ABA SECTION OF LABOR AND EMPLOYMENT LAW

INTRODUCTION TO CLASS ACTIONS AND COLLECTIVE ACTIONS

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I. INTRODUCTION: EMPLOYMENT CLASS ACTIONS

After years of steady decline, the number of filed employment discrimination class actions has dramatically jumped in recent years. The upswing in employment class actions was accompanied by the nationwide explosion of class and collective actions under the Fair Labor Standards Act, as well as collective actions under the Equal Pay Act and the Age Discrimination in Employment Act. With such prevalent workplace-related litigation comes an even greater need for skilled attorneys who understand and specialize in this complex area of multi-party litigation. This course is designed to outline the basics of litigating such cases from the initial investigation through pleadings, discovery, certification, and settlement of class and collective actions.

A. Class Action Lawsuits

Rule 23 of the Federal Rules of Civil Procedure governs class actions. A class action may be maintained only where plaintiffs satisfy all of Fed. R. Civ. P. 23(a)'s requirements of numerosity, commonality, typicality, and adequate representation.[2] The following is a working definition of these terms: (1) numerosity - class members are too numerous for practical joinder; (2) commonality - common questions of law or fact exist for all class members; (3) typicality – the named plaintiff's claims and defenses are typical of the class; and (4) adequate representation – the named plaintiff and her or his counsel will fairly and adequately represent the class.[3]

Additionally, the class action must fall within one of three categories: (1) incompatible standards class actions (risk of inconsistent results would cause prejudice to a party); (2) actions where the plaintiff is primarily seeking injunctive relief (defendant has taken or refuses to take action on grounds applicable to the entire class); or (3) where a common question among the

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2 FED. R. CIV. P. § 23.
3 FED. R. CIV. P. § 23(a).

class predominates over questions affecting only individuals (a mass tort or injury to the entire class).[4]

A court must determine whether to certify a class "at an early practicable time."[5] If the court decides to certify, its certification order must define the class, claims, and defenses, and must appoint counsel to represent the class.[6] After class certification, the court will notify the parties to the action. For incompatible standards and injunctive relief class actions, the court *may* direct notice of the pending action to the class.[7] Conversely, common question class actions *require* a heightened standard of "best notice practicable under the circumstances."[8] This may include individualized notice to members who can be reasonably identified.[9]

B. Collective Actions

Cases brought under the Fair Labor Standards Act ("FLSA"), the Age Discrimination in Employment Act ("ADEA"), or the Equal Pay Act ("EPA") may not be brought as Rule 23 class actions.[10] Instead, they must be brought as "collective actions" pursuant to 29 U.S.C. § 216.[11] There are some very important differences between Rule 23 class action lawsuits and collective actions. First, and most importantly, collective actions are "opt-in" procedures. This means that, unlike a Rule 23 class action, class members must actively opt in to

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4 FED. R. CIV. P. § 23(b)(1)–(3).
5 FED. R. CIV. P. § 23(c)(1)(A).
6 FED. R. CIV. P. § 23(c)(1)(B).
7 FED. R. CIV. P. § 23(c)(2)(A).
8 FED. R. CIV. P. § 23(c)(2)(B).
9 *Id.*
10 *See, e.g., Otto v. Pocono Health Systems* 457 F.Supp.2d 522, 524 (M.D. Pa. 2006).
11 Cases alleging violations of state wage and hour laws, as opposed to cases alleging solely FLSA violations, may be brought under F.R.Civ.P. 23. *Scott v. Aetna Servs., Inc.,* 210 F.R.D. 261, 264-68 (D. Conn. 2002) (certifying Rule 23 class where FLSA class was previously certified); *O'Brien v. Encotech Constr. Servs., Inc.*, 203 F.R.D. 346 (N.D. Ill. 2001) (certifying a Rule 23 class action that included more plaintiffs than those who had already opted into the FLSA action); *Sauter v. Snappy Apple Farms, Inc.*, 203 F.R.D. 281 (W.D. Mich. 2001) (certifying opt-out claims under AWPA alongside FLSA claims); *Brzychnalski v. Unesco, Inc.*, 35 F. Supp. 2d 351 (S.D.N.Y. 1999) (FLSA and New York state claims); *Leyva v. Buley*, 125 F.R.D. 512 (E.D. Wash. 1989) (certifying a Rule 23 class that would include members who had not opted into the FLSA action).

the lawsuit, by filing an individual consent to join. This tends to decrease class member participation, either because employees are afraid to join in a lawsuit against their current or former employer or because the employees either don't know about, or don't understand, how to participate in the lawsuit. Second, as discussed below, because the cases require class members to opt in, employers may be able to argue that each opt-in class member must individually respond to discovery, whereas in a Rule 23 "opt out" class, workers are usually successful in convincing the court that discovery of absent class members is not appropriate. Finally, as discussed below, there are different procedures for "certifying" a collective action.

II. INVESTIGATING, INITIATING, AND RESPONDING TO A CLASS ACTION COMPLAINT

A. Investigating A Potential Class Action Lawsuit

Clients sometimes come to counsel complaining of group, or class wide discrimination, and occasionally even come as a group of potential clients to counsel. In other cases, it is only one client complaining of an individual incident, but counsel believes that there may be a more widespread problem. How may counsel determine whether there is a potential class wide case?

1. Investigating Class Action Discrimination Cases

Discrimination class action lawsuits often take years to bring to trial or otherwise resolve, and generally require extensive and expensive expert testimony. Once a case is brought as a putative class action lawsuit, plaintiffs' counsel have a fiduciary duty to unnamed class members, and can't just drop the suit if it isn't working out, or proves too expensive.[12]

[12] *See, e.g., Rothman v. Gould*, 52 F.R.D. 494, 495-6 (S.D.N.Y. 1971). The named plaintiff was offered a $13,000 settlement after spending $40,000 and two years on the case. The plaintiff moved for decertification, unopposed by defendants. The court did not grant decertification: "counsel will not be allowed to forget the whole business on the mere assertion that it was a mistake to begin with." *See also Hanzly v. Blue Cross of Western New York, Inc*., 1989 WL 39427 (W.D.N.Y. 1989) ("Having initially requested and then obtained certification of a class, the named plaintiffs were duty-bound to represent the common interests of all the class members… Decertification cannot be permitted, however, because such would reward the self-interested conduct of the present class representatives by allowing them to consummate an amenable settlement of their individual claims but not those claims of certain other

Accordingly, it is even more important than usual to thoroughly investigate a potential discrimination class action lawsuit before filing.[13]

Some claims are more suitable for class treatment than others, because they lend themselves to group proof and/or are based on a common policy or practice of the company. Other claims are more susceptible to employers' claims that each employment decision was made separately for different reasons, making class treatment unavailable. For example, termination claims are generally not suitable for class treatment, unless there was some sort of group layoff in which members of a protected class were disproportionately terminated. Similarly, differential discipline is also often difficult to certify on a class wide basis, though again, there are cases in which such claims have been certified.[14] Harassment claims are also difficult to certify as class actions,[15] although it may be possible to certify harassment claims arising out of conduct at a single location, in which all class members were subjected to similar treatment by, often, the same people.[16] That is not to say that termination, discipline, or

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class members. Also the representative plaintiffs cannot be required or permitted to withdraw as such, because a suitable substitute representative has not stepped forward. Consequently this action must remain in abeyance, with the present, albeit inadequate, class representatives continuing in that capacity, until such time as a suitable representative does come to the fore or until the plaintiff class otherwise unites in a course of action." (citations omitted)).

[13] Because of the difficulty, expense, and risk involved in bringing Title VII class action lawsuits, very few firms bring these cases on a regular basis, and many of those that do work out cocounsel arrangements with other plaintiffs' firms to spread the risk and the expense. Counsel new to Title VII class action litigation are advised to work with experienced cocounsel.

