Employment Discrimination Class and Collective Actions: Special Issues and Considerations

A Lexis Practice Advisor® Practice Note by
Matthew W. Lampe and Kristina A. Yost, Partner at Jones Day


Matt W. Lampe


Kristina A. Yost

Matthew W. Lampe is a Partner in Jones Day's New York office and the co-leader of the firm's Labor and Employment practice. Kristina A. Yost is a Labor and Employment Partner in Jones Day's New York Office.

In an employment discrimination class or collective action, one or more plaintiffs assert that an employer discriminated against a potential class of individuals on the basis of a legally protected characteristic. Litigating class and collective action employment discrimination cases is complex and requires consideration of a number of different procedural and substantive factors. While the facts and procedural posture of each case are unique and will dictate your ultimate strategy, being aware of the common issues that arise in these cases will better prepare you to defend these types of claims.

This practice note addresses the following issues concerning employment discrimination class and collective actions:

- Employment Discrimination Class Action Statutes
- Employment Discrimination Collective Action Statutes
- Hybrid Employment Discrimination Class and Collective Actions
- Types of Employment Discrimination Class and Collective Actions
- Responding to the Complaint (including Potential Dispositive Motions)
- Opposing Conditional Certification (for Collective Actions Only)
- Planning and Conducting Discovery in Employment Discrimination Class and Collective Actions
- Deposition Tips
- Expert Witness Issues
- Use of Statistical Evidence
- Summary Judgment
- Opposing Class Certification (for Class Actions Only)
- Decertification of Collective Action (for Collective Actions Only)
- Settlement

For more information on employment discrimination class and collective actions, see 4 Larson on Employment Discrimination CHAPTER 81.syn. and 8 Larson on Employment Discrimination § 141.07.

For annotated forms for both employment discrimination and wage and hour class and collective actions, see the Class and Collective Actions forms page. For practice notes on wage and hour class and collective actions, see the Class and Collective Actions practice notes page.

EMPLOYMENT DISCRIMINATION CLASS ACTION STATUTES

Most employment discrimination class actions are traditional class actions brought under Federal Rule of Civil Procedure 23 (Rule 23). (Note that this practice note does not address pattern-or-practice employment discrimination actions brought by the Equal Employment Opportunity Commission (EEOC) or Department of Justice because those cases are not class actions governed by the requirements of Rule 23. See EEOC Systemic and Individual Discrimination Investigations and Litigation.) To certify a class under any of the following statutes, plaintiff(s) must demonstrate that they meet all the requirements of Rule 23, as further described in Opposing Class Certification (for Class Actions Only), below. See also 5-23 Moore's Federal Practice – Civil § 23.01 et seq. In particular, plaintiffs can bring claims under the following employment discrimination statutes as Rule 23 class actions:

- **Title VII of the Civil Rights Act of 1964 (Title VII).** Title VII prohibits discrimination on the basis of race, color, sex, national origin, or religion. 42 U.S.C. § 2000e-2(a). See Title VII Compliance Issues.
- **The Americans with Disabilities Act (ADA).** The ADA prohibits discrimination on the basis of disabilities and requires employers to reasonably accommodate disabilities. 42 U.S.C. § 12112. See Americans with Disabilities Act: Employer Requirements and Reasonable Accommodations.
- **The Genetic Information Nondiscrimination Act of 2008 (GINA).** Prohibits discrimination on the basis of genetic information, which includes the results of genetic tests or family member genetic tests, family member genetic diseases, an individual's request for or receipt of genetic services, or genetic information of a fetus carried by the individual or a family member or an embryo held by the individual or family member. Pub. L. No. 110-233, 122 Stat. 881. The prohibited discrimination includes not only making employment-related decisions on the basis of genetic information, but even acquiring any genetic information other than for the reasons listed in the statute. 42 U.S.C. § 2000ff-1(b). See Genetic Information Nondiscrimination Act (GINA) Employment Discrimination Prohibitions.
- **The Pregnancy Discrimination Act (PDA).** The PDA is an amendment to Title VII which prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions. 42 U.S.C. § 2000e-(k). See Pregnancy Discrimination Act: Compliance Tips.
- **State and local employment discrimination laws.** Most states, and some cities, have their own anti-discrimination laws, which often are more extensive than federal law and cover additional types of protected categories. For example, the New York State Human Rights Law also prohibits discrimination on the basis of sexual orientation, military status, familial status, marital status, domestic violence victim status, and arrest and conviction status. N.Y. Exec. Law § 296. See New York State Human Rights Law (NYSHRL). The New York City Human Rights Law prohibits discrimination on the basis of alienage or citizenship status, caregiver status, credit history, gender identity, marital or partnership status, salary history, sexual orientation, status as a victim of domestic violence, sexual violence or stalking, unemployment status, or status as a veteran or active military service member. N.Y.C. Admin. Code § 8-107. See New York City Human Rights Law (NYCHRL). For information on all states' employment discrimination laws, see Discrimination, Harassment, and Retaliation State Practice Notes Chart.

EMPLOYMENT DISCRIMINATION COLLECTIVE ACTION STATUTES

Plaintiffs may not bring group actions under the Age Discrimination in Employment Act (ADEA) or the Equal Pay Act (EPA) as Rule 23 class actions. Rather, plaintiffs must bring such actions as collective actions pursuant to *29* U.S.C. § 216(b). See 29 U.S.C. § 626(b); 29 U.S.C. § 206(d)(1).

The ADEA prohibits discrimination on the basis of age, and the EPA prohibits discrimination in pay on the basis of sex. See Age Discrimination in Employment Act (ADEA): Key Considerations and Equal Pay Act: Key Compliance Issues.

Crucially, in a collective action, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). Thus, unlike Rule 23 class actions, collective actions require plaintiffs to affirmatively opt in to the claim before they can be bound by a judgment.

In addition, collective actions differ from class actions in the manner in which classes are certified. Unlike Rule 23, under § 216(b) no statutorily mandated class certification procedure exists to determine numerosity, commonality, typicality, and representativeness; the only statutory criterion for certification is that the putative plaintiffs be "similarly situated." While there are differences between the circuits in how courts interpret the similarly situated standard, with limited exceptions courts follow a two-step approach to collective certification. (In Shushan v. Univ. of Colo., the District of Colorado applied the requirements of Rule 23 to the collective action. 132 F.R.D. 263, 265 (D. Colo. 1990). See also Bayles v. Am. Med. Response, 950 F. Supp. 1053, 1064–66 (D. Colo. 1996) (discussing an alternate approach known as "spurious" class actions)). At step one, the court makes an initial determination whether to send notice to potential opt-in plaintiffs after plaintiffs have made a "modest factual showing that they and potential opt-in plaintiffs together were victims of a common policy or plan that violated the law." Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010) (internal quotations marks omitted). This first step is generally known as conditional certification. At the second stage, on a fuller evidentiary record, courts engage in a more thorough analysis to determine whether the plaintiffs who have opted in are in fact similarly situated, and if not, the court may decertify the action, dismissing the opt-in plaintiffs' claims without prejudice. Id.

For more information on § 216(b) collective actions, see Class or Collective Actions—1-9 Wages & Hours: Law and Practice § 9.02, sub. [3][b]. See also Conditional Collective Action Certification and Decertification Motions under FLSA Section 216(b) and Notice Requirements for FLSA Section 216(b) Collective Actions.

HYBRID EMPLOYMENT DISCRIMINATION CLASS AND COLLECTIVE ACTIONS

When asserting ADEA or EPA claims, plaintiff(s) often bring what is called a hybrid case in which they seek collective certification of the ADEA or EPA claims and Rule 23 certification of state/local or other federal claims. For example, plaintiffs may file an ADEA collective action and simultaneously seek to certify a Rule 23 class under various state anti-discrimination laws. Similarly, plaintiffs may bring an EPA collective action and also seek to certify a Rule 23 class under Title VII or various other state anti-discrimination laws.

It is important to be mindful of the fact that because class and collective actions proceed via different procedural tracks, the federal and state law classes are often certified at different stages in the case. For example, courts generally allow little—and in some instances no—discovery at the conditional certification stage of a collective action prior to considering and granting such a motion. Ide v. Neighborhood Rest. Partners, LLC, 32 F. Supp. 3d 1285, 1290–91 (N.D. Ga. 2014), aff'd, 667 Fed. App'x 746 (11th Cir. 2016). Thus, plaintiffs often file for conditional certification fairly early in the case, and wait to move for Rule 23 certification until after more fulsome discovery.

Typically, if a court conditionally certifies a collective action, the employer might move for decertification around the same time as plaintiff(s) move for Rule 23 certification.

For more information on hybrid wage and hour class and collective actions, see the sections below entitled "Summary Judgment in Hybrid Class and Collective Actions," "Decertification of Collective Actions and Opposition to Class Certification in Hybrid Actions," and "Hybrid Class and Collective Action Settlement Agreements." For related guidance on hybrid wage and hour class and collective actions, see Hybrid Wage and Hour Section 216(b) FLSA Collective and Rule 23 Class Actions.

TYPES OF EMPLOYMENT DISCRIMINATION CLASS AND COLLECTIVE ACTIONS

This section addresses different kinds of employment discrimination class and collective actions.

Disparate Treatment Class and Collective Actions

In a disparate treatment class or collective action, a plaintiff claims that there is a "pattern or practice" of discriminatory treatment of individuals who are part of a particular protected class. To succeed in such a case, the plaintiff(s) must first certify a class, and then prove classwide liability. The plaintiff(s) bears the initial burden of showing classwide liability by proving, by a preponderance of the evidence, that disparate treatment is the defendant's "standard operating procedure." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977). Plaintiff(s) typically attempt to do so by combining statistical evidence in an effort to create an inference of discrimination along with anecdotal evidence of individual instances of discrimination.

The employer may then rebut the plaintiff's prima facie case, either by attacking the statistical evidence, offering alternative statistical evidence, or by presenting their own anecdotal evidence that rebuts any inference that discrimination is the standard operating procedure. Assuming that the plaintiff(s) is/are successful, the court may find that a pattern and practice of discrimination existed, and move on to determining the monetary relief, if any, to be granted to individual class members. During this stage, each class member has a rebuttable presumption that he or she was subject to the unlawful discrimination, but the employer can overcome this rebuttable presumption with evidence of its own.

For more information on disparate treatment, see Disparate Treatment: Key Considerations.

