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CLASS ACTION TRENDS REPORT

Defending class discrimination claims

ABC Discount Superstores prides itself on undercutting any competitor's prices—and on its diversity in hiring and promotions. Consequently, ABC's executive vice president for human resources was chagrined to receive a phone call from the HR chief overseeing the Midwest district office. "We've got a bit of a situation," the HR chief said. "One of the regional managers in Ohio—he's fairly new; we just hired him away from Mega Savers—has been 'gerrymandering' his management people by race. I don't know how else to put it. He assigns African-American managers into stores in 'black neighborhoods,' as he calls them, and his white managers in predominantly white areas. He said it provides for a more 'enhanced shopping experience,' and 'makes customers feel more at home.' Anyhow, I talked to him and made it clear that's not how we do business at ABC. He understands now. I think only a few managers were affected."

One of the "affected" managers, however, has already procured a right-to-sue letter from the EEOC. (A top performer in the region, the African-American manager nonetheless has repeatedly been told he's "not a good fit" whenever a position opens up at a higher-revenue store.) In the end, the Ohio regional manager resulted in ABC Discount Superstores defending against a companywide class action suit—brought on behalf of 10,000 African-American store managers and assistant store managers nationwide—alleging discrimination in hiring and promotions on the basis of race.

Allegations that a rogue manager in your company engaged in discriminatory conduct can be daunting enough. Allegations that your company has engaged in a systemic, companywide pattern of discrimination can have far more dire consequences. In our last issue of the *Class Action Trends Report*, we looked at the challenges of defending "pattern-or-practice" litigation pursued by the Equal Employment Opportunity Commission (EEOC). Here, we consider a different scenario: the ABC Discount Superstore manager has filed a putative Rule 23 class action, assisted by a private plaintiff's lawyer. Federal Rule of Civil Procedure 23 governs the procedure and conduct of class actions brought in federal court.

Big business. Discrimination class actions are big business. Experienced plaintiffs' counsel have turned to class claims alleging systemic gender, race, or

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A WORD FROM WILL AND STEPHANIE

Alexander Hamilton once said that “even to observe neutrality you must have a strong government.” Truer words could not be said when it comes to the application and enforcement of corporate policies and procedures. Indeed, failure to maintain a strong corporate “government” can lead to costly litigation in the form of class action lawsuits alleging disparate impact or disparate treatment on the basis of a protected trait. In this issue, we explore the recent trends in class action discrimination cases, potential strategies for defending against the claims, and, of course, preventive measures to avoid any such claims.

The subtlety of the facts underlying a disparate impact claim may catch an otherwise responsible employer off-guard. Compartmentalized corporate functions often create barriers from one department to the next. An isolated personnel or salary decision in one department is just that—an isolated decision where one employee advances while another does not. However, did we take a comprehensive look at the personnel decisions? Are those decisions based upon fair expectations or criteria? Does one particular group or those possessing a particular trait seem to succeed or fail at a higher rate than others outside that group or not possessing that trait? Put simply, is your company performing the necessary “pre-op” and “post-op” review of personnel decisions to shield itself from potential liability in a class action discrimination lawsuit?

Furthermore, how does your company deal with a so-called “rogue” manager? Again, the fallacy of considering any action an isolated incident leads to a false sense of security. A male manager who sexually harassed or requested sexual favors from a female employee may supervise other female employees. A review of prior resignations, transfers and employment decisions—while time-consuming and tedious—may go a long way in preventing a class action disparate treatment claim. Moreover, a review of

the promotion and salary decisions of the manager’s subordinates may reveal further potential exposures.

The point is simple: nobody, neither a judge nor a juror, will look at your organization as a static entity where decisions are made independently without the express approval of “the company.” Every hire, termination, promotion, demotion and disciplinary action may impact the next one in the courtroom. Your company, whether through human resources, finance (for salary decisions) or compliance, should think proactively in this realm to avoid potential liability.

Do not—and we repeat *do not*—underestimate the power of numbers. As you will read, regular “pre-op” and “post-op” reviews of personnel decisions will go a long way. Statistics have infiltrated the courtrooms, convinced jurors, and resulted in multi-million dollar plaintiff’s verdicts. The lesson learned: track and review your personnel decisions as vigilantly as you know a plaintiff’s attorney will do in a class action case.

In addition to some of the mechanics of discrimination class actions, we think this report will open your eyes to some of the lesser-known issues in disparate treatment and disparate impact claims. At the end, you should come out with a broader understanding of the legal landscape as well as some potential strategies to avoid these claims. We hope you get as much out of this issue as we put into it.

Thanks again.

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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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 other forms of discrimination as a mechanism for bringing large-scale, large-dollar lawsuits against all sectors of the business community, from the financial services industry, to the consumer goods sector, to heavy industry and professional services. Recent headlines tell the story: a claim alleging a companywide failure to promote thousands of women proportionately to men, based on

How do systemic claims arise in the private plaintiff context? If it's a great class action case, wouldn't the EEOC have taken the case on the complainant's behalf? Not necessarily.

intentional or unintentional gender discrimination; a claim seeking \$100 million dollars as damages for alleged gender-based discrimination in compensation practices; a settlement of over \$100 million to resolve a systemic discrimination class action alleging race discrimination in employee assignments.

With an active plaintiffs' bar, and with numerous courts acknowledging ways for plaintiffs to sidestep the obstacles that the U.S. Supreme Court appeared to construct, Rule 23 class actions will continue to be filed and pursued aggressively. Indeed, the well-publicized \$160 million settlement reached in 2013 in a race discrimination suit against Merrill Lynch—after the Seventh Circuit affirmed class certification of just the disparate impact claim seeking injunctive relief—is reason enough for the plaintiffs' bar to continue to engage actively in class action practice.

Types of class claims. "Current case law supports class treatment more readily for certain kinds of claims than for others," notes Victoria Woodin Chavey, a Principal in the Hartford, Connecticut office of Jackson Lewis. "For example, retaliation and harassment claims are likely to be individualized in nature, while courts may be more receptive to class claims that rely on alleged intentional race- or gender-based discrimination in promotion or pay practices that are claimed to be systemic in nature." Class-based claims frequently include challenges to broad pay, promotions, hiring, and termination practices or policies. Such claims include disparate impact allegations that a particular employer policy or practice,

while neutral and not overtly biased, has the *effect*, if not the intent, of discriminating against a specific protected class of individuals.

The degree of difficulty in defending disparate impact claims can depend on the specific statute invoked. "Employers facing a demonstrated disparate impact under the Age Discrimination in Employment Act

(ADEA) face less challenging defense proofs compared to that under Title VII and the Americans with Disabilities Act (ADA)," notes Paul Patten, a Principal in Jackson Lewis' Chicago office. "Under Title VII

and the ADA, an employer is required to show that a neutral rule with a disparate impact is job-related and consistent with business necessity. Under the ADEA, an employer is only required to show that a neutral rule is reasonable."

