

■ Employment Law Briefings

2004-2005

The Coming Storm? Wal-Mart, Morgan Stanley and the Wave of Big Employment Class Actions: Five Things You Can Do to Protect Your Company

Lynnwood, WA: November 10, 2004
Tacoma, WA: November 11, 2004
Seattle, WA: November 17, 2004
Bellevue, WA: November 18, 2004

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Seattle, Washington

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of Big Employment Class Actions:
Five Things You Can Do to Protect Your Company

by

James Sanders

I. INTRODUCTION

Make no mistake, employment class actions are on the rise. Wal-Mart, Costco, Coca Cola and Morgan Stanley are just a few of the major companies that have found themselves the targets of well-publicized employment class action lawsuits. The bad news is these headline grabbing lawsuits are only the tip of the iceberg.

A better overview can be found in places like BigClassAction.com, a popular internet site, which seeks to serve as a clearinghouse for class actions of all kinds. The site lists not only pending class actions, but also solicits potential class members for both specific lawsuits and for more general complaints.

What does BigClassAction.com tell us about the current state of employment class actions? First, there are a lot of them. The site currently lists approximately 180 current or proposed employment class actions. The roster reads like a Who's Who of American business. Traditional Fortune 500 companies like Coca Cola, Kodak, Xerox, Exxon-Mobile, Goodyear Tire & Rubber, and FedEx are among the listed targets. So are financial services companies like AON Insurance, PriceWaterhouse, Conseco Finance and CapitalOne. It includes retail companies like Costco, Ralph Lauren, Abercrombie & Fitch, Blockbuster Video, Radio Shack, and Home Depot. Technology companies, like Sun Microsystems and JDS Uniphase make the list, as do government employers, like the United States Postal Service, the Federal Aviation Administration and even our own Thurston County.

Wal-Mart? It makes the list six times.

What kinds of claims are involved in these types of lawsuits? Pay claims lead the list, with overtime complaints and other wage claims making up more than a third of the total. Discrimination suits account for about 25% of the total, with ERISA and employee benefit claims just behind. The balance runs the gamut of employment claims, including retaliation and whistleblower theories, as well as alleged FMLA and WARN Act violations. In one case, Ralph Lauren was reportedly sued for requiring its employees to purchase and wear Ralph Lauren clothing.

How big can the numbers get? One of the Wal-Mart class actions could include as many as 1.6 million current and former women employees. Some experts estimate that, if plaintiffs can prove their allegations, damages could exceed a billion dollars.

A. What are These Companies Doing Wrong?

In many cases, the targets of these suits have done nothing wrong. Here in Washington, for example, The Boeing Company was accused of national origin discrimination by a class consisting of employees claiming national origins from seven different countries in Asia. Rather than concede to plaintiffs' settlement demands, Boeing chose to defend the case at trial and it prevailed.

However, because of the enormous stakes, the uncertainty of jury verdicts, and the high legal costs required to defend these claims, very few employers have been willing to take these cases to trial. Plaintiff class action lawyers know this and they realize that even weak class claims can result in large settlements—as well as hefty attorney fees for the lawyers that bring them.

B. How Can You Tell You're About to Make the List?

There are a number of signs you look for that can indicate your company may be targeted for a future class action lawsuit. For example, charges filed with the Equal Employment Opportunity Commission or State Human Rights Commissions can provide early clues. Look for charges that raise the same or similar allegations or that use similar language, especially phrases such as "pattern and practice." That may indicate that seemingly individual charges are in fact part of an organized effort orchestrated by a class action law firm. Second, if the person filing the charge has an attorney at that stage, find out who the attorney is. Is the attorney known around town as a class action lawyer?

Disgruntled employees can also provide advance clues of a pending class action. Are you noticing a greater than usual number of complaints, and do they suggest a common pattern? Many web-sites now host message boards where employees can air complaints. Many of these are open forums and are accessible to employers. Taking a look every now and then may provide early warning.

II. CLASS ACTION: NUTS AND BOLTS

A. Why Do We Have Class Actions?

While it may not seem that way to most employers, or to those familiar with the exorbitant fees demanded and often received by class action counsel, the class action mechanism has its benefits.

- First, a class action can improve judicial economy by grouping lots of little lawsuits into one big lawsuit.
- Second, the class action mechanism can make it possible to redress a little injury through the legal process. Many otherwise legitimate claims are not economically viable on a stand alone basis—usually because the legal costs of pursuing the claim are greater than the expected recovery. For this reason, class actions can serve as a method of protecting the rights of litigants who would not bring valid claims because of prohibitive legal costs.
- Third, class actions can also protect defendants, who may want questions of liability and damages determined in one proceeding, rather than many.