[14] *Compare Lang v. Kansas City Power and Light Co.,* 199 F.R.D. 640, 656-8 (W.D.Mo. 2001) (Court denied class certification in case alleging racial discrimination in discipline); *with Satchell v FedEx Express*, 2005 WL 2397522 (N.D. Cal. September 28, 2005) (certifying class including differential discipline claims).

[15] *Faulk v. Home Oil Co,* 184 F.R.D. 645 (M.D.Ala.1999) (certified hiring and promotion classes but denied certification for a hostile work environment class because the twenty-one facilities at issue were not subject to common proof); *Carlson v. CH Robinson Worldwide*, 2005 WL 758602, *13 (D.Minn.2005) (certifying certain classes for disparate impact claims, but refusing to certify class for harassment); *Armstrong v. Whirlpool Corp*., 2007 WL 676694 (M.D. Tenn. Mar. 1, 2007) (class certification denied for "racial harassment"); *Goodwin v. Conargra Poultry Co.*, 2007 WL 1434905 (W.D. Ark. May 15, 2007) (racially hostile environment class certification denied); *Reid v. Lockeheed Martin*, 205 F.R.D. 655 (denying certification to class alleging, amongst other complaints, racially hostile work environment). But see *Wilfong v. Rent-A-Center, Inc*. 2001 WL 1795093 (S.D. Ill. Dec. 27, 2001).

[16] *See Jenson v. Eveleth Taconite Co*., 824 F. Supp. 847, 885 (D. Minn. 1993); see also *Beckman v. CBS, Inc.* 192 F.R.D. 608, 613-4, 619 (D. Minn. 2000); *but see Burrell v. Crown Cent. Petroleum, Inc.*, 197 F.R.D. 284, 290-91 (E.D. Tex. 2000).

harassment claims should not be certified in appropriate circumstances, but it is generally more difficult to obtain certification. Additionally, while claims for back pay and front pay have traditionally been considered claims for equitable relief certifiable under Rule 23(b)(2), some circuits have made it very difficult to obtain class certification in actions seeking compensatory damages, ruling that those cases may only be certified under the more stringent Rule 23(b)(3) standards.[17]

Claims that tend to be certified for class treatment include claims of failure to hire, failure to promote, and unequal compensation.[18] These claims are more likely to involve common policies and procedures (i.e. set qualifications for hire, promotion, or raises) and are also more likely to lend themselves to statistical analysis of electronic personnel data, which most companies maintain with respect to hires, promotions, and compensation. Even here, however, some claims are more suitable for class certification than others. For example, hires into entry level positions may be easier to certify than hires into management positions, because there may be more differentiating factors, and qualifications not accounted for in electronic data bases, for candidates for management positions. Similarly, entry level compensation claims may depend less on individual circumstances than compensation for exempt managers, and thus be easier to certify.

An important component of any class action discrimination case is statistical proof of the discrimination, generally shown through expert analysis of electronic payroll and other personnel records. Plaintiffs' counsel usually do not have access to this information prior to filing suit. However, there are a number of methods by which plaintiffs can try to determine if a company is

[17] *See, e.g., Allison v. Citgo Petroleum Corp*., 151 F.3d 402 (5th Cir. 1998)
[18] *Nelson v. Wal-Mart,* 245 F.R.D. 250 (M.D.N.C. 2007) (certifying claims for failure to hire); *Dukes v. Wal-Mart Stores*, 509 F.3d 1168 (9th Cir. 2007) (certifying claims for promotion and compensation); *Taylor v. DC Water & Sewer Auth*., 241 F.R.D. 33 (D.D.C. 2007).

discriminating on a class-wide basis. First, plaintiffs' counsel should interview as many potential class members as possible, to see if (1) they have similar, credible stories of discrimination; and (2) can describe some company policy or practice that causes or leads to the discrimination. If the company has multiple locations, it is important to try to speak with potential class members at many locations. Second, counsel should use any available method for "counting" potential class members. If the employer is open to the public, such as a retail establishment, attorneys or paralegals can visit multiple locations and count how many women or minorities they see, either generally working, or in management roles (to the extent that is visible). If the employer is not open to the public, clients may have lists of employees (i.e. telephone directories), from which one can get a rough count of females or Latinos, based on names. These counts of employees can then be compared to census data to get a rough idea of how this employer compares to other similar companies with respect to the number of potential class member employees. Third, counsel should review all available company documents, including handbooks, intranet websites, and any other source of company policy to determine if certain employment policies may be causing the disparities of which the client is complaining. Finally, because filing an EEOC or state discrimination charge is a prerequisite to filing suit in any case, counsel can file a class charge and wait to see what the agency investigation turns up. Once the agency closes its case, counsel can obtain copies of the agency's investigative files, which may contain statistics or other helpful information. Counsel must be mindful that, once the agency issues a right to sue letter, the complaint must be filed within 90 days.[19]

Another important consideration before filing a class wide discrimination suit is to determine what data is likely to be available, and in what format. Most companies will have

[19] 42 U.S.C. §2000e-5(f)(1). See also *Crown, Cork and Seal Co., Inc v. Parker*, 462 US 345 (1983) (when class certification denied, putative class members have a further 90 days to file a complaint).

some sort of electronic data on pay rates and compensation. In some companies, applications for hire or promotion are made and processed electronically, which allows for easy analysis. In other companies, applicants submit paper applications for hire or promotion. Counsel's ability to obtain statistical analysis of hiring or promotion trends may depend on how the company maintains (or fails to maintain) these paper records. Particularly in hiring cases, courts often accept analyses that compare the general labor pool for that type of employment to the defendant employer's employees. It will be very hard to prove a class wide discrimination case without some reliable method for obtaining a statistical analysis of the employer's employment practices.

Finally, counsel must insure that the prospective named plaintiff is "typical" of other potential class members, and will be an adequate class representative. A "typical" plaintiff has claims that are "reasonably co-extensive" with those of the class.[20] For example, if the plaintiff is an employee who was hired, that plaintiff may be able to represent a class asserting promotions and compensation claims, but that plaintiff may not be able to represent applicants who were not hired.[21] A named plaintiff should not have any conflicts with the proposed class.[22] Thus, some courts have ruled that management employees, who make the challenged employment decisions concerning hourly employees, are not adequate to represent those hourly employees, because of "intra-class conflict."[23] It is often wise to have several named plaintiffs, in case any one of them is unable to continue to serve. Also, it may be necessary to have different named plaintiffs for different claims—for example, one plaintiff to represent applicants and another to represent employees who were not promoted. However, it is not necessary to have a different named plaintiff to represent every promotion that could be obtained, or every

[20] *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1021 (9th Cir. 1998).
[21] *Gen Tel. Co. of SW.* v. *Falcon,* 457 US 147 (1982).
[22] *Hanlon v. Chrysler Corp.,* 150 F.3d 1011 (9th Cir. 1998).
[23] *See, e.g., Donaldson v. Microsoft Corp*, 205 F.R.D. 558 (N.D. Wa. 2003); *Bacon v. Honda*, 370 F.3d 565 (6th Cir. 2004); *Cooper v. Southern Co.,* 390 F. 3d 695 (11th Cir. 2004); but see *Stanton v. Boeing Co*., 327 F.3d 938 (9th Cir. 2003) (certifying a class of different categories of employees); *Dukes v. Walmart*, 222 F.R.D. 137 (N.D. Cal. 2005).

position within the company.[24] Because employers often go after the named plaintiff as an easy way to defeat class certification, counsel must insure that the named plaintiff has no obvious defects, such as a felony conviction or recent bankruptcy filing. Finally, it may not be wise to use as a potential named plaintiff a person with a very strong, high value, individual claim, such as retaliation, termination, or harassment, because of the difficulties in settling individual and class claims at the same time, and the potential for a conflict of interest between the named plaintiffs' desire for classwide relief on the one hand and high compensatory damages for her individual claims on the other.