"In addition," Patten said, "some courts have held that the disparate impact theory is not available to plaintiffs challenging hiring decisions under the ADEA. Likewise, the Supreme Court has suggested (but not definitely ruled) that the disparate impact theory is not available under the Equal Pay Act (EPA). Lower courts are split as to whether the EPA provides for a disparate impact challenge; to the extent that courts have found disparate impact applies to EPA claims, the employer's burden is to demonstrate reasonableness."

Also, instead of Rule 23 principles, the ADEA and EPA use the collective action framework set forth in the Fair Labor Standards Act including its conditional certification provisions. As a result, it can be easier for plaintiffs to aggregate these claims early, for purposes of securing court-authorized notice to putative class members.

Why not the EEOC? How do systemic claims arise in the private plaintiff context? If it's a great class action case, wouldn't the EEOC have taken the case on the complainant's behalf? Not necessarily. The EEOC may bow out of a potentially significant class litigation for several reasons. The agency has limited resources and a considerable caseload already. Thus, if the lawsuit

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isn't likely to make big headlines or generate significant damages, the EEOC will defer if it believes the case can be adequately resolved by plaintiffs' counsel. The EEOC also may decline a strong class case if the allegations don't fall within the agency's targeted enforcement goals.

Whatever the reason, once classwide allegations are in the hands of a private attorney rather than the EEOC, the Rule 23 factors come into play.

Alternatively, the EEOC's acquiescence might be the complainant's own doing. If a complainant (or his or her lawyer) wishes to fully control the claim, rather than involve the agency, plaintiff's counsel may withdraw the case before the EEOC can fully consider the matter for systemic litigation. Moreover, the plaintiff may opt to sue under state discrimination laws, which the federal agency may not pursue. State statutes, moreover, often provide more generous statutes of limitations and thus exponentially larger damages awards than under the federal law alone. Finally, a private attorney is less burdened by the kinds of procedural requirements that can hamper administrative agencies, meaning the litigation *might* proceed more quickly (although many variables affect the speed with which a case wends its way toward resolution).

When it's not the EEOC. Whatever the reason, once classwide allegations are in the hands of a private attorney rather than the EEOC, the Rule 23 factors come into play. Refuting Rule 23's "commonality" requirement will typically be the key focus of the defense as the employer seeks to avoid class certification.

The U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes* held female Walmart employees could not pursue sex discrimination claims as a 1.5 million-member class because they did not meet the commonality requirements for certification under Rule 23(a)(2). (See "*The case law*" on page 11 for a detailed discussion of this landmark decision.) "The defense bar has been quite successful in arguing the *Wal-Mart* points," notes Patten. He contrasts the thorny *Wal-Mart* rubric under which private plaintiffs must operate in establishing commonality with the greater

latitude afforded the EEOC under Sections 706 and 707 of Title VII. He noted that the EEOC has recently been allowed to proceed with several nationwide lawsuits challenging hiring, pay and accommodation decisions at employers' individual facilities. However, had these cases been brought by private plaintiffs, Patten said,

"there was a good chance they would have lost on commonality."

Commonality. To establish commonality, plaintiffs

generally must show there are questions of law or fact common to the class. They must begin by identifying a specific employer practice or policy that allegedly has affected the entire putative class, and show that the alleged discriminatory practice was the employer's standard operating procedure.

However, the Supreme Court in *Dukes* altered the analysis in a key way: directing courts to focus not solely on the common questions, but on whether there are common *answers* to those questions that are apt to drive the resolution of the litigation. As the Supreme Court instructed, a determination of the "truth or falsity" of the alleged practices must "resolve an issue that is central to the validity of each one of the claims in one stroke."

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Our Jackson Lewis expertise

When it comes to employment law litigation, data can be a driving force for both offensive and defensive litigation strategy. At Jackson Lewis, we have a unique in-house group of non-lawyers, data professionals dedicated to analyzing, understanding and exploring the powers of data in class and collective actions. Our in-house data team is comprised of Ph.D. and Masters-level statisticians, econometricians, data management and computer programming analysts, whose main function is to support attorneys and litigation matters.

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Statistical evidence. Compared to the single-plaintiff discrimination case, pretrial discovery in a class action will focus heavily on statistical evidence. In *Tyson Foods, Inc. v. Bouaphakeo* the Supreme Court held that plaintiffs in a wage-hour “donning and doffing” action

Compared to the single-plaintiff discrimination case, pretrial discovery in a class action will focus heavily on statistical evidence.

could use statistical evidence to establish both liability and damages—even though the class was comprised of hundreds of employees who might not have even been injured by the violations alleged. The plaintiffs’ statistical data assumed all class members were equal to the average of employees who incurred monetary damages from the breach of law. (The defendant did not challenge the plaintiffs’ expert testimony on this point, so the court did not decide it.) The Court concluded that the district court did not err in certifying the state-law wage claims as a class action or in refusing the employer’s subsequent motion to decertify the class. (For more on this March 2016 decision, see “*The case law*” on page 11.)

On the other hand, the Supreme Court noted in *Tyson* that courts must pay close attention to whether the use of statistical evidence would deprive defendants of the right to litigate individual defenses. Notably, the plaintiffs in *Tyson* did not have individual evidence

to support their claims because the employer failed to keep records. Consequently, class members had no way to establish the hours they worked, and had no real choice but to offer an average. The takeaway: if evidence specific to individual class members exists, there is little reason to rely on aggregate data, and employers have a solid foundation on which to challenge class certification.

Going forward, plaintiffs will certainly look to rely on expert statistical evidence to support their commonality argument, damages claims, and other aspects of their claims. Thus, it is useful to engage statistical consulting experts early in the case to analyze company data and make observations and recommendations based on what the data show.

Issue certification. Plaintiffs do not always have to show that the entire claim is suitable for class treatment. When there are common questions on some, but not all issues, plaintiffs may turn to Rule 23(c)(4) to seek class certification of certain narrow issues that would give rise to liability. In this way, plaintiffs can get common issues certified for class treatment while tabling the non-common issues for a later stage in the litigation—or, in individual lawsuits, if need be (in which case, the outcome of the “issue” class proceeding will have estoppel effect in those proceedings). Title VII plaintiffs have used the “issue

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Bifurcation

In managing class actions, courts may bifurcate the proceedings. The first phase of pretrial discovery and trial would focus on classwide issues, such as whether there is a pattern or practice of discrimination or the employer is liable for a policy causing a disparate impact. If an unlawful practice is found, the case proceeds to the second phase, which focuses on issues that may require individual proof, including damages and individual defenses that may apply,

such as an employee’s refusal of an offer of reinstatement or after-acquired evidence of employee misconduct that would have led to termination had the employer known at the time. But defendants should be ready to challenge efforts by plaintiffs’ counsel to “bifurcate” in a way that just “cherry-picks” the issues they like, while postponing the issues they fear, in the hope of extracting a settlement if they win the first round.