Disparate Impact Class and Collective Actions

In contrast to discriminatory treatment cases, in a disparate impact case, plaintiff(s) argue that a particular employment practice that is neutral on its face creates an unlawful adverse impact on individuals of a particular protected class. In a disparate impact class action, once a class is certified, the plaintiff(s) bears the burden to show, through statistical evidence, that the challenged practice has a substantial disparate impact on a protected class of people. 42 U.S.C. § 2000e-2(k)(1)(A)(i). Under Title VII, the burden then shifts to the employer to show that the practice is "job related for the position in question and consistent with business necessity." Id. If the employer meets its burden, the burden then shifts back to the plaintiff to show that the employer refused to use an alternative and effective practice that would have had a lesser disparate impact. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

Under the ADEA, once the burden shifts to the employer, the employer must show that the practice is based on a "reasonable factor other than age (RFOA)," and does not need to meet the higher burden of showing that it is job related and consistent with business necessity. See Meacham v. Knolls Atomic Power Lab., 554 U.S. 84 (2008). If the employer shows that the practice is based on a reasonable factor other than age, that ends the inquiry and the burden does not shift back to the plaintiff(s). Smith v. City of Jackson, 544 U.S. 228, 242–43 (2005).

It is common for plaintiff(s) to bring both disparate treatment and disparate impact claims in the same case. For example, a plaintiff(s) might allege under both theories that an employer discriminated through a reduction in force. But, there is an inherent tension that exists in alleging both that the employer intentionally discriminated against a group of people, and that the complained about action was facially neutral. An employer can exploit this tension in seeking to defeat one or both theories of discrimination.

For more information on disparate impact, see Disparate Impact Claims: Key Considerations and Disparate Impact Analysis: Key Steps and Tests.

Other Types of Class and Collective Actions

Class and collective actions can also involve allegations that plaintiff(s) and potential class members suffered a hostile work environment based on a protected class or that an employer failed to reasonably accommodate individuals with disabilities under the ADA. See Harassment Claim Prevention and Defense and Americans with Disabilities Act: Employer Requirements and Reasonable Accommodations.

Because these types of cases tend to involve more individualized facts, they may be less susceptible to class certification after the Supreme Court's decision in Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011). For additional information about Dukes, see Opposing Conditional Certification (for Collective Actions Only), below. Also, see 4 Larson on Employment Discrimination § 81.05, subsection [3].

RESPONDING TO THE COMPLAINT (INCLUDING POTENTIAL DISPOSITIVE MOTIONS)

This section provides strategies for responding to an employment discrimination class and/or collective action complaint, including, among other things, dispositive motions, such as a motion to dismiss.

Investigation into Claims

As is true in any employment discrimination case, the first step upon receiving an employment discrimination class or collective action complaint is to undertake an investigation. In employment class and collective action cases, in addition to investigating the plaintiff(s)' substantive allegations, you should also begin to investigate whether the underlying claims are susceptible to class treatment.

Thus, the investigation should proceed along two tracks, with the first focused on the plaintiff(s)' individual claims and the second focused on the classwide nature of the claims. As to the investigation into the plaintiff(s), this will entail a review of pertinent documents, including plaintiff(s)' personnel documents, as well as interviews of key witnesses.

As to the class investigation, it is important to review any applicable written corporate policies and interview managers who can demonstrate that the alleged claims are not subject to group proof and/or not based on a common policy or practice of the company. For example, in discrimination claims resulting from a mass layoff, it is important to interview managers at different levels of the organization who can attest to the decentralized nature of the decision-making process. Similarly, in cases involving discrimination in promotions or pay, developing evidence that decision-making was made at a local, department, or position level rather than corporate-wide, is of paramount importance as evidence of decentralized decision-making will make it easier to defeat class certification.

Another consideration at this stage is how to respond to the statistics you can expect plaintiff(s) to put on to demonstrate disparities among how different groups are treated. This includes thinking about what type of expert the employer should retain, what type of analysis the expert should do, and the appropriate time to begin

that work. We provide additional guidance on experts in Expert Witness Issues, below. One of the first steps in this process will be thinking about the different sources of data pertinent to the claims at issue and how the data can be analyzed. For example, in a pay discrimination case, it will be important to analyze payroll and HR data systems to determine what factors could be used in a regression analysis to assess the impact of nondiscriminatory factors on pay.

Implement Document Retention Measures

It is also important at the outset of a case to ensure that the employer retains all relevant documents and data and that it implements litigation hold procedures to ensure continued retention. See Litigation Hold Letter to Employer-Client (Employment Dispute). Once you and the employer complete the initial investigation as to what types of information are relevant to the claims at issue, you should immediately implement procedures to lock down relevant data and documents. In cases where it is expected that potentially relevant data and documents will be extensive, it may also be beneficial to negotiate with opposing counsel over what specific items or sample of items the parties will retain, as this can result in cost savings and limit disputes over whether retention measures were sufficient going forward.

Consider Filing a Motion to Dismiss

When served with an employment discrimination class or collective action, it is important at the outset of the case to quickly determine whether there exists a viable motion to dismiss the claims. However, pay careful consideration before bringing such a motion. Courts are often reluctant to dismiss class or collective actions prior to the parties taking discovery, making it difficult for employers to succeed in dismissing such claims on the pleadings. Additionally, moving to dismiss may (inadvertently) adversely impact later attempts to oppose class or collective certification as arguments made in a motion to dismiss can be resuscitated by opposing counsel in briefing.

On the other hand, a successful motion to dismiss can greatly benefit employers by eliminating or narrowing the plaintiff(s)' claims, limiting the scope of discovery, and/or requiring plaintiff(s) to plead their claims with greater specificity.

Failure to State a Claim

First, consider filing a motion to dismiss under Fed. R. Civ. P. 12(b)(6) if plaintiff(s) have not alleged sufficient facts to state a plausible claim for a violation of the employment discrimination laws. An employment discrimination class complaint, like any other complaint, must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged." Id. Neither "naked assertion[s]" nor "conclusory statements" are sufficient. Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557). Thus, for example, if presented with a failure to hire claim where the complaint alleges that plaintiff(s) were not hired on account of their protected status, but fails to provide factual support for that assertion—such as alleged discriminatory comments made by the interviewers or an ad or campaign that allegedly targets applicants outside of the protected class—consider a motion to dismiss.

Failure to Exhaust Administrative Remedies

Plaintiffs must exhaust their administrative remedies before suing a private employer in federal court under Title VII, the ADA, or the ADEA. 42 U.S.C. § 2000e-5(e) (Title VII); 42 U.S.C. § 12117(a) (ADA); 29 U.S.C. § 626(d) (ADEA). (The EPA is also enforced by the EEOC, and an individual may choose to file an EEOC charge asserting EPA violations. However, the EPA does not require the individual to exhaust administrative remedies before filing

a lawsuit in court.) Title VII and ADA plaintiffs must file a charge with the EEOC within 180 or 300 days (depending on state law) of the date of the adverse employment action and must file a lawsuit within 90 days of receiving a right to sue letter from the EEOC. Hall v. E.I. du Pont de Nemours & Co., 586 Fed. Appx. 860, 862 (3d Cir. 2014). The ADEA has somewhat different requirements. It explicitly contemplates early termination of an EEOC investigation and allows a private plaintiff to file suit 60 days after filing a charge with the EEOC, without first obtaining a right-to-sue notice. See McPherson v. New York City Dep't of Educ., 457 F.3d 211, 215 (2d Cir. 2006). Accordingly, before filing an answer to the Complaint, it is important to determine whether the plaintiff(s) has/have exhausted his/her/their administrative remedies and consider filing a motion to dismiss if the plaintiff(s) never filed a charge or failed to do so in a timely manner (or if the lawsuit is not within the scope of the charge).

Relatedly, consider whether there is a basis to argue that the EEOC charge did not include class claims, as courts generally require a plaintiff to have filed an administrative charge containing class allegations prior to filing a class action complaint. See Basch v. Ground Round, Inc., 139 F.3d 6, 9 (1st Cir. 1998) (EEOC charge must give "EEOC and the employer adequate notice of allegations of class-wide discrimination" to allow subsequent lawsuit to survive); Kloos v. Carter Day Co., 799 F.2d 397, 400 (8th Cir. 1986) ("To be faithful to the purposes of the filing requirement, an administrative charge must allege class-wide age discrimination or claim to represent a class to serve as the basis for an ADEA class action.").

However, some courts have allowed class claims to proceed where investigation of the class issues "could reasonably be expected to grow out of" the EEOC charge, so carefully look at the law in your jurisdiction to determine whether there exists a viable motion to dismiss on this basis. See Paige v. California, 102 F.3d 1035, 1041–42 (9th Cir. 1996) (individual race discrimination charge could support class action); Fellows v. Universal Rests., Inc., 701 F.2d 447, 450–51 (5th Cir. 1983) (fact that EEOC charge and investigation did not cover class allegations not sufficient basis to deny class: "[A] cause of action for Title VII employment discrimination may be based, not only upon the specific complaints made by the employee's initial EEOC charge, but also upon any kind of discrimination like or related to the charge's allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges of discrimination.").

Claims Barred by Release

Another avenue to explore is whether one or more plaintiffs have released their claims by signing a severance agreement or other similar document. When faced with an age discrimination case, it is important to keep in mind that the ADEA sets forth detailed requirements for enforceability of a release that may make dismissal at the pleading stage difficult. See 29 U.S.C. § 626(f) (release must (1) be drafted in ordinary language, (2) specifically note that the employee is waiving his rights under the ADEA, (3) provide the employee with consideration over and above that to which he is already entitled, (4) advise the employee to consult an attorney, (5) provide the employee with 21 or 45 days to consider the release (depending on the circumstances), (6) grant the employee seven days to revoke the agreement after it is executed, and (7) meet additional requirements if provided in connection with a group layoff). For more information on the ADEA's requirements for releasing age discrimination claims, see Older Workers Benefit Protection Act (OWBPA): Compliance Tips.

Moreover, even if a viable motion to dismiss may exist based on a signed release, employers sometimes choose to wait to move for summary judgment after they have had the opportunity to depose the plaintiff(s) and foreclose arguments that the employer fraudulently induced the release, or the release is otherwise invalid. In any event, investigate whether any plaintiff(s) signed releases early in the litigation to ensure that the employer includes any defenses based on releases in an answer, where applicable, and that the employer explores the release issue as necessary in discovery.

