

Ten Tips For Proactively Managing Employment Class Actions

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1. Don't Wait Until A Lawsuit Has Been Filed To Start Building An Effective Defense.

➤ Develop, Implement & Monitor The Effectiveness Of Your Employment Policies.

Adopt procedures for the oversight, monitoring and auditing of employment decisions as an evidentiary and actual control over subjective decision-making at the managerial level. This would include periodic statistical audits. *See Dukes v. Wal-Mart: Road Map for Critical Self-Analysis*, July 7, 2004, available at <http://www.morganlewis.com> under the "Publications" button.

- **Why?** Plaintiffs in employment discrimination class actions routinely rely on expert opinion about stereotyping in an attempt to satisfy Fed. R. Civ. P 23's commonality requirement. Plaintiffs argue that, where there is excessive subjectivity in employment practices and decisions are left largely to the unchecked discretion of managers, subconscious stereotypes will seep into managers' decision-making and inevitably result in workforce disparities. The social science experts do not quantify how much is "too much" subjectivity/discretion (and never find a company to have met their standards). Plaintiffs' argument has the most chance of success when an employer has *no* written guidelines and simply delegates employment decisions to managers to be made based on their good judgment. *Compare Dukes v. Wal-Mart*, 222 F.R.D. 137 (N.D. Cal. 2004) (certifying class of 1 million women in nation-wide class action based on theory that promotion and compensation practices were excessively subjective where company had few written guidelines) *with Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 676-77 (N.D. Ga. 2001) (refusing to certify class based on arguments of subjectivity where the challenged employment practices were not *entirely* subjective).
- **Why?** Treating an employee consistent with policy can strengthen the company's defense, if not avoid litigation. Jury consultants have found that jurors are strongly influenced by their own work experiences, and, irrespective of the technical legal issues, look for *fairness*. Red flags for jurors include:
 - ✗ Fired on first offense/fired without warning.
 - ✗ Someone else in same situation treated less harshly.
 - ✗ Good performance reviews, but terminated anyway.
 - ✗ Inadequate investigation before termination.
 - ✗ Promoted someone with less experience/fewer years.
 - ✗ Overlook misconduct of high earners.

- **Develop Written Criteria & Clear Guidelines** for employment-related decisions (*e.g.*, job descriptions, hiring, promotions, interviewing, access to training, performance evaluations, compensation, selection for leadership development programs, equal employment opportunity.). If economically feasible, hire a consultant with industrial psychologists on staff to assist with creation of the policies.
 - **Consistently Apply Policies.** Educate managers on policies, make policies easily accessible, and continually reinforce through training. If managers don't know about the policies or don't know how to find them, they won't use them—which diminishes their value in defending against a class allegation of subjective decision-making.
 - **Audit Compliance With Policies.** Are performance evaluations being done consistent with policy? Are interview guidelines being used? Are compensation guidelines being used?
 - **Analyze Workforce Statistics.** Analyze hiring, promotion, compensation and termination personnel data to identify areas of vulnerability, *i.e.*, areas where the company's employment practices are creating statistically significant disparities between similarly situated male/female and non-minority/minority employees.
 - ✗ Develop ways to make adjustments and correct any significant disparities.
 - ✗ Be aware of the risks in creating reports and analyses that may later be subject to discovery. Consider hiring outside legal counsel to take advantage of legal privileges—particularly when first setting up ongoing audit practices.
 - ✗ Be committed to addressing observed disparities. If no remedial steps are taken, Plaintiffs' could try to use the company's awareness of workforce disparities as evidence of intent to discriminate.
 - ✗ *Note.* Government contractors will be required to start performing more sophisticated analyses of their compensation data due to the OFCCP's adoption of multiple regression analyses to identify disparities in compensation. *See OFCCP Publishes Guidelines and Standards for Evaluating Potential Compensation Discrimination*, Nov. 16, 2004, available at <http://www.morganlewis.com> under the "Publications" button.
- **Your Complaint Process, Investigation, And Resolution Must Be Effective.**
- Ensure that Human Resources personnel are competent, knowledgeable and well trained. They should fairly and consistently enforce employment policies, promptly respond to employee complaints and issues, and resolve the issue fairly. Communicate with the complaining employee about the resolution of the matter to the extent feasible under the circumstances.
 - ✗ **Why?** *Faragher/Elterth* affirmative defense.
 - ✗ **Why?** Plaintiffs' counsel's opinion that many lawsuits would have been avoided if the company had more effectively handled the employee's internal complaint.

