EMPLOYMENT CLASS ACTIONS

The past year has seen a number of developments favorable to employers, including the passage of the Class Action Fairness Act of 2005, pro-employer decisions from several federal courts of appeals, and adverse publicity about class action abuses. Despite these developments, however, class action litigation has continued against employers unabated. In the last year, there have been numerous settlements and judgments ranging in excess of $100 million. Recent settlements and awards include:

- A $175 million jury verdict against Wal-Mart in a California case involving breaks and meal times;
- A $42.5 million settlement by Morgan Stanley of a class overtime claim;
- A $19.1 million judgment against Family Dollar Stores in a federal case in Alabama for overtime;
- A $6.5 million settlement by Ann Taylor of a class-wide overtime dispute;
- A $49 million settlement by Verizon of a pregnancy discrimination class action based upon decades-old practices by Verizon predecessor companies;
- An $89 million settlement of a wage and hour case by financial firm UBS;
- A $14.9 million settlement of an overtime lawsuit by video game producer Electronic Arts; and
- A $1.4 billion settlement of an IBM pension dispute.

Plaintiffs continue to press to broaden the grounds for class action litigation, aggressively pursuing claims based upon use of subjective criteria in making employment decisions. Further, plaintiffs, the courts, and agencies are employing new statistical methods and arguments to bolster class action claims. In 2004, a California district court certified the largest class action in United States history and, despite an expedited appeal, that issue remains unresolved.

While the body of case law relating to the class actions is becoming increasingly well developed, such claims are still highly unpredictable and extremely expensive for employers. The lingering doubt as to many significant issues, as well as the number of sympathetic jurisdictions, has emboldened the plaintiffs' bar in a number of areas. They have successfully employed tactics such as forum-shopping, the filing of multiple lawsuits, adverse publicity, the Internet, and other tools to bring employers to settle what would ordinarily be nuisance suits.
This paper will review the general law relating to employment class actions. It will also review recent developments in the law, including the case of Dukes v. Wal-Mart, in which the court certified a class of over 1.5 million female employees. It will review statistical and other means of proof by plaintiffs, and also identify areas in which employers may minimize their exposure to class action claims.

I. The Wal-Mart Case

Two years ago, a federal district court in California certified the largest employment discrimination class action in American history. In Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 189 (N.D. Cal., 2004), seven female Wal-Mart employees sought to assert a class against Wal-Mart for sex discrimination in the areas of pay and promotions. The court ultimately certified a class of over one million female employees of Wal-Mart in 3,400 stores across the United States, permitted the plaintiffs to assert claims for punitive damages, and minimized many of the defenses traditionally used by employers, which will be discussed more fully below.

The Dukes case itself concerned a claim that Wal-Mart discriminated against women in promotions and pay rates. The plaintiffs’ case was enhanced substantially by statistical evidence that demonstrated that, while only one-third of Wal-Mart’s employees were men, two-thirds of its management were male. The plaintiffs also produced statistical evidence that suggested that, on average, women were promoted more slowly to management positions than men.

In the court’s lengthy, 84-page decision, it reviewed a number of arguments raised by Wal-Mart that, in reality, should have resulted in the class not being certified. The court, however, either minimized them, or relied upon its own gender stereotypes, to conclude that a class lawfully could be certified.

Among the many significant findings made by the court:

(1) The court concluded that there were sufficient issues in common to the class, in large part because Wal-Mart had a strong “corporate culture.” The court failed to explain, however, how that culture in any way constituted discrimination or was the cause of any of the employment decisions about which the plaintiffs complained. Wal-Mart’s written corporate culture, in fact, stresses respect for the individual.

(2) The court could not find any objective criteria used by Wal-Mart that demonstrated sex discrimination. The court thus relied largely upon alleged subjective decision-making processes, but, once again, could identify no specific subjective criteria that constituted discrimination.

(3) Instead, the court relied upon its own gender stereotypes to find evidence of discrimination. The court, for example, noted that Wal-Mart expected its managers to be willing to relocate. The court then applied its own gender stereotype that women are less likely to want to relocate than men and then found that the use of that policy might constitute sex discrimination.
(4) The court largely dismissed the fact that the review of each particular plaintiff’s situation would require a case-by-case analysis of the relative qualifications of each of the candidates for each particular promotional opportunity. Indeed, the court failed to give weight to the fact that even the most abbreviated analysis of each decision would require a trial stretching over decades.

(5) The court permitted the imposition of punitive damages against the corporation, even though, by its own admission, the decisions being challenged were made on a local basis.

(6) The court certified a class that included many of the female managers whose decisions were being challenged.

(7) The court precluded Wal-Mart from introducing evidence at the liability phase of the case that individual decision-makers, or even individual stores, did not discriminate.

The Dukes case thus represents not only the largest employment class action ever certified, but also represents challenges to employers’ strongest, common sense arguments and the right to defend class claims on the merits. The Dukes decision is already prompting other plaintiffs to file similar cases against large retailers in the same court and will likely prompt arguments in cases throughout the United States about sprawling, unwieldy classes. See, e.g., Satchell v. FedEx Corp., Case No. 03-2659 (N.D. Cal., Sept. 27, 2005) (same court certified two classes of 10,000 employees in a race discrimination case).

The Ninth Circuit Court of Appeals has accepted review of the decision and has issued an expedited calendar to resolve it. It held oral argument on August 8, 2005, at which time the judges expressed some concern about the potential for intra-class conflicts, but did not appear troubled by the class’ size. Indeed, at least one of the judges seemed to find the trial court’s approach to be a practical means of resolving the dispute. There is no set date for the court of appeals’ decision, and further appellate review is likely.

II. Employment Class Basics

A. Definition of Employee Class Action

In theory, a class action is a vehicle by which a large number of individuals with largely similar claims may combine them in a single action against the defendant. In many cases, the class action may be the only realistic means of enforcing rights when there are a large number of claimants whose individual claims would not be worth pursuing on a piecemeal basis.

B. Current Threat to Employers

Unfortunately, particularly in recent years, class action litigation has become a great tool for abuse. First, class action litigation has been rightly criticized on the grounds that the primary beneficiaries of class action litigation are the plaintiffs’ attorneys. In many instances, the class members will receive relatively small or no consideration in a settlement, while the attorneys
will reap awards on the order of millions of dollars. In some cases, attorneys have pursued class action litigation when, in fact, some of the class members would be better off pursuing their own claims without a class.

Of greater concern to employers, class action litigation is particularly dangerous when applied to workplace issues. In many cases, plaintiffs' attorneys will take a handful of isolated issues and attempt to use them, in combination with a class action, to make it appear that rampant discrimination is the norm in the workplace. In such cases, the employer may be subject to staggering liability even when, if the claims were analyzed individually, each would be found to be without merit.

Class action litigation, particularly in the discrimination context, also has a deeply divisive effect in the workplace. Such litigation literally pits the rights of one group of employees versus another. It also creates difficult issues regarding employee discipline, while the action is pending, when any action taken by the employer will be subject to careful scrutiny and likely attacked as having a retaliatory basis.

Few employers are aware, as well, of the negative effect of publicity on their businesses. Plaintiffs' attorneys in the class action arena actively promote their cases to the media, issue press releases, and engage in other theatrics in an effort to pressure the employer into settlement. Unlike most cases in which publicity is a mere possibility should there be an adverse result, employers in class action employment disputes should expect, as a matter of course, that the case will be subject to media scrutiny. The media publicity and class action threat, in turn, will likely require the retention of a public relations adviser to deal not only with the public, but also with the employer's managers, employees, shareholders, and lenders. Plaintiffs not uncommonly set up web sites to drum up support and to gather more evidence in support of their claims. Class action litigation presents its own unique set of challenges.

C. Governed by Rule 23 of Federal Rules of Civil Procedure

Class action litigation is governed, in large part, by Rule 23 of the Federal Rules of Civil Procedure. To bring a class action, a plaintiff or group of plaintiffs must, in every case, satisfy four requirements contained in Rule 23(a). Assuming those requirements are met, they must then fall within at least three of the categories of classes under Rule 23(b). At least in theory, a number of these requirements will winnow out many class action claims. As a practical matter, however, many types of claims, if properly framed, will be able to survive examination of the Rule 23 requirements before a sympathetic court even if they are ultimately determined to be without merit.

As will be discussed further below, certain types of actions that resemble class actions do not need to satisfy Rule 23. More particularly, claims pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., and the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., are decided under a different set of standards. As a practical matter, however, many of the aspects of the Rule 23 requirements will have an impact on those types of claims.
1. All Class Actions: Rule 23(a)

All class actions must satisfy the requirements of Rule 23(a) of the Federal Rules of Civil Procedure. See Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 613-14 (1997). These four requirements are frequently described in terms of numerosity, commonality, typicality, and adequacy of class representation. As a practical matter, a large number of threatened employment class actions fail because of an inability to satisfy one of the four Rule 23(a) requirements.

a. Numerosity: Rule 23(a)(1)

(i) “class is so numerous that joinder of all members is impractical.”

