Chapter Eighteen

CLASS AND COLLECTIVE ACTIONS

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Table of Contents

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I. INTRODUCTION

Employment related class and collective actions continue to make headlines with significant monetary settlements. Additionally, the number of wage and hour collective actions filed under both state and federal law has increased, and, with the Department of Labor's (DOL) continued aggressiveness, will no doubt continue to increase. This Chapter provides an overview of the legal framework of employment-related class and collective actions, discusses some early warning signs that a company may be the target of a potential class action, and presents some strategies designed to help avoid becoming a target.

II. WHAT IS A CLASS OR COLLECTIVE ACTION LAWSUIT?

Class and collective actions are lawsuits brought by an individual or a group of individuals (referred to as the "class representatives") seeking to represent a larger group of individuals (referred to as the "putative class"). Generally, the class representatives claim that they and the members of the putative class have suffered injuries that share common issues of fact and law. Therefore, adjudicating the claims of the class representatives will effectively resolve the class members' claims without requiring the individual class members to file suit.

The substantive basis of a class action can be the same as any of the bases of an individual discrimination suit, but in a class action the class representatives claim the employer discriminated against them and a whole class of employees on a prohibited basis, such as sex, race, or national origin. Pension and benefit practices and payroll practices in states with wage and hour laws also can be targeted with class action lawsuits.

Collective actions alleging violations of the Fair Labor Standards Act (FLSA[1]) are similar to class actions but proceed under the framework set forth in the FLSA. In a collective action, the class representatives sue on behalf of themselves and all other "similarly situated employees." Collective actions frequently claim the employer misclassified a group of employees as exempt, thus denying them overtime wages for a period of time. Collective actions alleging violations of the FLSA are becoming more common and resolving them can be costly. See the discussion of collective actions in Section III(F) below.

III. PROCEDURES APPLICABLE TO CLASS AND COLLECTIVE ACTIONS

Most employment-related class actions proceed in accordance with Rule 23 of the Federal Rules of Civil Procedure. However, claims alleging violations of the Age Discrimination in Employment Act (ADEA), the Equal Pay Act (EPA), or the FLSA must use the special provision for group remedies under § 16(b) of the FLSA, which the ADEA specifically adopts. *Alix v. Shoney's, Inc.*, 1997 WL 66771 (E.D. La. Feb. 18, 1997)[2].

1 The FLSA, 29 U.S.C. §§ 201-219, is the federal law that sets minimum wage rates, establishes overtime requirements, contains record keeping provisions, and imposes child labor standards and penalties. Disputes often arise over whether an employer properly has classified an employee as exempt from the minimum wage and overtime requirements of the FLSA. Because an exemption may be applied to a category of employees, lawsuits challenging the exemption are often brought as collective actions. For a detailed discussion of the FLSA, please see the *Wage and Hour – Fair Labor Standards Act* Chapter of the SourceBook.

2 The ADEA, 29 U.S.C. §§ 621-634, is the federal law that prohibits discrimination in employment decisions because a person is age 40 or older. For a detailed discussion of the ADEA, please see the *Age Discrimination* Chapter of the SourceBook. The EPA, 29 U.S.C. § 206, is a portion of the FLSA that prohibits sex-based discriminatory rates of pay. For more information regarding the EPA, please see the *Sex Discrimination* Chapter of the SourceBook.

A. Exhaustion of Administrative Remedies. To support a class or ADEA collective action, a discrimination charge must contain a classwide allegation; an individual charge of discrimination is insufficient. In *Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124 (7th Cir. 1989), the court held that individual discrimination claims do not provide notice to the employer of the plaintiff's intention to make a claim of classwide discrimination. The court in *Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1200 (5th Cir. 1984), reached a similar conclusion. However, at least one court has held class issues reasonably could grow out of investigation of an individual charge. *See Fellows v. Universal Rest., Inc.*, 701 F.2d 447 (5th Cir. 1983).

The class representative, but not the class members, must have filed a proper class charge and received a notice of right to sue. *See Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968). An employee may rely on the class charge of another when that charge is timely and valid and the employee's claims arise out of similar discriminatory treatment in the same time frame (the "single filing rule"). *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1219 (11th Cir. 2001). If a class member's claim did not arise during the applicable limitations period of the class representative's administrative charge, that class member may be barred from seeking recovery from the employer unless the class member filed his or her own timely charge. *See* the discussion below regarding a class representative's failure to exhaust administrative remedies with regard to specific allegations of discrimination.

B. Tolling of Limitations Period.

1. Class Actions. The U.S. Supreme Court has held that, in a Title VII race discrimination suit, the filing of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983). Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until certification is denied. *Id.* at 354. If class certification is denied, class members may choose to file their own suits or intervene as plaintiffs in the pending action. *Id.*

2. Collective Actions. Unlike class action lawsuits, the filing of a collective action does not toll the statute of limitations for filing an individual FLSA complaint. The applicable statute of limitations continues to run until the individual employee opts in to the collective proceeding. 29 U.S.C. § 256.

3. The federal appellate circuits are split regarding whether filing a collective action tolls the statute of limitations in an ADEA claim. *Compare O'Connell v. Champion Int'l*, 812 F.2d 393 (8th Cir. 1987) (the statute of limitations continues to run on ADEA claims until a putative plaintiff files a written consent to opt into the action), *with Sperling v. Hoffmann-La Roche, Inc.*, 24 F.3d 463, 467 (3d Cir. 1994) (because the ADEA did not explicitly incorporate 29 U.S.C. § 256, the tolling rule applicable to Title VII class actions should apply to toll claims of opt-in plaintiffs from the moment the original collective action complaint is filed).

C. Federal Rule of Civil Procedure 23(a). Rule 23(a) of the Federal Rules of Civil Procedure requires certain prerequisites be met before a lawsuit will proceed as a class action. The class representatives must show that: (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 class representatives will fairly and adequately represent the class. Fed. R. Civ. P. 23(a). In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Supreme Court emphasized that Rule 23 is not merely a pleading requirement and reiterated its prior decisions holding that class certification demands a "rigorous analysis" that shows that the requirements of Rule 23(a) have been met – that is "actual, not presumed, conformance with Rule 23(a)." 131 S. Ct. at 2551. The Court acknowledged that this "rigorous analysis" frequently "will entail some overlap with the merits of the plaintiff's underlying claim" which "cannot be helped." *Id.* The Court specifically rejected the notion that its prior decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), reached a contrary conclusion. *See also*

Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147 (1982) (holding that general, across-the-board allegations of class discrimination do not meet the requirements of Rule 23(a)); requiring a showing that will withstand "rigorous analysis" that the prerequisites of Rule 23(a) have been satisfied).

After the Supreme Court's decision in *Dukes,* a number of federal courts have denied or overturned certification in employment-related class actions. For example, in *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011), a sex discrimination class action, the Ninth Circuit vacated a trial court's determination of commonality under Rule 23(a) because the court failed to conduct the required "rigorous analysis" to determine whether there were common questions of law or fact among the class members' claims. Instead, the trial court relied on the admissibility of the plaintiffs' evidence to reach its conclusion of commonality. In *Costco,* the Ninth Circuit held that the "merits of the class members' substantive claims are often highly relevant when determining whether to certify a class. More importantly, it is not correct to say a district court *may* consider the merits to the extent that they overlap with class certification issues; rather, a district court *must* consider the merits if they overlap with the Rule 23(a) requirements." *Id.* at 981 (emphasis in original). The Ninth Circuit remanded the case to the federal trial court, which subsequently certified a hybrid class action, with a current Costco employee acting as the representative of a 23(b)(2) class for injunctive relief and two former Costco employees representing a 23(b)(3) class seeking monetary relief. *Ellis v. Costco Wholesale Corp.,* 285 F.R.D. 492 (N.D. Cal. Sep. 25, 2012). *See also Davis v. Cintas*, 717 F.3d 476 (6th Cir. 2013) (relying on *Dukes* and affirming the trial court's determination in a hiring class action that "the plaintiff did not satisfy Rule 23(a)(2) because she could not show that a number of women, who failed to obtain employment at many places, over a long time, under a largely subjective hiring system, shared a common question of law or fact"); *Luiken v. Domino's Pizza, LLC*, 705 F.3d 370 (8th Cir. 2013) (relying on *Dukes* and reversing lower court order certifying class of delivery drivers who claimed the employer violated the state law governing retention of delivery charges; Domino's presented evidence of differences in delivery transactions that affected the reasonableness of construing the delivery charge as a gratuity, thus, "under *Dukes*, the district court here erred in finding commonality, because the varied circumstances of deliveries prevent 'one stroke' determination.").

In *Parra v. Bashas', Inc.*, 291 F.R.D. 360 (D. Ariz. 2013), the court noted that the Supreme Court and Ninth Circuit have yet to decisively attach a standard of proof to Rule 23 requirements, nor has the Ninth Circuit; however, the court noted, "[a]mong the Circuit Courts to have addressed the issue, a consensus is emerging around the 'preponderance of the evidence' standard." On rehearing, the district court noted that "it remains relatively clear that an ultimate adjudication on the merits of plaintiffs' claims is inappropriate, and that any inquiry into the merits must be strictly limited to determining whether plaintiff's allegations satisfy Rule 23.'" *Estrada v. Bashas' Inc.*, 2014 WL 1319189 (D. Ariz. Apr. 1, 2014) (citing *Herrera v. Serv. Employees Int'l Union Local 87*, 2013 WL 1320443 (N.D. Cal. Apr. 1, 2013)).

