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CLASS ACTION TRENDS REPORT

Challenging the complaint

"Look at this bare-bones complaint. I've got nothing to work with here."

Sitting down with her Jackson Lewis attorney to discuss a new class action wage-hour complaint for the first time, ABC Corporation's general counsel can't hide her frustration. "This plaintiff says that she never takes a lunch break. Why not? Our employee handbook says it's mandatory. And our time records don't reflect that. This is the first time I am hearing about this. Now we have to contend with a California Labor Code claim? How could this be a nationwide class action? What can this plaintiff possibly have in common with our New Jersey warehouse staff? She doesn't include any factual details in her complaint about any other employees. Plus, our California employees are paid through a contractor, but our non-California employees are not. And, our New Jersey employees all signed arbitration agreements. Aren't they excluded from this?

Can I file a motion to get rid of this claim? It has no merit. But, even if I'm right, how much will that cost me? Should I wait it out? Plaintiff barely alleges any facts. Maybe she has no claim. What is the best course of action here?"

Motions to dismiss single-plaintiff employment law claims can often seem like an exercise in futility. But that's not the case when a class or collective action lawsuit is in play. "For years, when I wasn't defending class actions, I was not filing these motions," said Will Anthony, Chair of Jackson Lewis' Class Action & Complex Litigation Practice Group. "You would just end up educating plaintiff's counsel, and they would get to amend anyway. But now that we defend class actions, I am a huge fan of exploring the appropriateness of a motion to dismiss in every case. As a result, whenever we get a complaint, we look very closely at whether an early motion makes good sense and is appropriate."

Scoping the issues

Some class and collective action complaints, particularly those drafted by sophisticated and experienced plaintiffs' counsel, make it perfectly clear exactly what the plaintiffs allege occurred and why they believe it violates the law. Many complaints, however, are not so clear. It's common for class action complaints to be full of numerous legal conclusions but relatively thin on actual factual details.

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A Word from Will

On behalf of everyone at Jackson Lewis, we are gratified by the response to our first issue of the Jackson Lewis *Class Action Trends Report*. Thank you to all who provided feedback regarding our inaugural issue last quarter, it is greatly appreciated. To those of you who are receiving the *Trends Report* for the first time after attending one of our Class Action Summits (see page 26 for details on upcoming summits), welcome. We hope you'll find the second issue to be equally informative and insightful. In round two, we look at why, when, and how to bring a motion to dismiss a class action complaint.

Motions to dismiss employment suits brought by individual litigants are often an exercise in futility. Before I was defending class actions, I generally opted not to file motions to dismiss due to the limited likelihood of success or the inevitable opportunity that courts give for plaintiffs to simply try again until they get it right. But in the class action context, that is certainly not the case. Whenever we get a class complaint—and Jackson Lewis takes in approximately 30 new employment law class actions each month—we engage in a rigorous analysis of potential motions to dismiss the complaint before filing a responsive pleading. In federal court in particular, the prospects for dismissal based on insufficient pleadings have improved with the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. Not surprisingly, though, standards vary from district to district and circuit to circuit. Pleading standards differ in state jurisdictions as well. Employers must carefully weigh the advantages of filing a so-called "*Iqbal/Twombly*" motion against the potential risks.

In this issue, we will look closely at the factors you'll need to consider in deciding whether to bring a motion to dismiss, discussing how the equation will vary based on the type of lawsuit you're defending, as well as the court in which the lawsuit was filed. In addition, we'll look at motions to strike the class allegations when the putative class is not ascertainable, or would be unable to satisfy Rule 23 standards. For reasons both strategic and substantive, both are important tools in defending against class litigation. A deftly executed motion practice at the early stages of your case is critical in order to maximize the likelihood of prevailing—or of avoiding having to defend against class or collective claims in the first place.

As developments in class litigation unfold at a rapid-fire pace, the *Class Action Trends Report* serves as a critical resource for staying abreast. In fact, since our last issue, the Supreme Court has granted petitions for certiorari in three important cases (*Tyson Foods, Inc. v. Bouaphakeo*; *Campbell-Ewald Company v. Gomez*; and *Spokeo, Inc. v. Robins*) that will impact employers' strategies in defending against class and collective actions. We discuss those pending cases in our "On the radar" section on page 25, which aims to keep you apprised of what's around the bend.

Once again, I encourage you to share any questions or suggestions that you may have regarding the Jackson Lewis *Class Action Trends Report*. What class action litigation challenges do you find most vexing—and most worth tackling in a future issue? Do you have success stories (or alternatively, horror stories) to offer for the sake of illustration? Are you in need of further guidance on a topic we've raised? We're eager to hear from you.

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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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Sometimes it can be difficult, if not impossible, for an employer to know exactly what it is that the plaintiffs claim the employer did wrong.

Just what is she alleging? Take ABC Corporation's California warehouse worker, above. She says that she regularly worked through her lunch breaks without pay—an "off the clock" claim and an alleged meal period violation under state law. But her complaint left the company's general counsel with many unanswered questions. Is the plaintiff even an ABC employee or is she an independent contractor? If she is an employee, is she "nonexempt" under the Fair Labor Standards Act (FLSA) and state law? Does she state her hourly rate of pay? What work does she claim she performed during her lunch period? Was it compensable work, or was she merely "on-call" in case she was needed? Is that allowed? Does she allege that her meal period work brought her over 40 hours in a workweek, thus raising an overtime claim too?

And what of the class allegations? Does the plaintiff allege that ABC had a common policy or practice of making warehouse employees work through their lunch? Did she expressly cite that policy? *Why* did she work through her lunch breaks? Why did *anyone* work through lunch breaks? Did their supervisors mandate that they do so? Did this vary per warehouse location? Those are questions that may need to be answered on an individualized basis. And how does she purport to know what's happening at ABC warehouses elsewhere throughout the country? Do non-California warehouses use the same staffing model? Has she spoken with other non-California employees? She doesn't include this information in her complaint.

"It often takes a fair amount of work to understand precisely what the substantive issues are," notes Paul DeCamp, Practice Group Leader of Jackson Lewis' Wage and Hour Practice Group. Still, it's essential for class action defendants, beyond simply identifying the claims, to understand as early as possible the full range of issues that are in play. But it's difficult to do so when the pleadings are so vague that you're not quite sure where to start, or what federal or state laws are at issue.

Attacking the pleadings

Federal courts don't demand a great deal of detail from plaintiffs in their complaints. Still, under the Federal Rules of Civil Procedure, a plaintiff must give the defendant "fair notice" of her claims and the underlying grounds upon which they rest. In *Bell Atlantic Corp. v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009), the Supreme Court clarified the pleading standards required of plaintiffs filing complaints in federal court. Mere "notice pleading," which simply states conclusions or recites the elements of a cause of action, isn't enough. Rather, a plaintiff must at least articulate facts that, taken as true, give rise to a "plausible inference" of liability. Otherwise, the complaint is subject to a motion to dismiss under Rule 12(b)(6). So, what exactly does that mean?

"Plausibility falls somewhere between possibility and probability," explained Wendy Mellk, a Shareholder in Jackson Lewis' New York City office. "Courts are to separate out conclusions from factual allegations. Conclusions are to be presumed untrue and ignored, while facts are to be presumed true. Based on the facts, the court is to determine whether there is a plausible inference of liability, using common sense and his or her own judicial experience—which is why you see such variations among judges" in deciding these motions.

The *Twombly* and *Iqbal* decisions have proven quite beneficial to defendants in federal court, particularly when faced with class litigation. Why? Because bare-bones pleadings favor the plaintiffs. "Plaintiffs' counsel want vague allegations so that as the case progresses they can cobble together large groups of people," Mellk explained. "The more specifically you have to define the claim, generally speaking, the narrower the class. Why not force them to plead very specifically what it is they allege has violated the law?"

There can be strategic benefits to filing a so-called "*Iqbal/Twombly* motion"—even if the case is not dismissed with prejudice. Yet there are both pros and cons to filing such a motion. Employers must carefully weigh the advantages and disadvantages when deciding whether to attack a plaintiff's pleadings on this basis.

The pros

In the best case scenario, the court will grant your motion to dismiss in full and dismiss the case with prejudice, successfully ending the litigation outright. More likely, a court will grant the motion with leave to amend. If so, the plaintiffs will be forced to plead additional facts in support of their claims.

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Armed with more specific factual pleadings regarding, for example, the plaintiffs' job duties, or individual supervisors' practices, you have more information to evaluate the claims at the outset and prepare a stronger defense. In addition, you can more readily identify how the named plaintiffs' circumstances are different from the experiences of potential class members, or even from each other. These additional facts may help to uncover reasons why class or conditional certification is inappropriate. Now you may have grounds for a motion to strike the class allegations—even before the plaintiff moves to certify his or her class.

A motion to dismiss also gives the defendant an opportunity to educate the court early on as to the applicable legal standards in the case.

A motion to dismiss may also bring these collateral benefits:

- An early challenge to the pleadings might delay the court's consideration of conditional or class certification. Some courts (depending on the facts of the case and the jurisdiction) will defer a ruling on certification while a dispositive motion is pending. If the motion to dismiss is granted, the certification issue is moot. Alternatively, some courts simply want a clear picture of the allegations and issues at stake before evaluating whether the case is appropriate for class or collective adjudication.
- The defendant can prevent, or at least delay or narrow, the scope of discovery that the plaintiffs will be able to pursue. Given the immense costs of discovery in class and collective actions (as compared to single-plaintiff litigation), this benefit is particularly attractive.
- A motion to dismiss also gives the defendant an opportunity to educate the court early on as to the applicable legal standards in the case. "We also want the judge to start thinking the right way, very early on, about some of the issues we'll be teeing up later on in the litigation," Mellk said.
- A successful motion may give the defendant the opportunity to settle the case at the initial stages, before significant litigation costs are incurred, and with the named plaintiff only.

The cons

Here's the major drawback: An *Iqbal/Twombly* motion may serve to educate plaintiffs' counsel about the weaknesses in their claims, defects that are potentially curable. Because courts routinely allow plaintiffs to amend their complaint before dismissing it with prejudice—giving the plaintiffs at least one or two chances, if not more—the end result of your motion, even if successful, will often be a more carefully and tightly pleaded complaint, cured of the previously identified defects. In fact, some judges provide a virtual roadmap for plaintiffs to replead their claims more successfully.

There also may be other important strategic reasons *not* to move for dismissal. For example, if you are facing a plaintiff from whom you think you can elicit testimony that might preclude her ability to obtain class certification—*before* giving plaintiffs' counsel an opportunity to shore up his case—then a motion to dismiss might not be the optimal strategy. Additionally, if you are confident that the case is likely in your favor, but you need to gather evidence to support a potential motion for summary judgment, then a motion to dismiss could be ill-advised.