(ii) 40-50 is generally the line at which joinder becomes impractical. See Andrews v. Bechtel Power Corp., 780 F.2d 124 (1st Cir. 1985) (49 from same geographical area not sufficient), cert. denied, 476 U.S. 1172 (1986); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (31 is too few); Richards v. Cooper & Lybrand, 82 F.R.D. 335, 338 (D.D.C. 1978) (limiting class to single facility, denying certification because no showing that class is sufficiently numerous); Roundtree v. Cincinnati Bell, Inc., 90 F.R.D. 7 (S.D. Ohio 1979) (36 is too few); Muntz v. Ohio Screw Prods., 61 F.R.D. 396 (N.D. Ohio 1973) (class of 10 to 14 is too few); Roman v. ESB, Inc., 550 F.2d 1343, 1348-49 (4th Cir. 1976) (55 not enough); Crawford v. Western Elec. Co., 614 F.2d 1300 (5th Cir. 1980) (34 not a class); Ohio v. Richter Concrete Corp., 69 F.R.D. 604, 605 (S.D. Ohio 1975) (37 insufficient).

(iii) Courts will look at whether the plaintiffs’ allegations involve discrimination of a limited number of employees or, rather, describe a company-wide policy which affects a large number of persons. Hewlett v. Premier Salons Int’l, Inc., 185 F.R.D. 211, 216 (D. Md. 1997)

(iv) Courts will also be more likely to find numerosity when the individual damage claims of class members are relatively small. James Wm. Moore, et al., Moore’s Federal Practice § 23.22 (3d ed. 2000).

(v) Courts also look at the amount of geographic dispersion among class members.

b. Commonality: Rule 23(a)(2)

(i) “There are questions of law and fact common to the class.”
(ii) In plain language, Rule 23(a)(1) requires that at least one issue must be common among the class.

(iii) Practically speaking, this requirement will mandate that the common issue be fairly specific, i.e., broad discriminatory allegations will not suffice. While claims can be based on an employer’s “general policy,” broad allegations should not meet the commonality requirement.

To meet this burden, the plaintiff will argue that the issues in the case are supported with generalized proof that applies to the class as a whole. Further, the plaintiff will argue that the generalized proof predominates over individualized proof.

c. Typicality: Rule 23(a)(3)

(i) “the claims or defenses of the representative parties are typical of the claims and defenses of the class.”

(ii) Typicality means that the named plaintiff’s claim and factual circumstances are reasonably aligned with those of the class. See, e.g., Donaldson v. Pillsbury Co., 554 F.2d 825, 830 (8th Cir. 1977), cert. denied, 434 U.S. 856 (1977). The plaintiff must show that he or she suffered the same specific harm as that alleged for the class. See, e.g., Washington v. Brown & Williamson Tobacco Corp., 959 F.2d 1566 (11th Cir. 1992); Alpert v. Utilicorp United, Inc., 84 F.3d 1525, 1540 (8th Cir. 1996); Roundtree v. Cincinnati Bell, Inc., 90 F.R.D. 7 (S.D. Ohio 1979); Meyers v. Ace Hardware, Inc., 95 F.R.D. 145, 151 (N.D. Ohio 1982).

(iii) Analysis is intertwined with commonality. Paxton v. Union Nat’l Bank, 688 F.2d 552 (8th Cir. 1982).

d. Fair and Adequate Representation: Rule 23(a)(4)

(i) “the representative parties will fairly and adequately protect the interests of the class.”

(ii) Two criteria determine whether representation of the class will be adequate: (1) the representative must have common interests with the unnamed members of the class, and (2) it must appear that the representative will vigorously prosecute the interests of the class through qualified counsel. Senter v. Gen. Motors Corp., 532 F.2d (6th Cir.
In assessing whether the named representative has common interests with the class, a court should consider: (1) whether the representative is a member of the class; (2) the nature and extent of the named party’s stake in the outcome; and (3) the representative’s familiarity with the conditions she seeks to challenge on behalf of the class. Bowen v. Gen. Motors Corp., 542 F. Supp. 94 (N.D. Ohio 1981), aff’d, 685 F.2d 160 (6th Cir. 1983); Roundtree v. Cincinnati Bell, Inc., 90 F.R.D. 7 (S.D. Ohio 1979) (lack of personal knowledge of personnel practices and lack of showing that others were affected is sufficient to deny class certification).

(iv) A class representative who was employed cannot ordinarily, fairly and adequately represent the interests of unsuccessful applicants. See, Equal Employment Opportunity Comm’n v. Detroit Edison Co., 515 F.2d 301, 310 (6th Cir. 1985). In Detroit Edison, the court found that the need for a commonality of interests was essential in class action litigation.

Nevertheless, though a broad definition of commonality of interests and typicality of claims is desirable, there remains a duty upon the court to consider carefully the requirement of fair and adequate protection in view of the serious consequences of res judicata in class actions.

515 F.2d at 311

See also, Chambers v. Franchise Realty Interstate Corp., 12 FEP Cases (BNA) 1817, 1820 (N.D. Ohio 1976) (court found that “representative black employees would not adequately represent the class of black applicants because they did not have interests in common with the applicants.”); Mixon v. Gray Drugstores, 81 F.R.D. 413 (N.D. Ohio 1978) (court found that it would be improper to certify a class that includes rejected applicants when the named plaintiff was an employee who has never suffered hiring discrimination).
2. Employer Arguments Under Rule 23(a)

a. Many employers successfully defend class actions by attacking the Rule 23(a) underpinnings. In many cases, they may assert that the members of the class are too differently situated from the representative plaintiffs and each other to satisfy Rule 23(a).

b. As set forth by the court in Stastny v. Bell Tel. & Tel. Co., 628 F.2d 267, 277 (4th Cir. 1980), among the many factors are:

(i) Whether the alleged unlawful employment practice affects one or a few employees or does it have an impact across the class.

(ii) Uniformity or diversity of employment practices considering:

(a) Size of workforce.

(b) The number of plants and installations involved.


(d) The diversity of employment conditions, occupations, and work activities.

(e) Degree of geographic dispersion of employees as well as intra-company employee transfers and interchanges.

(f) Whether the company has a decentralized administration and supervision, or rather, strong local autonomy.


(i) Different classes of positions. See, e.g., Johnson v. Bond, 94 F.R.D. 125, 130-31 (N.D. Ill. 1982) (rejecting class that included clerical employees, medical technicians, aviation inspectors, air traffic controllers, and managers).

(iii) Likelihood that the treatment of the class members involves common questions of law and fact.

(iv) How centralized/uniform are the employer’s personnel and employment policies and practices.

(v) The time span of the allegations as affecting the probability that similar conditions occurred throughout the time period.

3. The Remaining Certification Requirements – Rule 23(b)

If an employee can meet the requirements of Rule 23(a), the court will determine if the lawsuit can be maintained under one of the subsections of Rule 23(b). Plaintiffs in employment discrimination lawsuits generally seek certification under either Rule 23(b)(2) or Rule 23(b)(3).

Once a plaintiff has established all four elements of Rule 23(a), it must then attempt to satisfy one of the types of class actions under Rule 23(b). Those are:

- Rule 23(b)(1) – The prosecution of the claims separately would present the risk of inconsistent judgments.
- Rule 23(b)(2) – “The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.”
- Rule 23(b)(3) – Common questions of law or fact predominate, taking into account matters such as individual interest of the class members, any of the litigation pending between the parties, the benefits of consolidation in a single forum, and the difficulties likely to be encountered in management of the class.

a. Rule 23(b)(1). As a practical matter, class action claims under Rule 23(b)(1) are not common in the employment context. Rule 23(b)(1) is better suited for claims arising out of a single occurrence, such as a plane crash or toxic spill, in which one common occurrence unites the plaintiffs’ claims.

b. Rule 23(b)(2). Rule 23(b)(2) is a vehicle often favored by plaintiffs’ counsel in employment actions. In very general terms, it
applies when the plaintiffs are seeking injunctive or equitable relief, and they seek to challenge a decision by the employer that affects all of the class members more or less equally. An example might be the situation in which the employer violates the terms of an employee benefit plan by refusing to pay a particular benefit promised in the plan, and the employees bring suit seeking only to restore that benefit. Theoretically, a Rule 23(b)(2) class would also be available when the employees seek to eliminate a particular employment practice.

One of the primary benefits of a Rule 23(b)(2) class is the lack of an “opt-out” provision. In most class action litigation, employees who are not satisfied with the class or a settlement have a right of “opt-out,” meaning that they may withdraw from the class. In Rule 23(b)(2) litigation, however, all of the employees are bound by the determination and they may not opt-out.

Despite the convenience of having a no opt-out class, Rule 23(b)(2) is limited to claims for injunctive or equitable relief, and does not apply to claims in which there is a substantial component of monetary damages, particularly compensatory or punitive damages. In a number of cases, courts have refused to certify actions under Rule 23(b)(2) when it is apparent that the claims of individual members may predominate, or the plaintiffs seek substantial compensatory or punitive damages. See, e.g., Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998); Jefferson v. Ingersoll Int’l, Inc., 195 F.3d 894 (9th Cir. 1999); Manreal v. Potter, 367 F.3d 1224 (10th Cir. 2004); Murray v. Auslander, 244 F.3d 807 (11th Cir. 2001); Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997); Elkins v. American Shower, Inc., 219 F.R.D. 414 (S.D. Ohio 2002). The Sixth Circuit has noted a split between the Circuits, but has not expressed a view on this issue. Bacon v. Honda of Am. Mfg. Inc., 370 F.3d 565 (6th Cir. 2004).

c. Rule 23(b)(3) – Actions for Money Damages

(i) “[T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include: 1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; 2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; 3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and 4) the difficulties likely to be encountered in the management of a class action.”
(ii) The court usually considers the following factors important in certifying a class under Rule 23(b)(3):

(a) The predominance of common questions of law or fact.