2. Investigating A Potential Class Or Collective Action Wage And Hour Case

In general, most wage and hour cases tend to be susceptible to class treatment, and in fact, may not be economically feasible as individual actions. For example, if an employer has misclassified an employee as exempt when that employee is not in fact exempt, chances are that the employer has similarly misclassified all of its employees in that job category. Employers generally have standard policies governing such things as compensation for pre- or post-shift work or donning and doffing of protective equipment, and when lunch breaks are to be taken, all of which lend themselves to class treatment if counsel believes that the employer's policy is illegal. Other wage and hour cases are more difficult to certify; in particular, while it is possible to obtain certification of an off-the-clock or missed break case, courts are increasingly denying certification in such cases.[25]

Even if the case being investigated appears likely to be susceptible to class treatment, it is always important to investigate the case thoroughly, and, in particular, to make sure that what the

[24] *Satchell v. Fedex Corp*., WL 2397522 (N.D. Ca 2005) ("the named plaintiffs need not represent each and every type of claim in order to be "typical" and adequately represent the class").
[25] *See, e.g., Brinker Restaurant Corporation v. Superior Court*, 2008 WL 2806613 (Cal.App.4 Dist. 2008); *Petty v. Wal-Mart Stores, Inc.*, 148 Ohio App.3d 348, (Ohio App.2 Dist. 2002); but see *Armijo v. Wal-Mart Stores, Inc*. 142 N.M. 557 (N.M.App. 2007).

client tells counsel applies to all employees in that position, and that there are no unique circumstances making that client's position different from other employees. The same considerations apply as discussed above with respect to considering what data the employer is likely to have, and what proof may exist of standardized policies and procedures.

B. Administrative Charges And Complaints

Prior to filing a discrimination complaint under Title VII or most state anti-discrimination statutes, the plaintiff must file a charge of discrimination with the EEOC or state agency. The time limit for doing so varies from state to state, but may be as short as 180 days.[26] If counsel is contemplating bringing a class action lawsuit, then the administrative charge must be a class charge, and make class allegations.[27] The filing of the class administrative charge should thus toll the statute of limitations for the entire class. A copy of the charge, and the right-to-sue letter, when issued, should be attached to the complaint.

A class action complaint does not differ greatly from any other complaint, but should clearly set forth the class allegations. The complaint should contain a clear and simple definition of the class sought. The complaint should also contain specific allegations about why the case is suitable for class treatment, and should state under which subsection of Rule 23(b) class certification will be sought. Counsel should carefully consider the remedies sought, as these may be determinative with respect to which type of Rule 23(b) certification is available, which may in turn determine whether a class can be certified at all. In particular, do not routinely include a

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[26] *See* The U.S. Equal Employment Opportunity Commission, *Filing a Charge of Employment Discrimination*, at, http://www.eeoc.gov/charge/overview_charge_filing.html for a state-by-state rundown.

[27] *Hicks v. ABT Associates, Inc*., 572 F.2d 960 (3rd Cir. 1978) (charge filed with EEOC and scope of EEOC investigation determines scope of later private action); *Kloos v. Carter Day Co.,* 799 F.2d 397,400 (8th Cir. 1986) ("To be faithful to the purposes of the filing requirement, an administrative charge must allege class-wide age discrimination or claim to represent a class in order to serve as the basis for an ADEA class action...."). *But see Williamson v. Bethlehem Steel Corp*., 488 F. Supp. 827 (C.D.N.Y. 1980) (a single charge of racial discrimination can initiate a full scale inquiry into racial discrimination by EEOC).

claim for compensatory damages if such damages are not warranted under the facts of your case, as this claim may make it much more difficult to obtain class certification.

A collective action complaint is fairly similar to a class action complaint. One important difference is that each named plaintiff in a collective action should separately sign and date a "consent to join." The consents may be filed as exhibits to the complaint, but may also be filed separately. Some courts have ruled that, even with respect to the named plaintiff, the statute of limitations continues to run until an individual consent to join is filed for that plaintiff.[28] That is, the filing of a complaint alone, without a consent to sue, does not toll the statute of limitations, for the named plaintiff or for anybody else.

C. Responding To A Class Action Or Collective Action Complaint

Defendants may respond to a class action complaint with an answer, a motion to strike, a motion to dismiss, or a motion for summary judgment.

1. Answer

If the defendant chooses to answer, the defendant must admit or deny every element of plaintiff's claim and provide any affirmative defenses in the answer.[29] The answer, of course, will be dependent on the specific facts alleged in the case and the factual background which can form the basis of any affirmative defense.

2. Motion to Strike

The defendant can also attack the plaintiff's class pleadings on procedural grounds. The defendant can file a motion to strike the class action allegations as sham on two procedural

[28] *See, e.g., McLaughlin v. Boston Harbor Cruises, Inc*., 2006 U.S. Dist. LEXIS 48472 (D. Mass. 2006); *Smith v. Cent. Sec. Bureau*, 231 F.Supp.2d 455 (D. Va. 2002).
[29] FED. R. CIV. P. § 8.

grounds: (1) plaintiff's complaint fails to provide "a short and plain statement of the claim"[30] or (2) plaintiff does not have good grounds to support the complaint.[31]

3. Motion to Dismiss/Summary Judgment Motion

Finally, the defendant can file a motion to dismiss or a motion for summary judgment either to respond to the complaint or, later, simultaneously with a motion to defeat class certification. If the defendant wishes to file a motion to dismiss based on the merits of the case, the defendant must make a tactical decision to file either *before* or *after* the court determines class certification. If the court grants the motion to dismiss on the merits *before* class certification, it dismisses only the individual named plaintiff's complaint. It does not defeat the entire class action. A dismissal granted *after* class certification, however, has preclusive effect on the entire class and wholly defeats the class action as to all members of the class.

The defendant's motion to dismiss can also be based on grounds other than the merits of the case, including: (1) lack of jurisdiction; (2) lack of standing; and (3) mootness. Class action plaintiffs must have proper subject matter jurisdiction to file in federal court. The defendant should ensure that the plaintiff states a proper federal question, has jurisdiction based on the Class Action Fairness Act of 2005, or meets traditional diversity jurisdiction. Otherwise, the defendant should challenge the complaint because the court lacks jurisdiction.

A motion to dismiss can also be based on the individual plaintiff's lack of standing. To have standing, the plaintiff must show a direct connection between his or her individual injury and the cause asserted--the class claims. An individual plaintiff's standing is entirely separate

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[30] FED. R. CIV. P. § 8(a); *Shannon v. Hess Oil Virgin Islands Corp.*, 96 F.R.D. 236 (D.V.I. 1982).

[31] FED. R. CIV. P. § 11; *In re Ramada Inns Securities Litigation*, 550 F. Supp. 1127, 1132 (D. Del. 1982).

from the class action claim. Therefore, if the named plaintiff lacks individual standing, then the class action is entirely dismissed.[32]

Mootness can also form the basis of the defendant's motion to dismiss. An action becomes moot when the controversy between the parties no longer exists and "there is no reasonable expectation" that it will recur in the future.[33] Strategically, the defendant should bring a motion to dismiss based on mootness *before* the class is certified because, if granted, the claims of the entire class become moot as well. If the entire class's claims are moot, then the action must be dismissed outright. If the named plaintiff's claims become moot *after* the class is certified, however, mootness has no effect on the suit.[34]

III. CLASS ACTION DISCOVERY

Discovery in class action litigation not only determines the factual basis for the merits of the claims, but is also used to determine whether an actual class to be certified exists. Discovery is complicated by the fact that many courts have held that the class certification determination should not be based on the merits of the case, while others have determined that to properly decide whether to certify a class, the court may need to examine some issues related to the merits of a claim. While most plaintiffs' counsel believe that full discovery regarding all issues in an action should commence at once, most defense counsel lean toward a bifurcated discovery approach with regard to certification of the class and merits of the claims. Thus, courts usually must determine the extent that the parties may inquire into issues which may overlap between the merits of the case and the class certification decision. Another discovery issue unique to class actions concerns discovery from unnamed class members.