Weigh these other important considerations as well:

- The costs and fees involved in bringing the motion, which increases the overall cost of the litigation, as well as the fees awarded to the plaintiff if she ultimately prevails;
- The impact on the employer of the delay. While it's usually in the best interest of the defendant, that's not always the case;
- The risk of annoying the judge early on in the case if the motion is perceived as unnecessary or overly aggressive;
- Poor momentum as a result of starting the litigation with a loss;
- The prospect of creating bad law (both for your case and for future cases). Although your argument might be a winner on summary judgment, a court may be hesitant to grant summary judgment later on if it previously denied a motion to dismiss.

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Thus, in certain scenarios, the cost-benefit analysis may not favor filing a motion to dismiss. Consult your Jackson Lewis attorney to discuss whether, under the unique circumstances of your particular case, a motion to dismiss on Rule 12(b)(6) grounds is advisable.

Other grounds for dismissal

There are numerous other bases for filing a motion to dismiss as well, and further opportunities for the defendant to go on the offensive at a very early stage of the litigation. Such motions can be brought on substantive grounds, procedural grounds, or both.

Standing. Standing is a threshold issue: If the plaintiff lacks standing, the court does not have jurisdiction over the case. And unless the plaintiff can show an injury traceable to and redressable by the defendant, he lacks standing. If the plaintiff is an ex-employee, the employer can argue convincingly that he has no standing to seek prospective relief on behalf of current employees (such as an injunction barring the employer from engaging in specific conduct in the future).

Motion practice is a chess match. When bringing your motion to dismiss due to vagueness, presume that the plaintiff will be allowed to amend, and design your motion accordingly.

The plaintiff bears the burden of establishing standing and must do so as to each defendant. (The latter issue comes into play quite often in employment cases where the plaintiff has pleaded a joint employer relationship among several defendants—such as parent or sister companies, or contractors or staffing agencies and client companies.) Joint employer relationships are often pleaded in a conclusory fashion, which can be grounds for disposing of claims against particular defendants.

Insufficient service. Defendants can also seek dismissal for insufficient service of process. Again, it's another means of taking the offensive: forcing the plaintiff to go back and re-serve the defendants.

Timeliness. An employer can file a motion to dismiss due to statute of limitations problems, which have rendered claims untimely. (A limitations period problem can affect the forum, too, if the FLSA's three-year limitations period has passed, yet the state-law claim remains timely.)

Lollygagging. A number of courts have adopted specific requirements as to when a plaintiff must move to certify a class or collective action. Judges do have discretion to extend that limitations period, so dismissal is not guaranteed. However, a sympathetic judge who recognizes the prejudice to the defendant caused by the delay might well grant the motion, ending the matter outright.

Coverage. Is the employer covered by the statute in question? Small employers may not meet the minimum-employee requirements for liability under Title VII or other employment statutes. A wage-hour defendant might not be a covered enterprise under the FLSA. Consider too, when individual defendants are named in the complaint, whether the plaintiff sufficiently alleged they are "employers," with the requisite control over the plaintiff or the defendant employer's operations.

Arbitration agreements, releases. It's common now for employers to require employees to resolve any and all employment-related disputes through arbitration. Did the plaintiff sign an agreement to arbitrate the claims instead of filing suit? Has the plaintiff signed a release that precludes her from bringing a claim or from seeking to represent a class in pursuing such a claim?

Pointers

Motion practice is a chess match. When bringing your motion to dismiss due to vagueness, presume that the plaintiff will be allowed to amend, and design your motion accordingly. Structure your arguments in a way that will make the plaintiff have no choice but to commit to facts or theories of liability that you can use to your advantage—no matter *which* way he goes. If you can force the plaintiff to assert anecdotal, individualized allegations, then you can use those assertions to challenge class certification. And if the plaintiff is wary

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to do so, his decision to keep his pleadings vague now can significantly undermine his claim later.

Here's an example:

> In addition to wage-hour claims, a plaintiff includes a generic count for breach of contract. This vague claim states only conclusions, no facts. In the motion to dismiss, your goal is to force the plaintiffs and their counsel to make a choice at the outset: (a) provide specific allegations ("My supervisor promised me X"), in which case the defense is in a position to oppose class certification, because the case would turn on this alleged personal promise to the lone plaintiff; or (b) offer no further specific details, thus putting the defendant in a better position to defeat the claim on the merits—given that the vague generalities are not enough to establish the definite facts needed to prevail.

- **Get to know your plaintiff.** Conduct a background search to find out as much information as possible, including what kind of other litigation this plaintiff was involved in. The information you uncover may give rise to some basis for a motion to dismiss.
- **Scope the situation from the inside.** Visit the facility where the plaintiff works and interview key witnesses. The information you gain in an initial investigation will be beneficial in the long run and, more immediately, may provide additional grounds for dismissal.
- **Act quickly.** File your motion within the 20-day filing period so you're not at the mercy of plaintiff's counsel for an agreed extension. She will likely want a *quid pro quo*—typically a tolling agreement from the defendant, agreeing to stop the limitations clock from ticking while the motion is pending.
- **Identify the specific local rules and practices used within the particular jurisdiction for such filings.** They are important variables to factor into your cost-benefit analysis.
- **Consider the judge.** Pull the judge's docket and research how many other class and collective claims are currently assigned to him; how much experience he has in deciding these types of cases; and of course, the typical outcome. Does he generally disfavor these motions? Is he likely to grant the motion in full or in part? Will he consider granting the motion with prejudice? Does he tend to respond more favorably to a motion to dismiss a complaint in its entirety, or are you better off trying to eliminate a few specific claims? Does he have any specific chambers practices that will affect his ruling?
- **Know who you're up against.** Research plaintiff's counsel to gain a better understanding of their experience in handling these types of motions. Are they likely to be in it "for the long haul," or might they be apt to simply go away and not refile after you secure a favorable ruling on a motion to dismiss? Do they regularly litigate class and/or collective actions or do they typically only bring single-plaintiff cases? Do they have experience bringing these particular types of substantive claims? Take a look at what other related cases they are involved in, and what the outcomes have been.

The bottom line

Defendants have several bases on which to seek dismissal of a putative class or collective action complaint. An *Iqbal/Twombly* motion under Rule 12(b)(6) is an important tool when the plaintiff's scant pleadings put the defense at a strategic disadvantage. The traditional notion that such motions are futile in employment cases brought by individual litigants doesn't apply when class and collective claims are at issue, particularly in light of the heightened federal pleading standards ushered in by the Supreme Court in recent years.

Defendants have several bases on which to seek dismissal of a putative class or collective action complaint.

There are other tried and true grounds for dismissal, too, all of which are worth exploring with your Jackson Lewis attorney. The use of this early motion practice can effectively sidetrack, curtail significantly, or even eliminate a class action that your company is facing. ■

Jackson Lewis success stories

Jackson Lewis attorneys have obtained notable wins for our clients through the filing of early motions to dismiss in class or collective actions. In these cases, for example, the complaints were either dismissed (in full or in part), or our clients were able to leverage a favorable ruling to settle the case with the individual plaintiffs for considerably less than they were seeking on behalf of a putative class:

- Two personal trainers brought federal and state-law wage claims individually and on behalf of other trainers. However, the employer argued that when their wages were totaled and divided by the total number of hours that they each claimed to have worked, the trainers were paid in excess of the minimum wage. Additionally, one plaintiff failed to sufficiently allege that he worked more than 40 hours during the period in question. The court found that the allegations were conclusory and unsupported. Pursuant to the judge's chamber practices, the court dismissed the trainers' FLSA claims with prejudice, and the remaining claims under the New York Labor Law (NYLL) without prejudice, and the trainers were denied leave to amend.

- An indoor cycling instructor who was paid on a "per class" basis alleged that in addition to teaching his classes, he performed other tasks, such as "training, preparing for classes, developing routines," etc. requiring an additional 15 to 25 hours per week for which he was not paid. He filed suit on behalf of himself and other instructors under the FLSA and NYLL. Jackson Lewis attorneys moved to dismiss, arguing he offered no factual allegations to establish that his weekly per-class rate, divided by the number of hours worked, fell below the applicable minimum wage rate during specific workweeks. The instructor's employment agreement, which specifically stated that all instructor activities were included in the "per class" rate of compensation, also was attached to the motion. The court determined that the complaint failed to state his actual rate of pay (per class or otherwise) or the total number of hours that he worked per week. It also concluded that he was paid at least $1,430 per week, and that his rate of pay ranged anywhere from $43.00 to $60.55 per hour, depending upon the number of total hours he worked per week. Because his complaint failed "to adequately describe a minimum wage violation as a matter of law," his claims were dismissed without prejudice. The employer then settled the case with the individual plaintiff only.

- A satellite TV installer who was paid on a piece rate basis filed individual and class claims, alleging unpaid minimum wages and overtime. However, it was unclear from his complaint what he was claiming as "work time" and how many hours he was alleging that he actually worked. Citing to the recent trio of Second Circuit FLSA off-the-clock overtime cases (discussed in "The case law," at page 11), the court found that the installer failed to plead sufficient facts to plausibly give rise to claims for off-the-clock work, granting the motion to dismiss as it related to those claims. Subsequently, the employer settled the case with the individual plaintiff.

- Convenience store employees alleged minimum wage and overtime claims on behalf of themselves and all others allegedly similarly situated. The employer moved to dismiss early on, arguing that the allegations were insufficient. The court granted the motion in part. Among other claims, the court dismissed one plaintiff's FLSA and NYLL overtime claims and two plaintiffs' FLSA and NYLL minimum wage claims.

- A retailer was faced with a multi-plaintiff, national class and collective action alleging that it had misclassified employees as exempt under the retail sales exemption. The exposure for the claims was significant. After Jackson Lewis filed a motion to dismiss, plaintiffs' counsel lost interest in the case and asked to mediate the dispute. The litigation was resolved with a favorable settlement for the employer with minimal discovery.

- In a putative statewide collective action brought by restaurant servers, Jackson Lewis obtained dismissal on the basis of failure to state a claim regarding allegations that the servers spent time performing supposedly non-tipped duties while earning a tip-credit wage rate. The firm also defeated the plaintiffs' motion to conditionally certify a collective action alleging they did not receive sufficient notice of the tip credit.

Suing as a class? Not so fast

What about a motion to strike?