(b) The interests of individual members.

(c) The existence of other litigation on the same topic.

(d) Desirability of concentrating all actions in a single forum.

(e) Case management difficulties.

(iii) The court will certify a class under Rule 23(b)(3) when it finds that resolving the matter as a class is preferable to handling the cases on an individual basis.

(iv) The court’s inquiry as to whether common issues of law or fact predominate is more stringent than Rule 23(a)’s commonality requirement. Common issues must be a significant part of the class members’ claims.

(v) During this stage of the certification, employers can argue either that the individual claims of the class members predominate over the common issues or the practical difficulties of managing a class action when the members’ claims are so varied.

D. Effects of Class Certification

1. Discovery to Resolve Certification Issues

   a. Court has significant degree of discretion in allowing discovery to resolve certification.

   b. The merits of the case are usually bound up with certification issues.

   c. Plaintiff is often able to discover items which relate to the merits of the case as well as class certification. Employer becomes subject to time and expense of discovery.
2. Providing Notice to Class Members in Damages Actions

a. In money damages actions, notice must be provided to all class members. Rule 23(c)(2); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).

b. The practical effect of class action notice is to encourage participation and augment the size of the class.

3. Multiple Class Claims

Employers facing class actions in some cases must deal with two or more such claims being filed at the same time. The prevailing view is that in such cases, the first filed case should predominate, with later cases being dismissed or consolidated. See, e.g., Pacesetter Sys. Inc. v. Medtronic, Inc., 678 F.2d 93, 94-95 (9th Cir. 1982). While many plaintiffs prefer having multiple suits against the employer for tactical reasons, some employers have used such instances to engage in so called “reverse actions,” pitting the claimants against each other for a favorable settlement. See Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 282 (7th Cir. 2002).

Such efforts have not met with uniform success. See Wilfong v. Rent-A-Center (S.D. Ill., filed 2000) (unsuccessful efforts in a highly pro-plaintiff jurisdiction).

III. Employment Class Actions Under Specific Federal Statutes

A. Title VII of the Civil Rights Act of 1964

Title VII prohibits workplace discrimination based on race, color, national origin, religion, and gender. 42 U.S.C. §§ 2000e et seq. Title VII is also used as a basis for causes of action involving sexual harassment and pregnancy discrimination. Many class actions are brought under Title VII’s provisions.

B. The ADA and Rehabilitation Act

Claims for disability discrimination present difficult class action issues. Disability discrimination is prohibited by the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., and the Rehabilitation Act, 29 U.S.C. § 701. Such claims are more difficult in the class action context than claims of sex or race discrimination, however, for many reasons. First, of course, there are a wide range of medical conditions that may constitute disabilities, and it is therefore difficult to assemble a sufficiently homogenous class as the range of disabilities is likely to be highly diverse. Second, because disability claims frequently concern the employer’s obligation of reasonable accommodation and because the range of accommodations is equally vast (necessarily warranting individualized inquiries), it is unlikely that there will be any sufficient commonality or typicality of claims. As a result, courts have been reluctant to certify claims of disability discrimination.
C. Fair Labor Standards Act (FLSA)

1. The FLSA requires employers to pay minimum wage and overtime to employees who are covered by the Act. 29 U.S.C. §§ 201 et seq.

2. The FLSA contains a provision which allows collective actions for similarly situated employees. A collective action bears some common features with a class action, but there are significant differences. First, instead of the Rule 23(a) requirements, the court must determine whether the claims of the putative class members are “similar” or not. Of equal importance, a collective action class is an opt-in class, meaning that the individual members must affirmatively opt into the litigation.

Section 16(b) of the FLSA mandates that notice be provided to recognized class members. Such notice must inform the members that they will not be bound by any judgment unless they affirmatively “opt in.” 29 U.S.C. § 216(b).

3. Rule 23 does not apply to FLSA claims. Nonetheless, courts often borrow the requirements of Rule 23 to guide their certification analysis under the FLSA.

D. The Age Discrimination in Employment Act (ADEA)

1. The ADEA prohibits workplace discrimination against those 40 years old and older. 29 U.S.C. §§ 621-34.

2. Like the FLSA, the ADEA provides for collective actions and is not governed by Rule 23.

E. The Equal Pay Act (EPA)


2. Employees often choose to pursue actions under the EPA rather than Title VII because the EPA allows for double damages if the employer’s violation is willful.

3. The EPA is part of the FLSA and, as a result, contains the same “opt-in” provision for collective actions. As a practical matter, EPA and Title VII claims are often brought together and the case may proceed as a class action under Title VII based upon gender discrimination in wages.

F. Employee Retirement Income Security Act (ERISA)

1. ERISA covers employee benefit and retirement plans. 29 U.S.C. §§ 1001 et seq.
2. **Types of ERISA Claims.** ERISA class action claims arise in a variety of contexts. These include:


   d. **Breach of fiduciary duty resulting from an employer’s alleged failure to adequately advise employees regarding the terms, alteration, or termination of an employee benefit plan.** Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co., 15 F. Supp. 2d 773 (W.D. Pa. 1998).

3. Due to the inherently large size of benefit and retirement plans, ERISA class actions often implicate a large number of employees.


**G. The FMLA**

Courts have rejected class certification in claims under the Family and Medical Leave Act (“FMLA”) because of the highly individualized inquiry relating to leave eligibility, the nature of the reason necessitating leave, and other factors. *See Alexander v. Ford Motor Co.*, 204 F.R.D. 314 (E.D. Mich. 2001).

**H. The Impact of Class Action Litigation on an Individual’s Discrimination Claim**

1. The ADA, Title VII, and the ADEA require an employee to file a charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”) prior to bringing a suit against an employer.

2. Usually such filings must occur within 300 days of the purported discriminatory act. An employee is usually barred from bringing a lawsuit against the employer if he or she fails to file with the EEOC within the
300-day period. Bullington v. United Air Lines, 186 F.3d 1301 (10th Cir. 1999).

3. In the context of a class action, courts have held that a co-worker's filing of a class action suit, which affects an individual employee's cause of action, tolls the running of the filing period with the EEOC. This tolling is effective even if the class is not ultimately certified or even decertified. Armstrong v. Marietta Corp., 138 F.3d 1374 (11th Cir. 1998).

4. Essentially, a class-action filing works to freeze the EEOC filing period for class members. In addition to facilitating discovery and strategy planning, the freezing of the EEOC filing period ultimately draws out the time period between the alleged discriminatory act and the filing of the individual employee's claim (when the class either fails to achieve certification or is ultimately decertified).

I. Actions Brought by the EEOC

Title VII and the ADEA allow the EEOC to bring a class action without having to pass the requirements of Rule 23. As a result, EEOC-led class action suits can be significantly more difficult to dismiss on a procedural basis. EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999).

EEOC actions have been held to extinguish individual causes of action. As a result, an individual's failure to join an EEOC-led class action suit will operate to permanently bar the individual's cause of action. Frank's Nursery & Craft's Inc., 177 F.3d at 456.

J. Disparate Impact Class Action Suits

1. Disparate impact claims generally assert that although an employer's policies are facially neutral, such policies nevertheless create an adverse effect on a particular, protected group.

2. The plaintiff generally has the burden of showing that an employer has engaged in a particular practice or selection device (or a general decision-making process as a whole) which resulted in an adverse impact on a particular group. The employee will usually attempt to meet this burden via statistical analysis. In short, the plaintiff must show that the employer's practice has resulted in inequalities so great that they are not the result of chance.

3. Assuming the plaintiff has met his or her burden, the employer must then set forth evidence which shows that the employment practice is job-related and consistent with business necessity.

4. Even if the employer is able to show a business necessity for the disputed practice, the plaintiff may still show the employer failed to use an effective alternative practice which would have resulted in less of an

5. The special danger of disparate impact claims arises from the fact that an employee can make out a prima facie case using statistical evidence and without having to show the employer's discriminatory intent. Further, the plaintiff’s statistical analyses and their accompanying inferences do not need to reach a “scientific degree of certainty” for a plaintiff to meet his burden.

