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What Employers Need to Know Today About Class and Collective Actions: A View Through 2023's Cultural, Regulatory and Political Goggles

Introduction

The United States is in the midst of a unique cultural moment. A post-pandemic economy, a fractured political climate, a newly aggressive regulatory state, a deeply conservative U.S. Supreme Court and the relentless advance of technology have profoundly impacted our workplaces. Here, we look at some of the class and collective actions we will continue to see in 2023 at this historic juncture.

The pace of cultural, governmental and technological change has made it increasingly difficult for employers to manage the risk of class action exposure. Gone are the days when it might suffice to review your handbook, policies and employment practices every few years.

Old risks have morphed into new causes of action. Employees are newly empowered and more demanding of equity and work-life balance, and federal agencies and state legislatures are supporting these demands in unprecedented fashion. It is not possible to predict the next transformative, pandemic-level incident, the next ideological battle or stealth cause of action.

Employers must be vigilant, resilient and flexible. They must routinely audit their policies and practices and work with counsel to shore up their preventive strategies to minimize the costs and disruption of class litigation and potential liability.

ISSUE #1 The Post-Pandemic Workplace

WHAT YOU NEED TO KNOW — THE BOTTOM LINE: The post-pandemic workplace altered the class action landscape.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

The COVID-19 pandemic, the resulting quarantine and employers' earnest efforts to control the spread of the disease have stretched daily language to include remote work, temperature checks and vaccine mandates. Organizations that performed critical functions at the height of the shutdown offered "COVID-19 bonuses" to "essential workers" who could not work from home. Pre-shift temperature checks persist in some workplaces, along with "off the clock" claims that challenge the practice. Employees who *could* pivot to teleworking launched a transformative shift and created other potential liabilities, such as incurring home office expenses, working past closing time and outside sales employees losing their exempt status — according to a surge of

complaint filings under the Fair Labor Standards Act (FLSA) and state wage and hour laws.

The pandemic brought a heightened appreciation for health and wellness and a renewed legislative focus on employee wellness. This is reflected in a patchwork of new state and local paid sick leave or paid-time-off laws, predictive scheduling laws and, in California, A.B. 701 (effective Jan. 1, 2022), which restricts the use of productivity quotas for workers at warehouse distribution centers. Other states, such as New York, are poised to adopt similar restrictions. These measures create new compliance obligations and private rights of action; in addition, they create staffing pressures for employers and thus potential overtime costs — and the prospect of costly overtime class actions.

The COVID-19 shutdown and post-pandemic economy resulted in layoffs in some industries that were hit particularly hard, followed by a flood of class actions under the Worker Adjustment and Retraining Notification Act (and state law counterparts). Paradoxically, employers faced a worker shortage at the same time that boosted labor costs and employee leverage. “The Great Resignation” entered the lexicon. In July 2022, the Bureau of Labor Statistics reported an annual turnover rate 20% higher than pre-pandemic levels. Employees quit in record numbers — even higher in November 2022 — followed closed by steep recruiting, onboarding and training costs as well as an uptick in wage claims related to employee training. A growing number of employers have begun to use “clawback” arrangements to recoup the costs incurred in training employees who depart before a contractually agreed upon period. (The practice, once unique to Wall Street, has trickled down to lower-wage positions in recent years.)

Several class actions are pending challenging these recoupment efforts. In addition, class and collective actions involving otherwise exempt employees who claim they were nonexempt and entitled to overtime pay during weeks engaged in training programs began an upward trend in 2022. Hospitality, security and pharmaceutical industries were among the targeted employers.

Employer vaccination mandates were by far the most significant driver of COVID-19-related litigation, including class actions, large multi-plaintiff suits and a tsunami of single-plaintiff claims. Overwhelmingly, these complaints allege that employers failed to grant religious accommodations that allow plaintiffs to be excused from the vaccine requirement and, in many instances, discharged them for refusal to comply. The unprecedented deluge of vaccine mandate litigation took employers by surprise. Many attributed the volatile issue to vaccine opposition infused with politics rather than bona fide religious objections. The result: company-wide policies uniformly applied and costly class litigation. The disconnect on the issue between the Biden administration and the Equal Employment Opportunity Commission (EEOC) also caused disequilibrium. Given President Joe Biden’s staunch push for vaccination requirements (through executive orders and an OSHA emergency standard), employers were unprepared for a concerted

EEOC infrastructure focused on pursuing Title VII religious accommodation pattern-and-practice claims arising from mandatory vaccination requirements.