B. Class Actions Are Common In Many Types Of Litigation

While the class action mechanism can be used for just about any type of lawsuit, it is most commonly seen in these types of cases:

- Mass tort lawsuits;
- Toxic exposure lawsuits, such as in the book "A Civil Action" or the movie, "Erin Brockovich;"
- Consumer rights litigation;
- Securities fraud;
- Antitrust;
- Employment discrimination
- Wage and hour laws.
- ERISA and employee benefits issues.

C. The Law: Rule 23

Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") and its state law analogs govern the procedure for civil class actions. Parts (a) and (b) of the rule, set forth the basic prerequisites.

1. Rule 23. Class Actions

a. Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if:

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

b. Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of
 - (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
 - (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; *or*
- (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; *or*
- (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B)

the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

D. Specific Requirements of Rule 23(a).

1. Numerosity

Numerosity is a threshold issue. The class must be so numerous that joinder of all members in as individual plaintiffs would be impracticable. There is no "magic number." Rather, the court tries to determine whether joinder is impractical. Thus, whether a class meets the numerosity requirement ultimately rests on the facts of the case. As a practical matter, classes containing 40 or more members are usually found to be so large that joinder is impractical, while those containing fewer than 25 generally are not. The size of the claim also influences the impracticality of joinder because the size of the claim affects whether individuals will be sufficiently motivated to file their own damages.

2. Commonality

The issue of commonality arises in two different circumstances, with a different standard for each. First, at least one common question of fact or law is necessary as one of the four prerequisites under Rule 23(a). Second, if the plaintiffs seek certification under Rule 23(b)(3) they must also show that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"

3. Typicality

Courts have a tendency to merge typicality and commonality into a single analysis. Nonetheless, courts will usually try to give each requirement a content. Some courts have adopted a test that emphasizes only that the claims are typical; others focus on both the claims and the interests of the class representatives and members. Despite the differing emphasis of the tests, courts agree that the facts and the claims do not have to be identical.

If the named plaintiff is subject to a unique defense that threatens to be the focal point of the litigation, typicality may be destroyed.

4. Adequacy of Representation

Both the class representative and the class counsel are subject to an adequacy analysis.

a. Adequacy of Class Representative

In determining whether the class representative is adequate, the courts most typically look at items such as:

- Whether the representative is willing to vigorously prosecute the class interest at every stage of the proceeding;
- Whether the class representative is generally knowledgeable about the case.
- Whether the class representative is honest and credible. However, for lack of honesty or credibility to defeat certification, the deficiency must be obvious and clear.

Other points:

- The class representative should not be related to class counsel since such a relationship creates the appearance of impropriety.
- Some courts have examined the financial ability of the class representatives to pursue the litigation.
- Pro se class representation is normally not permitted.
- Conflict or antagonism within the class is an effective way to challenge the adequacy of representation. However, in order for this approach to succeed, the conflict must be more than merely theoretical or speculative.
- Personality conflicts normally will not defeat the adequacy of class representation. However, a number of courts have noted that an unduly antagonistic litigant, or one who bears a grudge against the defendant, is an inappropriate representative.
- Counterclaims. A conflict may arise when the class includes members who, if suit is brought, will be subject to compulsory counterclaims. The conflict is especially likely if the claims otherwise would not have been pressed by the defendants.

b. Adequacy of the Class Attorney

The class attorney is the guardian of the class and has a fiduciary duty toward each member of the class. Therefore, the class attorney is held to a very high standard of care. The attorney's competence is a central consideration in determining adequacy. Factors bearing on an attorney's competence generally are discoverable by defendants.

The attorney's ethical behavior is also highly pertinent. The ethical concerns attracting the most attention are solicitation and conflicts of interest. The most common conflicts are

- Whether the attorney can act as a class representative. The answer is generally no. Even when the class attorney is an associate, partner, or spouse of the class representative, an impermissible appearance of impropriety is often created.
- Another issue that frequently arises is whether the class attorney may advance litigation costs. Resolution of this issue may depend upon the jurisdiction. Those jurisdictions that still adhere to Canon 5 and DR 5-103(B) of the ABA Code of Professional Responsibility, which bars, in any type of litigation, an attorney's unreimbursed advancement of costs. In 1983, the ABA altered the judicial rule when it promulgated its new model Rules of Professional Conduct. Rule 1.8(e) provides

A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.

However, when class counsel go beyond simply advancing costs and become investors in the class action, the potential for conflict may be too great.