DEFENDING CLASS DISCRIMINATION CLAIMS continued from page 5
 class” device with increasing frequency in the aftermath of *Dukes*, which made it harder for employees to obtain class certification outright, particularly when it would not be possible to calculate damages on a classwide basis. As a practical matter, the strategy often is used to isolate liability questions from individualized damages determinations.

The test, at bottom, is whether certifying the narrow issue would materially advance the litigation as a whole. The employer’s task is to convince the court that it would not.

But uncertainties abound—not the least of which is the extent to which issue certification satisfies the predominance requirements of Rule 23. The circuits vary on this point; consequently, jurisdiction may well determine the wisest course of action for defendants in opposing issue certification. At any rate, employers would do well to frame the argument around these uncertainties. Would class treatment of the discrete issue simplify the proceedings? Would a decision on that issue materially provide the kind of “common answer” that *Dukes* requires? Looking ahead to the trial, how will the court handle notice to the class on this narrow issue? What are the implications of the preclusive effects of its resolution? Is it a final judgment? Is it appealable? How does it affect the prospects of settlement? The more questions that arise at the prospect of issue certification, the more forcefully a defendant-employer can urge the court that class treatment is *not* the superior means of adjudicating the matter. The test, at bottom, is whether certifying the narrow issue would materially advance the litigation as a whole. The employer’s task is to convince the court that it would not.

More pointers for the defense.

- Class claims likely will call for broad-based discovery. Employers may well be required to produce thousands of emails to or from the class members, hundreds of personnel files for class members and their putative comparators, and data on every possible employment decision arguably within the scope of the case. If the theory is broad and largely undefined, so too will the discovery requests be. Defense counsel must be on alert and prepared to assert appropriate objections to overbroad and ambiguous discovery requests.
- Plaintiffs often introduce expert opinions from social scientists on such topics as the corporate culture, the employer’s performance evaluation procedures, and the alleged decisionmaking process at the root of the claims. Therefore, defendants should be prepared to battle on two fronts: (1) challenge “experts” who are really just trying to argue the plaintiffs’ version of “what the law requires” (not a proper subject for expert testimony); and (2) engage a defense expert on these topics early in order to develop an effective defense.
- Many plaintiffs’ counsel will try to delay filing the class certification motion as long as possible to extend discovery before having to articulate their case and provide evidence in support of their theory. The defense strategy, then, is to request that the court set as early a deadline as possible by which the plaintiffs must file their motion. In the same vein, employers must press the plaintiffs to clarify their class theory as early in the case as possible, especially when the plaintiffs plead the case generally in hopes of filling in the details during or after discovery. ■

Disparate treatment vs. disparate impact

Class discrimination claims can take the form of “disparate treatment” or “disparate impact” allegations.

Disparate treatment requires intent. Disparate treatment means *intentionally* making adverse employment decisions based on a protected

Disparate treatment and disparate impact claims must meet the same Rule 23 requirements, although there is some variation when it comes to proving commonality[.]

characteristic, such as race or gender. Class plaintiffs’ prima facie case requires a showing that there is a pattern or practice of discrimination—the disparate treatment was so pervasive that it could be considered the employer’s standard operating procedure. If the plaintiffs make a prima facie showing, the burden of proof shifts to the employer to rebut the claims by showing the plaintiffs’ evidence either is inaccurate or insignificant; it is not enough to simply argue the challenged decisions were made in good faith.

In the ABC Discount Superstores example, evidence that African-American employees were dissuaded from applying for jobs at higher-revenue stores could show a corporate culture of discrimination. Such evidence could include repeated instances where class members asked multiple sources for applications, but were ignored or were inaccurately told there were no openings so it would be futile to apply.

Disparate impact does not require intent. Disparate impact claims involve employment policies or practices that are facially neutral (they appear neutral as to age, race, gender, and other protected characteristics), but have a statistically significant, disproportionate impact on protected groups, regardless of an employer’s intent. An employer shown to have a policy that results in a disparate impact still might avoid liability if it can show the policy or practice is job-related and consistent with business necessity. However, liability may attach if the employer refused

to adopt an alternative policy or practice that would have accomplished the same goals, but with less disparate impact.

Hostile work environment claims. Class plaintiffs also can assert hostile work environment claims. Although a hostile work environment may be experienced differently from one person to the next, it is still considered by courts to be “a single unlawful practice” for purposes of commonality. For example, the severe or pervasive use of racial epithets can create, on its own, an objectively hostile work environment for members of the class.

Class certification. Disparate treatment and disparate impact claims must meet the same Rule 23 requirements, although there is some variation when it comes to proving commonality (*i.e.*, whether the class action will generate a common answer to the crucial question of why class members were disfavored). Because disparate treatment claims, by their very nature, are individual, it can be harder to establish commonality, particularly if the case involves

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Examples of facially neutral policies that might have a disparate impact:

- Asking job applicants for their salary history to use as a basis for determining what job offer to make could have a disparate impact on groups who have historically been paid less.
- Basing a year-end bonus on attendance for the year could have a disparate impact on those who have to take leave due to disability or pregnancy.
- Having a grooming policy that prohibits “excessive hairstyles” or head coverings could have a disparate impact based on race or religion.

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multiple decisionmakers. Plaintiffs in a disparate impact case must identify a specific company practice responsible for the disparity. Disparate treatment plaintiffs do not need to be so specific, but they need to prove a pattern or regular practice of discrimination.

Proof of discrimination: statistics and anecdotes. In disparate treatment cases, class plaintiffs must show a pattern or practice of intentional discrimination, usually with a combination of statistics and anecdotal evidence. Disparate impact claims require proof of a “statistically

Plaintiffs in a disparate impact case must identify a specific company practice responsible for the disparity. Disparate treatment plaintiffs do not need to be so specific, but they need to prove a pattern or regular practice of discrimination.

significant” disparity that has been caused by a specific, facially neutral, companywide policy.

Statistical evidence typically involves an expert’s report and testimony analyzing data such as hiring rates (by race, gender, or other characteristic) and explaining whether the disparity cannot be explained by random variation but must be the result of the particular policy or practice being challenged. Anecdotal evidence consists of employees telling their stories. Courts do not require *all* class members to testify for purposes of establishing liability; a representative sampling of stories typical to the class will do.