NOW THAT YOU KNOW — KEY TAKEAWAYS

Much of the class claims emerging from COVID-19, especially the suits arising under wage and hour laws, amount to variations on a theme. Employers were forced to change the way their employees worked to keep them safe and, in doing so, are now faced with claims surrounding those hastily made changes. Vaccine mandate litigation, however, is materially different, resulting from a "perfect storm" of an unprecedented crisis, legitimate fear for the safety of employees, a highly politicized environment and, in some cases, unconscious bias. Employers should revisit their accommodation processes and policies (including disability and religious accommodation requests to work remotely) and look carefully at the presumptions and biases behind the processing of those policies.

ISSUE #2 The Anti-Woke Backlash

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

A social reckoning has sparked a furious backlash.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

The #MeToo movement shone a light on the persistent challenges women experience in the workplace, including sexual harassment and pay disparities. The killing of George Floyd awakened the nation to the urgent underpinnings of the Black Lives Matter movement. Weather-related catastrophes and similar incidents put a greater focus on climate change. These developments inspired a critical course correction. At the same time, they placed more demands and increased liability risk for employers. Several jurisdictions have enacted pay transparency laws aimed at rooting out salary inequities, and such measures may flourish elsewhere. These measures impose new compliance burdens, complicate already difficult recruitment efforts and could expose employers to a wave of Equal Pay Act collective actions. In one highly publicized 2022 settlement, the U.S. Soccer Federation paid out $24 million to resolve a pay discrimination collective action brought by the U.S. Women's National Team. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act prohibits employers from enforcing mandatory arbitration agreements or joint action waivers of claims involving sexual harassment or assault. This means employers may be forced to defend high-profile and inflammatory claims on a class-wide basis in court. This could result in public exposure of highly inflammatory allegations and exponentially higher damages.

Many employers responded to the social reckoning with diversity, equity and inclusion (DEI) and (more recently) environmental, social and governance (ESG) initiatives to

ensure their organization benefited from the contributions of a diverse workforce and that their business practices reflected their commitment to the planet and the community at large. In several high-profile instances, organizations eager to meet their diversity hiring goals reported data revealing where past efforts had fallen short. The disclosure served as fodder for discrimination class actions and, for some publicly traded organizations, class actions brought by shareholders for putting earnings at risk. Shareholders also sued one large employer for its rollout of a DEI initiative, arguing that corporate leadership's decision to formalize a "program of invidious discrimination" presented an ensuing risk of litigation against the company, harming shareholders.

The larger peril for employers, however, may be the anti-wokeness (cast as a pejorative) backlash. In Florida, the "Stop WOKE Act" sought to hamstring workplace nondiscrimination training by expanding an employer's civil liability for discriminatory employment practices under the Florida Civil Rights Act if the employer endorses certain concepts in a "nonobjective manner" during training or other required activity that is a condition of employment. In August 2022 a Florida federal court enjoined enforcement of the law on constitutional grounds. The ruling is on appeal before the U.S. Court of Appeals for the Eleventh Circuit. If the Florida law survives constitutional challenge, employers might soon have to contend with similar legislation cropping up in other jurisdictions.

The anti-woke backlash has prompted a surge in reverse discrimination claims asserting that employers' diversity hiring goals discriminate against white (typically, male-identifying) employees. For example, one putative class action pending in a federal court in Texas asserts that the employer, a global financial services firm, "decided that they wanted the percentage of black employees in the company to match that of the U.S. population [and] implemented policies to achieve that numerical goal without any regard for employees in unfavored racial categories or existing civil rights laws."