6. Common Types of Disparate Impact Cases

a. Restricting Job Advertising to Local Newspapers

United States v. City of Warren, 138 F.3d 1083 (6th Cir. 1998). The city government of a predominantly white city, which was located within a predominantly white county, restricted advertising of city employment opportunities to local county newspapers. The city did not advertise in newspapers distributed in the bordering city of Detroit, which had a substantial black workforce. The Sixth Circuit held that the city’s failure to advertise outside the predominantly white county essentially created a “barrier between employment opportunities and members of a protected class.” The court took particular notice of the fact that while the advertising policy was in place, the city had not employed any black workers. Statistical analysis showed that the city would have employed 99 black individuals if the city had expanded its advertising base.

b. Minimum Educational Requirements

EEOC v. Joint Apprenticeship Comm. of Joint Indus. Bd. of Elec. Indus., 164 F.3d 89 (2d Cir. 1998) The Second Circuit held that an industrial board’s requirement of a diploma or GED as a condition for entering its apprenticeship program could support a claim of disparate impact racial discrimination. The EEOC’s data showed that within the relevant counties 89.2% of whites and 68.3% of blacks between 18 and 22 had either a diploma or GED. In addition, while blacks made up 18.3% of the potential local labor force for the apprenticeship program, they consisted of only 12.2% of the program’s actual applicants. The Second Circuit found both of these discrepancies statistically significant.

c. Using Personal or Family Ties as Hiring Criteria

Although the City of Albany had a black population of 21.5%, only 3.1% of the Albany's firefighters were black. The court based its decision on the fact that the Department Chief, who had sole authority to determine who was hired, relied on his personal knowledge of the candidates and their families in making hiring decisions. The court found that this practice had no business necessity and would serve to exacerbate the Department's under-representation of minorities.

7. Disparate Impact Claims Brought Under the ADEA

In March of 2005, the U.S. Supreme Court resolved a conflict in the federal circuit courts of appeals in Smith v. City of Jackson, Mississippi, 125 S. Ct. 1536 (2005), holding that disparate impact claims are allowed under the Age Discrimination in Employment Act (ADEA).

In holding that the ADEA authorizes a disparate impact claim, the Court emphasized the limited nature of its ruling. It found that two textual differences between the ADEA and Title VII made it clear that even though both statutes allow recovery on a disparate impact theory, "the scope of disparate-impact liability under ADEA is narrower than under Title VII." Because the ADEA specifically provides that it is not unlawful for an employer to take an employment action based upon reasonable factors other than age (29 U.S.C. § 623(f)(1)), and given the fact that Congress did not amend the ADEA when it expanded the coverage of Title VII disparate impact claims to modify the Court's holding in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), in the 1991 Civil Rights Act, the Court in Smith held that "Wards Cove's pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."

a. This aspect of the holding is very significant for employers. The Supreme Court's decision in Wards Cove severely circumscribed the ability of employees to maintain disparate impact claims. Under the Wards Cove analysis, the burden of proof remains at all times with the employee, and the demanding Wards Cove standard sets forth specific elements an employee must meet in order to maintain a disparate impact claim.

b. Under this heightened standard, the Smith Court confirmed that to maintain a cognizable disparate impact claim, "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." (Emphasis in original). As the Court explained, this requirement is necessary because the "failure
to identify the specific practice being challenged is the sort of omission that could result in employers being potentially liable for the myriad of innocent causes that may lead to statistical imbalances.”

c. If an employee can make this showing, the employer has only the burden of production, not proof, that its action was based on a reasonable non-age factor. As Justice O’Connor explained in her concurring opinion, a reasonable non-age factor is “one that is rationally related to some legitimate business objective.” Once the employer makes this proffer, the employee bears the burden of disproving this proffered reason.

d. This test of reasonableness is dramatically different than the burden in Title VII cases after the 1991 Civil Rights Act. As the Court explained, “[u]nlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.”

e. Applying these standards, the Court upheld dismissal of the ADEA disparate impact cause of action in Smith. At the outset, the Court found that the employees could not identify a specific practice that resulted in the alleged unfair age disparities. As Justice Stevens explained: “Turning to the case before us, we initially note that petitioners have done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They have not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers.”

f. The Court further held that the employees could not meet their burden of disproving the reasonableness of the city’s actions. The Court found that the alleged disparate impact was attributable to the city’s decision to give raises based on seniority and position. Finding that reliance “on seniority and rank is unquestionably reasonable given the City’s goal of raising employees’ salaries to match those in the surrounding communities,” the Court concluded that “[w]hile there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable.” Accordingly, dismissal of the employees’ disparate impact claim was affirmed.

g. While the Court recognized disparate impact as a viable theory under the ADEA, Smith should not be viewed as a decision that creates a risk of significant additional exposure to employers. Before the Civil Rights Act of 1991 amended Title VII, the
demanding standards of Wards Cove severely limited the ability of employees to successfully establish disparate impact claims. Those exact standards now have been incorporated into the ADEA by the Smith decision.

8. Steps for Avoiding Disparate Impact Litigation

   a. Conduct an evaluation of the employer’s workforce using a proper statistical method. The employer’s EEO-1 form is a good starting point.

   b. If the employer has an affirmative action plan, do not use the 80/20 rule to determine under-utilization because that will likely lead to more "problem" areas and will bolster the plaintiffs' argument that the 80/20 rule is appropriate.

   c. Reassess practices traditionally considered suspect by plaintiffs’ counsel (e.g., nepotism, educational requirements, etc.)

   d. Validate job requirements.

   e. Assess the effect of employment and recruiting policies on protected groups within the employer’s geographic area.

   f. Create clear, objective, nondiscriminatory hiring and promotion criteria. Ensure that the employees who conduct interviews and make hiring decisions apply the proper criteria uniformly across candidates.

   g. Regularly train the employees who are responsible for hiring decisions and examine interviewing and evaluation procedures.

   h. In a reduction in force context, perform a statistical analysis of the adverse impact upon protected groups before the selection decisions are finalized.

IV. Appeals in Class Actions

A. Rule 23(f) permits discretionary appeal of orders relating to certification:

   A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.
B. In the employment class action setting, Rule 23(f) gives employers a significant degree of flexibility. Prior to Rule 23(f), an order granting class certification meant that an employer could only obtain a review of the certification decision after a final judgment on the merits of the entire case. Now, employers are not forced to choose between settling groundless claims or taking their chances and going to trial in the hopes of prevailing on the merits or on appeal.

C. In describing the choice that employers face once a class is certified, the Seventh Circuit stated: “[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff’s probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.” Blair v. Equifax Check Serv., Inc., 181 F.3d 832 (7th Cir. 1999).

V. Statistics

Increasingly, courts in class action employment litigation are looking to statistical arguments being raised by the parties. Unfortunately, some of the tests employed are better suited as screening mechanisms than as constituting any substantive analysis. Further, many courts have become confused regarding the underpinnings of various statistical arguments, as well as the significance of the methodology being used.

A. Significance of Statistical Analysis

There is no question that statistics can, in an appropriate case, form the basis of either an individual or employment class action. See, e.g., International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Statistics have considerable probative force because “absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will result in a work force more or less representative of the racial and ethnic composition of the population in the community from which the employees are hired.” Id. at 40 (quoting Hazelwood School District v. United States, 433 U.S. 299, 307 (1977)). Although the Supreme Court has held that strong statistical proof may be sufficient to establish a prima facie case in employment discrimination cases, the plaintiff does not have to prove a racially disproportionate impact with “complete mathematical certainty.” Id. at 41. Generally, the question posed will be whether the numbers in a particular case rise to the level of statistical significance. In most cases, while courts may employ different approaches, the level of statistical significance is considered to be five percent, meaning that the chances of a particular statistical disparity occurring by chance would be five percent or less.


2. A “p-value” is an observed significance level. The p-value associated with the null hypothesis that a regression coefficient is 0 is the probability
that a coefficient of this magnitude or larger could have occurred by chance if the null hypothesis were true. If the p-value were less than or equal to 5%, the expert would reject the null hypothesis in favor of the alternative hypothesis; if the p-value were greater than 5%, the expert would fail to reject the null hypothesis. Reference Manual on Scientific Evidence at 194.

3. Put another way, courts may permit an inference of discrimination if, after an appropriate statistical analysis, it appears that the chances of a particular outcome occurring in the absence of discrimination are less than one in twenty.

4. While the threshold for statistical significance is relatively well settled, the appropriate methodology, and the factors to be considered, are not. Courts and agencies, in fact, have employed a wide variety of statistical analyses that include:

- The Four/Fifths Rule (a.k.a. the 80% Rule).
- Multiple Regression Analysis.
- The T-Test.
- Fisher's Exact Test.
- Deviation Score Method.

In addition, some courts have employed different variations on the analyses used by these methods, or have combined tests to address a particular case. Some of the key tests are as follows:

B. 4/5 Rule (a.k.a. 80% Rule)

1. Description: “A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.” Uniform Guidelines on Employee Selection Procedures (1978) § 1607.4(d).

2. Strengths and Weaknesses:

   a. Strengths: The only strength for the four-fifths rule is its ease of application. It permits the review of virtually any employment decision based upon a very simple formula that can be performed by a lay person with a pocket calculator. The test is also relatively easily understood by lay persons, courts, and juries.
b. Weaknesses: On the flip side, the four-fifths test is not very accurate, and in fact, is better suited to being a screening device than any meaningful statistical analysis. Few expert statisticians would give the results of the four-fifths rule any credence.

c. The four-fifths rule, while it has difficulties at any level, is particularly weak with respect to small statistical samples. If the sample is sufficiently small, the test is virtually meaningless.

d. As a result, the four-fifths rule has received a great deal of criticism. A number of courts have rejected its application in favor of more sophisticated tests. Unfortunately, the continued use or threatened use of this approach leaves employers vulnerable because the four-fifths test may result in litigation or other proceedings against them, yet even if the employer does satisfy the test, it may still be held liable under more accurate tests.