For example, in a suit by black laborers alleging both disparate treatment and disparate impact, anecdotal evidence might include testimony about hearing the N-word and racist remarks at work, seeing racist bathroom graffiti, being given worse assignments than white coworkers, and being disciplined more harshly than white coworkers for minor policy violations. Plaintiffs often argue that such incidents created a corporate culture of discrimination. Statistical evidence could include an expert’s comparing termination rates of recently hired laborers and testifying that black laborers are

disproportionately likely to be fired soon after being hired due to “inability to perform tasks” as compared to recently hired white laborers.

Damages and other relief. In both disparate treatment and disparate impact cases, injunctive relief may be awarded to stop the discriminatory practice. Equitable relief also is available in both (this is relief that puts a plaintiff into the economic position he or she would have been in had the discrimination not occurred). It can include back pay and either front pay or an order to place the employee in the job position denied due to discrimination.

Attorneys’ fees also may be awarded under Rule 23.

With respect to damages, there is some variation. Title VII and the ADA authorize compensatory damages for plaintiffs asserting disparate

treatment claims, but *not* for disparate impact claims. “Compensatory damages” include future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.

As for punitive damages, in disparate treatment class actions, Title VII, the ADA, Section 1981, and Section 1983 allow plaintiffs to recover punitive damages where the employer acted with malice or reckless indifference, though statutory caps may apply under Title VII. Punitive damages are not available for disparate impact claims under Title VII or the ADA and are not available at all under the ADEA. However, liquidated damages (which are punitive in nature) are available for willful violations of the ADEA or EPA. Under the EPA, a court may not award liquidated damages if an employer can prove that it acted in good faith and had reasonable grounds to believe it was not violating the EPA.

Methods for measuring damages in both disparate treatment and disparate impact class actions include, for example, the appointment of a special master to hear evidence from individual class members. Importantly, the need for individualized findings on the amount of damages does not defeat class certification. ■

The legislation

What laws authorize discrimination class actions that are filed privately by individuals?

Title VII. Title VII of the Civil Rights Act prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. Title VII applies to employers of at least 15 employees and includes

The 1991 Act added a new subsection to Title VII, writing the disparate impact theory of discrimination into the statute as it was before the Supreme Court reinterpreted it.

both intentional discrimination and disparate impact discrimination (See “*Disparate treatment vs. disparate impact*” on page 7).

Title VII was amended by the Civil Rights Act of 1991 (to address several decisions by the Supreme Court). The 1991 Act added a new subsection to Title VII, writing the disparate impact theory of discrimination into the statute as it was before the Supreme Court reinterpreted it. The Act also provided that if an employee shows that discrimination was a motivating factor for an employment decision, the employer would be liable for injunctive relief, attorney’s fees, and costs (but not individual monetary damages or affirmative

relief) even though it proves it would have made the same decision without a discriminatory motive. Litigants also could obtain jury trials, and recover compensatory and punitive damages in Title VII and ADA lawsuits involving intentional discrimination under the 1991 Act. The 1991 Act also set statutory caps on the amount of damages that could be awarded:

a maximum of \$300,000 for compensatory and punitive damages combined.

Section 1981. Section 1981 of the Civil Rights Act of 1866 prohibits *intentional* discrimination based on race (and is not limited, like Title VII is, to employers of at least 15 employees). “Race,” for Section 1981 purposes, covers individuals who can be identified by racial or ethnic characteristics, such as African-American, Latino, and Arab. Section 1981 does not require, like Title VII does, the exhaustion of administrative remedies, and it has a four-year statute of limitations within which employees can file suit. The law also applies to state and local governments.

The ADA. Titles I and V of the Americans with Disabilities Act prohibit employment discrimination on the basis of disability in the private sector and in

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Rule 23 or FLSA?

Rule 23 of the Federal Rules of Civil Procedure governs class actions that involve discrimination claims under Title VII, Section 1981, the ADA, the Family and Medical Leave Act, the Fair Credit Reporting Act (FCRA), and most other class litigation in federal court. Employers also 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.

Rule 23 does *not* apply to the Equal Pay Act (EPA) or the Age Discrimination in Employment Act (ADEA). The EPA is a part of the Fair Labor Standards Act (FLSA), and the wage statute’s collective action opt-in provisions apply to EPA claims. The ADEA also utilizes the FLSA’s “opt-in” collective action mechanism.

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state and local governments. This law also applies to employers of at least 15 employees. Law review articles have pointed out that private class actions under the ADA's employment provisions (Title I) have been "virtually nonexistent." Courts facing private disability class actions have pointed out that, as opposed to Title VII, courts presiding over ADA cases must determine not just whether the employer acted improperly, but also whether class members are "qualified" under the ADA and whether they can

[A]s opposed to Title VII, courts presiding over ADA cases must determine not just whether the employer acted improperly, but also whether class members are "qualified" under the ADA and whether they can be reasonably accommodated before a classwide determination of unlawful discrimination can be reached.

be reasonably accommodated before a classwide determination of unlawful discrimination can be reached. To determine whether class members are qualified requires determining the job of each putative class member as well as the essential functions of the job. In addition, if the class member alleges a failure to accommodate, the court must determine whether the requested accommodation was reasonable and whether it imposed an undue hardship on the employer. All of these tend to require individualized inquiries that just don't fit within the criteria of Rule 23.

Equal Pay Act. The EPA prohibits discrimination on the basis of sex in compensation for substantially similar work performed under similar conditions. The EPA applies to employers that have at least two employees and have at least a \$500,000 volume of business, or to individual employees whose work regularly involves them in commerce between states.

The EPA prohibits covered employers from discriminating "within any establishment" between employees on the basis of sex by paying wages to employees at a rate less than the rate at which employees of the opposite sex are paid for equal work on jobs that require equal skill, effort, and responsibility, and that are performed under similar working conditions. EPA class actions litigated and settled in the past few years include female employees at accounting firms, pharmaceutical firms, retailers, and public relations firms.

Age Discrimination in

Employment Act. The ADEA, which applies to employers with at least 20 employees, prohibits employment discrimination against individuals—applicants or employees—40 years of age and older. The law forbids

discrimination in hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment. Disparate impact theory applies, but to a more limited extent than under Title VII.

