CLASS ACTION TRENDS REPORT

We've just been served with a class action lawsuit. Now what?

Atop a stack of fresh mail on her desk, ABC Corporation's general counsel finds a complaint brought by a single employee in the company's California warehouse. Claiming that the demands of her job have her working through lunch nearly every day, the employee is seeking compensation for alleged unpaid work time. And here's the catch: She wants to represent ABC's 3,000 or so warehouse employees across the country, certain that they have similar stories to tell. Naturally, the general counsel's mind is racing: 3,000 employees? How could she possibly know what goes on at other warehouses? Get our payroll chief on the phone. I thought we had outsourced our warehouse function. What complex California statute are we dealing with? Didn't these employees sign arbitration agreements? How much money are we talking here? Plaintiff's counsel has a blog advertising this lawsuit? Is that even allowed?

The first 30 days

The first days and weeks after a class action lawsuit is filed are a critical time during which an employer must ask crucial questions about whether the claims are viable and the extent of the organization's potential liability. Is the complaint just a sheep in wolves' clothing, claiming to be on behalf of many workers but likely to be resolved for a nominal amount? Or is the company facing a major threat—with potential exposure in the range of seven, eight, or even nine figures? The answer depends on carefully scrutinizing the players involved, the arena in which the suit will be litigated, the nature of the claims, and the potential defenses available.

Evaluating the complaint

Now is the time to take an honest look at the situation. With your HR leaders, other key members of the executive team, and your Jackson Lewis attorney, consider these critical factors:

The players

- What do you know about the employee bringing the claims? How long has she worked for the company, and at what locations? Who is her immediate supervisor? Is there a possible ulterior motive for filing suit? Has she signed an arbitration agreement—one that includes a waiver of class claims?

WE'VE JUST BEEN SERVED continued on page 4

CONTENTS

A WORD FROM WILL

I would like to personally welcome you to the inaugural issue of the Jackson Lewis *Class Action Trends Report*. Our new quarterly resource will offer practical guidance designed to educate and assist executives (including in-house counsel, operations officers, human resources professionals, compensation/benefits/payroll executives, and risk managers) charged with the responsibility of defending (or implementing strategies to prevent) class or collective claims asserted by employees or government agencies.

Class action lawsuits present a significant liability risk for employers and continue to rise as an experienced plaintiffs' bar seeks to involve the largest possible number of claimants to increase the return on investment. Make no mistake about it: Class and collective actions are big business. Creative plaintiffs' attorneys assert claims ranging from systemic discrimination (*e.g.,* gender, race or other protected characteristics) to collective actions for overtime or minimum wages (*e.g.,* misclassification as independent contractor or exempt, off-the-clock work such as donning and doffing, preliminary and postliminary work, or work through meal periods). The plaintiffs' bar uses the class action mechanism to bring large-scale, multi-million dollar lawsuits against all sectors of the business community, from the financial services industry and hospitality, to the consumer goods sector and professional services. In the wage and hour context, these litigations frequently target independent contractor agreements, franchisor/franchisee arrangements, and contingent employment relationships.

The federal agencies also have entered the fray. The Equal Employment Opportunity Commission (EEOC) has set its sights on systemic discrimination cases, and the National Labor Relations Board (NLRB) has aggressively sought to prevent employers from taking steps to defend themselves from discrimination, wage-hour, and other employment claims on an individual basis by asserting that arbitration agreements with class waivers are unlawful under the National Labor Relations Act.

The Jackson Lewis *Class Action Trends Report* will discuss significant new developments in class action litigation and offer strategic guidance and tactical tips on how to defend such claims. Since Jackson Lewis prides itself in the preventive practice of law, the quarterly will also discuss preventive measures (*e.g.*, self-audits and policy reviews) to decrease the likelihood or strengthen the defense against class action claims. We'll share success stories from employers that have fended off class action lawsuits, keep you apprised of class action trends in the courts and administrative agencies, and maintain a watchful eye over emerging traps for the unwary—all with the goal of providing practical advice from Jackson Lewis attorneys to those of you on the front lines.

As we begin this quarterly together, I want to ensure that it is designed to meet the needs of the business community Jackson Lewis services and personally welcome any questions or suggestions. In this first issue, we'll tackle the early stages of class action litigation with a look at the important questions you'll need to consider in order to best position your organization right out of the gate.

William J. Anthony

Chair, Class Action & Complex Litigation Practice Group
Jackson Lewis P.C.
18 Corporate Woods Blvd, 3rd Floor, Albany, NY 12211
518.434.1300 E-mail: AnthonyW@jacksonlewis.com

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.

Jackson Lewis editorial team

Ashley B. Abel
Brett M. Anders
William J. Anthony,
Chair, Class Action & Complex Litigation Practice Group
Brian T. Benkstein
Chad D. Bernard
David S. Bradshaw
Jeffrey W. Brecher
Richard S. Cohen
Paul DeCamp
Stephanie L. Goutos
Douglas J. Klein
James M. McDonnell
Daniel L. Messeloff
L. Dale Owens
Paul Patten
Robert M. Pattison
T. Chase Samples,
Charles F. Seemann III
Ana C. Shields
Kenneth C. Weafer

Employment Law Daily editorial team

Joy P. Waltemath, J.D., *Managing Editor* Lisa Milam-Perez, J.D., *Senior Employment Law Analyst* Ronald Miller, J.D., *Employment Law Analyst*

Mail regarding your subscription should be sent to contactus@jacksonlewis.com or Jackson Lewis P.C. 666 Third Avenue, New York, NY 10017. Attn: Client Services. Please include the title of this publication.

Opting in or opting out?