What if the complaint's allegations appear to be sufficiently pleaded (and a Rule 12(b)(6) motion seems futile), but based on the pleadings, you believe that the plaintiff could never satisfy Rule 23 requirements for class certification? That's when a motion to strike the class allegations can be particularly useful.

A successful ruling on a motion to strike class claims will not only narrow the scope of the action, it will cut off class-wide discovery with its attendant costs and put additional pressure on the individual plaintiff or plaintiffs and their counsel. In the right situation, an early motion to strike class allegations may reduce—or even entirely avoid—the time and expense of litigation.

In the right situation, an early motion to strike class allegations may reduce—or even entirely avoid—the time and expense of litigation.

A motion to strike clearly can help parties navigate the class allegations as the case moves forward. "In fact, a motion to strike can educate the court, and the adversary, that this class action can't be maintained," explained Will Anthony.

The benefits

What are the potential benefits to employers of a motion to strike class allegations?

Eliminate the class. If the motion is successful, class allegations are removed, and the case is then limited to individual claims on behalf of named plaintiffs only. Depending on the substantive claims, this may reduce potential exposure from millions of dollars to a nominal amount, or even result in a voluntary dismissal of the entire case.

Narrow the class. Even if the motion is not granted, a motion to strike still may benefit the defense because it may narrow how the plaintiff defines the class.

Limit discovery. Limiting the class limits the employer's discovery obligations. "Discovery is *expensive*, so if we can minimize that, it's a victory," stressed Stephanie Peet, Shareholder in Jackson Lewis' Philadelphia office. "Limiting discovery means limiting an employer's document preservation obligations, as well as its potential liability." The judge may require plaintiffs to specifically delineate what discovery they want, to help streamline the issues.

Stay discovery. At least one district court has ordered a stay of discovery while a motion to strike class allegations is pending. (Trial courts have broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined, the court noted, and a motion to strike class claims is "dispositive" of class action allegations.) Be advised, however, that other courts take the opposite approach and won't entertain a motion to strike class allegations unless the parties have *completed* discovery in order to conduct the "rigorous analysis" necessary to make a decision about the class.

Slow plaintiff's momentum. In many cases, a motion to strike will force the plaintiff to justify or explain the deficiencies in its pleadings, potentially before it is prepared to do so. Sometimes the process of addressing a motion to strike nets useful information for the defense. It may become abundantly clear that the claims hinge on individualized facts, that the class is a "fail-safe" class (which means that whether an individual qualifies as a class member depends on whether that person has a valid claim—not allowed as a matter of law), or that potential class members reside in different states, creating choice of law issues. An early motion to strike means you don't have to wait for the plaintiff to move to certify a class when the plaintiff is ready: you can force the issue early on.

Procedural basis

Although Rule 12(f) permits a motion to strike for "redundant," "immaterial," "impertinent" or "scandalous" matters, it doesn't specifically address inadequate class allegations. Lacking a crystal-clear procedural provision for doing so, most counsel rely on Rule 23(d)(1)(D),

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which authorizes orders that "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." Some—but not all—district courts have validated this approach.

Who has the burden of proof? Remember, Rule 23 requires (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy, as well as at least one provision of Rule 23(b). Failure to meet all of these requirements precludes class certification. So who has the burden of proof on the motion to strike? This is a bit of a gray area. There is no clear rule when bringing such a motion, so litigants are constrained by the jurisdiction and the particular judge's predilections in deciding these motions.

So who has the burden of proof on the motion to strike? This is a bit of a gray area.

"We have seen courts fall into two different buckets," notes Wendy Mellk, Shareholder in the firm's New York City office. "One bucket says, 'Well, defendant, you're bringing the motion, you prove it.' But a majority of courts say the plaintiff still has the burden," because it is the plaintiff's responsibility to satisfy Rule 23 requirements.

Prospects for denial

A motion to strike the class allegations could well be denied as premature. Some courts may be reluctant to strike class allegations based solely on the pleadings because "striking a pleading is a drastic remedy" and could be used merely for purposes of delay.

The discovery factor. Moreover, there is a line of authority that at least some discovery is required—in fact, some courts want discovery to be completed—in order for a court to be able to undertake the "rigorous analysis" on which class certification decisions must be made, even on a motion to strike. Particularly in the First and Third Circuits, courts may find the defense must wait until the plaintiff has moved to certify the class and discovery has been completed.

In contrast to this approach, recently a court presiding over a significant case in which the plaintiffs are seeking to hold a national restaurant chain jointly liable for alleged wage violations by fast-food franchisees stayed discovery until the court could rule on the defense's pending motion to strike the class allegations. Citing to the trial court's "broad discretion," the court said it had to weigh "the burden of proceeding with discovery upon the party from whom discovery is sought against the hardship which would be worked by a denial of discovery."

Employees of several restaurants allege that the franchisees did not pay them for time spent waiting to clock in at the beginning of scheduled shifts or after returning from unpaid mid-shift breaks. After the court denied their motion for conditional certification, they moved to compel discovery to support their class allegations. The defense argued instead that they were only entitled to discovery on the named plaintiffs' claims and that the court should stay any decision on the motion to compel discovery until the court addressed "pending dispositive motions."

The court agreed with the defendants. Stating that "the motion to strike the class allegations in the complaint, if successful, is dispositive of plaintiffs' class claims against defendants in this lawsuit," the court held that the burden on defendants in having to engage in class discovery while dispositive motions were pending on the class claims outweighed the potential prejudice to plaintiffs in delaying such discovery.

The bottom line

We'll have much more to say about challenging class certification in future issues of the *Class Action Trends Report*. For now, it suffices to note that, similar to a motion to dismiss, an early motion to strike class allegations can be beneficial to employers defending class and collective claims—even if the motion is ultimately unsuccessful. As such, it is an important tool in your motion practice arsenal. ■

On what basis are courts granting motions to strike class allegations?

Ascertainability. The class has to be ascertainable. Ascertainability refers to the ease with which potential class members can be identified. It's not a criterion under the Federal Rules of Civil Procedure; it's a judicially created principle—one that has been universally adopted, though. "If we can't have a class that's easily identifiable, then we're not having a class. It's an implied prerequisite," explained Will Anthony.

This means the defense should examine the plaintiff's proposed class definition at the outset of the case, because before a motion for class certification can be granted, the plaintiff must establish "that the proposed class is 'adequately defined and clearly ascertainable.'" If it is unclear exactly who the proposed class members are, defendants have a good chance of successfully moving to strike class allegations for lack of an ascertainable class.

Fail-safe class. A subset of the ascertainability argument, a "fail-safe" class (also called a "merits-based" class definition) is defined by tying whether a person qualifies as a class member to whether that person has a valid claim. This manner of class definition is improper because a class member either wins or, by virtue of losing, gets "defined out of the class" (which would mean she is therefore not bound by the judgment). A fail-safe class requires the court to conduct an individualized inquiry as to the merits of the claim simply to determine whether an individual is a proper class member.

Predominance. Predominance under Rule 23(b)(3) is another big reason why courts grant motions to strike class allegations. The essential predominance argument is that based on the complaint alone, together with the plaintiff's theory of the case, it's very clear that individualized issues are going to predominate over classwide issues. It is critical to look at every aspect of the allegations and ask whether, from the pleadings themselves, there are individual issues on causation? Liability? Affirmative defenses? Another way to think about it is whether it would require an individualized inquiry to discern the nature of the harm allegedly suffered by class members.

One red flag that signals an immediate "predominance problem" for the plaintiffs is when the alleged class members are residents of multiple states (for example, if a nationwide class is alleged). If this is the case, choice of law problems often can be raised successfully. The idea here is that because class members' claims would be governed by the law of the state in which the member resides, the differences in the various substantive state laws will overshadow any common class issues.

Commonality, typicality. Closely aligned with predominance, of course, are the elements of commonality and typicality. If a court is required to "delve into the specific facts" of each potential class member's interactions with the employer, or, for example, if the complaint alleges multiple agreements executed over an extended period of time, these unique characteristics can prevent plaintiffs from establishing commonality or typicality and will thus thwart their attempt to proceed as a class.

Adequacy of representation. Another argument commonly made when challenging class allegations is the lack of an adequate class representative. For example, this issue has come up when there is a *pro se* plaintiff who seeks to serve as both a class representative and as class counsel. Courts likely will find a conflict of interest between a plaintiff's "duty to represent class interests" and the plaintiff's "chance to gain financially from an award of attorneys' fees" (*Jaffe v. Capital One Bank*, S.D.N.Y., 2010).

But the issue is more likely to come up where the plaintiff is, or at some time has been, in a supervisory or managerial role. Think about a situation where the plaintiff is a lower-level employee, who is then promoted to a supervisor or other manager. He could not adequately represent a class of non-managers. This scenario also raises typicality issues, because defenses unique to the plaintiff (and any other manager in the putative class) will prevent a plaintiff from establishing typicality and from being a proper class representative.

The case law

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 class action complaint?

Twombly and *Iqbal* refined and enhanced the civil pleading standards of Rule 8(a) of the Federal Rules of Civil Procedure. A pleading that merely states conclusions or recites the elements of a cause of action is not sufficient. As the Court stated in *Iqbal*, it "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." In order for a complaint to survive a motion to dismiss, it must "contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" So where does that leave us?

The ability to dismiss a so-called "bare-bones" complaint depends, in part, on the interpretation of the above standard by the particular circuit deciding the case.

Wage-hour suits

The ability to dismiss a so-called "bare-bones" complaint depends, in part, on the interpretation of the above standard by the particular circuit deciding the case. For example, in 2013, the Second Circuit decided a trio of cases that addressed the pleading requirements to state a claim for unpaid overtime in a collective action under the FLSA. These cases have provided the roadmap for the district courts in the Second Circuit, and have been instructive to federal courts in other circuits, on analyzing such claims.

First, in *Lundy v. Catholic Health System of Long Island, Inc.*, the appeals court found no plausible claim that the FLSA was violated, in a complaint alleging plaintiffs were not adequately compensated for time worked during meal breaks, before and after scheduled shifts, and during required training sessions, because the plaintiffs did not allege "a single workweek in which they worked at least 40 hours and also worked uncompensated time in excess of 40 hours."

Next, the Second Circuit in *Nakahata v. New York-Presbyterian Healthcare System* affirmed the district court's dismissal of an overtime claim based upon a similar rationale—that is, in order to sufficiently state a claim for overtime under the FLSA, the plaintiffs "must provide sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than 40 hours in a given week."

Finally, in *DeJesus v. HF Mgmt. Services*, the Second Circuit, in dismissing a complaint alleging unpaid overtime, held that the mere recitation of the language contained in the statute, *i.e.*, that the plaintiff "worked more than 40 hours per week during 'some or all weeks' of her employment," would not suffice to raise a plausible inference that there was an overtime violation.

