

**TRENDS IN EMPLOYMENT LAW:  
AVOIDING CLASS ACTIONS**

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## **INTRODUCTION**

A mere glance at today's news headlines reveals an alarming increase in the number, scope and dollar amounts of employment related class action lawsuits brought against some of the largest and best known corporations in America. These large, high profile cases are expensive, image-damaging, and risky to litigate. Employment class action plaintiffs and their lawyers are increasingly pursuing: (1) nationwide as opposed to single state litigation; (2) class actions against bigger companies in the public spotlight; and (3) a game of one-upsmanship in the amount of compensatory and punitive damages claimed, which recently reached the \$5 billion mark in a class action complaint against Microsoft. With multi-million dollar class-action verdicts and settlements now almost commonplace, employers are feeling the pressure to both minimize the risk of exposure to, and effectively manage, employment related class action litigation.

The following are just a few examples of big-ticket class action cases:

On August 9, 2001, the Northern District of Illinois denied The Dial Corporation's motion for summary judgment in a class pattern and practice of sexual harassment case brought by the Equal Employment Opportunity Commission, allowing the case to proceed to trial. In the case, the EEOC alleges wide-spread sexual harassment at Dial's Aurora, Illinois facility dating back to 1988. The class includes approximately 90 female employees. If the EEOC is successful at trial, damages could exceed \$25 million.

On June 19, 2001, female workers filed a federal lawsuit against Wal-Mart Stores, Inc. alleging rampant gender discrimination. The suit seeks to represent as many as 500,000 current and former female employees and could be the largest gender-based class action against a private employer. The class complaint accuses Wal-Mart of unequal pay practices, failure to train and promote female employees, and retaliation against female employees who register complaints.

On May 9, 2001, black employees of Xerox Corporation filed a class-action lawsuit accusing the company of racial discrimination. The potential class action, consisting of all former and current sales representatives, claims that Xerox assigned black sales representatives less profitable territories than white co-workers; assigned territories based on race; denied them more lucrative sales territories and promotions, and denied them commissions they had earned.

On March 12, 2001, the Equal Employment Opportunity Center filed a motion to intervene in a nationwide sex discrimination class action against Rent-A-Center, Inc. The class complaint claims that Rent-A-Center eliminated job classifications previously held by women; imposed a weight-lifting requirement unrelated to actual job requirements; harassed and unfairly disciplined female employees; assigned women cleaning and clerical duties; demoted and failed to promote females; and discharged or forced women to resign. The suit seeks \$410 million in damages, including back pay and interest.

In December, 2000, Coca-Cola settled a race discrimination class action suit brought by current and former employees for \$192.5 million, including \$92.4 in cash payments, \$20.7 million in attorneys' fees, and extensive programs aimed at eliminating discrimination throughout all levels of the company. The plaintiffs' claims included allegations of emotional distress; hostile environment; non-wage related disparate treatment; and disparities in compensation and promotions. Although the legality of the settlement has been accepted by the Court, Coke made headlines after the settlement because many of its current and former employees covered by the settlement considered pursuing an alternative resolution. Eventually only 23 ultimately opted out. Coke also faces a separate \$1.5 billion race discrimination case involving a small number of African-American former employees who allege Coke permitted a "pattern of discrimination against African-Americans" and shows "reckless indifference" to a hostile work environment.

Texaco settled its race discrimination class action in 1997 for \$176.1 million, including \$115 million in damages and \$29 million in attorneys' fees. The plaintiffs in this highly publicized case alleged they had been discriminated against on the basis of compensation, promotions, and training and job assignments.

Microsoft is involved in a \$5 billion race discrimination case brought by a purported class of African-American employees alleging race discrimination in hiring and promotion practices.

Office Depot was recently put on notice of a possible class action race discrimination suit for more than \$5 billion. The suit would encompass, among other things, claims of paying African-American employees less than their white counterparts, denying African-American employees the same opportunities for promotion, and holding those employees to different standards in performance evaluations.

Mitsubishi Motors settled one sexual harassment class action for \$9.5 million in 1997 followed by a second \$34 million settlement of a pattern and practice sexual harassment suit brought in 1998 by the Equal Employment Opportunity Commission.

Home Depot reached a \$65 million settlement in a sex based class action lawsuit in 1997. The settlement encompassed modification of Home Depot's hiring, promotion, and compensation practices.

The Coca-Cola settlement topped the previous record holder, Texaco for the largest settlement of an employment based class action case. Fueled by record settlements such as these, the use of class actions to challenge discriminatory employment practices has increased substantially over the last several years. For corporate counsel, these staggering numbers -- coupled with no sign of relief in the foreseeable future -- are cause for great concern. Class actions usually allege that the employer has implemented a policy that has an adverse impact on employees of a protected class, such as women or minorities. As most class actions are driven by statistical evidence, the employers most vulnerable to class actions are those whose workforces are not diverse or where employees seem clustered in certain job categories.

Class actions also often involve allegations that the employer has treated a large group of employees in a discriminatory fashion.<sup>1</sup> The recently resolved Coca-Cola class action, and very recent complaint against Microsoft, jointly demonstrate the contours of this risk. The allegations in those cases are broad-gauged, claiming discrimination in performance evaluation systems; all aspects of compensation, including stock options; promotions, as a matter of policy and application; advancement into the senior levels of the employer (“glass ceiling”); job assignments, i.e., the segregation of protected class employees in a limited, usually non-operational range of business units (“glass walls”); and terminations. And although the allegations are on behalf of a class of current or recent employees, the complaint will typically specify, as exemplars of the class claims, the worst individual “horror stories” of racial or sex inequity among an employer’s population. Typically, one of those stories will involve a relatively senior or long-term employee.

A common theme in employment class action litigation is that the employer’s practices place too much discretion in the hands of supervisors whose inherent bias is then unchecked. Employers least vulnerable to such a challenge are those with effective procedures in place to monitor and evaluate personnel decision-making, measure the career progression of all protected classes, ensure the equity of compensation decisions, and train supervisors in their equal employment opportunity obligations. Conversely, employers most at risk are those with casual or excessively subjective employment practices that can not survive close scrutiny.

The increase in employment related class action suits is linked to several factors. In 1991, Congress revised the Civil Rights Act of 1964 to allow plaintiffs to collect punitive damages. The amendment thus created an incentive for more plaintiffs’ counsel to file employment based discrimination claims. In addition, the nature of the employment discrimination complaints is increasingly related to charges of harassment and failure to promote --- claims readily adaptable to groups --- rather than to more individualized failure to hire claims.

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<sup>1</sup> Explanation of several key terms is useful to better understand employment related class action law. A case involving allegations of “disparate impact” involves a challenge to a facially neutral policy or practice that falls more harshly on a protected group and cannot be justified by business necessity. For example, if an employer institutes a policy requiring a college degree as a prerequisite for a clerical position, and that policy has a disproportionate adverse impact on African-American applicants, all African-American applicants without a college degree who were denied clerical positions would have a strong argument for class certification because they all would potentially have common claims of discrimination. An individual “disparate treatment” case, on the other hand, challenges a policy or practice that is allegedly per se discriminatory on its face. Where there is no direct evidence of discrimination, the burden of proof in an individual disparate treatment case involves the familiar burden shifting analysis established in McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973), in which the plaintiff must establish a prima facie case and the employer has the burden of producing a legitimate, nondiscriminatory rationale for the decision. Finally, in class action “pattern and practice” cases, the plaintiffs’ burden is to show that the alleged discrimination was the defendant’s “standard operating procedure,” thus creating a presumption of discrimination. The defendant then bears the burden of proving that individual members of the class were not harmed by the discriminatory practice. See Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

This change in focus makes the workplace ripe for class action lawsuits in addition to single plaintiff cases.

The availability of so many different theories of liability and the attractiveness of significant remedies have resulted in a substantial increase in the number of employment lawsuits. Highly visible industries that lack diversity are particularly vulnerable to class action litigation. Although some in the legal profession are willing to call the trend toward threat of employment discrimination class action litigation “legal blackmail,” employers must heed this wake up call and take action to assess and, where necessary, adjust their employment practices to ensure that all segments of the workforce are treated fairly. Proactive implementation of such measures on the employer’s own terms may reduce the possibility that the company may later be subject to the terms of an outside task force as a result of class action litigation.

This paper will address many of the issues related to class action lawsuits, using the Coca-Cola settlement and its lessons as a guide. It will also provide an outline of a typical class action suit itself, including a discussion of Federal Rule of Civil Procedure 23, which governs class actions. Finally, the paper will address ways in which employers can reduce their chances of being hit by such an action and will offer practical guidance for defending an employment discrimination class action suit should one be filed against you.

## **I. LESSONS FROM THE COCA-COLA SETTLEMENT**

The recent Coca-Cola race discrimination settlement is a helpful example of the breadth and depth of issues implicated in employment discrimination class action cases.<sup>2</sup> This example, the largest employment related class action settlement to date, is provided as a means of demonstrating just how expansive and intrusive a class action case can be. Implementing one or more elements of the Coca-Cola settlement may be a method of reducing risk for a class action lawsuit, or may provide valuable evidence in defense of claims of a pattern and practice of discriminatory conduct.

