CLASS ACTION TRENDS REPORT

Mapping the defense strategy

ABC Corporation's general counsel is consulting with the company's Jackson Lewis attorneys, contemplating whether to file a motion to dismiss the putative collective action wage suit filed by an employee in the company's California warehouse. But for now, this lawsuit is a live one, and there are other approaches to consider. Meanwhile, the company has to gird itself for what may turn out to be protracted class litigation and minimize the distraction such a lawsuit can have on the business. Hunkering down with outside counsel, the task at hand is for counsel to to map out the defense strategy. What is the plan for winning or otherwise resolving this case?

Preliminary matters

EPLI coverage. As with any litigation matter, it is important to determine whether the organization has insurance coverage to cover the liability or costs of defense and, if so, to contact the carrier promptly. If there is any doubt regarding whether the company's insurance policy may cover the case, err on the side of contacting the carrier. Many policies expressly provide that the insurer must be notified immediately when the insured has reason to know there is a potential claim. That may mean even *before* a lawsuit is filed.

Litigation holds. Similarly, while most counsel know to preserve documents once litigation begins or a subpoena is received, employers frequently are unaware that the obligation to preserve pertinent documents can arise even earlier—once the employer has reason to anticipate litigation. The failure to issue a prompt and effective litigation hold can spell trouble. Even inadvertent lapses in document retention can result in sanctions that potentially can alter the outcome of a case. It's not as simple as directing key individuals "not to throw anything out." Brian Benkstein, a Shareholder in the Minneapolis office of Jackson Lewis, talks more about this topic at page 8.

Managing managers. The general counsel knows that it's unlawful to retaliate against employees who file suit against the company. The human resources office knows this too. What about your management team, though—particularly the manager who is implicated in the complaint, who is hurt and/or angry as a result? Effectively managing the manager is a crucial function at this point, not only to avoid incurring potential additional liability for retaliation, but also to

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A WORD FROM WILL

Adages are oft-repeated and tend to enhance our focus while giving us needed perspective on matters at hand. Our third issue of the Jackson Lewis *Class Action Trends Report* brings two adages to mind: (1) the ability to *see the forest through the trees*; and (2) *not preparing is preparing to fail*.

The ability to *see the forest through the trees* is crucial in class litigation. In-house counsel, executives, and management surely understand that litigation is inherently disruptive. A lawsuit distracts the organization from its usual order of business; it's fraught with uncertainty, ill feelings and, in no small measure, expense. Of course, when it's class litigation at hand, these concerns are multiplied. The primary goal of defense counsel in *any* litigation is, ideally, to dispose of the lawsuit quickly, efficiently and with no exposure; alternatively, we strive to reduce a defendant's potential damages exposure to the greatest extent possible. While litigation, and class litigation for that matter, are certainly a "cost of doing business," your company should not lose sight of its purpose and goals, *i.e.*, the business itself. Legal liability aside, the broader aim of defense counsel is to minimize the fallout on an employer's operations, its employee relations, and its reputation with customers, clients, and the community at large. Employers must be ever cognizant of these considerations. As your partner in responding to the legal challenges, outside counsel must be, too. Indeed, we would be remiss *not* to, as business impact and legal strategy are inextricably intertwined.

The only way for your company to *see the forest through the trees* in the context of class litigation is to create and implement a comprehensive strategy, *i.e.*, preparation. As we continue to explore the early, precertification stage of class litigation in this issue, we do so with an eye on this bigger picture. The decisions made in the initial stages of litigation can shape not only the outcome of the lawsuit, but can impact the organization itself.

In this issue, we discuss how we devise the litigation strategy based on the type of case at hand—the relative strength or weakness of the plaintiffs' claims and the cohesiveness of the putative class. But the strategy also must be informed by such questions as: Is this case likely to attract media attention? What kind of employee engagement issues are at stake? Are the claims in the litigation likely to affect the brand with respect to the willingness of business partners and customers to continue to affiliate with the employer? These considerations must also factor into how we proceed.

We don't defend lawsuits, after all, we defend *employers*. And we are honored when you entrust us to do so.

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About the *Class Action Trends Report*

The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Law & Business *Employment Law Daily*, the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

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When the EEOC is the plaintiff

Defending class litigation is daunting enough. When the federal government is the plaintiff—particularly the Equal Employment Opportunity Commission (EEOC) bringing a "pattern-or-practice" suit on behalf of employees—it presents another set of challenges. How can an employer best position itself during the pre-complaint administrative process to avoid having a narrow charge of discrimination expand into the basis for a systemic lawsuit?

Upon receiving notice of an EEOC charge, counsel's first concerns are to draft a position statement, prepare for the agency investigation, and respond to the agency's information requests—all while keeping a strategic eye toward a potential trial.

Write with tunnel vision. When presented with a charge of discrimination (or retaliation), an employer must prepare a position statement responding to the allegations. It's crucial to note that unlike a private litigant, who can only assert allegations in court that are "like or related" to those set forth in his charge, the EEOC can bring suit on any allegations that reasonably grew out of its investigation and were investigated, as long as the agency then found cause as to the new allegations (and attempted to conciliate them). The employer's goal, then, in drafting the position statement, is to focus on the charging party's initial allegations that brought the EEOC to the door.

What's an employer to do to counter the EEOC's potentially expansive posture? Respond to the charges as *narrowly* as possible. Address the facts relating to the individual charging party only, and avoid unnecessary discussion about the company's employment policies or practices, the overall operations of the business, or national or even regional statistics. Such missteps can make the company more vulnerable to claims of systemic discrimination.

Give them the trees, not the forest. Similarly, in responding to the EEOC's requests for information—which may come quickly on the heels of receiving notice of the charge—do not provide documents or other information that the agency did not request. Instead, submit *only* what is reasonably related to charge. If, for example, the EEOC asks to see a specific policy that appears in your employee handbook, there is no need to provide the entire handbook.

Crunch the numbers first. When the EEOC files a systemic discrimination lawsuit against an employer, it often includes statistical evidence of discrimination. To this end, during its investigation, the agency requests data from a targeted employer so that it can analyze and identify statistical trends. When responding to an information request, conduct your own statistical analysis of the requested data *before* submitting it. Use the results of that analysis to shape your legal strategy and your negotiations with the EEOC.

