

MVP: Gibson Dunn's Theane Evangelis

By **Emmy Freedman**

Law360 (October 10, 2023, 1:08 PM EDT) -- Theane Evangelis of Gibson Dunn & Crutcher LLP's employment practice defended large companies operating in the gig economy and argued the first and only successful constitutional challenge to California's assembly bill governing employee classification, earning her a spot among Law360's 2023 Employment MVPs.

Why she's an employment attorney:

Employment law affects everyone, Evangelis said. The issues that are being hashed out in courts right now have real, tangible consequences for many people, she said, so it can be a rewarding practice.

In recent years, she's focused her practice on representing companies and workers involved in the gig economy. As people increasingly turn to Uber to hail rides and Postmates to deliver them dinner, a host of questions has arisen regarding whether the people these companies use to offer these services are employees or independent contractors.

While those designated as employees are entitled to legal protections and benefits, such as minimum wage, overtime pay and unemployment benefits, independent contractors are not. But independent contractors can also theoretically act as their own bosses, setting their own schedules and performing their job outside a company's control.

"I believe very strongly in the value of giving gig workers the flexibility and autonomy that they enjoy," Evangelis said. "And, you know, the freedom to work whenever, wherever and however long or short they choose. So that's been a big focus of my practice as well. And with technological innovation come new legal challenges, so that's where I'm happiest, and those are the cases where you'll find me."

Her biggest accomplishment over the past year:

Stemming from her increased workload representing companies using gig workers, Evangelis spent a lot of time arguing on their behalf in appellate courts toward the end of 2022. Over two days that November, she presented arguments to the First and Third Circuits in three different cases that drivers working in the gig economy could not employ an exemption for transportation workers under the



Federal Arbitration Act to avoid companies' arbitration agreements.

Section 1 of the FAA exempts seamen, railroad workers and other classes of workers who are engaged in foreign or interstate commerce from arbitration. But the statute does not define the phrase "engaged in foreign or interstate commerce," nor does it specify which "class[es] of workers" count toward the exemption.

Evangelis told the Third Circuit in *Singh v. Uber Technologies* that Uber drivers also are not engaged in interstate commerce since most drivers transport passengers on local, short-distance trips that average six miles.

The next day, she told the First Circuit that while Postmates and Grubhub workers may deliver goods that were originally grown or manufactured out of state, the purchase of that good and its delivery to the customer is separate from its earlier interstate travel.

Evangelis ended up winning all three cases.

"Being able to argue those three appeals in two different circuits in two days, and then win all of them, that's probably my proudest moment," she said. "And I have now argued and won at least, I would say, half a dozen appeals in several circuits and state high courts on this issue."

Other notable cases she's worked on:

Evangelis also argued the first and only successful constitutional challenge to date of California's A.B. 5, which made it more difficult to classify workers as independent contractors. Under that statute, workers are considered employees unless a company can show they are free from its control, perform work outside its line of business and operate as an independent firm.

Representing Uber, Postmates and a pair of workers, Evangelis told the court that A.B. 5 unlawfully targeted the companies by pushing them to reclassify workers as employees while also forcing them to rebuild their business models.

While the case was dismissed by the trial court, the Ninth Circuit reversed that decision. The panel found merit in Evangelis' argument that the statute constituted an equal protection violation by arbitrarily exempting workers for some similarly situated companies while unfairly zeroing in on Uber and Postmates.

"So that was really a very proud moment, because we believed very much in our clients' position and the Ninth Circuit has very rarely sustained any equal protection challenges," Evangelis said. "So this was a really important case, and I think really an extreme example of an equal protection challenge. And, you know, a very cutting edge issue, and I was really proud of when the Ninth Circuit vindicated our position.

Advice she has for junior attorneys:

Evangelis, who's been practicing law since she graduated from New York University School of Law in 2003, said it's important to believe in one's ability to change the law, even if it takes a long time.

"It's not something that you can do overnight," she said. "So, you know, laying the groundwork for future rulings sometimes is a longer process, and so I think to continue in the face of setbacks and to persevere when at times you may lose the first suit or the first challenge. But over time, laying the groundwork and thinking creatively and strategically about the long game is really important."

--As told to Emmy Freedman

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