3. Treatment by Courts:

a. Isabel v. City of Memphis, Nos. 03-5912/5914/6011/6231 (6th Cir. 2005).

120 sergeants competed for promotion to lieutenant. Of those, sixty-three were black and fifty-seven were white. The City informed the candidates that the promotional process would consist of four components: 1) a written test – 20%; 2) a practical exercise test – 50%; 3) performance evaluations for the previous two years – 20%; and 4) seniority points – 10%. Those who passed the written test would proceed to the next three components; those who did not pass would not be invited to continue in the process. With a cutoff score of 70, the passing rate of African Americans was less than 4/5 of the passing rate of non-minorities. After lowering the cutoff score by 4 points to 66 and giving everyone credit for nine questions on the test deemed to be faulty, 98 candidates passed the test – 51 white and 47 black.

Problems resulted from ranking candidates based on their written test scores; it was argued that the cutoff score was incapable of distinguishing between candidates who can and cannot perform the job of lieutenant. For example, a non-minority candidate failed the written test but was ultimately ranked second highest in line for promotion.

Although the result did not violate the 4/5 rule, other statistical analyses – including the T-test and the Z-test – did show an adverse impact. The T-test measured the difference in mean scores between minority and non-minority candidates; the Z-test
measured statistical success across groups; both tests showed a statistically significant adverse impact.

The issue in the case was whether the court may look to alternative statistical analyses (besides the 4/5 rule), such as the T- and Z-tests to find an adverse impact. The court held that:

(i) Statistical analyses must be relevant.

(ii) Supreme Court has approved the use of a case-by-case approach, recognizing that statistics come in an infinite variety.

(iii) Commentary to the Commission’s regulations allows for exceptions to the 4/5 rule.

(iv) Notwithstanding a test’s compliance with the 4/5 rule, other analyses may still reveal adverse impact.

(v) To validate a cutoff score, the inference must be drawn that the cutoff score measures minimal qualifications.


The issue in this case was whether the Superior Court had erred by giving the jury an instruction that included the four-fifths rule.

The court held that the trial court erred by giving the instruction because it focused the jury’s attention on one specific type of statistical comparison.

(i) “Although EEOC Guidelines are generally entitled to deference, we refuse to incorporate this rule as a substantive part of discrimination law in Washington for two independent reasons.” Id. at 13 (the two reasons were 1.) the presence of discrimination is ultimately a factual question which the jury should be left perfectly free to decide, and 2.) the four-fifths rule is objectionable because it focuses the jury’s attention on one specific type of statistical comparison). Id. at 13-14.

(ii) “We refuse to elevate a guideline, the purpose of which is to ensure the uniform exercise of prosecutorial discretion, into a rule of law which would change the determination of discrimination into an arbitrary numbers game.” Id. at 14.

The plaintiff in Dahl had several chemistry degrees and worked for the defendant for 21 years in various positions. Each change of position was associated with a restructuring of the company. The last change (plaintiff's termination) was part of a wider reduction-in-force. According to the plaintiff's analysis of the defendant's records, in the 2002 RIF, which included the plaintiff, 15 individuals were terminated and 12 of the 15 were over 40. The general employee population at the employer was evenly divided between persons under and over the age of 40.

The issue was whether the hiring and firing statistics were sufficient at the summary judgment stage under either the direct or indirect method of showing discrimination.

The court held that the raw statistics did not present a sufficient level of specificity to support the inference of discrimination because they did not account for variations among employees in skill level, job function, and education as variables that necessarily must be accounted for in establishing a probative value of the raw numbers given.

Although this court never mentioned the "4/5 rule" by name, but by the description of the plaintiff's evidence, it suggested that it would reject a discrimination case that rested entirely on 4/5 evidence, especially when it is a case of termination due to economic necessity because of the greater burden the plaintiff carries to come forward with additional evidence.

d. Smaller employers are particularly vulnerable to violating the eighty-percent rule. In particular, the Sixth Circuit has vehemently criticized the application of the rule:

[If an employer selects 60% of the blacks and 80% of the whites, this very likely indicates a real difference in selection procedures if he is choosing 600 blacks out of 1,000 and 800 whites out of 1,000. On the other hand, if he chooses 3 blacks out of 5 applicants and 4 whites out of 5 applicants, [the percentages are the same, and the eighty percent rule is violated] both common sense and rigorous statistical analysis tell us that it is much more likely that mere chance is the controlling factor. Black v. City of Akron, 831 F.2d 131 (6th Cir. 1987).]
4. Notes:

a. The Uniform Guidelines offer the 4/5 rule as a standard, but its description of the rule suggests that it is not much of a rule at all. Although a selection rate less than 4/5 is generally regarded as evidence of adverse impact, and a selection rate more than 4/5 is generally not regarded as evidence of adverse impact, “smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user’s actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group.” Uniform Guidelines on Employee Selection Procedures (1978) § 1607.4(d).

b. “Where the user’s evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact.” Id.

c. By placing the above qualifications on the 4/5 rule, the Uniform Guidelines attempt to minimize the rule’s statistical weakness. The qualifications, however, make the rule more cumbersome, and thus reduce the rule’s strengths.

C. T-Test.

1. Description: The t-test is used to evaluate the statistical significance of a difference observed between the null hypothesis and the actual numbers. It uses the t-statistic to evaluate the hypothesis that a model parameter takes on a particular value, usually 0.

2. Practical Example: In a wage discrimination case, the null hypothesis would be that there is no wage difference between sexes. If a negative difference is observed (meaning that women are found to earn less than men, after the expert has controlled statistically for legitimate alternative explanations), the difference is evaluated as to its statistical significance using the t-test.
D. Fisher’s Exact Test

1. Description: Measures the probability that a distribution would occur by random chance. The difference between the results that one would expect to occur as a result of chance and the actual results are measured in “standard deviations.”


   a. In Schanzer, the test measured the probability that the resulting distribution of the ages of the terminated employees would occur by random chance. The test assumed that there was no correlation between the employees’ ages and whether they were terminated (the null hypothesis). If the assumption is correct, the resulting data will demonstrate only a coincidental degree of association.

   b. Fisher’s Exact Test indicated that the employee ratings and the layoff decisions “were very significantly related to whether employees were 40 years-of-age or older at the time of layoff.” *Id.* at 8.

   c. The defendant argued that several recent Second Circuit cases present the proposition that statistical evidence which fails to account for nondiscriminatory factors is properly excluded because it is not probative of discrimination. The court found this reading too strict.

   d. The court concluded that applicable law does not mandate the use of a multiple regression analysis in every case in which statistical evidence forms some part of the proof. *Id.* at 13.

E. Deviation Score Method

1. Example: Suppose 49% of people taking a test are minority. The expected number of minorities among the 29 test-takers who failed is 14.21 (.49 times 29). If the actual or observed number of minority failures is 28, then the difference between the observed and the expected number is 13.79. The standard deviation of the observed from the expected is approximately 2.7 [The standard deviation is calculated by taking the square root of the following: total number in the sample (29 failures), times the representation of minority test-takers (.49), times the representation of majority test-takers (.51)]. See *Bew v. City of Chicago*, 1997 U.S. Dist. LEXIS 15314 at 7-8 (N.D. Ill., September 29, 1997).
2. Cases applying the deviation score method


The decision in Fairfax related to promotional practices that had a large statistical imbalance under any measure. The court held that a two or three standard deviation disparity between expected and observed number of persons in a particular group establishes a prima facie case of discriminatory treatment, even without a showing of specific instances of overt discrimination. \textit{Id.} at 10.

The court, incidentally, found additional support for the plaintiff’s disparate impact case by applying the 80% rule. The court said that the 80% rule “is appropriate for gauging impact when the sample size in a category is so small that statistical significance cannot be ascertained by use of a standard deviation analysis, e.g., adverse impact is revealed in category 5 (para-professionals) for blacks using the 80% rule, although the standard deviation showing such impact cannot be accorded statistical significance.” \textit{Id.} at 16. That statement seems counterintuitive – a smaller sample size might show adverse impact using the 80% rule, but that result could be wrong.

The court also recognized the stark disparity without the use of statistics: “The most damning evidence with regard to the police corporal position is that while approximately 20 persons are promoted to corporal every eighteen months, from 350-400 applicants, there is not now and there has never been a black corporal on the County’s police force.” \textit{Id.} at 20-21.

The court suggested that more specific analysis of the data (i.e., the question of testing or qualifications) does not become an issue until it is determined that, at least prima facie, there has been disparate impact. \textit{Id.} at 21.


The issue in Bew was whether a difference in passage rates exceeding three standard deviation points is statistically significant enough to argue against chance and make out a prima facie case of disparate impact.

The court found that the test for differences between independent proportions yielded a Z-score of over five standard deviations. The disparity between the minority and the majority pass rates is statistically significant and therefore supports a prima facie case of
disparate impact. The court rejected the city’s argument that its employment practices are sound because they satisfy the 4/5 rule.