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[32] *Dallas Gay Alliance v. Dallas County Hosp. Dist.*, 719 F. Supp. 1380 (N.D. Tex. 1989).

[33] *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

[34] There is one primary exception. If the defendant's conduct was transitory or a one-time incident that could reasonably occur again in the future, then the termination of the named plaintiff's claim does not render moot the claims of the remaining members of the class, even before class certification.

A. Bifurcation

A common issue in discovery is whether the court will allow full discovery on all issues to commence immediately, or whether the judge will bifurcate discovery between class certification and merits issues. The decision to bifurcate is within the discretion of the trial court. The court in *Tracy v. Dean Witter Reynolds, Inc.*, a collective action brought under the Fair Labor Standards Act, explained "some discovery is necessary prior to the determination of class certification, but the recognized need for pre-certification discovery is subject to limitation which may be imposed by the court, and any such limitations are within the sound discretion of the court."[35]

Thus, the discovery should be sufficiently broad that the plaintiffs have a fair and realistic opportunity to obtain evidence which will meet the requirements of Rule 23, yet not so broad that the discovery efforts present an undue burden to the defendant. The court in *Tracy* went on to explain, "Discovery is not to be used as a weapon, nor must discovery on the merits be completed precedent to class certification."[36] Therefore, in managing discovery in cases of this nature, district courts are required to balance the need to promote effective case management, the need to prevent potential abuse, and the need to protect the rights of all parties.[37]

Bifurcation is often desirable from the defendant's perspective because discovery limited to class certification can prevent the costly and burdensome process of producing documents, depositions and information geared toward the substance and merits of plaintiff's class wide claims, which may never reach the threshold of establishing a class or collection action. Thus if defendant is first allowed to litigate whether a class exists, it may be able to avoid the extensive litigation concerns that arise from responding to broad and sweeping claim-based discovery.

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35 185 F.R.D. 303, 304-05 (D. Colo. 1998).

36 *Id*. at 305

37 *Id*. at 305 (citing *Nat'l Org. for Women*, 88 F.R.D. 272, 277 (D. Conn. 1980)).

Bifurcation of class and merits discovery is very common because it "best serves the ends of fairness and efficiency." [38] Bifurcation can also assist the defendant in avoiding the costs associated with responding to merits discovery on a class-wide basis before the court has certified the class.[39] District courts will often limit precertification discovery to class certification issues and postpone discovery on the merits of the action until after the certification decision.[40]

Despite its benefits,"[o]ften, however bifurcating between class and merits discovery will be counterproductive. Discovery relating to class issues is not always distinguishable from other discovery."[41] Although bifurcating class and merits can at times be more efficient and economical, it can also result in duplication and unnecessary disputes among counsel over the scope of discovery. To avoid this, the court should call for a specific discovery plan from the parties, identifying the depositions and other discovery contemplated and the subject matter to be covered.[42]

Discovery relating to class issues may overlap substantially with merits discovery. A key question in class certification may be the similarity or dissimilarity between the claims of the representative parties and those of the class members - an inquiry that may require discovery on the merits and development of basic issues.[43] The scope of inquiry during the pre-certification stage of class litigation is unsettled, but is usually limited to the Rule 23 (a) and (b) elements of

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38 See, e.g., *Rodriguez v. Banco Central*, 102 F.R.D. 897, 902 (D. Puerto Rico 1984).

39 *Karan v. Nabisco.*, Inc. 78 F.R.D. 338, 396 (W.D. Pa. 1978) (explaining that class determination is preferable before substantial discovery on the merits to be conducted, "[w]here plaintiff's seek to represent a large national class on a broad spectrum of issues, discovery can require immense commitments of time, money and resources and involve innumerable documents and records.")

40 5 Moore's Federal Practice § 23.61[6][b] (3d Ed.); Rutter Group Practice Guide, Federal Civil Procedure Before Trial, §10.518 (1997).

41 Manual for Complex Litigation (Second) §30.12, at 211 (1985).

42 Manual for Complex Litigation (Fourth) §30.12, at 215-16 (2008).

43 *Id*.

numerosity, commonality, typicality, adequacy, predominance, manageability, etc.[44] Thus, courts may prevent "fishing expeditions" and impose reasonable limitations as to scope.[45] Furthermore, discovery from the defendant's perspective is usually limited to the putative class representative, not to the members of the class.[46] Implementation of the above techniques provides the foundation for more manageable proceedings, at least from defendant's perspective.

B. Class Member Declarations

Counsel for both sides often use declarations from unnamed class members in support of, or in opposition to, class certification and summary judgment motions. In a discrimination case plaintiffs' counsel may submit numerous declarations from unnamed class members describing the discrimination they face in order to "bring the cold numbers convincingly to life."[47] Counsel for the employer may counter with declarations from potential class members who do not believe they have faced discrimination. Counsel in wage and hour cases often submit competing declarations as well, with plaintiffs' declarants describing the nature of the work they do as non-exempt, or explaining that they were denied compensation for pre- and post-shift work, or denied rest and meal breaks, while defense declarations state the reverse.

Finding class members willing to sign declarations is an important part of initial investigation and discovery in an employment class or collective action. Plaintiffs' counsel may find class members through publicity generated around the filing of the complaint, or, later in the case, the motion for class certification. Some plaintiffs' counsel set up a website or 1-800

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[44] *Id*.

[45] *Mantolete v. Bolger*, 76 F.2d 1516 (9th Cir. 1985)(plaintiff must show discovery likely to substantiate class allegations); *Hoffmann-LaRoche*, *Inc.v. Sperling*, 493 U.S. 165 (1989) (discovery may be appropriate to identify names of potential class members in order to facilitate notice or determine numerosity issues in opt-in class context).

[46] Manual for Complex Litigation § at 236 (4d ed. 2008).

[47] *Teamsters v. United States*, 431 U.S. 324, 339 (1977)**.**

number to field inquiries from interested class members. Defense counsel generally gather declarations from current employees, to whom they have easy access during working hours.

In both cases, there may be potential ethical issues for counsel seeking to speak to unnamed class members, and counsel should be aware of the ethical rules in their own jurisdiction before speaking to unnamed class members. For example, some jurisdictions have ruled that unnamed class members are potential clients of plaintiffs' counsel, and thus shouldn't be contacted by defense counsel, even prior to class certification.[48] Once a class is certified, class counsel represents all class members, and contact by defense counsel may be considered unethical.[49] In some jurisdictions, employees of a company represented by counsel may be deemed represented by that counsel, such that plaintiffs' counsel should not be contacting them. And some jurisdictions, like California, have a basic rule of "equal access" for communications between class members and either counsel for the plaintiffs or defendant.[50] Even if contact with absent class members is permitted in a given jurisdiction, counsel must take care to insure that the communications are not misleading, as courts may require corrective notice and/or issue sanctions for misleading communications to unnamed class members.[51]

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[48] *Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662 (E.D. Pa. 2001).

[49] *Resnick v. American Dental Assoc.*, 95 F.R.D. 372, 376-77 (N.D. Ill. 1982) ("Without question the unnamed class members, once the class has been certified, are 'represented by' the class counsel. Class counsel have the fiduciary responsibility and all the other hallmarks of a lawyer representing a client"); *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1207 (11th Cir. 1985) ("[D]efense counsel had an ethical duty to refrain from discussing the litigation with members of the class as of the date of class certification, *if not sooner*."); *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. 630, 634 (N.D. Tex. 1994) ("It is difficult to conceive of any advice from [defendant] regarding the lawsuit that is not rife with the potential for confusion and abuse given [defendant]'s interest in the suit. . . . In short, there is no legitimate purpose for defendants to communicate with class members regarding the lawsuit prior to trial, and such communications as discussed previously invite abuse."); *Bublitz v. E.I. du Pont de Nemours & Co.*, 196 F.R.D. 545, 549 (S.D. Iowa 2000).