Consider Filing a Motion to Strike Class and Collective Action Allegations

You may also want to consider filing a motion to strike or dismiss the class and/or collective action allegations. It may be worthwhile to file this type of motion if the class and/or collective action allegations are insufficient on their face, either in whole or in part. For example, after the Supreme Court decision in *Dukes*, a complaint that alleges solely that discretionary decision-making resulted in discrimination, without specifically alleging that the discretion was exercised in a common way, may be susceptible to a motion to strike the class allegations. See, e.g., Scott v. Family Dollar Stores, Inc., 733 F. 3d 105 (4th Cir. 2013) (upholding motion to dismiss where original complaint alleged only discretionary decision-making). Similarly, if the proposed class definition includes individuals with time-barred claims, it may be worthwhile to file a motion to strike the untimely portion of the class and/or collective action allegations. See, e.g., Enoh v. Hewlett Packard Enterprise Company, 2018 U.S. Dist. LEXIS 115688, at *42–43 (N.D. Cal. July 11, 2018) (granting motion to strike class allegations on grounds that the class definitions were temporally overbroad).

However, absent one of the above situations, think carefully before filing a motion to strike class and/or collective action allegations. If you have a weak motion, a court will likely deny it and the motion may only serve to preview arguments you may make in class or collective action certification briefing.

Consider Filing a Motion to Compel Arbitration

Another key consideration is whether any plaintiff(s) has/have signed an arbitration agreement or employment agreement compelling arbitration, an area that is likely to take on increased significance due to the Supreme Court's ruling in Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018). In Epic, the Supreme Court decided that class and collective action waivers in arbitration agreements are lawful and must be enforced under the Federal Arbitration Act (FAA). In light of this ruling, carefully examine any arbitration agreements entered into by the plaintiff(s) to determine if there is a viable basis to move to compel arbitration. Although arbitration agreements, if properly drafted, can prohibit class arbitration, poorly drafted agreements may be interpreted by arbitrators as allowing class arbitration, which many employers view as less favorable than class litigation in court. See Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452–53 (2003) (where arbitration agreement is ambiguous on whether it allows class arbitration, issue is for arbitrator to decide). Thus, you should carefully review the agreement itself to determine if you have a solid class and collective action waiver, and, if so, consider moving to compel individual arbitration. In contrast, if the agreement is ambiguous as to whether it allows class arbitration, it may be a better strategic decision to litigate in court where an experienced judge decides whether to certify a class or collective action at the appropriate time.

For more information on compelling arbitration and class action waivers, see Arbitration Agreement and Class Action Waiver Enforcement in Employment Litigation.

Consider Filing a Motion to Transfer Venue

In class or collective actions challenging one alleged universal corporate policy, it may be advisable to move under 28 U.S.C. § 1404(a) to transfer venue to the district in which the employer is headquartered. See, e.g., Sovik v. Ducks Unlimited, Inc., 2011 U.S. Dist. LEXIS 40951, at *1 (M.D. Tenn. Apr. 13, 2011) (transferring case to district where defendant had its headquarters). See also Change of Venue—17 Moore's Federal Practice - Civil Chapter 111.syn. This could result in cost savings for the employer if many of the relevant documents and potential 30(b)(6) witnesses (i.e., witnesses who testify on behalf of the company) are located at its headquarters. See Rule 30(b)(6) Deposition Strategies for Employer-Defendants in Employment Cases. This strategy may be particularly effective if plaintiffs and putative collective or class members are spread across a large geographic area and plaintiffs' chosen venue lacks a strong connection to the claims in the case.

Note, however, that the arguments made in support of a motion to transfer venue may be inconsistent with any subsequent motion to oppose class or collective action certification. For example, to succeed on a motion to transfer the case to the venue of the employer's headquarters, the employer typically has to argue that key witnesses and documents are located there. This argument may undercut subsequent arguments in opposition to class certification that the employer is decentralized and differences in practices between various company locations preclude class certification. Therefore, before filing any motion to transfer venue, fully consider the benefits and risks.

Answer the Complaint

If you decide not to file a motion to dismiss, when filing an answer be sure to include all defenses pertinent to all claims in the case. For example, if the case involves both disparate impact and disparate treatment claims, insert defenses to both claims. Also be sure to include all defenses you intend to assert to class or collective action certification, and all procedural defenses like failure to exhaust administrative remedies or jurisdictional issues, as well as any release-based defenses. See Answer and Defenses (Employment Discrimination Class or Collective Action).

OPPOSING CONDITIONAL CERTIFICATION (FOR COLLECTIVE ACTIONS ONLY)

This section addresses strategies for opposing motions for conditional certification in employment discrimination collective actions.

Conditional Certification Standard

Some courts hold that "[t]he standard for conditional certification is a lenient one that typically results in certification." Heath v. Google Inc., 215 F. Supp. 3d 844, 851 (N.D. Cal. 2016); see Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1218 (11th Cir. 2001) (same). Typically, plaintiffs move for conditional certification at an early stage of the lawsuit before discovery has commenced. "At this stage of analysis, courts usually rely only on the pleadings and any affidavits that the parties have submitted." Leuthold v. Destination Am., Inc., 224 F.R.D. 462, 468 (N.D. Cal. 2004). According to some courts, to succeed in their bid, plaintiffs must show "nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan." Thiessen v. Gen. Electric Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001). Further, the plaintiffs' claims and positions need not be identical to the potential opt-ins, they need only be similar. Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir. 1996), cert. denied, 519 U.S. 982 (1996).

Strategies for Opposing Conditional Certification

If possible, consider pushing for a case schedule that permits the parties to take some discovery prior to the conditional certification motion. This will enable you to develop evidence that the plaintiff(s)' experiences are unique and not reflective of a single corporate practice. Courts vary in their approaches to allowing discovery prior to conditional certification, so these efforts may or may not be successful.

Even if the court does not allow for discovery prior to deciding plaintiff(s)' motion for conditional certification, arguments can still be successful that plaintiff(s) are not similarly situated to the potential collective action members based on the factual record set forth by the plaintiff(s) and the employer's own affidavits.

First, you can oppose certification on the basis that the plaintiff(s)' affidavits are insufficient. For example, they may be factually too weak to establish a company policy. In Jones v. RS&H, Inc., 2017 U.S. Dist. LEXIS 60088, at *16 (M.D. Fla. Apr. 20, 2017), the court denied a conditional certification motion where the plaintiff relied on alleged discriminatory statements to support his claim of a company-wide pattern of age discrimination, but his

affidavits failed to identify by name or specific job title the people who made the alleged discriminatory statements. Similarly, the affidavits may show that the plaintiff(s)/declarant(s) are too dissimilar from each other to warrant conditional certification. For example, in Roberts v. Target Corp., 2013 U.S. Dist. LEXIS 132431, at *14 (W.D. Okla. Sept. 17, 2013), the court denied a conditional certification motion that had been supported by affidavits from two plaintiffs because the two individuals "were employed at different stores in different states, had different supervisors, and were at different levels in the organizational hierarchy." Or the affidavits may simply be too individualized and fail to allege a sufficient company-wide policy. In Gallender v. Empire Fire & Marine Ins. Co., 2007 U.S. Dist. LEXIS 7127, at *8 (S.D. Miss. Jan. 31, 2007), the court denied conditional certification because the plaintiffs' affidavits only focused on the alleged age-animus of a particular manager, which failed to sufficiently allege that the employer had a policy or plan of discriminating against employees over the age of 40.

Second, it can be helpful to secure your own declarations from putative collective action members, or at least managers, showing variation by location, department, or position regarding the challenged practice to refute the existence of any alleged classwide policy. While courts vary in their deference to these types of affidavits, at the minimum, they may suggest that plaintiff(s) may have difficulty down the line proving the merits of the case or keeping the collective action certified at the second stage.

While these arguments may ultimately not be successful at the lenient conditional certification stage, they can ultimately set the stage for decertification (and/or Rule 23 certification arguments in a hybrid case) later in the case, and there is often a strategic advantage in giving the court a preview of your theory of the case early on.

PLANNING AND CONDUCTING DISCOVERY IN EMPLOYMENT DISCRIMINATION CLASS AND COLLECTIVE ACTIONS

At the outset of any class or collective action, you should give careful consideration as to how to structure the case. Typically, there may be a period of discovery leading up to an anticipated collective and/or class certification motion, followed by briefing on class certification, and then a period of class discovery if the court certifies a class. However, it may benefit an employer to move for summary judgment at or before the time the plaintiff(s) move for either conditional or class certification, as a successful summary judgment motion on the plaintiff(s)' individual claims may moot the class or collective action certification motion.

Under Federal Rule of Civil Procedure 26(f), at the start of discovery of a case, the parties must hold a conference to discuss discovery issues and set a case schedule. As a result of that conference, the parties jointly prepare a discovery plan and case schedule to submit to the court for approval, which is often referred to as the Rule 26(f) report. In negotiating with opposing counsel over the Rule 26(f) report, for the reasons laid out above, you may want to consider pushing for a case schedule that allows summary judgment briefing to occur before or simultaneous to class and/or collective action briefing. You should also discuss and include in the Rule 26(f) report a proposal for the timing of expert discovery. For more information on experts and summary judgment in employment discrimination class and collective action cases, see Expert Witness Issues and Summary Judgment, below.

Once discovery starts, it can be expected that both sides will serve requests for production, interrogatories, and deposition notices on the other side. See, e.g., Interrogatories (Defendant to Plaintiff) (Employment Discrimination Class or Collective Action) and Document Requests (Defendant to Plaintiff) (Employment Discrimination Class or Collective Action). Carefully think through all the documents and information you can seek from the plaintiff(s) to defend against the class allegations, individual allegations, and damage claims. For example, it can be helpful to obtain copies of social media posts from plaintiff(s) that might provide contemporaneous information about events that form the basis for their discrimination claims. Email, text messages, and messages from other platforms

can similarly contain useful admissions about allegedly discriminatory events. Although employers typically cannot serve discovery on absent class members prior to Rule 23 class certification, see, e.g., Mehl v. Canadian Pac. Ry., 216 F.R.D. 627, 631–32 (D.N.D. 2003) (denying discovery of absent class members prior to class certification), think through whether the plaintiff(s) or their attorneys may have information about potential class members that may be useful. For example, the plaintiff(s) may have copies of communications with potential class members or opt-ins that you could potentially use to defeat class or collective action certification.