1. Numerosity. Courts have not identified a bright-line number that meets the requirement of numerosity, but instead consider a variety of factors including: the class size, the geographic diversity of class members, the relative ease or difficulty in identifying members of the class for joinder, the financial resources of class members, and the ability of class members to institute individual lawsuits. *See, e.g., Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000) (nonemployment case) (noting that courts should not focus on sheer numbers alone but should focus on whether joinder is impracticable in view of the numerosity of the class and other relevant factors).

While there is no bright-line number, courts generally consider a class of 40 or more to be sufficient. *See Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) ("less than 21 is inadequate, more than 40 adequate, with numbers between varying according to other factors").

However, in a few cases, depending on the specific factual circumstances, courts have certified classes smaller than 40. *See Lanning v. SEPTA*, 176 F.R.D. 132, 147 (E.D. Pa. 1997) ("Although in most cases numerosity would not be satisfied if only twenty-two persons had to be joined, the Court finds that numerosity is satisfied here"; joinder was impracticable because, although the

class representatives had the names of putative class members and the names of the streets on which they lived, they did not have complete addresses or telephone numbers), *reversed on other grounds, Lanning v. SEPTA*, 181 F.3d 478 (3d Cir. 1999).

While the class representatives are not required to identify members of the class, a reasonable estimate of the number of purported class members is required. Speculation is not enough, and a court may find numerosity is not satisfied if the complaint fails to describe the class with specificity. *See Abrams v. Kelsey-Seybold Med. Group*, 178 F.R.D. 116, 128 (S.D. Tex. 1997) (numerosity not satisfied when class representatives did not estimate class size, did not provide data confirming the existence of the class or its geographical dispersion, and did not explain difficulties inherent in joinder).

2. Commonality. This element addresses whether there is a question of law or fact common to the class. In *Dukes,* the Court held that commonality means that the class members "have suffered the same injury," not just that all have suffered a violation of the same provision of law. 131 S. Ct. at 2551. Moreover, the common contention must be of such a nature that it is capable of classwide resolution – "which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id. See also Costco,* 657 F.3d at 981 (vacating and remanding trial court's determination that plaintiffs met Rule 23's commonality requirement because the court failed to engage in a "rigorous analysis" on this point; relying on *Dukes* and noting that "Plaintiffs must have a common question that will connect many individual promotional decisions to their claim for class relief"); *Jimenez v. Allstate Ins. Co.,* 765 F.3d 1161, 1165 (9th Cir. 2014) ("As *Dukes* and all of our subsequent caselaw have made clear, a class meets Rule 23(a)(2)'s commonality requirement when the common questions it has raised are 'apt to drive the resolution of the litigation,' no matter their number.") (affirming grant of certification on plaintiffs' state law wage hour claims), *cert. denied,* 135 S. Ct. 2835 (2015).

In *Dukes* the Court noted that its decision in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), suggested two ways the commonality issue could be approached. First, if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." *Dukes,* 131 S. Ct. at 2553 (citing *Falcon*, 457 U.S. at 159, n. 15). Second, "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." *Id.* (citing *Falcon,* 457 U.S. at 159, n. 15). The Court held that the first method was not applicable because Wal-Mart had no testing procedure or other company-wide evaluation method that could be charged with bias. *Id.*

Subsequently, the Ninth Circuit issued a decision that makes it clear that *Dukes* applies to wage and hour actions brought under Rule 23. In *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013), the Ninth Circuit reversed and remanded the case to the trial court to reconsider its analysis under Rules 23(a) and 23(b)(3), and to examine whether the Rule 23(b)(2) class certification could continue for the purposes of injunctive relief. The Ninth Circuit vacated the trial court's Rule 23(a)(2) commonality finding and remanded for reconsideration in light of *Dukes,* directing the lower court to determine whether the claims of the proposed class "depend upon a common contention … of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." (citing *Dukes,* 131 S. Ct. at 2551). The Ninth Circuit also ordered the trial court to determine whether, in light of *Dukes,* the previously granted certification of a Rule 23(b)(2) class should continue for purposes of injunctive relief. The Ninth Circuit ordered the trial court to first consider its commonality finding under Rule 23(a)(2). "If it again finds commonality, it should consider whether class certification under Rule 23(b)(2) for purposes of injunctive relief can be sustained." *Id.* at 545. The Ninth Circuit also ordered the trial court to

reconsider the propriety of class certification under Rule 23(b)(3) for three reasons. First, the trial court could only certify a class under Rule 23(b)(3) if it first determines that plaintiffs meet the commonality requirements of Rule 23(a). Second, the trial court's conclusion that common questions predominated rested on the fact, considered largely in isolation, that plaintiffs challenged Chinese Daily News' uniform policy of classifying all reporters and account executives as exempt employees. The Ninth Circuit noted that it has subsequently criticized the nature of the trial court's predominance inquiry in this case, holding that the "main concern of the predominance inquiry under Rule 23(b)(3) is 'the balance between individual and common issues.' *Id.* at 959. '[A] district court abuses its discretion in relying on an internal uniform exemption policy to the near exclusion of other factors relevant to the predominance inquiry.'" *Wang,* 737 F.3d at 546. Third, the Ninth Circuit held that the trial court should reconsider its predominance analysis in light of the California Supreme Court's decision in *Brinker Rest. Corp. v. Superior Court*, 273 P.3d 513, 535 (Cal. 2012), addressing meal breaks under California's wage hour laws. On remand the District Court held that the prerequisites to class certification under Rule 23(a) were met and that class certification under Rule 23(b)(3) was appropriate. *Wang v. Chinese Daily News, Inc.*, 2014 WL 1712180 (C.D. Cal. Apr. 15, 2014). The court held that certification under Rule 23(b)(3) was appropriate because the common questions that established plaintiffs' commonality under Rule 23(a) were "the same questions that will drive the resolution of this litigation." *Id.* at *5. Additionally, the court held that the answers to each of the plaintiffs' common questions "are susceptible to common proof and hinge on Defendant's uniform corporate policies and procedures which govern all of its employees." *Id.* The court also held that the decision of the California Supreme Court in *Brinker* did not change its analysis under Rule 23(b)(3), stating that "current California and federal law affirm that CDN's uncontested lack of any meal or break policy is strong evidence favoring class certification in this matter." *Id.* at *7.

Subjective Decision-making. The Court in *Dukes* noted that the second method of establishing commonality requires "significant proof" that the employer operated under a general policy of discrimination. *Id.* The Court noted that Wal-Mart has a policy forbidding sex discrimination and imposing penalties for the denial of equal employment opportunity. The only proof the plaintiffs submitted on this issue was the testimony of their "expert" who relied on "social framework" analysis to conclude that Wal-Mart had a strong corporate culture that made it "vulnerable" to "gender bias." *Id.* However, the expert could not determine with any specificity "how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart." *Id.* The Court held that even if this evidence was properly considered (an issue which it questioned but did not decide)[3], the expert's testimony did nothing to advance the plaintiffs' case. Accordingly, the Court disregarded his testimony, finding that it was "worlds away from 'significant proof'" that Wal-Mart "operated under a general policy of discrimination." *Id.* at 2554.

Additionally, the Court in *Dukes* found the only corporate policy established by the evidence was Wal-Mart's policy of allowing discretion by local supervisors over employment matters. The Court held:

> [o]n its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy against having uniform employment practices. It is also a very common and presumptively reasonable way of doing business – one that we have said "should itself raise no inference of discriminatory conduct."

Id. The Court acknowledged that it has recognized, in appropriate cases, that giving discretion

3 The Court noted that the parties disputed whether this testimony met the requirements for admission of expert testimony under the Federal Rules of Civil Procedure and the Supreme Court's decision in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Although the Court did not rule on the issue of whether *Daubert* applies at the certification stage of a class action proceeding, a number of courts have held that it does. *See, e.g., Ellis v. Costco Wholesale Corp.,* 657 F.3d 970 (9th Cir. 2011) (noting that the district court applied the evidentiary standard set forth in *Daubert* at the certification stage).

to lower level supervisors can be the basis for Title VII liability under a disparate impact theory since "an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination." *Id.* However, the recognition that this type of Title VII claim can exist "does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common." *Id.* The Court held that in a company with such a policy, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another manager's. "A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions." *Id. See also Bolden v. Walsh Construction Co.*, 688 F.3d 893, 896 (7th Cir. 2012) (following *Dukes* in a race discrimination class action, rejecting the argument that discretionary acts by local managers produced discriminatory effects; "when multiple managers exercise independent discretion, conditions at different stores (or sites) do not present a common question"). In *Bolden*, the Seventh Circuit distinguished its decision in *McReynolds* and reiterated that "*Wal-Mart* tells us that local discretion cannot support a company-wide class no matter how cleverly lawyers may try to repackage local variability as uniformity." *Id.* at 898. The Seventh Circuit noted that its analysis applied both to the race discrimination hostile work environment class and the overtime class alleged by the plaintiffs.

The Court held that the plaintiffs in *Dukes* failed to identify a common mode of exercising discretion that pervades the entire company or any other specific employment practice – other than the bare existence of delegated discretion – that would tie together the claims of all 1.5 million class members. In rejecting the plaintiffs' statistical evidence, the Court reiterated that "[m]erely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice" to establish Title VII liability under a disparate impact theory. *Id.* at 2555.

