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Hot Topics: What Employers Need to Know in 2010

Labor & Employment Law Seminar
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Dukes v. Wal-Mart

- April 26, 2010 9th Circuit *en banc* decision affirming nationwide class certification in Title VII sex discrimination case
- District court certified a class encompassing all women employed by Wal-Mart at any time after December 26, 1998, and encompassing all plaintiffs' claims for injunctive relief, declaratory relief, and back pay, while creating a separate opt-out class encompassing the same employees for punitive damages

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Dukes v. Wal-Mart (cont'd)

- Affirmed district court's certification of a Federal Rule of Civil Procedure 23(b)(2) class of current employees with respect to their claims for injunctive relief, declaratory relief, and back pay
- Remanded claims for punitive damages so that the district court could consider whether to certify the class under Rule 23(b)(2) or (b)(3)
- Remanded claims of putative class members who no longer worked for Wal-Mart when the complaint was filed so that the district court could consider whether to certify an additional class or classes under Rule 23(b)(3)

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Dukes v. Wal-Mart (cont'd)

- Plaintiffs alleged that women employed in Wal-Mart stores: (1) are paid less than men in comparable positions, despite having higher performance ratings and greater seniority; and (2) receive fewer—and wait longer for—promotions to in-store management positions than men
- Plaintiffs claimed Wal-Mart's strong, centralized structure fosters or facilitates gender stereotyping and discrimination, that the policies and practices underlying this discriminatory treatment are consistent throughout Wal-Mart stores, and that this discrimination is common to all women who work or have worked in Wal-Mart stores

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Dukes v. Wal-Mart (cont'd)

- Class encompassed part-time entry-level hourly employees to salaried managers at 3,400 stores in 41 regions
- Dissent estimated class could include 1.5 million women
- Wal-Mart argued that the district court erred by: (1) concluding that the class met Rule 23(a)'s commonality and typicality requirements; (2) eliminating Wal-Mart's ability to respond to individual Plaintiff's claims; and (3) failing to recognize that Plaintiffs' claims for monetary relief predominated over their claims for injunctive or declaratory relief

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Dukes v. Wal-Mart (cont'd)

- Plaintiffs presented four categories of commonality evidence:
  - (1) facts supporting the existence of company-wide policies and practices that, in part through their subjectivity, provide a potential conduit for discrimination;
  - (2) expert opinions supporting the existence of company-wide policies and practices that likely include a culture of gender stereotyping;
  - (3) expert statistical evidence of class-wide gender disparities attributable to discrimination; and
  - (4) anecdotal evidence from class members throughout the country of discriminatory attitudes held or tolerated by management

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Dukes v. Wal-Mart (cont'd)

- Majority quotes plaintiffs' expert's opinion that "social science research demonstrates that gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors, because substantial decision maker discretion tends to allow people to seek out and retain stereotyping-confirming information and ignore or minimize information that defies stereotypes."
- Expert concludes that Wal-Mart is "vulnerable" to bias or gender stereotyping but does not identify a specific discriminatory policy at Wal-Mart

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Dukes v. Wal-Mart (cont'd)

- Expert opinion and statistical evidence held to a lower standard at class certification stage
- 120 declarations regarding anecdotal evidence of discrimination to support a class of 500,000 to 1.5 million women
- Next step – Supreme Court or settlement?

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Independent Contractors

- TRACA
- EMPA
- DOL
- IRS
- CA

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Taxpayer Responsibility, Accountability, and Consistency Act of 2009 ("TRACA") (S. 2882)

- TRACA would revise current safe harbor for employment taxes ("no reasonable basis"):
  - Employer would need written determination regarding worker's status
  - No worker in similar position treated as employee since 1978
- New reports to and by IRS

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Employee Misclassification Prevention Act ("EMPA") (S. 3254)

- Would require notice to service providers
  - Status as IC or employee
  - DOL contact information
- Would require recordkeeping re: ICs
- Presumption of employee status if notice not given or records not kept

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EMPA

- Would double liquidated damages
- New penalties:
  - $1,100 per employee
  - $5,000 per employee if willful
- New DOL enforcement
  - Info sharing (including with IRS)
  - Targeted audits

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U.S. Department of Labor

- $12 to $25 million in 2011 budget
- Up to 100 new enforcement personnel
- Competitive grants to state agencies
- Working on regulations requiring compliance plans

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IRS Employment Tax National Research Program

- 2,000 employers per year
- "Comprehensive in scope" per IRS
- Focus to include:
  - IC/contingent workforce issues
  - Expense reimbursements
  - Fringe benefits

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California (and Other States') Plaintiffs' Bars

- Orange County Register Settlement:
  - 5,000 newspaper deliverypersons
  - $28 million
- $5.3 million Fed Ex verdict affirmed in CA
- Taxicab drivers, sales representatives, exotic dancers, telecommunications servicepeople, delivery drivers, etc.