### **A. Key Elements Of The Settlement**

The settlement, approved by a United States federal district court on November 16, 2000, provides benefits to all African-American former and current employees employed during the period April 1995 to June 2000 and is comprised of the following key elements:

#### **1. Cash**

\$92.4 million in cash, exclusive of \$20.7 million in attorneys’ fees, will be distributed, subject to various criteria, to African-American former and current employees. The total includes a \$43.5 million fund to be distributed after an independent pay equity analysis identifies the “adjustments” necessary to eliminate those pay disparities between African-American and white employees that are not objectively job-related.

<sup>2</sup> Abdallah v. Coca-Cola Company, 98-CV-3679-RWS, 2000 U.S. Dist. LEXIS 19966 (D.N.Ga. Nov. 28, 2000).

## **2. Board Of Directors**

A new “Public Issues and Diversity Review Committee” will have (a) broad oversight over Coke’s overall equal employment performance and the specific performance of the settlement, as well as (b) the duty to provide “input” into how corporate officers are compensated and how Board members are selected.

## **3. Independent “Task Force”**

A seven-member Task Force, with membership completely external to Coke and whose leadership includes former United States Secretary of Labor Alexis Herman, will have independent “investigative, reporting and monitoring powers over all pertinent human resources practices” and will have the power to make “binding” recommendations to Coke for changes in those practices. The Task Force’s “mandate” will be to assure compliance with the settlement agreement and oversee Coke’s diversity efforts generally; the group will also conduct a “broad-based review” of Coke’s human resources practices and modify them where it deems necessary. Finally, the Task Force will post annual reports on Coke’s “compliance” on the company’s website.

## **4. Outside Experts**

In addition to the Task Force, the settlement calls for the retention of two independent industrial psychologists who will review Coke’s human resources practices and prepare recommendations to the Task Force.

## **5. Independent Ombudsperson**

An Ombudsperson will be hired, with input from the lawsuit plaintiffs, to investigate internal complaints of discrimination and retaliation and independently monitor how Coke’s human resources function handles discrimination complaints.

## **6. Limits On Managerial Discretion**

The settlement compels the Task Force to ensure that Coke provides (a) oversight of individual managerial decisions on promotion, compensation and performance evaluations to eliminate unlawful bias and “excessive” subjectivity, and (b) an appellate process for employees to “appeal” those managerial decisions.

## **7. Diversity Training**

The settlement requires diversity training annually for all managers and bi-annually for all other employees.

## **B. Implications Of The Settlement**

In the context of a litigation settlement, the Coke agreement is the most extensive surrender of traditional employer decision-making to date. Up until this settlement, the resolution of the Texaco race class action lawsuit was the high water mark of litigation-induced intrusion into an employer's policies and practices. The Coke settlement surpasses the Texaco agreement both in the level of intrusion into areas typically deemed the province of the employer and in the detail of its remedial scheme. The settlement compels the following observations:

### **1. Corporate Image Does Not Immunize An Employer**

Coke was well known for its long-standing support of minority-oriented philanthropic causes as well as its extensive use of minority images and minority-focused strategies in its marketing efforts. In addition, a small number of senior African-American executives were given extensive public exposure by Coke. None of these externally-focused actions provided Coke with any immunity from an attack on its fundamental employment decisions as they pertained to African-American employees.

### **2. Management Discretion Is Deemed Inherently Suspect**

The Coke case, among others, demonstrates the prevalence of a key argument deployed by plaintiff employment lawyers (and supported by the expert testimony of a small cadre of organizational psychology academics employed by plaintiffs' lawyers): unless an employer rigorously oversees white and/or male managers and compels them to apply "objective" decision-making, the managers will inevitably be influenced by improper racial or gender bias in exercising their discretion in employment decisions.

### **3. In The 21st Century, Equal Employment Opportunity Means The Opportunity To Advance**

The Coke case confirms a strong trend in American employment law in which the battleground of the most intractable litigation is no longer the hiring process but rather current employees' opportunities for promotion, corporate influence and increased compensation. Thus, the employment decisions least susceptible to purely "objective" criteria (promotion, reassignment, performance evaluation and compensation) become the most vulnerable to an allegation of improper, subjective bias and discrimination. Moreover, the litigation adversary is not a former employee, but is rather a current employee whose ability to disrupt and distract the workplace is magnified accordingly.

### **4. Corporate Governance Structures Are "Fair Game"**

Plaintiffs in this type of broad class action start with the proposition that the discrimination complained of is systemic in scope and tolerated, explicitly or implicitly, by corporate leadership. Therefore, negotiated settlements of these cases will increasingly feature specific changes to corporate governance structures, such as new Board of Directors committees

and changes to the scope of the Human Resource function's responsibilities, to ensure "top down" change.

## **5. "Outsiders" Are Deemed Necessary To Effect Meaningful Change**

The Coke settlement illustrates a perception that, left to its own resources, an employer lacks the capacity at best and the will at worst to effect change in the processes and practices deemed discriminatory. Hence the prevalence in the settlement of "independent" bodies to set, monitor, investigate, alter, enforce and report upon corporate employment policies.

## **6. More Class Actions Are Likely**

Extraordinary amounts of capital have been committed such settlements as Texaco's (a total of \$176.1 million, including attorneys' fees of \$29 million) and Coke's (a total of \$192.5 million, including attorneys' fees of \$20.7 million). As a result, there is now a tremendous incentive for plaintiffs' attorneys to invest time, energy and capital in carefully developing classes of aggrieved current and former employees, be they women, minorities or employees over forty years of age. Thus, employers should anticipate a surge of spurious as well as potentially difficult class action lawsuits as the plaintiffs' lawyers attempt to win "the next Coke" case.

In light of these implications, employers should be on the lookout for areas within their own company in need of reform. Because of the recent successes in obtaining settlements, the trend of class actions suits is not likely to abate in the near future. Employers who take a proactive approach to resolving troublesome issues are more likely to be rewarded with fewer class action "hits" down the road.

## **II. OVERVIEW OF THE MECHANICS OF CLASS ACTION LAWSUITS**

Cases alleging discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act may be pursued as class actions under Rule 23 of the Federal Rules of Civil Procedure.<sup>3</sup> Applied to employment cases, Rule 23 requires the class of plaintiffs to provide a showing of facts that might raise an inference of a pattern and practice of discrimination. Failure to meet the requirements of Rule 23 may allow for the defendant employer to defeat the certification of the class.

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<sup>3</sup> Employment cases brought under the Equal Pay Act ("EPA") or the Fair Labor Standards Act ("FLSA") are known as "collective actions" and are governed by the requirements of Section 216(b) of the FLSA. Age Discrimination in Employment Acts ("ADEA") actions are covered under 29 U.S.C. § 216(b) and, thus, also must be brought as collective actions. See 29 U.S.C. § 626(b) (providing that "the provisions of this chapter [Age Discrimination in Employment] shall be enforced with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section."). Unlike class members in Rule 23 class actions who are automatically bound by the judgment unless they opt out, to be a party in an FLSA, EPA or ADEA representative action, potential plaintiffs must affirmatively opt into the suit by filing a written consent with the court.

Employers should also note that although a pattern and practice action by the EEOC is effectively a class action, the EEOC as a general matter is not required to satisfy the detailed requirements for class certification outlined in Federal Rule of Civil Procedure 23.<sup>4</sup> Instead, the EEOC may, in certain circumstances, intervene in a private action already filed by a charging party following receipt of a right to sue notice<sup>5</sup>, or may initiate a lawsuit on behalf of a charging party and a class, based on either an individual's charge or a charge by the Commissioner. The law remains unsettled, however, as to whether the EEOC may intervene into a private class action, sidestep Rule 23, and then stand in the private plaintiffs' shoes to represent the proposed class(es) or shield private plaintiffs from Rule 23 requirements.<sup>6</sup> Class actions involving the EEOC are necessarily more complicated, create more uncertainty, and require greater creativity to defend.

**A. Requirements Of Federal Rule Of Civil Procedure 23**

**1. Rule 23(a)**

A party seeking class certification must demonstrate, under nothing less than rigorous scrutiny, that all the requirements of Rule 23(a) are clearly satisfied. Specifically, Rule 23(a) provides that:

[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Rule 23 thus sets forth four prerequisites for class action treatment of any particular claim, commonly known as: numerosity, commonality, typicality, and adequate representation.<sup>7</sup>

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<sup>4</sup> See General Tel. Co. v. EEOC, 446 U.S. 318, 333-34 (1980) (“EEOC may maintain its ¶ 706 [of Title VII] civil actions for the enforcement of Title VII and may seek specific relief for a group of aggrieved individuals without first obtaining class certification pursuant to Federal Rule of Civil Procedure 23”) (footnote omitted).

<sup>5</sup> Section 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

<sup>6</sup> Compare United Telecommunication, Inc. v. Saffels, 741 F.2d 312 (10th Cir. 1984) (extending principles of General Telegraph to EEOC intervention in a private action) with Horn v. Eltra Corp., 686 F.2d 439, 441 n.1 (6th Cir. 1982) (stating in dicta that General Telephone is inapplicable where the EEOC intervenes in a private action).