F. Multiple Regression Analysis


2. Strengths and Weaknesses:

Strengths:

a. Unlike the 4/5 rule, which seems to just look at the results, multiple regression analysis looks at the causes in an attempt to explain the results.

b. It may be a good tool for both plaintiffs and defendants. Multiple regression analysis is good at uncovering discrimination, but is also more accurate than other tests, such as the 4/5 rule, that may suggest discrimination where none exists.

c. Accounts for multiple variables.

Weaknesses:


e. It is more complicated – difficult to use and understand.

f. It is necessary to distinguish between correlation and causality - watch out for “spurious correlation” which arises when two variables are closely related but bear no causal relationship because they are both caused by a third, unexamined variable.

g. The absence of a correlation does not guarantee that a causal relationship does not exist – lack of correlation can occur if (1) there are insufficient data; (2) the data are measured inaccurately; (3) the data do not allow multiple causal relationships to be sorted out; or (4) the model is specified wrongly because of the omission of a variable or variables that are related to the variable of interest. See Reference Manual on Scientific Evidence, 2d Ed., Federal Judicial Center (2000) at 185.
h. If there are measurement errors in the dependent variable, estimates of regression parameters will be less accurate, though they will not necessarily be biased. However, if one or more independent variables are measured with error, the corresponding parameter estimates are likely to be biased, typically toward zero.

3. Discrimination cases using multiple regression analysis:


h. Denny v. Westfield State College, 880 F.2d 1465 (1st Cir. 1990) (sex discrimination).

i. Black Law Enforcement Officers Ass’n v. City of Akron, 920 F.2d 932 (6th Cir. 1990).


G. Other Statistical Issues

1. Should Statistical Tests Be One-Tailed or Two-Tailed?

a. When the expert evaluates the null hypothesis that a variable of interest has no association with a dependent variable against the alternative hypothesis that there is an association, a two-tailed test,
which allows for the effect to be either positive or negative, is usually appropriate.

b. A one-tailed test would usually be applied when the expert believes, perhaps on the basis of other direct evidence presented at trial, that the alternative hypothesis is either positive or negative, but not both.

   Example: An expert might use a one-tailed test in a patent infringement case if he or she strongly believes that the effect of the alleged infringement on the price of the infringed product was either zero or negative.

2. One-Tailed Tests, Two-Tailed Tests, and P-Values:

   a. Because using a one-tailed test produces *p*-values that are one-half the size of *p*-values using a two-tailed test, the choice of a one-tailed test makes it easier for the expert to reject a null hypothesis.

   b. Correspondingly, the choice of a two-tailed test makes null hypothesis rejection less likely.

   c. IMPORTANT: Since there is some arbitrariness involved in the choice of an alternative hypothesis, courts should avoid relying solely on sharply defined statistical tests. Reporting the *p*-value or a confidence interval should be encouraged, since it conveys useful information to the court, whether or not a null hypothesis is rejected.

   d. Courts have shown a preference for two-tailed tests. See, e.g., Palmer *v.* Shultz, 815 F.2d 84, 95-96 (D.C. Cir. 1987) (rejecting the use of one-tailed tests, the court found that because some appellants were claiming over-selection for certain jobs, a two-tailed test was more appropriate in Title VII cases); Csicseri *v.* Bowsher, 862 F. Supp. 547, 565 (D.D.C. 1994) (finding that although a one-tailed test is “not without merit,” a two-tailed test is preferable).

3. Robustness:

   a. Robustness concerns how sensitive regression results are to slight modifications in assumptions.

   b. Feedback affects the robustness.

   Example: Suppose that in a salary-based sex discrimination suit the defendant’s expert considers employer-evaluated test scores to be an appropriate explanatory variable for the
dependent variable, salary. If the plaintiff were to provide information that the employer adjusted the test scores in a manner that penalized women, the assumption that salaries were determined by test scores and not that test scores were affected by salaries might be invalid. If it is clearly inappropriate, the test-score variable should be removed from consideration. Alternatively, the information about the employer’s use of the test scores could be translated into a second equation in which a new dependent variable, test score, is related to workers’ salary and sex. A test of the hypothesis that salary and sex affect test scores would provide a suitable test of the absence of feedback.

4. Correlation Between Explanatory Variables: If there is perfect correlation between two variables, the effect of the variable of interest on the dependent variable from the effect of the other variable cannot be separated.

5. Errors in the Regression Model: They need to be accounted for, but it can be difficult to ascertain their independence.

H. Combined Tests

1. Some courts have looked at a variety of statistical tests and have used them together to draw conclusions about the raw data.


In Brown a black male employee filed a discrimination action on behalf of himself and all other African American people who had been discriminated against by the employer. Both parties submitted statistical evidence during the trial in support of their respective positions.

The court held that the plaintiff’s statistical evidence failed to include the necessary starting position for an accurate analysis of employee movement. It also found that omissions and errors in the analysis tainted the evidence. Id. at 16.

The court reviewed a number of tests that included:

a. “Hypergeometric test” – was used by an expert witness to calculate the precise probability that random decision-making would affect the observed number of black promotions, and to see whether the difference from the expected number was statistically significant (where statistical significance is measured by the .05 range). Id. at 22.
b. “Binomial test” – not used in this case, but appears to have been used in Castaneda v. Partida, 430 U.S. 482, 496-97 n.17 (1977). According to the expert, the hypergeometric test is more sensitive to differences from the expected result than the “binomial test.” Id.

c. “Fisher’s transformation” – performed by the expert witness after the hypergeometric test. The transformation test was used to cumulate the data from all seven promotional steps at issue. It was performed to ensure that a pattern of insignificant differences within the individual steps did not mask systematic bias along the whole promotion ladder. Here, the expert used a one-tailed test which tends to favor the plaintiff’s viewpoint because with a one-sided test, it takes less of a variation from expectation to reach “.05 significance.” Id. at 23.

(i) Example: A coin that yields 5 heads in a trial of 8 flips would vary from the expected result (4 heads), but such a small number of flips would certainly not warrant any inference that the coin was not “fair.” If, however, 5 or 6 subsequent trials yielded the same variance (5 heads rather than 4), one would begin to suspect that the coin is not fair. Id.

(ii) Benefit/Weakness: “Fisher’s transformation” increases the sensitivity to any bias against blacks. Moreover, the use of a one-tailed, rather than two-tailed test favors the plaintiff’s viewpoint even further because with a one-sided test, it takes less of a variation from expectation to reach significance. Id.

(iii) “Fisher’s transformation” eliminates the possibility that several samples, each with an independent variation that is not statistically significant, might reveal cumulatively a significant bias. Id.

d. “Fisher’s exact test” – Used to analyze each promotional step separately. The expert used “Fisher’s exact test” to calculate the precise probability of the observed occurrences within each promotion rung for each year. He then used “Fisher’s transformation” to cumulate the probabilities within each promotion rung over all five years. Id. at 23.

e. Tests on the queuing data – If a promotional scheme was affected by racial discrimination, the results of tests performed on the promotional data would indicate that the positions of black employees in the promotional queue fall consistently below their
positions in the hiring queue. The expert here performed three different tests on the queuing data, in increasing order of sensitivity. Id. at 26.

(i) The “runs” test. This test examined the number of positive and negative values assigned black employees on each exhibit. Random hypothesis would suggest that half of the blacks would have positive values, while the other half would have negative values. The expert determined that blacks were not at a statistically significant disadvantage under this test. Id.

(ii) The “difference in proportions” test. This test is more precise because of the greater numbers using all employees, not just blacks. Also, it addresses the possibility that more than 50 percent of the total group has one sign. If half the black employees had “+” signs, that would satisfy the “runs” test, but it would ignore the possibility that far more (or less) than half of the whites had “+” signs.

(iii) The “sign rank” test. This test is more sensitive than the other two because it takes into account the magnitude of each person’s positive or negative values.

I. Frequent Responses to Statistical Analyses

Even apart from the precise statistical test being used, employers may attack class action treatment on a number of grounds relating to the populations for which the statistical analysis is appropriate. These include:

1. Statistical sample size. In many instances, the statistical sample will simply be too small to make any meaningful analysis.

2. It is well-recognized that a statistical analysis of a small sample size is unreliable. See, Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n. 20 (1977) (“Considerations such as small sample size may, of course, detract from the value of [statistical] evidence.”); Mayor of Philadelphia v. Educ. Equity League, 415 U.S. 605 (1974) (finding sample size of 13 too small to provide reliable sample).