- ✖ Plaintiffs' counsel maintain databases of contacts with complaining employees and look for trends to target companies for class actions.
- **Develop A Record Of EEO And Harassment Training.** Without records, it's difficult to prove during litigation that training occurred, how frequently it occurred, and who was trained.
- **Appreciate The Evidentiary Value Of Diversity Efforts And AAPs.** Diversity training and initiatives are becoming more common, and are useful for countering plaintiffs' class action allegations that managers will exercise discretion in a discriminatory way. For the same reason, Affirmative Action Plans and related materials (including OFCCP compliance materials) can be useful in defending against a class action.
- **Examine HRIS Data.** Review the contents of the company's HRIS data set to determine whether the required elements/factors are recorded and transactions are recorded properly, *e.g.*, different types of promotions.
- **Control Access To Statistical Reports.** Monitor and control the development and distribution of statistical reports within the corporation concerning the utilization of minorities and women. (These are developed as a rote process without any thought to the damage that they could cause once discovered.)
- **Understand That Employee Surveys Are Discoverable.** Monitor and control the creation and use of attitude surveys, employee climate surveys, and diversity studies. (These reports are often quoted in class action complaints.)
- **Manage Employment-Related Documents.**
 - Inventory how documents and information relative to issues which could be raised in class action litigation are recorded and maintained in electronic and hard copy format. (*e.g.*, compensation, promotions and advancement, performance management, reductions in force, terminations, equal employment opportunity efforts). Review coding issues, maintenance and document destruction issues, electronic document maintenance and destruction issues, *etc.* This will have a direct bearing on your evaluation of the retention and maintenance of documents and other information and how to effectively implement an appropriate "litigation hold" to prevent the destruction of relevant information.
 - **Document Retention Policies.** Make sure you have effective document retention/destruction policies that are consistent with the law. (Evidence spoliation has become a hot topic.). See Stephanie Blair, *Focusing On Reasonableness and Cost Trends in E-Discovery and Record Retention*, Dec. 2003, available at <http://www.morganlewis.com>. (Under the "People" button, locate the profile of Stephanie Blair in the Philadelphia office. This white paper is attached to her profile.)
 - **Consider A Complaint Tracking System.** Frequently, employers maintain copies of documents related to internal complaints alphabetically by the name of the complainant. During discovery, when plaintiffs request relevant employee complaints, internal personnel spend a great deal of time reviewing individual files for relevant complaints.

- Consider keeping a database with basic information about complaints (and keep in mind that it could be discoverable).
2. **Once A Case Is Filed, Select Employment Counsel With Class Action Experience That Will Partner Closely With In-House Personnel.**
- **Select Experienced (And Likable) Counsel.** Close partnerships with in-house personnel is one of the single most important elements to effectively managing class actions and minimizing cost. Lawyers who have class action experience will handle your case more efficiently and competently. Thus, you want competent counsel, but you also want to work with people *you like*. If you don't *like* your outside counsel, don't use them anymore. Otherwise, over the several years that class actions can extend, communication will be strained and the defense of the case will suffer. It is more likely that they will make decisions or pursue a strategy without sufficient input from you—which could prove costly.
 - **Dedicate An In-House IT Expert And Paralegal To The Case.** Their expert knowledge of the company and data and their relationships with key personnel will significantly reduce costs and risk of mistakes. For the same reasons an in-house paralegal should be closely involved with document collection and scheduling witness interviews.
 - **Select Counsel With Experience Managing Experts.** For class actions, select counsel with experience in developing statistical analyses and managing statistical experts. This is critical. There needs to be a lawyer who can speak the experts language and translate the litigation into terms that they understand.
3. **Prepare A Case Assessment As Early As Possible And Continually Re-Evaluate As More Facts Are Learned.**
- **To Be Proactive, An Early Assessment Is Needed.** Simply being reactive to opposing counsel allows them to drive the strategy and frequently determines how the judge will first view the case. The goal is to affirmatively pursue the company's strategy to build the most effective case. To do so, a case assessment must be done early in the litigation. For single plaintiff cases or class actions, promptly prepare a memo identifying the primary legal issues and the legal standards in the relevant jurisdiction, including statutes, case law, Local Rules, and any Standing Orders. Do a risk assessment and strategy based on this preliminary research and known facts. Prepare an initial strategy based on that assessment. Issues that are particularly important for class actions include:
 - Has the Circuit adopted the approach in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1988) (holding that request for compensatory and punitive damages destroys class certification under (b)(2))?
 - How has the Circuit interpreted *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156 (1974)? Do the courts refuse to look behind the pleadings? See *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999) (court ruling on class certification may not go beyond the face of the pleadings with respect to any issues relating to the merits and must instead accept as true the well-pleaded allegations in the complaint); accord *In re Buspirone Patent Litig.*, 210 F.R.D. 43, 56 (S.D.N.Y. 2002); *In re Vitamins Antitrust Litig.*, 209