Push back, if need be. Understandably, employers react negatively to extremely broad requests for information from the EEOC and initially want to send a "see you in court" response. Keep in mind that the EEOC's requests for information are informal, and an employer has no statutory obligation to provide what the agency has requested. But, providing information that is not burdensome to obtain may be well received by the EEOC. As a general

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Red flags

If the EEOC seeks information or data beyond the location, review period, or processes implicated by the underlying charge of discrimination, that's a clear indication that a systemic discrimination investigation is afoot. Here are some common requests that should put an employer on alert:

- Information on how the company's data is stored and what fields of information are available
- Job applicant data
- Employee testing or background check data
- Validation conducted on pre-employment tests
- Information on other corporate locations using the same hiring processes, background checks, drug screens, physical ability tests, etc.

If the EEOC requests that data be provided in Microsoft Excel, that's another "red flag" that the agency is investigating a charge as a systemic matter.

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rule, employers should be guided by the charging party's worksite/position/supervisor and the time frame identified in the charge. The point is to show the EEOC that it can conclude there has been no discrimination based on an appropriate sample. Note that the EEOC always has its subpoena authority in its back pocket, and courts tend to be more than willing to enforce agency subpoenas. Upon receipt of an EEOC subpoena, you'll want outside counsel on your side to meet immediate deadlines to object, which if not met in a timely manner, may result in a court finding that all objections are waived.

Some final pointers on information requests: Statistical analyses and document reviews should be conducted under privilege. Employers must take steps at the onset to maintain the confidentiality of their analysis to ensure that the privilege remains intact. Also, be prepared to act on any issues uncovered by the analysis. The only thing worse than having a systemic issue is *knowing* you have a systemic issue and not taking remedial action.

Take the long view. It may well be that, regardless of what an employer does to keep the scope of an investigation narrow, the EEOC will find some basis for significantly expanding the investigation beyond the charging party's initial allegations. Aggressive plaintiffs' attorneys who bring class actions, for example, have prepared charges for their clients that allege that the employer is engaging in classwide discrimination. Similarly, EEOC investigators can include allegations of class discrimination—and have encouraged charging parties to do so. Accordingly, the best legal strategy, upon initially receiving notice of a charge, is to respond formally as though an individual claimant is involved, while preparing for a potential classwide suit. ■

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ensure that the department's operations continue to run smoothly during the course of the litigation.

Current employees as plaintiffs. Exacerbating the challenge is the occasional plaintiff who might feel he has carte blanche authority to engage in misconduct or poor performance because of his seemingly protected status as a litigant. Such behavior can't be permitted, of course, but it certainly puts the employer in a quandary. In such instances, consult your Jackson Lewis attorney before disciplining or taking other adverse employment action against the named plaintiff if he or she engages in conduct that would normally be grounds for such action.

What if the company faces a lawsuit filed by key decision-makers? Consider the store managers who bring a wage claim insisting they are misclassified as exempt, yet are making key strategic decisions for your company and setting policy day-in and day-out. An employer may have misgivings about their commitment to the company and whether they are sufficiently focused on their work. To strip the named plaintiffs of their managerial authority, however, may constitute reprisal. It would do little good to provide fodder to plaintiffs' attorneys to use the company's heavy-handed conduct to gain sympathy with the judge—or worse still, to create a separate retaliation lawsuit.

Procedural motions. Another important consideration at the outset is whether each defendant is subject to suit in the "forum state," whether in state or federal court. Plaintiffs generally sue in the state where they work(ed), which in most instances is the state where they reside. A corporation that does business and employs workers in that state ordinarily will be subject to suit in that state. But plaintiffs often name other defendants—parent companies or related corporate entities, corporate officers and directors individually, even unrelated entities such as payroll processors or professional employer organizations—whose relationship to the forum state is not so clear. The employer must decide early on whether to contest personal jurisdiction; failure to do so can result in a waiver of the objection.

Should the employer file a motion to transfer venue, *i.e.*, the place where the litigation will take place? Employers normally prefer to defend litigation in the jurisdiction where they maintain their headquarters or otherwise have a strong local presence. When plaintiffs file a putative class or collective action in a different state, the employer must consider whether to seek to move the case to a preferred forum. This decision involves several considerations, including:

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- The location of the key evidence, such as substantial documentary evidence or other physical evidence necessary for discovery and trial
- The location of the witnesses
- The location of class members
- The relative interests of the respective states where the case could be brought or transferred
- Variations in case law, which in some cases may involve outcome-determinative differences in interpretation.

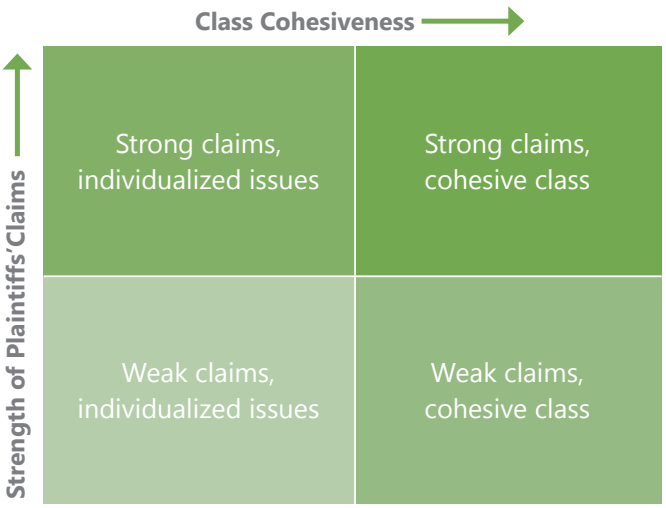
An additional consideration, of course, is whether the case belongs in court at all. If the employees signed arbitration agreements—an increasingly common occurrence—the employer may wish to file a motion to compel arbitration of the underlying dispute.

What kind of case is this?

Class and collective actions generally fall into one of four broad categories:

1. Strong claims, individualized issues
2. Strong claims, cohesive class
3. Weak claims, individualized issues
4. Weak claims, cohesive class.

Understanding as early as possible which of these scenarios the litigation involves will heavily influence the initial defense strategy and potentially the remaining course of the lawsuit.



Strong claims, individualized issues. Cases with strong claims, but presented by a plaintiff whose facts are not representative of many other employees, call for a focus on *keeping the case small.*

An example of such a case is a complaint alleging that a retail employer misclassified its store managers where the evidence shows that the named plaintiff(s) worked for a uniquely micromanaging district manager who left the store managers with no authority regarding hiring, firing, or other significant matters affecting store employees, but where the rest of the company's store managers working outside that district clearly possess that authority.