<sup>7</sup> Several recent decision have denied class certification, finding that the proposed plaintiffs could not meet the four requirements of Rule 23(a). See generally, Wright v. Circuit City Stores, Inc., 201 F.R.D. 526 (N.D. Ala. 2001) (finding that plaintiffs established numerosity; could not identify a patter or practice that affected the plaintiffs in common ways necessary to establish commonality and typicality; and could  
Continued . . .

## 2. Rule 23(b)(2)

A class action may also be maintainable under Rule 23(b)(2) if:

the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed. R. Civ. P. 23(b)(2).

## 3. Rule 23(b)(3)

Once the named plaintiffs in any class action demonstrate the four prerequisites from Rule 23(a), they must also satisfy one of the three categories set forth in Rule 23(b). Plaintiffs typically seek class certification under either Rule 23(b)(2), 23(b)(3) or both. A class action is maintainable under Rule 23(b)(3) if:

the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3). Under the “predominance” prong of Rule 23(b)(3), the class plaintiffs must show that common questions of law and fact predominate over individualized questions of discrimination. Although the predominance inquiry focuses on the same issues as the commonality and typicality inquiry under Rule 23(a), the Rule 23(b)(3) analysis is more demanding. Under the “superiority” prong of Rule 23(b)(3), the class plaintiffs must show that the class action method is superior to individual disparate treatment actions. Class plaintiffs must demonstrate that both the “predominance” and “superiority” prongs have been met to satisfy the requirements of Rule 23(b)(3).<sup>8</sup>

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not establish adequacy of representation because former employee class representatives did not have same interest as putative class which included current employees); Reid v. Lockheed Martin Aeronautics Co., No. 1:00-CV-1182-JOF (N.D. Ga. Aug. 2, 2001) and Yarbough v. Lockheed Martin Aeronautics Co., No. 1:00-CV-1183-JOF (N.D. Ga. Aug. 2, 2001) (refusing to certify two race discrimination class actions because the plaintiffs failed to satisfy the commonality and typicality requirements where decisionmaking was too decentralized to find systemic responsibility).

<sup>8</sup> In Smith v. Texaco, Inc., No. 00-40337, 2001 WL 958903 (5th Cir. Aug. 22, 2001) the court found that the plaintiffs met the four requirements under Rule 23(a), but failed to show that common issues predominated over individual claims. The court held that a class action was not the superior adjudicatory scheme for handling the case.

## **B. Basic Procedural Steps Of A Class Action**

As shown in the attached flow-chart entitled “Class Action Employment Litigation,” the steps between the filing of a class action complaint and a trial or appeal are numerous and varied. At a basic level, however, litigation of an employment class action generally involves the following sequence of steps:

- (1) The named plaintiffs file a Complaint in federal court against the defendant company. The complaint is served on the company.
- (2) After conducting a basic assessment of the case, the defendant company will either file a Motion to Dismiss some or all of the claims for failure to state a claim or will file an Answer to the Complaint. If the defendant company files a Motion to Dismiss, the company must file an Answer with respect to any claims left standing after a ruling on the Motion to Dismiss.
- (3) A period of discovery related to class certification issues ensues. At the end of pre-class certification discovery, the defendant company may choose to file a Motion for Summary Judgment to demonstrate that no genuine issue as to any material fact exists and that they are entitled to a judgment as a matter of law. In addition, prior to a Motion for Class Certification from plaintiffs, the company may file a Motion to Deny Class Certification.
- (4) At the close of pre-class certification discovery (which may take years) the named plaintiffs will file a Motion for Class Certification. Prior to a decision on class certification, plaintiffs may be required to make several attempts to define a proper class or classes. The defendant company will oppose the class certification motion. All, some, or none of the class may be certified. In addition, the judge will make necessary determinations as to the procedure for litigation of the case, including determinations of whether the case should be hybridized (a mix of 23(b)(2) and 23(b)(3) certification) and/or bifurcated.
- (5) Assuming the company does not settle after class certification (as most do), a period of merits discovery related to liability issues ensues. As in pre-class certification discovery, the defendant company will attempt to limit the scope of merits discovery. At this stage, the defendant company must attempt to limit the scope of discovery through motions in limine and other devices to limit the scope of evidence.
- (6) At the close of merits discovery, if the case has not settled or if the class claims have not been dismissed, the case will go to trial in accordance with the judge’s determination of the structure of the case. Although there is no specific pattern followed for every class action case, the trial may proceed in three phases during which time interlocutory appeals may be made from each. The “pattern and practice” phase is generally first, and will be a trial by jury if demanded by either party. If the Court finds at least some pattern or practice violations, the case may

then proceed to the individual trial phase. The individual cases may be heard by a magistrate or special master. The named plaintiffs will publish “notice” to the class advising them of their rights and informing them of the deadlines for “opting out” of the class (in the case of a 23(b)(3) class). Finally, a remedy phase may then complete the trial with a judge granting equitable remedies and a jury, if elected by either side, will award any legal remedies.

- (7) Should remedies be awarded to the class, the defendant company may appeal those remedies as well as the decisions regarding class certification, pattern and practice, and liability (if not earlier appealed).

### **III. ANTICIPATION OF CLASS ACTION: SPECIFIC RECOMMENDATIONS FOR PREVENTION AND PREPATORY ACTION**

The recommendations below should assist an employer in identifying potential problem areas and resolving them before a lawsuit is filed. The following suggestions are intended as a practical guide and should serve as a starting point for the careful legal analysis necessary for employers seeking to prevent and defend against employment related class actions:

#### **A. Identify And Evaluate Risk Of Class Action And Problem Areas**

Identifying employment related class action risk begins with an assessment of the workforce environment. Careful, and confidential, analysis of hiring, promotion, transfer, compensation and termination personnel data that a potential (or real) group of aggrieved plaintiffs would seek to use to support their class claims may identify areas of vulnerability where the company’s employment practices are creating statistically significant disparities between similarly situated<sup>9</sup> male/female and non-minority/minority employees.<sup>10</sup> As discussed herein, a plaintiff would likely successfully obtain this personnel data. Early analysis may result in improvements to a company’s employee relations systems, promotions systems, management accountability systems, or other employment related functions that could ward off a class complaint.

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<sup>9</sup> “Similarly situated” is a term of art used in the context of Title VII litigation to describe a member of a particular statutorily protected class who shares common characteristics (e.g. skill set, education, position, experience) with another employee(s) not of the protected class, but who nonetheless alleges less favorable treatment under comparable circumstances. The term is applied here in the context of employer review of personnel databases to convey the fact that such analysis, coupled with precise data entry, may assist the employer to identify those employees who are actually similarly situated.

<sup>10</sup> To the extent an employer’s business is considered under applicable law to be a contractor with the federal government, that business unit is likely already under a legally binding obligation to conduct some of the analyses suggested herein.

## **1. General Review**

Employers should review their own human resources and similar databases before any litigation is filed. As discussed further below at pp.13-15, however, employers should be aware that there are significant risks in documenting studies that may later be subject to discovery in litigation. The benefits of the following suggestions, therefore, must be weighed against the risks that any of the analyses may later be discoverable. It is important to note that undertaking these studies requires an unwavering commitment, in advance, to address and remedy any discriminatory inequities revealed. Otherwise, an employer may be exposed through litigation to be in a vulnerable position: aware, through its own efforts, of discriminatory practices without having remedied them.

### **a. Analyze Placement Of Employees**

Analysis of placement of employees throughout the company will help determine whether a disproportionate share of a particular group of employees are found in a particular department. This analysis should include a determination of whether there is a justifiable explanation, such as self-selection, for a resulting disproportionate share. In the absence of a justifiable explanation, a disproportionate share may subject the employer to vulnerability for a charge of unlawful steering on the basis of one or more protected characteristics.

### **b. Identifying Conflicting Databases And Available Fields Of Data**

The database review will assist the employer in obtaining a greater understanding of available fields of information that might support legitimate business reasons for employment decisions later challenged in litigation.<sup>11</sup> These fields might include those that allow the employer to “carve out” its data geographically, by department, by union representation, or by craft.

One example of the importance of precise data collection might be the employer seeking to defend a class action resulting from an alleged discriminatory reduction-in-force who simply codes all departing employees as “T” for “terminated.” This employer will likely have a far more difficult time defending the class action than the employer who has previously identified departing employees with precise reason codes. The recorded reasons for employees departing the company might include “V - voluntarily departure,” “R - retired,” “D - quit per disability,” or “F - fired.” The latter employer will be in a better position to differentiate those employees who left the company voluntarily from those who were dismissed at the behest of the company, and therefore may be able to reduce the number of plaintiffs claiming to have been unlawfully aggrieved by the reduction-in-force or defeat the requirement of numerosity.

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<sup>11</sup> Review of all personnel databases will assist the employer in proactively identifying and correcting any conflicting data between databases.

**c. Improve Employment Practices**

Rather than facing them for the first time in litigation, review of personnel data will assist a company in correcting employment practices that have led to any disparities identified in the data. For example, the employer who discovers a disproportionate number of female employees in low-level cashier or operations positions could take affirmative steps to ensure that all employees have equal training for, and access to, sales, merchandising, managerial and supervisory positions.