F.R.D. 251 (D.D.C. 2002). Or are they more aggressive in reviewing plaintiffs' factual assertions in support of their motion for class certification? See *Cooper v. Southern Co.*, 390 F.3d 695, 712 (11th Cir. 2004) (impossible to meaningfully address the Rule 23 criteria without at least touching on the merits of the litigation) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n. 12 (1978)); *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181, 1188 n.15 (11th Cir. 2003) ("Although the trial court should not determine the merits of the plaintiffs' claim at the class certification stage, the trial court can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied." (citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982)); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

- An issue related to *Eisen* is whether the Circuit will absolutely forbid "expert dueling." See *Caridad*, 191 F.3d at 292 (refusing to consider "statistical dueling" of the experts at the class certification stage); *accord Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 155 (N.D. Cal. 2004). Or, will the court more closely analyze the statistical data and expert opinions? See *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 2002 WL 32058462, at * (Dec. 31, 2002) (Johnson, Magistrate, J., Report & Recommendation) (rejecting plaintiffs' contention that court must disregard any "dueling" between the parties' experts at the class certification stage), adopted and affirmed, 213 F.R.D. 619 (N.D. Ga. 2003). Some defendants' counsel choose not to hire an opposing expert based on the mistaken belief that the court will reject "expert" dueling. This is simply not true in all jurisdictions. Further, a court may be persuaded by the evidence even if it does not expressly rely on it.
- Has the Circuit ever certified a class action based on the notion that an employer's employment practices are excessively subjective?
- If plaintiffs are claiming a violation of Title VII, did they exhaust their administrative remedies? Do the limitations on the "single-filing rule" restrict the temporal scope or claims that plaintiffs can validly assert? See *Carter v. West Publ'g Co.*, 225 F.3d 1258, 1263 (11th Cir. 2000) (under the "single filing rule," "[a]s long as at least one named plaintiff timely filed an EEOC charge, the precondition to a Title VII action is met for all other named plaintiffs and class members"); *Gitlitz v. Compagnie Nat'l Air Fr.*, 129 F.3d 554, 557 (11th Cir. 1997) (for the single-filing rule to apply, plaintiffs must suffer "similar discriminatory treatment in the same time frame").
- Does each class representative have constitutional standing to challenge the practice that they allege is discriminatory? Put another way, for every practice that is allegedly discriminatory, is there a named plaintiff with standing to challenge it? *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987) (prior to assessing Rule 23's factors, the court must determine if there is an individual plaintiff who has constitutional standing to raise the claim and, for Title VII claims, who claim has satisfied the procedural requirements of Title VII); *Prado-Steinman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000) ("Prior to certification of a class, and before undertaking any formal commonality or typicality

review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim.”).

➤ **Strategically Analyze Data Early In The Case.**

- As part of the initial risk assessment when a class action is filed, analyze the relevant data as soon as possible. In doing so, put yourself (as a defendant) in the plaintiffs’ position—review the data as *they* will review it. Anticipate and defend against those arguments. Competent outside counsel who is accustomed to working with statistical experts on these issues is critical.
- In class actions, an early understanding of the data will provide leverage in settlement discussions. If the data looks good, class actions can settle early—sometimes even before the class action lawsuit is filed.