In this instance, the key is to mount a vigorous defense by developing evidence at the outset demonstrating that the named plaintiff's claims are not typical of the claims of the putative class. If the case can remain small in terms of the number of plaintiffs, mediation ordinarily resolves the matter.

Strong claims, cohesive class. Cases involving strong claims on the merits coupled with a cohesive plaintiff class present the most difficult scenario. An example is a complaint alleging (correctly) that a company misclassified all of its managers as exempt because it paid them all on an hourly basis rather than on a salary basis. The exposure may be high and the plaintiffs' counsel may have little incentive to settle the case for a discount in light of the attorneys' fees often available for a prevailing plaintiff.

In that case, the company must decide *whether to fight the case*—recognizing that the end result will likely involve high exposure and substantial expenditure of attorneys' fees for its own defense as well as the plaintiffs' counsel—*or seek an early resolution*.

Weak claims, individualized issues. Cases presenting weak claims on the merits, coupled with highly individualized issues that are not likely to support a certified class, are the least threatening type of putative class or collective action. An example would

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be a complaint seeking overtime pay on behalf of 50 categories of employees performing very different, but clearly exempt, roles. As the plaintiffs' counsel has little leverage in this scenario, these cases typically result in *dismissal or an early settlement* on behalf of one or a few individuals.

Deciding at the outset where the main battle lines are drawn will help to focus resources and to set appropriate expectations for how the litigation will proceed.

Weak claims, cohesive class. Cases involving weak claims, but made on behalf of a cohesive group of potential class members, offer more leverage to the plaintiffs' counsel due to the cost and workplace disruption involved in certifying a class. Here's an example: The complaint claims that all of the company's exempt employees are in fact nonexempt because the company requires them to use available paid time off if they are absent for a portion of their regular work schedule.

The employer's goal in this type of case is to *focus on the merits issues* before proceeding to class or conditional certification. If the claims are vulnerable to a strong summary judgment motion, it might be the best course to file that motion early as to the named plaintiff's claims. Here, too, if the claims are weak but not subject to such a motion, *early mediation* may be appropriate.

Where does the lawsuit fit? So, which type of lawsuit is ABC Corp. facing? Will the case primarily be about the procedural issue of conditional or class certification or decertification? Will the case focus on defeating the substantive claims on the merits? Does this litigation call for vigorous challenges on both substantive and procedural bases? Deciding at the outset where the main battle lines are drawn will help to focus resources and to set appropriate expectations for how the litigation will proceed.

Searching for landmines

Are there other potential claims lurking that could come to light during the discovery process? Employers must assess whether discovery is likely to lead to additional causes of action.

Plaintiffs often allege certain claims but fail to raise other potentially available issues. For example, in the wage-hour context, a complaint may challenge an employer's practice of not compensating for certain pre-shift and post-shift activities but fail to challenge its practice of automatically deducting a 30-minute meal period each work day. When an employer realizes that a complaint fails to raise certain potentially problematic issues, those non-pled issues must be treated as part of the overall litigation defense strategy. It may mean the best defense is to resolve the case quickly to avoid the assertion of these other claims. That's why it's essential to determine as early as possible in the litigation whether there are other areas of concern that could be exposed.

Plaintiffs' counsel, of course, are on the lookout for those types of issues in discovery, including document demands, and during depositions of corporate witnesses. Given the breadth of permissible discovery, courts typically give plaintiffs some measure of leeway to ask about practices that affect the class members, even if the complaint does not call out those specific practices. (Note, though, that imminent amendments to the Federal Rules of Civil Procedure will offer employers some relief in this regard; the changes will narrow the scope of permissible discovery so that it must be proportional to the needs of a given case.) And on occasion a plaintiffs' attorney will stumble on those types of issues inadvertently, such as when a deposition witness gives a long, rambling answer and volunteers information beyond the scope of the question.

Additional landmines might also be uncovered in conversations with potential class members. An employer may confer directly with employees who are potentially "similarly situated" with the plaintiffs in order to assess the terrain and to shore up evidentiary support for the defense, such as declarations contradicting the factual allegations of the complaint. Most courts hold that during the precertification stage of class litigation, these individuals are not represented by plaintiffs' counsel, and the employer can communicate directly

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with them about the lawsuit, even about potential individual settlement offers, if that is strategically sound. However, any communication strategy must be vetted with counsel in advance.

Assessing the potential exposure

How does an employer begin to evaluate the strengths of the plaintiff's claim to assess the potential exposure to the company? The first step is to take a fresh look at the facts. The employer, together with defense counsel, must have an accurate, objective understanding of what the evidence available to the parties will actually show. This often requires conducting numerous witness interviews, as well as examining that previous job description analysis. Only when there is a well-grounded appreciation of the facts can the employer truly evaluate whether the asserted claims are true, or the extent to which they are subject to factual dispute.

Doing the math. As for gauging the likely monetary damages in the event the class claims are meritorious, precision is not essential, but an early, well-reasoned estimate of likely damages is. A sound damages estimate will inform key decisions in mapping the litigation strategy. It's also what can support removing the case to federal court under the Class Action Fairness Act, if desired. (A more extensive discussion of removal appears on page 9).

The employer, together with defense counsel, must have an accurate, objective understanding of what the evidence available to the parties will actually show.

Ordinarily, it will be relatively simple to determine the worst-case damages scenario, typically by:

1. identifying the potential liability period
2. determining the maximum possible class size
3. figuring out the largest possible recovery by a class member
4. adding whatever liquidated or other additional damages may be available under the substantive law
5. building in something for attorneys' fees and costs, and
6. doing the math.

Because pulling all of the detailed payroll information and other data needed for a finely calibrated individualized damages analysis may take an employer several weeks or longer, a preliminary exposure analysis is often more akin to a back-of-the-envelope calculation that makes assumptions and applies them across the class, rather than actually attempting to calculate exposure for each potential class member.

Not surprisingly, the number generated by this type of worst-case approach is also typically very large, and it is often several times the level at which experienced employers and counsel believe a case of that type would typically settle. Consequently, it's also useful to prepare a reasonable, *middle*-case assessment of damages as well—one that builds in realistic assumptions regarding the facts of the litigation.

Communicating the numbers. Which estimate gets communicated to the top brass? Some in-house counsel want to ensure that the company's business leaders know the worst-case number; others prefer not to communicate that number, or to provide it but to emphasize instead the realistic middle-range figure.

