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Class Certification in Employment Litigation: Recent Case Developments

Pursuing or Defeating Certification in the Aftermath of Wal-Mart v. Dukes

TUESDAY, JULY 17, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Class Certification in Employment Litigation: Recent Case Developments

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Wal-Mart v. Dukes (June 20, 2011)

- Questions Presented:
  - Whether claims for monetary relief can be certified under Federal Rule of Civil Procedure 23(b)(2) and, if so, under what circumstances.
  - Whether the class certification ordered under Rule 23(b)(2) was consistent with Rule 23(a).
- Unanimously reverses the Ninth Circuit and decertifies the Class (opinion by Justice Scalia)
  - Claims for individualized relief, such as the backpay sought by plaintiffs, cannot be brought under Rule 23(b)(2)
  - "Trials by formula" are prohibited
- 5-vote majority holds that commonality is not satisfied
  - Evidence was "worlds away" from showing a discriminatory policy

Rigorous Analysis and Rejecting *Eisen*

- "Rule 23 does not set forth a mere pleading standard."
- "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."
- "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped."
- "A statement in one of our prior cases, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), is sometimes mistakenly cited to the contrary[.]"

Definition of Commonality

- "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." (Quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev. 97, 132 (2009)).
- "That common contention, moreover, must be of such a nature that it is 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."
- "Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."

"Significant Proof" and *Daubert*

- "Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims."
- One "manner of bridging the gap requires 'significant proof' that [the employer] 'operated under a general policy of discrimination.'"
- "The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, but even if properly considered, Bielby's testimony does nothing to advance respondents' case."

Relief Under Rule 23(b)(2)

- "Our opinion in *Ticor Title Ins. Co.* v. *Brown*, 511 U. S. 117, 121 (1994) *(per curiam)* expressed serious doubt about whether claims for monetary relief may be certified under [Rule 23(b)(2)]. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief."
- "[W]e think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule."
- Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."
- "We think it clear that individualized monetary claims belong in Rule 23(b)(3)."

No "Trials by Formula"

- An employer "will have the right to raise any individual affirmative defenses it may have, and to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."
- "The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. . . . We disapprove that novel project."
- "[A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."

Excessive Subjectivity Claims

- "*[A]llowing discretion* by local supervisors over employment matters . . . . 'should itself raise no inference of discriminatory conduct.'" (Quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988).)
- "[L]eft to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all."
- "In such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's."
- "A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions."

Post-*Dukes* Landscape

- As of June 30, 2012, 560+ court decisions had cited *Dukes*
  - U.S. Supreme Court (1)
  - U.S. Court of Appeals (37)
  - U.S. District Court (490)
  - U.S. Court of Federal Claims (1)
  - U.S. Bankruptcy Court (1)
  - State supreme or intermediate appellate court (25)
  - State trial court decisions (6)
- Critical importance of Rule 23(f) appeals

Some Highlights

- *M.D. ex rel. Stukenberg v. Perry* (5th Cir. Mar. 23, 2012)
  - Rigorous analysis of commonality
- *Gooch v. Life Investors Ins. Co. of America, et al.* (6th Cir. Feb. 10, 2012)
  - Rigorous analysis of *material*, *disputed* issues
  - Declaratory relief as to meaning of contract
- *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.* (6th Cir. May 3, 2012)
  - Rigorous analysis *to the extent necessary* re class certification
- *Creative Montessori Learning Centers v. Ashford Gear LLC* (7th Cir. Nov. 22, 2011)
  - Rigorous analysis of adequacy of class counsel

Some Highlights

- *Ross, et al. v. RBS Citizens, N.A., et al.* (7th Cir. Jan. 27, 2012)
  - Commonality: size of class and type of proof distinguished from *Dukes*
- *Jamie S. v. Milwaukee Public Schools, et al.* (7th Cir. Feb. 3, 2012)
  - "Highly individualized and vastly diverse" claims
- *McReynolds, et al. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (7th Cir. Feb. 24, 2012)
  - Plaintiffs sought Rule 23(f) appeal in light of *Dukes*
  - "But you've made a good argument, and I think it deserves to be put to rest one way or the other."