- An attorney who has sued class members for unpaid fees may create a conflict.
- Some courts have held that when a class attorney represents another class in a different suit against the same defendant, that attorney may be involved in a course of litigation which will potentially drain the defendant's resources, which might influence the attorney's litigation strategy. A number of courts, however, have required that the conflict be more than illusory or speculative.
- Class attorneys who represent two class representatives whose interests may later conflict may be disqualified.
- A class attorney who represents opposing factions of a class with differing interests may be disqualified because he/she cannot unqualifiedly represent all of his clients.

- If the class attorney represents the defendants in unrelated matters, generally the attorney cannot represent a plaintiff class against that defendant. In fact, a class counsel's close business relationship with a potential defendant renders the class counsel inadequate.

E. Specific Requirements of Rule 23(b)

Generally, there are three types of class actions under Rule 23(b). An action qualifies for class action status under Rule 23(b)(1) if either (a) the person opposing the class might be caught between incompatible judgments, or (b) resolution of the individual's claims would practically dispose of the rights of other individuals who are not part of the lawsuit.

Rule 23(b)(2) tends to include civil rights actions where injunctive and equitable relief (often including back pay) is the primary goal. Rule 23(b)(3) applies to situations where questions involved are facts common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for a fair efficient adjudication of the controversy.

F. How Does an Employment Class Action Proceed?

The guiding light in understanding class actions is that the trial court will be granted enormously broad discretion in certifying and dealing with the class. Variations in individual courts' attitudes toward class actions have a direct impact on the outcome of the certification decision. As a result, firm guidelines regarding certification are rare, and trial courts are free to indulge in their idiosyncratic attitudes about class actions.

1. Certification

As Rule 23 suggests, a plaintiff cannot create a "class action" merely by filing a complaint. Rather, the action must be "certified" as a class action, almost always after extensive and expensive discovery (formalized sharing of documents and other evidence). The court's obligation is to determine "as soon as practicable after the commencement of an action brought as a class action" whether the suit shall be so maintained. Certification decisions are not subject to appeal as a matter of right, but in big cases it is not unusual for the courts of appeal to grant discretionary review.

2. Use of Subclasses

A court intent on certifying a class may create subclasses to avoid legitimate problems that the party opposing certification has raised.

3. Notice

A class action will usually require that class members be provided with some notice of the class action. A significant distinction exists with regard to notice and the corresponding opt-out rights between (b)(1) and (b)(2) classes on the one hand and (b)(3) on the other. No mandatory notice or opt-out apply to the former, though courts may, and often do, require notice as a discretionary matter. Individual notice in opt-outs is required under a (b)(3) class. Moreover, Rule 23(e) provides that a class action may not be dismissed or settled until notice has been given to members of the class.

A notice should be neutral and objective in tone. The content and form of the notice should permit class members to make informed choices. The notice should enable members of the class to signify whether they consider the representation fair and adequate and to permit members of the class to object to the proposed representation. The notice should be written in lay terms and, in appropriate cases, may be printed in several languages. Rule 23(b)(3) class members must be informed of their right to request exclusion. The notice must advise class members that they will be bound by the judgment if they fail to request exclusion.

III. SPECIFIC ISSUES WITH WAGE AND HOUR CLASS ACTIONS

A. What Are Wage and Hour Lawsuits About?

The general rule of the FLSA is actually quite simple. Employees must be paid no less than a minimum hourly wage, and all work in excess of 40 hours in a single workweek must be compensated at a rate not less than one and one-half times the employee's regular rate of pay. 29 U.S.C. §§ 206, 207. Where the statutes get complicated, and where employers are most likely to make mistakes, are in the vast array of exemptions to this general rule.

The so-called "white collar" exemptions are the most used and therefore the most litigated exemptions in the FLSA. Under the "white-collar" exemptions, the FLSA minimum wage and overtime pay provisions do not apply to "any employees employed in a bona fide executive, administrative, or professional capacity. . . or in the capacity of outside salesman." 29 U.S.C. § 213(a)(1).

As interpreted and defined by the Department of Labor and judicial decision, these exemptions have two basic requirements. First, the employee's primary duty must be work of an exempt nature (i.e., duties in an executive, administrative, professional, or outside sales capacity (the "duties" test)). Second, the employee must be paid

compensation in a specified form (the "salary basis test").¹ The analysis of whether an employee meets the duties test and the salary basis test can be extremely complicated for employers.

Most of the wage and hour class action suits currently being filed arise from an employer's misclassification of employees under the "white collar" exemptions. In part, this is due to the changing environment of the modern workplace. Congress enacted the "white-collar" exemptions over fifty years ago. A worker who used to be classified as exempt because he supervised the labor-intensive work of other employees may now do such work by himself, e.g., on a computer—thus making him non-exempt under the FLSA. Recently popularized alternative work arrangements, such as employees who work from home, also create new exemption issues for employers. New technology, such as pagers, cell phones, and laptop computers, have changed views on what is considered on-call and has redefined working hours. With all of these changes, it is very easy for an employer to make costly mistakes.