The Court also found the plaintiffs' anecdotal evidence of discrimination failed to show that the company operates under a general policy of discrimination. The Court noted that the affidavits describing specific incidents of alleged sex discrimination submitted by the plaintiffs (about 1 for every 12,500 class members) related to only 235 out of Wal-Mart's 3,400 stores. Further, more than half of those incidents occurred in just six states, and there was no anecdotal evidence from 14 of the states in which the company has stores. The Court held that "even if every single one of these accounts is true, that would not demonstrate that the entire company 'operate[s] under a general policy of discrimination,' … which is what respondents must show to certify a companywide class." *Id.* at 2556. *See also Tabor v. Hilti, Inc.,* 703 F.3d 1206 (10th Cir. 2013) ("Given the broad discretion involved in Hilti's alleged discriminatory employment practice and the highly individualized facts and circumstances raised in each employment decision, we cannot say that the proposed class 'present[s] common issue[s] that could be resolved efficiently in a single proceeding.' ") (citing *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012)) (allowing class certification in a Title VII claim where plaintiffs pointed to a uniform company policy that based account distributions on employees' past success and gave limited discretion to managers). After remand in *Tabor,* the Tenth Circuit affirmed the trial court's denial of class certification and entry of summary judgment on individual retaliation and disparate treatment claims, but reversed the entry of summary judgment on other individual claims of disparate treatment and disparate impact. *See Tabor v. Hilti, Inc.*, 577 F. App'x 870, 872 (10th Cir. 2014).

3. Typicality. This element addresses whether the claims or defenses of the representative parties are typical of the claims or defenses of the class. "The typicality requirement is designed to 'limit the class claims to those fairly encompassed by the named plaintiffs' claims.' " *Bacon v. Honda of Am. Mfg.*, 370 F.3d 565, 572 (6th Cir. 2004) (citing *Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 330 (1980)). Some differences are acceptable so long as claims are based on the same legal or remedial theories. Class representatives usually must show that the employment practices of which they complain affected both them and the absent class members. *Id.*

In *Bacon*, the court held that the class representatives failed to meet the typicality requirement in their failure to promote case because "their personal choices, independent of any practices

by Honda that have a disparate impact," rendered them ineligible for promotion for most of the time they worked for the company. *Id.* The class representatives in *Bacon* had chosen to pursue promotion by transferring departments instead of following the promotional process within their current departments. Because of this, and because of their failure to meet other requirements for promotion such as attendance and work on special projects, they were ineligible for promotion during most of their employment. Accordingly, the court found no typicality because the class representatives were unable reasonably to represent the interests of those who consistently applied for promotions and were turned down for discriminatory reasons. *Id.* at 574.

4. Adequacy of Representation. This issue addresses whether the representative parties will fairly and adequately protect the interests of the class. Courts generally look to whether there are common claims and whether the representatives will vigorously prosecute the interests of the class. In analyzing this factor, courts evaluate whether there are any conflicts of interest or antagonism between the class representatives and putative class members. *See, e.g., Colindres v. Quietflex Mfg.*, 235 F.R.D. 347 (S.D. Tex. 2006) (a decision not to pursue compensatory damages may waive that claim on behalf of the individual class members; waiving compensatory damages may create a conflict between the interests of present and past employees because former employees have less interest in declaratory or injunctive relief than in compensatory damages, making the plaintiffs inadequate representatives under Rule 23(a)(4)). *See also Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 824 (7th Cir. 2011) (noting that "named plaintiffs who are subject to a defense that would not defeat unnamed class members are not adequate class representatives, and adequacy of representation is one of the requirements for class certification"). In *Randall*, although the district court denied certification because the plaintiffs' claims were not "typical of the claims or defenses of the class," the 7th Circuit noted that the usual practical significance of lack of typicality is that it undermines the adequacy of the named plaintiff as a representative of the entire class.

a. Conflicts of Interest. In *Talley v. ARINC, Inc.*, 222 F.R.D. 260 (D. Md. 2004), a class action alleging race and sex discrimination in the areas of promotion, salaries, and layoff, the court held that the class representatives could not fairly and adequately represent the interests of the putative class due to a number of conflicts. Two of the class representatives had been employed in the defendant's human resources department and were responsible for investigating the complaints of other class representatives and putative class members. This placed these class representatives "squarely at odds" with the other class representatives and the putative class members. *Id.* at 269.

There also were conflicts between the class representatives, two of whom claimed they should have received the same job, and conflicts inherent in the classes as the class representatives defined them (past and present African American employees and past and present female employees). For example, one of the class representatives, an African American male, claimed he was denied a promotion in favor of a female, a putative class member.

The court also found a conflict between current and former employees, noting that the interest of former employees "is clearly monetary damages for past alleged mistreatment." Conversely "the interests of current employees may be in the area of injunctive relief separate from monetary damages." *Id.* at 270.

Additionally, supervisory employees are generally not adequate representatives of nonsupervisory employees because of the potential for conflicts within the class. *See, e.g., Wagner v. Taylor*, 836 F.2d 578, 598 (D.C. Cir. 1987) (class representative who was a supervisor was an inadequate representative of nonsupervisory employees because of potential conflicts within the class).

b. Failure to Exhaust Administrative Remedies/Lack of Standing. A court may address standing as a "threshold" issue before analyzing the procedural requirements of Rule 23 or it may be addressed as part of the Rule 23 requirements. *Compare Swanson v. Lord & Taylor*

LLC, 278 F.R.D. 36, 39 (D. Mass. 2011) ("Failure to exhaust administrative remedies may render a class representative inadequate if it means that his or her claim is subject to summary judgment or dismissal where similar claims by other class members would not suffer the same defect.") *with Carter v. W. Publ'g*, 225 F.3d 1258, 1262 (11th Cir. 2000) ("Only after the court determines the issues for which the named plaintiffs have standing should it address the question of whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others.").

Regardless of when the court addresses the issue of standing, the class representative must have standing in the constitutional sense to raise certain issues. *See Carter*, 225 F.3d at 1262.

(1) Exhaustion of Administrative Remedies. In a Title VII or ADEA case, standing includes a requirement that the class representative has exhausted administrative remedies with regard to the allegations of discrimination as to which class certification is sought. In *Carter*, the court held that the class representatives lacked standing to bring a class action lawsuit alleging sex discrimination in violation of Title VII because none of them had filed a timely administrative charge on the sex discrimination allegation. *Id.* at 1266; *see also Swanson, supra.*

(2) Lack of Standing. A class representative "cannot represent a class of whom [he is] not a part." *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962) (per curiam). No one has standing to challenge an alleged discriminatory practice that did not affect him or her personally. *Vuyanich v. Republic Nat'l Bank*, 723 F.2d 1195, 1200 (5th Cir. 1984) (class representatives who could allege injuries only as a result of the employer's hiring and termination practices lacked standing to assert class claims arising from the employer's compensation, promotion, placement, and maternity practices). Courts have held that class representatives who were hired do not have standing to represent a class alleging discrimination in hiring. *See, e.g., E.Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977).

D. Rule 23(b). In addition to the requirements of Rule 23(a), the class representatives must meet the requirements of Rule 23(b)(1), (b)(2), or (b)(3). Most employment-related class actions are maintained either under Rule 23(b)(2) or (b)(3), depending on the type of remedy sought.

1. 23(b)(1). This rule applies when the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications or where adjudications with respect to individual members of the class would be dispositive of the interests of the other members not parties to the adjudication. Employment class actions are rarely, if ever, certified as Rule 23(b)(1) class actions. However, where the class involves an insolvent employer not in bankruptcy, or involves insurance proceeds even if the employer is in bankruptcy, Rule 23(b)(1) could apply.

2. 23(b)(2). This rule applies if the party opposing the class "acted or refused to act on grounds generally applicable to the class" and if one of the remedies sought is "injunctive relief or corresponding declaratory relief with respect to the class as a whole." If a claim is certified as a class action under Rule 23(b)(2), the court may, but is not required to, direct appropriate notice to class members. Fed. R. Civ. P. 23(c)(2)(A). Even though notice may be provided, class members typically cannot opt out of a class certified solely under Rule 23(b)(2). Because of this, classes certified under Rule 23(b)(2) (and Rule 23(b)(1)) are often referred to as "mandatory class actions."

Prior to the passage of the 1991 Civil Rights Act (1991 CRA), Title VII actions usually were certified under Rule 23(b)(2), because the opposing party (the employer) allegedly acted "on grounds generally applicable to the class," and the class representatives sought injunctive relief and/or back pay, an equitable "make whole" remedy under Title VII, for their claims. Courts generally concluded that these types of remedies fit within the subsection's prescriptions for relief. *See, e.g., Jefferson v. Ingersoll Int'l*, 195 F.3d 894, 896 (7th Cir. 1999) (commenting that the strictly equitable relief available pre-1991 "nicely fit" the language of Rule 23(b)(2)).

The passage of the 1991 CRA complicated the issue because it permits plaintiffs to recover compensatory and punitive damages for violations of Title VII. In *Dukes,* 131 S. Ct. 2541, the Court held that the plaintiffs' claims for back pay and punitive damages should not have been certified under Rule 23(b)(2). The Court held that claims for individualized relief, like the claims for back pay in *Dukes,* do not satisfy the requirements of Rule 23(b)(2) because these claims are not ever "incidental." Instead, Rule 23(b)(2) applies "only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id.* at 2557. The Court held that Rule 23(b)(2):

> does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

Id. The Court also held that the additional procedural protections provided for nonmandatory classes under Rule 23(b)(3) make it "clear that individualized monetary claims belong in Rule 23(b)(3)." *Id.* at 2558.