As an initial matter, let's briefly outline the different means by which lawsuits may be brought on behalf of more than one claimant. Employees pursue classwide claims against employers under one of two procedural avenues: traditional class actions under Rule 23 of the Federal Rules of Civil Procedure or similar state rules; or Section 16(b) of the Fair Labor Standards Act (FLSA), which authorizes courts to certify "collective actions."

Rule 23 is the operative provision for bringing private discrimination class actions, including suits under Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act, the Employee Retirement Income Security Act (ERISA), the Fair Credit Reporting Act (FCRA), and most other class litigation in federal court. Additionally, employers are subject to Rule 23 class actions under state antidiscrimination laws brought in federal court. Most state court systems have a similar class action procedure.

Alternatively, Section 16(b) is used for classwide claims brought under the FLSA, the Equal Pay Act, and the Age Discrimination in Employment Act. While there are many similarities between class and collective actions, the Supreme Court has noted that a collective action is "fundamentally different" from class actions brought under Rule 23.

While there are many similarities between class and collective actions, the Supreme Court has noted that a collective action is "fundamentally different" from class actions brought under Rule 23.

If a class is certified under Rule 23, employees are presumed to be a part of the class, and any employee who doesn't want to participate in the lawsuit must opt out. The typical class action is thus generally referred to as an "opt-out" class—meaning that once the class is certified, all employees are included in the class and bound by the judgment unless they deliberately opt out of the suit.

However, under a collective action, the opposite is true; the lawsuit only includes employees who affirmatively file a consent form joining the action. Employees who do not file a written consent are not bound by the outcome of the collective action and may file a separate action. For this reason, a collective action is generally referred to as an "opt-in" class, as opposed to the standard opt-out class. And there are different standards used by the courts for certifying each.

Rule 23 certification

Under Rule 23, an employee seeking class certification in court must first prove that:

1. the class is so numerous that joinder of all members is impracticable (numerosity);
2. there are questions of law or fact common to the class (commonality);
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and
4. the representative parties will fairly and adequately protect the interests of the class (adequacy).

To be certified, a class also must satisfy one of the three criteria under Rule 23(b). Rule 23(b)(3) is used most often; this prong requires the putative class to prove that the issues common to all class members "predominate" over individual issues, and that a class action is a superior means of litigating the dispute (superiority).

Once a Rule 23 class is certified, potential class members are sent notice of the pending litigation and given an opportunity to opt out of the class.

Collective actions

Employees can bring a collective action under Section 16(b) on behalf of themselves and other employees who are similarly situated. Though the statute does not define "similarly situated," courts have treated it as a less stringent standard than under Rule 23—at least in the early stage of the certification process.

Generally, the named plaintiffs must assert "substantial allegations" that they, and the employees they hope to represent, are victims of a common (perhaps company-wide)

OPTING IN OR OPTING OUT? **continued on page 5**

WE'VE JUST BEEN SERVED **continued from page 1**

- How large is the class that the plaintiff seeks to represent? What factors differentiate the employee-plaintiff from the proposed class members?
- Who is plaintiff's counsel? Does the employee have a well-funded, heavy-hitting national class action firm on her side, or a local solo practitioner? How much does the attorney already know about the case and the company? Does this attorney usually settle quickly?

The arena

- In what jurisdiction has the suit been brought? How plaintiff-friendly is it? Do juries in that jurisdiction tend to favor employees?
- Who is the judge? How has this judge handled these types of cases before? How likely is he or she to certify a class?
- What local procedural rules weigh against you, or in your favor?
- If the matter is in state court, what is the prospect of having it removed to federal court?
- Will the case be heard by a mediator or arbitrator?

The claims

- What statutes are invoked? FLSA or other federal laws? State law? A hybrid?
- Is the organization facing a controlled threat, such as sexual harassment allegations against a rogue shift manager at a single facility? Or is the company contending with an all-out attack on its very business model, *e.g.*, a challenge to the independent contractor status of your entire fleet of drivers?
- How weak or strong are the merits of the substantive claims?
- What is the geographic scope of the class?
- Are the class/collective allegations sufficient to survive? Are they too vague or overly broad?
- Is the discovery process likely to lead to additional claims?
- Has anyone brought similar claims against your competitors? To what end?

The damages

- Can you file a motion to compel arbitration of the plaintiff's individual claims?

An analysis of potential damages is among the first tasks to undertake upon receiving notice of a class or collective action. Here's why: It allows you to quickly gauge your class-based exposure and perhaps get the case removed to federal court under the Class Action Fairness Act (CAFA), even if it is not otherwise removable. A solid damages estimate out of the gate allows you to influence mediators, judges, and opposing counsel as well. It can also help to deflate a damages report from the plaintiffs' expert and to find arguments to defeat class certification.

The answers to these questions will inform several key decisions that must be made at this important juncture to develop a strategy for defending the case—decisions that can affect the course of the litigation for years to come. We'll take a closer look at these and related questions as we delve deeper over the course of future issues of the *Class Action Trends Report*.

Defense strategies

How will your company defend this lawsuit? There are a number of strategies to consider for winning (or otherwise favorably resolving) a costly class or collective action. These will vary by claim and will depend in no small measure on the particular circumstances of the case. Will you file a motion to dismiss, challenging the claims as insufficient at the outset? Will you vigorously oppose class certification? Make an offer of judgment to try to terminate the class action? File a preemptive motion for summary judgment? Look to settle the case promptly?

The *Class Action Trends Report* will offer specific defense strategies at each stage of the case. We'll provide advice on how to defeat a finding that class members are "similarly situated." We'll explore ways of limiting the class by facility, state, or region; using a declaration "blitz" campaign to develop evidence to defeat class certification; and settling with named plaintiffs through offers of judgment or finding reasons to disqualify them. We'll explain ways to dissect the class and consider whether provoking such divisions into competing subclasses can create discord among plaintiffs' counsel.