[50] *Atari, Inc. v. Superior Court*, 166 Cal. App. 3d 867, 871 (Cal.App. 1985).

[51] *Haffer v. Temple University of the Commonwealth System of Higher Education*, 115 F.R.D. 506, 509-10 (E.D. Pa. 1987) (issuing protective order limiting defendant's communication with class members)**.** *Impervious Paint Industries Inc. v. Ashland Oil*, 508 F. Supp. 720 (W.D. Ky. 1981) (ordering opportunity to revoke opt-outs); *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985) (defense counsel disqualified and ordered to pay $50,000 fine to the court); *Erhardt v. Prudential Group, Inc.*, 629 F.2d 843, 845 (2nd Cir. 1980) (corrective notice to class members, opportunity to revoke opt-outs, and ban on defendants' further communications with class members except upon prior approval of the court).

Counsel for both sides generally devote considerable resources to discovery related to the class member declarations. Issues that may arise include: (1) when the declarations must be disclosed (must counsel produce declarations in response to early discovery requests, or may counsel wait until a motion is filed that relies upon the declarations); (2) whether drafts of the declarations are discoverable, or instead protected as work product or attorney-client communications; and (3) whether unnamed class members who sign declarations may be deposed, or be required to produce documents or respond to interrogatories (discussed below).

C. Discovery From Absent Class Members

In general, in Rule 23 class actions, "a defendant does not have unlimited rights to discovery against unnamed class members."[52] Indeed, discovery of unnamed class members would defeat the whole purpose of class actions, which is to allow common questions of law and fact to be decided on a representative basis, without having to obtain testimony from all those affected. Thus, courts have held that "discovery against absentee class members . . . cannot be had as a matter of course" but instead is only available "when the information requested is relevant to the decision of common questions, when the interrogatories or document requests are tendered in good faith and are not unduly burdensome, and when the information is not available from the representative parties."[53] "While situations may occur in which discovery of [unnamed] class members is the only method to ascertain certain class facts without unduly compromising fairness to the party opposing the class, such discovery should not be imposed when a less restrictive alternative exists."[54] "Recognizing that [discovery of absent class members] runs contrary to the general intention of Rule 23 to allow unnamed class members to remain passive,

[52] *Blackie v. Barrack*, 524 F.2d 891, 906 (9th Cir. 1975).
[53] *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 340 (7th Cir. 1974). *See also Dellums v. Powell*, 566 F.2d 167, 187 (D.C. Cir. 1977).
[54] 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions §16.4 (4th ed. 2002) (footnote omitted).

those courts that have allowed such discovery have required the defendant to (1) make a strong showing of the need for the particular discovery and (2) narrowly tailor its requests to its particular need, so as not to burden the absent members."[55]

In contrast to Rule 23 class actions, courts have been more willing to allow discovery of class members who have "opted in" to FLSA or EPA actions, apparently on the theory that such "opt in" plaintiffs are not "unnamed class members" in the same sense as are Rule 23 unnamed class members, but have affirmatively set forth their desire to participate in the lawsuit. Other courts have rejected this distinction, ruling that opt-in actions pursuant to 29 U.S.C. Section 216 are still "representative actions," the efficiencies of which would be destroyed by permitting unlimited discovery of opt-in plaintiffs. In either case, courts will generally limit discovery of unnamed class members to some representative sample, and will not require it of all unnamed class members or opt-in plaintiffs.[56]

Of course, where class members have submitted declarations in support of or opposition to class certification or summary judgment, courts are likely to find some need for discovery, of at least some of the unnamed class members. Even here, however, reasonable limitations will generally be imposed, including limits on the number, length, and scope of depositions (*i.e.* limiting scope to content of declaration), and whether and how many documents may be requested.

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[55] In re Publication Paper Antitrust Litigation, No. 3:04 MD 1631, 2005 WL 1629633, *1 (D. Conn. July 5, 2005).
[56] *Bradford*, 184 F. Supp. 2d 1342 (discovery from 25 of 300 plaintiffs); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 354 (D.N.J. 1987) (parties used 51-person sample of class of over 1,300 plaintiffs); *Brooks v. Farm Fresh, Inc.*, 759 F. Supp. 1185, 1187-88 (E.D. Va. 1991), *rev'd on other grounds sub nom. Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142 (4th Cir. 1992) (discovery of opt-ins permitted but only until either side felt the record sufficiently developed to answer the "similarly situated" question); *Adkins v. Mid-Am. Growers, Inc.*, 143 F.R.D. 171, 174 (N.D. Ill. 1992) (depositions and interrogatories on a representative basis); *Adkins v. Mid-Am. Growers, Inc.*, 141 F.R.D. 466, 468 (N.D. Ill. 1992) (rejecting magistrate judge's order for individualized discovery; "Whether prior to class certification or after, discovery, except in the rarest of cases, should be conducted on a class wide level.").

IV. CLASS AND COLLECTIVE ACTION CERTIFICATION

Whether it be a class or collective action, it is the responsibly of the court to determine whether to certify the matter. Typically, this determination is made after the named plaintiff moves for an order certifying the class.[57] The burden of demonstrating that all the requirements of Rule 23 are satisified must be met by the plaintiff.[58] However, defendants need not wait for the plaintiffs to act before presenting their own motions for an order denying class certification[59] or motions to alter or amend a certification order at any time before final judgment,[60] as several opportunities arise to challenge class certification.

A. Rule 23 Class Certification Procedures

1. Moving For Class Certification

Class certification is often regarded as the "make or break" motion in a class case.[61] Rule 23 requires that class certification be ruled upon "at an early practicable time." To prevail on class certification, plaintiffs must demonstrate that they meet all of the requirements of Rule 23(a), and meet the requirements for one type of Rule 23(b) certification. Traditionally, Title VII cases have been certified under Rule 23(b)(2), which allows a case to be certified if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Make-whole remedies that involved the payment of money in the form of back or front pay were regarded as equitable matters properly certifiable under Rule 23(b)(2).[62] Since Title

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[57] *East Texas Motor Frieght Sys., Inc.l v. Rodriguez*, 431 U.S. 395, 404-405 (1977).
[58] *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).
[59] *See Bryant v. Food Lion, Inc*., 774 F. Supp. 1484, 1495 (D.S.C. 1991); *Brown v. Milwaukee Spring Co.*, 82 F.R.D. 103, 104 (E.D. Wis. 1979).
[60] Fed. R. Civ. P. 23(c)(1)(C).
[61] Rule 23(c).
[62] *Dukes v. Wal-Mart, Inc*., 509 F.3d 1168 (9th Cir. 2007); *Holmes v. Continental Can Co*., 706 F.2d 1144, 1152 (11th Cir. 1985).

VII was amended in 1991 to permit claims for compensatory damages, some courts have held that cases must be certified instead under the more stringent Rule 23(b)(3) rules.[63]

The Rule 23(a) requirements are commonly referred to as numerosity, commonality, typicality, and adequacy. The requirement that "the class be so numerous that joinder of all members is impracticable" (Rule 23(a)(1)) is generally satisfied by a class containing at least 40 members.[64] To meet the commonality requirement—that there exist "questions of law or fact common to the class" (Rule 23(a)(2))—"all questions of fact and law need not be common…. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."[65]

The last two requirements of Rule 23(a)—typicality and adequacy—focus on the suitability of the named plaintiffs to represent the class. "Representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical."[66] In a discrimination case, courts look to see if the named plaintiffs were allegedly harmed by the same allegedly discriminatory practice.[67] To meet the adequacy requirement, plaintiffs must demonstrate that they do not have any conflicts of interest with the proposed class, and that they are represented by qualified and competent counsel.[68] With respect to adequate counsel, courts must now appoint class counsel as part of the class certification procedure, looking to the requirements set forth in Rule 23(g).