In collective actions, it is important to start planning for decertification at the very start of discovery, or, if you have phased discovery, at the start of the second phase of discovery. You should consider the unique facts of your case in determining how many opt-in plaintiffs from whom to seek discovery to support a motion for decertification. In some collective actions, particularly smaller ones, it may make sense to seek discovery from all, or substantially all, opt-ins. You can argue that, because these individuals affirmatively chose to join the action, defendant should have the right to develop facts against these individuals' claims as well. See, e.g., Ingersoll v. Royal & Sunalliance USA, Inc., 2006 U.S. Dist. LEXIS 50912, at *7–9 (W.D. Wash. July 25, 2006) (permitting depositions of all opt-in plaintiffs). Some courts only permit the employer to depose a percentage of opt-ins. See, e.g., Scott v. Chipotle Mexican Grill, Inc., 300 F.R.D. 188, 192–93 (S.D.N.Y. June 6, 2014) (allowing employer to depose 10% of opt-in plaintiffs); Hill v. R+L Carriers Shared Servs., LLC, 2010 U.S. Dist. LEXIS 105699, at *4–7 (N.D. Cal. Sept. 22, 2010) (employer could depose 28% of opt-in plaintiffs); Sylvester v. Wintrust Financial Corp., Sylvester v. Wintrust Fin. Corp., 2014 U.S. Dist. LEXIS 135907, at *16–17 (N.D. Ill. Sept. 26, 2014) (court permitted depositions of 32% of plaintiffs). No matter what, the employer should insist on having the ability to select the opt-ins who will be subject to discovery. Having the plaintiff(s) select the opt-ins subject to discovery, or even a random selection of opt-ins subject to discovery, can prejudice the defendant's ability to defend the case and prevent the defendant from securing evidence necessary to defeat class certification.

In collective actions, the employer should also consider seeking permission to send written discovery (even if a limited number of interrogatories and document requests) to all members of the opt-in class. The answers given in this limited written discovery can assist the defendant in selecting opt-ins for deposition discovery. Any opt-ins who fail to respond to discovery are subject to dismissal from the case.

It is also important to develop a strategy for responding to offensive discovery early on. Although employers almost always turn over copies of basic documents like anti-discrimination policies, the plaintiff(s)'s employment documents, and training materials, employers do not always consider how they intend to respond to requests for the production of data files, emails, and other electronically stored information. Investigating the types of data available and the burden of pulling this data from various sources prior to negotiating with opposing counsel over production of these files can be an effective way to limit the scope of these productions.

Common Discovery Issues

Disputes often arise regarding the scope of production of electronic discovery. Two of the most common sources of electronically stored information in these cases are (1) databases that house personnel, hiring, or payroll data; and (2) emails, instant messages, and other electronically stored messaging. Disputes often arise as to the scope of production of both of these sources.

For example, as to databases, there may be disputes surrounding the scope of the data to be produced. Plaintiff(s) often push for as broad of a production as possible, while employers often want to limit production to the specific department, location, or job where the plaintiff worked, unless the employer determines that broader production is justified to facilitate its own affirmative statistical case. Employers also often resist production of such data where it has been archived and is difficult to produce. To prevail on limiting production of these files,

an employer must be able to show that it is not reasonably accessible and that there is no good cause for it to be produced. Fed. R. Civ. P. 26(b)(2)(B). These types of disputes are highly fact specific and likely will come down to the particulars of the data, its importance to the case, and how burdensome production is. See North Shore-Long Island Jewish Health Systems, Inc. v. MultiPlan, Inc., 325 F.R.D. 36, 50–52 (E.D.N.Y. Mar. 28, 2018).

The scope of the email and other electronically stored information production is also likely to be an issue. It is becoming more common for parties to negotiate the scope of an ESI production early in the case. In these cases, typically the parties will agree upon a set of ESI custodians and search terms to be run on those custodians. However, disputes may arise in the course of these negotiations that may require court intervention.

DEPOSITION TIPS

In an employment discrimination class or collective action, plaintiff(s) will likely depose the employer's corporate representative pursuant to Federal Rule of Civil Procedure 30(b)(6), and will likely depose managers and human resources professionals as well. The employer will likely depose the plaintiff(s) and opt-in plaintiff(s) (in a collective action) at the minimum. Before depositions start, you should spend some time carefully developing themes and theories of the case so that you can fully educate your witnesses on them and use them to develop testimony from the plaintiff(s). To do so, interview relevant witnesses, review documents produced by both sides, and review the legal theories in the case.

Receiving a 30(b)(6) Deposition Notice

It is common in employment discrimination class and collection actions to receive a 30(b)(6) deposition notice for a corporate representative to testify about key topics. Plaintiff(s) resort to this tool to get information about general employment policies and practices to develop evidence to support their class and/or collective certification motions and the merits of their case. The specific topics will depend on the nature of the claims at issue. For example, in a case alleging that a reduction in force led to discrimination against a particular protected class, a 30(b)(6) notice might include topics like:

- The process used to identify departments and jobs for termination
- The process used to select individuals within those departments and jobs for termination
- Individuals involved in making termination decisions
- Policies and procedures used to evaluate employees
- Any internal assessments/audits of whether the terminations had a disparate impact on particular protected classes
- Any internal assessments/audits related to the protected class at issue
- Any diversity studies completed
- Training provided, if any, concerning EEO policies/practices
- Past lawsuits/charges involving that protected group
- Internal complaints regarding discrimination against that protected group and how the company has handled such internal complaints
- Databases used to store information about selections for reductions in force (RIFs)

Preparing a 30(b)(6) Witness for Deposition

The first thing to do upon receiving a 30(b)(6) notice is select the witness or witnesses who will testify in response to the notice. First, this requires consideration of whether one 30(b)(6) witness will testify or whether multiple witnesses will cover different 30(b)(6) topics. If there is only one witness, the plaintiff may be limited to the seven hours dictated by Rule 30 for all topics, which may have some strategic benefit. However, this benefit may be offset by selecting a witness who will be so unfamiliar with the topics that he or she will need excessive education and preparation and/or will not be confident enough to be a good witness. Balance these concerns in light of the specific topics at issue.

Next, you will need to select your 30(b)(6) witness(es). This will require interviewing multiple company representatives. It is best to choose someone who is at least somewhat familiar with the topics or who can easily be educated on the topics contained in the notice. It is also best to choose someone who either has prior experience as a witness, or who has personal traits that will likely make the person a good witness (e.g., confident and not easily rattled, good memory, ability to explain things clearly).

Once you select the 30(b)(6) witness(es), prepare materials and an outline to use to prepare the witness(es) for the deposition. The outline should take into account the relevant legal standards applicable both to the merits of the case and as to class certification, and then go through the specific topics to be covered with each witness. Include all relevant in the prep materials and reference them in the outline. The specific nature of the prep materials and outline will depend on the topics to be included and the claims in the case. For example, if you receive a 30(b)(6) notice along the lines of the above sample 30(b)(6) notice in a mass layoff case, be sure to include any written guidance given about selection for the RIF, any data or documents used in decision-making, any emails discussing the criteria or selection process for the RIF, any disparate impact analyses performed, as well as more basic documents like antidiscrimination policies and training, and copies of past/lawsuits/charges and internal complaints.

When preparing the 30(b)(6) witness(es), explain the relevant legal standards, your themes, the themes you expect the other side to use, and then substantively prepare the witness(es) on the topics to be covered. In the case of the above RIF example, be sure to educate the witness(es) on your themes about the selection process, the decentralized nature of the decision-making, and explanations for any purported disparities in the selection of different groups. It is also important to ensure that the witness(es) is/are familiar with key documents and data. It may be necessary to call in others within the company to educate the witness as to topics with which the witness is less familiar, as the witness will ultimately be testifying as to the employer's knowledge on each topic.

For more information on Rule 30(b)(6) depositions, see Rule 30(b)(6) Deposition Strategies for Employer-Defendants in Employment Cases.

Preparing for Other Manager Depositions

Plaintiff(s) may also depose other managers outside the 30(b)(6) context. Most of the same strategies for taking and defending 30(b)(6) depositions still apply, but you will need to prepare any other managers to speak about any topics as to which they have personal knowledge. The prep materials should include any documents in your production that relate to that witness.

Deposing Plaintiff(s)

As the employer, you will want to depose the plaintiffs in the case. Typically, it is best to depose the plaintiffs after they have responded to document requests and interrogatories, and after you have already produced documents related to that plaintiff (i.e., personnel file, emails, employment data, etc.).

Once you have scheduled the deposition, you will need to prepare by gathering all relevant documents and interviewing key witnesses. For example, you will likely want to speak to the plaintiffs' manager(s) and any human resources professionals familiar with the individual to gather information that may be useful in the deposition.

Next, create a detailed deposition outline. The outline should take into account the legal standards applicable to the claims, your themes, the other side's themes, key areas of questioning, and make sure to note the key admissions you are looking for in the deposition both as to the merits and class certification. The specific topics will vary depending on the specific allegations in the case. For example, in a case involving failure to promote a particular protected group, in addition to background topics, you may want to ask about:

- Employment history at company
- Knowledge of company anti-discrimination policies
- Work performance/evaluations
- Circumstances of individual's application for promotion
- Knowledge of selection process for promotions
- Information about other people in department who were selected and not selected
- Information about employee's department
- Establish employee's lack of knowledge of other departments
- Admissions concerning differences in different departments or lack of knowledge
- Seek admissions that promotion decisions were made at the department level
- Knowledge of comments/discrimination against protected group more broadly
- Damages related questions (i.e., efforts to seek employment elsewhere, any medical treatment sought, etc.)

For detailed deposition guidance in employment discrimination actions, see Deposing Plaintiffs in Employment Litigation. See also Deposition Questions (Defendant to Plaintiff) (Discrimination, Harassment, or Retaliation).

For related information on depositions in wage and hour class and collective actions, see Discovery Strategies for Employers in Wage and Hour Class and Collective Actions — Taking and Defending Depositions. See also Depositions in Wage and Hour Exemption Misclassification Cases: Employer Best Practices.

EXPERT WITNESS ISSUES

Expert witnesses are typically a key part of employment discrimination class and collective actions. They often provide reports and testimony (1) supporting or opposing the merits of the case, (2) supporting or opposing class certification, and (3) regarding damages.

Types of Experts

The types of experts vary, but it is a near certainty that each side will have a statistical expert to prove or disprove the merits of the claim and to support or oppose class certification. Other types of experts may include economists, human resources experts, organizational psychology experts, sociologists, and survey researchers.

Consider whether to retain a testifying expert, a consulting expert, or both. A testifying expert typically submits an expert report, may be deposed, and may testify at trial. Although many communications with a testifying

expert are subject to the attorney-client privilege, certain communications are not. For example, communications between counsel and a testifying expert identifying facts or data counsel provided to the expert that the expert considered in formulating his or her opinion, describing assumptions the expert relied upon in forming his or her opinions, and communications related to the expert's compensation are non-privileged and discoverable. Fed. R. Civ. P. 26(b)(4).