Is it possible to get class-certification discovery bifurcated, so as to avoid full-fledged merits discovery until a discernible class is actually certified? What are the prospects of an early motion to dismiss or motion for summary

WE'VE JUST BEEN SERVED **continued on page 5**

WE'VE JUST BEEN SERVED continued from page 4

judgment? Is it more beneficial to bring that motion against the individual plaintiffs or the class as a whole?

We'll also look at the full range of merits defenses available to employers. In the wage-hour context, for example, we will offer guidance on the use of the "white-collar" exemptions to FLSA overtime coverage, the *de minimis* rule, good-faith defenses to a claim for liquidated damages, and the use of the fluctuating workweek method of calculating (and minimizing) damages.

The "to do" list

There is much to ponder during the first 30 days. But there are concrete actions that must be taken at the onset as well. These include basic procedural obligations as a litigant as well as forward-looking measures to protect your organization as the litigation unfolds:

- ✓ Put litigation holds in place for all relevant persons and custodians.
- ✓ Identify and preserve relevant documents, including documents stored in electronic format (ESI).
- ✓ Consider whether there are third parties that must be put on notice of the litigation to preserve discoverable data.
- ✓ Decide whether the challenged employment practices merit revision and, if so, determine the optimal time for doing so.
- ✓ Ensure that currently employed named plaintiffs and class members are not subjected to treatment that could be construed as retaliation for participating in the lawsuit.
- ✓ Assess the potential effect of the litigation on your business operations and bottom line.
- ✓ Evaluate how media attention to the case might impact your litigation approach going forward as well as business considerations. Ensure your organization has a PR strategy in place to minimize the fallout.
- ✓ Confer with your Jackson Lewis attorney to begin building your defense.

As you can see, there is much to talk about in the *Class Action Trends Report*. Jackson Lewis attorneys are eager to share our insights and expertise with you.■

OPTING IN OR OPTING OUT? continued from page 3

policy or practice that violates the law. Some courts demand slightly less, requiring only that the named plaintiffs make a "modest factual showing" through the use of pleadings, depositions, declarations, affidavits, and time records.

Why have courts interpreted the Section 16(b) burden to be less onerous? The rationale is that, in opt-in situations, members of the collective action class have affirmatively decided to join in the suit, so the due process concerns that arise with respect to absent class members in the Rule 23 context are not implicated.

A two-stage process

Certification of a collective action proceeds in two stages. The initial "notice" stage, during which a collective action is "conditionally" certified, merely determines whether the named plaintiffs and the putative class should be preliminarily certified solely for the purpose of sending notice to potential opt-in plaintiffs to advise them of the pending lawsuit and of their right to join. District courts have discretion in granting conditional certification, and the scrutiny with which a particular court evaluates a case before certifying it will vary. Certain jurisdictions, particularly New York courts, apply a very lenient standard, which results in most cases being conditionally certified. Indeed, some employers, given the low probability of defeating conditional certification, simply consent to conditional certification at stage one.

At the second stage, typically after discovery has been completed, the court will either affirm that the suit may proceed collectively—having concluded that the dispute can be resolved through common proof—or decertify the collective action. Courts consider a number of factors at the second stage, including:

- whether the putative class members were subject to the same allegedly unlawful common policy or practice;
- whether they possessed the same job titles and duties;
- whether they worked in the same office or plant;
- whether they worked in similar geographic locations; and
- whether each of their claims is subject to individualized defenses.

All of these factors relate to the overarching consideration—whether it is practical and fair to both sides

OPTING IN OR OPTING OUT? continued on page 6

Only in California?

Employment attorneys throughout the United States tend to keep a watchful eye on developments in California, both in the courts and the legislature. Why? Because the state imposes perhaps the most onerous legal requirements upon employers, and trends there often serve as a harbinger of things to come across the country. California often plays the role of "outlier," too—frustrating the efforts of multistate employers to forge a uniform compliance approach. For both reasons, it's critical to stay abreast of emerging court rulings and legislation from California.

For example, a unanimous U.S. Supreme Court ruled, in *Integrity Staffing Solutions v. Busk*, that employers are not required under the FLSA to compensate employees for the time they spend going through security checks after their shifts end, or for the time they spend waiting in line to undergo such screenings. In a class action brought by employees at an Amazon.com warehouse, the Justices looked to the Portal-to-Portal Act, which requires employees' activities to be compensated only when they are "integral and indispensable" to an employee's "principal activities." The High Court noted that the relevant inquiry wasn't whether the security screenings were mandated by the employer; rather, what mattered was whether the activities were "tied to the productive work that the employee is employed to perform."

However, California wage law doesn't look at an employee's "principal activities," or whether the challenged pre- or post-shift activities are "integral and indispensable" to those "principal activities," when considering compensability. Rather, what may matter is whether the employee is "subject to the employer's control" when carrying out those activities. In California, then, a standard applies that is different from the test set forth by the Supreme Court in *Busk*.

Another case in point is the state's steadfast refusal to condone the consensual arbitration of disputes. The California Supreme Court ruled last summer, in *Iskanian v. CLS Transp. L.A., LLC*, that employees cannot waive the right to bring claims under the state's Private Attorney General Act (PAGA), even if they have waived their right to bring class or collective suits on behalf of other employees by virtue of having entered into an arbitration agreement requiring individual arbitration of all employment-related claims. Despite the Federal Arbitration Act's clear policy favoring arbitration—and disfavoring state laws that undermine arbitration—the state high court said its rule against waiver of PAGA claims is not preempted by the federal law. Although federal courts have declined to apply *Iskanian*, the U.S. Supreme Court denied certiorari in January so it remains good law.