➤ **Preliminary Motions?** As part of the initial assessment, determine as early as possible whether any preliminary motions should be filed. For example, consider whether to file a motion to strike all or part of class allegations. This gives you “two bites at the apple” and allows you to affirmatively take the initiative to undermine the class.

➤ **Consider A Consulting Expert.** Consider using a consulting expert in addition to a testifying statistical expert. Communications with and work by consulting experts typically is privileged and not discoverable. *E.g.*, *United States v. Kovel*, 296 F.2d 918, 920 (2d Cir. 1961) (attorney-client privilege); *Westinghouse Elec. Corp. v. Rep. of Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991) (“When disclosure to a third party is necessary for the client to obtain informed legal advice, courts have recognized exceptions to the rule that disclosure waives the attorney-client privilege.”); *F.T.C. v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980)(attorney-client privilege); *Kent Corp. v. NLRB*, 530 F.2d 612, 623 (5th Cir. 1976) (work product privilege); *Martin v. Bally’s Park Place Hotel & Casino*, 983 F.2d 1252, 1260-61 (3d Cir. 1993) (work product).

➤ **Depose Plaintiffs Promptly.** Immediately depose the named plaintiffs to force them to stake out their positions early in the litigation. This helps on issues relating to commonality, typicality, and adequacy of representation. It also helps on 23(b)(2) issues and “similarly-situated” issues in ADEA collective actions.

4. Communicate, Communicate, Communicate With Outside Counsel.

- **Set Expectations.** Develop and communicate expectations with outside counsel early on. Clearly articulate expectations and procedures regarding billing, case management, company policies and other litigation matters. This reduces the risk of misunderstandings later on.
- **Demand Candor.** Discuss strengths and weaknesses of the case candidly—and continue to re-evaluate as the case proceeds. The company cannot realistically assess the likelihood of success or the wisdom of settlement if it doesn’t understand the weaknesses of the case as early as possible. Be watchful for outside counsel who sugar-coats weakness in the case or is overly confident that, despite the weakness, success is certain.

5. Preserve Relevant Information And Documents.

- If there is a pending or reasonably foreseeable lawsuit, there is a duty to preserve relevant documents that may be discoverable. *E.g., West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776 (2d Cir. 1999).
- The issue of what is “relevant”—and therefore subject to the duty to preserve—can be tricky. This is especially true in single plaintiff cases where plaintiffs seek information related to discrimination complaints filed by other employees.
- As soon as dispute develops (*e.g.*, when an internal complaint or EEOC charge is filed), take aggressive steps to preserve (if not collect) all relevant documents.
 - Distribute a litigation hold memo that instructs personnel to retain relevant documents—in hard copy and electronic form. Make sure documents are not destroyed under the regular operation of the document retention policy, electronic janitors for email, or other means of automatic destruction of documents. *See Litigation Hold – Sorting Through Record Preservation Issues*, Mar. 7, 2005, available at <http://www.morganlewis.com> under the “Publications” button.
 - ✘ A string of decisions—especially from Judge Scheindlin in the Southern District of New York—has heightened awareness of these issues. *E.g., Zubulake v. UBS Warburg LLC*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) (jury allowed to infer that evidence UBS failed to produce would have been unfavorable); *U.S. v. Philip Morris, Inc.*, No. 99-2496 (D.D.C. July 21, 2004) (defendant fined \$2.5M for destroying email and barred from presenting key witnesses at trial who failed to follow litigation hold); *In Re Prudential Insurance Co. of America Sales Practice Litigation*, 169 F.R.D. 598 (D. N.J. 1997) (Prudential fined \$1M for failure to prevent unauthorized destruction of discovery materials).
 - ✘ Counsel no longer has the right to rely on the client to comply with proper instructions and advice. Counsel has a duty to communicate effectively to the client its discovery obligations so that all relevant information is discovered and retained, and that all relevant, non-privileged information is produced.
 - ✘ Once the duty to preserve arises counsel must identify sources of discoverable information, such as that in the possession of key company personnel or in the possession of IT staff.
 - ✘ When the duty to preserve attaches, counsel must put in place a litigation hold and make the fact of the hold known to all relevant employees.
 - ✘ Counsel must reiterate the hold instructions on a regular basis.
 - ✘ Counsel must actively monitor the instructions and, when needed, corrective action must be taken to ensure continued compliance.
 - ✘ When dealing with electronic media, counsel must communicate to all relevant persons that the obligation to preserve information includes electronic data.
 - Notably, Plaintiffs’ counsel are exploring preservation issues in discovery requests and depositions. Deponents should be prepared to testify about their own preservation and collection efforts.