"Boilerplate complaints." In *Pruell v. Caritas Christi* (2012), the plaintiffs alleged that they had regularly worked over 40 hours in a week and were not compensated for that time. The First Circuit, in dismissing the complaint on insufficiency grounds, described this allegation as "one of those borderline phrases" that, "while not stating ultimate legal conclusions, are nevertheless so threadbare or speculative that they fail to cross the line between the conclusory and the factual." Further, the court noted that the amended complaint lacked examples of unpaid time, a description of work performed during overtime periods, or estimates of the overtime amounts owed.

"Typically." In *Davis v. Abington Memorial Hospital* (2014), the Third Circuit held that allegations that the plaintiffs "typically" worked shifts totaling between 32 and 40 hours per week and "frequently" worked extra time were insufficient to state an overtime claim under the FLSA. The plaintiffs contended that "because they typically worked full time, or very close to it" and "also worked several hours of unpaid work each week," it was certainly plausible that at least some of their uncompensated work was performed during weeks when the plaintiffs' total work time was more than 40 hours. The appeals court disagreed. While an allegation that a plaintiff typically worked a 40-hour week, and worked uncompensated extra hours during a particular 40-hour workweek, would state a plausible claim for relief, no such allegation was made by any of the

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plaintiffs, explained the court, and it affirmed dismissal of the overtime claims.

Context-specific. The Ninth Circuit in *Landers v. Quality Communications, Inc*. (2014) joined the First, Second, and Third Circuits in holding that to survive a motion to dismiss post-*Twombly* and *Iqbal*, a plaintiff asserting an overtime claim must allege that he worked more than 40 hours in a given workweek without being paid for the overtime hours worked during that workweek. Also agreeing that the plausibility of a claim is "context-specific," the court explained that a plaintiff may establish a plausible claim by estimating the length of his average workweek during the applicable period and the average rate at which he was paid, the amount of overtime wages allegedly owed, or any other facts that will permit a court to find plausibility.

Ultimately, the Ninth Circuit declined to require that a plaintiff alleging failure to pay minimum wages or overtime wages must approximate the number of hours worked without pay. However, at a minimum, the plaintiff must allege at least one workweek when he worked in excess of 40 hours and was not paid for the excess hours in that workweek, or was not paid minimum wages.

In April 2015, the Supreme Court denied a petition for certiorari in *Landers*, declining the opportunity to clarify the appropriate pleading standard, at least for FLSA cases, post *Twombly* and *Iqbal*. A High Court ruling on the case would have had implications beyond the FLSA as to how much factual detail must be pleaded in a complaint in order to survive dismissal. Nonetheless, the takeaway is that four circuits have now adopted a variation of the rule originally set forth by the Second Circuit in *Lundy*.

But … A contrary result was reached in *Secretary of Labor v. Labbe*, a 2008 post-*Twombly*, pre-*Iqbal*, unpublished decision from the Eleventh Circuit, which applies a liberal standard and does not require detailed factual allegations regarding the number of overtime hours worked by the plaintiff to state such a claim. The appeals court concluded that the allegations that "Labbe repeatedly violated stated provisions of the FLSA by failing to pay covered employees minimum hourly wages and to compensate employees who worked in excess of forty hours a week at the appropriate rates[]" stated plausible claims for relief.

Discrimination cases

Iqbal and *Twombly* have offered a bit less solace to employers defending against discrimination claims. The challenge lies in the ongoing uncertainty over whether those decisions diluted the Supreme Court's 2002 ruling in *Swierkiewicz v. Sorema N.A*. Courts generally seem to be coming down on the side of *Swierkiewicz* to the extent that plaintiffs need solely to allege, for example, "I was fired based on my race, black."

Fair notice and plausibility. In 2012, the Sixth Circuit reversed the dismissal of a putative Title VII and Section 1981 class action brought by an African-American employee. In *Keys v. Humana, Inc.*, the court said the complaint's allegations met both the "fair notice" and "plausibility" standards set forth by the Supreme Court, and reiterated that the prima facie case standard under *McDonnell Douglas* is an evidentiary standard, not a pleading requirement, citing *Swierkiewicz*. The precise requirements of a prima facie case can vary depending on the context, and before discovery has unearthed the relevant facts and evidence, it may be difficult to define the appropriate formulation. *Twombly* and *Iqbal* did not change that approach.

To meet the "plausibility" standard, the discrimination complaint had to allege sufficient factual content from which a court could draw the reasonable inference that the employer discriminated against the employee with respect to her compensation, terms, conditions, or privileges of employment, because of her race. The employee's amended complaint did so, said the court. It alleged that Humana had a pattern or practice of discrimination against African-American managers and professional staff in hiring, compensation, promotion, discipline, and termination. The complaint detailed specific events in each of those employment-action categories where the employee alleged she was treated differently than her white management counterparts and identified the key supervisors and other relevant persons by race and either by name or company title. It alleged that the employee and other African-Americans, despite evidence of satisfactory performance, received specific adverse employment actions.

Disparate impact. Also in 2012, the Seventh Circuit endorsed the application of *Iqbal* in *McReynolds v. Merrill*

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Lynch, a putative class action race discrimination case brought by a group of brokers. Then, in 2014, the appeals court issued an *Iqbal* opinion in a disparate impact discrimination case that is a double-edged sword for defendants. In *Adams v. City of Indianapolis*, the appeals court held a plaintiff must do more than just allege disparate impact. Given the difficulty of obtaining specific statistical data to plead sufficient facts to show disparate impact, the holding presents a considerable hurdle for plaintiffs. On the other hand, the court held that a plaintiff need not point to a facially neutral employment practice or policy to maintain a disparate impact claim. Such claims may be based on any employment policy, not just a neutral one, the court reasoned, noting that the word "neutral" appears nowhere in the text of the statute.

Threadbare. In *Khalik v United Air Lines* (2012), the Tenth Circuit affirmed dismissal of a complaint after determining that an employee's allegations, though not conclusory, were simply threadbare and did not plausibly state a cause of action for discrimination, retaliation, or a violation of the Family and Medical Leave Act (FMLA). The court reasoned that while an employee need not establish a prima facie case in her complaint, setting forth the elements helps to determine the plausibility of the claim. The plaintiff, a Kuwaiti-born Arab-American and practicing Muslim, alleged she was terminated following a physical assault and a complaint about a denial of FMLA leave and other matters despite satisfactory job performance. The plaintiff's allegations were conclusory recitations to be disregarded under *Iqbal,* the court concluded. The complaint was completely devoid of context, contained no allegations as to when the employee complained and to whom, or that similarly situated employees were treated more favorably.

Inference of bias. In 2015, the Fourth Circuit held that even though a lower court improperly applied the *McDonnell Douglas* evidentiary standard in analyzing the sufficiency of an applicant's complaint alleging that a state agency refused to hire her for two positions because of her race and sex, it nonetheless reached the correct conclusion under *Twombly* and *Iqbal* because the complaint failed the plausibility threshold. *McCleary-Evans v. Maryland Department of Transportation, State Highway Administration* involved failure-to-promote/hire claims that lacked allegations regarding the qualifications or suitability of the persons hired to fill the two positions the plaintiff claimed she had been denied on account of her race and sex. While she did allege that the employer failed to hire her, she did not allege facts sufficient to show that the reason it did not hire her was because of her race or sex. Allegations that non-black decision makers hired non-black applicants instead of the plaintiff were consistent with discrimination but, standing alone, did not support a reasonable inference that the decision makers were motivated by bias.

A new wrinkle?

Complicating matters further is a 2014 Supreme Court decision that seems to step back from the holdings of *Iqbal* and *Twombly* in favor of notice pleading. In *Johnson v. City of Shelby, Mississippi,* police officers filed suit alleging the municipality violated their due process rights under the Fourteenth Amendment by firing them for blowing the whistle on an alderman's criminal misconduct. Although the officers alleged sufficient facts to support their due process cause of action, the district court, nevertheless, dismissed their suit because they failed to specifically invoke the relevant civil rights statute, *i.e.* 42 U.S.C. § 1983. Finding this lapse to be "fatally defective," the Fifth Circuit affirmed dismissal.

Factual vs. legal basis. The Supreme Court reversed, explaining that *Twombly* and *Iqbal* addressed whether the *factual* allegations were sufficient to survive a 12(b)(6) motion. According to the Court, at issue in the *City of Shelby* was an evaluation of the *legal* basis for the claim and whether an "imperfect statement of the legal theory supporting the claim asserted" requires dismissal of the complaint. However, the procedural rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted," the High Court held. The Court addressed the factual pleadings in *City of Shelby*, observing that the plaintiffs need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Here, the factual allegations met that standard: The complaint "simply, concisely, and directly stated events that, they alleged, entitled them to damages." So long as the facts are well-pleaded, the Supreme Court seems to have left plaintiffs with some wiggle room before they'll be required to nail down their legal theory.

For recent decisions involving collective and class action employment litigation see "Other class action developments" on page 20. ■

Only in California? By Joel Kelly

California employers are seeing a plethora of cases of late filed as PAGA-only actions. "PAGA" claims are representative claims under the state Private Attorneys General Act (California Labor Code Sec. 2699), which provides "aggrieved employees" a private right of action against an employer in order to collect penalties on behalf of the state's Labor and Workforce Development Agency (LWDA).

While the limitations period under PAGA is far shorter than for claims we would see in a typical wage-hour class action (one year vs. four years), many plaintiffs' counsel will dispense with the longer limitations period in favor of (1) avoiding arbitration and (2) avoiding class certification requirements since the California Supreme Court has held, in *Arias v. Superior Court* (2009), that a plaintiff need not bring a PAGA representative action as a class action.

Pleading issues in PAGA actions

The pleading rules for PAGA cases, as with many other areas of PAGA law, remain uncertain. The pleadings requirements will vary, depending on whether the case is in state court, which requires "fact" pleading, or federal court, with its more relaxed "notice" pleading requirement. Increasingly, however, we are seeing form complaints that allege nothing more than the requirements of the Labor Code, and conclusory allegations that the employer supposedly violated them. Even under the federal rules, this is insufficient and leaves the complaint subject to a motion to dismiss.