3. The obvious danger posed by small sample sizes is that they tend to produce misleading results that would not hold over the long run, and thus erroneously may be attributed to discriminatory practices rather than to chance. For example, if an employer laid off three employees aged 35, the average age of those laid off would be 35. If the employer also laid off a 75 year-old, the average age of those laid off would be 45.
4. Recognizing this danger, federal trial and appellate courts consistently invalidate and fail to give weight to statistics derived from small samples. See, e.g., Castillo v. Am. Bd. of Surgery, 221 F. Supp. 2d 564, 570 (E.D. Pa. 2002) (finding evidence “not statistically significant at all” because of small sample size); Vivone v. Acme Markets, Inc., 687 F. Supp. 168, 171 (E.D. Pa. 1988) (finding statistical evidence “unreliable because of small sample-size.”); Berkowitz v. Allied Stores of Penn-Ohio, Inc., 541 F. Supp. 1209, 1219 (E.D. Pa. 1982) (declining to rely upon “inconclusive” statistical evidence in age discrimination action because of small sample size); Commonwealth v. Rizzo, 466 F. Supp. 1219, 1228-32 (E.D. Pa. 1979); Fallis v. Kerr-McGee Corp., 944 F.2d 743, 746 (10th Cir. 1991) (finding group of nine individuals too small to provide reliable statistical results); Frazier v. Consolidated Rail Corp., 851 F.2d 1447, 1451 (D.C. Cir. 1988) (“As the size of a statistical sample decreases, the probability that a discrepancy is due to chance is heightened.”); Simpson v. Midland Ross, 823 F.2d 937, 943 (6th Cir. 1987) (sample size of 17 terminated employees too small to be statistically significant); Haskell v. Kaman Corp., 743 F.2d 113 (2nd Cir. 1984) (rejecting statistical data where sample size was too small to be meaningful); Soria v. Ozinga Bros., 704 F.2d 990, 995 (7th Cir. 1983); Eubanks v. Pickens-Bond Constr. Co., 635 F.2d 1341, 1347-48, 1350 (8th Cir. 1980); Ochoa v. Monsanto Co., 473 F.2d 318, 319-20 (5th Cir. 1973) (per curiam).

5. Beyond the courts, the Equal Employment Opportunity Commission also recognizes in its own regulations that small sample sizes do not yield reliable statistical analysis. 29 C.F.R. § 1607.4(D).

6. A second frequent attack on statistical analysis is to address whether the employees being compared are, in fact, similarly situated. It is well established that a claim of discrimination requires that the plaintiff and the comparable employee be similarly situated. See, e.g., Minadeo v. ICI Paints, 398 F.3d 751 (6th Cir. 2005); Clayton v. Meijer, 281 F.3d 605 (6th Cir. 2002); Peltier v. United States, Case No. 03-3623 (6th Cir., October 28, 2004); Gray v. Toshiba Am. Consumer Prods, Inc., Case No. 99-6460 (6th Cir. 2001). If a static results in two dissimilar employees being compared, it may not be an appropriate statistical analysis.

7. Frequently, plaintiffs will attempt to combine positions in an effort to create sufficient numerosity or a statistically significant sample. Some courts have rejected these attempts, particularly when the positions combined are not logically connected. See, e.g., Anderson v. Westinghouse Savannah River Co., Case No. 03-1150, 2005 WL 102 7356 (4th Cir. 2005).

8. As a practical matter, attacks on the data going into the statistical analysis may be more fruitful for the employer because it avoids the need for
expert testimony and is something which may be resolved by a court without needing to resolve questions of fact.

VI. Attacks on Subjective Decisions in the Class Action Context

Long suspicious of any subjective employment criteria, plaintiffs’ attorneys are increasingly focusing on the use of subjective criteria in the employment context. While certainly subjective criteria would be suspect in a purely numerical context, such as sales quotas, production figures and similar matters, the presentation of the ability to engage in subjective decision-making is vital for most employers. Indeed, with respect to management and executive decisions, subjective criteria may very well prove to be more important than purely objective data.

In Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), the United States Supreme Court first recognized that a disparate impact theory might apply to an employer’s subjective decision-making process. In that case, the Court found that there was nothing inherently discriminatory about the use of subjective criteria, but that decisions were not immune from scrutiny, simply because they were subjective in nature. The Court stressed that a plaintiff asserting such a claim must “demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the Court that the elements of [employer’s] decision-making process are capable of separation for analysis, the decision-making process may be analyzed as one employment practice.”

In the wake of the Watson decision, there have been numerous challenges to employers’ subjective decision-making processes. Indeed, many plaintiffs’ attorneys direct their energies toward seeking to challenge any criteria that might even be remotely subjective, with mixed success.

In Lott v. Westinghouse Savannah River Co., 200 F.R.D. 539 (D.S.C. 2000), the plaintiff sought to assert a “pattern and practice” claim of discrimination based upon the employer’s subjective decision-making process. The court found that the Company’s grant of discretion by managers did not constitute a “systemic,” company-wide policy of intentional discrimination and was not actionable. In the Dukes case, the court specifically relied upon Wal-Mart’s subjective decision-making process as a basis for certifying the class, even though the court could find no subjective criteria that genuinely constituted discrimination.

Attacks on an employer’s decision-making process are among the most dangerous in the employment context. Frequently, plaintiffs are unable to identify any discriminatory aspect of the decision-making process, but, instead, simply point to any subjective decision-making process as what they believe to be the likely “culprit” for statistical disparities, whether or not they have anything to do with discrimination. Frequently, they dismiss traits that might be viewed as vital to an employer, such as teamwork, the ability to work with others, the ability to instill customer confidence, success at special projects, and numerous other matters.
VII. Arbitration and Class Action Litigation


1. In Green Tree Fin. Corp. v. Bazzle, the U.S. Supreme Court held that an arbitration clause contained in a lending contract required an arbitrator, rather than a court, to determine whether or not the arbitration agreement prohibited class arbitration.

2. In Green Tree, the plaintiffs entered into contracts with a commercial lender. Each contract contained an arbitration clause that stated “all disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us [Green Tree] with consent of you [plaintiff/customer].” In addition, each arbitration contract was governed by the Federal Arbitration Act. 9 U.S.C. § 1.

3. When the loan contracts were entered, Green Tree failed (in violation of state law) to provide the plaintiffs with a form that would have informed them that they had a right to name their own lawyers and insurance agents and would have provided a space to name such agents. Both plaintiffs sought damages for this violation of state law.

4. One set of plaintiffs filed their complaint in state court and asked the court to certify the case as a class action. Green Tree attempted to stay the court proceedings and compel arbitration. The trial court’s order certified the litigation as a class action and compelled arbitration. Green Tree selected an arbitrator to which the plaintiffs consented. The arbitrator awarded the plaintiffs damages and attorney fees. Green Tree appealed to the South Carolina Court of Appeals, arguing that class arbitration is legally impermissible. The procedural history of the other group of plaintiffs followed a similar path.

5. The South Carolina Supreme Court withdrew both cases from the Court of Appeals and assumed jurisdiction. The court then held that the contracts were silent with respect to class arbitration, and hence, the contracts implicitly authorized class arbitration.

6. The United States Supreme Court held that whether the arbitration clause forbids class arbitration is a matter of contract interpretation properly relegated to the arbitrator under the terms of the parties’ agreement. Specifically, the Court found that the issue over the interpretation of the arbitration clause was “a dispute ‘relating to this contract’ and the resulting ‘relationships.’” Thus, the arbitrator is the proper person to decide whether the arbitration agreement allows class actions. The court ultimately remanded the cases to the arbitrators to decide whether the respective arbitration agreements allowed class actions.
B. Since Green Tree, cases have roughly evenly split on the enforcement of waivers in the class action context. Compare, e.g., Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002) (enforcing waiver); Boomer v. AT&T Corp., 309 F.3d 404 (7th Cir. 2003) (same), with Ting v. AT&T Corp., 319 F.3d 1126 (9th Cir. 2003) (refusing enforcement); Eagle v. Fred Martin Motors, 157 Ohio App. 3d 150 (2004) (same).

C. Given the remaining uncertainty in the enforcement of arbitration clauses, employers desiring arbitration of class claims should:

1. Consider the limitations of the particular jurisdiction where employees work.
2. Avoid limitations of remedies.
3. Make any waiver conspicuous.
4. Use plain language.
5. Consider specifying that a court, not the arbitrator, must decide whether class action treatment is available.
6. Avoid burdensome requirements, such as the imposition of costs or attorney fees.

VIII. Class Action Fairness Act of 2005

A. Introduction

The Class Action Fairness Act of 2005 (the “Act”) passed in February 2005. The Act, which had been close to passage for several years, is designed to curb widely perceived class action abuses. President Bush said that the Act “will help protect people who are wrongfully harmed while reducing the frivolous lawsuits that clog our courts, hurt the economy, cost jobs, and burden American business.” The Act is directed largely at consumer and securities litigation, but is likely to have at least a modest impact on employment-related class actions, which have been increasingly filed in state courts over the past several years.

B. Purpose of the Act

The Act’s “Finding and Purposes” section highlights those problems that the Act seeks to resolve. It reflects Congress’ belief that the class action mechanism has been abused, undermining business and faith in the judicial system. It specifically notes the perception that the current system actually harms class members, who often receive “little or no benefit from class actions.” In congressional hearings, the Act’s proponents highlighted instances of this type of abuse. For example, they noted that the proliferation of class action lawsuits among different states produces an unpredictable body of law and invites abuse by plaintiffs’ attorneys, who often file suits in certain jurisdictions known to be sympathetic to class action plaintiffs and large fee awards.
C. Provisions

The Act curbs class action abuses in a number of ways.

1. State Court Limitations

First, the Act restricts the filing of class actions in a state court by giving the federal courts jurisdiction over any class action that involves a claim of at least $5 million and has at least one class member from a state other than that of any of the defendants. Federal judges, considering a variety of circumstances, may decline jurisdiction when more than one-third but less than two-thirds of the plaintiffs are from a particular state and a primary defendant is in that state.

