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DESTINATION : INNOVATION

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Employment Class Actions: The Train Keeps Picking Up Steam

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Purposes

- » Describe the types of employment law claims being litigated as class actions
- » Identify the trends and developments in these lines of cases
- » Offer suggestions for avoidance

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Why?

- » Because these claims continue to proliferate
 - “[T]he major percentage increases [in filings in federal courts] came in ERISA, labor, and employment rights class actions... Uniquely, labor and ERISA class actions have increased in percentage terms for several years...”
 - » Professor John C. Coffee, Jr., *Class Certification: Developments Over the Last Five Years 2002-2007*

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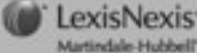
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Why?

- » Plaintiffs' counsel everywhere are actively seeking clients and generating claims
 - Web sites provide information and easy, nationwide "sign up"
 - New businesses help plaintiffs' counsel find new clients



Hyde, Kevin E.

From: Michelle Taylor <inforequest@employmentlawfirms.com>
To: Hyde, Kevin E.
Sent: Tue Nov 06 15:40:28 2007
Subject: Employment Litigation Cases

Dear ,

Employees are on our websites looking for an attorney. Within minutes we are capturing their first and last names, emails and phone numbers. In most cases they are demanding that someone call them immediately.

They are providing information to us because they have had issues related to:

- Wages and Overtime Pay
- Contract Dispute
- Harassment
- Wrongful Termination
- Discrimination (Gender, Race, Marital Status)
- Workers Compensation
- Retaliation

To view real time employment litigation cases please click on the link below or paste it in your browser:

<http://cp20.com/Tracking/t.c7T19-uf0-3e84E5khyde@foley.com&campid=342>

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Thank you,

Michelle Taylor
 EmploymentLawFirms.com
 SexualHarassmentLawFirms.com
 100 West Cypress Creek Road
 Suite 1050
 Fort Lauderdale, FL 33309
 USA
 Phone: 800-631-5158 Ext. 207



Why?

- » Employment claims raise unique reputation concerns
 - Discrimination as immoral and unethical
 - » NAACP joined race discrimination class action against Eli Lilly in SD Indiana
 - » Impacts business relationships
 - Improper pay practices create “bad will” and quash low employee morale
 - » Increases attrition
 - » Sometimes prompts union organizing

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Why?

- » Employment class claims result in large liabilities
 - Discrimination claims
 - » Fed Ex - \$55 million on race discrimination (N.D. Cal.) (basic skills test allegedly screened out minorities)
 - » Bell Atlantic - \$48.9 million on pregnancy discrimination claims (S.D.N.Y.)
 - » Morgan Stanley - \$48 million on sex discrimination claims (D.D.C.)
 - » Morgan Stanley - \$23.5 million on race discrimination claims (N.D. Cal.)
 - » C.H. Robinson - \$15 million on sex discrimination claims (D. Minn.)

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Why?

- » Employment class claims result in large liabilities
 - Wage claims (Fair Labor Standards Act (FLSA) and state laws)
 - » Citigroup Global Markets - \$98 million
 - » UBS Financial Services, Inc. - \$89 million
 - » Wal-Mart - \$78.5 million (*plus* \$62 million)
 - » UPS - \$87 million
 - » IBM - \$65 million
 - » Morgan Stanley - \$42.5 million
 - » Staples - \$38 million
 - » 24 Hour Fitness - \$38 million
 - » Merrill Lynch - \$37 million
 - » Siebel Systems - \$27.5 million
 - » Sears Roebuck - \$15 million

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Why?

- » Employment class claims result in large liabilities
 - Benefits claims (ERISA)
 - » AOL Time Warner - \$100 million
 - » Sprint - \$47.5 million
 - » Qwest - \$37.5 million
 - » Enron - \$37.5
 - » Dillard's Dept. Stores - \$35 million
 - » HealthSouth - \$28.75 million

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Why?

- » Because in-house counsel care
 - Litigation Trends survey (Oct. 2007)
 - » Over 250 major US and 50 U.K. corporations
 - » 51% said employment issues are one of top five legal issues of concern

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Employment Discrimination

- » Types of cases
 - Gender: Pay/promotion
 - Race: Pay/promotion
 - National Origin: Pay/promotion/hiring
 - Age Discrimination: Termination
- » Class Certification: Fed.R.Civ.P. 23
 - Requires all 4 elements of Rule 23(a) **and**
 - 1 of 3 elements of Rule 23(b)

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Employment Discrimination

- » FRCP 23(a): “One or more member of a class may sue...on behalf of all **only if**”
 - Numerosity (> 20?)
 - Commonality (one issue of fact or law)
 - Typicality (claims “substantially similar”)
 - Adequacy of representation
 - » Lack of conflicting interests
 - » Vigorous representation; resources
 - » Experienced counsel
 - » Focus on due process rights of class members

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Employment Discrimination

- » FRCP 23(b): Proposed class must also satisfy 1 of 3 subsections in Rule 23(b)
- » 23(b)(1) (risk of inconsistent adjudications)
 - Applies to “limited fund” cases
- » 23(b)(2) applies to claims primarily seeking injunctive or other non-monetary relief
 - No notice required; no opt-out rights

