbourne and Proskauer suits undertake that analysis, they'll be doing it in the context of a changing legal industry, and what it means to be a partner at one of the country's largest firms. In a general sense, says Shechtman, the nature of being a partner at many large law firms has shifted in recent years, as more firms have created and expanded nonequity partner roles. Meanwhile, more firms have concentrated the authority to make strategic decisions in an executive or management committee that includes only a subset of the firm's full equity partnership.

"In the last 10-15 years, we've seen the whole concept of law firm partnership evolve," says Pryor Cashman's Shechtman. "That evolution has primarily been the move in many firms to a two-tier partner structure."

Bruce MacEwen of the legal consultancy Adam Smith Esq. says that the changes in the industry have typically moved firms away from a "true partnership" model, in which the full group of equity partners make most of the firm's business decisions collectively. There are still firms, even a few near the top of the Am Law 100 rankings, that would qualify as true partnerships; MacEwen says they're often marked by a smaller equity partnership that's geographically concentrated in one or few offices. But at many firms, MacEwen says, there's a distinction between what he sees as the "fact" of modern day partnership and the "truth."

"If you're an equity partner, you are an owner. That's a fact," MacEwen said. "In these larger firms, we think that's not actually the truth. ... The truth is that they have to be managed more centrally."

MacEwen and his colleague, Janet Stanton, say there are many reasons for large law firms to operate in a way that might make most of their partners look like employees. Among other issues, allowing the majority of partners to see themselves as autonomous owners of their firm can be a recipe for gridlock—especially if there are hundreds or thousands of partners spread out in offices across the globe.

"At large law firms, the partnership model is an incredible impediment to the effective management of the firm," says Stanton.

Although it's not an exact analogy, MacEwen says the typical equity partner in Big Law these days might be more akin to a shareholder that has bought stock in a large company, or to a high-level corporate employee whose compensation includes a stock component. Despite their ownership stake, they wouldn't be guaranteed a huge say in the day-to-day direction of the business. The shareholder wouldn't control hiring and firing, or determine which computer systems the company used, for instance.

"We're talking about the functioning of the law firm as a business," says MacEwen, noting central management often has far more authority than any one equity partner.

Still, while firms that cede control to a centralized executive committee may be better managed, it won't necessarily insulate them from claims by unhappy partners.

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