**2. Pay Equity Analysis**

Employers should conduct a statistical analysis of the compensation provided to its employees to determine if there are statistically significant differences in compensation between similarly situated (i) male and female employees and (ii) white employees and minority employees. If such differences exist, managers should then be directed to justify those differences. Absent a legitimate business justification, the employer might then consider appropriate and carefully implemented adjustments to the compensation levels of affected employees.

**3. Promotion Analysis**

Employers should conduct a study of the number and frequency of promotions among its women and minority populations and compare the resulting data to the number and frequency of promotions among similarly situated male and white employees. Assuming statistically significant variations are found, the employer would then examine promotion processes to determine if a particular set of practices (i.e., promoting from a pool of predominantly male candidates) may contribute to the adverse data. Such an analysis would focus not only on the number and frequencies of promotion, but also on whether there are de facto limits on the kinds of positions women and minority employees attain. The analysis should also consider whether there is data to suggest that the employer might be vulnerable to a charge by a plaintiff of unlawful steering into certain types of positions.

**4. Analysis Of Access To Training Opportunities**

Employers should compare the training opportunities offered to female and minority employees to similarly situated white male employees to determine whether there is a correlation between offers of training and a protected characteristic such as race or gender.

**5. Evaluations Analysis**

In conjunction with the Promotions Analysis described above, employers should analyze their evaluation system. This analysis should involve the following steps: First, determine if the results of the above promotion analysis are affected significantly by disparities in performance

evaluation scores. The employer should then review their performance evaluation system to ensure the presence of non-discriminatory reasons for any disparities. To do so, determine the utility and accuracy of the company's human resources information systems in generating a statistically valid database for the further study of performance evaluations. Alternatively, select a statistically reliable sample of performance evaluations for review. Finally, analyze the data obtained on performance evaluations to determine whether there is a correlation between evaluation results/scores and a protected characteristic, i.e. race or gender.

## **6. Termination Analysis**

Employers should similarly study the termination rates among its female, minority and over-40 employee populations and compare them to the rates of similarly situated male, white and under-40 populations.

The above analyses assume that reliable, coherent and accessible databases exist from which to extract pertinent data. In the absence of such a database or otherwise reliable data, employers are at risk in that it would be extraordinarily difficult to rebut a class action claim alleging a systemic pattern and practice of discrimination.

The implementation of these recommendations may reveal sensitive information and perhaps expose significant legal liability. It is therefore strongly recommended that employers take advantage of available legal privileges (and their concomitant confidentiality) by using outside counsel, in tandem with the employers' internal resources, to direct and effect the various analyses suggested. As such, the studies discussed above require the services of a professional statistician who would assist counsel in helping to conduct an analysis of diversity and equal employment initiatives. The company may wish to consult a law firm such as Morgan Lewis with internal statistical resources and relationships with suitable expert consultants, as well as identify dedicated, internal human resources and information systems capacities to undertake the above-noted studies. Outside counsel will provide legal analysis of the data and the privilege protections as described below.

Although it is unlikely the raw data analyzed by the suggested studies will be protected by the attorney-client privilege or the work product doctrine, careful routing and identification of the analyses and related results and documents, careful documentation of outside counsel participation in meetings and rigorous confidentiality protections may increase the likelihood that counsel's review of the data will be protected from discovery. Employers are again cautioned, however, that the raw data for the studies – even if directed by counsel -- is almost certainly unlikely to be protected from discovery and has the potential of becoming a "blue print" for a class action litigation later.

In addition, some employers argue that even if the statistical analysis was not prepared at the behest of counsel, it can still be withheld under the "self-critical analysis privilege." The self-critical analysis privilege is a non-statutory privilege designed to keep confidential the internal audits and investigations performed by companies to improve safety, productivity or compliance with various state and federal laws. The rationale for the privilege is that companies would either abandon or curtail candor in such investigations or audits if the information therein were likely to

become public. In other words, the privilege offers businesses incentives to correct their own internal flaws without fear of litigation. The self-critical analysis privilege is, however, a state common law development that is often not successfully invoked by defendants seeking to protect internal studies.<sup>12</sup> The privilege has been disfavored largely because of the Supreme Court's position that the law favors broad discovery as opposed to a liberal assertion of privileges, particularly when Congress has not acted to grant such privileges.<sup>13</sup> In the context of employment litigation, although invocation of the privilege has not been foreclosed, it has been largely disfavored by courts.<sup>14</sup>

Whether an employer wishes to rely on the attorney-client privilege, the attorney-work product doctrine, or the critical self-analysis privilege, the employer should take note that privilege disputes are resolved on their own set of unique facts and one cannot guarantee the studies will never be disclosed.

## **B. Analysis Of Diversity And Harassment Prevention Programs**

Coke was likely unprepared for its own employees initiating such a significant legal attack upon its employment policies and practices. Consequently, a growing number of companies are implementing aspects of Coke-type settlements both to help prevent class action complaints and to comply with United States Supreme Court directives for reducing unlawful workplace harassment liability. One aspect of a strong offense to employment class action litigation is a diversity and harassment prevention program. These programs seek to promote

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<sup>12</sup> See, Brad Bacon, *The Privilege of Self-Critical Analysis: Encouraging Recognition of the Misunderstood Privilege*, 8 Kan. J. L. & Pub. Pol'y 221 (1999) (noting that attempts to invoke the self-critical analysis privilege are often rejected despite the discretion of courts to interpret privileges pursuant to Fed. R. Evid. 501).

<sup>13</sup> See, *United States v. Bryan*, 339 U.S. 323 (1950) (noting the fundamental principle that the public has a right to evidence, and this is especially true in private discrimination suits); *University of Pa. v. E.E.O.C.*, 493 U.S. 182, 189 (1990) (denying defendant's request that the Court recognize a new privilege pertaining to peer review documents). See also, *United States v. Nixon*, 418 U.S. 683, 710 (1974) (privileges are "not lightly created not expansively construed, for they are in derogation of the search for the truth.").

<sup>14</sup> See e.g., *Etienne v. Mitre Corp.*, 146 F.R.D. 145 (E.D. Va. 1993) (In *Mitre*, the court held that the self-critical analysis privilege did not apply to salary and promotion reviews performed by an outside consultant. The court considered the three criteria generally considered by courts in determining whether to apply the self-critical analysis privilege: (1) the information contained in the document must result from the internal investigation or review conducted to evaluate or improve a party's procedures or product; (2) the party must originally have intended that the information remain confidential, and (3) must demonstrate a strong interest in preserving the free flow of the type of information sought, and the information contained in the document must be of a type whose flow would be curtailed if discovery were allowed. The *Mitre* case suggests that an employer could argue that an internal corporate review kept strictly confidential, not developed pursuant to any requirement under the law, and not performed by an outside consultant might, depending on the unique facts, warrant application of the self-critical analysis privilege).

awareness of, and respect for, employees of different races, ages, religions, genders and ethnic backgrounds in order to enhance opportunities available to, and productivity of all employees and, ultimately, the organization. The ultimate goal of such programs is to reduce workplace biases, tensions, and harassment as well as to increase productivity by fostering communication and cooperation. In consultation with counsel<sup>15</sup>, employers should review their current policies and practices to determine the appropriateness of implementing some of the following preventative measures *now* that may help diminish the risk of class action litigation *later*.

The purpose of a diversity training program is to assist employees in identifying diversity issues in the workplace and provide them the tools to avoid and resolve conflict. An employer must exercise caution, however, when implementing a diversity training program. If an employer makes a poor choice of a diversity trainer and does not implement the program correctly, the diversity training may have the effect of polarizing the workplace and may actually increase tensions and biases among groups of employees. Some methods of diversity training actually perpetuate stereotypes by eliciting prejudices and derogatory comments and provoking employees to express negative beliefs about or blame other groups. Some diversity trainers emphasize the differences among cultural, racial, ethnic and gender based groups, thereby undercutting the fundamental goals of eliminating biases and promoting harmony in the workplace.

A good workshop on diversity should focus on identifying behaviors that are potentially disruptive and liability causing and ways to avoid and resolve conflict. The goal of these programs is to encourage employees to think about their day-to-day actions and demeanor and how they can help cut down on workplace friction. Thus, careful consideration must be given to the selection of diversity consultants and the type of diversity training program methods to be used. Managed appropriately, the risks of a diversity program can be minimized and benefits fully realized.

Likewise, a properly implemented unlawful workplace harassment prevention training program should do the following: (1) provide practical guidelines for acting appropriately in the workplace and identify common behaviors which may be perceived by others as harassment; (2) explain the rationale for the training and the company's goals; (3) explain the company's policy against all forms of harassment and distribute a copy of the policy at that time; (4) describe the consequences of conduct that violates the policy; (5) encourage use of a complaint or reporting process; (6) stress that no retaliation will be given to those who complain; (7) stress that prompt investigation and corrective action will follow any complaint; (8) include a Human Resources or member of management at every training session; and (9) be applied to the entire workforce. In addition to these points, unlawful workplace harassment training administered to management and supervisors should include an explanation of their special responsibilities under the law. Attendance at all training sessions, whether diversity training or unlawful workplace harassment prevention training should be documented. Drafting of all documents pertaining to diversity and

<sup>15</sup> Because implementation, maintenance and analysis of an effective anti-discrimination and harassment prevention program is an ongoing detailed and often fact-driven process, it should be undertaken in consultation with counsel. Employers must be extremely careful in analyzing and implementing diversity and harassment prevention programs so that no element of the program is construed as reverse discrimination or could be adversely construed in subsequent litigation.

unlawful workplace harassment prevention training should be retained as well as written with an eye towards their use in future litigation.