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Employment Discrimination

- » 23(b)(3) applies to claims for money damages; requires showing of
 - Predominance: Common questions of law or fact outweigh any individualized questions
 - Superiority: Class procedure and trial is superior to other methods for the fair and efficient adjudication of the case
- » Notice to class required; Opt-outs permitted

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(b)(2) or Not (b)(2)? That is the Question

- » Before 1991: Class actions certified per (b)(2) because “equitable” relief
- » CRA 1991: Added rights to jury trial, compensatory and punitive damages
- » After 1991: Courts applied (b)(3) b/c money damages, and denied class cert. due to predominance of individual issues
 - e.g., *Allison v. Citgo*, 151 F.3d 402 (5th Cir. 1998)
 - Plaintiffs struggle with (b)(3) standards

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Dukes Case

- » Alleging gender discrimination in pay and promotions
 - Seeking injunctive relief, back pay and punitive damages
- » Largest civil rights class action in U.S. history
 - Over 1.5 million former and current ees
 - Employed at over 3,400 stores across USA since 1998
 - Estimated \$11 billion damages

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Dukes Case

- » Ninth Circuit (2-1) aff'd order granting class certification
 - See *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. Feb. 6, 2007)
- » Alleged common practice is employer's excessive subjectivity "which provides a conduit for gender bias"

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Dukes Case

- » Certified per (b)(2) due to plaintiffs' self-proclaimed intent in filing suit, despite
 - billions in back pay and punitives sought, and
 - most class members are former employees with no self-interest in the injunctive relief sought
- » Dissent
 - (b)(2) inapplicable where most class members would not have standing to seek the injunctive relief
 - Defendant's due process rights trampled

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Dukes Case

- » Petition for review *en banc* granted and decision from full Ninth Circuit expected soon
- » Highlights circuit split on reach of (b)(2)
 - “Incidental damages” test: 6th, 7th, 11th
 - “Ad hoc” test: 2d
 - » Is value of injunctive relief predominant?
 - “Subjective intent” test: 9th

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Employment Discrimination

Other Developments

- » Disparate impact theory allowed for age discrimination claims
 - *Smith v. City of Jackson*, (U.S. 2005)
 - ADEA claims as “collective actions”; not Rule 23
- » Arbitration agreements may be enforceable and may preclude class relief
 - *Dale v. Comcast Corp.*, (11th Cir. Sept. 4, 2007)
- » Equal Employment Opportunity Commission (EEOC) initiative to explore charges as class claims and allocate litigation resources to class claims (“pattern and practice”)

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Employment Discrimination

Prevention Ideas

- » Self-audit pay and promotion practices in relation to gender, race and national origin
 - To identify and fix disparities
- » Use subjective, decentralized decision making (despite *Dukes*)
- » Train managers on Equal Employment Opportunity (EEO) practices
- » Develop several grievance mechanisms
- » Use agreements, or terms in employment applications, to
 - Waive jury trials; shorten statutes of limitations; require arbitration

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Wage and Hour

- » Amenable to class-wide allegations because typically derived from an employer's policy or practice applied to many employees
 - liability can “reach back” 2 or even 3 years
- » FLSA remedies
 - Wages due (plus pre-judgment interest)
 - Liquidated damages = wages due
 - Attorneys fees
 - » Has attracted a large plaintiffs' bar

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Wage and Hour

- » Types of claims (per the FLSA and/or state wage laws)
 - Overtime claims of employees treated as “exempt” by employer
 - » Department of Labor (DOL) Regulations revised August 2004
 - » Executive, Administrative, Professional and others
 - » Hit retail, then financial services industries
 - e.g., N.D. Cal. certification of class of some 30,000 home mortgage consultants suing Wells Fargo for overtime

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Wage and Hour

- » Types of claims (per the FLSA and/or state wage laws)
 - Settlements
 - » Citigroup \$98m; UBS \$89m; UPS \$87m; IBM \$65m; Morgan Stanley \$42.5m; Staples \$38m; 24 Hour Fitness \$38m; Merrill Lynch \$37.5m

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Wage and Hour

- » Types of claims (per the FLSA and/or state wage laws)
 - “Hours worked” claims from preliminary and post-liminary work activities
 - » Donning/doffing claims (manufacturers)
 - » Computer log-in and log-out times (call centers)
 - » Security/safety procedures (mobile ees)
 - » Travel time for service technicians
 - e.g., Sears · \$15 million

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Wage and Hour

- » Types of claims (per the FLSA and/or state wage laws)
 - “Off-the-clock” and missed break claims
 - » Wal-Mart jury verdict (Philadelphia County, PA) - \$78.5 million
 - » \$62 million added by court for liquidated damages

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Wage and Hour

- » Types of claims (per the FLSA and/or state wage laws)
 - Calculation of overtime (“regular rate”)
 - » Includes more than hourly wage rate
 - » Wal-Mart 2007 consent decree with DOL = \$33 million
 - Missed meals/rest breaks
 - » State law claims based on statutes and/or contract law-type claims
 - » UPS settlement = \$87 million