In contrast, a consulting expert typically advises counsel on areas within his or her area of expertise, and all communications with that individual are typically subject to the attorney-client privilege. Many lawyers choose to work with a consulting expert first to develop strategy and work through analyses, and then use a testifying expert to further develop the ideas that originated with the consulting expert.

If you retain both consulting and testifying experts, bear in mind that you should not permit consulting experts to communicate with testifying experts, as those communications would not be subject to the attorney-client privilege and could be discoverable. See, e.g., In re M/V MSC Flaminia, 2017 U.S. Dist. LEXIS 119146, at *176–77 (S.D.N.Y. July 28, 2017).

When to Retain an Expert

It is typically best to retain experts as early in the case as possible, particularly any consulting experts, as they can help you develop a case strategy. Experts can help you think through what types of discovery to seek, how to respond to discovery from the other side, how to frame motions before the court, and how to strategize to win on the merits or defeat class certification.

You will also want to ensure you retain your testifying expert sufficiently in advance of the deadline for the expert report set by your case management plan, or, if not addressed there, with the timing requirements set forth by Rule 26(a)(2)(D).

How to Retain an Expert

There are several ways to go about finding an expert. First, ask around your network for recommendations, both within your firm or company and among other employment lawyers. Typically, the best experts are well known and this can be an effective method of locating a proficient expert quickly and efficiently. Second, you should do some research into an appropriate expert for your type of case. For example, you can look at recent class certification decisions in your type of case to see which experts other firms or companies tend to use frequently.

Once you have a list of several possible experts, look carefully at their record to see if they have been excluded in other cases and if so, on what basis. If a particular expert has been excluded in many instances, it may be advisable to remove that expert from consideration.

Assuming you have a few possible candidates, you should then set some time to interview the experts. Although research can be very informative, there is no substitute for discussing the specifics of the case at a high level with an expert and ensuring that the expert is sufficiently qualified to perform the specific analysis required.

Your Expert's Analysis

The exact type of expert and analyses you retain an affirmative expert to do will depend on the specific types of claims at issue. Your affirmative expert will provide a report in support of your defense in the case instead of in response to a report from plaintiff(s)' expert. That affirmative expert will need to produce a report prior to trial that

complies with all requirements of Federal Rule of Civil Procedure 26(a)(2)(B), including containing a "complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B).

At minimum, you will likely want an expert to conduct a statistical analysis comparing how employees or applicants of a particular protected class were treated in comparison to employees or applicants outside of that protected class. Depending on the types of claims, that may include a selection rate comparison, which compares the rates at which different classes of individuals are selected or not selected for jobs, a comparison of the number of individuals in the workforce of different protected categories, or regression analyses, which isolate the impact of particular factors on personnel actions at issue in the case, such as pay, promotion, or selection for layoff. For more detail on these statistical analyses, see Use of Statistical Evidence, below. Plaintiff(s)' experts will attempt to rely on these types of analysis to prove that the protected trait at issue caused disparities in treatment. Defense experts will aim to demonstrate that there is no statistically significant difference among how the different protected groups are treated, at least after they control for relevant factors.

In a case involving particular selection mechanisms, also consider using an organizational psychologist, human resources expert, or other similar expert to opine on the appropriateness of the selection mechanism more broadly.

Retaining a Rebuttal Expert

It is preferable to have a rebuttal expert for each of the other side's witnesses. Your rebuttal witness will likely attack the other side's analytical models and assumptions in an effort to discredit the analysis performed. Retain rebuttal witnesses as early as possible, even before receiving the other side's expert report, since the process of selecting an appropriate expert may be time intensive.

Daubert Motions

Motions to exclude expert testimony are common in employment discrimination class and collective actions. In every case, consider whether there exists a basis to move to exclude the other side's expert and if so, when to make that motion pursuant to Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993). Under *Daubert*, which is codified in the Federal Rules of Evidence, a witness may only testify as an expert in federal court if he or she satisfies all of the following criteria:

- The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.
- The testimony is based on sufficient facts or data.
- The testimony is the product of reliable principles and methods.
- The expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702(a)–(d).

Although the issue of whether a full *Daubert* inquiry is required at the class certification stage remains unresolved following Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011), most courts conduct a fulsome Daubert analysis at the class certification stage to the extent that an expert's testimony is critical to the class certification inquiry. See, e.g., Campbell v. AMTRAK, 2018 U.S. Dist. LEXIS 70667, at *29 (D.D.C. Apr. 26, 2018); In re Blood Reagants Antirust Litigation, 783 F. 3d 183, 187 (3d Cir. 2015) (At the Rule 23 stage, "the plaintiff [must] demonstrate . . . that the expert testimony satisfies the standard set out in Daubert."); In re Carpenter Co., 2014 U.S. App. LEXIS 24707, at *10–11 (6th Cir. 2014) (appropriate for district court to analyze expert testimony offered in support of

class certification under Daubert); Ellis v. Costco Wholesale Corp., 657 F. 3d 970, 982 (9th Cir. 2011) (district court "correctly applied the evidentiary standard set forth in Daubert" at the class-certification stage); Am. Honda Motor Corp. v. Allen, 600 F. 3d 813, 815–16 (7th Cir. 2010). (Note that the Eighth Circuit conducts only a "focused Daubert analysis" at the class certification stage that "examine[s] the reliability of the expert opinions in light of the available evidence and the purpose for which they were offered." In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 611–14 (8th Cir. 2011)). Thus, if the other side is relying upon expert testimony in support of class certification, consider whether there exists grounds to move to exclude that expert.

There are generally three bases for seeking to exclude expert testimony in federal court, each of which we address below:

- The expert is not qualified by virtue of his or her "knowledge, skill, experience, training, or education."
- The expert testimony is not relevant (i.e., will not help the trier of fact to understand the evidence or to determine a fact in issue).
- The expert testimony is not reliable.

Fed. R. Evid. 702.

Excluding the Expert Because He or She Is Not Qualified

An expert must be qualified to testify about the specific topic upon which he or she is called to opine to be admissible. To the extent that the expert does not have expertise in that area, there may be grounds to exclude his or her testimony. Given that experts tend to be retained in areas in which they are qualified, this is a relatively uncommon basis for a motion to exclude expert testimony. However, you should certainly evaluate any experts proffered by the other side to ensure they are properly qualified to testify about the subject matter at hand.

Excluding Expert Testimony Because It Is Not Relevant

In determining relevance, courts tend to look at whether there is a sufficient nexus between the issues in the case and the expert's opinion. If there is not, the court may exclude the expert opinion. Daubert, 509 U.S. at 591. For example, expert testimony on other practices an employer could have used instead of the practice at issue is likely to be deemed to be irrelevant, and expert testimony on industry standards may not be relevant for similar reasons. See, e.g., Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 84 (3d Cir. 2017) (in ADEA reduction in force case, expert testimony on 20 reasonable practices employer could have used when conducting RIF was not relevant to whether the employer's actual practice was reasonable); EEOC v. Morgan Stanley & Co., 324 F. Supp. 2d 451, 464 (S.D.N.Y. 2004) (expert report noting that Morgan Stanley's compensation system was consistent with industry practices was "irrelevant to a determination of whether the company discriminated").

Excluding Expert Testimony Because It Is Not Reliable

As to reliability, under Rule 702, expert testimony is reliable if it is (1) "based on sufficient facts or data," (2) "the product of reliable principles and methods," and (3) "the expert [] reliably applied the principles and methods to be the facts of the case." Fed. R. Evid. 702(b)–(d). In considering whether expert testimony is reliable, Daubert also sets forth additional, non-exhaustive factors that courts should consider: "the theory's testability, the extent to which it 'has been subjected to peer review and publication,' the extent to which a technique is subject to 'standards controlling the technique's operation,' the 'known or potential rate of error,' and the 'degree of acceptance' within the 'relevant scientific community.'" United States v. Romano, 794 F. 3d 317, 330 (2d Cir. 2015) (quoting Daubert, 509 U.S. at 593–94). These factors are flexible and courts should apply them mechanically in

every case. Kumho Tire Co v. Carmichael, 526 U.S. 137, 141, 149–50 (1999). District courts will consider other factors where appropriate. Id.

In employment discrimination class and collective actions, *Daubert* motions often argue that the opposing expert's analysis is not reliable because it aggregates data in particular ways. For example, one side may do a regression analysis across an entire company that suggests that protected class has a statistically significant impact on selection rate, while the other side does an analysis by region that suggests that protected class does not have any statistically significant impact on selection rate. See, e.g., Ellis v. Costco Wholesale Corp., 285 F.R.D. 492 (N.D. Cal. 2012) (plaintiffs' expert found gender-based disparities based on nationwide aggregate data, and defendant's expert found no disparities when he performed the same analysis region by region). In that instance, both sides may file dueling *Daubert* motions challenging the opposing expert's report. Similarly, *Daubert* motions may arise over whether particular factors should or should not be included in regression analyses. There is no one statistical method that is always appropriate, and different types of methodologies may be equally reliable, in which case Daubert motions may not succeed. See, e.g., Karlo, 849 F.3d 61, 82–84; Brown v. Nucor Corp., 785 F.3d 895, 904 (4th Cir. 2015).

Determining Whether to File a Daubert Motion

In deciding whether to file a *Daubert* motion, consider the strength of the motion, the stage of the litigation, and how significant the expert testimony is to the other side's case. For example, while a very strong motion may result in the exclusion of potentially harmful expert opinions, a weak motion may only serve to preview arguments you intend to use in class certification or summary judgment, thus giving the other side a better chance to respond to them. You should also consider the procedural posture of the case in making this determination. Courts often scrutinize experts more carefully at the summary judgment or pretrial stage than at the class certification stage. Finally, consider how important the testimony is to the other side's case. Daubert motions are time intensive, costly, and take resources away from other aspects of litigation. If the expert testimony is not particularly harmful to your case or is relatively unimportant to the legal framework at issue, it may be advisable not to file a Daubert motion.

USE OF STATISTICAL EVIDENCE

Statistical evidence is typically a significant part of an employment discrimination class or collective action, as it is central to refuting both disparate impact or disparate treatment discrimination. Parties generally use statistical evidence to compare how a particular protected group is treated in comparison to the non-protected group.

Types of Statistical Analysis

You should give some thought to what type of statistical analysis will be most helpful to the defense of the case, and what type of analysis the plaintiff(s) are likely to conduct. The specifics of the analysis will depend on the type of claims in the case.