In *Wang,* 737 F.3d at 544-45, the plaintiffs conceded that class certification for their monetary claims under Rule 23(b)(2) could not stand in light of *Dukes*; however, the Ninth Circuit remanded for the trial court to determine whether, in light of *Dukes*, the previously granted certification of a Rule 23(b)(2) class should continue for purposes of injunctive relief. Subsequently, the plaintiffs dropped their claim for certification of a Rule 23(b)(2) class because there were no identifiable class plaintiffs who remained employed by the defendant, thus injunctive relief would not be appropriate. *Wang v. Chinese Daily News, Inc.*, 2014 WL 1712180 at * 4 (C.D. Cal. Apr. 15, 2014).

Trial by Formula. In *Dukes,* the Court rejected the Ninth Circuit's "Trial by Formula" approach. Under that method, a sample set of class members would be selected as to whom liability for sex discrimination and the back pay owed as a result would be determined in depositions supervised by a magistrate. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average back pay award in the sample set to arrive at the entire class recovery – without further individualized proceedings. 131 S. Ct. at 2561. The Court disapproved "that novel project," holding that Wal-Mart was entitled to individualized determinations of each employee's eligibility for back pay. *Id.* Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," the Court held that a class could not be certified on the premise that Wal-Mart would not be entitled to litigate its statutory defenses to individual claims. Further, the Court held that because the necessity of that litigation would prevent back pay from being "incidental" to a classwide injunction, the plaintiffs' class could not be certified, even assuming *arguendo,* that "incidental" monetary relief can be awarded to a Rule 23(b)(2) class. *Id.* at 2561. *See also Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 775 (7th Cir. 2013) (treating wage and hour collective action and state law class action essentially the same; rejecting as inadequate a "formulaic" approach for determining damages, holding that a damages determination would require 2,341 separate evidentiary hearings. The court also rejected the plaintiffs' suggestion that damages could be established by trying a sample of 42 class members' claims, finding that the "representative proof" submitted by the plaintiffs failed to establish the amount of unreported time for each class member. While there are methods by which the time could be established, the court held that "what can't support an inference about the work time of thousands of workers is evidence of the experience of a small, unrepresentative sample of them.").

In *Davis v. Cintas Corp.,* 717 F.3d 476 (6th Cir. 2013), the court held that *Dukes* precluded certification of a class under Rule 23(b)(2) based on the plaintiff's proposition that the trial court would determine damages by issuing an injunction ordering Cintas to hire class members "randomly selected in numbers equal to the proven shortfalls for each facility." The plaintiff would then calcu-

late Cintas' backpay liability for the class as a whole by multiplying the proven shortfall times lost wages. That calculation would be the limit of Cintas' liability for backpay. The Sixth Circuit held that this "trial-by-formula" system was similar to that rejected by the Court in *Dukes.* In *Dukes,* the Court held that such a formula abridged or modified Wal-Mart's statutory right to assert individual defenses to individual awards of backpay. The Sixth Circuit held that the plaintiffs' plan in *Cintas* suffered from a "similar but even more troubling infirmity … *Davis's* 'shortfall-based' model, unlike the 'trial-by-formula' system, makes no effort to individualize damages at all." *Id.* at 490. The court found that individualized monetary relief was not incidental to the injunctive and declaratory relief the plaintiff in *Cintas* sought; accordingly, it found that the trial court correctly denied class certification under Rule 23(b)(2).

3. 23(b)(3). This rule applies if: (a) questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (b) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. A class action brought under Rule 23(b)(3) may seek primarily money damages as long as it meets these two requirements. If the class is certified under Rule 23(b)(3), the court must direct notice to potential class members. Notice is required to enable class members to opt out and file individual claims if they choose.

The following factors are relevant in determining whether these two requirements are met: (a) the interests 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; and (d) the difficulties likely to be encountered in the management of a class action.

The U.S. Supreme Court has extended *Duke's* rigorous analysis standard to the requirements of Rule 23(b). In *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013), the Court held that the party seeking class certification "must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast* was an antitrust action in which certification was sought under Rule 23(b)(3). In applying *Duke's* analytical principles, the Court held, "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)." *Id.* at 1432. Although the Court did not determine whether the standard for evaluating expert testimony set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), applies to expert testimony at the class certification stage, the Court held that certification under Rule 23(b)(3) was improper because the lower court failed to consider the defendants' arguments against the plaintiffs' damages model.

> By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.

Id. at 1432. Thus, under the Court's decision in *Comcast,* it is clear that an action cannot be certified for class treatment under Rule 23(b)(3) where it is evident that "questions of individual damages calculations will inevitably overwhelm questions common to the class."

Since the *Comcast* decision, lower courts have grappled with *Comcast's* application to plaintiffs' claims. The issue has become a source of heated debate in the wage and hour context, in which it may be possible for plaintiffs to present a classwide methodology for damages given the existence of records. In *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015), the Second

Circuit held that it does not read *Comcast* as overruling the "'well-established' [rule] in this Circuit that 'the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification' under Rule 23(b)(3)." The court further held:

> *Comcast* held that a model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury; but the Court did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate predominance.

Id. at 407. (citing *In re Deepwater Horizon,* 739 F.3d 790, 817 (5th Cir. 2014) (construing the "principal holding of *Comcast* [as being] that a 'model purporting to serve as evidence of damages … must measure only those damages attributable to th[e] theory' of liability on which the class action is premised" (ellipsis and second alteration in original) (quoting *Comcast,* 133 S. Ct. at 1433)); *Butler v. Sears, Roebuck & Co.,* 727 F.3d 796, 799 (7th Cir.2013) (construing *Comcast* as holding only "that a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of the classwide *injury* that the suit alleges" (emphasis in original)); *Leyva v. Medline Indus. Inc.,* 716 F.3d 510, 514 (9th Cir. 2013) (interpreting *Comcast* to hold that class action plaintiffs "must be able to show that their damages stemmed from the defendant's actions that created the legal liability"); *accord Catholic Healthcare W. v. U.S. Foodservice Inc. (In re U.S. Foodservice Inc. Pricing Litig.)*, 729 F.3d 108, 123 n. 8 (2d Cir.2013) ("Plaintiffs' proposed measure for damages is thus directly linked with their underlying theory of classwide liability … and is therefore in accord with the Supreme Court's recent decision in *Comcast*….")). The court also noted that its interpretation that *Comcast* "did not foreclose the possibility of class certification under Rule 23(b)(3) in cases involving individualized damages determinations" is consistent with other federal appeals courts that have decided the issue. (citing cases). *See also, e.g., AstraZeneca AB v. United Food & Commercial Workers Unions & Emp'rs Midwest Health Benefits Fund (In re Nexium Antitrust Litig.)*, 777 F.3d 9, 21, 23-24 (1st Cir. 2015) (explaining that *Comcast* "simply" requires that a damages calculation reflect the associated theory of liability, and discussing the "well-established" principle that individualized damages do not automatically defeat Rule 23(b)(3) certification). In *Roach,* the Second Circuit reversed the lower court's denial of class certification, which was based only on the trial court's conclusion that damages were not capable of measurement on a classwide basis, finding "[t]hat holding was not required by *Comcast,* was contrary to the law of this Circuit—left undisturbed by *Comcast*—that individualized damages determinations alone cannot preclude certification under Rule 23(b)(3) … and cannot support the district court's denial of Plaintiffs' motion for certification.") (citations omitted). *See also Jacob v. Duane Reade, Inc.*, 602 F. App'x 3 (2nd Cir. Feb. 10, 2015) (finding lower court did not err in finding that common questions predominated with regard to liability in plaintiffs' misclassification class action, even though it decertified the class with respect to damages.) In *Jacob,* the court held "in decertifying the class with respect to damages, the district court concluded that although the individualized nature of the damages inquiry would defeat Rule 23(b)(3) predominance in the case as a whole, Rule 23(b)(3) predominance was satisfied with respect to issue of liability alone. *See Jacob II*, 293 F.R.D. at 592–93. That conclusion was within the district court's discretion." (citations omitted).

However, in *Ginsburg v. Comcast Cable Communications*, 2013 WL 1661483 at *7 (W.D. Wash. Apr. 17, 2013), the court noted that individualized damages "need not prevent class certification" but held that since the plaintiffs had presented "no manageable way to calculate damages … individual damage calculations will … overwhelm questions common to the class," another obstacle to a finding of predominance."

Many claims will not meet Rule 23(a)'s commonality requirement under the rigorous analysis imposed by *Dukes;* thus courts will not reach the predominance of common issues analysis under Rule 23(b)(3). *See Hadjavi v. CVS Pharm., Inc.*, 2011 WL 3240763 (C.D. Cal. July 25, 2011). In *Hadjavi,* the court noted that the Rule 23(b)(3) predominance inquiry is a more rigorous require-

ment than the Rule 23(a)(3) commonality prerequisite. The "main concern in the predominance inquiry … [is] the balance between individual and common issues." *Id.* at *8 (citations omitted). In *Hadjavi,* the court held that the plaintiffs could not meet this requirement if common issues are lacking at the outset because individual issues predominate. Courts that do reach the predominance inquiry note that this inquiry is more demanding than the commonality determination under Rule 23(a). For example, *Altier v. Worley Catastrophe Response, LLC*, 2011 WL 3205229 at *15 (E.D. La. July 26, 2011), held that the predominance requirement under Rule 23(b)(3) "although reminiscent of the commonality requirement of Rule 23(a), is 'far more demanding' because it 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" (citations omitted). In *Altier,* the court held that determining whether the predominance requirement has been met requires courts to consider how a trial on the merits would be conducted if a class were certified. *Id.* at *16. The court denied certification because the action would involve the resolution of significant individualized damages issues, as well as individualized evidentiary issues.