One concern is that the middle-case estimate may anchor the leadership's expectations, meaning that if the ultimate resolution of the case exceeds that estimate, the leadership may view the result as a failure. The flip side, though, is that if the leadership hears only the worst-case number, and the case ultimately resolves for a substantially lesser amount, the leadership will then perceive the preliminary analysis as unduly alarmist and unrealistic. The important consideration is to understand what type of exposure information the business needs and how best to communicate it in the context of the specific corporate culture involved. Ultimately, in-house counsel will need to determine individually, based on the culture of his or her organization and its leaders, how best to communicate the potential liability for the lawsuit at hand. ■

Litigation holds: no longer a mere formality

By Brian T. Benkstein

One of the first orders of business upon being served with a lawsuit, charge, or formal demand is to implement a "litigation hold." A party's obligation to implement a litigation hold in connection with an active or threatened legal claim is not a new phenomenon. However, the expectations are changing, and litigants are now under increased pressure to implement an effective hold and ensure it is being followed.

Make it real. Once a company has knowledge of a legal claim or a matter that could reasonably give rise to a claim, it has an affirmative duty to preserve and safeguard information relevant to the matter. Implementation of a timely and effective litigation hold is, therefore, a necessity. A hold should be viewed as an overall process that must be planned, executed, and monitored. The days of simply sending out an email notification to a handful of individuals to "save information" are over. Rather, litigation holds must be comprehensive and effective.

Higher stakes. Litigation holds are particularly important in the class action or complex litigation context for the simple reason that the stakes are higher. As a result, plaintiffs' counsel are more likely to scrutinize and challenge the defendant's hold. With increased frequency, defendants are faced with written discovery and corporate (Rule 30(b)(6)) depositions that drive at issues of information preservation and hold activities. An effective hold can mitigate the obvious risk of spoliation and the less obvious risk that plaintiffs may gain leverage in the litigation as a result of a botched or incomplete hold.

Documents to preserve. Common types of records subject to preservation in class and collective actions include personnel files (including performance evaluations and disciplinary notes), payroll records, time-clock records, security records reflecting building or parking area access, network log-in and log-out records, emails, text messages, telephone records, voice mails, and other data stored on electronic devices.

Features of an effective hold. What makes a litigation hold effective in the class or complex litigation context? The following (non-exhaustive) summary highlights some of the common features of a well-designed and executed hold:

- **Appropriate scope.** The litigation hold must be designed to be effective. A hold notice must be sent to the right people in the organization. It must communicate in sufficient detail the types and categories of information to be preserved. Factors affecting scope might include: the number of employees or claimants involved; whether the case involves a local site decision or a national practice; whether the litigated issues are historical or ongoing; and, naturally, the potential sources of relevant information. Early on, a litigant must determine whether the hold should extend to corporate-wide electronic information systems or to local, employee-specific devices (including, for example, smart phones), or both. The litigant also must consider whether there are third-party vendors, such as payroll processors or cloud storage providers, that must be put on notice.
- **Customized.** The hold should be case-specific; avoid a one-size fits all approach. Hold notices and expectations will be different for electronically stored information (ESI) and for those employees who are responsible for it, as compared to employees who may have electronic and hardcopy information. The hold must be tailored to the specific type of information at issue and the people who work with or retain that information.
- **Mindful of existing policies**. It will likely be necessary to modify existing ESI protocols, and it may be necessary to suspend hardcopy document destruction policies to effectuate the hold.
- **Active monitoring.** A hold should be viewed as an ongoing process. Follow-through is essential; a litigant cannot simply issue a hold notice and forget about it. Rather, hold notices should be acknowledged and retained. Compliance with the hold must be monitored and enforced.

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Removing a class action to federal court

One of the most critical strategic decisions that employers must make at the initial stages of class litigation is whether to remove a state law case filed in state court to the federal forum. Depending on the nature and size of the case, the Class Action Fairness Act (CAFA) can get you there.

Why remove a case? As a general rule, defendants prefer to litigate employment cases in federal courts, finding that federal judges have more experience with the procedural dictates of Rule 23 and also are less inclined to reflexively certify a proposed class. (In fact, CAFA was enacted in response to perceived abuses by state court judges who were certifying class action lawsuits filed by plaintiffs in states with a reputation for unfairness toward out-of-state defendants.) Being in federal court, especially on a class action, is also advantageous because the federal bench tends to have more resources at its disposal. The odds are in the employer's favor that the judge is going to give the case a more careful look, simply because he or she has the luxury of additional resources, such as law clerks and other staff on whom to rely.

In certain unique circumstances, counsel may determine that the employer is better off in state court, taking into account the claims at issue and the judges that may be deciding the case. Your Jackson Lewis attorneys, seasoned litigators with extensive familiarity with both federal and state courts, can assess whether your case is one of those rare situations.

Provisions. CAFA, enacted in 2005, modifies the rules for federal court jurisdiction over class actions based on diversity of citizenship, relaxing the historically strict standard for diversity jurisdiction to allow defendants to remove what were formerly "non-diverse" state law-based class actions.

Before CAFA, *all* named plaintiffs in a class action had to be citizens of states differing from those of *all* defendants, a prerequisite that typically could not be met in class actions seeking nationwide classes. CAFA eased the rules for diversity jurisdiction (albeit for class actions only), so that the diversity requirement is satisfied if any class member or any defendant is a citizen of a different state from any other defendant. Also, prior to CAFA, every plaintiff in the case had to satisfy a minimum monetary threshold of $75,000 in damages in order to remove a case on diversity grounds. With CAFA's passage, federal jurisdictional requirements are met as long as the *aggregated*, not individual, amount in controversy for all class members exceeds $5 million and the class involves more than 100 individuals.

CAFA also established a class action "bill of rights" for litigants, which includes various protections for class members, such as judicial review and approval of "injunctive relief only" settlements, protection against losses to the class because of payments to class counsel, more standardized settlement notification information, and specific requirements regarding notification to federal and state officials of proposed class action settlements.

Impact on class litigation. CAFA's impact has been significant. More class actions are being filed in federal courts, and more intrastate class actions are being heard in federal courts through the statute's removal mechanisms.

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- **Reevaluation at defined milestones.** Hold activities that may be appropriate at the commencement of the litigation may not be sufficient as the case evolves. It may be necessary to expand the scope of the hold as a party learns more about the case, its defenses, and the issues involved.