For example, in July, yet another federal court in California applied the Ninth Circuit's reasoning *in Landers v. Quality Communications, Inc.*, a 2014 decision dismissing under Rule 12(b)(6) the insufficient pleadings in an FLSA action, to wage claims brought under the California Labor Code, both individually and on behalf of other aggrieved employees pursuant to the PAGA. The plaintiff in *Raphael v. Tesoro Refining and Marketing Co., LLC* had contended that the employer carried out "a uniform policy and systematic scheme of wage abuse" against him and the other aggrieved employees and violated the Labor Code by failing to pay minimum wage and overtime; provide uninterrupted meal and rest periods; pay all wages due within a permissible period of time; pay promptly upon termination; provide accurate wage statements; keep proper payroll records; and reimburse business expenses. The employer objected to the bare-bones pleadings and cited *Landers* in support of its motion to dismiss.

In *Landers*, the plaintiff claimed that the employer failed to compensate him for all overtime hours worked. While the appeals court recognized that "detailed factual allegations" were not required to survive a motion to dismiss, it explained that, nonetheless, there had to be something more than the conclusory language offered up by the plaintiff. It instructed that "at a minimum, the plaintiff must allege at least one workweek when he worked in excess of forty hours and was not paid [overtime or regular wages]." The employee argued that *Landers* was inapplicable because it addressed pleadings under the FLSA and not the California Labor Code, but the district court found the Ninth Circuit holding persuasive nonetheless. It noted, in fact, that the *Landers* decision has now been cited in several district court cases addressing Labor Code claims.

As for the complaint at hand, the court said it was "readily ascertainable" that the allegations were insufficient under *Landers*. The plaintiff included no relevant facts or dates during which the alleged wage violations occurred; rather, the pleadings state that "at all relevant times," the employer failed to comply with "a laundry list of regulations." The language of the complaint was almost identical to the "blanket statements" found lacking by the other district court rulings applying *Landers* to state-law claims. "Barren of facts" as to specific periods of time where pay was denied or the employer engaged in other specific unlawful practices, the complaint instead offered only conclusory language. As such, the pleadings fell within the scope of those deemed wanting in *Landers*, and they were insufficient to withstand the employer's motion to dismiss.

Regulatory roundup

A look at how the pleading standards apply when the EEOC is the plaintiff, agency wins at the Supreme Court and elsewhere, and major rulemaking developments:

"Unique enforcement role"

Although the EEOC is subject to the federal pleading rules, because of its statutory role in advancing the public interest (rather than as a private litigant) courts generally have allowed complaints with "class" allegations to move forward, both pre- and post-*Twombly* and *Iqbal*. For example, recognizing the "unique enforcement role" played by the EEOC, a federal district court in Illinois ruled on a motion for reconsideration that it should not have dismissed the EEOC's amended complaint alleging class claims that United Parcel Service violated the ADA by implementing an inflexible leave policy (*EEOC v. United Parcel Service, Inc.*, N.D. Ill., January 11, 2013). At issue was how much information the EEOC was required to provide about unidentified UPS employees on whose behalf the agency was suing—a hotly disputed question that lies at the heart of how the EEOC may litigate systemic discrimination class cases. The EEOC had not identified by name more than two of its class members in any of its complaints. However, in reversing itself, the court decided that the EEOC was not required to plead detailed factual allegations supporting the individual claims of every potential class member; the first amended complaint satisfied *Twombly* and *Iqbal* and their progeny because the factual allegations were sufficient to raise the possibility of relief above the "speculative level" for the unidentified class members.

Subsequently, the court denied UPS's request for interlocutory appeal, deciding that further litigation at the trial court level would speed up the proceedings. The court acknowledged that the move would entail discovery in an effort to present for early evaluation, and perhaps adjudication, some threshold issues that the parties had already touched on in their pleadings and in hearings. While UPS raised a valid concern regarding the expense and scope of discovery, the EEOC asserted that once UPS produced documents on the potential universe of claimants, the agency itself would undertake the lion's share of the legwork in determining which UPS employees might fall within the scope of this litigation.

In a similar vein, a federal district court in Wisconsin recently refused to dismiss an EEOC action to enforce its administrative subpoenas against an employer, holding that the agency could investigate a pattern or practice of discrimination even if the EEOC charges at issue alleged only individual discrimination. The EEOC serves not only the interests of individuals who file charges but also the public's interest, the court reasoned, and its investigatory powers are independent of any resolution between an employer and employee—including a judgment dismissing the charging parties' individual claims in a separate suit (*EEOC v. Union Pacific Railroad Co.*, E.D. Wis., May 1, 2015).

Notwithstanding this special standing afforded the EEOC by some courts, in some instances courts have played their gatekeeping role more assertively when scrutinizing vague EEOC allegations.

Notwithstanding this special standing afforded the EEOC by some courts, in some instances courts have played their gatekeeping role more assertively when scrutinizing vague EEOC allegations. In *EEOC v. Port Authority* (September 29, 2014), the Second Circuit affirmed a grant of judgment on the pleadings to the employer in an Equal Pay Act suit brought by nonsupervisory female attorneys, and the lower court's finding that the EEOC's selection of comparators were "frankly random" and ignored "extraordinary differences" between the attorneys. The EEOC's allegations that the employer paid female attorneys less than their male counterparts for substantially equal work, that they all had the same job code, and that the pay disparity could not be attributed to factors other than sex were plainly insufficient to support a claim under the EPA, the appeals court said.

It rejected the EEOC's contention that allegations regarding the attorneys' actual job duties were unnecessary because

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"all lawyers perform the same or similar function(s)" and that "most legal jobs involve the same 'skill.'" As the appeals court observed, "accepting such a sweeping generalization as adequate to state a claim under the EPA might permit lawsuits against any law firm—or, conceivably, any type of employer—that does not employ a lockstep pay model." While a discrimination complaint need not allege facts establishing each element of a prima facie case of discrimination to survive a motion to dismiss, it must at a minimum assert nonconclusory factual matter sufficient to "'nudge[] [its] claims' . . . 'across the line from conceivable to plausible'" to proceed. The EEOC failed to do so here.

Supreme Court victories

In other EEOC news, the Supreme Court handed the agency two major victories in recent months. First, in *Mach Mining, LLC v. EEOC* (April 29, 2015), the High Court unanimously ruled that the EEOC's statutory duty to conciliate a discrimination claim with an employer before filing suit is subject to judicial review. However, that scrutiny is quite limited. Thus, while the EEOC technically suffered a loss, the agency was quite pleased with the outcome. Consequently, claiming insufficient EEOC conciliation efforts will not be outcome determinative in the first instance. Instead, the court will just make the agency try again.

Without the requirement of such a showing, employers are left more vulnerable to classwide claims brought by the EEOC as well as private litigants.

In *EEOC v. Abercrombie & Fitch Stores, Inc.* (June 1, 2015), the Supreme Court reversed the Tenth Circuit's grant of summary judgment to Abercrombie & Fitch on the EEOC's claim that the company's refusal to hire a Muslim applicant because her headscarf conflicted with the store's "Look Policy" violated Title VII. The Court rejected the retailer's argument that a job applicant cannot show disparate treatment based on religion under Title VII without first showing that an employer has "actual knowledge" of the applicant's need for a religious accommodation. Rather, it held, an applicant need only show that her need for an accommodation was a motivating factor in the employer's decision not to hire her. Without the requirement of such a showing, employers are left more vulnerable to classwide claims brought by the EEOC as well as private litigants.

Deference due?

To what extent have courts deferred to the purported unique "special competence" of the federal regulatory agencies, and embraced their interpretations of federal law? It's been a decidedly mixed bag in recent months:

- In one of the most significant cases in decades for federal regulatory agencies, a unanimous Supreme Court in *Perez v. Mortgage Bankers Association* (March 9, 2015) was quite deferential to a Department of Labor "Administrator's Interpretation," which reversed the agency's prior stance on whether the FLSA's administrative exemption applied to mortgage loan officers. (A new-fangled creature of the Obama administration, Administrator's Interpretations replaced the traditional opinion letters that had long been issued by the Wage and Hour Division and which served as critical compliance guidance for employers asserting fact-specific questions to the agency.) The landmark administrative law decision came on the crest of a wave of class and collective-action wage suits brought by loan officers—whose exempt status has remained the wild-card variable in these lawsuits over the last decade. The High Court said the DOL's new issuance was a valid agency interpretation, notwithstanding the fact it was issued without undertaking notice-and-comment procedures, and thus rejected the Mortgage Bankers Association's challenge to the DOL's about-face under the Administrative Procedure Act. Concluding that the plain text of the APA does not require federal agencies to undertake notice-and-comment rulemaking when merely promulgating "interpretive rules" such as the DOL issuance in dispute here, the Court reversed the D.C. Circuit's grant of summary judgment in the industry trade group's favor. "Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule," the Court held.
- Weeks later, the Ninth Circuit cited the High Court's holding in deferring to the DOL's regulation defining the FLSA's auto dealership service advisor exemption. Parting

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ways with the Fourth and Fifth Circuits and granting *Chevron* deference to the DOL's regulatory definitions in the face of statutory ambiguity, the appeals court reversed a lower court's dismissal of the service advisors' overtime claims (*Navarro v. Encino Motorcars, LLC*, March 24, 2015). *Chevron* deference was due the DOL's regulatory interpretation, having been promulgated after notice-and-comment rulemaking, the appeals court said. Also, it noted that the DOL's "formal, regulatory position" on the scope of this exemption has been materially consistent going back to 1970. Yet even if a 2011 DOL rule on the subject *did* amount to a change of position on the agency's part as to the reach of the exemption, the DOL would still be entitled to *Chevron*-level deference, the Ninth Circuit said, based on *Perez v. Mortgage Bankers*.

- On the other hand, the EEOC was dealt a rebuke from the Supreme Court in March when the High Court scrapped the agency's July 2014 pregnancy discrimination guidance. The Court found the guidance had taken a stance on which prior EEOC guidelines were silent, and which was inconsistent with the government's previous litigation positions. Consequently, the EEOC had to go back to the drawing board, issuing an updated guidance in June. (The agency was careful to note that only a few pages of its guidance required revision pursuant to the High Court's holding, and that most of the substantive guidance was not impacted.)
- Most recently, the Second Circuit rejected the DOL's six-factor test for deciding whether individuals are "trainees" or statutory employees under the FLSA, reversing a district court's determination that the agency's "fact sheet" was the proper measure for deciding whether unpaid interns should be entitled to minimum wage and overtime. The DOL test amounted to a "distillation" of the key facts of a 1947 Supreme Court decision resolving the trainee question and, "[u]nlike an agency's interpretation of ambiguous statutory terms or its own regulations, 'an agency has no special competence or role in interpreting a judicial decision.'" Moreover, the appeals court said, the test was "too rigid" and, ultimately, unpersuasive (*Glatt v. Fox Searchlight Pictures, Inc.*, July 2, 2015).