Employers should review their anti-discrimination and harassment prevention program to ensure that they have done (and are doing) the following:

- (1) A “zero tolerance” for unlawful workplace harassment and unlawful discrimination is regularly communicated company-wide, including whether the company’s chief executive sends to all employees an annual letter reaffirming the “zero tolerance” policy; and
- (2) An open-door policy exists giving employees access to designated senior management to raise work-related concerns. The focus of the employer’s efforts should be to eliminate the opportunity for an employee to later reasonably argue that s/he could not have complained (e.g. the employer may wish to consider implementation of a 24 hour/7 day a week 800 number for ;
- (3) An “open line” of communication exists between the Company’s Human Resources department and internal legal department for coordination on harassment and diversity issues.
- (4) Designated a person(s) within the company responsible for the implementation and oversight of anti-discrimination and anti-harassment policies;
- (5) Developed and implemented formal, written policies prohibiting harassment and discrimination on the basis of race, color, gender, sex, religion, age, national origin, veteran status, disability or any other characteristic protected by law<sup>16</sup>;
- (6) Distributed to all employees copies of the policies against discrimination and harassment (including consideration of whether the policies should be annually disseminated from a CEO or other senior management to reflect a “top down” commitment to enforcement of the policies);
- (7) Trained all employees about the anti-harassment and anti-discrimination policies<sup>17</sup>;

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<sup>16</sup> Depending upon the relevant jurisdiction, the employer may need to include sexual orientation in the list of protected categories.

<sup>17</sup> The Supreme Court’s decision in Kolstad v. American Dental Association, 119 S.Ct. 408 (1998) held that an employer may not be liable for punitive damages for discriminatory employment decisions of managers where those decisions are contrary to the employer’s good faith efforts to comply with employment discrimination statutes. In order to best establish a Kolstad defense, the employer should strongly consider requiring all managerial employees to attend a special mandatory training session regarding anti-discrimination laws. Such a measure will put the company in a better position to establish that it has engaged in good faith efforts to comply with the law.

- (8) Promptly and thoroughly investigated all reported incidents of violations of the anti-discrimination and anti-harassment policies;
- (9) Enforced the policies by taking appropriate actions against employees who violated the policies;
- (10) Provided special training and materials to those carefully selected<sup>18</sup> employees who are to receive complaints regarding policy violations and conduct internal investigations. These employees should (1) be taught to identify and handle anti-discrimination and anti-harassment issues; (2) have the skill to serve as witnesses; (3) know how to confront the employee accused of discriminatory conduct; (4) be prepared to provide support for the complaining employee; (5) know how to educate other employees about the anti-discrimination and anti-harassment policies;
- (11) Ensured that the internal complaint resolution process assures and practices protection against reprisal; and
- (12) Ensured that the Company has posted all required EEO notices.

**C. Personnel Best Practices**

Employers should strive to ensure that diversity is appreciated as part of the corporate culture of the company. The following checklist of “best practices” for personnel practices may assist the employer in that effort:

**a. Recruiting**

- (1) Does the employer implement, maintain and appropriately monitor hiring data, and monitor employee hiring to identify potential disparities?
- (2) Does the employer have internship programs that focus on mentoring and professional development?
- (3) Does the employer provide scholarships for students in their industry, and ensure that advertisements for these scholarships are placed in a variety of newspapers and advertising media?
- (4) Does the employer recruit through a variety of professional organizations, educational institutions, job fairs and employee referral programs?
- (5) Does the employer train managers on appropriate interviewing techniques?

<sup>18</sup> These employees should be selected not only with respect to their merits and general sensitivity to equal employment opportunity issues, but with an eye toward their position in the organization such that they are perceived as being able effectively to address a harasser in the senior ranks of the organization.

**b. Employee Selection, Training And Advancement**

- (1) Has the employer made every effort to avoid excessively subjective employment selection practices and guard against unfettered individual discretion of managers? A checklist of safeguards against potential individual bias includes:
  - (a) Articulation of clear, written criteria with objective standards with respect to hiring, promotion, training, transfers, salary increases and termination standards, and confirmation that those practices are actually implemented and practiced.
  - (b) Communication of the criteria described in (a) so that opportunities for training and advancement are well-publicized and available for review by employees.
  - (c) Training for managers regarding (i) the use of objective criteria for selection of employees for training and advancement opportunities and (ii) the importance of being able to articulate a justifiable reason(s) for the selection.
  - (d) Position descriptions and job postings should set forth objective criteria and/or the requisite skills necessary for the position.
  - (e) A performance evaluation system that includes written guidelines for preparation of performance evaluations made on objective job requirements.
  - (f) Systematic monitoring of promotion, transfer, and training opportunity selections.
- (2) Has the employer justified the limits, if any, on the types of positions posted within its job posting processes? The employer should examine carefully any positions not posted to determine the reason such positions were not posted. A practice of wide dissemination of promotion and transfer opportunities decreases the likelihood that an employee will later argue in litigation that the employee did not have access to a particular promotion or transfer because the opportunity was not communicated by the employer.
- (3) Has the employer articulated clear, written criteria for all positions (including those in its succession planning process and on “high potential lists”)? Objective job criteria reduces the vulnerability of the employer to a claim of excessive subjectivity. Without clearly articulated objective job criteria, the employer also runs the risk that hiring, promotion or transfer decisions will be based upon stereotypical job qualifications rather than objective, measurable position qualifications.

- (4) Where the data suggests a disparity, has the employer conducted a broad review of selection criteria to ensure that it is job related and therefore not unnecessarily exclusive? For example, does job criteria state certain educational requirements that are actually not necessary to perform the job but are present in the job criteria by virtue of longstanding tradition?
- (5) Has the employer reviewed its succession planning processes and “high potential” lists to insure that protected class employees are being fairly considered for inclusion? The employer must be certain that objective criteria for the succession process and for those included on “high potential” lists is articulated and vetted to others to ensure its validity.
- (6) Does the employer have in place a company-wide mentoring program and/ or employee networking groups?
- (7) Does the employer provide professional development programs that focus on leadership capabilities, and is the existence of those programs widely communicated?
- (8) Does the employer provide tuition aid or tuition reimbursement to employees and is the existence of such aid widely communicated?

#### **IV. DEFENDING A CLASS ACTION**

Despite the seriousness of the rising trend in class action litigation, employers should understand that the mere filing of a class action lawsuit does not mean that a class will actually be certified or that the class claims will be successful. An employer may negate any inference of a pattern and practice of discrimination and successfully defend against a class action lawsuit.

##### **A. The Litigator’s Toolkit**

As soon as possible after a class action complaint is filed and in consultation with counsel, an employer should consider doing the following:

##### **1. Document Assembly For The Relevant Time Period**

- (1) Copies of all relevant EEO and anti-harassment policies, notices, posters, brochures and reminders/reaffirmations;
- (2) Copies of all materials related to employee and managerial training;
- (3) Organization charts, annual reports, and/or position descriptions reflecting those personnel responsible and qualified to handle corporate EEO concerns;

- (4) Materials reflecting prompt investigation and effective remedial measures in the case at issue;
- (5) Necessary files to assemble may include:
  - (a) Personnel files of named plaintiffs, their supervisors, and other key witnesses;
  - (b) Internal charge files and/or EEOC charge files of named plaintiffs;
  - (c) Medical files of named plaintiffs;
  - (d) Hiring and Promotion Files, which may include candidate applications or resumes, interview notes, test scores, performance reviews, selection criteria, posting records, job qualifications and classifications, bid pool data;
  - (e) Discipline files of named plaintiffs
  - (f) Labor relations file, if applicable
  - (g) Payroll file
- (6) All relevant collective bargaining agreements, if applicable to company;
- (7) Applicant flow logs, EEO-1 reports, and supporting data, if applicable to company;
- (8) Policies regarding qualifications necessary for promotion, transfer or establishment of tenure or seniority;
- (9) Employee handbooks for the time period at issue and receipt of acknowledgement forms for named plaintiffs;
- (10) Records from internal EEO audits of any relevant departments;
- (11) All document retention policies.

In addition to the suggestions above, the company's legal department should draft a document retention memorandum referencing all named plaintiffs and distribute it to all managers to preserve records for litigation. The record retention memorandum should also remind managers that any retaliation against class members or employees who complain is illegal. The legal department should also draft a memorandum to all managers to solicit updated records on a periodic basis as the case continues.

## **2. Investigation And Identification Of Witnesses**

- (1) Identify and interview corporate witnesses to determine those persuasive individuals who may testify about the company's good faith efforts toward compliance with anti-discrimination laws;
- (2) Identify potential supervisory and managerial witnesses who will be prepared to testify concerning the level and detail of their training on EEO and anti-discriminatory matters;
- (3) Determine whether any key witnesses are no longer employed by the company or are planning to leave the company in the near future.