Selection Rate Comparison

One common type of analysis is a selection rate comparison, which compares the percentage of the protected class at issue that are selected with the selection rate for the protected group. This is a very common analysis used in disparate impact hiring, promotion, and/or layoff cases. See, e.g., Kerner v. City and Cty. of Denver, 2015 U.S. Dist. LEXIS 131153, at *10–13 (D. Colo. Sept 29, 2015) (using selection rate comparison to show disparate impact in hiring based on use of test). Selection rate comparisons should generally take into account relevant, nondiscriminatory factors that the employer relied upon in making its selections. For example, in Campbell, 2018 U.S. Dist. LEXIS 70667, at *97–98, in denying class certification, the court refused to rely on plaintiffs' selection rate comparison showing that African American employees were underrepresented because it failed to consider

seniority, previous work experience, or education, which were factors the company took into account in making selection decisions.

Selection Rate Analysis

A related analysis, known as a potential selection rate analysis, compares the percentage of the protected class in the potential applicant pool that meets the employer's requirement with the percentage of the protected group that meets the same requirement. This type of analysis is often used instead of a selection rate comparison when the plaintiff alleges that the challenged requirement might deter people of the protected class at issue from applying. See, e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (relying on potential selection rate statistics showing that that employer's height and weight restrictions would exclude over 40% of the female population but less than 1% of the male population). Selection rate analysis is particularly common in disparate impact hiring cases. See Disparate Impact Analysis: Key Steps and Tests.

Regression Analysis

Regression analysis is another common type of statistical analysis that is particularly common in pay discrimination and mass layoff cases. Regression analysis aims to show the extent to which discrimination allegedly influenced decisions by accounting for all other variables that could have led to the decision. For example, in a pay discrimination case, a common regression analysis might try to account for other variables that could impact pay like education, experience, and performance ratings to isolate the impact of being in a particular protected class. See, e.g., Zuniga v. Bernalillo Cty., 319 F.R.D. 640, 650–51 (D.N.M. 2016) (regression analysis controlling for grade and experience in a pay discrimination suit). While a regression analysis does not need to include every measurable variable to be admissible, the exclusion of relevant factors may affect the weight the court gives the evidence. Bazemore v. Friday, 478 U.S. 385 (1986); Morgan v. United Parcel Service of Am., Inc., 380 F.3d 459, 468–70 (8th Cir. 2004) (finding regression analysis that failed to include relevant variables was insufficient to defeat summary judgment for employer). Thus, the most probative analyses include all of the factors that might impact the employer's decision-making.

There are many other types of analyses used in employment class actions. You should work with your expert(s) early on to determine the particular type of analysis that will be most useful in a particular case.

Scope of Statistical Analyses

One common issue with respect to statistical evidence that arises in employment discrimination cases is whether the analysis should be performed on a company-wide basis or broken down by particular location, job title, or department. Typically, employers prefer to break down statistical analyses by department, location, or job title.

In any particular case, whether broader or more narrow analyses are more probative will depend on the employer's structure and where decision-making occurs. For example, if decision-making is decentralized, courts will likely consider localized statistics to be more probative. See, e.g., Brown v. Nucor Corp., 656 F.3d 802, 814–16 (8th Cir. 2011) (refusing to rely upon plaintiffs' aggregate statistics where defendant had produced evidence as to the decentralized management structure).

As illustrated in the seminal Dukes case, the Supreme Court found that Plaintiffs' statistics showing only regional disparities were insufficient to certify a class because decisions were made locally. Dukes, 564 U.S. at 356. On the other hand, if decision-making is more centralized, a court may find broader statistics to be more probative. In McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012), the Seventh Circuit found that certification of a class of 700 African-American brokers who claimed to have suffered disparate impact discrimination based on two corporate-wide policies based on broader statistics was appropriate. Thus, if statistics

that are broken down by location, department, or on some other basis are more favorable to the defense of a particular case, you should develop evidence through fact discovery that decision-making is in fact made on a decentralized basis.

The amount of weight courts give to aggregated statistical analyses also often depends on the size of the sample. Where the sample size of the disaggregated data is too small to produce any meaningful results, courts will sometimes give more weight to the aggregated analysis. See, e.g., Ellis, 285 F.R.D. at 522–23 (finding aggregate data "more probative" where the amount of data at the regional level was too small).

Reliability of Statistical Analyses

As a defendant, you will want your analysis to be considered reliable. More importantly, you will likely want to find ways for your expert to attack plaintiff(s)' statistics as unreliable. Statistical analyses are generally considered reliable if the disparity is significant, the sample size is sufficiently large, and the analysis sufficiently isolated the protected classification from other factors that may have caused the disparity. See, e.g., Tabor v. Hilti, Inc., 703 F.3d 1206, 1222 (10th Cir. 2013).

Standard Deviation Analysis

In terms of significance, courts often look to whether there is at least a two to three standard deviation difference between the number of protected individuals expected to be selected and the number that are actually selected, and if there is not, the statistics will not be sufficient to create an inference of discrimination. Hazelwood School Dist. v. United States, 433 U.S. 299, 311 n.17 (1977) ("a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race"); Tabor, 703 F.3d at 1223 (10th Cir. 2013) (finding 2.777 standard deviations statistically significant); Kerner, 2015 U.S. Dist. LEXIS 131153, at *12–13 (finding 10.3 standard deviations statistically significant). If there are two or three standard deviations between those two numbers, statistically speaking, it means it is not likely that the result occurred by chance. Courts also sometimes rely on other statistical models like confidence intervals or the chi-square test. See Disparate Impact Analysis: Key Steps and Tests.

Four-Fifths Rule

As to the size of the disparity, some courts have looked at the EEOC's four-fifths rule to measure this, particularly in disparate impact cases. See, e.g., Kerner, 2015 U.S. Dist. LEXIS 131153, at *10 ("Although not controlling on the courts, [the four-fifths rule] serves as a rule of thumb for courts."). Under this rule, if the selection rate of the protected group is less than 80% the selection rate of the non-protected group, a presumption that the decision was discriminatory arises. The EEOC relies upon this rule, which was originally set forth in its Uniform Guidelines on Employee Selection Procedures. 29 C.F.R. § 1607.4(D). In response, the employer can either attack plaintiffs' statistics as not reliable or probative under the four-fifths rule or provide statistics of its own that show more comparable selection rates.

Using Nondiscriminatory Factors to Discredit Statistical Analysis

Finally, courts will typically not rely on statistical analyses where they do not account for nondiscriminatory factors used in decision-making. See, e.g., Carpenter v. Boeing Co., 456 F.3d 1183, 1198–99 (10th Cir. 2006) (refusing to consider statistical analysis showing disparities between men and women assigned overtime where analysis failed to account for variables in eligibility for assignment of overtime). If plaintiff(s) fail to account for such nondiscriminatory factors, employers will have good arguments to discredit their analysis.

SUMMARY JUDGMENT

You should carefully think about the timing, scope, and substance of any summary judgment motions. In employment discrimination class and collective actions, you can file for summary judgment on just the individual plaintiff(s)' claims or, after a class is certified, on the claims of the entire class. One approach that employers often take is to try to obtain summary judgment on the claims of the individual plaintiffs prior to class certification to make the class certification motion moot. See, e.g., Davis v. District of Columbia, 246 F. Supp. 3d 367, 401 (D.D.C. 2017) (granting summary judgment motion as to claims of individual plaintiffs and finding plaintiffs' class certification motion moot). If you have good arguments as to individual summary judgment, it is best to make them as soon as possible to get the case dismissed before expensive class certification proceedings. However, if your summary judgment arguments are weaker, you may want to wait until filing your opposition to class or collective action certification so as to avoid previewing any aspects of your opposition to certification.

Alternatively, summary judgment arguments often overlap with arguments made in opposing class certification, and it is common to file motions at the same time as opposing class certification. For example, in a disparate impact case, an employer might move for both summary judgment and oppose class certification on the basis that plaintiff(s) have failed to identify any specific employment practice responsible for the alleged disparate impact. See, e.g., Campbell, 2018 U.S. Dist. LEXIS 70667, at *113 (to survive summary judgment, plaintiffs are "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities"); Davis, 246 F. Supp. 3d at 394 (plaintiffs failed to identify a specific employment practice where they pointed only to a disparate impact on African American individuals as a result of a RIF); Bennett v. Nucor Corp., 656 F.3d 802, 817 (8th Cir. 2011) (plaintiffs must show that employer "uses a particular employment practice that causes a disparate impact").

Similarly, in a disparate treatment case, an employer often may make a summary judgment motion and oppose class certification on the grounds that any statistical evidence proffered by plaintiffs fails to show a significant disparity when taking into account nondiscriminatory factors, or that their evidence otherwise does not make a prima facie case of discrimination. See, e.g., Morgan v. United Parcel Service of Am., Inc., 380 F.3d 459, 465 (8th Cir. 2004) (granting summary judgment for UPS where plaintiffs' statistics purporting to show under representation of African American employees at division manager level failed to account for qualification).

You should develop an initial plan for the timing and substance of your summary judgment motion at the time you enter into your Rule 26(f) report, and continually assess as discovery proceeds whether to amend your approach. However, in any event, it is best to reserve your right to move for summary judgment at different stages of the case depending on the direction discovery takes.

Summary Judgment in Hybrid Class and Collective Actions

In a hybrid class and collective action case, you will need to give more care to the timing of a summary judgment motion. If you have strong arguments as to summary judgment on the plaintiff(s)' individual claims, it is likely still best to try to move for summary judgment as soon as possible. In a hybrid case, this likely means moving for summary judgment before or at the same time as plaintiff(s) move for conditional certification. However, if plaintiff(s) insist on moving for conditional certification before any discovery such that it is not feasible to move for summary judgment at the same time, you can still consider moving for summary judgment before or at the same time as plaintiff(s) file for class certification to at least potentially moot the possibility of Rule 23 class certification.

OPPOSING CLASS CERTIFICATION (FOR CLASS ACTIONS ONLY)

This section addresses strategies for opposing class certification in Rule 23 employment discrimination class actions. This section is not applicable to employment discrimination collective actions.

Class Certification Criteria

Fed. R. Civ. P. 23(a)

To certify a class, a plaintiff must satisfy all four requirements of Rule 23(a):

- Numerosity
- Commonality
- Typicality
- Adequacy of representation

Fed R. Civ. P. 23(a).

Numerosity

Rule 23(a)(1) provides that the class must be "so numerous that joinder of all members is impracticable." Courts generally presume numerosity where a putative class has 40 or more members. Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234, 252 (2d Cir. 2011).