Employees and their attorneys are quick to find these mistakes. The most common claim appears to be for unpaid overtime based on misclassification as exempt. Also, off-the-clock work and docking of employee's wages account for a surge in FLSA and state law cases.

B. What Does It Take for Employees to Join Together as a Class?

Wage and hour lawsuits are potentially massive and expensive undertakings when individual employees join together in a class action. In order for members of a group to proceed as a "class," a court must first certify them as such.

1. Class Certification Criteria

For most class action claims, including wage and hour claims under state law, the courts generally look to the criteria found in Rule 23. As previously stated, under Rule 23, members of a putative class must show that their claims meet the following four criteria: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation.

The FLSA, however, does not follow the procedure for establishing a class action set out in Rule 23. Instead, the FLSA only requires a group of employees to show that its members are "similarly situated." "The 'similarly situated' requirement for FLSA collective actions permits a wider variety of claims than would generally be classified under a Rule 23 class action. Courts merely require that, under §216(b), potential

¹ For more detailed information on the duties test and salary basis test, please consult the Perkins Coie Employment Law Briefing materials titled "Wage and Hour Law Update" presented in February of 2000.

plaintiffs make a showing that they are 'similarly situated' and that there is a reasonable basis to proceed in the collective action. A detailed complaint and supporting affidavits have been held to be sufficient under this standard." Michael W. Hawkins, *Current Trends in Class Action Employment Litigation*, 19 *The Labor Lawyer*, at 51.

2. "Opt-out" Versus "Opt-in" Classes

Classes that are certified under Rule 23 are subject to an "opt-out" provision. This means that an individual who wishes to pursue his or her own interests apart from a class may opt-out of the class and proceed independently. In contrast, section 16(b) of the FLSA limits participation in FLSA class actions to those who affirmatively "opt-in" to the litigation. Therefore, cases that proceed under Rule 23 certification are likely to have far more members included in a class because they automatically include a large group, while for FLSA classes the members must actively choose to get involved.

IV. WHAT YOU CAN DO TO PREVENT AND DEFEND AGAINST CLASS ACTIONS

While there is probably nothing employers can do to completely eliminate the risk of being targeted, when developing strategies to prevent and defend against these kinds of suits it pays to be aware of the two main categories of employment class actions: (1) unequal treatment of employees in protected categories, such as age, sex, race or national origin and (2) failure to strictly comply with one or more of the many laws regulating the employment relationship or employee benefits.

Each category requires different prevention and defense strategies. Plaintiffs often seek to prove discrimination suits point by pointing to statistical disparities between employees in protected and non-protected classes. Thus, employment statistics play a key role in prevention and defense strategies for discrimination class actions. While statistics will usually also play a role in the second category of class actions, careful monitoring of the employer's policies and practices warrant greater emphasis.

A. Steps To Help Prevent All Employment Class Actions

Employers can take a variety of measures to help minimize the risk of being named in a class-action lawsuit:

- First, make sure you have correctly classified your employees for purposes of overtime rules. Are the employees you are treating as exempt for overtime, really exempt? Small mistakes in this area can lead to enormous damage awards.
- Second, review all of your employment policies, especially payroll policies, to ensure they are complete and comply with all state and federal laws.

- Third, train your supervisors and other employees on your employment policies and the law.

B. Steps Specific To Preventing Discrimination Class Actions

Preventing discrimination class actions requires ongoing monitoring of your employment statistics. Disparities between protected and non-protected categories of employees need to be identified and then analyzed to ensure they are not being caused by discriminatory practices or policies. These are the protected categories that should be monitored for adverse statistical disparities:

- Age groups Over 40;
- African-American, Hispanics and Asian employees
- Employees of specific national origin;
- Female employees; and
- Disabled employees.

Look for statistical disparities in the following areas:

- Pay;
- Promotions;
- Hiring;
- Rates of discipline; and
- Layoff or discharge.

Any disparities should be identified and analyzed to determine their root cause. Many disparities are the result of non-discriminatory factors, so a disparity does not equal discrimination. Any factors contributing to statistical disparities should be very carefully reviewed, however, and in most cases they should be remedied.

C. The Importance Of Privilege

The steps outlined above should usually be done at the direction of counsel. Normally, an attorney will direct that statistical studies or policy and practice audits be conducted so that she can provide the company with appropriate legal advice. There are other benefits to proceeding under the direction of counsel. Such studies will usually be protected from disclosure by the attorney client privilege. Employers who run these studies under the

direction of their Human Resources department or other business division run the risk that their own studies may be used against them.