### **3. Data Analysis**

Initial data collection efforts should begin with the following analysis of relevant key departments within the company (including Human Resources; Information Systems; Labor Relations; Payroll; Training and Testing Departments; Internal EEO Department; Discipline Department):

- (1) What personnel data is available;
- (2) The form in which it is stored (paper versus electronic);
- (3) The range of years during which the information has been maintained;
- (4) The departments and specific individuals in the company who are responsible for maintaining the data;
- (5) Where, specifically, the data is housed;
- (6) An assessment of the amount of time it will take to assemble the data;
- (7) How that data is inputted and manipulated;
- (8) Whether manuals exist to explain codes in the data;
- (9) Whether the data contains "quirks" resulting from inconsistent data entry;
- (10) For whom the data is maintained (applicants? former employees? current employees?).

Once initial data review and collection has begun, the company may choose to begin working with a consulting expert to analyze the data. A consulting expert is one selected in litigation to do statistical analysis protected under the work product doctrine, and neither whose work nor identity need be disclosed to the opposing party. The consulting expert must be chosen carefully, remain distinguished at all times from any testifying experts, and should be carefully monitored

to ensure that any work performed is protected by the work product doctrine. A testifying expert, on the other hand, is selected specifically for the purpose of testifying at trial. The identity of the testifying expert, as well as his or her reports of statistical analysis, must be revealed to the opposing party prior to the expert testifying at trial.

#### **4. Company-Analysis**

In-house counsel and the outside legal team assigned to the class action should intimately understand the:

- (1) Company's corporate and organizational structure;
- (2) Decisionmaking process and responsibilities within the company, including policies that relate to the claims in the Complaint and any differences across or within departments;
- (3) Role of unions, if any, in the class action;
- (4) Key provisions of applicable collective bargaining agreements, if any;
- (5) Nucleus of control in the company: central headquarters? local field offices? both?; and
- (6) Role of subjectivity in decision-making.

#### **B. Challenging Class Certification**

##### **1. Challenges To An "Across The Board" Class Under Rule 23(a)**

In 1969, the former United States Court of Appeals for the Fifth Circuit announced a rule in Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969) that allowed for "across the board" class actions, which permitted a single plaintiff to represent all members of a minority group who had allegedly been harmed by an employer's allegedly discriminatory practices, regardless of whether those practices similarly affected the class representative and each of the members of the putative class.

In General Tel. Co. v. Falcon, 457 U.S. 147 (1982), however, the Supreme Court held that "across the board" class actions did not satisfy the commonality or typicality prongs of Rule 23(a). As a result, it has become much more difficult for plaintiffs to bring class actions based on vague allegations of a pattern and practice of discrimination in an employer's policies. However, the Falcon Court did leave open one avenue through which class plaintiffs can, and often do, attempt to bring broad-based "across the board" pattern and practice class actions. In a footnote, the Supreme Court stated that:

[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees

if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision making processes.<sup>19</sup>

Class plaintiffs have seized upon this language in order to bring “across the board” class actions, often alleging that the employers policies and decision making processes are “entirely subjective”. In order to defend against such class actions, employers must strike a delicate balance between demonstrating that their decision making processes are decentralized, in order to challenge plaintiffs’ claims of commonality, and highlighting the objective criteria used by the employer in making its employment decisions, to defend against claims of “subjectivity.” The following suggestions should help employers to strike this balance, and thus, allow them to successfully defend against across the board class actions.

- (1) Identify written guidelines, if any, relating to transfers, promotions and salary increases.
- (2) Identify objective criteria used in the decision making process.
- (3) Identify position descriptions and job postings which set forth objective criteria and/or requisite skills necessary for the position.

## **2. General Challenges To The Class Under Rule 23(a)**

### **a. Challenges To Commonality**

To establish commonality, named plaintiffs must make a “specific presentation identifying the questions of law or fact that were common to the claims of the [named plaintiffs] and of the members of the class [they seek] to represent.” Falcon, 457 U.S. at 158 (footnote omitted). It is not enough merely to “specify grievances of other members of the purported class.”<sup>20</sup> Thus, conclusory allegations of “harassment” would not, by themselves, create commonality.

### **b. Challenges To Typicality**

When a named plaintiff’s claims are typical, he or she will necessarily prove the bulk of each class member’s claims by proving his or her own, thus advancing Rule 23’s goals of judicial economy. Typicality will not be found where claims are fact-specific or highly individualized.

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<sup>19</sup> General Tel. Co. v. Falcon, 457 U.S. 147, 158 n.15 (emphasis added).

<sup>20</sup> Berggren v. Subeam Corp., 108 F.R.D. 410, 411 (N.D. Ill. 1985). Cf. BreMiller v. Cleveland Psychiatric Institute, 898 F. Supp. 573, 576-77 (N.D. Ohio 1995) (finding that the existence of individual damages was not enough to defeat class certification on the commonality element where plaintiff had alleged, with specificity, that discrimination was practiced across the board), *summ. judg. granted in part, denied in part*, 195 F.R.D. 1 (N.D. Ohio 2000).

**c. Challenges To Adequate Representation**

Rule 23(a)(4) requires that named plaintiffs adequately and fairly represent the interest of the class as a whole in an effort to insure that the representative will adequately protect the interests of the class.<sup>21</sup> Adequate representation requires findings by the court regarding both the class representative and class counsel. The inquiry is intended to uncover conflicts of interest between the named parties and the class they seek to represent.<sup>22</sup> Therefore, if a plaintiff's claims are "of a personalized nature" such that similar claims by other employees would present substantially different facts, the plaintiff could not adequately represent the class.<sup>23</sup> In addition, the court must find that class counsel is qualified and will be able to serve the interests of the "entire" class.<sup>24</sup>

**d. Challenges To Numerosity**

The "numerosity" prong of class action certification under Rule 23(a) is a practical question, allowing the court to determine, in its discretion, whether the class is so numerous that joinder of all members is simply unwieldy.<sup>25</sup> In making this determination, a court must consider all pertinent surrounding circumstances, including, *inter alia*, the judicial economy provided by avoiding multiplicity of actions, the geographic dispersion and financial resources of class members, the amount of each member's claim and the ability of such member to institute an individual lawsuit.<sup>26</sup> However, a plaintiff's failure to fully identify the identities and number of putative class members does not amount to a failure to satisfy the numerosity requirement, particularly where plaintiff identifies the class members as past and present employees of defendant.<sup>27</sup>

**3. Challenging Class Certification Under Fed R. Civ. P. 23(b)(2)**

In addition to meeting the requirements of Fed R. Civ. P. 23(a), a Plaintiff must also satisfy the requirements of either Rule 23(b)(1), (b)(2) or (b)(3). Fed. R. Civ. P. 23(b)(2) allows for certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final relief or corresponding

<sup>21</sup> Rutherford v. City of Cleveland, 137 F. 3d 905 (6th Cir. 1998).

<sup>22</sup> Id. at 909.

<sup>23</sup> See Allen v. City of Chicago, 828 F. Supp. 543 (N.D. Ill. 1993).

<sup>24</sup> See In Re Drexel Burnham Lambert Group, 960 F.2d 285, 291 (2d. Cir. 1992).

<sup>25</sup> See Fed. R. Civ. P. 23(a).

<sup>26</sup> See Andrews v. Bechtel Power Corp., 780 F.2d 124 (1st Cir. 1985).

<sup>27</sup> See BreMiller, 898 F. Supp. at 576-77 (finding that defendant "can examine its own personnel files to aid in the determination of the identity of the potential class members and thus, may not use plaintiff's lack of knowledge as to the exact number of affected persons as a bar to plaintiff maintaining [her sexual harassment] action as a class action.").

declaratory relief with respect to the class as a whole.” While defenses against 23(b)(2) certifications will in some cases be similar to those available under 23(b)(1), the unique nature of 23(b)(2) requires some creativity on the part of defendants who wish to attempt to defeat class certification.

The first issue to consider when constructing a 23(b)(2) defense is whether the plaintiff has also claimed any type of money damages. If all claims are for injunctive or declaratory relief, there are a number of possible defenses, including:

- (1) Identify Issues And Circumstances That Will Render The Request For Injunctive Or Declaratory Relief Moot

In an employment setting, this defense could be suitable if, for example, anti-discrimination or unlawful workplace harassment policies are already in place or have been implemented since the inception of the action, or that handicapped facilities have been installed and/or certain accommodations made.