Commonality

Plaintiffs and putative class members meet the Rule 23(a)(2) commonality requirement if their claims share a common question of law or of fact. Shahriar, 659 F.3d at 252. To show commonality, class members' claims "must depend upon a common contention" that must be "capable of classwide resolution, which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Dukes, 564 U.S. at 350.

Typicality

Under Rule 23(a)(3), the named plaintiff must show that his or her claims are typical of the class' claims. Zuniga v. Bernalillo County, 319 F.R.D. 640, 664 (D.N.M. 2016). That is, a class representative "must possess the same interest and suffer the same injury as the class members to be typical." Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1275 (11th Cir. 2009).

Adequacy

The final requirement, adequacy under Rule 23(a)(4), "comprises two parts: the adequacy of the named plaintiff's counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interest of the class members." Balderrame-Baca v. Clarence Davids and Co., 318 F.R.D. 603, 612 (N.D. Ill. 2017). "A class is not adequately represented if class members have antagonistic or conflicting claims." Id.

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

A plaintiff must also satisfy one of the prongs of Rule 23(b).

Rule 23(b)(1)

Rule 23(b)(1) applies when prosecuting separate actions by individual class members would be likely to result in inconsistent outcomes or would impede the ability of individual class members to protect their interests. Fed. R. Civ. P. 23(b)(1).

Rule 23(b)(2)

Rule 23(b)(2) applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

Rule 23(b)(3)

Class actions brought under Rule 23(b)(3) must show common questions "predominate over any questions affecting only individual members" and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622 (1997).

For more information on Rule 23 class action certification in general, see Motion for Class Certification: Making the Motion (Federal), Class Action Fundamentals (Federal), and 5-23 Moore's Federal Practice – Civil § 23.01 et seq.

Class Certification in Employment Discrimination Class Actions

Historically, plaintiff(s) have sought to certify Title VII class actions under either Rule 23(b)(2) or (b)(3), rather than Rule 23(b)(1). In Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360–61 (2011), the U.S. Supreme Court held that plaintiffs cannot use Rule 23(b)(2) to certify a class where "each class member would be entitled to an individualized award of monetary damages." Thus, practically speaking, employers can expect that plaintiffs will seek to certify most if not all employment discrimination class actions under Rule 23(b)(3).

Strategies for Opposing Class Certification

Although your approach and strategy for opposing class certification will depend on the case and the specific facts, it is likely that you will, at the minimum, be arguing that plaintiff(s) failed to demonstrate commonality. Post-*Dukes*, in many cases, commonality has become a significant hurdle to class certification. However, you should make sure to oppose certification based on all applicable grounds, including a lack of numerosity where the class is small, a lack of adequacy where there may be a conflict between the plaintiff(s) and putative class members, and/or a lack of predominance based on individual issues.

Dukes also highlights several arguments to consider in opposing the plaintiffs' commonality showing. First, it is clear that after Dukes, simply allowing discretion in decision-making is not going to be sufficient to show commonality on either a disparate treatment or a disparate impact theory. Rather, to certify a class on a disparate treatment theory, a plaintiff(s) must show that some specific policies "resulted in a common mode of exercising discretion" that "led to the discrimination about which plaintiffs complain." Campbell, 2018 U.S. Dist. LEXIS 70667, at *91–92 (denying certification where statistical and anecdotal evidence did not establish common mode); Tabor, 703 F.3d at 1229 (upholding denial of class certification where employer did not maintain its performance system in a uniform manner). Similarly, in a disparate impact case, merely showing a disparity based on discretion will be insufficient. Plaintiff(s) need to attack a specific employment practice, which discretion is not. See, e.g., Campbell, 2018 U.S. Dist. LEXIS 70667, at *94.

Second, under Dukes, plaintiffs relying on statistics to establish commonality must focus their evidence at the level at which decisions are actually made. In Dukes, the plaintiffs' statistical evidence showed only regional disparities, which "d[id] not establish the existence of disparities at individual stores," and "may be attributable to only a small set of Wal-Mart stores." Dukes, 564 U.S. at 356. To the extent plaintiffs offer similar statistical evidence that does not align with an employer's actual decision-making, the court may reject plaintiffs' commonality argument. See, e.g., Bennett, 656 F.3d at 815–16 (upholding denial of class certification where statistical analysis was a plant-wide but there was "strong evidence that employment practices varied from

department to department"). To prevail along these lines, during discovery, you will need to establish the level at which decisions are actually made, and ideally establish that they are made by local/departmental managers rather than at the corporate level. It is also helpful to develop statistical evidence that shows that disparities against particular groups do not exist if the analysis is performed at that level.

Third, Dukes also demonstrated that to the extent plaintiffs seek to buttress arguments in a disparate treatment case with anecdotal evidence, it must be extensive and representative. There, plaintiffs' anecdotal evidence, representing testimony of only about one in every 12,500 class members, was insufficient. Dukes, 564 U.S. at 358. If plaintiffs in your case have affidavits or deposition testimony from only a small percentage of class members or class members only in particular locations or departments, there will likely be strong arguments that such evidence is insufficient to support certification.

Responding to Smaller Classes and/or Issue Certification

Post-Dukes, some plaintiffs have sought to improve their chances of obtaining class certification by either seeking to certify smaller classes at a local, department, or job level, or by seeking issue certification. As to issue certification, Rule 23(c)(4), states that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). Post-Dukes, plaintiffs have argued in some cases that courts can disparate impact or disparate treatment cases for the purposes of determining whether a disparate impact or pattern of practice of discrimination has occurred. Plaintiffs have had success with this argument in some cases. See, e.g., McReynolds, 672 F.3d 482. But other courts have denied requests for issue certification for a variety of reasons. See, e.g., Doe v. City of Harvey, 2014 U.S. Dist. LEXIS 133624, at *7–12 (N.D. Ill. Sep. 22, 2014) (rejecting plaintiff's argument that the action was maintainable under Rule 23(c)(4) for all the alleged class issues because the plaintiffs failed to demonstrate commonality).

DECERTIFICATION OF COLLECTIVE ACTION (FOR COLLECTIVE ACTIONS ONLY)

Decertification Standard

Unlike the lenient standard applied by the courts at the conditional certification stage in ADEA and EPA cases, at the decertification stage, which occurs at or near the end of discovery, courts will apply a more rigorous version of the similarly situated standard. Lugo v. Farmer's Pride Inc., 737 F. Supp. 2d 291, 299 (E.D. Pa. 2010). Using information gathered during discovery about the opt-in plaintiffs, their claims, and applicable defenses, courts assess several factors in determining whether the lawsuit may proceed as a collective action including (1) the disparate factual and employment settings of the individual plaintiffs, (2) the various defenses available to the defendant that appear to be individual to each plaintiff, and (3) fairness and procedural considerations. Thiessen, 267 F.3d at 1103.

Strategies for Decertification

To obtain decertification, you will need to highlight the differences in employment settings of the opt-ins, and, ideally, the different decision-making practices to which they were subject. For example, in Lusardi v. Xerox Corp., 122 F.R.D. 463 (D.N.J. 1988), the District of New Jersey decertified a collective action where the opt-ins came from "different departments, groups, organizations, sub-organizations, units and local offices within the [ ] organization. The opt-in plaintiffs performed different jobs at different geographic locations and were subject to different job actions concerning reductions in work force which occurred at various times as a result of various decisions by different supervisors [sic] made on a decentralized employee-by-employee basis." Lusardi, 122 F.R.D. 465; see also Peterson v. Seagate U.S. LLC, 809 F. Supp. 2d 996, 1002 (D. Minn. 2011) (decertifying ADEA collective action where some members were subject to layoff in a reduction in force, while others voluntarily participated in an early retirement program).

To succeed in this approach, it is often necessary to obtain testimony that shows the decentralized nature of the decision-making process for the employment actions at issue. It will be important to try to obtain this testimony from your 30(b)(6) witness or other deponents. In addition, you should obtain declarations from managers who were directly involved in the adverse employment actions and who can attest to their own individual reasons for making those decisions. Indeed, even in the context of a company-wide reduction in force that is initiated at the top, courts have decertified collective actions where the plaintiffs "were each selected for termination on a decentralized basis at the discretion of local unit managers." See, e.g., Karlo v. Pittsburgh Glass Works, LLC, 2014 U.S. Dist. LEXIS 43043, at *60 (W.D. Pa. Mar. 31, 2014), aff'd, 849 F.3d 61 (3d Cir. 2017).

If the court concludes that the plaintiffs are similarly situated, the action proceeds collectively. If the conditional group of plaintiffs does not meet the similarly situated standard at the second stage, the group is typically decertified, the opt-in plaintiffs are dismissed without prejudice, and any remaining plaintiffs may move to the trial stage of litigation.

Decertification of Collective Actions and Opposition to Class Certification in Hybrid Actions

In a hybrid class and collective action case, an employer typically moves for decertification of the collective action at the same time as plaintiff(s) move for Rule 23 class certification. While the strategies above still apply in hybrid cases, bear in mind that there may be overlap between the two motions and ensure that defense themes are consistent in the two filings. For example, in a hybrid ADEA and state law class and collective action concerning whether a RIF constituted age discrimination, you will want to be sure that both the class certification opposition and the motion to decertify focus on the decentralized nature of the decision-making and rely upon statistics that suggest a lack of discrimination when that decentralized decision-making is considered.

SETTLEMENT

It is always best to assess the possibility of settlement early on in a case and to continue to assess it as the case progresses. At the early stages, as an employer's attorney, if your investigation reveals problematic facts as to the plaintiff(s) but does not suggest any systemic discrimination, you may want to try to push for an early individual settlement. Plaintiff(s) may or may not be willing to settle on an individual basis. On the other hand, if your expert uncovers statistical disparities that suggest a broader pattern, it may be advisable to consider an early class settlement. Later on, developments in the case may also suggest that a class settlement is appropriate. For example, if a class is certified and you anticipate possible poor merits rulings, considering a reasonable class settlement may be a good option.

Rule 23 Class Action Settlement Considerations

If you decide to pursue a Rule 23 class action settlement, you must comply with the requirements of Rule 23(e). Under Rule 23(e), a class action settlement must be approved by the district court after class members have been notified of the proposed settlement. Typically, approval is a two-stage process. First, the court preliminarily approves the settlement by making a preliminary determination that it is fair, reasonable, and adequate. Manual for Complex Litigation (Fourth) § 21.632 (2004). The court then directs that notice of the settlement be provided to the class members, along with an opportunity to object and potentially to opt out of the settlement. Fed. R. Civ. P. 23(e). The court will then hold a fairness hearing to determine ultimately whether the proposed settlement is fair, reasonable, and adequate. Id.; Manual for Complex Litigation (Fourth) §§ 21.634–21.635 (2004). The Class Action Fairness Act also requires you to notify certain federal and state officials of the settlement, and a settlement cannot be finally approved until at least 90 days after that notice has been served. See 28 U.S.C. § 1715. See Class Action Fairness Act (CAFA) Settlement Notice. See also Settlements of FRCP Rule 23 Wage and Hour Class Actions — Step 6: Filing CAFA Notices.