6. Prepare A Discovery Plan, Use In-House Personnel To Help With Discovery, And Minimize Discovery Disputes.

- **Prepare Discovery Plan** as soon as possible, realizing that it likely will change as the case evolves.
 - Identify witnesses for interview. Use in-house paralegal to schedule interviews and gather background information on the witness prior to interview.
 - Based on the claims in the complaint, identify the group of people likely to have relevant documents—both to build the company’s case and to respond to plaintiffs’ discovery requests. Find out how relevant electronic and hard copy documents are stored.
 - ✦ Documents retained on hard drive? E-mail folders on hard drive? Network shared drives? Applications accessed over the Local Area Network (LAN) or Wide Area Network (WAN)? Instant messaging for business purposes? Instant message logs? Handheld computing devices (e.g., Palm, Blackberry)? Sync these devices to your desktop? Use more than one computer in the office? home computer? DVDs? CDs?
 - Decide how documents will be collected. Custodians gather their own documents based on review of the discovery requests? Do an electronic snap-shot of the custodian’s computer and have paralegals or lawyers review and identify relevant documents? Key word search of electronic documents? A lead person in each department responsible for collecting all relevant policy documents used during class period?
- **Discuss Staffing.** As noted above, close partnering between the company and outside counsel—such as dedicating a corporate IT employee to the litigation—is one of the most effective ways to reduce costs and keep the litigation on track. Work with outside counsel early in the case to prepare a staffing plan that makes sense.
 - **Use Paralegals & Non-Legal Personnel** when possible to gather documents and organize information. Decide whether it is more cost effective for in-house counsel to do fact intensive legal tasks such as responding to interrogatories.
 - **Vendors? Contract Lawyers?** Evaluate cost-effectiveness of using outside vendors or temporary personnel for projects such as document review.
- **Use Technology To The Greatest Extent Possible:**
 - Storing and organizing documents electronically (e.g., Concordance) so that electronic key word searches can be used improves effectiveness of deposition preparation and drafting motions.
 - Storing pleadings and other case documents electronically improves sharing among lawyers and reduces repeated copying costs.
 - Consider using eRooms or extranets for communication between the company, in-house counsel and outside counsel.
- **Minimize Discovery Disputes.** Overly aggressive counsel waste money and risk sanctions. Class actions can last for a long time. Pick your battles. Remain cooperative where it doesn’t hurt your case and don’t personalize the lawsuit.

- **Consider Informal Discovery—Especially About Data.** Agreeing to informal discovery with opposing counsel can sometimes be an effective way to reduce costs without weakening the defense—especially in class actions. Consider cooperating in the creation of a joint database that both parties experts will use for their data analyses. Consider allowing opposing counsel to have informal conversations with lawyers and IT personnel to reduce/eliminate the need for lengthy depositions about data.

7. Establish Reasonable Procedures To Protect Privileged Documents.

- In class actions where thousands of documents may be produced, ensuring that no privileged document is inadvertently produced can be challenging. In a growing number of jurisdictions, the disclosure of privileged documents during discovery will not automatically result in the waiver of the privilege. Courts will analyze whether reasonable steps were taken to prevent disclosure. If so, the document will not be admissible at trial. The ABA’s rules of professional responsibility require that opposing counsel promptly return a privileged document once he/she realizes that it is potentially privileged.
- Because some courts look to the party’s “intent” in assessing waiver, consider including the following statement in response to document requests: “If a privileged document is inadvertently produced, Defendant does not intend to waive its privilege as to the subject matter in that document, and Defendant requests that such document(s) be returned to its counsel as soon as is reasonably possible.”