- (2) Identify The Circumstances Of The Named Plaintiff(S) And Argue That Satisfying His Request Renders Relief To The Class Unnecessary

If plaintiffs are requesting injunctive and/or declaratory relief and are also claiming money damages, they must prove that money damages are incidental to the injunctive or declaratory relief. In this situation, possible defense strategies include:

- (3) Demonstrate That Money Damages Are Plaintiffs’ Primary Focus

Employers should consider the argument that certification under Rule 23(b)(2) is only appropriate where the predominant relief sought is injunctive or declaratory, and therefore plaintiffs should not be permitted to certify a class under Rule 23(b)(2) where their claims for monetary relief predominate over any claims for injunctive or declaratory relief. In other words, the argument goes, 23(b)(2) certification is inappropriate where the compensatory and punitive damages sought are not “incidental” to equitable and declaratory relief. The seminal case in support of this argument is Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5<sup>th</sup> Cir. 1998). In Allison, the Fifth Circuit affirmed the district court’s determination that a proposed class of over 1,000 plaintiffs alleging race discrimination in violation of Title VII and Section 1981 could not be certified under Rule 23(b)(2) because the money damages sought by the plaintiffs were not incidental to the requested injunctive or declaratory relief. (Plaintiffs sought injunctive, declaratory and monetary relief including back pay, front pay, prejudgment interest, attorneys’ fees, compensatory damages and punitive damages). Similarly, the Eastern District of Pennsylvania recently adopted Allison’s Rule 23(b)(2) certification test where money damages predominate.<sup>28</sup> Whether 23(b)(2) class actions can ever be certified where compensatory and punitive damages are sought remains an open question<sup>29</sup>, however, and employers and their counsel should watch the progression of this issue within the Circuits.

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<sup>28</sup> See Miller v. Hygrade, No. 99-1087, 2001 WL 74773, at \*2 (E.D.Pa. 2001).

Continued . . .

- (4) Identify Alleged Incidents Specific To Named Plaintiffs And Demonstrate That They Do Not Apply Classwide

This argument can be compelling in light of the fact that putative class members may not opt out under 23(b)(2).

- (5) If The Putative Class Includes Former Employees, Argue That As Injunctive Relief Cannot Make Them Whole, Primary Focus Must Be Money Damages
- (6) Demonstrate That The Requested Money Damages Are Not Related To The Injunctive Or Declaratory Relief Or Easily Calculable
- (7) Beware Of The “Hybrid” Certification

Courts have justified bifurcation by noting that no class member can opt out of the Stage I trial, preventing inconsistent adjudications, however, plaintiffs may opt out of the Stage II trial under Rule 23(b)(3).

- (8) Be Cognizant Of The Possible Broad Reading Of 23(b)(2), Particularly In Civil Rights Cases

#### **4. Challenging Class Certification Under Rule 23(b)(3)**

##### **a. Challenges to Predominance**

Courts generally will not certify a class if it appears that the class action will devolve into a series of individual mini-trials on issues peculiar to each plaintiff. Thus, in order to defend against a 23(b)(3) class action, the employer should try to distinguish the claims of the named plaintiffs from the claims of other putative class members, and from the alleged pattern and practice of discrimination. By drawing these types of distinctions, an employer may argue successfully that common questions of law and fact do not predominate and, in fact, many aspects of the purported class action will require individualized inquiries into the unique circumstances surrounding each plaintiffs employment with the employer. Rule 23(b)(3) class actions are frequently denied for this reason. The following distinctions are in this regard helpful for employers.

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<sup>29</sup> See, e.g., Smith v. Texaco, Inc., 88 F.Supp. 2d 663, 682 (E.D. Tex. 2000) (“[S]imply because Allison held it was not an abuse of the district court’s discretion to refuse to fashion a method of proceeding under Rule 23(b)(2) or 23(b)(3) does not necessarily forbid a district court from attempting to dispose of these claims in a fair, orderly manner, while affording parties their full rights under the expanded statute.”). But see Jefferson v. Ingersoll International Inc., 195 F.3d 894, 898 -99 (7th Cir. 1999) (vacating district court certification of 23(b)(2) class seeking compensatory and punitive damages, and remanding for determination of whether monetary damages were more than “incidental” to the equitable relief requested); Lemon v. International Union of Operating Eng’rs, Local No. 139, 216 F.3d 577, 581 (7th Cir. 2000) (applying Allison test to proposed Title VII class).

- (1) Identify different decisions at issue, i.e. applicants versus incumbent employees; failure to hire versus failure to promote;
- (2) Identify whether the allegedly discriminatory employment decisions occurred in different locations, offices, departments or divisions of the employer;
- (3) Identify different decision makers involved in the allegedly discriminatory employment decisions;
- (4) Identify any policies or procedures that do not apply to the purported class as a whole;
- (5) Identify distinctions in job functions, pay grades, eligibility for promotions and raises; and
- (6) Identify any facts that are unique to each purported class member, i.e. seniority, qualification, level of education, availability.

**b. Challenges To Superiority**

Courts have been hesitant to certify employment discrimination class actions where the scope of the action is so broad that it appears unmanageable. This is particularly true where the class of plaintiffs seeks compensatory damages. Claims of emotional distress and psychological damages necessarily require an examination of each the individual plaintiffs' circumstances, complicating the class action and making it unmanageable to litigate. As a result, employers can defend against Rule 23(b)(3) class actions on superiority grounds in the following ways.

- (1) Identify differences in the damages, particularly compensatory damages for emotional distress, claimed by each of the putative plaintiffs; and
- (2) Argue that the employer has a Seventh Amendment right to have the same jury determine liability and damages, thus making the trial inherently unmanageable.

**C. The Tactical Use Of Personnel Databases**

Statistics are central to class action cases. Under a disparate impact theory, plaintiffs commonly introduce statistical evidence that an employment practice has an adverse effect on one or more protected classes of individuals. Under a pattern and practice theory, plaintiffs have to show that purposeful discrimination was the employer's standard operating procedure. Plaintiffs can do this by presenting statistical evidence that shows individuals in the protected class were treated differently by than similarly situated individuals who were not in the protected class.

Moreover, proof of the existence of an aggrieved class, a necessary predicate to class certification in a number of circuits, is often accomplished through a combination of statistics

and affidavits.<sup>30</sup> In fact, courts routinely deny motions for certification where neither adequate statistical evidence or affidavits from a statistically significant percentage of an aggrieved class is submitted to bridge the gap between an individual plaintiff's allegation of a policy of discrimination and the existence of a class of persons who have suffered an injury similar to that of the individual plaintiff.<sup>31</sup>

Issues related to the use of databases in class action litigation of which employers should be particularly aware include the following:

**1. Database Discovery Requests Are Common And Are Routinely Upheld By Courts**

It is quite common for plaintiffs to attempt to use personnel data (e.g., hiring, promotion, transfer and termination) in order to support the propriety of certification of a class of aggrieved plaintiffs. Moreover, courts fairly routinely permit plaintiffs discovery of employers' personnel data.<sup>32</sup>

**2. You Must Fully Understand Your Data**

Thus, it is important fully to understand the personnel data kept by your company. Often, personnel data is maintained in more than one database, and may take different forms and involve different fields of information. It is therefore necessary early in a purported class action to determine what personnel data is available and to understand how that data is inputted, stored, and manipulated. Indeed, it may become necessary to synthesize the available data for review, and to assess whether information contained in one personal database conflicts with that contained in another.

Moreover, you may wish to conduct an analysis of your personnel data prior to producing that data in discovery. Indeed, it may be necessary to retain a statistician early in a class action litigation for the purpose of helping you to understand the parameters and available fields of information in your database, as well as the significance of the available data, in order to help you determine how best to respond to database discovery demands.

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<sup>30</sup> Stambaugh v. Kansas Dep't. of Corrections, 151 F.R.D. 664, 675-76 (D. Kan. 1993); Harris v. Marsh, 100 F.R.D. 315, 322 (E.D.N.C. 1983).

<sup>31</sup> Grundman v. Trans World Airlines, Inc., 49 Fair Empl. Prac. Cas. (BNA) 1048, 1050 (S.D.N.Y. 1988); Warren v. ITT World Communications, Inc., 95 F.R.D. 425, 429-30 (S.D.N.Y. 1982).

<sup>32</sup> See, e.g., Orlowski v. Dominick's Finer Foods, Inc., No. 95C 1666, 1995 U.S. Dist. LEXIS 12468 (N.D.Ill. Aug. 28, 1995) (granting class plaintiffs pre-certification database discovery); Anti-Monopoly, Inc. v. Hasbro Inc., 1995 U.S. Dist. Lexis 16355, at \*4 (S.D.N.Y. Nov. 3, 1995) ("Thus, today it is a black letter law that computerized data is discoverable if relevant").