As we explore the various issues impacting class action litigation in forthcoming installments of the *Class Action Trends Report*, we'll highlight key areas in which California law raises unique compliance challenges—or, where state-law issues demand particular attention.

OPTING IN OR OPTING OUT? **continued from page 5**
to use a single trial to litigate the claims and defenses relating to numerous employees, claims, and theories.

When the statute tolls

Another important distinction between Rule 23 class actions and Section 16(b) collective actions is the tolling of the limitations period. In a Rule 23 case, the limitations period is tolled from the filing of the original complaint as to all persons who meet the proposed class definition. By contrast, in a Section 16(b) collective action, an individual employee's lawsuit "commences," for tolling purposes, only when he or she files a written consent to join the action. Those consent forms do not relate back to the filing of the original complaint.

Hybrid claims

Here's where things get tricky: There are also "hybrid" class actions to contend with, usually arising in the

OPTING IN OR OPTING OUT? **continued on page 9**

The Case Law

Any primer on class actions has to begin with the pronouncements of the U.S. Supreme Court. While our focus is on class actions in the employment context, cases impacting such litigation do not necessarily arise only in employment law cases. That being said, *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend* continue their prominence in decisions brought under Rule 23, having a wide-ranging impact on virtually all class actions pending in federal and state courts.

***Dukes v. Wal-Mart:* Common violations binding class.** In the Supreme Court's 2011 *Dukes* decision, the named plaintiffs sued Wal-Mart under Title VII alleging that women employed by the retail giant were paid less than men in comparable positions and received fewer promotions to management. The Court reiterated that class actions are the exception to the rule of individual litigation and that Rule 23 requirements effectively limit class claims to those fairly encompassed by the named plaintiff's claims.

Common answers. Within that framework, the Court found the plaintiffs failed to meet the commonality requirements of Rule 23(a)(2) because the plaintiffs failed to demonstrate that class members "suffered the same injury" under Title VII. What matters to class certification is not raising common *questions*, but rather the capacity of a classwide proceeding to generate common *answers* apt to drive resolution of the litigation, stressed the Court, in language on which numerous lower courts have focused. Dissimilarities within the proposed class may "impede the generation of common answers."

These seminal class action decisions can be used by employers to great advantage in defeating class certification at the early stages of litigation.

Comcast v. Behrend. Relying in large part on its 2011 decision in *Dukes*, the Supreme Court held in the 2013 decision in *Comcast Corp. v. Behrend* that a class action in an antitrust case had been improperly certified under Rule 23(b)(3).

Because the damages methodology used in *Comcast* identified damages that were not the result of the specific antitrust violation for which the class had been certified, the High Court reversed the order upholding the class certification. However, the Court in *Comcast* did recognize that where a theory of liability is capable of classwide proof, calculations of damages need not be exact.

Comcast "changed the way we look at Rule 23(b)(3) and the issue of classwide damages," Will Anthony notes. In the absence of a method of establishing classwide damages, individual damages calculations would inevitably overwhelm the questions common to the class, and thus there can be no class. This analysis, together with the analysis of Rule 23's commonality requirement in *Dukes,* makes it much more difficult for plaintiffs to demonstrate that their Rule 23 class should be certified.

Why is this important? These seminal class action decisions can be used by employers to great advantage in defeating class certification at the early stages of litigation—and not just for discrimination suits. According to one estimate, FLSA filings have increased some 400 percent nationwide since 2001 and now comprise nearly nine percent of all new civil cases in some federal district courts. Moreover, survey data estimated that corporate counsel spent $2.1 billion on class action lawsuits in 2012, nearly 25 percent of which was related to labor and employment issues. So cases interpreting these rulings are useful as well in fending off wage-hour collective actions and other class claims.

Wage-hour class and collective actions are the most frequently litigated type of class actions in federal courts over the last five years, so it's expected that many of the issues raised in *Comcast* will be decided in these cases. The changing landscape means that employers must stay abreast of emerging trends and develop strategies that meet new litigation challenges.

For recent decisions involving collective and class action employment litigation see "Other Class Action Developments" on page 11.■

Regulatory Roundup

In surveying the landscape of class action employment litigation, the *Class Action Trends Report* will keep a watchful eye on what's happening at the EEOC, the DOL and other federal and state administrative agencies. Agency litigation initiatives, rulemaking, and a concerted focus on "enforcement" over compliance assistance during the Obama administration all increase the likelihood that an employer could become ensnared in litigation brought on behalf of more than one employee.

The EEOC is litigating Title VII and ADA matters creatively so as to not be solely reliant on charges of discrimination received from the public.

EEOC's "systemic enforcement." The EEOC has expressly indicated that it will focus its resources on challenging and eliminating patterns or policies of discrimination. To that end, the agency has made investigating and litigating systemic cases a high priority, and it is aggressively litigating these cases. At the end of fiscal year 2014, for example, systemic cases represented 25 percent of the EEOC's active litigation docket—the largest proportion of systemic suits since tracking began in fiscal year 2006. With significant court rulings such as *Wal-Mart Stores, Inc. v. Dukes* limiting the scope of Rule 23 private class actions, the EEOC likely will strive to maintain an even higher "pattern-or-practice" profile, as the EEOC is not required to comply with Rule 23.