An employment policy or practice that applies to everyone, regardless of age, can be illegal if it has a negative impact on applicants or employees age 40 or older and is not based on a reasonable factor other than age (RFOA). What is a RFOA? It is a factor that "is objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances." The RFOA defense applies only to disparate impact claims. These claims often involve multiple plaintiffs and can be costly for employers to defend. The employer has the burden of persuading the court that the RFOA exists as a factual matter. ■

The case law

Wal-Mart v. Dukes. Hailed by employers and management-side attorneys for tempering the growth of class action employment litigation, the U.S. Supreme Court's June 2011 decision in *Wal-Mart Stores, Inc. v. Dukes* was one of the largest class action employment cases ever and certainly one of the most significant for private litigants. The Court unanimously held that a potential class of about 1.5 million women—current and former employees—should not have been certified under Rule 23 because they sought monetary relief that was not incidental to any injunctive or declaratory relief that might have been available.

The plaintiffs had sued Walmart alleging that the discretion exercised by local supervisors over pay and promotion matters violated Title VII by discriminating against women. They also argued, because Walmart was aware of its effect, the retailer's refusal to curb its managers' authority amounted to disparate treatment. Notably, the plaintiffs did not argue that the employer had an express policy against the advancement of women. The basic theory of their case was that a strong and uniform "corporate culture" permitted bias against women to infect the discretionary decisionmaking of each of Walmart's thousands of managers in its 3,400 stores, thereby making every female employee a victim of one common discriminatory practice.

The crux of the case, said a 5-4 Court, was commonality. The *Dukes* class did not meet the commonality requirements under Rule 23(a)(2), which requires the plaintiff to demonstrate the class members have suffered the same injury, because it failed to identify a specific employment practice that resulted in a common injury to all class members, much less one that tied all their 1.5 million claims together. Proof of commonality necessarily overlapped with the plaintiffs' contention that Walmart engaged in a pattern or practice of discrimination. The crux of a Title VII inquiry is ascertaining "the reason for a particular employment decision." As the Court noted, the plaintiffs wanted to sue for millions of employment decisions at once. Without some glue holding together the alleged reasons for those decisions, it would be impossible to say that examination of all the class members' claims would produce a common answer to the crucial discrimination question of *why* a decision was made.

The only corporate-wide policy the plaintiffs convincingly established was Walmart's policy of giving local supervisors discretion over employment matters, which, on its face, was the opposite of a uniform employment practice that would provide the commonality needed for a class action.

Especially in a company of Walmart's size and geographic scope, it was unlikely that all managers would exercise their discretion in a common way without some common direction. Therefore, class treatment was not appropriate.

The *Dukes* Court also held that claims for monetary relief may not be certified under Rule 23(b)(2), at least where monetary relief is not incidental to the requested injunctive or declaratory relief. Rule 23(b)(2) applies only when a single, indivisible remedy would provide relief to each class member. Individualized monetary claims belong instead in Rule 23(b)(3) with its procedural protections of predominance, superiority, mandatory notice, and the right to opt out, the Court explained. It also disagreed with the Ninth Circuit Court of Appeal's "trial by formula" approach, in which a sample set of class members would be selected to determine liability and damages and the percentage of claims determined to be valid would then be applied to the entire remaining class. The number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery without further individualized proceedings.

Comcast Corp. v. Behrend. Relying in large part on *Dukes*, the Supreme Court held the Third Circuit Court of Appeals improperly upheld certification of a class action in an antitrust case under Rule 23(b)(3). Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." The appeals court erred in refusing to decide whether the named plaintiffs' proposed damages model could show damages on a classwide basis simply because the model also would be pertinent to the merits determination.

The plaintiffs claimed that Comcast and its subsidiaries clustered their cable TV operations within a particular region, causing harm to subscribers due to decreased competition and, consequently, inflated prices. Accepting

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only one of the plaintiffs' four proposed theories of antitrust impact—that Comcast's actions decreased competition from companies that build competing networks in areas where an incumbent cable company already operates—a federal district court certified the class, finding that the damages based on this sole theory could be calculated on a classwide basis, even though the plaintiffs' expert acknowledged that his regression model did not isolate damages resulting from any one of the plaintiffs' theories individually. On appeal, Comcast challenged the propriety of class certification based on this damages model, but the Third Circuit rejected its arguments, noting they would be pertinent to the

The Tyson case is helpful to employers because it emphasized that the standards for admissibility of expert testimony are not lower in employment cases.

determination of the merits. In so holding, the appeals court ran afoul of Supreme Court precedent, including *Dukes*, which require a determination that Rule 23 is satisfied even when that requires inquiry into the merits of the claim.

Under the proper standard for evaluating certification, the plaintiffs' model fell "far short" of establishing that damages could be measured classwide, the Supreme Court held. The amount the plaintiffs' expert used was calculated assuming the validity of all four theories of antitrust impact initially advanced by the plaintiffs, not just the lone theory on which the lower had granted certification. Thus, the class action was improperly certified under Rule 23(b)(3).

Tyson Foods, Inc. v. Bouaphakeo. Most recently, in March 2016, the Court in *Tyson Foods, Inc. v. Bouaphakeo* held that a district court did *not* err in certifying (and maintaining) a class of employees who alleged their employer failed to compensate them for time spent donning and doffing personal protective equipment. Rejecting the employer's generalized challenge to the use of representative statistical evidence for purposes of class certification in this wage-hour suit, the Court found that because a representative sample may be the only feasible way to establish liability, it cannot be deemed improper merely because the claim is brought on behalf of the class. In *Tyson*, the employees could show that an expert witness's sample was a permissible

means of establishing hours worked in a class action by showing that each class member could have relied on that sample to establish liability had each brought an individual action.

Because the employer failed to keep records of donning and doffing time, the employees *had* to rely on representative evidence derived from an expert's study to determine average donning and doffing time. (Tyson had not challenged the expert witness, and so the Court did not decide whether the evidence in that case was admissible.) They sought to introduce a representative sample to fill an evidentiary gap created

by the employer's failure to keep adequate records. Had the employees proceeded with individual lawsuits, each employee likely would have had to introduce the study to

prove the hours he or she worked. Rather than absolving the employees from proving individual injury, then, the representative evidence here was a permissible means of making that very showing.

While the employer argued that the varying amounts of time it took employees to don and doff different protective equipment made the lawsuit too speculative for classwide recovery, and that necessarily person-specific inquiries into individual work time predominated over the common questions raised by the employees' claims, making class certification improper, the Court found that the permissibility of a representative or statistical sample turns on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action.

While the Supreme Court expressly noted that the decision presented no occasion for adoption of broad and categorical rules governing the use of representative and statistical evidence in class actions, the *Tyson* case is helpful to employers because it emphasized that the standards for admissibility of expert testimony are not lower in employment cases. The ability to use a representative sample to establish classwide liability will depend on whether it is properly supported, as well as the purpose for which the sample is being introduced. ■

Prevention pointer

By Brian Benkstein and Elizabeth Gerling

As highlighted by this *Class Action Trends Report*, any company can become the target of an employment discrimination class action. There is no ironclad way to prevent such a lawsuit. However, a company can limit the likelihood of such claims and minimize the chances of success of discrimination class claims.