**3. You Should Identify All Fields Of Information That Might Provide Legitimate Business Reasons For Challenged Employment Decisions**

It is important to identify all available fields of information that might provide legitimate business reasons for challenged employment decisions. For example, a class plaintiff may allege discriminatory treatment against a protected class of employees in connection with reductions in force, and seek to demonstrate that a significantly higher percentage of that group was selected for inclusion in a reduction in force as compared to the entire workforce. In that regard, it is critical to include available fields of information that will help establish that reasons other than protected status contributed to any apparent statistical disparity. For example, the reduction in force data may include individuals who separated voluntarily from the employer which, without data distinguishing those employees from those involuntarily terminated, may skew the relevant statistics. Identifying those individuals who volunteered to be included in a reduction-in-force will enable you to attack an attempt by a class plaintiff to rely on such potentially misleading statistics.<sup>33</sup>

Similarly, apparent discrepancies in rates of termination may be explained by their relationship to legitimate business criteria. For example, the fact that a disproportionate number of females were laid off by a defendant company may be explained by the relative seniority of those employees or the fact that a disproportionate number of those employees worked in areas of the company which were particularly hard-hit by layoffs. Thus, fields of information which may help to explain disparities in termination, promotion, transfer or hiring rates include years of employee experience, educational background, and skill or job code.<sup>34</sup>

**4. You Should Identify Fields Of Information That Establish Distinctions Between Departments, Supervisors, Etc.**

A class plaintiff may attempt to take advantage of significant disparities in termination, promotion, transfer or hiring rates in a particular department, division or area of the employer in an attempt to demonstrate that a pattern of discrimination existed throughout a broader unit of the employer or even throughout the entire company. Thus, it is important to identify fields of information (department, supervisor, etc.) that will allow a statistician to distinguish these problematic units, and to understand the decision-making processes sufficiently to refute an

<sup>33</sup> Cf. Sheehan v. Purolater, Inc., 839 F.2d 99, 102-03 (2d Cir. 1988) (upholding the denial of class certification and approving the lower court's findings with respect to the statistical evidence that the omission of variables from a regression analysis reduced the probative value of the evidence and that the analysis failed to take into account various relevant non-discriminatory factors); Fowler v. Blue Bell, Inc., 92 F.R.D. 475, 477 (N.D. Ala. 1981) (denying certification of class of applicants because statistics did not take into account the pool of qualified applicants in the work force); Gonzalez v. Brady, 136 F.R.D. 329, 333 (D.D.C. 1991) (finding insufficient, for purposes of sustaining class promotion claim, statistics merely comparing the relative number of Hispanics and non-Hispanics at various grade levels, without proof that such employees were similarly situated, i.e., possessed similar qualifications and experience).

<sup>34</sup> See, e.g., Ray v. Phelps Dodge Brass Co., 35 Fair Empl. Prac. Cas. (BNA) 1004, 1006-07 (N.D. Ala. 1983) (finding, without reviewing the statistics on the merits, that defendant's statistical evidence was sufficient to rebut any possible inference of commonality, typicality and numerosity that could be drawn from plaintiffs' descriptive statistical evidence and expert's analysis).

argument that the personnel data reflects a policy or practice of discrimination within the company.

Each of these issues demand careful legal analysis based on the unique facts of each case. Employers and their counsel should, however, be prepared to undertake these analyses promptly and speedily upon becoming aware of a potential class action. Given the complexity of the factual arguments, it may be difficult for employers to develop these arguments adequately in the midst and heat of full class action battle.

#### **D. Public Relations Control**

Civil rights employment class actions “inevitably bring disastrous verdicts from the court of public opinion.”<sup>35</sup> A primary concern for any corporation facing a civil rights class action should thus be management of public relations and development of a strategy for internal and external communications. Once faced with a class action, companies often must respond to inquiries from the press, regulatory or oversight organizations, employees, activist organizations as well as board members, shareholders and the company’s consumer base. Therefore, in some circumstances, a company may find it worthwhile to enlist the services of a public relations firm to aid in the difficult balance of maintaining positive public relations without appearing overly defensive. It should be noted, however, that communications with an outside public relations firm may not be privileged.<sup>36</sup>

In addition to the “external” public relations front, the employer’s public relations strategy should address guidelines for control of the inevitable “rumor-mill” as well as address issues related to internal communications with both potential class members and non-members. Public relations problems can be exacerbated if a perception develops among current employees that the company is trying to intimidate or retaliate against potential class members.<sup>37</sup>

#### **V. STRATEGIES FOR SHIFTING TO SETTLEMENT MODE**

Because of the high risk and expense that can arise from these cases, most class actions are settled at some stage. The settlement of class actions tend to include systemic changes in employment practices as well as very significant payouts. Thus they are effective tools for plaintiffs and plaintiff’s counsel interested in forcing sweeping changes. There are potential advantages to the employer, however, of a voluntary resolution. These advantages include (1) minimizing the potential for negative publicity and destruction of public good will; (2) allowing the company, including both management and the employees, to keep its focus on its business,

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<sup>35</sup> Steven I. Adler and Randi W. Kochman, *Strategies for Defending Civil Rights Class Action Lawsuits*, 148 N.J.L.J. 210 (April 21, 1997).

<sup>36</sup> See, e.g., *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 54 (S.D.N.Y. 2000).

<sup>37</sup> See, e.g., *Abdallah v. Coca Cola*, 186 F.R.D. 672 (N.D. Ga. 1999) (court ordered restrictions on defendant’s communication to potential class members on the grounds that the CEO’s e-mail’s to potential class members had the potential to be coercive). See also, *Lawyers in Discrimination Lawsuit Seek Halt in Coke Waiver Demand*, ASSOCIATED PRESS, (January 28, 2000).

not the pending litigation; (3) reducing the legal fees associated with protracted litigation; (4) avoiding the risk of Court-dictated injunctive relief that can be inflexible and is not tailored to the companies' business operations; (5) avoiding the risk of court-ordered back pay; and (6) avoiding the risk of a large jury verdict for emotional distress and punitive damages. Just as a myriad of business circumstances might underlie the decision of whether to litigate or settle a large, high profile, employment discrimination case, settlement agreements themselves implicate numerous legal concerns for which legal counsel should be consulted.

The following discussion of some of the issues that arise in structuring settlement agreements in a class action apply to settlement with a private party.<sup>38</sup> Variations on these comments would apply if settlement were anticipated with the Equal Employment Opportunity Commission ("EEOC").<sup>39</sup>

#### **A. Choose The Right Time To Settle**

There are many stages in a large employment discrimination case at which settlement could take place. At each stage of the litigation the factors for and against settlement must be balanced in order to determine whether the estimated costs of settlement are less than the estimated costs, burdens and impacts of continuing litigation. Employers should note that with the obvious exception of settling before a lawsuit is ever filed, settlement at any stage of the litigation will require court approval.

1. **Prior To Suit Being Filed:** Most flexibility with respect to scope of class; less publicity; lower attorneys fees and litigation expenses; most difficult to evaluate case.
2. **Prior To Class Certification:** Flexibility with respect to scope of class; may be possible to settle on non-class basis.
3. **Following The Court's Ruling On Class Certification:** Limited flexibility as to scope of class; less flexibility as to relief.

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<sup>38</sup> Federal Rule of Civil Procedure 23(e) requires court approval of the settlement of a class action. In order to obtain court approval, the settlement class must meet the Rule 23(a) and (b) prerequisites. See Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S. Ct. 2231 (1997).

<sup>39</sup> Although a number of recent cases have involved plaintiffs seeking injunctive relief in addition to monetary damages, as a general rule the EEOC may be more interested than private plaintiffs in pursuing injunctive relief or structural change because the EEOC's mandate is to litigate in the public interest. See, e.g., General Tel. Co. v. EEOC, 446 U.S. 318, 326 (1980). In addition, EEOC settlements are subject to fairly elaborate policy guidelines, and are therefore, in many cases, less negotiable than private settlements. For example, confidentiality provisions, normally a key non-monetary provision for the employer, is difficult and sometimes impossible to negotiate in many EEOC cases. See Regional Attorneys' Deskbook (BNA) GC:4512. (1993).

4. **Following A Finding Of Pattern And Practice In Phase I:** Avoid Phase II by agreeing to a lump sum and/or alternative process for determining individual relief for class members.

**B. Choosing The Most Appropriate Method For Settling**

Because class action cases are generally extremely complex, and are often very heated and emotion packed, it is often difficult for the parties to resolve the issues without the assistance of counsel or an outside third party.

Employers who choose to settle a class action have a number of options for obtaining assistance in settling. These options include:

**1. Direct Negotiation Between Counsel For The Parties**

For direct negotiation between counsel to be effective, the parties must have a precise idea about their settlement goals and there must be at least some common ground between those goals.

**2. Use Of A Private Mediator**

Mediated discussions between the parties are often essential to reach a resolution in heated employment litigation because the parties may be more likely to respect or take seriously the opinions of an objective neutral than those of its adversary. In addition, the mediator can probe the parties' positions directly and offer creative alternative solutions. If using a mediator, special attention should be paid to selection of one who is both skilled and truly neutral, trusted and respected by both parties. The parties should mutually agree upon a mediator deemed to be intelligent, experienced in the industry, and known to be fair and impartial.

**3. Use Of A Settlement Judge Or Court Appointed Mediator**

The parties may choose to have a judge or federal magistrate appointed to assist them in reaching settlement. The settlement judge will be one other than the trial judge. In some jurisdictions, a court appointed mediator is utilized in lieu of a settlement judge. In this case, the court will appoint a professional mediator from their staff to handle the mediation.

## **C. General Considerations For Settlement**

### **1. Agree Upon The Process To Be Used For The Exchange Of Information**

This step should include a confidentiality agreement which includes confidentiality of settlement process itself as well as confidentiality of data exchanged.

### **2. Consider Alternatives For Determining Individual Settlement Amounts**

Alternatives include: (1) Lump sum allocation by a neutral; (2) Lump sum with agreed allocation; (3) Claim process with cap; (4) Claim process without cap; (5) Opt-in process for FLSA and ADEA cases.

### **3. Consider The Impact Of Non-Monetary Relief On Monetary Settlement**

Non-monetary relief such as rehiring, training, promotions, etc. may reduce the amount of monetary relief needed to settle.

### **4. Attorneys Fees**

Attorneys fees should be negotiated separately after settling on class relief or a court should decide the issue.