- In short, the design and implementation of a litigation hold is an integral component of any initial defense plan, especially in the context of class or complex litigation. Not only is a hold essential to carry out a party's duty to preserve relevant information, it is necessary to avoid the unintended consequences of giving the opponent a tactical or legal advantage in the underlying litigation. ■

Practice pointer: Should you make an offer of judgment?

By Daniel L. Messeloff

In many cases, after an employer reviews a class or collective action complaint for the first time, whether for unpaid lunch breaks, miscalculation of overtime, or similar claims, one of the employer's first thoughts may be "so, in a worst-case scenario, we owe this employee $124.38. Can't we just pay that amount and be done with this?" The short answer is "it depends."

Rule 68 of the Federal Rules of Civil Procedure and the comparable procedural rule in many states generally allow a defendant to make an "offer of judgment" to a plaintiff in full satisfaction of the plaintiff's claim (together with reasonable attorneys' fees). If the plaintiff accepts the offer, the plaintiff's claim is resolved and the matter will be dismissed. If the plaintiff refuses the offer and the plaintiff is not ultimately awarded at trial as much in damages as was offered to her in the defendant's offer of judgment, the plaintiff may not be able to recover her attorneys' fees or costs, the general principle being that the claim could have been resolved with the defendant's offer of judgment without the need for further litigation. In the face of an unaccepted offer of judgment, some courts have also held that, because the plaintiff could not recover at trial more than what was offered to her in the offer of judgment, the plaintiff's claim was effectively resolved by the offer of judgment, and therefore the plaintiff's claim should be dismissed as moot.

Offers of judgment can be used very successfully when there is one plaintiff and the amount of damages at issue is readily ascertainable. However, how offers of judgment have been interpreted in class and collective actions has been debated among many district courts, courts of appeals, and even the U.S. Supreme Court. In contrast to a single-plaintiff case, the question in class and collective actions is if the named plaintiff's claim is moot, what happens to the claims of the rest of the alleged class? For that matter, does a plaintiff who brings a class or collective action have any right or interest in the class above and beyond her own claim?

Supreme Court weighs in. Some courts have dismissed class and collective actions where the plaintiff has refused to accept an offer of judgment early in the case, under the theory that a plaintiff who receives full relief on her claim no longer has a personal stake in the outcome of the litigation. In a 2013 decision, the Supreme Court recognized that "Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot," but it declined to resolve the split because the question was not properly before the Court.

Justice Kagan wrote a strongly worded dissent in the case, however, arguing that "as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." Quoting the High Court's 2012 decision in *Chafin v. Chafin*, she added, "A case becomes moot only when it is impossible for a court to grant any effectual relief whatsoever to the prevailing party. By those measures, an unaccepted offer of judgment cannot moot a case." Since the High Court issued its 2013 holding, district courts and courts of appeals have remained divided as to the effect of an unaccepted offer of judgment.

In October 2015, the Supreme Court heard oral argument in *Campbell-Ewald Company v. Gomez* on the questions that were left unanswered in its prior decision—namely, whether a case becomes moot when the plaintiff receives a proper offer of judgment, and whether the answer is any different if the plaintiff asserted a class claim but receives an offer of judgment before a class is certified. What are the answers to these questions? Stay tuned.

Depends on the case. A number of considerations go into deciding whether to make a Rule 68 offer of judgment at the start of litigation. In some cases, it's the optimal strategy for resolving the lawsuit; other claims, however don't lend themselves readily to such an approach.

In off-the-clock wage suits, for example, "sometimes the facts are so outrageous that it would be very difficult to make an

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offer of judgment," explains Gregory T. Alvarez, a Shareholder in Jackson Lewis' Morristown, New Jersey, office. "There's no doubt we'd have to overpay that claim if we were to pursue a Rule 68 strategy; it may be simply too high." Offers of judgment also don't work well for cases alleging the employer has misclassified employees as FLSA-exempt. "It's very difficult to use an offer of judgment because often the plaintiff is seeking injunctive relief, and the employer does not want to concede that the exemption doesn't apply."

On the other hand, if there are small damages for the named plaintiff and a large prospective class, "that's the perfect case."

Other factors to consider:

- **Jurisdiction:** If the case was brought in a jurisdiction that already has held an unaccepted offer of judgment will not moot a case, it's not a viable strategy.
- **Opt-ins:** If there are already opt-in plaintiffs, defending an offer of judgment, ultimately, is going to be more complicated and more difficult to do successfully. "And there are some courts that say if the offer doesn't address the opt-ins, then the case is not moot," Alvarez notes.
- **Bait for plaintiffs.** Plaintiff's attorneys often use offers of judgment to recruit more clients—posting them on their firm's websites and in newspapers. "It wakes people up, makes people think 'there must be something there,'" Alvarez cautioned. There's always the risk of attracting more plaintiffs.
- **Damages:** Is it even possible to determine the amount the plaintiff's damages would be in order to make such an offer? Sometimes it's not feasible to make an offer early on, but as the case goes on, "after you get the documents, responses to interrogatories, you get the facts, and you can make an offer of judgment that you can live with," Alvarez added.

"I'm very bullish on these offers," Alvarez said. "I wouldn't say it's a silver bullet, but it's an excellent tool in your arsenal."

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Because the law's provisions are designed to prevent plaintiffs' counsel from keeping class actions in state court that are more appropriately litigated in federal court, CAFA forecloses the pleading tactic of requesting damages of less than $75,000 per class member (the jurisdictional limit for a federal court to hear a claim involving plaintiffs and defendants of different states) in order to stymie a defendant's attempt to remove the lawsuit to federal court.

The statute is having a profound effect on litigation strategy and the structuring of class actions as well. Lawyers on both sides of the bar continue to confront novel CAFA issues in these types of cases, for the fight over venue is often a key driver of exposure and risk. In response to CAFA, plaintiffs' lawyers seeking to avoid removal to federal court are using various tactics, including prayers for relief of less than $5 million, the filing of multiple "baby" class claims on behalf of less than 100 plaintiffs, and limiting the scope of the class to residents of one state. Employers defending state-law wage and hour class actions are increasingly confronted with such ploys.

Evolving law. Jurisprudence under CAFA continues to mature after the Supreme Court decided its first case under the statute in 2013 in *Standard Fire Insurance Co. v. Knowles*. In 2014, the Supreme Court held in *Dart Cherokee Basin Operating Co., LLC v. Owens* that defendants are not required to submit evidence in support of a removal petition under CAFA, and that a short and plain statement of fact is enough. The Supreme Court also reaffirmed that there is no presumption against removal under CAFA.