To meet the requirements of Rule 23(b)(2), plaintiffs must show, first, that the defendant has "acted or refused to act on grounds that apply generally to the class," which generally means

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[63] *See, e.g., Allison v. Citgo*, 151 F.3d 402 (5th Cir. 1998).
[64] 5 James Wm. Moore, *Moore's Federal Practice* Section 23.22[1][b] (3d ed. 2004) and cases cited therein.
[65] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). *See also Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997).
[66] *Hanlon*, 150 F.3d at 1020.
[67] *Dukes v. Wal-Mart, Inc*., 509 F.3d 1168, 1184 (9th Cir. 2007).
[68] *Dukes*, 509 F.3d at 1185; *Hanlon*, 150 F.3d at 1020.

showing that the employer has certain challenged employment practices that it applies uniformly, and that "final injunctive relief" is appropriate with respect to the class as a whole. Some circuits hold that cases seeking both injunctive relief and monetary damages are certifiable under Rule 23(b)(2), so long as injunctive relief is the primary goal and damages are merely "incidental."[69] Other circuits have held that cases seeking any monetary damages may not be certified under Rule 23(b)(2), even if they also seek injunctive relief.[70]

If a class cannot be certified under Rule 23(b)(2) because it seeks monetary damages, then plaintiffs must seek to certify the case under Rule 23(b)(3), which requires that common legal and factual issues *predominate* over individual issues, and that a class action is "superior" to other methods for resolving the conflict. A key issue in many Rule 23(b)(3) battles is whether a class action would be manageable. Here, there are certain standard practices in Title VII discrimination cases that may be helpful. The most common procedural method for litigating such cases is to try class-wide liability and injunctive relief first. In these Stage I proceedings, plaintiffs attempt to prove systemic discrimination with a combination of statistical and anecdotal evidence. Stage II is some sort of claims procedure which allows class members to prove individual damages, or to receive monetary relief based on a formula. During Stage II proceedings, there is a presumption that each class member was the victim of the employer's discriminatory practices, unless the employer can prove otherwise.[71]

In general, courts are not to consider the merits of plaintiffs' claim at the class certification stage.[72] On the other hand, the Second Circuit has recently indicated that when

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[69] *Robinson v. Metro-North Railroad,* 267 F.3d 147 (2d Cir. 2001); *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003).
[70] *Allison v. Citgo*, 151 F.3d 402 (5th Cir. 1998); *Reeb v. Ohio Department of Rehabilitation and Correction*, 435 F.3d 639 (6th Cir. 2006); *Cooper v. Southern Company*, 390 F.3d 695 (11th Cir. 2004).
[71] *See, e.g., Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324, 360-62 (1977); *Domingo v. New England Fish Co.*, 727 F.2d 1429 (9th Cir. 1994).
[72] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1982).

merits issues overlap with Rule 23 issues, there must be some inquiry into the merits.[73] It is uncertain how *IPO* will be interpreted by courts in the Second Circuit, or whether it will be followed elsewhere. There is also a split in the circuit courts about expert evidence presented with a class certification motion, and whether (1) such expert evidence must fully pass "*Daubert"* muster; and (2) whether courts should resolve the "battle of the experts" in ruling upon class certification.

Although the merits are not to be considered in ruling on a motion for class certification, plaintiffs bringing class action discrimination cases generally present a statistical analysis of the challenged claim. The purpose of the statistical analysis is to demonstrate to the court that the challenged practices have resulted in systemic discrimination against plaintiffs, rather than isolated instances. Thus, statisticians are asked to calculate whether any disparity between class members' rate of hire, promotions, or compensation is over two or three standard deviations from what might be expected in a totally random sample. At this point the results are "statistically significant," and courts have held that such results may be used to support an inference of discrimination.[74]

2. Opposing Class Certification

While grounds for denying class certification must be based on the inability of the plaintiff to meet the requirements of Rule 23(a) and (b), counsel should be aware that several of these requirements become less determinative of whether a class will remain certified once a trial has begun. This is best understood through an individual analysis of each requirement.

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[73] *Miles v. Merrill Lynch (In re Initial Public Offerings Sec. Litig (IPO)*, 471 F.3d 24 (2d Cir. 2006).
[74] *Hazelwood School District v. United States*, 433 U.S. 299, 311 n. 17 (1977). Courts also consider statistics that are significant at the 0.05 level of statistical significance, which means that the probability of the statistical disparity occurring by chance is 5 percent, or 1 chance in 20, which is the conventional measure of statistical significance among social scientists. *See, e.g., Palmer v. Shultz*, 815 F.2d 84, 96 (D.C. Cir. 1987).

a. Numerosity

As a practical matter, a challenge to the numerosity of a putative class is usually not the most likely ground for successfully challenging class certification. Although no set number is prescribed to meet the mandate for class certifications, it is generally expected that a potential class of over 40 persons will meet the requirement.[75] When the potential class is under 25 persons, numerosity will likely not be found.[76] Depending on circumstances, it may be difficult to determine the exact size of the class until after the class is defined. However, plaintiff must ordinarily demonstrate some evidence of a reasonable estimate of the number of purported class members.[77]

b. Typicality

In determining whether a class meets the typicality requirement courts consider "whether other members of the putative class have the same or similar injury, whether the injury is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct."[78] The typicality requirement may be defeated by showing that there are differences in damages claimed by the named plaintiffs as compared to the putative class, the presence of unique or general defenses against the class representatives, and/or the lack of personal grievances suffered by plaintiffs for all grievances complained of on behalf of the class.[79] For example, in *Osgood v. Harrah's Entertainment, Inc.*, the court held that because the named plaintiff's demotion claim "is subject to the specific defense that her own inadequate performance in her assigned position was the reason for the self-described demotion,"

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[75] *Mayfield v. Meese*, 53 FEP 1313 (D.D.C. 1987) (approximately 112 members).
[76] *In Re Syncor ERISA Litigation,* 227 F.R.D. 338, 343 (C.D. Cal. 2005) (noting that the 9th Circuit has found that classes with fewer than 100, and even few as 39, meet the numerosity requirement).
[77] *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980); *Pederson v. Louisiana State Univ.,* 213 F.3d 858, 868 (5th Cir 2000).
[78] *Hanon v. Data Products Corp*., 976 F.2d 497, 508 (9th Cir. 1992).
[79] Newberg on Class Actions Fourth Edition § 3:14 Challenges to typicality.

her claim was not typical of those of the class.[80] Similarly, the Court in *Anderson v. Westinghouse Savannah River Co.,* found class certification inappropriate because the claims of the proposed class representative had been found to be without merit.[81] The individual plaintiff had no valid claims to give her "the same interest" and cause her to "suffer the same injury" as proposed class members.[82]

c. Commonality

In order to meet the commonality requirement, there need be only a single issue common to all members of the class.[83] In employment discrimination cases, developing adequate factual basis to challenge the commonality during the pre-trial discovery often becomes the centerpiece of a defense. In *General Telephone Co. of the Southwest v. Falcon*, the Supreme Court held that the mere fact that a plaintiff is a member of an identifiable racial or minority group is not sufficient to give him or her standing to litigate all possible claims against an employer on the group's behalf.[84] In that case, the Mexican-American employee-plaintiff had not presented any specific questions of law or fact common to the plaintiff and the class of Mexican-Americans he sought to represent. Therefore, the Court found no reason for his discrimination in promotion claim to require determination of any common question regarding the employer's alleged failure to hire more Mexican Americans.[85]

Similarly, the Court in *Bacon v. Honda of America Manufacturing, Inc.*, affirmed denial of class certification because the African-American employee-plaintiffs' failure to show common