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Paycheck Fairness Act of 2009

- Then-Senator Hillary Clinton introduced the original bill and then-Senator Barack Obama was one of the 24 co-sponsors of the 2008 bill.
- The bill was passed by the House in 2009 and currently is pending in the Senate with 41 co-sponsors. Senate Committee on Health, Education, Labor, and Pensions (HELP) held hearings on the bill on March 11, 2010.
- Would amend the Equal Pay Act (a 1963 amendment to the Fair Labor Standards Act of 1938) to revise the Equal Pay Act's exceptions to the prohibition of wage rate differentials between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions.

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Paycheck Fairness Act of 2009 – Concerns for Employers

- Would make it more difficult for employers to defend Equal Pay Act claims.
- Increased litigation over new and narrowed defenses.
- Difficulty of showing every pay determination is consistent with business necessity.
- Would expose employers to unlimited compensatory and punitive damages (versus Title VII which caps damages).
- Would make it easier to bring EPA class actions.
- Would require the EEOC to collect pay data from employers regarding the sex, race, and national origin of employees.

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Fair Pay Act of 2009

- HELP held hearings on the bill on March 11, 2010 with Paycheck Fairness Act (then-Senator Obama was one of prior bill's co-sponsors in the Senate)
- "Equal Pay for Equal Worth" rather than "Equal Pay for Equal Work."
- The Act would amend the Equal Pay Act / Fair Labor Standards Act to prohibit an employer from:
  - Discriminating between employees on the basis of sex, race, or national origin by paying wages to employees in a job that is dominated by employees of a particular sex, race, or national origin at a rate less than the rate at which the employer pays wages to employees in the same establishment in another job that is dominated by employees of the opposite sex or of a different race or national origin, respectively, for work on equivalent jobs.

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Fair Pay Act of 2009 – Concerns for Employers

- Difficulty in determining what is "equivalent work."
- How to show equivalent:
  - skills
  - effort
  - responsibility; and
  - working conditions.

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Washington Wage Payment Act Amendment

- Signed by Governor Gregoire March 12, 2010
- Effective June 10, 2010
- Increases Department of Labor and Industries authority to investigate and penalize employers who fail to pay wages owed to an employee

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Employee Free Choice Act

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- "This is how a civilization disappears."
- "It will be a firestorm bordering on Armageddon."
- "If the bill passes, we'll become like France and Germany."

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Employee Free Choice Act

- Three main components
  - "Card-check" certification of unions
  - Arbitrator can impose terms of a binding two-year contract
  - Laws more punitive for employers who violate NLRA
- Assuming EFCA never passes . . .

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Ricci v. DeStefano

- 2009 Supreme Court decision overturning 2nd Circuit (panel included now Justice Sotomayor)
- Group of white firefighters and one Hispanic firefighter sued New Haven after city threw out exam results because not enough minorities had passed the exam
- City concerned with *disparate impact*
- Firefighters claimed *disparate treatment*
- Conflict between two prohibited forms of discrimination under Title VII

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Ricci v. DeStefano (cont'd)

- Trial and appellate courts rule for the city
- U.S. Supreme Court reversed and ruled for the firefighters
- New "strong basis in evidence" standard announced
- No evidence that the city had an objective strong basis in evidence to believe it would face disparate impact liability

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Ricci v. DeStefano (cont'd)

- Disparate Impact Liability
  - Proof by plaintiff of a statistically significant disparity
  - Challenged practice or policy job related and consistent with "business necessity"
  - Alternate policy or practice that would not have a disparate impact
- Fear of litigation is not enough

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Ricci v. DeStefano (cont'd)

- Cannot invalidate exam results after selection criteria established unless "strong basis in evidence"
- Might have to live with the results, so…
  - Ensure employment tests are fair and objective
  - Questions should relate to job duties relevant to job hiring or promotions
  - Rule out less discriminatory alternatives

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Ricci v. DeStefano (cont'd)

- Concerns about impact on workplace diversity?
- Possible legislative response?
  - Civil Rights Act of 2008 would have amended Title VII and the ADEA to set forth requirements for establishing discrimination based on disparate impact
  - Bill did not make it out of committee in 110th Congress and so far it has not been re-introduced but then-Senator Obama was one of the bill's co-sponsors in the Senate
- More litigation?
  - *Briscoe v. City of New Haven*

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Protecting Older Workers Against Discrimination Act

- Would overturn U.S. Supreme Court decision in *Gross v. FBL Financial*
- Court adopted the "but for" standard for ADEA claims
- More difficult standard than the "motivating factor" standard applied to Title VII claims
- Would amend ADEA to clarify appropriate standard of proof in unlawful disparate treatment cases