In *Wang,* 737 F.3d 538, 544 (9th Cir. 2013), the Ninth Circuit remanded a class action brought under California state wage and hour laws, ordering the district court to reconsider the propriety of class certification under Rule 23(b)(3). The Ninth Circuit held that the trial court erred in finding that common issues predominate because this finding rested on the fact "largely in isolation, that plaintiffs are challenging [the employer's] policy of classifying all reporters and account executives as exempt employees." *Id.* at *545. The Ninth Circuit noted that it has criticized similar decisions by the trial court in other cases because the court's determinations essentially created a presumption that "class certification is proper when an employer's internal exemption policies are applied uniformly to the employees." *Id.* According to the Ninth Circuit, such a presumption disregards the existence of other potential issues that may make class treatment difficult if not impossible. *Id.* Thus, because the trial court's method did not balance the individual and common issues, since it excluded factors other than the uniform internal exemption policy, it was improper. In remanding the case, the Ninth Circuit ordered the trial court to consider the entire record of the case in making the predominance determination. *Wang's* holding has subsequently been extended to support the proposition that when conducting a predominance analysis, district courts must consider all evidence presented by both parties to determine whether the case can be adjudicated on a classwide basis. *See Ordonez v. Radio Shack, Inc.*, 2014 WL 4180958 at *5-*6 (C.D. Cal. Aug. 14, 2014) (denying class certification despite existence of facially defective break policy based on plaintiff's failure to submit evidence showing whether that policy was actually implemented); *Cummings v. Starbucks Corp.*, 2014 WL 1379119 at *22-*23 (C.D. Cal. Mar. 24, 2014) (same). Consequently, critical to the predominance analysis is not only evidence establishing the existence of a policy or practice, but also evidence demonstrating how that policy was actually applied.

Along these same lines, it will also be important for district courts to analyze whether class claims may present manageability concerns in the future. This issue typically arises in cases in which records of alleged violations are sparse or nonexistent. *See Ordonez*, 2014 WL 1379119 at *5 (refusing to certify due to lack to records creating manageability concerns); *In re Autozone, Inc.*, 289 F.R.D. 526, 535 (N.D. Cal. 2012) (certifying rest break subclass but acknowledging the defendant's legitimate concerns about manageability due to lack of records). As a result, district courts in the future will likely require plaintiffs in these cases to put forth evidence demonstrating a common classwide method of proof of liability and damages prior to certification.

On the other hand, in *Easterling v. Connecticut Department of Corrections*, 278 F.R.D. 41 (D. Conn. 2011) (D. Conn. Nov. 22, 2011), a group of female applicants challenged the Department of Corrections' policy requiring that candidates pass a physical fitness test including completing a 1.5 mile run within a certain time. The plaintiffs claimed the physical fitness test had a disparate impact on female applicants. The case was originally certified under Rule 23(b)(2); however, after *Dukes,* the court revisited the certification decision. Instead of decertifying the class, the

court held that the claims for classwide declaratory and injunctive relief should be certified under Rule 23(b)(2) and the claims for monetary and individualized relief should be certified under Rule 23(b)(3). The court also held that it would make an aggregate calculation of the back pay to which the class was entitled, which would be distributed to the eligible class members. With regard to the Rule 23(b)(3) requirements, the court noted that although individual issues would still exist after such calculations are made, "these individual questions are less substantial than the issues that will be subject to generalized proof." *Id.* at 50. The court also found that a class action was the superior method of adjudicating the issues involved in the case.

The reasoning in these cases demonstrates how district courts analyze individualized factors in order to determine whether such facts can be managed on a classwide basis, including whether they are relevant to the causes of action at issue, or whether their impact or significance can be addressed through alternative forms of proof.[4]

4. Partial Certification/Bifurcated Proceedings. In an effort to avoid the problems presented by mandatory class actions under Rule 23(b)(2), courts have used bifurcated or hybrid proceedings. Although the continued viability of the procedure is questionable after *Dukes,* at least one federal court has certified a hybrid class action in a disparate impact case. *See Easterling. v. Connecticut Department of Corrections*, discussed above.

Additionally, some courts may grant class certification on specific issues. In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012), the court granted certification under Rule 23(c)(4) on the issue of whether the employer had engaged in practices that have a disparate impact on members of the class, in violation of Title VII. The court noted that if the claim of disparate impact prevails at the classwide proceeding, "hundreds of separate trials may be necessary to determine which class members were actually adversely affected by one or both of the practices … but at least it wouldn't be necessary in each of those trials to determine whether the challenged practices were unlawful." *Id.* at 491.

E. Appeal of Class Certification Order. Federal appeals courts have discretion to permit an appeal from an order of a district court granting or denying class certification. *See* Fed. R. Civ. P. 23(f). The appeal must be filed within 14 days of the class certification order or denial. A motion for reconsideration filed in the district court within 14 days after the certification order tolls the deadline for filing a petition under Rule 23(f) until the district court rules on the motion. The Seventh Circuit has noted the importance of a Rule 23(f) appeal since the "denial of class certification often dooms the suit – the class members' claims may be too slight to justify the expense of individual suits. Conversely, because of the astronomical damages potential of many class action suits, a grant of certification may place enormous pressure on the defendant to settle even if the suit has little merit." *McReynolds*, 672 F.3d 482. In *Merrill Lynch,* the Seventh Circuit held that an appeal filed within 14 days of the trial court's second denial of class certification was timely.

F. Collective Actions. Collective actions alleging widespread violations of the FLSA may involve thousands of employees and subject an employer to significant liability. For example, Staples recently agreed to pay $42 million to resolve allegations it misclassified assistant store managers as exempt from overtime laws. *See Staples Agrees to $42 Million Settlement of Assistant Store Managers' Overtime Suits*, 19 Daily Lab. Rep. (BNA) A-1 (Feb. 1, 2010) (*In re Staples Inc. Wage & Hour Employment Practices Litig.*, D.N.J., No. 2:08cv5746, settlement announced January 29, 2010). In January 2012, Novartis agreed to pay $99 million to settle an FLSA overtime collective action lawsuit filed by a group of pharmaceutical sales representatives. *See Novartis to Cough Up $99 Million to Settle Overtime Lawsuit*, http://www.foxbusiness.com/industries/2012/01/25/novartis-to-cough-up-million-to-settle-overtime-lawsuit/#ixzz1l3NrlbZ0.[5] In addition to collective action litigation by pri-

4 The U.S. Supreme Court is expected to provide guidance on the issue of manageability and claimants' ability to establish their membership in a proposed class in *Tyson Foods Inc. v. Bouaphakeo*, Case No. 14-1146.

5 Subsequently, *in Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156 (Jun. 18, 2012), the U.S. Supreme Court held that pharmaceutical sales representatives qualify as "outside salesmen" and, accordingly, are exempt from the FLSA's overtime requirements.

vate plaintiffs, the Department of Labor can file suit under the FLSA and obtain the same monetary relief for class members they could obtain in a class or collective action. *See Espenscheid*, 705 F.3d at 772, 775 (treating class and collective actions as essentially the same, noting "there isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards, though with some terminological differences.") As Judge Posner noted in *Espenscheid*, recently the DOL has brought a large number of FLSA enforcement actions and, in 2011, recovered $225 million in back wages for employees, the largest amount ever collected by the Wage and Hour division in a single fiscal year. *Id.* at 776.

1. "Opt in" Procedure. Collective actions alleging violations of the FLSA, ADEA or EPA must follow the procedure set out in the FLSA, 29 U.S.C. § 216. The most significant difference between the FLSA's collective action procedure and class actions under Rule 23 is that putative class members must affirmatively "opt in," in writing, to become members of a collective action, while individuals who fit the class definition in a class certified under Rule 23 are included unless they opt out. *See Hipp*, 252 F.3d at 1216; 29 U.S.C. § 216(b).

2. Similarly Situated. The FLSA specifies that employees have "the right to bring their FLSA claims through a 'collective action' on behalf of themselves and other 'similarly situated' employees." *Alvarez v. City of Chicago,* 605 F.3d 445, 448 (7th Cir. 2010) (quoting in part 29 U.S.C. § 216(b)); *Gonzalez v. Winn-Dixie Stores, Inc.*, 2014 WL 4665468 at *4 (S.D. Fla. Sept. 18, 2014) ("conclusory assertion other employees are similarly situated to Plaintiffs fails to meet Plaintiffs' burden under the FLSA"). Many federal appeals courts have approved a two tiered or two-step "ad hoc" approach in determining whether plaintiffs are "similarly situated" for purposes of § 216(b). *See, e.g., Hipp*, 252 F.3d at 1219.

Both tiers analyze whether the members of the proposed class are similarly situated, but in very different procedural and evidentiary postures. In the first tier, the district court determines whether to send notice to potential class members. This decision is usually based on pleadings and affidavits, with no evidentiary hearing, and the standard is fairly lenient. *See Smith v. Family Video Movie Club, Inc.*, 2012 WL 580775 at *2 (N.D. Ill. Feb. 22, 2012) (at the initial step of the certification process, the plaintiffs are only required to make a minimal showing that others in the potential class are similarly situated; later noting that the court applies a more stringent standard in the second step, *Smith v. Family Video Movie Club, Inc.*, 2012 WL 4464887 (N.D. Ill. Sep. 27, 2012)), *certification aff'd in part, rev'd in part,* 2015 WL 1542649 (N.D. Ill. March 31, 2015) (noting at the second stage the "Court must consider: (1) whether the plaintiffs share similar or disparate factual and employment settings; (2) whether the various affirmative defenses available to the defendant would have to be individually applied to each plaintiff; and (3) fairness and procedural concerns"); *Brown v. Money Tree Mortg., Inc.*, 222 F.R.D. 676, 679-80 (D. Kan. 2004) ("the standard for certification at this notice stage is a lenient one"; relying on pleadings and affidavits to resolve first tier motion for certification). *But see Gonzalez* 2014 WL 4665468 at *5 (S.D. Fla. Sept. 18, 2014) ("Plaintiffs' failure to specifically identify others in the class precludes conditional certification").