Case law under CAFA has certainly turned the corner in this regard for employers, allowing them to solidify defense strategies to secure removal of class actions to federal court. On the other hand, the plaintiffs' bar continues to devise techniques to adapt to rulings on the scope, meaning, and application of the statute. ■

Regulatory roundup

The EEOC

Fending off process challenges. Three years ago, the EEOC suffered a well-publicized defeat in *EEOC v. CRST Van Expedited Inc.* In *CRST*, the Eighth Circuit found that the EEOC had failed to investigate and conciliate the claims for the class on whose behalf the EEOC brought its lawsuit. Accordingly, the EEOC's class claim was dismissed because the EEOC did not comply with statutory "EEOC process" requirements. Since the *CRST* decision, the EEOC has successfully appealed three rulings in which district courts had held the EEOC to strict process requirements. With respect to the EEOC's mandate that it investigate, the EEOC has succeeded with the argument that courts are not to judge the sufficiency of an EEOC investigation. In the conciliation context, earlier this year the Supreme Court, in *Mach Mining, LLC v. EEOC*, has endorsed the EEOC's view that the remedy for a failure to engage in conciliation is not the dismissal of the lawsuit but rather the entry of a stay for purpose of conducting the conciliation that did not take place prior to the lawsuit.

Employers are rightly concerned about EEOC lawsuits that will bear no semblance to the EEOC's pre-lawsuit investigation. Historically, courts have been willing to examine the scope of an EEOC investigation, and if the EEOC's investigation focuses on one facility or geographic location, some courts have limited the EEOC's lawsuit to parallel the scope of the EEOC's investigation. More recently, in *EEOC v. AutoZone, Inc.* (N.D. Ill. Nov. 4, 2015), a district court refused an employer's request to limit the EEOC's lawsuit to issues addressed in the EEOC's investigation. Facing a nationwide lawsuit, AutoZone claimed the EEOC requested no information from AutoZone during the EEOC's investigation of three charging parties who worked at three AutoZone stores. Relying on Seventh Circuit case law and the Supreme Court's decision in *Mach Mining,* the district court ruled it was not appropriate to review the EEOC's investigation. Instead, the court found the EEOC had satisfied its requirement to investigate when the EEOC issued a determination (1) stating the EEOC had investigated and (2) identifying in summary fashion alleged nationwide discrimination discovered during its investigation.

With the EEOC focusing its attention on larger nationwide lawsuits and at the same time looking to conserve investigative resources, we can expect to see courts taking varying approaches when asked to reign in an EEOC lawsuit based on the scope of the EEOC's investigation.

Criminal background checks. The EEOC continues its several-year initiative to challenge some criminal background check practices as creating a disparate impact that violates Title VII. Currently, the EEOC is not requiring employers to cease conducting criminal background checks. Instead, the EEOC is pushing employers to follow its 2012 Guidance, specifically, to give very little, if any, weight to criminal charges that do not result in convictions, and to conduct an individualized assessment before disqualifying an individual for a criminal conviction. Among other things, the EEOC expects the individualized assessment to provide the applicant or employee with an opportunity to explain his/her criminal record before the employer makes a final employment decision based on that record.

Other federal agencies

The D.C. Circuit Court of Appeals on August 21 upheld Labor Department rulemaking that stripped live-in home care providers employed by third-party agencies of the FLSA's "companionship services" exemption from minimum wage and overtime. The rulemaking also narrowed the definition of "companionship services" for all such workers, thus limiting the reach of the exemption. Although the district court in *Home Care Association v. Weil* struck down the rule change, the appeals court found the revision neither arbitrary nor capricious, reversing the court below.

The decision opens the door to a potential wave of wage-hour suits—likely of a collective-action variety—among employees in one of the fastest-growing occupations in the United States. On October 6, Supreme Court Chief Justice John Roberts denied a request by industry trade groups to delay implementation of the regulation while they challenge the appellate court's ruling. The DOL had previously announced it would not bring enforcement actions against employers for violations of the final rule until 30 days following the D.C. Circuit's issuance of the mandate making effective its opinion. On October 13, the appeals court issued its formal order implementing the decision; that means the non-enforcement period ends November 12.

The OFCCP has announced a new website designed to inform the public about OFCCP settlements in which there may be unidentified class members eligible for back pay. Individuals who believe that they may be part of an impacted class can use the "Class Member Locator"

REGULATORY ROUNDUP **continued on page 13**

Prevention pointer: Do you need to rethink an employment practice?

It is tempting, when faced with a class action complaint, for an employer to assert reflexively that the allegations are ludicrous and that the employment practices at issue comply fully with the law. While natural, this reaction is often based on factual assumptions about what the employer's policies and expectations require of its employees. The facts are often more complicated than the employer initially believes.

For example, when faced with a putative wage-hour collective action challenging the exempt status of a group of employees who hold a particular position, the employer may have looked at the job description years ago and concluded that the role is exempt. It may turn out, though, that the job description was not comprehensive and that the actual job differed in material ways from what is says "on paper." Or the job duties may have changed significantly in the interim, perhaps at the behest of the managers who supervise those employees—and unbeknownst to Human Resources. In addition, the legal landscape pertinent to the exempt classification of that position may have changed over the years.

For these reasons, the employer needs to take a fresh look at the facts and reevaluate the job description, its exempt status, and the classification practice at the source of the underlying legal claim. It might well merit revision.

Changing course mid-(litigation) stream? Because class litigation can often take years to work its way from complaint to final resolution, a considerable amount of potential damages exposure can arise while a case is pending. Particularly under laws with relatively short statutes of limitations, more liability can accrue during the litigation than existed at the time the employees filed the complaint. On the other hand, making a change while the case is ongoing may amount to an admission that the previous practice was unlawful—and the plaintiffs may be able to present the change in practice as evidence at trial. Consequently, it can be a thorny decision whether to change the employment practice at issue while the case is pending or hold off on any changes until the case is done.

Determining factors. In most cases, the decision turns on how clearly the underlying policy complies with the law. If the employer believes that the practice is clearly lawful and that it serves important business goals, then the employer is unlikely to abandon it. But if, on careful examination, it appears that the practice is probably unlawful, then the employer should change the practice promptly to at least prevent further damages from accruing—so long as the employer can afford to do so without crippling its profitability.

When the challenged practice falls in the gray area between clearly lawful and clearly unlawful, the decision whether to make a change essentially boils down to a question of the employer's risk tolerance.