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Proposed ADA Regulations

- ADA Amendments Act (ADAAA) in effect 1/2009
  - Overruled several U.S. Supreme Court decisions and EEOC regulations
  - Changed the way statutory terms should be interpreted
  - Effect is to make it easier for an individual to establish that he or she has a disability within the meaning of the ADA
- Regulations revised to conform with ADAAA
  - Final rule to be adopted this year

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Proposed ADA Regulations (cont'd)

- "Disability" shall be interpreted broadly
- Revises definitions of the term "substantially limits"
  - Does not have to "significantly" or "severely" restrict a major life activity
  - Deletes "condition, manner, or duration"
- Expands definition of "major life activities"
  - List of activities
  - List of major bodily functions

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Proposed ADA Regulations (cont'd)

- Mitigating measures not to be considered (except for ordinary eyeglasses or contacts) in assessing disability
- Condition that is episodic or in remission can be a disability
- "Regarded as" definition changed
- Actions based on symptoms of an impairment

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Cause for Concern

- EEOC believes the new regulations will make it easier to bring collective actions / class actions for disability discrimination
- *Hohider v. UPS*, 574 F.3d 169 (3rd Cir. 2009)
  - "100% healed" policy challenged
  - Class certification reversed because individual issues predominated
  - Only qualified persons with disabilities could suffer harm under the policy

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Interim Final Rules Regarding Genetic Discrimination

- Genetic Nondiscrimination Act (GINA) employment provisions in effect 11/09
- Prohibits discrimination based on genetic information in health insurance coverage and group health plans
- EEOC issued separate guidelines prohibiting employment discrimination based on genetic information

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Interim Final Rules Regarding Genetic Discrimination (cont'd)

- Interim final rules prohibit group health plan or health insurance issuer from:
  - Increasing group premium/contribution amounts
  - Requesting/requiring genetic test by individual or family member
  - Requesting, requiring, purchasing genetic information for enrollment or underwriting purposes
- Wellness Plans
- Comment period ended January 5, 2010

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Employment Non-Discrimination Act of 2009 (ENDA)

- Prohibit workplace discrimination based on actual or perceived "sexual orientation" or "gender identity"
- Closely follows existing federal civil rights laws
  - Apply if more than 15 employees
- Prohibits association discrimination

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Employment Non-Discrimination Act of 2009 (ENDA) (cont'd)

- Other specific provisions included
- Armed forces and religious organizations exempt
- Does not allow "disparate impact" causes of action

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Employment Non-Discrimination Act of 2009 (ENDA) (cont'd)

- Washington law already prohibits discrimination on the basis of sexual orientation, including gender identity
- ENDA would allow
  - Reporting to EEOC
  - Filing lawsuits in federal court
  - Title VII remedies (punitive damages – not available under Washington law)

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Domestic Partners

- Washington's "Everything But Marriage" law expanded rights of registered domestic partners
- 2009 act provides domestic partners with all rights and responsibilities possessed by married couples in Washington State
- Watch interplay with federal law
  - Benefits
  - WFLA/FMLA

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Recent Changes under the FMLA

- FMLA already amended twice in 2009
  - Scope of military family leave expanded
  - New law addressing eligibility of flight personnel
- DOL to issue new proposed regulations by November 2010
  - More controversial provisions in 2008 regulations likely to be affected
  - Address military family leave changes and different eligibility requirements for flight personnel
  - May address pandemic issues
- DOL forms have been updated regarding military family leave – access new forms at www.dol.gov/whd/forms
- Many other changes are expected or possible in the next year

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FMLA – Proposed Legislation

- Family Medical Leave Restoration Act would counteract many reforms in DOL 2009 regulations
- Family Medical Leave Enhancement Act would amend FMLA to cover employees at worksites with 25 employees, allow "parental and grandparental involvement leave," medical and dental appointments, and care of elderly relative

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FMLA -- Proposed Legislation

- Family Medical Leave Inclusion Act would amend FMLA to permit leave for a same sex-spouse, domestic partner, parent-in-law, adult child, sibling, or grandparent
- Military Family Leave Act of 2009 would amend FMLA to provide 2 weeks of unpaid leave to employees whose family members have received notice of impending active military duty (without qualifying exigency)
- Domestic Violence Leave Act would amend FMLA to provide for similar leave of up to 12 weeks

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Healthy Families Act of 2009

- Repeatedly introduced but not passed – currently referred to committee
- Requires employers with 15 or more workers for at least 20 weeks in a calendar year to permit each employee to earn at least one hour of paid sick time for every 30 hours worked
- Applies to part-time employees as well as full-time employees
- Paid sick leave capped at 56 hours in calendar year unless employer chooses higher limit

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Healthy Families Act of 2009