In terms of substantive focus, late last year, the EEOC announced plans to issue proposed regulations regarding wellness programs that would "promot[e] consistency between the ADA and HIPAA, as amended by the ACA," and "clarify[] that employers who offer wellness programs are free to adopt a certain type of inducement without violating GINA." The EEOC also is expected to continue to pursue pregnancy discrimination claims as the agency issued a follow-up to revised guidance last year on pregnancy discrimination and related issues. The position taken by the EEOC in its guidance—that pregnant employees must be treated the same as all other employees, including disabled employees—has the potential for supporting class-based enforcement actions.

In addition to pursuing systemic claims generally, we can expect the EEOC to continue to focus on neutral rules that create a disparate impact on females or racial groups. Litigating under a disparate impact theory, the EEOC can dispense of the need to prove intent to discriminate. Thus, in addition to criminal background checks, the EEOC will be examining application tests or assessments, bright-line hiring criteria, and objective compensation decisions to determine if those practices have a disparate impact.

Moreover, the EEOC is litigating Title VII and ADA matters creatively so as to not be solely reliant on charges of discrimination received from the public and/or obtaining relief without exhausting the administrative process. These efforts, if successful, will free up investigators and allow EEOC attorneys to go directly to court and investigate through discovery. For the first time in its history, late last year, the EEOC was successful in obtaining monetary relief via contempt proceedings based on an alleged violation of a consent decree's injunctive language. Such contempt proceedings give the EEOC and employees the advantage of obtaining relief that would otherwise require the employees to file a charge and wait for the EEOC's administrative process to run its course.

Additionally, the EEOC has begun invoking pattern-or-practice provisions of Title VII (Section 707(a), which also apply to the ADA and Genetic Information Nondiscrimination Act (GINA)). No court has yet to endorse freestanding 707(a) actions brought by the EEOC; however, if fully accepted by courts, these actions might allow the EEOC to file lawsuits that are not tethered to employee or employer status, do not allege discrimination or retaliation, and do not require a charge, investigation, or conciliation.

In that regard, the EEOC is currently challenging the use of a typical severance agreement in a lawsuit against CVS

REGULATORY ROUNDUP **continued on page 9**

REGULATORY ROUNDUP **continued from page 8**

Pharmacy. That lawsuit was dismissed by the district court on the grounds that the EEOC failed to engage in conciliation efforts, but the EEOC has appealed to the Seventh Circuit.

Of particular note (and appropriate to our focus, in this issue, on the early stages of class litigation, when employers look to reduce the scope of lawsuits and consider potential affirmative defenses to such claims): The Supreme Court recently heard oral argument in a case in which it will consider the extent to which courts may scrutinize the EEOC's conciliation efforts. The agency has a mandatory duty to attempt to conciliate Title VII discrimination claims before filing lawsuits, and in most appellate jurisdictions its failure to do so constitutes an affirmative defense to a pattern-or-practice claim (or any other EEOC lawsuit). The eventual ruling by the High Court in the case, *Mach Mining v. EEOC*, may well give clarity to the level of judicial scrutiny of the EEOC's pre-litigation processes.

Other federal agencies. Meanwhile, President Obama has instructed the DOL to revisit the FLSA's overtime regulations, primarily with an eye to reducing the number of employees who are deemed exempt from the statute's provisions—opening the door for even greater confusion (and consequently, class litigation) over which employees are exempt. The expected regulatory changes are imminent.

Rulemaking aside, the DOL continues to pursue an aggressive enforcement strategy as well, particularly in the area of independent contractor misclassification—a legal issue ripe for class treatment. Under the direction of Wage-Hour Administrator David Weil, the agency has set its sights on so-called "fissured industries," where the primary employer that receives the benefit from workers' labor has contracted out that work so that it is performed under the auspices of another entity, thus shedding liability for wage violations (or other potential infractions). And the NLRB adamantly continues to cling to its position that mandatory waivers of classwide arbitration violate the NLRA—despite a federal appellate court ruling to the contrary. ■

OPTING IN OR OPTING OUT? **continued from page 6**

wage-hour context. These suits allege both federal violations (a collective action) and state-law claims (a class action) in the same lawsuit. Hybrid actions are steadily increasing—and further complicating this already complex form of litigation.

Defending against two types of class certification standards in the same lawsuit, with both opt-in and opt-out classes, makes it measurably more difficult to defend the case.

Defending against two types of class certification standards in the same lawsuit, with both opt-in and opt-out classes, makes it measurably more difficult to defend the case. Adding to the challenge: State wage-hour laws often provide additional or different employee protections than those afforded under federal law, such as more generous limitations periods, and may have more lenient procedural or evidentiary standards.

While employers have urged federal courts that these two vehicles are inherently incompatible, their pleas have often fallen on deaf ears. Employers have also sought to convince the courts that they should not assert supplemental jurisdiction over these state actions, which, they argue, predominate over the federal cause of action. This line of defense has had some success, but the discretionary nature of supplemental jurisdiction makes this tactic far from foolproof. And if the employer persuades the court not to sever the state law claims from the federal lawsuit, it faces the risk that the plaintiffs' lawyers may simply file a parallel state court lawsuit, forcing the employer to defend not one, but two lawsuits.

Still, there are hurdles for employees when a federal court, having taken up the hybrid claims, considers whether to actually certify both the class and collective actions. It may be harder in these cases for plaintiffs to satisfy Rule 23's requirement of showing that a class action is the superior method for adjudicating their

OPTING IN OR OPTING OUT? **continued on page 10**

Prevention Pointer

By Daniel L. Messeloff

To centralize or *not* to centralize? One fundamental class action avoidance and prevention strategy is to carefully balance the extent to which your company centralizes—or decentralizes—business operations and processes.