If the court determines notice is appropriate, the court grants a conditional certification. Discovery proceeds as a representative action while notice is given and class members opt in. Although Federal Rule of Civil Procedure 23(f) permits an immediate appeal from an order granting or denying class certification (within the appellate court's discretion), a decision to conditionally certify a class under 29 U.S.C. § 216(b) is not immediately appealable. *See McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136 (9th Cir. 2007); *Baldridge v. SBC Communs., Inc.*, 404 F.3d 930 (5th Cir. 2005).

At or near the close of discovery, the defendant moves for decertification of the class. This is the second tier. This determination is based on a full factual record; thus class representatives must establish that they and those who have opted in are similarly situated. *See Mitchell v. Acosta Sales, L.L.C.*, 841 F. Supp. 2d 1105 (C.D. Cal. 2011) (At that stage, the court makes a factual

determination as to whether the plaintiffs are similarly situated, based on the following factors: "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendants with respect to the individual plaintiffs; and (3) fairness and procedural considerations.") (citations omitted). If the similarly situated standard is met, the case proceeds to trial as a representative action. If the similarly situated standard is not met, the opt-in plaintiffs are dismissed without prejudice and the case proceeds to trial on the claims of the original plaintiffs. Individuals who do not choose to become part of an FLSA collective action are not barred by issue or claim preclusion from pursuing individual claims.

In *Espenscheid,* 705 F.3d 770 at 772, Judge Posner affirmed the trial court's decision decertifying a class of satellite technicians who claimed they were unlawfully denied overtime wages, but treated the FLSA collective action and the state law class action as a single class, holding "there isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards, though with some terminological differences." Judge Posner acknowledged that one of the functions of the procedural protections in Rule 23, which are not included in the collective action section of the FLSA, is the need to protect the right of unnamed class members to opt out of the class proceeding. He also noted, however, that the provisions of Rule 23 are intended to promote efficiency as well and "in that regard are as relevant to collective actions as to class actions. And so we can, with no distortion of our analysis, treat the entire set of suits before us as if it were a single class action." *Id.* Applying a Rule 23 analysis and rejecting the plaintiffs' argument that the court should use a "trial by formula" consisting of a sample of 42 of the 2,341 putative class members, the court affirmed the lower court's decision decertifying the action. If other courts follow the Seventh Circuit in applying the more stringent Rule 23 standards to FLSA collective actions, it could become more difficult for plaintiffs to maintain these lawsuits.

In FLSA collective actions, a potential class member must either file an opt in consent in a pending action or file a separate lawsuit before the statute of limitations has run in order to preserve his or her FLSA claim. *See, e.g., Aros v. United Rentals, Inc.*, 269 F.R.D. 176, 181 (D. Conn. 2010) (In FLSA collective action suits, the statute of limitations is tolled when a plaintiff files written consent pursuant to § 216(b)).

IV. ISSUES UNIQUE TO THE MANAGEMENT OF CLASS AND COLLECTIVE ACTIONS

In addition to the headaches that accompany litigation of individual discrimination claims, class and collective action lawsuits can present unique difficulties for the employer.

A. Plaintiff-Friendly Forums and the Class Action Fairness Act. In certain states, plaintiffs tend to forum shop and bring their class claims in state court in order to take advantage of the state's liberal policies on class certification. *See, e.g., Sav-On v. Super. Ct.*, 96 P.3d 194, 209 (Cal. 2004) (acknowledging California's public policy encouraging the use of the class action device). This often occurs in jurisdictions such as the State of California, in which state courts tend to be more liberal than federal courts in granting class certification. In 2005, in an effort to reduce plaintiffs' forum shopping, the federal government passed the Class Action Fairness Act of 2005 (CAFA), which expanded federal jurisdiction over many large class action lawsuits and mass actions. Under CAFA, class and other mass actions may be brought or removed to federal court if the amount of controversy exceeds $5 million, and in which class members (or a majority of them) are generally citizens of a state different from the defendant. While CAFA has permitted some employers to remove plaintiffs' claims to federal court, plaintiffs have engaged in a number of tactics to avoid removal under CAFA. Among the most prevalent of techniques implemented by plaintiffs was to stipulate or plead that the class would seek less than $5 million. Other strategies that plaintiffs had implemented was to challenge an employer's basis for removing the case to federal court, specifically challenging the calculations submitted by the employer in establishing the $5 million amount in controversy threshold.

However, in *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013), in a brief opinion written by a unanimous court, the Supreme Court repudiated this technique. There, the plaintiff had brought a class action in state court with the stipulation that he and the class would seek less than $5 million. Defendant removed the case to federal court, but the district court subsequently found the stipulation persuasive and remanded the case to state court; the Eighth Circuit denied appeal. On certiorari with the Supreme Court, the High Court reversed the district court's decision, finding that "a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified." In the wake of *Standard Fire Ins. Co.*, the decision has given employers a greater chance of success on an attempt of removal under CAFA. For example in *Rea v. Michaels Stores Inc.*, 742 F.3d 1234, 1236 (9th Cir. 2014), the plaintiffs expressly disclaimed any recovery for the class over $4,999,999.99; however, court noted that under *Standard Fire Ins. Co.*, such waivers are ineffective and will not defeat removal under the CAFA. Additionally, the court in *Michaels* applied *Standard Fire Ins. Co.* to adopt a lower "preponderance of the evidence" standard when courts review an employer's basis for establishing a dollar value in controversy for purposes of removal.

B. Broad Discovery. The temporal and geographic scope of permitted discovery in a class or collective action is generally much broader than in an individual discrimination claim. This means the employer can anticipate being required to produce reams of papers and/or terabytes of electronic data relevant to the prospective class. In some class or collective actions, the employer can expect to dedicate one employee to spend most of his or her time during the certification period (usually 90 days or more) coordinating the document production and response to written discovery.

The Court's decision in *Dukes* means that employers are likely to see more precertification discovery because the certification decision overlaps with the merits decision. Additionally, if courts apply *Daubert* at the class certification stage, more expert and factual discovery will be required. *See* Beisner, Miller and Rose, "Class-certification '*Daubert*' inquiries: Half a loaf better than a whole?" *National Law Journal,* Feb. 9, 2012; *Burton v. District of Columbia*, 277 F.R.D. 224, 230 (D.D.C. Dec. 23, 2011) (denying motion for class certification because the plaintiffs failed to show commonality, but ordering pre-certification discovery; "The Supreme Court's ruling in *Wal-Mart* confirms that pre-certification discovery should ordinarily be available where a plaintiff has alleged a potentially viable class claim because *Wal-Mart* emphasizes that the district court's class certification determination must rest on a 'rigorous analysis' to ensure '[a]ctual, not presumed, conformance' with Rule 23").

1. Electronic Records. Class representatives undoubtedly will seek the production of electronic records. Locating and producing electronic records in a class action can be a monumental task. The employee in charge of coordinating discovery should coordinate with the company's information systems department to ensure that computer backup tapes from the relevant period are preserved and not overwritten in accordance with a standard business schedule for overwriting the tapes. At a committee meeting of the American Bar Association's Section of Labor and Employment Law, Magistrate Judge Ronald L. Ellis noted that "IT people" should be deposed under Fed. R. Civ. P. 30(b)(6) to determine the employer's document retention practices and the extent of potential evidence. *Practitioners Give Advice on Motion Practice and Discovery in Class 'Glass Ceiling' Suits*, 69 Daily Lab. Rep. (BNA) C-3 (April 12, 2005). Thus, it is important to designate the appropriate person to fulfill this role and ensure that he or she is properly prepared.

Employers also should identify employees who may be key witnesses in the litigation and instruct them not to delete potentially relevant electronic documents. Documents saved on individual witnesses' computer hard drives should be preserved because the hard drives could contain information not stored elsewhere. If potential witnesses are in geographically dispersed locations, coordinating the review of this information and ensuring the electronic files are preserved can be a difficult and time-consuming process. For a further discussion of the production of electronic communications and potential spoliation of evidence, see the *Potential Liability in the Electronic Workplace* Chapter of the SourceBook.

2. Geographic Scope of Discovery. Counsel for the defendant usually will seek to limit the geographic scope of discovery, while plaintiffs' counsel likely will request discovery covering a

broad range of jobs and/or a broad geographic area. The depositions of the class plaintiffs may provide a basis for limiting discovery. Accordingly, these depositions should be conducted as early in the discovery process as possible.

3. 30(b)(6) Depositions. The deposition of the corporate representative pursuant to Fed. R. Civ. P. 30(b)(6) often plays a much larger role in defending a class action than in individual discrimination lawsuits. The employer has the discretion to designate the appropriate individual to act as the corporate representative, and may designate more than one individual if necessary to address the specific information sought by the 36(b)(6) deposition notice. These individuals should be chosen with care and properly prepared for their depositions. High level executives, who would normally not be involved in litigation of individual discrimination claims, often spend a great deal of time meeting with attorneys, reviewing documents, preparing for depositions, and being deposed in class action litigation.

4. Expert Witnesses. While expert witnesses may not be involved in litigation of individual claims, they almost always will be involved in class action litigation. The use of experts can further complicate the discovery process and increase the expense of litigation.