Other agency developments

Department of Labor. On May 28, the DOL issued a proposed guidance to assist federal agencies in implementing President Obama's "Fair Pay and Safe Workplaces" executive order—commonly referred to as the "blacklisting" rule by the government contractors and business groups that adamantly oppose the measure. The EO will require companies with federal contracts valued at $500,000 or more to self-report every six months any violations of federal employment laws on their part or by their subcontractors, among other new burdens. Potential contractors will need to disclose labor law violations from the past three years before they can receive a contract. For companies that report violations, "Labor Compliance Advisors" will coordinate with the relevant enforcement agency experts to help them come into compliance. Failing that, companies could find themselves losing their federal contracts.

"The government apparently expects it will be easy for employers to report on any and all violations under the 14 major federal employment laws and their state law equivalents," notes Mickey Silberman, who leads Jackson Lewis' Affirmative Action Compliance & OFCCP Defense Practice Group. But "the information employers will be required to report on is not sitting in one place within an organization or its data systems. The administrative burden of collecting, reviewing, synthesizing, and reporting on this information will be daunting."

In addition, mandatory disclosure requirements will require companies to provide their workforce with documentation regarding their status as an employee or independent contractor, or as an exempt or nonexempt employee under the FLSA, along with detailed compensation information regarding their hours worked (including overtime hours), deductions from pay, and other compensation information.

The DOL on July 6 formally released its long-anticipated proposed rule to amend the FLSA's "white-collar" regulation, which defines the executive, administrative, professional, outside sales, and computer employee exemptions from overtime. The rule would more than double—from $23,660 to $50,440—the current floor below which the overtime exemptions would not apply. Although the DOL made no specific proposed changes to the "duties" test, the agency has requested comments on the current provisions, both as to whether it should implement a bright-line rule for what

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percentage of nonexempt work could be performed by exempt workers, and as to the particular substantive duties that should be considered part and parcel of an administrative, professional, or executive employee under the FLSA.

The agency's misguided effort, if implemented as proposed, will be a case study in unintended consequences. "Millions of workers will suffer a dramatic and permanent reduction in their pay during the first year or two after the regulations go into effect," Paul DeCamp predicts. "This is because employers will reduce worker schedules and spread work around to other employees in order to avoid paying very high hourly rates for overtime work."

Also, on July 15, the DOL issued an Administrator's Interpretation on the misclassification of employees as independent contractors, taking the position that most workers are employees under the FLSA. The document focuses on the economic realities test used by the DOL in light of the FLSA's definition of "employment" as "to suffer or permit to work." (We'll delve deeper into the critical issue of employee vs. independent contractor status, and the continuing rise in class action misclassification suits, in a forthcoming issue of the *Class Action Trends Report*.)

National Labor Relations Board. Settled that class action lawsuit? That doesn't necessarily mean you've brushed aside pending unfair labor practice charges arising from the underlying dispute. The NLRB refused to let a charging party withdraw pending unfair labor practice charges after settling a wage dispute with an employer that it had also accused of violating the National Labor Relations Act by requiring employees to agree to individually arbitrate any employment-related claims. The Board said that withdrawing the pending charge would not effectuate the purpose of the Act (*Flyte Tyme Worldwide*, March 30, 2015).

Relying on the NLRB's decision in *D.R. Horton, Inc.*—a ruling that has been almost universally rejected by every federal court to consider it—an administrative law judge found that an employer violated Sec. 8(a)(1) of the Act by maintaining an arbitration agreement that required employees to individually arbitrate all employment-related claims or disputes, and to waive their right to maintain collective and class actions in all forums. (The Board's position is that such agreements impair employees' right to engage in collective action.) The ALJ also found the employer separately violated Sec. 8(a)(1) by filing a motion to dismiss the class action wage suit and to compel arbitration pursuant to that agreement.

After the parties reached a settlement resolving the wage suit, the charging party filed a motion to withdraw the pending charge, but the Board refused. Noting that its power to prevent unfair labor practices is exclusive, "and that its function is to be performed in the public interest and not in vindication of private rights," the Board said that it alone "is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned." Using that discretion, the Board declined to cede to a settlement that left the mandatory class action waiver intact. ■

Heightened pleading for the EEOC?

While the heightened pleading requirements ushered in by *Iqbal/Twombly* have facilitated the prompt resolution of meritless employment law claims, they ultimately have not been as helpful in resolving class litigation brought by the EEOC. In fact, in massive cases brought against national employers like Bass Pro Shop and United Parcel Service, the defendants obtained *Iqbal* dismissals, only to have the respective district court judges reverse themselves on motions for reconsideration and, after mere tweaks to the complaint by the EEOC, allow the claims to proceed.

Teamsters or McDonnell Douglas?

A key question regarding pleading standards as applied to the EEOC is whether the agency may rely on the *Franks/Teamsters* model of representative proof, which historically has been applied to claims brought under Title VII, Section 707, when pursuing claims under Section 706 of the statute, which allows for compensatory and punitive damages—and whether the agency must specifically plead as such. Claims brought under Section 706 typically call for the *McDonnell*

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Douglas burden-shifting paradigm; the *Teamsters* approach, however, shifts the burden to the employer to rebut liability for individual claims once evidence of a pattern or practice of discrimination is produced.

In 2012, the Sixth Circuit held the EEOC may pursue pattern-or-practice claims under Section 706 and need not specifically plead as such, reversing a judgment in an employer's favor in a suit alleging gender bias in the company's hiring practices. The district court had ruled that the EEOC failed to state a pattern-or-practice claim because the agency brought suit pursuant to Section 706, not Section 707. In addition to concluding that the EEOC cannot pursue a claim under the *Teamsters* pattern-or-practice framework when it acts pursuant to Section 706, the lower court held the EEOC erred in never pleading its intent to rely on the *Teamsters* framework and that, "[o]n these procedural facts alone," the defendant was entitled to judgment on the pleadings. But the Sixth Circuit rejected this reasoning and vacated the judgment.

The appeals court provided an overview of where the *Teamsters* framework fits, relative to *McDonnell Douglas*, into the legal landscape of Title VII claims: The two structures are similar insofar as they impose the initial burden on the plaintiff to present facts sufficient to create an inference of discrimination, the court explained. However, the substance of what the plaintiff must prove in establishing a prima facie case varies under each framework. While Section 706 does not contain the same explicit authorization as does Section 707 for suits under a pattern-or-practice theory, relevant Supreme Court precedent suggests that the exclusion of pattern-or-practice language from Section 706 "does not mean that the EEOC may utilize a pattern-or-practice theory only when bringing suit under Section 707." Instead, it suggests that the inclusion of the language in Section 707 "simply means that the scope of the EEOC's authority to bring suit is more limited when it acts pursuant to Section 707."

McDonnell Douglas did not create "an inflexible formulation" for burden shifting, but rather embodied the "general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act," the Supreme Court explained in its *Teamsters* ruling. A plaintiff has flexibility in how she meets that initial burden, and variance based on the facts of the case is expected.

Importantly, the appeals court also rejected the district court's conclusion that the EEOC had to specifically plead in its complaint that it intended to prove its Title VII claim pursuant to the *Teamsters* framework. That holding was contrary to Supreme Court precedent—specifically, its decision in *Swierkiewicz v. Sorema N.A.*, in which the High Court explained that *McDonnell Douglas* is "an evidentiary standard, not a pleading requirement." The appeals court said that, given that the precise requirements of a prima facie case can vary depending on the context, and the appropriate type of prima facie case may not be evident until discovery is conducted, it would be improper to impose "a rigid pleading standard for discrimination cases." Rather, a complaint satisfies pleading requirements (even post-*Twombly*) as long as it provides an adequate factual basis for a Title VII discrimination claim.

Consequently, the EEOC is not required to plead whether it intends to employ *McDonnell Douglas* or *Teamsters*. In fact, to so require "would be akin to requiring a plaintiff to plead the theory of the case in the complaint, a requirement which has been rejected unequivocally even outside of the Title VII context," the appeals court concluded. The Supreme Court denied the employer's petition for certiorari in the case.

On deck at Fifth Circuit. Similarly, a federal district court in Texas held the EEOC could support racial bias claims using the *Teamsters* framework under Section 707 to prove liability for claims brought on behalf of individuals under Section 706 (*EEOC v. Bass Pro Outdoor World LLC*, S.D. Tex., July 30, 2014). Recognizing, though, that the legal questions on the applicability of this model to Section 706 claims were "close," the district court indicated that it would favor interlocutory appeal. That case is now pending before the Fifth Circuit.

Other class action developments

Important developments in class litigation since our last issue:

Wage-hour suits

Denying an employee's motion under Rule 72(a) to set aside a magistrate judge's decision to deny conditional certification of a collective action alleging national retailer T.J. Maxx failed to pay him overtime wages, a federal court held the employee's modest showing that the named plaintiff and potential opt-in plaintiffs were similarly situated could not be satisfied by unsupported assertions (*Ahmed v. T.J. Maxx Corp*., E.D.N.Y., May 11, 2015).

Although the employees alleged their job duties were uniform across stores, the record evidence demonstrated differences based on the type of store, location, hours, and clientele.

Wal-Mart asset protection coordinators who alleged they were misclassified as exempt could not pursue their claims as a class, a federal court in California ruled, because individual issues predominated. Although the employees alleged their job duties were uniform across stores, the record evidence demonstrated differences based on the type of store, location, hours, and clientele. Therefore, the employees' renewed motion for class certification was denied (*Zackaria v. Wal-Mart Stores, Inc*., C.D. Cal., May 18, 2015).

Certified nursing assistants and housekeepers found their Rule 23 class decertified after a court concluded individualized inquiries were needed to discern whether the communication devices that they had to carry during unpaid meal periods constituted "work" under Wisconsin administrative rules, and whether the employees were free to leave the premises during their meal periods (*Aguilera v. Waukesha Memorial Hospital, Inc*., E.D. Wis., June 18, 2015).

Hybrid actions. Wal-Mart was unable to dismiss a class overtime claim under the Pennsylvania Minimum Wage Act. The plaintiffs presented enough detailed personal experiences about what they saw, heard, and did; how Wal-Mart assigned duties to assistant managers; and how they were paid that a permissible inference could be drawn that those practices extended across Wal-Mart's stores throughout the state. In a separate but related FLSA-only collective action to which the plaintiffs in this case had already opted in, the court granted their motion to amend the complaint to make a hybrid FLSA/state-law class action, but it denied their motion to consolidate the two cases, at least until the pleadings were closed out (*Swank v. Wal-Mart Stores, Inc*., W.D. Pa., March 31, 2015).