Fallout at trial? Of course, there *is* a chance that the jury will hear evidence that the employer has revised its employment practice. Generally, though, procedural rules bar the use of subsequent remedial measures to support an adverse inference that the challenged practice, now revised, was unlawful. Moreover, given that so few class cases go to trial, the odds of the adverse inference actually hurting an employer at trial in a given case are somewhat remote.

Make the change. Ultimately, then, if an employer concludes that its employment practice is probably unlawful, the better approach is to change the practice promptly, if possible, even with the possibility that the change in practice would serve as evidence at trial in the unlikely event that one would occur. By doing so, the employer avoids accruing even further liability in the current litigation.

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webpage to review listings of specified federal contractors that have signed conciliation agreements with the OFCCP, along with links to a brief summary of each settlement, redacted versions of the applicable conciliation agreements, and the relevant press release, if available. In addition, the website provides regional email accounts and 1-800 numbers so that individuals can directly contact the OFCCP if they have questions or need assistance, and it contains an outreach video for workers. ■

Other class action developments

A sampling of important developments in class litigation since our last issue:

Wage-hour suits

A former Lenscrafters employee filed a putative class action in California court asserting a number of state-law wage claims. The employer removed the case to federal court, where the employee added a representative claim for civil penalties under the Private Attorneys General Act (PAGA), and the employer moved to compel arbitration. The employee did not dispute that most claims were arbitrable under the employer's arbitration agreement but argued that a provision barring him from bringing PAGA claims on behalf of other employees was not enforceable under California law. Citing *AT&T Mobility LLC v. Concepcion*, the district court disagreed, finding that the Federal Arbitration Act (FAA) would preempt a state rule barring waiver of PAGA claims. But a divided Ninth Circuit panel reversed, holding that the California Supreme Court's holding in *Iskanian v. CLS Transportation Los Angeles, LLC*, which bars the waiver of representative claims under the PAGA, was a generally applicable contract defense falling within the savings clause of FAA Section 2, and the *Iskanian* rule was no obstacle to FAA objectives and thus was not preempted (*Sakkab v. Luxottica Retail North America, Inc.*, 9th Cir., September 28, 2015).

The Eleventh Circuit scrapped the DOL's six-part test for determining whether trainees qualify as "employees" under the FLSA (and thus entitled to minimum wage and overtime).

Agreeing with the reasoning of the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, the Eleventh Circuit scrapped the DOL's six-part test for determining whether trainees qualify as "employees" under the FLSA (and are thus entitled to minimum wage and overtime). The appeals court did not take a position regarding whether the plaintiffs here—student nurse anesthetists—were employees, but it remanded the case for further development of the record regarding the clinical program that they were required to take in order to complete their degree (*Schumann v. Collier Anesthesia, PA*, 11th Cir., September 11, 2015).

The Ninth Circuit found a district court abused its discretion in denying certification of a class action brought on behalf of service technicians because the plaintiff failed to satisfy the commonality requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3). As for the commonality analysis, the lower court improperly evaluated the merits of the plaintiffs' commuting-time claims, rather than focusing on whether common questions were presented. However, as to their meal and rest-break claims, the appeals court agreed with the district court's conclusion that questions as to why individual technicians missed their breaks would predominate over questions common to the class (*Alcantar v. Hobart Service*, 9th Cir., September 3, 2015).

Uber drivers who claim the ride-share juggernaut was their statutory employer under the California Labor Code may pursue some of their state-law claims as a class, a federal court ruled, finding the drivers satisfied Rule 23(b)(3) requirements to proceed on a class basis on claims they were wrongly classified as independent contractors. "At bottom, it appears that common questions will substantially predominate over individual inquiries with respect to class members' proper employment classification under the *Borello* test" set forth by the California Supreme Court for determining whether an employer can rebut a *prima facie* showing of employment. "Indeed, every (or nearly every) consideration under the California common-law test of employment can be adjudicated with common proof on a classwide basis. Some may favor Plaintiffs' position on the merits, while others support Uber's. But all favor certification," the court found (*O'Connor v. Uber Technologies, Inc.*, N.D. Cal., September 1, 2015).

A district court did not abuse its discretion in certifying a bank employee's overtime suit alleging that her employer had a policy and practice of denying overtime pay that affected many other employees. Many issues remained unanswered, including whether the bank had an unlawful policy denying required compensation and whether it willfully denied overtime pay, and a class action would be an appropriate and efficient pathway to resolution, the Seventh Circuit held (*Bell v. PNC Bank, NA*, 7th Cir., August 31, 2015).

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Reversing a $19 million judgment in favor of hourly workers at a Nebraska pork processing plant, the Eighth Circuit held that Tyson Foods was entitled to judgment as a matter of law on their collective and class action wage-hour claims. The named plaintiffs never filed timely consents to join a FLSA collective action, and Nebraska's wage collection statute offered no recourse because Tyson never "agreed" to pay the disputed wages. In a separate decision, the appeals court reversed a $5 million judgment in favor of Tyson workers at another Nebraska plant (*Acosta v. Tyson Foods, Inc., dba Tyson Fresh Meats*, 8th Cir., August 26, 2015).

A federal district court certified an FLSA collective action of hourly Chipotle employees alleging that the restaurant chain's timekeeping practices resulted in off-the-clock work for employees working closing shifts. Departing from the typical two-step approach, the court found no requirement under the FLSA that wage claimants prove a single decision, policy, or plan to deprive them of pay in order to prevail on their claim. Rather, the proper approach for certification purposes is to presumptively allow workers bringing the same statutory claim against the same employer to join as a collective, with the understanding that individuals may be challenged and severed from the collective if the basis for their joinder proves erroneous (*Turner v. Chipotle Mexican Grill, Inc.*, D. Colo., August 21, 2015).

A California federal district court conditionally certified a class of Wal-Mart pharmacists who alleged that the retailer improperly failed to pay them for the time spent at home studying for and then taking an immunization course, which was intended to make them more efficient in their current jobs. Although there would be no FLSA violation unless the failure to pay resulted in the underpayment of overtime or minimum wages, the court held that while the pharmacists did not yet present evidence that other opt-in plaintiffs took the course under circumstances resulting in overtime or underpayment of the minimum wage, this did not defeat conditional certification at this early stage (*Nikmanesh v. Wal-Mart Stores, Inc.*, C.D. Cal., August 18, 2015).