C. Class Communications. The district court has the authority to restrict communication between the parties to a class action and putative class members if necessary to prevent abuse of the class action procedures. *See McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 295 (D. Mass. 2004), *class certification granted by McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304 (D. Mass. 2004). A broad order limiting the defendant's ability to communicate with its employees regarding the litigation can have a detrimental impact on its ability to defend the case. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the U.S. Supreme Court held that an order limiting communications between parties and class members "should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." The Supreme Court held that there must be a specific record showing the particular abuses justifying an order limiting class communications and that the order must be carefully drawn to limit speech as little as possible, consistent with the First Amendment rights of the parties under the circumstances.

Counsel often jointly negotiate and stipulate to guidelines for class communications, which helps ensure both parties' interests are protected. Employers should be aware of potential restrictions on their right to communicate with employees regarding the litigation and should consult with counsel before doing so.

D. Settlement. Settlement of a class action is also more complicated than settlement of an individual discrimination claim because certain procedural steps must be followed and issues beyond an individual plaintiff's rights must be resolved. Additionally, the Supreme Court's decision in *Dukes* appears to have resulted in a decrease in value of settlements in the employment class action context. According to one report, the top 10 settlements in 2012 totaled $48.65 million, a significant decrease from 2010, the year prior to the *Dukes* decision, when the total was $346.4 million. *See "Dramatic Halo Effect" of Wal-Mart Ruling Seen Spurring Change in Workplace Suits,* 10 Daily Lab. Rep. (BNA) A-9 (Jan. 15, 2013). The Court's decision is likely to produce more, smaller-scale class actions and make all of them more difficult to settle.

1. Class Actions. Rule 23(e) requires court approval of any settlement of a class action and requires individual notice of the settlement be given to all affected class members. Additionally, under Rule 23(h), parties to a class action cannot negotiate attorneys' fees as part of a settlement agreement. Instead, all fee awards must be made by motion under Rule 54(d)(2).

The Supreme Court's ruling in *Dukes* may make it more difficult to obtain approval of a settlement class. For example, in *Rodriguez v. Nat'l City Bank*, 277 F.R.D. 148 (E.D. Pa. 2011), (a nonemployment case) the court refused to approve the settlement class because it did not meet the commonality requirements set forth in *Dukes.* In *Rodriguez*, the court held that the ultimate inquiry into the fairness of the settlement under Fed. R. Civ. P. 23(e) "does not relieve the court of its responsibility to evaluate Rule 23(a) and (b) considerations." Thus, before a class action suit

that would bind class members is settled, the court must conduct a hearing to determine: (a) that certification of the proposed class is appropriate; and (b) that the settlement "is fair, reasonable, and adequate." *Id.* The Third Circuit subsequently affirmed this decision, noting that "One cannot say, in effect, 'we could show commonality, if we had to.' The short answer is, 'you do have to.'" *Rodriguez v. Nat'l City Bank,* 726 F.3d 372, 380 (3d Cir. 2013).

Additionally, the CAFA requires defendants participating in a class action settlement in federal court to serve a detailed notice on the appropriate state and federal officials no later than 10 days after filing a proposed settlement. The statute defines appropriate federal official as the U.S. Attorney General or the person with primary federal regulatory or supervisory responsibility over the defendant. Appropriate state official is defined as the state attorney general or the person in the state who has the primary regulatory or supervisory responsibility over the defendant or who licenses or otherwise authorizes the defendant to conduct business in the state if the matters in the class action are subject to regulation by that person.

The CAFA also provides that an order of final approval of the proposed settlement cannot be issued earlier than 90 days after the later of the dates on which the appropriate state and federal officials are served with the notice discussed above. If a class member can demonstrate that notice has not been provided to the appropriate state and federal officials, he or she may refuse to comply with or choose not to be bound by a settlement agreement or consent decree.

In addition to the procedural hurdles in settling a class action, the terms of the settlement agreement must resolve more complicated issues than those presented in the settlement of an individual lawsuit. For example, the parties must decide how the proceeds of any settlement fund will be distributed to the individual class members. The terms of the settlement agreement may provide for the distribution or it may provide that entitlement to and/or distribution of funds will be determined by a neutral third party. For example, Astra USA, Inc. agreed to resolve a class action suit filed by the Equal Employment Opportunity Commission (EEOC) by having the fund apportioned by a court-appointed special master. A settlement agreement entered into by Smith Barney provided for a three-tiered process by which individual class members could adjudicate their claims. The process included negotiation with the company, nonbinding mediation, and, if the first two steps failed, binding arbitration. While such processes may not always be appropriate, the settlement of a class action must take into consideration how the proceeds will be distributed.

Additionally, settlement agreements of employment discrimination class actions often require the employer to take certain actions, such as providing training or implementing policies or procedures to ensure the hiring or advancement of members of the class. Considerations in drafting such terms include how such actions will be implemented and how compliance will be monitored.

2. Collective Actions. The requirements of Rule 23(e) and (h) and the CAFA do not apply to collective actions alleging violations of the FLSA; however, a court must approve the settlement of an FLSA lawsuit because the FLSA prohibits employers and employees from entering into any agreement that results in violation of the FLSA's terms. If a settlement in an FLSA suit brought by employees reflects a reasonable compromise over issues such as FLSA coverage or computation of back wages that are actually in dispute, courts may approve the settlement in order to promote the policy of encouraging settlements of litigation. *See Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir. 1982). Alternatively, the Secretary of Labor is authorized to supervise payment to employees of unpaid wages owed to them. An employee who accepts such a payment supervised by the Secretary thereby waives his right to bring suit for both the unpaid wages and for liquidated damages, provided the employer pays in full the back wages. *Id. See also Heath v. Hard Rock Café Int'l (STP), Inc.*, 2011 WL 5877506 at *3 (M.D. Fla. Oct. 28, 2011), *adopted, motion granted, Heath v. Hard Rock Café Int'l (STP), Inc.*, 2011 WL 5873968 (M.D. Fla. Nov. 23, 2011) (noting that claims for compensation under the FLSA may only be settled or compromised when the Department of Labor supervises the payment of back wages or when the district court enters a stipulated judgment "after scrutinizing the settlement for fairness"; further holding that in any case in which a plaintiff agrees to accept less than his

full FLSA wages and liquidated damages, he has compromised his claim within the meaning of *Lynn's Food Stores*).

Courts may incorporate the fairness factors of Rule 23 in evaluating the settlement of an FLSA collective action, but are not required to do so. In *Diaz v. Scores Holding Co.*, 2011 WL 6399468 (S.D.N.Y. July 11, 2011), the court noted that the standard for approval of an FLSA collective action is lower than that for a Rule 23 settlement because of the opt-in provisions applicable to FLSA collective actions. Accordingly, the court in *Diaz* declined to apply the standards for approval of settlement of a Rule 23 class action in determining the fairness of the settlement of an FLSA collective action.

Collective action settlements, like class action settlements, may require the employer to take certain actions such as changing pay policies or implementing methods for monitoring the workplace to ensure overtime violations do not occur.

A possible strategy for employers to consider in an FLSA collective action is submitting to the named plaintiff an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure for complete relief, which in some federal jurisdictions, allows the defendant to moot the plaintiff's individual FLSA claim. In the past, circuit courts were divided on the question of whether an unaccepted offer of judgment under Rule 68 of the Federal Rules of Civil Procedure for complete relief could moot a plaintiff's claim. A growing number of circuit courts now conclude that it does not. *See Bais Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 52 (1st Cir. 2015 (finding unaccepted Rule 68 offer does not moot plaintiff's claim); *Hooks v. Landmark Indus. Inc.*, 797 F.3d 309, 314-15 (5th Cir. 2015); *Chapman v. First Index Inc.*, 796 F.3d 783, 786 (7th Cir. 2015); *Tanasi v. New All. Bank*, 786 F.3d 195 (2d Cir. 2015), *pet. for cert. filed*, 84 U.S.L.W. 3054 (U.S. Jul. 17, 2015) (No. 15-84); *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 703 (11th Cir. 2014); *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 952-53 (9th Cir. 2013). Litigants had expected the split to be resolved in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), in which the question before the U.S. Supreme Court was whether an employer can obtain dismissal of an FLSA collective action by mooting the named plaintiff's claims before the trial court rules on a motion for conditional certification. However, the High Court declined to reach this question or resolve the split, finding that the issue was not properly before the Court.[6]

E. Systemic Investigations by the EEOC. Recent years have seen an increase in the number of systemic lawsuits (class-like lawsuits filed by the EEOC aimed at obtaining relief for a large number of employees) and this trend appears likely to continue as the EEOC has listed preventing harassment through systemic enforcement and targeted outreach as one of its national priorities for FY 2013-2016. *See U.S. Equal Employment Opportunity Strategic Enforcement Plan FY 2013-2016,* http://www.eeoc.gov/eeoc/plan/sep.cfm. Because systemic lawsuits are not subject to the restrictions imposed by *Dukes,* employers will undoubtedly face more systemic lawsuits in the upcoming years.

V. ARE YOU AT RISK FOR A CLASS OR COLLECTIVE ACTION SUIT?

Although no employer is immune from the threat of a class or collective action suit, large, customer-driven corporations who are especially sensitive to negative publicity are frequent targets. Additionally, plaintiffs' lawyers often target specific industries, so employers should pay attention to whether their competitors have been sued in class or collection actions. It is important for all employers to be aware of potential warning signs that could indicate vulnerability to a class or collective action.