The complaint alleges that the employer incentivized executives to "decrease the percentage of white employees in their department" by conditioning at least 15% of their annual bonuses on attaining this goal. "The tactics became exponentially more aggressive after the death of George Floyd," according to the complaint. It also alleges that the employer "installed black individuals in executive positions across the country in unprecedented numbers with the intent that they would help to expedite its agenda." The plaintiff contends that, once corporate leadership "handed down their racial engineering marching orders, it gave executives carte blanche to ruthlessly implement a racial caste and quota system in the company." The plaintiff seeks to certify a nationwide class comprised of "[a]ll past, present, or potential white employees … in bands 30 and higher who, as a result of the operation of past, current, or planned policies and practices, have been, are being, or will be discriminated against in the terms and conditions of employment, including but not limited to recruitment, hiring,

promotions, training, and discharge, because of their race." For an employer with a 60,000-employee workforce, the potential class size is staggering.

NOW THAT YOU KNOW — KEY TAKEAWAYS

Most employers did not anticipate the downstream effect of #MeToo and the potential litigation over salaries in job postings or companies' earnest efforts to build a diverse workforce and provide antibias and anti-harassment training facing class-wide charges of invidious discrimination. The current backlash should not deter employers from pursuing their DEI initiatives, however. Employers should review their DEI recruitment efforts and training programs on diversity, inclusion, bias, equal employment opportunity and harassment prevention through the lens of the current cultural moment to ensure these initiatives are sensitive to the needs of all members of the workforce and fully compliant with equal employment laws.

ISSUE #3 The Rise of Data Privacy Claims

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

The prospect of big damages has spurred a flood of data privacy litigation.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

While wage-hour claims continue to make up the lion's share of class action employment litigation, privacy-related class actions are a rapidly emerging threat, with the potential for massive damages. The less-secure environment of remote employment, the rapid advance of technology, burgeoning cybercrime and an ever-expanding list of privacy-related legislation and regulations have laid the groundwork for this trend.

In *Rogers v. BNSF Railway Co.*, the first-ever case involving claims under the Illinois Biometric Information Privacy Act (BIPA) to go to trial, a federal jury in October 2022 returned a verdict for the plaintiff class of truck drivers who claimed they were fingerprinted when they entered BNSF's railyards to make pickups and deliveries, without being given written notice and without BNSF first obtaining their informed consent. Under the BIPA, for noncompliant collection, use or disclosure of biometric information, a prevailing party may recover actual damages or statutory liquidated damages of $1,000 for each negligent violation and $5,000 for each reckless or intentional violation, plus attorneys' fees and costs and injunctive relief. The jury found that the employer recklessly or intentionally violated the BIPA 45,600 times or one time for each member of the class. Shortly after the jury verdict, the trial court entered judgment awarding the class $228 million, which equated to $5,000 per class member. Worse still, in a February decision, the Illinois Supreme Court ruled that BIPA carries a *five-year* statute of limitations (overruling a state appellate decision that held that plaintiffs had a one-year limit on claims under the statute).

Other privacy laws provide for similarly steep statutory damages, making them attractive class action vehicles. Such laws include the California Consumer Privacy Act, federal Telephone Consumer Protection Act and Florida Telephone Solicitation Act (which restricts the making of telemarketing calls and the use of automatic telephone dialing systems and artificial or prerecorded voice messages). The latest favorite of the plaintiff's bar is the Video Privacy Protection Act, a 1988 statute. The law regulates data collection and sharing through company websites (through the use of pixels) and carries statutory damages of $2,500 per violation (as well as potential punitive damages). Class actions also have proliferated under the Electronic Communications Privacy Act (aka the Federal Wiretap Act) related to the use of session replay (replaying a visitor's website usage within a mobile or web application).

Negligence claims arising from the alleged wrongful disclosure of information, or from the alarming rise of criminal data breach incidents, have fueled a sharp uptick in class litigation. In 2022 cybersecurity breaches skyrocketed. One analysis found a direct link between the cost of a data breach to employers and the percentage of their workforce that works remotely. Moreover, downstream liability for cyber incidents can be unexpected and significant. One such incident in December 2021 resulted in a deluge of *wage and hour* class actions in 2022 against users of the payroll system who scrambled to record employees' work hours and to timely pay them while the system was out of commission.