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[80] 202 F.R.D. 115, 125 (D.N.J. 2001).
[81] 406 F.3d 248, 274 (4th Cir. 2005).
[82] *Id.*
[83] *Savino v. Computer Credit, Inc.*, 173 F.R.D. 346 (E.D.N.Y. 1997).
[84] 457 U.S. 147, 157-58 (1982). *See also* Ellis v. Elgin Riverboat Resort, 2003 WL 22006249 at *12 (N.D. Ill., Aug. 22, 2003) (the decentralized and subjective nature of defendant's personnel policies precluded a finding that it engaged in a "pattern or practice" of discrimination); Abram v. UPS of America, 200 F.R.D. 424, 430 (E.D. Wis. 2001)("If the decision to permit some measure of subjectivity could be regarded as itself a discriminatory practice, virtually all Title VII cases against large employers would be transformed into nationwide class actions").
[85] *Id.* at 158

promotion interests between hourly wage earners and salaried employees, did not demonstrate discriminatory promotion criteria common to diverse jobs, and did not explain how all African-American employees could be harmed by subjective management decisions in the face of objective promotion criteria.[86]

d. Adequate Representation

The adequacy of representation requirement generally concerns both the named plaintiffs, as representatives of the potential class, and the named plaintiffs' counsel. The purpose of this requirement is to protect the interest of the absent class members who will be bound by the adjudication of their rights in the class action.[87] In determining adequacy of representation the court considers the typicality of the representative's claims to the class members' claims and whether there are actual or potential conflicts of interests between the representative and the class.[88] Courts have found representatives to be inadequate in a number of cases where the representative failed to institute the class claim on a timely basis[89], failed to complete required steps in the judicial process[90] and/or showed lack of interest or active cooperation in the judicial process.[91]

Courts generally do not question the capabilities of counsel unless some particular demonstration or charge of incompetence or conflict of interest is presented. As with the representative, class counsel may be found to be inadequate when they fail to move for certification in a timely manner, or neglect other judicial responsibilities including appearing for hearings, notifying class members, briefing a critical issue, articulating what the membership of the class was or conducting discovery.

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[86] 370 F.3d 565, 571 (6th Cir. 2004)
[87] *Fed. R. Civ. P. 23* advisory committee notes.
[88] *See, e.g. General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982)
[89] *See, e.g. East Texas Motor Freight Sys., Inc. v. Rodriquez*, 431 U.S. 395 (1977).
[90] See, e.g., Mayfield v. Meese, 704 F. Supp. 254 (D.D.C. 1988).
[91] See e.g. Cooper v. Florida Power & Light Co., 22 FEP 120 (M.D. Fla. 1979).

Issues of manageability of the class action are usually reviewed under adequacy of representation. If defense counsel can show that a class has grown so large that manageability is an issue, it follows that adequacy of representation is jeopardized. Courts are cautious about certifying overly large class actions due to concerns about adequacy of representation.[92] For example, in *Windham v. American Brands, Inc.*, the Fourth Circuit Court of Appeals affirmed the denial of class certification because the determination in favor of the proposed class representative would not result in automatic liability with regard to liability for other members of the proposed class.[93] In denying certification, the Court the noted that the multiplicity of potential claimants, the complexity of their claims relating to injuries and damages, and the individualized problems of proving injury and damage would necessitate "mini-trials" with separate juries, making a class action unmanageable.[94]

e. Other Considerations

Rule 23(a) factors should never be approached as singular reasons, in and of themselves, to deny class certification. Indeed, typicality and commonality requirements of Rule 23 are distinct but closely interrelated. "Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." [95] In *Dukes*, the Court explained that "although the commonality and typicality requirements of rule 23(a) tend to merge, each factor serves a discrete purpose. Commonality examines the relationship of facts and legal issues

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[92] *Harriss v. Pan Am. World Airways, Inc.*, 74 F.R.D. 24 (N.D. Cal. 1977). *But see Dukes v. Wal-Mart*, 509 F.3d 1168 (9th Cir. 2007).
[93] 65 ftd 59, 66 (4th Cir. 1977)
[94] *Id.* at 66.
[95] *Falcon*, 457 U.S. at 157 n.3.

common to class members, while typicality focuses on the relationship of the facts and issues between the class and its representatives."[96]

Likewise, certification can be successfully defeated by challenging the type of class which plaintiffs attempt to certify under Rule 23(b). For example, the Fifth Circuit, in *Allison v. Citgo Petroleum Corp.*, affirmed the trial court's denial of certification of a class seeking injunctive relief under Fed. R. Civ. P. 23 (b)(2), because certification was no longer appropriate because the class was found to be seeking predominately compensatory and punitive damages.[97] The *Allison* Court held that the district court properly found that claims for compensatory damages are not sufficiently incidental to injunctive and declaratory relief being sought to permit them in class action under Rule 23(b)(2), since an award of compensatory damages requires individualized proof from each employee.[98] Moreover, the *Allison* Court held that punitive damages may not be awarded in a (b)(2) class action, since they are not incidental to injunctive or declaratory relief.[99]

Not all courts have found an incompatibility when a class seeks both injunctive relief, as well as compensatory and punitive damages under Rule 23 (b) (2).[100] However, the denial of certification by the trial and appellate courts in *Allison* were also buttressed by the finding that the case presented an overwhelming number of individual-specific issues and manageability problems; the case would have involved more than a thousand potential plaintiffs spread across

[96] *Dukes*, 474 F.3d at 1232 n. 10.
[97] *See Allison v. Citgo Petroleum Corp.,* 151 F.3d 402, 418 (5th Cir. 1998)
[98] *Id.*
[99] *Id.* at 418-18.
[100] *Compare Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211, 257 (5th Cir. 1974)(allowing (b)(2) class Certification for award of back pay); *Massie v. Illinois Dept. of Trans.,* 78 Fair Empl. Prac. Cas. (BNA) 111 (N.D. Ill. 1998)(class action was certified under Rule 23(b)(2), even though plaintiffs seek back pay and compensatory damages, where those damages were ancillary to the claims for injunctive and declaratory relief).

two separate facilities, represented by six different unions, working in seven different departments, alleging discrimination over a period of nearly 20 years.[101]

B. Collective Action Certification Procedures

1. Moving For Collective Action Certification

Unlike class actions brought pursuant to Rule 23, representative actions under the FLSA, EPA, or ADEA brought pursuant to 29 U.S.C. Section 216 don't have any particular requirements, other than that the plaintiffs be "similarly situated." Nor is there any set time or procedure to follow. Indeed, Section 216 never discusses moving for collective action certification at all. However, courts have developed a set of procedures for determining if the representative plaintiffs are "similarly situated" to those they seek to represent. This determination is usually precipitated by plaintiffs filing a motion seeking the names and contact information for other employees, so that plaintiffs can send out notice of the lawsuit to these other employees, and give them an opportunity to "opt in" to the lawsuit. This procedure is commonly referred to as "*Hoffmann*" notice, after the United States Supreme Court decision in *Hoffmann LaRoche v. Sperling*, 493 U.S. 165 (1989)**,** in which the Supreme Court held that names and contact information of other employees of the company were discoverable and that, in appropriate instances, courts could authorize the sending of notice to these employees.

There are essentially three approaches by which courts analyze if a class of plaintiffs is "similarly situated" under §216(b). The approach most widely followed is the *ad-hoc* two-tiered analysis. *Hipp v. Liberty National Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001); *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1212 (5th Cir. 1995). At the first notice stage, the district court makes a decision, "usually based only on the pleadings and any affidavits which have been submitted – whether notice of the action should be given to potential class members." *Hipp*, 252

[101] *Id.* at 420.

F.3d 1208 . Because of the minimal evidence at this stage in litigation, "this determination is made using a fairly lenient standard," typically resulting in "conditional certification" of a representative class. *Id*.