8. Use Plaintiffs’ Discovery Efforts To Build Your Own Defense.

- **Don’t Resist Producing Helpful Documents.** Plaintiffs’ discovery requests often are interpreted narrowly. This might not always be the best strategy in building the company’s defense. This is especially true with information related to EEO efforts, diversity initiatives, monitoring of policies, *etc.*
- **Prepare Deponents Thoroughly.** In class actions, the 30(b)(6) depositions will be key to building an effective defense. *The witnesses must be well-prepared.* For example, in discrimination class actions premised on the notion that the employer’s policies are overly-subjective, deponents should be ready to testify about the company’s practices that counter the theory’s applicability: written guidelines, criteria for employment decisions, instructor-led training, training materials on the company’s website, documentation for selection decisions, complaint mechanisms, any mechanisms by which equal employment opportunity/diversity goals are tied to management compensation, any mechanisms by which the company monitors the demographics of its workforce, diversity initiatives, equal employment opportunity initiatives, *etc.*

9. Be Careful In Communications With Testifying Experts.

- Tell experts that everything he or she writes or receives (including email) might be discoverable. Nothing should be discarded (but little should be written to begin with). Counsel should avoid written communications with experts and should be aware that their own notes of conversations with experts might be discoverable.
- Documents provided by counsel to the expert and the expert’s draft reports and notes generally are discoverable. *Corrigan v. Methodist Hosp.*, 158 F.R.D. 54, 58 (E.D. Pa. 1994); *Ladd Furniture v. Ernst & Young*, 1998 U.S. Dist. LEXIS 17345, at *34 (M.D.N.C. Aug. 27,

1998); *Hewlett-Packard v. Bausch & Lomb*, 116 F.R.D. 533, 537 (N.D. Cal. 1997).

Consequently, ordering experts to destroy drafts and notes is generally sanctionable. *W.R. Grace & Co. v. Zotos Int'l*, 2000 WL 1843258, at *10-11 (W.D.N.Y. Nov. 2, 2000). But, even if drafts are discoverable, there is no duty to create them. There is no rule against the expert working on a single version of an electronic document.

- Drafts bearing the comments of non-testifying, consulting experts may be discoverable. *Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D. Va. 2001). There is a split in the courts as to the discoverability of communications between counsel and experts. *Compare Karn v. Ingersoll Rand*, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (all communications between counsel and experts are discoverable) with *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995). Thus, drafts bearing counsel's comments may be discoverable. *Weil v. Long Island Savings Bank*, 206 F.R.D. 38 (E.D.N.Y. 2001).
- Whether an attorneys' notes of oral conversations with testifying experts remains an issue. Courts have been apprehensive about ordering their production. *E.g.*, *B.C.F. Oil Refining v. Consol. Edison Co of N.Y.*, 171 F.R.D. 57, 66-67 (S.D.N.Y. 1997); *W.R. Grace & Co. v. Zotos Int'l*, 2000 WL 1843258, at *5 (W.D.N.Y. Nov. 2, 2000); *Amster v. Tiver Capital Int'l Group*, 2002 U.S. Dist. LEXIS 13669 (S.D.N.Y. July 26, 2002).

10. Be Careful In Communications With Potential Class Members.

- The general rule is that defendants may communicate with putative class members provided they do not give them false or misleading information or attempt to influence whether they remain in, or become part of, the putative class. *Gulf Oil v. Bernard*, 452 U.S. 89, 101 (1981); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1002 (11th Cir. 1997).
- Courts have found that communications may be coercive where putative class members and the class opponent are involved in an on-going business relationship. *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1202 (11th Cir. 1985); *EEOC v. Morgan Stanley & Co., Inc.*, No. 01 Civ. 8421, 2002 WL 1159694, at *3 (S.D.N.Y. May 31, 2002); *Ralph Oldsmobile, Inc. v. General Motors Corp.*, 2001 WL 1035132, at *6 (S.D.N.Y. Sept. 7, 2001). Specifically, several courts have found that the danger of such coercion in the employer-employee relationship is sufficient to warrant the imposition of restrictions on communications between an employer and putative class members. *Morgan Stanley*, No. 01 Civ. 8421, 2002 WL 1159694, at *3; *Bublitz v. E.I. DuPont de Nemours & Co.*, 196 F.R.D. 545, 547 (S.D. Iowa 2000); *Abdallah v. Coca-Cola Company*, 186 F.R.D. 672, 675 (N.D. Ga. 1999).

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