For important business (and legal) reasons, employers place policymaking authority and key decision-making functions under the narrow control of Human Resources. Uniform employment practices and procedures are critical. However, the more that an employer's decisions regarding hiring, compensation, promotions, and termination are concentrated in the hands of relatively few decision-makers within an organization, the greater the likelihood that claims arising from those decisions will be litigated on a classwide basis. Conversely, the more these decisions are diffused across the organization, the harder it will be for a plaintiff to establish that his or her claims are common to other potential class members working under different supervisors, or facing adverse employment decisions made by different decision-makers.

In fact, in its landmark *Wal-Mart Stores, Inc. v. Dukes* decision reversing certification of the largest class action employment discrimination case ever, the Supreme Court noted that the record evidence convincingly established that Wal-Mart gave local supervisors considerable discretion over employment matters. As such, the plaintiffs were unable to establish that there was a company-wide policy of discrimination—making class treatment of their claims inappropriate.

Here are a few practical tips for striking the proper balance between centralized and decentralized decision-making in order to minimize your organization's vulnerability to class action claims:

- While some decisions can be decentralized, certain functions such as calculation of overtime compensation should be performed by a central source, such as your payroll department. Because calculations of overtime are determined by federal regulations and/or state law, a centralized payroll system should be utilized to ensure consistent and accurate calculations made in compliance with federal and state laws.
- Similarly, your human resources department should be the central authority for issuing and revising your company's policies. You do not want your equal employment policy, your overtime policy, or many other essential policies to be determined on a region-by-region basis.
- Make sure that whoever the decision-makers may be, they are trained in how to make the correct decisions. For example, you can and should ensure that supervisors who are responsible for hiring employees and overseeing their hours worked are trained in non-discrimination issues and in prohibiting off-the-clock work.
- Lastly, audit employees' time records, exemption status, and other relevant practices on a regular basis. Even if you let other employees make decisions, you can still review the decisions they are making. An internal audit allows you to make sure that employees are making the right decisions—and it enables you to identify and correct any wrong decisions—before you are hit with a lawsuit.

OPTING IN OR OPTING OUT? continued from page 9

claims. Moreover, crafting notice to potential class members in these situations is problematic: Employees have to be advised that they must "opt in" to the FLSA collective action if they wish to join and, at the same time, advised that if they wish not to participate in the state law class action, they must affirmatively "opt out." Courts are understandably concerned about the potential for confusion.

Employers that seek to settle hybrid class/collective actions also must recognize the risk of a dispute over which persons are bound by the settlement, and plan their settlement strategy accordingly. ■

Other Class Action Developments

Each Jackson Lewis *Class Action Trends Report* will apprise you of important developments in class litigation in the months since our last issue.

In the news

In a class action brought in California against major technology companies for allegedly engaging in a conspiracy to fix and suppress employee compensation, Apple, Google, Adobe Systems, and Intel Corp. agreed to pay a beefed-up $415 million to settle former employees' claims arising from the firms' hi-tech no-poach agreements. A federal district court has granted preliminary approval of the deal, which is $90.5 million more than a proposed settlement that the court rejected last year (*In re High-Tech Employee Antitrust Litigation*, N.D. Cal, March 3, 2015). The employees had already reached a $20 million settlement with defendants Pixar, Lucasfilm, and Intuit, which the court approved in May 2014.

At least six putative class action suits have been brought thus far against Sony Pictures in California by employees whose personal information was compromised as a result of the hacking incident that arose over "The Interview," a comedy about a plot to assassinate North Korean leader Kim Jong-un. The suit over the data breach alleges the movie studio failed in its duty to protect confidential employee information and asserts claims under a number of California statutes and common law.

The reach of *Comcast*

In a highly anticipated decision, the Second Circuit Court of Appeals determined that the Supreme Court's decision in *Comcast Corp. v. Behrend* did not require that damages be measurable on a classwide basis for certification under Rule 23(b)(3). The court of appeals vacated and remanded a district court's order denying class certification, on that sole basis, of wage claims brought by Applebee's employees. Although the appeals court acknowledged that *Comcast* reiterated that damages questions should be considered at the certification stage when weighing predominance issues, it concluded that the Supreme Court did not completely foreclose the possibility of class certification in cases involving individualized damages calculations (*Roach v. T.L. Cannon Corp.*, February 10, 2015).

Wage-hour suits

The Supreme Court issued a resounding decision in *Integrity Staffing Solutions v. Busk* (U.S.S.Ct, December 9, 2014), unanimously holding that time spent by employees waiting in line to undergo security screenings was not compensable under the Portal-to-Portal Act. Closing the book on a class action FLSA suit filed by Amazon.com warehouse workers, the High Court thwarted what might otherwise have been a flood of class-action security screening suits that had already begun to emerge.

Interns. Another wave of class actions—suits brought by unpaid interns claiming they were improperly characterized as "trainees" but were in fact employees entitled to the minimum wage—has crested in the form of significant payouts in several cases. In December, a federal district court judge in New York signed off on a $6.4 million settlement in a class action against NBCUniversal Media and certified, for settlement purposes, a Rule 23 class comprised of more than 7,700 members (*Eliastam v. NBCUniversal Media LLC*, S.D.N.Y., December 15, 2014). Soon thereafter, a $5.85 million settlement resolved the claims of Conde Nast interns, a 7,500-member class (*Ballinger v. Advance Magazine Publishers, Inc, dba Conde Nast Publications*, S.D.N.Y., December 29, 2014). In a class action against Gawker Media, the court rejected the plaintiffs' motion to disseminate a proposed opt-in notice via social media (Facebook, Twitter, and LinkedIn) and publication on Tumblr and on Reddit pages such as "r/OccupyWallStreet." The plaintiffs were looking to punish the defendant by advertising alleged wage violations rather than notifying eligible opt-in plaintiffs, the court concluded (*Mark v. Gawker Media LLC,* S.D.N.Y., March 5, 2015). Most recently, Viacom Inc. agreed to pay $7.2 million to settle an intern class action alleging federal and state wage violations (*Ojeda v Viacom Inc.,* S.D.N.Y., motion for preliminary approval filed March 11, 2015). The essential question—whether interns qualify as employees under the FLSA and thus are entitled to compensation—remains pending before the Second Circuit.