A federal court refused to certify a Rule 23 class in a wage suit brought by service technicians at a Chicago Comcast facility. Finding the plaintiffs could not satisfy numerosity or commonality requirements, the court delved no further into the remaining Rule 23 factors. And, because the Seventh Circuit has instructed district courts to apply Rule 23 standards to both claims when plaintiffs seek to bring a collective and class action in the same case, the court granted Comcast's motion to decertify their conditionally certified FLSA collective action too. With the plaintiffs having failed to satisfy Rule 23 requirements, the court said it must likewise conclude they would be unable to show sufficient similarity with opt-in plaintiffs to allow the matter to proceed to trial on a collective basis, either (*Elder v. Comcast Corp.*, N.D. Ill., June 1, 2015).

Employees? Reversing summary judgment in favor of FedEx by a federal court in Indiana presiding over multidistrict litigation launched more than a decade ago and encompassing claims filed in 40 states, the Eleventh Circuit found that a dispute over whether the courier's drivers are employees or independent contractors under Florida law was a matter for the jury. The MDL court ruled that the Florida drivers were independent contractors because, under the operating agreement and standard practices and procedures, FedEx did not have the right to control the manner, method, and means by which the drivers did their jobs. However, while the agreement specified that the drivers were independent contractors, the appeals court found this conclusory language was not determinative, given that other contract provisions and

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procedures gave FedEx control over delivery procedures, uniforms, and truck specifications, and other work conditions (*Carlson v. FedEx Ground Package Systems, Inc.*, May 28, 2015).

Weeks later, under a deal in principle recently disclosed in its SEC Form 8-K, FedEx Ground said it will pay $228 million to resolve the unpaid wage claims of an estimated 2,000 FedEx Ground and FedEx Home Delivery pickup and delivery drivers in California and Oregon. Reversing the MDL court's holding, the Ninth Circuit last August held the drivers were misclassified as independent contractors, rather than employees, under the laws of both states. The decision "substantially unravel[ed] FedEx's business model," according to a concurring opinion. As a result, the company faced a payout to the drivers for the costs of FedEx-branded trucks and uniforms, FedEx scanners, pay for missed meal and rest periods, overtime compensation, and penalties (*Slayman v. FedEx Ground Package System, Inc.*).

In a case that had volleyed between state and federal court—removed under the Class Action Fairness Act, remanded, then removed once again—a federal court decertified a class of more than 1,000 insurance sales agents who asserted that they were statutory employees, not independent contractors, and thus entitled to $16.9 million in unpaid overtime under the Washington Minimum Wage Act. The court said it would require individualized inquiries to discern the nature of the relationship between each agent and the insurance company under Washington law (*David v. Bankers Life and Casualty Co.*, W.D. Wash., June 30, 2015).

Discrimination claims

A putative class of police officers who complained that a change in promotion practices impacted older officers and who, for the *third* time, sought certification of an age discrimination class under the California Fair Employment and Housing Act, was denied certification once again. Although the 133-person class met Rule 23(a) requirements, the employees failed to show predominance and superiority. The majority of prospective class members were not entitled to damages, and the smaller, "fallback" class consisted of 55 individuals who would only "eventually" have received a promotion, indicating the need for individual inquiries into qualifications (*Stockwell v. City and County of San Francisco*, N.D. Cal., May 8, 2015).

A federal court in Illinois certified a Title VII class action in a suit brought by a teachers' union and three individual plaintiffs who alleged that the Chicago Public Schools carried out a large-scale series of layoffs targeting schools that were disproportionately located in African-American neighborhoods, thus having a predictably disparate impact on African-American teachers and staff (*Chicago Teachers Union, Local 1, American Federation of Teachers v. Board of Education of the City of Chicago*, N.D. Ill., May 22, 2015).

Taking the position held by a majority of courts, a federal district court in Indiana agreed that the EEOC was not required to establish that job applicants subjected to pre-employment medical examinations and questions were otherwise qualified for the position in order to state a claim under the ADA. Contending that the employer engaged in a pattern or practice of discrimination with its pre-hire inquiries and examinations, the EEOC brought suit on behalf of two groups of job applicants—one group comprised of initially unsuccessful applicants, and another group who made it through an initial cut but were refused employment after they did not pass the employer's physical exam administered during a pre-hire driver orientation period. The court rejected the employer's assertion that the class members did not suffer an injury in fact. While it is true that tangible harm is required for an individual plaintiff to recover damages on such a claim, the EEOC is differently situated, the court said, and suffers an injury that is "sufficient to give rise to Article III standing when a violation of Section 102 of the ADA occurs." (*EEOC v. Celadon Trucking Services, Inc.*, S.D. Ind., June 30, 2015).

Procedural matters

In three separate class actions in Missouri, New Jersey, and Texas alleging that Michaels Stores violated the Fair Credit Reporting Act (FCRA) by failing to properly notify online job applicants that background checks would be performed, a judicial panel on multidistrict litigation concluded that, for purposes of pretrial proceedings, the suits involved common questions of fact and that centralized litigation would promote the interests of the

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parties and promote just and efficient conduct of the litigation (*In re Michaels Stores, Inc*., J.P.M.L., April 2, 2015).

In an ongoing class action wage suit brought by Gawker Media interns, a federal district court in New York granted the plaintiffs' renewed (revised) bid for court approval of a plan to disseminate notice to potential opt-in plaintiffs via social media. A month earlier, the court had rejected the plaintiffs' initial notice plan, finding it overbroad and concluding that it seemed bent on publicizing Gawker's alleged wage infractions rather than targeting prospective opt-ins to the suit. Satisfied that the plaintiffs cured these issues on their second try, the court approved notice to be disseminated pursuant to the revised plan. However, agreeing with the defendant, the court told the plaintiffs they may not "friend" potential opt-ins on Facebook, and they must "unfollow" from Twitter those individuals who don't join the action before the opt-in period closes (*Mark v. Gawker Media LLC*, S.D.N.Y., April 10, 2015).

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Even though a "master franchisor" was not a signatory to the franchise agreement between franchisee janitors and a regional subfranchisor, it could enforce a mandatory arbitration clause contained within that agreement to compel the janitors to individually arbitrate their class wage claims against the master company. After holding that a mandatory class waiver did not render the agreement unconscionable, the Massachusetts high court concluded that, under the circumstances, equitable estoppel principles allowed the nonsignatory master franchisor to compel arbitration. The franchisees essentially had lumped the defendants together and alleged that the master franchisor was effectively their real employer—the creator of the franchise agreements, the beneficiary of their purported misclassification as "franchisees" rather than employees, and the violator of the agreement's terms. These claims were inextricably intertwined with, and related directly to, the franchise agreements containing the arbitration provision (*Machado v. System4 LLC*, Mass. S. J. Ct., April 13, 2015).

Resolving some remaining pretrial disputes in a long-running class action brought by the EEOC alleging a pattern or practice of failing to hire female sales reps, a federal district court in Michigan reopened fact discovery for a year, allowed for additional expert discovery, ordered that the defendant's CEO could be deposed for up to four hours with no court-ordered limitation on the lines of inquiry, ruled that equitable relief could be sought any time after Phase I of the bifurcated trial should the EEOC prevail on liability, and took a "blended" approach on the issue of punitive damages, finding that *availability* of punitive damages would be determined in Phase I and *amount* in Phase II.

Texas and New Jersey employees who sought to pursue class claims against JP Morgan Chase under the FLSA and state law were sent packing for California by a federal district court in New York, which granted the employer's motion to transfer the suit pursuant to the first-filed rule. The fact that the claimants filed suit in a jurisdiction other than the one in which they lived worked to their detriment (*Henry v. JP Morgan Chase & Co*., S.D.N.Y., May 11, 2015).

A federal magistrate denied a joint motion by parties to a FLSA lawsuit to either seal their settlement agreement or redact the settlement amount before filing. Although the parties argued that the confidentiality provision was a material term and that disclosing the settlement amount would unfairly disadvantage the employer in future FLSA suits, the court found no compelling reason to grant the motion, noting that such "conclusory" assertions had been rejected by other courts (*Smith v. Golden Gate LLC*, E.D. Cal., May 13, 2015).

Putative class members in the landmark *Wal-Mart v. Dukes* case involving allegations of systemic sex discrimination by the retailer were entitled to seek

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certification of a regional-only Rule 23(b)(3) class limited geographically to stores in several states, the Sixth Circuit held. After the Supreme Court issued its *Dukes* decision, a federal district court in California, on remand, issued an order granting individual plaintiffs time to file EEOC charges. The plaintiffs here timely complied and then filed suit in a district court in Tennessee. Reversing the district court, the appeals court held the action was timely under *American Pipe* tolling, rejecting Wal-Mart's argument that a bright-line rule barred such tolling for any purported class action brought after a previous denial of class certification, and noting that no court had ruled on whether certification of the Rule 23(b)(3) class was appropriate. The plaintiffs also would be allowed to pursue certification of a Rule 23(b)(2) putative class seeking declaratory and injunctive relief (*Phipps v. Wal-Mart Stores, Inc.,* July 7, 2015).

Settlements

A proposed $7.8 million deal would resolve class litigation against Chinese Daily News—a ten-year battle that included two motions for class certification, cross-motions for summary judgment, a jury trial, a bench trial, a motion for decertification, several appeals, and even a stop at the Supreme Court. The underlying suit involved claims brought by reporters who challenged their exempt "creative professional" status under the FLSA and salespersons who asserted they did not satisfy the "outside sales" exemption, among other contentions. (*Wang v. Chinese Daily News*, C.D. Cal., motion for preliminary approval filed May 12, 2015).

Granting preliminary approval to a $7.2 million agreement to settle a wage-hour class and collective action against Viacom Inc., Viacom International, and Black Entertainment Television asserted on behalf of interns who were either purportedly unpaid or paid less than minimum wage, in violation of federal and state law, a federal district court in New York found that the proposed settlement fell within the range of reasonableness and therefore met the requirements for preliminary approval, such that notice to the class was appropriate (*Ojeda v. Viacom Inc.*, S.D.N.Y., May 28, 2015).

Warner Music Group and Atlantic Recording have agreed to pay up to $4.2 million to end consolidated class and collective actions asserting that they owed former student interns unpaid wages and overtime under the FLSA and New York law. While the number of potential class members is unclear, one of the consolidated suits initially alleged there were about 3,000 potential members; the other put the number at about 2,800. That estimate may have dwindled for several reasons; however, the companies have retained the right to terminate the stipulated settlement agreement if the number of participating claims exceeds 1,135. Under the agreement, the companies would pay $4.2 million to establish a gross settlement fund. Participating claimants would receive $750 for each traditional academic semester in which they interned with the defendants. However, no claimant would be compensated for more than two traditional academic semesters, no matter how many academic semesters in which he or she served as an intern (*Grant v. Warner Music Group Corp*., S.D.N.Y., motion filed June 9, 2015).