However, a federal court decertified a collective claim in a suit alleging that CVS Pharmacy violated the FLSA by misclassifying regional loss prevention managers. Discovery revealed multiple distinctions in job duties performed by the various opt-in plaintiffs, which would require an individualized inquiry into whether certain FLSA defenses, including the administrative exemption, applied (*Bradford v. CVS Pharmacy, Inc.*, N.D. Ga., August 6, 2015).

Discrimination claims

A federal court in Minnesota refused to dismiss the Title VII suit of a former Wal-Mart employee who claimed she was discriminated against during her six-month tenure as a store employee in 2000. Wal-Mart moved to dismiss on the grounds that she never filed a timely EEOC charge on that claim and that her suit was untimely. But she was a member of the original *Dukes v. Wal-Mart Stores, Inc.* class—which tolled the statute of limitations on her claim (*Catlin v. Wal-Mart Stores, Inc.*, D. Minn., August 19, 2015).

Class race discrimination claims brought by African-American teachers and other Chicago Public School employees who were displaced in a program to "reconstitute" struggling schools were revived by the Seventh Circuit. Each affected school was evaluated under the same set of criteria, analyzed by the same committee, and finally subjected to the authority of one individual decision-maker. As such, *Wal-Mart Stores, Inc. v. Dukes* did not close the gate on their class claims (*Chicago Teachers Union Local 1 v. Board of Education of the City of Chicago*, August 7, 2015).

A former Wal-Mart employee who claimed she was discriminated against in 2000 was a member of the original Dukes v. Wal-Mart Stores, Inc. class—which tolled the statute of limitations on her claim.

Settlements

A federal court in New York approved a $15 million settlement in a class and collective action brought by exotic dancers alleging that they were denied minimum wage under the FLSA and New York Labor Law. The settlement came after the dancers obtained a ruling on summary judgment that they were employees, not independent contractors, of the nightclub (*Hart v. RCI Hospitality Holdings, Inc., fka Rick's Cabaret International, Inc.*, S.D.N.Y., September 22, 2015). ■

On the radar

A few of the important developments we're tracking:

- **Joint employers.** Franchisors, parent corporations, staffing agencies—even companies that contract out discrete operational functions—are increasingly vulnerable to class litigation brought by employees of subcontractors, franchisees, and other related entities seeking to hold these companies liable for alleged violations of labor and employment law. The plaintiffs' bar has been buoyed, no doubt, by the NLRB's recent decision in *Browning-Ferris Industries*, which broadens the definition of "joint employer" for purposes of holding companies accountable for labor law violations, as well as recent stirrings at the Department of Labor, which appears to be urging OSHA investigators to inquire into the potential "employer" status of related companies when looking into allegations of workplace safety violations.
- **"Sharing economy" lawsuits.** With class action lawsuits against Uber, GrubHub, and other "sharing economy" app companies in full swing—all contending that the users who have signed on to perform on-demand services are employees, not independent contractors—it was perhaps not surprising that plaintiffs' attorneys also have set their sights on the small entrepreneurs who sell makeup, candles, essential oils, or other consumer goods as independent sales consultants under a proven business model that has been in force for decades. In September, cosmetics company Mary Kay, Inc., was hit with a class action suit in New Jersey by individuals who contend they were employees of the company and were forced to buy its products as a condition of employment in violation of the New Jersey Wage Payment Law. The lawsuit in *Collins v. Mary Kay, Inc.* alleges there are "tens of thousands" of class members in the state. No doubt a harbinger of things to come, we anticipate such actions being filed against other direct sales stalwarts like Avon, Amway, Pampered Chef, and similar companies.
- **"On-call" under fire.** Retail employers face a rising wave of putative class action suits alleging that the common practice of requiring employees to be on-call, ready to come into work if needed, violates state wage laws. For example, a former sales clerk for a clothing chain filed a complaint in California alleging that the company breached the state's "reporting time pay" provisions by failing to pay employees who report to work but don't end up performing compensable duties and get sent home instead. Several retailers have ended on-call scheduling for their employees.

  New York promises to be a hotbed of such activity as well: The state attorney general has set his sights on the industry. He demanded information from 13 major retail chains about their scheduling practices, citing concerns that their use of "on-call" shifts violates state wage laws. A number of retailers have agreed to end the use of on-call shifts, at least in New York, following the attorney general's inquiry.

  Meanwhile, in Washington, Democrats in July introduced the "Schedules That Work Act" (S. 1772). The legislation, aimed at the retail, food service, and cleaning industries, would regulate "unstable, unpredictable, and rigid scheduling practices," such as on-call duty that does not guarantee paid work hours, split-shift scheduling of nonconsecutive hours, sending employees home early without pay when demand is low, and "punishing" employees who request schedule changes. The legislation would provide a private right of action, including class actions, and allows for direct monetary damages and liquidated damages for violations.
- **Volunteers or employees?** The D.C. Circuit Court of Appeals recently heard oral argument in an appeal asserting that a federal court erred in dismissing a challenge to a Department of Labor determination

Retail employers face a rising wave of putative class action suits alleging that the common practice of requiring employees to be on-call, ready to come into work if needed, violates state wage laws.

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that "consignment volunteers" who help run a company's consignment shows, in exchange for gaining early access to the consignment merchandise, were statutory employees under the FLSA and should have been paid the minimum wage. The lawsuit was brought by Rhea Lana's, a children's consignment business, which organizes consignment sales for people seeking to buy and sell used children's clothing and other goods. In exchange for assistance running the sales events, volunteers are given a chance to purchase merchandise before the sale opens to the general public. But the DOL investigated and concluded that the volunteers for the for-profit operation were employees and should have been paid as such.

Rhea Lana's filed a complaint in federal court seeking a declaration that the consignors are not employees, as well as an injunction prohibiting the DOL from further investigating the enterprise or from collecting penalties. The court granted the DOL's motion to dismiss. The International Franchise Association (IFA) has filed an amicus brief in support of the plaintiff's appeal of that decision, contending that the agency's enforcement action also threatens other enterprises that utilize a similar business model. Rhea Lana's, an IFA member, has franchises in 22 states in more than 60 locations. ■

Up next...

Employers increasingly are entering into arbitration agreements with employees as a more expedient and cost-effective means of resolving employment-related claims—including class claims. Should you? What terms should such agreements include? What are the benefits of arbitrating these disputes? What are the potential drawbacks? What hurdles do employers face in enforcing such agreements? And how has the plaintiffs' bar responded? These questions will be the subject of the next Jackson Lewis *Class Action Trends Report*.