Exotic dancers. A federal district court in New York awarded nearly $10.9 million in damages to a class of 2,300 exotic dancers in an ongoing wage dispute alleging they were erroneously classified as independent contractors and denied minimum wage under the

OTHER CLASS ACTION DEVELOPMENTS **continued on page 12**

OTHER CLASS ACTION DEVELOPMENTS continued from page 11

FLSA and New York Labor Law (*Hart v. Rick's Cabaret International, Inc.*, S.D.N.Y., November 14, 2014). And, the Nevada Supreme Court in late October held that 6,600 exotic dancers were employees under state law, not independent contractors (*Terry v. Sapphire/Sapphire Gentlemen's Club*, Nev. Sup. Ct., October 30, 2014).

Another *Wal-Mart*? Dwarfing these classes was a state-wide class action against Wal-Mart in Pennsylvania. In *Braun v. Wal-Mart Stores, Inc*. (Pa. Sup. Ct., December 15, 2014), the state high court affirmed a $187.6 million judgment in favor of a 188,000-member class in a suit alleging off-the-clock and meal and rest period violations. The court rejected Wal-Mart's contention that it had been subjected to the kind of "trial by formula" disfavored by the U.S. Supreme Court in *Dukes*. Wal-Mart has asked the U.S. Supreme Court to review the state high court's ruling on due process grounds.

Dollar General was not the only large company to relent to large payouts when faced with FCRA class actions.

Only in California ...

A number of high-impact rulings, and class actions against major national employers, emerged from California last year. Among them:

In a proposed settlement filed with the court in October 2014, JP Morgan Chase Bank agreed to pay $12 million to end class allegations that it required nonexempt retail banking branch employees to perform off-the-clock work, among other alleged violations of federal and state wage-hour laws (*Hightower v. JP Morgan Chase Bank, NA*, C.D. Cal.). The litigation, which consolidated 13 related wage-hour actions against Chase throughout the country, involved more than 145,000 class members; the plaintiffs reviewed and analyzed 3,373,154 payroll records, 7,011,885 time-clock records, and 204,889,096 transactions records, for an astounding total of 215,274,135 records.

A federal district court in California certified a class of 64,593 former J.C. Penney employees who alleged the company's vacation policy required employees to forfeit accrued vacation benefits, in violation of California labor law. The court did, however, find that the named plaintiffs lacked standing to seek injunctive relief (*Tschudy v. J.C. Penney Corp., Inc*., S.D. Cal., December 17, 2014).

Fair Credit Reporting Act

A federal court in Virginia certified a FCRA class of 1,700 job applicants who alleged that, in rejecting them for jobs, an employer procured consumer reports without first receiving written consent or making the proper disclosures, and failed to timely provide them with both copies of the reports and a statement of their rights under the Act (*Milbourne v. JRK Residential America LLC*, E.D. Va., October 31, 2014). The court had previously declined to hold that the company's Rule 68 offer of judgment satisfied the named plaintiff's claim because it could not determine if the amount of punitive damages offered (which was ten times the cap for statutory damages) unequivocally offered all the relief sought.

A federal district court in Virginia granted preliminary approval to a $4.08 million settlement resolving class FCRA claims against discount retailer Dollar General. The plaintiffs alleged the national chain unlawfully denied them employment when it conducted background checks and made adverse employment decisions about them without properly complying with the statutory notice requirements (*Marcum v. Dolgencorp, Inc. dba Dollar General*, E.D. Va., October 16, 2014).

Dollar General was not the only large company to relent to large payouts when faced with FCRA class actions. A week earlier, another judge within the same federal district had granted final approval of a settlement in which Swift Transportation Co. agreed to pay $4.4 million to resolve a class complaint alleging that it violated the FCRA by failing to obtain authorization from online job applicants for criminal background checks, then relying on the results to take adverse actions without notifying them of their rights. (*Ellis v Swift Transportation Co of Arizona, LLC*, E.D. Va., October 7, 2014).

More recently, DelHaize America, the parent company of Food Lion and other grocery retailers, agreed to pay nearly $3 million to resolve a FCRA class action involving a class of nearly 60,000 individuals who had applied for work but were denied positions at one of five supermarket

OTHER CLASS ACTION DEVELOPMENTS continued on page 13

OTHER CLASS ACTION DEVELOPMENTS **continued from page 12**

chains (*Brown v. DelHaize America, LLC,* M.D.N.C., motion for preliminary approval filed March 2, 2015).

Discrimination claims

EEOC bungling. Concluding that the EEOC's proffered expert had committed a "mind-boggling" number of errors in a pattern-or-practice suit alleging that an employer's criminal background checks had an unlawful disparate impact on black and male job applicants, the Fourth Circuit affirmed a district court decision excluding the expert's testimony and granting summary judgment in the employer's favor (*EEOC v. Freeman,* February 20, 2015). The defendant, a family-owned company, employed over 28,500 employees. Because of problems with theft, drug use, and workplace violence, the company in 2001 began conducting checks of job applicants' credit and criminal histories. The EEOC began to investigate the employer's credit check policy in 2008 after an applicant who was denied a position filed a charge. It subsequently expanded the investigation to the employer's criminal background check policy, ultimately concluding that the employer's use of credit and criminal background checks violated Title VII. The agency filed suit on behalf of a class of job applicants after conciliation failed. The appeals court affirmed summary judgment to the employer solely on the basis that the district court did not abuse its discretion in excluding the agency's expert reports as unreliable under Rule 702.