The Act also provides that a district court should decline jurisdiction under certain specified circumstances in which an action has a particularly close relationship to the state in which it was filed. This provision will limit the Act’s impact on employment class actions, because such a large number of actions will have the needed criteria. A district court must decline to exercise jurisdiction over a class action in which the following four criteria are met: 1) greater than two-thirds of the members of all proposed plaintiff classes are citizens of the state in which the action was originally filed; 2) at least one defendant from whom significant relief is sought and whose alleged conduct forms a significant basis for the claims is a citizen of the state in which the action was originally filed; 3) the principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state in which the action was originally filed; and 4) (a) during the three-year period preceding the filing of the class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or similar persons or (b) two-thirds or more of the members of all proposed plaintiff classes and the primary defendants are citizens of the state in which the action was originally filed. Employers with a large percentage of their employees at a single site who are sued in their own states may have difficulty using the Act’s provisions.

2. Easier Removal

The Act also changes the removal framework so that class actions may be more easily removed without regard to the barriers that might exist for individual actions. Under the Act, for example, a class action may be removed to a district court without regard to whether any defendant is a citizen of the state in which the action is brought. An action may be removed by any one defendant without the consent of all defendants. Further, unlike individual actions, orders of remand may be appealed immediately and resolved in accordance with an accelerated timetable.
3. Coupon Settlements

The Act also seeks to remedy the abuse against class members whom the Act's drafters found "often receive little or no benefit from class actions, and are sometimes harmed." The Act gives many examples of such harm. Congress singled out cases in which counsel are awarded large fees while class members receive awards of little or no value; those in which unjustified awards are made to some class members at the expense of other class members; and confusing published notices that prevent class members from being able to understand and effectively exercise their rights.

The Act contains a number of provisions directly related to so-called coupon settlements, in which plaintiffs receive discounts on future purchases of the defendant's product. The Act limits coupon settlements by providing that the portion of any attorney fee award to class counsel that is attributable to the award of the coupons must be based on the value to class members of the coupons that are redeemed. Also, any attorney fee award not based on the recovery of the coupons must be based upon the amount of time class counsel spent working on the action. Last, the court must approve any attorney fee that is attributable to the award of coupons and any proposed settlement under which class members would be awarded coupons.

These provisions are of lesser import in the employment context because "coupon settlements" are relatively rare.

4. Settlement Approach

The Act also provides that the court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members receiving the greater sums are in closer geographical proximity to the court. Finally, within ten days after a proposed settlement is filed in court, each defendant must serve upon the appropriate state and federal officials a notice of the proposed settlement containing, among other things, a copy of the complaint, a notice of any scheduled judicial hearing in the class action, any proposed or final notification to class members, and the names of class members "if feasible."

D. Impact on Employers

Many of the Act's provisions are directed more toward consumer litigation than employment-related claims, but will still likely have an impact. Removal will still be difficult in situations in which the employer has been sued in the state where it and at least two-thirds or more of its employees reside. The Act may have a greater impact on an employer whose employees are outside its home state, thereby bringing these class action suits into federal court.
It may also affect the recovery of attorney fees and approvals of settlements that disproportionately benefit a few employees.

IX. Avoiding Class Action Claims

As class action litigation against employers is showing no sign of abatement, employers should continue to take steps to minimize their exposure to class action claims.

A. General

Employers should examine their workforces, employment practices, and claims experience and consider the following:

1. Examine Racial or Gender Disparities

A starting point for many employers is to examine the makeup of the workforce and to determine whether there are race or gender disparities between the rank and file and management, between high- and low-paying positions, or between the employer's workforce as a whole and others in the same industry or geographic area. The employer's EEO-1 form or affirmative action plan is likely to be reviewed by an agency or plaintiff's counsel and be a good initial document to review.

2. Review Training and EEO Materials

Courts, agencies, and juries are raising the bar for employment policies. Employers may be expected to do more than to have a boilerplate EEO policy. Employers should consider broader EEO statements and other means of announcing a commitment to a nondiscriminatory environment.

3. Be Aware of Warning Signs

Certain occurrences should be considered "red flags" of potential class action activity, such as:

a. Union organizing activity;
b. Probable cause findings from agencies;
c. A rise in the number of charges filed;
d. Charges with "class-type" allegations;
e. Publicity;
f. A rise in the number of grievances or other internal complaints;
g. Multiple requests for personnel files.
B. Wage and Hour Cases

1. Most wage and hour cases arise in the context of an employer failing to pay minimum wage and/or overtime and/or miscalculating the FLSA’s required rate for overtime. Also, an employer may mislabel an employee as salaried or exempt under the FLSA, but yet still treat her or him as hourly. Bryzchnalski v. Unesco, Inc., 35 F. Supp. 2d 351 (S.D. N.Y. 1999); Heidtman v. County of El Paso, 171 F.3d 1038 (5th Cir. 1999).

2. Special Dangers of Wage and Hour Cases. Although an individual employee’s claim may only total a few hundred dollars in back pay, the employer may be subject to tens of millions of dollars in liability if it employs a large number of non-salaried personnel who obtain class certification.

3. Minimizing Wage and Hour Claims
   a. Regularly reassess the job classifications of employees. Pay particular attention to employees classified as “administrative” exempt employees, a longstanding problem for employees.
   b. Keep accurate time records of non-exempt employees. Police local managers to ensure that employees are not being required to work “off the clock.”
   c. Create and enforce policies regarding lunch and break times. Such a policy may prevent an employer from being held liable for using employees during unpaid periods of time.
   d. Beware of any policy that requires the docking of pay for salaried workers. Such policies are subject to counterintuitive rules. A loss of the salaried status of one employee, under the right circumstances, may lead to the loss of the exemption for entire classes of employees.

C. Sexual/Workplace Harassment Claims

1. Employer Liability

   A significant development in the area of sexual harassment jurisprudence occurred when the Supreme Court ruled that, in certain cases, an employer may be strictly liable for a supervisor’s sexual harassment. Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). Although most sexual harassment lawsuits consist of a single, or, rarely, a few plaintiffs, class actions can occur if there is a pattern of sexually harassing conduct which affects a large number of employees. E.E.O.C. v. Dinuba Med. Clinic, 222 F.3d 580 (9th Cir. 2000); Donnelly v. Glickman, 159 F.3d 405 (9th Cir. 1998).
2. Employer Defenses

a. The Supreme Court has advised that, in appropriate cases, an employer's use of reasonable care to prevent harassment, as well as its prompt action to correct problems that arise, may be raised as affirmative defenses. Essentially, an employer must show the court that it took affirmative steps to prevent harassment and responded quickly to any reports of alleged harassment.

b. The employer can also raise as an affirmative defense the plaintiff's failure to avail herself of programs designed to prevent, report, or avoid sexual harassment. Faragher, 524 U.S. at 807-08.

3. Avoiding Sexual Harassment Claims

a. Establish and publish a clear anti-harassment policy which prohibits all forms of harassment and discrimination. Such a policy should include examples of the forbidden conduct. Ideally, that listing should have examples of sexual and other types of harassment.

b. Implement a full discrimination/harassment reporting and investigation system. Such a system should include:

(i) The names and phone numbers of people in the employer's HR department who are responsible for investigating reports of discrimination. Consider creating an 800 "hotline" number or similar mechanism where employees can report harassment 24 hours a day, even anonymously. Many employers today combine that reporting structure with one for reporting ethical or criminal violations as well.

(ii) A list of other members of management (or, in the case of large companies, a particular department) who can be contacted to report harassment. An unqualified statement that reports of harassment will not result in punishment to the person reporting the incident.

(iii) Ensure that each employee, including managers and executives, receives and reads the anti-harassment policy. Require employees to sign a form stating that they have received and read the policy and will follow it. Retain the forms in the employee's personnel file.

(iv) Post copies of the policy in highly visible areas of the workplace. Continuously update and remind all personnel of the policy.
(v) Immediately investigate all reports of harassment. While the investigation is occurring, separate the employee reporting the harassment from the alleged harasser. Where possible, avoid moving the complaining employee or otherwise placing her in a less desirable position. The complaining employee also should be protected from retaliation by the harasser or other employees.

(vi) Ensure that supervisory personnel are trained on their reporting and investigation duties. Front-line supervisors should also be urged to monitor the use of bulletin boards, workplace language, and graffiti. In most instances, however, supervisors should not investigate the harassment allegations themselves but should defer to company officials trained in the investigation of harassment complaints.

(vii) Take harassment complaints seriously, investigate thoroughly and promptly, and document the outcome.

D. ERISA Class Actions

1. Issues Peculiar to ERISA Claims. ERISA class actions pose a significant problem for employers due to the potential for large damage awards as well as the complexity and cost of fighting such claims.

2. Avoiding ERISA Claims

a. Clearly and unambiguously disclaim any vesting rights in the employer’s welfare benefit plans.

b. Announce changes to plans well in advance. Do not mislead employees as to likely changes. Be particularly careful when an employee makes a major job decision, such as retirement, near the time that the employer is making significant changes.

c. Ensure compliance with ERISA’s detailed reporting requirements.

X. Conclusion

Class action lawsuits against employers continue unabated. The Dukes decision is already prompting ever larger and more difficult claims to be brought. Employers should review their operations now to minimize their risk of such suits in the future.