These warning signs include:

- A significant increase in internal complaints, especially if the complaints are from a group of employees in the same protected class (for example, race or sex), complaining of a specific employment policy or practice.

6 The U.S. Supreme Court is expected to address this question again in *Campbell-Ewald Co. v. Gomez*, No. 14-857.

- A decrease in employee morale.
- A significant increase in the number of employees requesting to review their personnel files. If there is such an increase, employers should examine the requested files to determine whether there are similarities or potentially common issues affecting the employees.
- An increase in turnover.
- Multiple complaints regarding the same supervisor or from the same location.
- Numerous EEOC charges from employees in one facility making the same or similar allegations. Additionally, employers with multiple locations should have a system in place to be aware of EEOC charges filed by numerous employees at different locations making the same or similar allegations.
- The involvement at the EEOC stage of a seemingly routine charge of a high-profile law firm or a law firm with a reputation for pursuing class actions.
- An EEOC charge making class allegations.
- Contact from a national advocacy group indicating a particular concern regarding an employment practice.
- Cause determinations issued by the EEOC, especially if the charge easily could be the basis of a class action (such as hiring, failure to promote, or layoffs).
- A failed union campaign. Disgruntled employees who seek to organize may file a class or collective action lawsuit if the organizing campaign fails. Employers should address any issues that arise during a union organizing campaign that might be grounds for a class or collective action.
- Complaints about the company aired on the Internet – through web sites, chat rooms, etc. Employers should monitor the Internet and be aware of any complaints by employees regarding employment practices that could be the basis of a lawsuit. Be aware, however, that the National Labor Relations Board (NLRB) takes the position that maintaining overly broad social media polices or taking adverse action based on an employee's negative comments about the employer on the employee's social networking site could be an unfair labor practice.
- Management demographics may indicate a potential problem if there are significantly fewer minority or female upper level managers compared to the numbers of minority and female employees and lower level managers. Be aware that conducting such an analysis can backfire if the employer does not take action to rectify negative information uncovered. Internal evaluations of company demographics should be conducted with the advice and assistance of counsel to help ensure the information obtained from the evaluations is privileged.

VI. PREVENTATIVE STEPS

How can an employer avoid becoming the target of a class or collective action lawsuit? Although there are no guarantees, employers can help protect themselves by monitoring the morale of the workplace and avoiding perceptions of unfairness or discrimination in employment practices.

A. Avoid Entirely Subjective Decision-Making Practices. In *Falcon*, the U.S. Supreme Court held that the requirements of commonality and typicality in a class action claim could be satisfied if the plaintiffs could show that the employer operated under a "general policy of discrimination." 457 U.S. 159, n.15. The Court suggested that an entirely subjective decision-making process in hiring and promotion could constitute such a general policy. However, in *Dukes,* 131 S. Ct. 2541, the Court significantly limited this theory. The Court held that Wal-Mart's policy of allowing discretion by local supervisors over employment matters is "a very common and presumptively reasonable way of doing business -- one that we have said 'should itself raise no inference of discriminatory conduct.'" *Id.* The Court in *Dukes* further held that in a company with such a policy, demonstrating the invalidity of

one manager's use of discretion will do nothing to demonstrate the invalidity of another manager's.

While the decision in *Dukes* likely will make it more difficult for plaintiffs to obtain class certification based on the argument that the employer used an entirely subjective decision-making process, it is more important than ever for employers to have validated selection criteria, as plaintiffs necessarily will have to identify specific policies or procedures that target a protected class.

1. **Hiring.**

   a. Notice of Vacancy. Establish a procedure for making potential applicants aware of job openings. This procedure may include posting vacancy notices on employee bulletin boards and advertising in local newspapers or industry publications. Employers who rely on word of mouth to fill open positions risk being accused of discriminatory hiring practices because this may limit the applicant pool to individuals who have similar characteristics (i.e., race, sex, etc.) to current employees.

   b. Objective Qualifications. Employers should identify objective criteria that establish the minimum qualifications for vacant positions. Additionally, if there are entry-level openings in more than one department, employers should establish an objective method for determining the department to which the applications will be sent or newly hired employees assigned. The use of such objective criteria may preclude a claim that women or minorities were "channeled" into "dead end" jobs.

   c. Final Hiring Decision. While all hiring decisions involve some degree of subjectivity, employers should have some objectively measurable criteria to differentiate applicants and support the final decision.

2. **Promotions.**

   a. Job Descriptions. Employers should have written job descriptions for all positions so that employees and managers know what the employee is expected to do in the position.

   b. Performance Evaluations. Employers should utilize written performance evaluations that accurately assess the employee's performance of all of the job duties as described in the job description, as well as other aspects of performance, such as attitude. The supervisor should meet with the employee to discuss the performance evaluation and address any problem areas that need improvement. Employees should have the opportunity at this time, and throughout the year, to discuss promotion or training opportunities.

   c. Training. Where specific training is required to qualify for desirable positions (for example, operating specific machinery), employers should establish training programs or opportunities that are available to all employees or all employees that meet established objective criteria. This can help preclude a claim that a class of employees was denied advancement opportunities because those employees were not given the training necessary for a promotion.

   d. Job Postings. If internal applicants will be given priority in applying for open positions, a notice of job vacancy, along with the qualifications for the job, should be posted in a place that is accessible to all employees. The notice of vacancy should provide specific instructions on how applications should be submitted, including where to submit the application, a method for identifying which position is being sought, and the date by which all applications must be submitted. Doing so can help the employer demonstrate the use of objective criteria in promotion decisions and can bolster the argument that it was required to consider for promotion only those who applied in accordance with posted procedures. All positions should remain posted for the same length of time to give employees the same opportunity to become aware of the openings. An informal, word of mouth process of notifying employees of job openings can lead to claims of classwide discrimination if minorities or females are not informed of the openings.

B. Evaluate Payroll Practices. Employers are increasingly faced with collective actions alleging they have violated the FLSA by misclassifying employees as exempt or by not paying for all hours worked. A review of an employer's payroll practices, including employee classification, conducted with the advice and assistance of counsel, can help employers avoid such lawsuits and possible DOL investigations.

C. Analyze Workforce Statistics Under Direction of Counsel. Plaintiffs often use employment statistics to buttress their discrimination claims by showing that for a particular job or position a statistically significant disparity exists between the number of employees in a protected category and the number of nonprotected employees. Rather than waiting until a class action lawsuit is filed, employers may want to consider analyzing workforce statistics on a regular basis, at the direction of counsel (so that the information is not discoverable), and taking appropriate action to correct any statistically significant disparities. To conduct such an analysis, the employer should ensure it has policies and procedures in place to record and maintain employment information, such as hiring, terminations, promotions, rates of pay, and disciplinary actions. Ideally, this information should be maintained in a centralized, searchable computer database with report-producing capabilities. Access to this database should be restricted to in-house counsel and a limited number of human resources employees with a need to know the information. If an outside expert is retained to conduct the statistical analysis, communication with the expert should be limited to the employer's counsel. The counsel's legal opinion should incorporate the results of the analysis.

It is important to understand that conducting such statistical analysis can create problems for the employer, especially if a statistically significant disparity is discovered but no action is taken to correct the problem. Plaintiffs could use this information to establish a systemic problem susceptible to class treatment. Additionally, this information could be the basis for seeking punitive damages against the employer. Employers should consult with experienced employment counsel to consider whether such an analysis would be appropriate.

D. Conduct a Validation Study of Any Standards Used for Hiring or Promotion. Requirements or standards used for hiring or promotion have been challenged in class action lawsuits as having a disparate impact on protected categories. Employers using such standards should conduct a validation study to ensure that the standard is a valid predictor of success in the position. Such studies are necessary to establish the defense that the standard is job related for the position in question and consistent with business necessity if the standard is challenged and shown to have a disparate impact.

E. Complaint Procedure. Establishing an internal complaint procedure that enables employees to bring their complaints to the attention of management without fear of retaliation may help prevent class action claims (as well as individual employment lawsuits). The complaint procedure should be in writing and disseminated to all employees. Employees should acknowledge receipt of the procedure when hired, and it should be redistributed on a regular (perhaps annual) basis. The procedure should identify individuals within the company, other than the employee's direct supervisor, to whom complaints can be made. Employers may want to consider implementing a hotline for employee complaints or using an ombudsperson to resolve internal complaints. Employees who feel their needs are heard and addressed may be less likely to become involved in litigation.

F. Exit Interviews. Employers should consider implementing a policy to conduct exit interviews. These interviews could disclose valuable information, such as a perception that the company's promotion or advancement practices are unfair.

G. Diversity Training. Employers are not required by law to conduct diversity training; however, such programs can boost employee morale, raise awareness of diversity issues, and emphasize the employer's commitment to diversity in the workplace. Additionally, diversity training is the first step to developing a corporate culture of inclusiveness, which decreases the likelihood of class action claims alleging discriminatory hiring or promotion practices.

H. Management Accountability. Employers may want to consider implementing a policy that holds managers accountable for failure to comply with Equal Employment Opportunity (EEO) or diversity policies. Managers who perform well but fail to adhere to EEO or diversity policies can be a source of liability by exposing the employer to litigation.

I. Class and Representative Arbitration Waivers. In the wake of the Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which held that states' laws prohibiting the use of class arbitration waivers were pre-empted by the Federal Arbitration Act, the use of arbitration agreements containing class and representative arbitration waivers have increasingly become a viable means to prevent or defend against class action litigation. Further information regarding the use and enforceability of class and representative arbitration waivers in arbitration agreements may be found in the *Alternative Dispute Resolution* Chapter of the SourceBook.