- Currently employers are not *required* to provide paid sick leave, although many do – 86% of full-time workers have paid leave they can take when they fall ill
- Employees may use time for (1) own medical needs; (2) care for certain family members; (3) seek medical attention, assist certain family members, take legal action, or engage in other specified activities related to domestic violence, sexual assault, or stalking
- Illness, diagnosis, preventive care all covered

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Healthy Families Act of 2009

- Child, parent, spouse of employee
- Any individual "related by blood and affinity whose close association with the employee is the equivalent of a family relationship"
- "Care for" not defined

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Healthy Families Act of 2009

- Employer may require medical certification if absence is for three or more days
- Sick leave may be taken in increments of either an hour or "the smallest measure of an employee's workday"
- Rollover of unused leave to next calendar year but no more than 56 hours of leave on the books at any given time

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Other Leave Legislation

- Paid Vacation Act of 2009 would amend FLSA to provide minimum of 1 week vacation
- Working Families Flexibility Act would permit employees to request every 12 months that their employers modify work hours, schedule, or location

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FTC Guidelines re: Employees' Online Conduct

- Effective December 1, 2009
- FTC may hold employers accountable for employees' online endorsements of employer's products/services
- Robust employer policies "would warrant consideration" in FTC's decision whether to bring enforcement action

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Investigations

- *Lakeside-Scott v. Multnomah Co.*, 556 F.3d 797 (9th Cir. 2009) shows importance of relying on truly independent investigation for disciplinary and discharge decisions
- Scott fired after investigation confirmed numerous policy violations
- Had filed whistleblower complaint against third-level supervisor Brown
- Brown brought forward information that led to investigation
- Scott claimed retaliation for filing whistleblower claim

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Lakeside-Scott v. Multnomah Co.
(cont'd)

- Unbiased decision maker can be tainted by biased subordinate
- Personal liability for biased subordinate
- Decision maker relied on independent investigation to make discharge decision
- No evidence Brown was *a substantial or motivating cause* of termination

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Cat's Paw

- *Staub v. Proctor Hosp.*, 560 F.3d 647 (7th Cir. 2009), *cert. granted* April 19, 2010
- 7th Circuit reversed jury verdict for plaintiff in an USERRA case involving "cat's paw" theory
- Where the HR representative undertook a separate, unbiased investigation of employee, and took independent action, supervisor's bias was immaterial

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Arbitration

- 14 Penn Plaza v. Pyett
- Stolt-Neilsen, S.A. v. AnimalFeeds Int'l
- Kitsap County Deputy Sheriff's Guild v. Kitsap County
- Walters v. AAA Waterproofing
- Arbitration Fairness Act

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14 Penn Plaza v. Pyett

- Respondents worked as night lobby watchmen
- Members of union
- Union agrees consents to engage unionized security contractor
- Respondents are reassigned and file grievance alleging age discrimination
- Union withdraws grievance

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14 Penn Plaza v. Pyett

- Collective bargaining agreement explicitly required statutory discrimination claims be arbitrated, including ADEA claims
- Trial and appellate court refuse to enforce the arbitration provision

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14 Penn Plaza v. Pyett

- U.S. Supreme Court upheld arbitration provision
- "condition of employment" subject to mandatory bargaining
- Provisions are enforceable unless ADEA is amended

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14 Penn Plaza v. Pyett

<u>Take Away Points</u>

- Another example of the Supreme Court's endorsement of arbitration to resolve employment disputes
- Provision must reference statute
- Arbitration under attack by Congress
  - Arbitration Fairness Act of 2009

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Stolt-Neilsen, S.A. v. AnimalFeeds Int'l

- Parties not required to arbitrate classwide claims where no evidence that they intended to allow "class action" arbitrations
- Only for sophisticated commercial entities?
- Open door for broader review of arbitrators' decisions?

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Walters v. AAA Waterproofing

- Arbitration provision allowing for fee-shifting not enforceable for wage and hour claims
- Walters sued AAA for wage and hour violations
- Employment contract had fee-shifting provision and venue clause
- State wage and hour law doesn't shift fees

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Kitsap County Deputy Sheriff's Guild v. Kitsap County

- Deputy discharged for 29 documented rule violations, various concerns
- Arbitrator reinstated conditioned on fitness for duty evaluation
- Supreme Court affirmed – award not a violation of public policy

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Walters v. AAA Waterproofing

- Fee and venue provisions found unconscionable
- Risk of paying employer's fees "enormous deterrent"
- Policy favoring arbitration
- Unconscionable terms severed and claim sent to arbitration

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Walters v. AAA Waterproofing

Take Away Points

- Arbitration is favored for resolving employment disputes
- Examine provisions that could lead to litigation

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Arbitration Fairness Act (H.R. 1020, S. 931)

- Predispute arbitration agreements would be invalid if required arbitration of a "dispute between an employer and employee arising out of the relationship of employer and employee"

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Employee Free Choice Act

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