United Airlines agreed to pay more than $1 million to resolve the EEOC's challenge to the airline's transfer policy, which required employees who sought transfer as an ADA reasonable accommodation to compete for vacant positions. The EEOC asserted that by requiring workers with disabilities to compete for vacant positions for which they were qualified, and which they needed in order to continue working, the airline prevented employees with disabilities from continuing employment with the company. The litigation garnered national attention in a lengthy and complicated battle that began in a federal district court in California, moved to a federal court in Illinois, and made its way to the Seventh Circuit (*EEOC v. United Airlines*, N.D. Ill., consent decree approved June 11, 2015).

Deals rejected. Dashing the litigants' hopes of resolving several wage suits brought by Merrill Lynch financial advisors in one fell swoop, a federal court in California denied a joint motion to approve a $5 million settlement. Concluding that the named plaintiff failed to present sufficient evidence that the entire proposed class had been misclassified as exempt, and that the central issues were not common to all class members, the

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court had previously denied his motion for class and collective certification and struck all class, collective, and representative allegations. Nonetheless, the parties jointly filed a motion for preliminary approval, for settlement purposes, of a narrower class. The parties asked the court to certify both a federal collective class of financial advisors employed throughout the country, and a California class of employees.

Also before the court was a motion to intervene filed by plaintiffs who were litigating two other class actions against Merrill Lynch (one in New York, another also in California). Now, the proposed settlement agreement blocked the plaintiffs in one of those cases from pursuing their claims, while also releasing the claims in the other case. As the court saw it, the company was hoping to take advantage of the plaintiff's "compromised position" to negotiate a "sweeping" agreement settling not just the case at hand, but the two other suits brought by the would-be intervenors. This didn't sit well with the court, having quashed the plaintiff's initial bid for certification and leaving him in a weakened negotiating stance. He certainly was in no position to resolve plaintiffs' claims in other ongoing cases against the employer, the court found (*Litty v. Merrill Lynch & Co., Inc.,* C.D. Cal., April 27, 2015).

A federal court in New York refused to sign off on a proposed settlement agreement in an FLSA collective action against Lowe's Home Center stores. There was a significant discrepancy among the class members—human resource managers—as to the degree of discretion and judgment they exercised. Because the parties failed to demonstrate that the job duties of the HR position were uniform throughout all the stores, the plaintiffs failed to show the class members were similarly situated. The proposed class also included employees whose FLSA claims were time-barred. The settlement was not fair and reasonable because Lowe's could opt out while those HR managers who opted in would be obligated to remain even if the settlement did not materialize (*Augustyniak v. Lowe's Home Center, LLC*, W.D.N.Y., May 1, 2015.).

Finding that the size of an incentive award to the lead plaintiff, at 37 times the net average award to unnamed class members (and over 7 percent of the total settlement fund), rendered his representation of the class inadequate, a federal court refused to grant preliminary approval to a proposed class action settlement. This was "grossly disproportionate," said the court, citing empirical research showing incentive awards constitute on average 0.16 percent of the class recovery, with a median of 0.02 percent, and that incentive awards at or near just 1 percent of the common fund should be scrutinized intensely and "require exceptional justification." (*Chavez v. Lumber Liquidators, Inc*., N.D. Cal., May 8, 2015). ■

Another Jackson Lewis resource!

Employment Class and Collective Action Blog

Jackson Lewis' Employment Class and Collective Action Blog provides analysis and commentary on the latest changes, developments and trends in class action law. You can access it through our website or directly at **www.employmentclassactionupdate.com/**.

The breadth of knowledge and practical experience of attorneys in Jackson Lewis' Class Actions and Complex Litigation practice allows us to keep our "finger on the pulse" in this rapidly evolving area of law. The blog is a new forum for our attorneys to share their insights with you.

To subscribe to the blog, **click here** and enter your email address. If you would like additional information about our Class Actions and Complex Litigation Practice Group or our class action blog, please contact William Anthony at AnthonyW@jacksonlewis.com.

On the radar

A few of the important pending developments that we're tracking:

Litigation

Teed up for the Supreme Court's 2015-2016 docket are three cases of critical importance to class and collective action litigation:

- In *Campbell-Ewald Co. v. Gomez*, the Supreme Court will consider whether an unaccepted Rule 68 offer of judgment which offers a judgment in favor of only the named plaintiff, served prior to a motion for class certification, moots a named plaintiff's individual claim as well as those claims asserted on behalf of a putative class. Below, the Ninth Circuit held that the plaintiff's individual and class claims were not rendered moot by his rejection of an offer of settlement tendered before he moved for class certification. According to the petition for certiorari, that ruling "contravenes basic Article III principles [and] directly conflicts with the decisions of other circuits." While not an employment case (it involves claims under the Telephone Consumer Protection Act), it nonetheless implicates an employer's ability to head off both individual and class claims by making an offer of full relief to the named plaintiff only prior to a request for Rule 23 class certification. The decision could impact early litigation strategies in class actions and, in particular, the offer of judgment and accompanying motion to dismiss for mootness at the start of the case.
- The Court granted review of an Eighth Circuit decision, *Tyson Foods, Inc. v. Bouaphakeo*, rejecting the company's bid to overturn an order certifying an FLSA collective action and a Rule 23 class action in a "donning and doffing" suit brought by hourly production workers at a pork processing plant. According to Tyson, the appeals court condoned "seriously flawed procedures" used by the district court in certifying FLSA collective and Rule 23(b)(3) class actions. Tyson argues that the court certified the classes based on the existence of common questions about whether the donning and doffing activities were compensable "work," even though there were "differences in the amount of time individual employees actually spent on these activities" and "hundreds of employees worked no overtime at all." Tyson also contends that the court allowed the plaintiffs to prove liability and damages with "common" statistical evidence that "erroneously presumed all class members are identical to a fictional employee[,]" and in doing so, the court ran afoul of the Supreme Court's holdings in *Wal-Mart Stores, Inc. v. Dukes* and *Comcast v. Behrend*.
- Does an individual plaintiff have standing to sue a consumer reporting agency for a "knowing violation" of the FCRA, even if the individual may not have suffered any actual injury? The Supreme Court agreed to consider that question in *Spokeo, Inc. v. Robins*. Spokeo operates a "people search engine" website that offers users personal information about individuals. The plaintiff claimed that the website included inaccurate information about him, which was interfering with his ability to get a job and causing him emotional distress, and that Spokeo knew the information was inaccurate. A federal district court dismissed the complaint, concluding the plaintiff had not alleged any actual or imminent harm resulting from the inaccurate information but merely raised the possibility of an injury in the future—which was insufficient for federal court jurisdiction. The Ninth Circuit reversed, holding that standing could be based on the alleged violation of a right created by the FCRA and that an actual injury need not be shown. An individual's standing to sue companies for statutory violations involving no actual damages is critical for assessing potential liability, especially in the context of class action lawsuits. The decision may allow potential class members who otherwise would be excluded from the class for failing to assert actual damages to be included as plaintiffs.

Other pending cases of note:

- In *EEOC v. Sterling Jewelers*, the Second Circuit will consider whether to revise the EEOC's nationwide pattern-or-practice discrimination suit against the national jewelry retailer. The EEOC contended that the retail chain paid its female salespersons less than males in similar positions and discriminatorily denied females promotions. After concluding that the EEOC failed to carry out a nationwide investigation before bringing claims on a nationwide basis, a federal district court in New York dismissed the suit with prejudice. The EEOC's investigator did not recall investigating any stores except two, and the only

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nationwide data specifically identified by the EEOC was the statistical analysis provided by the charging parties' expert. Having invoked privilege in response to Sterling's inquiries in discovery, though, the EEOC was not allowed to rely on that analysis or argue that it took any steps to verify its reliability. Emboldened by the Supreme Court's April decision in *Mach Mining v. EEOC*, which held that courts have only limited judicial review of the EEOC's pre-suit conciliation efforts, the EEOC is asserting here that its pre-suit investigation efforts are similarly immune from close scrutiny by the courts.

- Pending in the Fifth Circuit is a petition for review of a NLRB decision finding Murphy Oil USA Inc. unlawfully enforced a mandatory arbitration agreement that prohibits employees from resolving employment disputes through class or collective actions. A divided five-member Board panel held the employer violated the NLRA by requiring its employees to agree to resolve all employment-related claims through individual arbitration and by taking steps to enforce the unlawful agreements in federal district court when an employee and three coworkers filed a collective FLSA claim against the company. The ruling disregards the Fifth Circuit's 2013 holding in *D.R. Horton v. NLRB* expressly invalidating the Board's stance on the issue. Consequently, the employer also has asked the appeals court to impose sanctions on the Board in light of its disregard for the court's earlier decision.

Legislation

The House Judiciary Committee has approved the Fairness in Class Action Litigation Act of 2015 (H.R. 1927) by a vote of 15-10. The bill would rein in class action lawsuits by shoring up Rule 23's typicality requirement to mandate that class action claimants demonstrate that the proposed class consists of members "with the same type and scope of injury." The proposed legislation simply provides that "No Federal court shall certify any proposed class unless the party seeking to maintain a class action affirmatively demonstrates through admissible evidentiary proof that each proposed class member suffered an injury of the same type and extent as the injury of the named class representative or representatives." Bill sponsors say the measure is consistent with the original goals of the Class Action Fairness Act as passed in 2005, and that it "furthers a common sense principle that should apply to class action lawsuits in the future: Only those people who share injuries of the same type and extent should be part of a class action lawsuit." The potential impact of this legislation on class litigation, especially in reducing overly broad class actions, is significant. ■

Up next...

In our next issue of the Jackson Lewis *Class Action Trends Report*, we'll look at other considerations that go into mapping out the initial defense strategy. Should you remove a class action to federal court? How does a defendant go about evaluating the strengths of the plaintiff's claim and challenging the cohesiveness of the proposed class? Are there other potential landmines lurking that could come to light during discovery? How do you begin to assess potential exposure? Is it time to reconsider an employment practice at the source of the underlying claims? Litigation holds ... communications with potential class members ... Rule 68 offers of judgment ... These and other precertification issues will be the subject of the next Jackson Lewis *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!

Tuesday, October 27
Seminole Hard Rock Hotel & Casino
Hollywood, FL

Wednesday, November 11
The University Club
Chicago, IL