In a long-running sex discrimination suit against Goldman Sachs, a federal magistrate judge has recommended that the district court deny class certification.

In a long-running sex discrimination suit against Goldman Sachs, a federal magistrate judge has recommended that the district court deny class certification to a class of female associates and VPs who contended they were denied promotions and equal pay based on gender. Citing the "law of the case," the magistrate deferred to a previous district court determination that Dukes foreclosed class resolution of their claims—even though he would have certified a 23(b)(2) class had he been working with a "clean slate" (*Chen-Oster v. Goldman, Sachs & Co,* S.D.N.Y., March 10, 2015).

Unions. In a decision of note for employers in a unionized setting, a federal district court held that a union may pursue Title VII pattern-or-practice discrimination claims on behalf of African-American union members without satisfying Rule 23 class certification requirements (*Bhd. of Maintenance of Way Employees v. Ind. Harbor Belt Railroad Co.*, N.D. Ind., October 7, 2014).

Settlements. A federal district court in Tennessee has granted preliminary approval to a $30 million settlement in a collective action against Publix Super Markets alleging that the grocery chain improperly calculated overtime pay for its managers and assistant managers using the fluctuating workweek method (*Ott v. Publix Super Markets, Inc.,* M.D. Tenn., February 4, 2015).

ERISA litigation

In a unanimous decision, the Supreme Court vacated a ruling that expired bargaining agreement provisions had created a vested right to lifetime, contribution-free health insurance benefits for retirees, their surviving spouses, and their dependents. The High Court overturned the Sixth Circuit's decades-old "*Yard-man* presumption" that, absent evidence to the contrary, parties to a bargaining agreement intended to vest retirees with lifetime benefits. Such a presumption was "inconsistent with ordinary principles of contract law," the Court found (*M & G Polymers USA, LLC v. Tackett*, U.S.S.Ct., January 26, 2015).

Class Action Fairness Act

An employer facing a putative class action over its alleged failure to pay for off-the-clock work could not support federal jurisdiction under the CAFA merely by asserting, based on allegations in the plaintiffs' complaint of a "pattern or practice" of labor law violations, that more than $5 million was at stake (*Ibarra v. Manheim Investments, Inc.*, 9th Cir., January 8, 2015). The employer was relying on assumptions, without showing the assumptions were grounded in real evidence, in order to satisfy the CAFA amount in controversy, the Ninth Circuit found. The employer would have to show its chain of reasoning had some evidentiary backup, and it failed to do so here, so the appeals court remanded for both sides to submit proof as to the amount in controversy. In contrast, in another decision issued that same day, the appeals court held another employer did establish that it relied on a reasonable chain of logic, and presented sufficient evidence to establish the $5 million CAFA minimum (*LaCross v. Knight Transportation Inc.*, 9th Cir., January 8, 2015).■

On the Radar

- In January, the Second Circuit heard oral argument in a pair of cases in which it will consider whether a class of unpaid interns should have been certified in a wage suit alleging that they were statutory employees, rather than "trainees," under the FLSA and New York Labor Law. In *Wang v. Hearst Corp.* and *Glatt v. Fox Searchlight*, the court of appeals also will decide the appropriate test to be used in determining whether interns are "employees" under federal and state law.
- Also pending in the Second Circuit is *Cohen v. UBS Financial Services Inc.*, in which the appeals court will decide whether Financial Industry Regulatory Authority (FINRA) Rule 13204(a) bars the mandatory waiver by financial advisers of class action suits. The lower court had ordered the employees to individually arbitrate their FLSA claims, but the employees (a class of several thousand advisers who alleged they were denied overtime pay) contend the class waiver imposed by their employer is unenforceable.
- A group of former employees has filed a Title VII discrimination suit against a McDonald's franchisee that operates fast-food restaurants in Massachusetts and Virginia, along with McDonald's Corporation itself as a putative "joint employer." The plaintiffs allege "rampant racial and sexual harassment" at the restaurants, and also contend there was a plan in place to reduce the number of African-American employees and replace them with white employees. The named plaintiffs in this putative class action are nine African-American and one Hispanic former employee. In naming the McDonald's corporate entity as a defendant along with the franchisee employer, the plaintiffs contend that corporate "has control over nearly every aspect of its franchised restaurants' operations." The lawsuit, launched in January, marks the latest attack in the ongoing offensive against the franchise business model by the plaintiffs' bar (and, in this case, by organized labor front groups that continue to target the fast-food industry, which have a hand in the current litigation). ■

A group of former employees has filed a Title VII discrimination suit against a McDonald's franchisee, along with McDonald's Corporation itself as a putative "joint employer."

Up Next...

How do the pleading standards set forth by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009) affect how you will respond to a class action lawsuit? How have the circuit courts applied these High Court rulings when evaluating the sufficiency of a complaint? What factors should you consider in deciding whether to attack the pleadings on *Iqbal/Twombly* grounds? These questions and related issues will be the subject of the next *Class Action Trends Report*.

SAVE THE DATES!

Jackson Lewis is pleased to announce the 2015 Class Action Summits that are scheduled from coast to coast. More details will follow but save the date for the location near you!

Thursday, June 11 Ritz-Carlton **San Francisco, CA**	**Friday, June 19** Grand Hyatt **New York, NY**	**Tuesday, October 27** Seminole Hard Rock Hotel & Casino **Hollywood, FL**