In a previous “*Prevention pointer*,” we offered suggestions to avoid or reduce liability in the case of one “bad apple” or rogue manager who engages in wrongful conduct. However, if the company receives complaints or must defend claims related to a rogue manager, it may signal a deeper issue. In these situations, the prudent organization will also evaluate whether the manager’s actions are truly rogue or whether his or her conduct may be attributable to more systemic problems at a higher level.

It starts in the C-suite. One refrain heard with increasing frequency in class claims involving discrimination is that company leadership—the Board, the C-suite, the executive ranks, the managers of the division or department at issue—was not diverse in race, gender, or another protected characteristic that is the subject of the lawsuit. These lawsuits may also attempt to capitalize on an actual or perceived lack of commitment to diversity originating at these same, higher levels of the organization.

Of course, any organization can and, ideally, should take a critical look at how its leadership’s style and attitudes affect the conduct of lower management and the behavior of employees throughout the organization long before a complaint of wrongful conduct arises. As a preventive strategy, a company should assess the diversity of its management team, its diversity-related initiatives, and its commitment to and follow-through on any such programs. Completing such an introspective assessment can pay dividends down the road if, unfortunately, class claims involving allegations of systemic discrimination arise.

Organizations also should evaluate initiatives with respect to recruitment and hiring that encourage diversity—at all

levels. In other words: are the company’s diversity initiatives actually being carried out or are they just lip service? If the latter, it can actually increase the company’s risk.

Top leadership must be “all in” and execute on these plans. Not only is this simply good business practice, but the company will be taking real steps to protect itself from claims of systemic discrimination. An ineffective or failed diversity program can (and likely will) be used against the unsuspecting organization. Actual or perceived lack of commitment to such programs at the C-suite level can have the unintended consequence of creating evidence that actually harms the company. The first step in mitigating this risk is to conduct a critical self-assessment and, if necessary, recommit to diversity initiatives.

Other strategies. Some preventive steps are simply basic HR best practices. For example, a strong corporate EEO policy is essential—as evidenced by the Supreme Court’s decision in *Dukes*, which specifically noted Walmart’s express written policy of non-discrimination. Therefore, it is important not to overlook, and revise as necessary, the organization’s core policies on non-discrimination. Another basic but invaluable strategy is to critically review written policies and HR practices regarding compensation, FMLA, maternity and disability leave, hiring, performance evaluations, promotions, and terminations, to ensure that all policies and practices are facially neutral and legally compliant. All of these areas may constitute risk “hot spots.”

The anticipated focus by prospective plaintiffs on subjective or discretionary decisionmaking underscores the value of robust manager training on all facets of employment discrimination as an important guard against class claims. Especially in organizations where diversity is lacking, training and education programs also can build awareness, help employees understand the need for valuing diversity, educate employees on specific cultural differences, and provide the skills necessary for working in diverse work teams. In so doing, the company will also be building strong, affirmative evidence if it winds up defending against allegations of discrimination.

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Regulatory roundup

The EEOC's Strategic Enforcement Plan (SEP) for fiscal years 2017-2021 promises to infuse the class discrimination landscape with a greater focus on issues that have become a sign of the times. The updated SEP generally continues the priorities identified in the earlier version: Eliminating Barriers in Recruitment and Hiring; Protecting Vulnerable Workers, Including Immigrant and Migrant Workers and Underserved Communities from Discrimination; Addressing Selected Emerging and Developing Issues; Ensuring Equal Pay Protections for All Workers; Preserving Access to the Legal System; and Preventing Systemic Harassment. However, the Commission modified these priorities in the updated SEP:

- Under the priority for emerging and developing issues, the ADA issues within this category are narrowed to *qualification standards* and *inflexible leave policies* that discriminate against individuals with disabilities.
- Two areas are added to the priority for emerging and developing issues:
 - One to address issues related to complex employment relationships and structures in the

21st century workplace, focusing on *temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy*.

- The second on *backlash discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern, or South Asian descent*, as well as persons perceived to be members of these groups, as events in the United States and abroad have increased the likelihood of discrimination against these people.
- A *continuing focus on gender-based pay discrimination* but in addition, in recognition of the pay disparities that persist based on race, ethnicity, and for individuals with disabilities and other protected groups, *extending its equal pay priority to explicitly reach all workers*.
- Removing "retaliatory actions" from the access to the legal system priority because the term was undefined and resulted in inconsistent application. This priority is refined to focus on significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights, as well as to focus on retaliatory policies. ■

PREVENTION POINTER *continued from page 13*

A corporate culture in which HR and Legal are empowered to guide and challenge management practices and decisionmaking as necessary is another key ingredient in claim avoidance. Another critical prevention strategy is to ensure that internal complaint procedures and investigation mechanisms are responsive to employee concerns and proactive in resolving issues that arise. Such internal mechanisms should be designed to spot troubling issues and lead to effective solutions that eliminate the need for employees or former employees to file lawsuits.

No strategy is foolproof. As to other company practices, it is less clear which approach will most effectively minimize the likelihood of employment discrimination class claims, and each company must evaluate the options to determine what will work best for its business and will provide the most suitable form of risk management.

For example, as we discussed in a previous issue of the *Class Action Trends Report*, the current state of class action case law does not provide a clear answer as to whether decentralized decisionmaking (where a rogue manager could potentially effectuate his or her bias in employment decisions) or centralized decisionmaking (which could lead to arguments that the commonality requirement is satisfied by the fact that all decisions were subject to the same centralized process) is preferable. Similarly, the use of certain workforce studies—a pay equity analysis, an attrition analysis, and the like—could be beneficial if appropriate action is taken in response to problematic findings. On the other hand, if such studies are conducted and no action is taken in response to the results, then the fact of such studies would permit the argument that the company was unresponsive to known disparities in treatment of certain groups in the workforce. Put simply, an employer that has reason to know of discrimination has reason to remedy it.

What's trending?

Noteworthy developments in class litigation since our last issue:

Discrimination class actions

- Female tech employees can proceed with a disparate impact claim alleging a technology company's performance review system favored males. A federal court in Washington held it was plausibly alleged that males were unfairly advantaged by the company's method of ranking employees from best to worst, especially when the criteria were unreliable and allegedly over 80 percent of managers doing the ranking were male. The plaintiffs cited research showing that women in male-dominated occupations tend to be "disproportionately devalued" when evaluators are male.