NOW THAT YOU KNOW — KEY TAKEAWAYS

The risk of exposure from data privacy class actions shows no signs of abating. In 2023, new privacy laws, or expansions of existing privacy laws, took effect in California, Colorado, Connecticut, Utah and Virginia. Congress is working to pass federal privacy legislation. Additionally, the Federal Trade Commission (FTC) is considering promulgating a privacy rule. Compliance with myriad privacy laws and regulations and rigorous attention to information security (particularly with respect to remote employees) should be a primary focus of employers' risk management strategy. Employers should adopt protective measures, including website terms of use and arbitration provisions, to make the organization an unattractive target for the plaintiff's bar. Review all of your privacy-related activities with your privacy or employment counsel to be sure you are "buttoned up."

ISSUE #4 Aggressive Agency Actions

WHAT YOU NEED TO KNOW — THE BOTTOM LINE: Regulatory agencies are turning up the heat about the direction of the Biden administration.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

When the occupant of the White House changes, employers feel a regulatory "whiplash." The latest regime change was particularly drastic. Eleventh-hour regulations

issued by the Trump administration were promptly undone by the Biden administration. Obama-era rules rolled back by the agencies under President Donald Trump were restored under President Joe Biden. What's old is new again. What's new is *really* novel.

This trend was on full display at the U.S. Department of Labor (DOL). The DOL returned to pursuing liquidated damages in connection with pre-litigation investigations and settlements of wage and hour claims (a practice the Trump DOL had suspended). The Wage and Hour Division is engaged in rulemaking on how to define "independent contractor" under the FLSA and proposed a rule updating the white-collar exemptions from overtime (another perennial source of agency flip-flopping). The agency finalized a rule updating Davis-Bacon Act regulations (which sets prevailing wages for public works projects), the first update in more than 40 years.

The Biden "tip rule," which reinstated the 80-20 approach the Trump DOL had abandoned, is under challenge at the U.S. Court of Appeals for the Fifth Circuit. One concern cited by the industry group suing the agency is that, without the usual opportunity for comment, the DOL unveiled a brand new "30-minute" rule provision, disallowing the tip credit when a tipped employee spends more than 30 continuous minutes performing work not considered to be "tip producing." The resulting confusion is even more problematic given that one of the DOL's stated enforcement priorities is lower-paid workers, including tipped workers in various sectors. The private bar is also paying attention: the number of tip credit suits rose dramatically in 2022.

The standard for defining who is an independent contractor (rather than statutory employee) has flipped and flopped from Obama to Trump and back to Biden, resulting in a compliance challenge for employers. To exacerbate the confusion, the FLSA standard differs from that used by the IRS, both of which may take a back seat to more rigorous definitions under various state laws. Further, the agencies are particularly aggressive in policing this issue, teaming up under formal cooperative agreements with other federal agencies and with individual states to tackle enforcement. The DOL recently identified misclassification as an enforcement priority and has stepped up investigations in this area. Potential exposure can be massive. The DOL recovered $5.7 million (in back pay, liquidated damages and civil monetary penalties) in a misclassification case involving 1,300 drivers. In a case brought by private plaintiffs, a trucking company agreed to pay $7.25 million in 2022 to resolve a misclassification claim involving a class of California truck drivers.

A settlement with the DOL may not end the matter, however. A 2022 memorandum of understanding means the Department of Justice and FTC may scrutinize a misclassification case for potential antitrust violations. This practice is reflective of a larger, troubling mission creep among federal consumer protection agencies into the employment realm. The FTC is scrutinizing "wage-setting" practices for antitrust violations and has promulgated a rule barring employers' use of noncompete agreements (another practice that has generated class litigation of late). Both the FTC

and Consumer Financial Protection Bureau are investigating employers' training recoupment practices (noted above). The catalyst was a July 9, 2021, executive order by President Biden encouraging federal agencies to issue rules to promote a "fair, open marketplace," including the labor market, by eliminating practices "that may unfairly limit worker mobility."