This lenient standard "is considerably 'less stringent' than the proof required pursuant to Fed.R.Civ.P. 20(a) for joinder or Fed. R. Civ. P. 23 for class certification." *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 (11th Cir. 1996), *cert. denied*, 519 U.S. 982 (1996). For an opt-in class to be created under § 216(b), an employee need only show that he/she is suing the employer for herself and on behalf of other employees "similarly situated." *Id.* The plaintiffs' claims and positions need not be identical to the potential opt-in, they need only be similar. *Id.* Moreover, the plaintiffs need only demonstrate "a reasonable basis" for the allegation that a class of similarly-situated persons may exist. *Id.* at 1097. Under the two-tiered approach, at the conclusion of discovery (often prompted by a motion by defendant to decertify), the court then makes a second determination, utilizing a stricter standard of "similarly situated." Plaintiffs' counsel filing an initial motion for collective action certification should carefully scrutinize the cases cited by defendant in opposition, as those may actually be "second tier" cases requiring stricter scrutiny, which are appropriately used only after discovery has been completed.

Under the second approach, also known as the *Shushan* approach, district courts have incorporated into § 216(b) the requirements of current Federal Rule of Civil Procedure 23. *See Shushan v. University of Colo.*, 132 F.R.D. 263 (D. Colo. 1990). Finally, in a third approach, known as "spurious," district courts have suggested incorporating into § 216(b) the requirements of the pre-1966 version of Rule 23, which allowed for "spurious" class actions. *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1102-1103 (10th Cir. 2001). *See* analysis in *Bayles v. American Medical Response of Colorado, Inc.*, 950 F.Supp.1053, 1064-1066 (D. Co. 1996).

2. Opposing Collective Action Certification/Moving For Decertification

Under the two-tiered approach, as noted above, the court ordinarily first makes a "notice stage" determination of whether potential plaintiffs are similarly situated such that a collective action should be conditionally certified for the purpose of sending notice of the action to potential collective class members. The court then makes a second certification determination after discovery is largely completed and the case is ready for trial. Although different in scope and the presentation of evidence, both stages provide opportunities for defendants to challenge certification.

a. Opposing the Lenient First-Tier Standard

As noted above, the first-tier of the two-tier approach is a lenient standard with a very low threshold for determining that potential plaintiffs are similarly situated to the putative collective class members.[102] In fact, the initial showing required is "little more than substantial allegations, supported by declarations or discovery that 'the putative class members were together the victims of a single decision, policy, or plan.'"[103] Under the first-tier approach "the court usually has only minimal evidence before it – the pleadings and any affidavits submitted by the parties, and, therefore, this determination is usually made using a fairly lenient standard . . ."[104]

However, conditional certification of a collective class can best be challenged by obtaining opposing declarations showing the ways in which a class plaintiff and the members of the putative class action are not similarly situated to each other and were not "victims of a single decision, policy, or plan." Declarations should demonstrate differences in their employment relationship such as contractor versus employee status. Furthermore, declarations should

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[102] *Leuthold v. Destination AM., Inc.*, 224 F.R.D. 462, 467 (N.D. Cal. 2004).

[103] *Morden v. T-Mobile USA, Inc.*, 2006 U.S. Dist. LEXIS 68696, at 6 (W.D.Wash. 2006).

[104] *Morisky v. Pub. Serv. Elec. & Gas Co.*, 111 F.Supp. 2d 493, 497 (D.N.J. 2000).

illustrate the differences in job duties, job locations, locations of activities performed and other indicia which impact employee status and classification.

In *Clausman v. Nortel Networks, Inc.,* the court withdrew its first-tier certification determination, which allowed notice to a putative class of outside sales persons employed by defendant, because of "new information that defendant presented."[105] Specifically, the court cited deposition testimony, obtained subsequent to its initial order, that "regarding how much time they spent outside of the office, each sales person . . . operate[d] differently."[106] Because the evidence suggested that the court would have to "determine precisely what each individual did while [in the] office" to determine defendant's liability, the court withdrew certification.

In *Diaz v. Electronics Boutique of America, Inc.,* the plaintiff, store managers of a retail chain specializing in the sale of computer and video game hardware and software, alleged that defendants improperly classified them as "exempt" employees in order to avoid paying overtime in violation of the FLSA and New York state law. [107] In a rare decision applying the more lenient first-lenient standard, the court denied plaintiffs' motion for conditional class certification on the basis, among others, that plaintiffs did not show that they were similarly situated to other store managers because the responsibilities of managers varied greatly from store to store. The court noted that "[a]lthough SMs share the same job description, their responsibilities, in fact, may differ and thus highly fact-specific and detailed analysis of each SM's duties is required, making class treatment inappropriate."[108]

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105 2003 WL 21314065, at*5 (S.D. Ind. May 1, 2003).

106 *Id.* at 4.

107 2005 U.S. Dist. LEXIS 30382, at *2 (W.D.N.Y. Oct. 17, 2005).

108 *Id*. at *14.

b. Second-tier Stricter Standard

Issuance of a conditional certification and notice is not the final determination as to whether a potential plaintiff is similarly situated to the putative collective action members, and whether the action can proceed as a class.[109] As discovery is nearly completed and the case is ready to proceed to trial, a motion to decertify, showing that the lenient first-tier standard is inappropriate and a stricter standard should be used to evaluate whether the plaintiff is similarly situated to potential collective action members, may be used to defeat collective action certification.[110] At this second-tier, the court has much more information on which to base its decision, and as a result, now employs a stricter standard to plaintiff's allegation that he or she is similarly situated to the rest of the class.[111] The court weighs various factors in making a factual determination as to whether the plaintiff is similarly situated during this second-tier analysis, such as (1) the disparate factual and employment settings of the individual plaintiff; (2) the various defenses available to the defendant which appear to be individual to the plaintiff; and (3) fairness and procedural considerations.[112]

In *Morisky*, the court held that collective treatment of employees with various job titles claiming they were misclassified as exempt administrative employees was improper because of "[t]he individual nature of the inquiry required."[113] There, the plaintiffs sought to bring a collective action under § 216(b), arguing that the defendants' "common scheme" to deny overtime made them all similarly situated.[114] Applying the second-tier approach, the court found, however, that whether employees were properly classified as exempt involved an

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[109] *See, e.g., Thiebes v. Wal-Mart*, 1999 WL 1081357, at *3 (D. Or. 1999).

[110] *Thiessen,* 996 F. Supp. at 1080 (applying stricter standards where 100 plaintiffs had opted in and discovery was complete.)

[111] *Leuthold*, 224 F.R.D. at 467.

[112] *Theissen,* 267 F.3d at 1103.

[113] 111 F. Supp. 2d 493, 499.

[114] *Id.* at 498.

"extremely individual and fact-intensive" determination, which requires a "detailed analysis of the time spent performing administrative duties' and 'a careful factual analysis of the full range of the employee's job duties and responsibilities'" on an "employee by employee basis."[115] Accordingly, the court denied the plaintiffs' motion.

Similarly, in *Mike v. Safeco Ins. Co. of Am.,* the plaintiff sought certification of an action involving a group of claims representatives whose primary duty was to appraise the damage done to certain insured automobiles.[116] The defendant claimed that the employees fell under the FLSA's "administrative exemption."[117] Because the proof in the case was specific to the individual and would involve an examination of each plaintiff's "day-to-day tasks," the court denied the plaintiff's motion.[118] Applying the second-tier approach, the court held collective action certification was improper because regardless of the named plaintiff's allegations, "any other plaintiff would also have to present specific evidence of his or her daily tasks, and the court would have to apply the regulations on an individual basis."[119]

V. CONCLUSION

Although in one sense litigating class and collective actions is similar to litigating any other cases, there are important differences, in addition to the sheer size and complexity of class cases. Counsel prosecuting or defending class and collective actions should keep these important procedural and tactical differences in mind from day one of the case investigation, through trial and/or settlement.

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115 *Id.* at 499 (citation omitted).

116 274 F. Supp. 2d 216, 219 (D. Conn. 2003).

117 *Id* at 217-18.

118 *Id.* at 220-21.

119 *Id.* at 221.