Rather than independently evaluate each employee or applicant, the utility purportedly refused to hire disabled applicants or return employees to work following a medically related absence—in some cases disregarding the opinions of treating physicians who attested the claimants could return to work.

- Pursuant to a consent decree with the Equal Employment Opportunity Commission (EEOC), an Atlanta-headquartered utility company will pay \$1.5 million to settle a class disability discrimination suit alleging that it refused to hire applicants and/or fired employees based on their disabilities or perceived disabilities. Rather than independently evaluate each employee or applicant, the utility purportedly refused to hire disabled applicants or return employees to work following a medically related absence—in some cases disregarding the opinions of treating physicians who attested the claimants could return to work. In other cases, the company automatically disqualified individuals under its seizure policy or its drug and alcohol policy, without individually assessing their ability to work.
- The owner/operator and management company of an Ohio restaurant will pay \$1.4 million and furnish other relief to settle class allegations that they violated Title

VII by subjecting a group of female employees as young as 17 years old to sexual harassment and retaliating against them for complaining. The EEOC identified 12 alleged victims of the manager's abuse, who suffered unwelcome touching, humiliating remarks about their and other females' bodies and sexuality, and pressure for sexual favors in exchange for employment benefits or as a condition of avoiding adverse employment action. The harassment was coupled with retaliation against employees who opposed the abuse.

Class action waivers

- The Fifth Circuit held a district court erroneously delayed ruling on the "gateway" issue of whether a bank teller must arbitrate his Fair Labor Standards Act (FLSA) overtime claim until after the conditional certification stage of his putative collective action, brought on behalf of similarly situated bank tellers. The lower court also was in error, the appeals court said, because the parties had contractually delegated to an arbitrator the threshold question of whether the claims were arbitrable.
- A class action waiver in the arbitration provision of a grocery chain's employment agreement violated an employee's substantive rights under the National Labor Relations Act (NLRA), a bankruptcy court in Delaware ruled, addressing an issue of first impression in the Third Circuit, and an opt-out provision contained in the agreement could not save it. Therefore, the court denied the employer's motion to compel a laid-off employee to individually arbitrate her Worker Adjustment and Retraining Notification (WARN) Act claims, which arose after the employer closed all of its stores upon filing a voluntary bankruptcy petition.

Procedural matters

- In multidistrict litigation against a national bank that allegedly misclassified home mortgage consultants as overtime-exempt, the Fifth Circuit held that *res judicata*

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precluded employees who did not opt out of a state-law class action brought in California from pursuing their overtime claims in a Texas collective action. A release executed as part of the California settlement which waived any FLSA claims barred their Texas claims, even though the California suit did not assert FLSA claims.

“What we are doing in this case is challenging the business model itself,” said a regional administrator for the DOL’s Wage and Hour Division.

Also, the fact that the settlement was accomplished through an opt-out class action did not raise an irreconcilable conflict with the FLSA’s mandate that claims cannot be asserted using an opt-out class action, the court found.

- The Eleventh Circuit joined its sister circuits in holding that an FLSA Section 216(b) collective action and a state-law Rule 23(b)(3) class action may be maintained in the same proceeding. The appeals court reversed a lower court’s conclusion that the two types of actions were “mutually exclusive and irreconcilable” because Section 216(b) requires plaintiffs to opt in to be class members while Rule 23(b)(3) requires that plaintiffs opt out if they do not wish to be bound by a judgment. The underlying case was brought against a county sheriff and alleged minimum wage and overtime violations under both the FLSA and Florida Minimum Wage Act resulting from unpaid off-the-clock work.
- Three WARN Act class actions brought by employees against the investment firm that owned their employer should be handled by the bankruptcy court resolving the employer’s Chapter 7 bankruptcy, a federal court in New York held. The employer, an emergency medical transport provider, fired most of its employees when it filed for bankruptcy, without giving the required 60-day notice under federal and state WARN laws. The class action and bankruptcy proceedings were “inextricably intertwined,” the court held, and to allow the cases to proceed in tandem could affect the bankruptcy court’s administration of the employer’s estate. The plaintiffs alleged that the entities comprised a single business enterprise and, therefore, both were liable under WARN.

“Gig” economy litigation

- An online retail behemoth and its logistics arm face a nationwide collective action alleging it misclassified delivery drivers as independent contractors and thus violated the FLSA as well as Washington state law by failing to ensure the drivers receive minimum wage after accounting for business expenses such as gas and car maintenance. The drivers also claim they were denied overtime for hours worked in excess of 40 per week. A separate Rule 23 class comprised of delivery drivers who work in Seattle alleges additional violations of the city’s minimum wage ordinance.
- A federal court in California denied a rideshare app’s motion to dismiss breach of contract claims or to strike the non-California plaintiffs in an ongoing suit brought by drivers who claim they were wrongly deemed independent contractors. The court, however, dismissed the drivers’ California Unfair Competition Law (UCL) claim, but only to the extent they sought to proceed under the UCL’s “fraudulent” prong. The drivers alleged that when the app imposes a “Prime Time” surcharge for rides given during peak hours, it falsely tells riders that the surcharge goes solely to the driver, when in fact the company takes a 20-percent cut of the surcharge (just as it takes 20 percent of the regular fare).

Franchise cases

- Affirming class certification in a dispute over whether janitorial service franchisees are employees rather than independent contractors, the Third Circuit found that Rule 23’s commonality and predominance requirements were met because the misclassification dispute could be resolved by common evidence, including the franchise agreement, company manuals, and representative testimony. Two franchisees had filed suit on behalf of a class of Philadelphia-area franchisees, claiming they were really employees and seeking unpaid wages under the Pennsylvania Wage Payment and Collection Law. The U.S. Department of Labor has filed an FLSA lawsuit against the janitorial company in Oklahoma, asserting that it sold franchises to individuals who were in reality employees eligible for minimum wage and overtime. “What we are doing in this case is challenging the

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WHAT'S TRENDING continued from page 16

business model itself," said a regional administrator for the DOL's Wage and Hour Division.

- Under what would be the first class action settlement between a national fast-food chain and a class of crew members working at franchise-operated restaurants, the corporate entity would pay \$1.75 million to class members from five California Bay Area franchise restaurants for unpaid wages, as well as the costs of

The court found the corporate chain was plausibly the joint employer of servers at its franchisee-owned restaurants, denying a motion to dismiss putative class and collective claims.

class notification and administration, attorneys' fees, and costs to plaintiffs' counsel of up to \$2 million—purportedly half of the actual fees and costs plaintiffs' counsel have incurred. The restaurants were operated by a family company under franchise agreements with the parent corporation, which the plaintiffs maintained was jointly and severally liable for many California Labor Code violations.