Meanwhile, some states are empowering workforce agencies to flex their muscles in radical new ways. In September 2022 California Governor Gavin Newsom signed the "FAST Recovery Act" (AB 257). The new law establishes a Fast Food Council comprised of officials within the state Department of Industrial Relations, along with fast-food employees, worker advocates, franchisors and franchisees, to set industry-wide standards for wages, working hours and other working conditions related to the health and safety of fast-food workers. A state court has enjoined the government from enforcing or implementing the statute while the secretary of state counts signatures to determine if a voter referendum challenging AB 257 will make it on the 2024 election ballot. The future of the measure remains uncertain; what is clear, however, is that for legislators seeking to expand the reach of the regulatory state, even centralized planning is on the table.

NOW THAT YOU KNOW — KEY TAKEAWAYS

Managing legal risk can be particularly challenging when agency priorities change, often dramatically, with each administration. The most recent regime shift is more impactful than the usual back-and-forth between compliance assistance and enforcement. Employers now must navigate a much broader landscape of regulatory activity. Employers should expect a continued aggressive approach among federal agencies (at least for the duration of the Democratic administration) in states with Democratic administrations. One potential saving grace: the U.S. Supreme Court, in *West Virginia v. Environmental Protection Agency*, used the once-obscure "major questions" doctrine to invalidate an environmental regulation that exceeded the agency's scope of authority. This doctrine may be a powerful basis for challenging agency overreach, including by agencies not charged by Congress with regulating the employment relationship.

ISSUE #5 The Agile Plaintiff's Bar

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

A nimble plaintiff's bar continues to find new avenues to sue employers.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

For the first time since 2015, federal court filings under the FLSA rose in 2022. Federal wage and hour claims had been steadily decreasing, in no small part due to employers' growing use of mandatory arbitration agreements with class waivers. However, the plaintiffs' bar continues to attack arbitration, litigating the validity of arbitration

agreements and using mass arbitration as a tactic to undermine much of the fundamental advantages of the arbitral forum. (These attacks have been quite successful in California, where class counsels have used the California Labor Code's Private Attorneys General Act [PAGA] to dodge arbitration. However, the U.S. Supreme Court's 2022 decision in *Viking River Cruises Inc. v. Moriana* and the California Supreme Court's pending consideration of whether employees who have agreed to arbitrate can bring PAGA claims on behalf of other employees in court may put a damper on plaintiffs' use of PAGA as a de facto "get out of arbitration free" card.) Consequently, plaintiffs may be less hesitant than in previous years to file suit in court.

Class action attorneys are adept at finding workarounds. This also has proven true with respect to claims under the Fair Credit Reporting Act (FCRA). Defendants in FCRA class action suits scored several significant victories in recent years on whether plaintiffs had Article III standing to sue in federal court based on mere "informational injuries" (where they suffered no adverse action from a purely procedural violation of the FCRA). Employers' sense of relief was short-lived, however, because plaintiffs simply opted to pursue these claims in state court.

The plaintiffs' bar has gotten more creative of late, constructing new theories of liability under existing statutes. For example, just as employers gain certainty around what types of compensation to include when computing the "regular rate of pay" for overtime purposes under the FLSA, plaintiffs' attorneys bring class claims alleging that vested restricted stock grants and profit sharing should be factored into the calculation. Plaintiffs' attorneys also have proven savvy at capitalizing on outlier decisions that may open the door to class-wide liability. In 2022 employers faced hundreds of class actions in New York State under New York Labor Law 191 (NYLL 191), which requires that employers pay "manual workers" on a weekly basis. The litigation stems from a single 2019 decision by a state appeals court that the statute provides a private right of action for violations. The overwhelming majority of courts to have addressed the issue previously had found employees had no right to sue under the statute and, for employers, a $3,000 fine from the New York Department of Labor was the maximum potential liability. However, one national retailer ended up paying out $29 million to settle a private class action suit under NYLL 191.

NOW THAT YOU KNOW — KEY TAKEAWAYS

For every employer action, there is an equal and opposite plaintiffs' bar reaction. Employers should not let their guard down. There are no ironclad measures to prevent litigation or procedural wins likely to permanently shut out a particular type of claim. Employers should conduct compliance audits regularly to identify and, if necessary, correct any potential points of vulnerability.