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Wage and Hour

- » Types of claims (per the FLSA and/or state wage laws)
 - Prompt Final Pay (under state laws)
 - » Some states impose liquidated or treble damages for failure to timely pay

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Wage and Hour

- » Class procedures
 - State law claims under state procedural law (typically like Rule 23); *but*
 - FLSA class claims are a “collective action”
 - » 29 U.S.C. § 216(b)
- » Attributes of “collection action”
 - “Opt-in” rather than “Opt-out”
 - Two-step process
 - » Conditional Certification upon showing of similarly-situated persons
 - » Final decision after opt-ins and discovery

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Wage and Hour – Trends

- » Where?
 - State law claims (e.g., missed breaks) and some overtime/exempt status claims often seen first in California
 - FLSA claimants love FL
 - » S.D. Fla. filings lead the nation
 - Over 950 in 2007 through October
 - 1200 in each of 2005 and 2006
 - » Second place: M.D. Fla.
 - Over 780 in 2007 through October

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Wage and Hour – Trends

- » “Hybrid” cases: Plaintiffs combine both state law class claims and FLSA collective action claims
- » Some (but not all) courts are rejecting these as “inherently incompatible”
 - *Himmelman v. Continental Casualty Co.*, 2006 U.S. Dist. LEXIS 56187 (D.N.J. Aug. 11, 2006)

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Wage and Hour – Trends

- » Some courts engaging in the more rigorous second-step analysis at the first step
 - *Ledbetter v. Pruitt Corp.*, 2007 WL 496451(M.D. Ga. Feb. 12, 2007)
 - » Especially if enough discovery occurred to permit more comprehensive assessment
 - So, defendants are digging in to discovery more vigorously at the outset

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Wage and Hour – Trends

- » Discovery and trial techniques
 - Depending on class size, request individual discovery
 - Utilize random samples for discovery and trial
 - Separate corporate policy and practice from individual manager decisions
 - Focus on whether there is really widespread desire of individuals to opt in

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Wage and Hour – Trends

- » For pure state law claims, maybe new federal jurisdiction per the Class Action Fairness Act
 - Relaxes “complete diversity” requirements
 - Need only one plaintiff diverse from one defendants
 - Need at least \$5 million at issue
- » Employers prefer to be in federal court on these claims
 - Rule 23 more predictable
 - Judges, with clerks, typically more predictable

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Wage and Hour

Prevention Ideas

- » Scrutinize exempt status classifications and consider changing borderline cases
 - Track work time of exempt employees (to rebut damages claims)
- » Identify all preparatory and concluding activities required and assess if compensable
- » Ensure proper calculation of OT
 - Don’t assume that outsourced payroll provider does this correctly; make them prove it to you

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Wage and Hour

Prevention Ideas

- » “Test” whether employees are accurately recording hours worked
 - Prevents future claims of employees claiming they failed or were told not to accurately report work hours
- » Train managers on wage issues (off-the-clock work, particularly)

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Wage and Hour

Prevention Ideas

- » Communicate policies
 - Prohibiting off-the-clock work
 - Requiring proper reporting of work time
- » Provide easy complaint mechanism and rectify concerns promptly
- » Consider mooted plaintiff’s claim with Rule 68 Offer of Judgment

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Benefits (ERISA)

- » Some benefits claims also are amenable to class treatment
- » Rule 23 analysis
 - Administrative remedies need not be exhausted by class members
- » ERISA remedies limited, but
 - Statute authorizes award of attorneys fees

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Benefits (ERISA)

- » Types of class claims being brought
 - Challenges to “independent contractor” status, seeking eligibility for company benefits as a de facto “employee”
 - » e.g., nation wide class of drivers certified; seeking employee benefits from FedEx
 - » 2000 DOL study shows 30% of employers misclassify persons as independent contractors
 - » Resulted in recent proposal in the Senate called the “Independent Contractor Proper Classification Act of 2007”

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Benefits (ERISA)

- » Types of class claims being brought
 - Challenges to employer changes to retiree welfare benefits (claiming these are vested)
 - » Sometimes implicates labor contracts too
 - Claims against or in relation to plan service providers
 - » Excessive/hidden service providers' fees
 - » Company stock as investment of retirement plan; derived from securities fraud litigation

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Benefits (ERISA)

- » Types of class claims being brought
 - Breach of fiduciary duty against employer as plan sponsor or administrator of 401(k) or other retirement plan that includes company stock as an investment
 - » Failure to disclose known problems; off shoot of securities fraud issues
 - » Investment “prudence” claims
 - e.g., Citigroup class action after \$11 billion hit for sub prime mortgage exposure
 - Especially problematic where Company stock investment is automatic (like with matching)

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Benefits (ERISA)

Prevention Ideas

- » Scrutinize use of company stock as investment option in retirement plans
- » Scrutinize independent contractor relationships
 - Perhaps use better contracts with much language documenting the key elements
 - Require indemnification for taxes and penalties
 - Require release of prior claims and future covenant not to assert claims for benefits

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Benefits (ERISA)

Prevention Ideas

- » Review developing law on service provider fees and assess those fees and the adequacy of disclosures

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