To the extent you reach a class settlement prior to class certification, in addition to determining whether the settlement is substantively fair, the court will also need to determine whether the requirements of Rule 23 have been met. Thus, you will also need to be prepared to argue that class certification is appropriate for purposes of settlement. See Amchem Prods., 521 U.S. at 617–23.

For an annotated employment discrimination class action settlement agreement, see Settlement Agreement (Employment Discrimination Class Action).

Collective Action Settlement Agreement Considerations

Although there is no statutory requirement that collective action settlements be court approved, courts have generally required FLSA settlements to be approved by either a court or the Department of Labor. See Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199, 206–07 (2d Cir. 2015). Because the ADEA and the EPA incorporate the enforcement provisions of the FLSA, some courts have treated collective action settlements arising under the ADEA and/or EPA as requiring court approval. See, e.g., KH v. Secretary of the Dep't of Homeland Security, 2018 U.S. Dist. LEXIS 125459, at *6–7 (N.D. Cal. July 26, 2018) ("Because the provisions of the ADEA are 'enforced in accordance with the powers, remedies, and procedures' provided by the FLSA, the Court will review the settlement agreement."). Other courts have noted that court approval of such settlements is not required but granted approval in an abundance of caution. See, e.g., Lachney v. Target Corporation, 2010 U.S. Dist. LEXIS 152858, at *10–12 (W.D. Okla. Sept. 16, 2010).

To the extent court approval may be required, you will likely have to demonstrate that the settlement is "fair and reasonable" and the product of a bona fide dispute. KH, 2018 U.S. Dist. LEXIS 125459, at *7. Depending on your jurisdiction, the court also may only allow the release in your settlement agreement to release ADEA or other claims within the scope of the lawsuit and not allow for a broader release. 2018 U.S. Dist. LEXIS 125459, at *11 (refusing to approve settlement because broader than ADEA claims).

You should check the law in your jurisdiction to determine whether a collective action settlement agreement needs to be court approved and if so, what standards the court will apply. Ensure your settlement agreement complies with any such local approval requirements.

In addition, if you are settling an ADEA or EPA case on a collective basis but the court has not yet conditionally certified the case or sent notice to opt-ins, the parties will likely need to move the court to conditionally certify a collective action and authorize notice for settlement purposes to effectuate the settlement.

For an annotated employment discrimination collective action settlement agreement, see Settlement Agreement (Employment Discrimination Collective Action) (ADEA).

Hybrid Class and Collective Action Settlement Agreements

In a hybrid case, there are different ways to structure a settlement that may depend on the particular type of hybrid case you are facing and the facts of the case. Prior to a Rule 23 class being certified, an employer may want to consider taking a less expensive settlement that only settles the claims of collective action opt-ins and not potential Rule 23 class members, since those people are the most likely to bring claims against the company. For example, an employer may consider this approach when facing ADEA claims and parallel state law age discrimination claims. On the other hand, such a settlement also leaves the employer exposed to additional claims from potential Rule 23 class members, and it may be preferable to pay more to get a complete resolution. Accordingly, to gain the maximum benefit of a settlement, many employers choose to settle a hybrid case by settling all the class and collective action claims together.

Typical Hybrid Settlement Process

If an employer does decide to settle all class and collective action claims, the settlement process generally follows the process above for class action settlements. This requires first moving for preliminary approval of the Rule 23 class settlement, preliminary Rule 23 certification of the Rule 23 class (if it has not already been certified), and conditional certification of the ADEA/EPA collective action (if it has not already been conditionally certified).

After the court grants preliminary approval to the settlement, the parties would then issue notice to the class members and potential opt-ins regarding the settlement. At that time, if no class or collective group has previously been certified, in most employment discrimination class actions (certified under Rule 23(b)(3)), class members will need to receive an opportunity to opt out, and potential collective action members will need to receive an opportunity to opt in.

After the notice period, the court would hold the fairness hearing required by Rule 23, and then subsequently grant final approval to all claims in the settlement and grant final class and collective action certification.

Strategy Considerations in Hybrid Settlement

There are many important strategic decisions that you will need to make while negotiating a hybrid settlement, and every settlement will need to be structured individually based on various considerations. Some of the common issues that you may need to consider when structuring a hybrid settlement include the following:

- First, in a case where a class or collective action has not been certified, the parties will need to decide whether to define the settlement class action and collective action coextensively or differently from each other. For example, some state equal pay laws have longer statutes of limitations than the EPA, and an employer may decide that having separate collective and state law classes is the best way to proceed where faced with that issue. Alternatively, if the parties prefer to keep the settlement simple and there is no material difference in the statutes of limitations applicable to the different claims, the parties might decide to request certification of a single collective group and ask that all members opt in to the case to receive a settlement payment.
- Second, a related consideration is whether the class and/or collective action members will receive the same or different settlement benefits. In some cases, it may be appropriate to give higher payments to individuals who choose to opt in to a collective action, particularly where the ADEA or EPA may provide more relief than the state law statute forming the basis for the Rule 23 class. In other cases, if the relief class members could recover is virtually the same for the class and collective action claims, it may make sense to have one payment structure for everyone.
- Third, another consideration is whether class and collective action members have to file a claim to receive a settlement payment or not. In many settlements, only individuals who submit a claim form receive a settlement payment. This structure may be particularly appropriate where opt-ins get higher payments and individuals need to agree to opt in on the claim form. On the other hand, in some settlements, the parties decide to forego claim forms and simply send everyone a settlement payment. This structure may be more appropriate where there is a single payment structure for all class and collective action members, and the attorneys can include opt-in language on the back of the check so that all class members effectively opt in to the case.
- Finally, assuming the parties agree that class members have to file a claim to recover, you may want to consider including a reversion of unclaimed funds to the employer as a settlement term. In most jurisdictions, reverters are not a barrier to court approval of a settlement. See, e.g., Wilson v. Sw. Airlines, Inc., 880 F.2d 807, 816 (5th Cir. 1989) (apportioning the remainder of a Title VII settlement fund according to the parties' agreement, which awarded 64.5% to defendant and 35.5% to class counsel); Van Gemert v. Boeing Co., 739

F.2d 730, 731 (2d Cir. 1984) (affirming district court's decision to distribute unclaimed portion of a securities class action judgment fund to defendant); Warren v. Cook Sales, Inc., 2017 U.S. Dist. LEXIS 8577, at *24 n.11 (S.D. Ala. Jan. 23, 2017) (finally approving a collective action settlement containing a reversion feature "pursuant to which excess/unclaimed settlement amounts [including attorney's fees] in the Net Fund will revert to [defendant]").

However, courts in some jurisdictions scrutinize reverters carefully in approving settlements. See, e.g., Six (6) Mexican Workers v. Ariz. Citrus Growers, 904 F.2d 1301, 1309 (9th Cir. 1990) (noting that reversion of unclaimed funds to defendants is an available option in class action settlements but finding reversion to defendants unavailable in this instance "[i]n light of the deterrence objective of FLCRA and the nature of the violations"). Thus, you should carefully examine the law in your jurisdiction before including a reverter in a settlement. You should also consider the particular circumstances of a case before advocating for a reverter. For example, in some cases, plaintiffs' counsel will insist upon a higher total settlement value in exchange for a reverter, which may weigh against including a reverter in the settlement agreement.

The authors would like to thank associates Eric D. Distelburger and Ira Handa and summer associates Trent Fujii, Danae Kassotis, and Dina Ljekperic for their assistance in preparing this practice note. The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

Matt W. Lampe
Partner, Jones Day

Matt Lampe, who has nearly 30 years of experience defending employers in class actions and other complex litigation, is co-leader of the Firm's Labor & Employment Practice. He represents employers in matters under the FLSA, ERISA, Title VII, ADA, ADEA, and numerous state discrimination, wrongful discharge, and other tort laws. Matt also defends companies in EEOC, DOL, and other agency investigations alleging systemic discrimination or pay practice violations. He has extensive experience leading the defense of clients facing employment class actions and agency investigations across multiple jurisdictions. In addition, Matt counsels clients across a broad spectrum of employment law and litigation avoidance topics.

Matt is recognized as one of the "Nations Most Powerful Employment Attorneys" by HR Executive magazine. In 2017, he was named a Law360 "Employment MVP" for "securing hard-earned successes in high-stakes litigation." In 2012, he was honored as a "Client Service All-Star" by BTI Consulting Group. Matt is a Fellow of The College of Labor and Employment Lawyers, a life member of the U.S. Court of Appeals Sixth Circuit Judicial Conference, and a member of the New York City Bar Association and the Labor and Employment Law Sections of the American Bar Association and the New York State Bar Association.

Matt speaks frequently on employment topics, including class action defense and wage and hour compliance and audit strategies. He is a contributing author to Labor & Employment N.Y. (LENY), the official blog of the New York State Bar Association's Labor and Employment Section, and a chapter editor for The Fair Labor Standards Act, Third Edition, American Bar Association Section of Labor and Employment Law.

Kristina A. Yost
Partner, Jones Day

Kristina Yost has a decade of experience defending significant employment litigation and counseling employers on compliance with federal, state, and local employment laws. In particular, she has extensive experience defending companies in wage and hour class actions, including hybrid Fair Labor Standards Act and Rule 23 state law class claims. She also has defended companies in single and multiplaintiff Title VII, Americans with Disabilities Act, Fair Housing Act, and other discrimination matters, including in Equal Employment Opportunity Commission and other agency investigations.

In addition, Kristina counsels clients on a variety of federal, state, and local employment laws, including the Worker Adjustment and Retraining Notification Act (WARN), Title VII, the Age Discrimination in Employment Act, ADA, the Older Workers Benefit Protection Act, FLSA, New York State and City Human Rights laws, and local paid sick leave and predictive scheduling laws.

Kristina has written and spoken on a variety of topics and is coauthor with Samuel Estreicher of "Measuring the Value of Employment Class and Collective Action Settlements: A Preliminary Assessment," 6 J. Empirical Legal Stud. 768 (December 2009). She also maintains an active pro bono practice counseling nonprofit companies in all areas of labor and employment law.