ISSUE #6 The Importance of Jurisdiction

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

With growing procedural fault lines, jurisdiction can have a seismic impact on class litigation.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

Now, more than ever, it matters *where* you are sued. Federal circuits increasingly are divided on critical issues that impact the size of a class or collective, the likelihood of certification and the prospects for the expeditious resolution of class action disputes. In 2017 the U.S. Supreme Court in *Bristol-Myers Squibb v. Superior Court of California* held that a state court lacked jurisdiction over nonresident plaintiffs' claims against a nonresident company. Ever since federal courts have split over whether the precedent applies to out-of-state plaintiffs in Rule 23 class actions or potential opt-in plaintiffs in collective actions brought under the FLSA's Section 216(b) mechanism. Several courts of appeal have weighed in. As for collective actions, the Third, Sixth and Eighth Circuits have held that *Bristol-Myers* jurisdictional limits apply to collective actions, whereas the First Circuit held the Supreme Court's decision does not apply (meaning, FLSA collectives may include members from outside the forum state). Bottom line: the circuit in which an employer is sued may make the difference between defending against a nationwide class or collective action or litigation involving a much smaller class.

In its 2021 decision in *Swales v. KLLM Transport Services LLC*, the Fifth Circuit rejected the two-stage, "conditional" certification standard commonly applied by courts in FLSA collective actions. The decision marked a momentous change in how collective actions are litigated in federal courts in Louisiana, Mississippi and Texas. Conditional certification is a low bar for plaintiffs to meet — a "modest factual showing" — making FLSA litigation particularly inviting to the plaintiffs' bar. According to one study, courts granted 82 percent of motions for conditional certification brought by plaintiffs; in contrast, when a more stringent standard applies at the decertification stage, the litigation proceeds as a collective in only 50 percent of cases. As such, courts outside the Fifth Circuit clinging to the two-stage "*Lusardi*" process are far more likely to grant plaintiffs' motions to send notice of the litigation to potential opt-in plaintiffs. So far courts outside the Fifth Circuit have been resistant to adopting the *Swales* approach. However, the Sixth Circuit is considering a case that urges the circuit to abandon the conditional certification device. A favorable decision there could convince other appellate courts to follow suit.

The Eleventh Circuit hindered parties looking to resolve disputes with a 2020 decision holding that "incentive payments" or "service awards" to lead plaintiffs in a Rule 23 class action are unlawful. The appeals court vacated a $1.43 million settlement in a Telephone Consumer Protection Act case and further complicated settlement

negotiations and the already arduous process of securing court approval in the Eleventh Circuit.

In 2022 a district court within the Eleventh Circuit invalidated a $10,000 payment to three named plaintiffs in exchange for a general release of claims. The payments were part of a stand-alone agreement negotiated separately from a settlement resolving an overtime action involving a class of 1,365 employees. However, the district court concluded that the side agreement was an attempted workaround of the circuit's prohibition on service payments. (The decision is on appeal, where there is a rare accord between the plaintiffs' and defense bar urging reversal.) Here too, jurisdiction matters: both the Second and Ninth Circuits issued decisions upholding the use of service payments in those circuits (also in 2022).

In California, infighting among the plaintiffs' bar has added yet another impediment to settlement. Class action attorneys recently have been filing overlapping suits against a single employer and, when the employer settles one of the matters, class counsel in the other cases raise settlement objections.

NOW THAT YOU KNOW — KEY TAKEAWAYS

Plaintiffs have long engaged in jurisdictional jockeying to position their class and collective actions in favorable jurisdictions. *Bristol-Myers* may put a damper on those efforts. Employers sued outside the Fifth Circuit should continue to assert nonfrivolous arguments against two-stage certification, which unfairly pressures employers into an early settlement. Employers with class litigation pending in the Eleventh Circuit may consider whether it may be more effective to have the litigation resolved in a state court. They may also reconsider whether to remove an action to federal court or encourage class counsel to consider voluntary dismissal of actions filed in a federal court to refile in a state court.