- A restaurant chain will pay \$4.6 million under a proposed deal that would end class litigation on behalf of servers who purportedly were not paid for off-the-clock work and spent more than 20 percent of their time doing non-tipped tasks in violation of the FLSA and state wage laws. The court found the corporate chain was plausibly the joint employer of servers at its franchisee-owned restaurants, denying a motion to dismiss putative class and collective claims. The settlement to some 10,300 class members would give about \$332 per claimant.

Miscellaneous class claims

- The predominance requirement for class actions lawsuits was satisfied in a Racketeer Influenced and Corrupt Organizations (RICO) Act action filed by sales associates against a multi-level marketing business that allegedly operated an illegal pyramid scheme involving resale of gas and electricity, the Fifth Circuit ruled. A district court had certified a class of plaintiffs who allegedly lost money by purchasing the right to become "independent associates" in an affiliated company's marketing program. A divided

appellate panel reversed class certification after finding that individual issues of causation would predominate at trial. However, on rehearing *en banc*, the appeals court held the plaintiffs could prove RICO causation through a common inference of reliance on a false representation.

- Two former employees of a national bank that recently entered into a \$185 million settlement with the Consumer Financial Protection Bureau and fired more than 5,000 employees for creating more than two million checking and credit card accounts that may not have been authorized by customers have filed a \$2.6 billion class action against the bank in California asserting state-law claims of retaliation, wrongful termination against public policy, unlawful business practices, and unpaid wages for overtime and off-the-clock work. The bank fired or demoted employees "who did not meet their impossible quotas," the plaintiffs alleged.
- Call center workers failed to assert more than a technical violation of the Fair Credit Reporting Act (FCRA), and therefore did not allege a sufficient injury to establish Article III standing to sue, a federal court in Minnesota held, putting an end to their conditionally certified class action claims. The employees claimed their employer violated the FCRA's stand-alone disclosure requirement, which mandates that a "clear and conspicuous" disclosure is required—"in a document that consists solely of the disclosure"—if a consumer report is to be obtained for employment purposes. Applying the Supreme Court's analysis in *Spokeo, Inc. v. Robins*, the district court acknowledged the failure to comply with this provision *could* give rise to an injury sufficient to confer standing, but not on the facts here.

Wage-hour suits

- The Third Circuit held a federal court erred in granting summary judgment to a national conglomerate in a class and collective overtime action brought by manufacturing employees who challenged the company's practice of offsetting pay given employees for meal breaks against overtime compensation due.

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Nothing in the FLSA authorized this type of offsetting, where an employer seeks to credit compensation it included in calculating an employee's regular rate of pay against its overtime liability, the appeals court said. The employees were seeking pay for time spent donning and doffing uniforms and protective gear and performing "shift relief" before and after their regularly scheduled shifts.

- More than 1,400 California-based flight attendants were allowed to proceed as a class on claims an airline required them to perform off-the-clock work and violated other Labor Code requirements. The airline argued that because the flight attendants typically spent much of their workday traveling outside of

\$15 million settlement of consolidated class suits alleging delivery drivers for a package delivery giant were misclassified as independent contractors.

California, individualized inquiries would be necessary to determine the extent to which each was covered by California law, if at all. The court said it was premature at this stage to decide the extraterritorial application of California wage-hour rules. Under the company's written compensation policies, flight attendants are paid only when the aircraft is moving; they are not paid for time spent participating in preflight briefings, boarding passengers and deplaning, or for time in between flights.

Key settlements

- \$15 million settlement of consolidated class suits alleging delivery drivers for a package delivery giant were misclassified as independent contractors. Strengthening the drivers' hand in negotiations was the Ninth Circuit's 2014 ruling that the drivers were employees as a matter of law, both under Oregon's right-to-control test and its economic realities test. The appellate decision had reversed a ruling by an Indiana federal court in multidistrict litigation, where the matter had been consolidated with similar suits against the courier before being returned to the federal court in Oregon.
- \$3.75 million settlement resolving a class action brought by line-haul drivers who alleged they were not

properly paid for non-driving time and were denied meal and rest breaks, among other California Labor Code violations. (Meanwhile, a court in Pennsylvania allowed yet another overtime collective action to proceed against the courier, brought by drivers who technically worked for the company's "contracted service providers" under a standard operating agreement. However, the court declined to certify a class of drivers nationwide.)

- \$6 million settlement in a wage-hour action brought by non-exempt technicians, inspectors, and examiners who said they were required to complete online training at home, without pay. The workers also claimed they had to work through breaks, were forced to work overtime without pay, and had to travel long distances to perform jobs without compensation for travel time. Although the maximum verdict value was estimated at more than \$73 million, the court granted preliminary approval to a \$6 million resolution in light of the "daunting" risks faced by the plaintiffs because of the employer's "robust fact-based defense."
- Assistant store managers at three related discount retail chains brought several complaints alleging they were misclassified as exempt and denied overtime during their formal training period (and thereafter). The cases were consolidated into one lawsuit and a settlement was reached on the training claims. The employers will pay up to \$4.75 million.
- \$1.75 million settlement in a California Labor Code class action brought by sales associates for a high-end retailer. The plaintiffs claimed they spent 5 to 30 minutes each shift waiting for supervisors to check their bags and other personal belongings before leaving the stores for breaks or at the end of their shifts. The net settlement fund will be distributed among an estimated 4,100 individuals.
- In a WARN Act suit affecting 1,430 employees, the court found the interests of the class would be best served through the settlement, especially in light of the employer's limited remaining funds. Although \$3 million was the maximum amount for which the employer could be liable, the employer had only \$472,000 left in an escrow account—which would be distributed to the class under the terms of the settlement. ■

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On the radar

Rule 23 is due for an update. In August 2016, the Judicial Conference Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules proposed a host of significant amendments, including to Rule 23. After the comment period closes February 15, 2017, the Advisory Committee will decide whether to submit the proposed amendments to the Committee on Rules of Practice and Procedure. If approved, the proposed amendments would be effective December 1, 2018. For more information, read our [blog post](#) on the proposed rule changes on Jackson Lewis' *Employment Class and Collective Action Update* blog.

Up next...

Rule 23 governs most class action lawsuits brought by private plaintiffs. It provides a comprehensive map for the circumstances under which class litigation may be brought and the conduct of the litigation from beginning to end. In our next issue of the *Class Action Trends Report*, we'll take a deeper dive into the procedural requirements for certifying a class under this procedural roadmap, looking at the key points of contention in defending against certification, and offer "from the trenches" guidance for defending against certification or, at minimum, narrowing the class or the issues certified. We'll also discuss recent important amendments to Rule 23, with an eye to how those revisions will impact the defense strategy.

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