Some Highlights

- *Bennett, et al. v. Nucor, et al.* (8th Cir. Sept. 22, 2011)
  - Subjective promotion practices and the *Falcon* gap
- *Ellis v. Costco Wholesale Corp.* (9th Cir. Sept. 16, 2011)
  - Rigorous analysis of commonality
  - *Daubert* inquiry + common questions
  - Monetary relief
- *Duran v. U.S. Bank Nat'l Ass'n* (Cal. Ct. App. Feb. 6, 2012)
  - Trial by Formula

What's Next—Cert. Granted

- *Comcast v. Behrend*
- *Genesis Healthcare Corp. v. Symczyk*
- *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*

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Class Certification in Employment Litigation: Recent Case Developments

Litigation trends after *Wal-Mart v. Dukes*

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Commonality Under Scrutiny

- What is the "glue" that binds the class together?
- *Wal-Mart v. Dukes*: "excessive subjectivity" rejected
  - π: nationwide class based on regional statistics
  - Δ: decisions at sub-department level within each store
- Unlawful policy that is uniformly applied
  - DOL: policy positions asserted in amicus briefs
  - *Christopher v. SmithKline Beecham* (U.S. Sup. Ct. 6/18/12): employers entitled to "fair warning" that allegedly violative conduct is prohibited

EEOC Litigation

EEOC implements Strategic Plan for Fiscal Years 2012-2016, commencing March 2012

- Increased focus on systemic cases with broad impact

EEOC v. CRST Van Expedited (8th Cir. 2012)

- Requires EEOC to engage in pre-suit investigation and good faith conciliation of each claim before filing suit
- Scope of EEOC's lawsuit is limited to individuals and wrongdoing discovered during the course of its investigation
- EEOC may not use post-suit discovery as a fishing expedition to uncover more violations

"No Fault" Attendance Policies

- EEOC enforcement initiative targets blanket attendance policies: employees disciplined or terminated upon reaching a certain number of absences
  - Premise that ADA reasonable accommodation is not "one size fits all," requires individualized assessment
- *EEOC v. AT&T Corp.* (S.D. Ind., filed 3/29/12)
- *EEOC v. Verizon* (D. Md., filed 7/5/11)
  - Settled for $20 million

Criminal Background Check Policies

- April 25, 2012: EEOC issues new Enforcement Guidance on employer use of criminal records under Title VII
  - Employees or applicants with comparable criminal records cannot be treated differently based on race, color, national origion, or other protected charateristic
  - Blanket exclusion policy may create disparate impact on minorities
  - Defense to disparate impact that challenged practice is job related and consistent with business necessity
    - Arrest record standing alone may not be used to deny employment opportunity, but may trigger further inquiry into underlying conduct
    - Targeted exclusion, application of *Green* factors
    - Individualized assessment

Wage & Hour Policies

Brinker Restaurant Corp. v. Superior Court (Cal. Sup. Ct. 4/12/12)

- Court allows "rest break" class to proceed as a state-wide class action because uniform policy was susceptible to common proof of a violation affecting all class members
- Court rejects "off-the-clock" class because policy prohibiting employees from working off-the-clock was consistent with state law, no common policy or common method of proof
- Court remands "meal break" class to lower court for further consideration in light of its substantive ruling

Combined Opt-In / Opt-Out Class Actions

Recent appellate opinions permit hybrid opt-in / opt-out class actions, reject "inherently incompatible" argument

- *Knepper v. Rite Aid* (3d Cir. 2012)
- *Shahriar v. Smith & Wollensky* (2d Cir. 2011)
- *Ervin v. OS Restaurant Services* (7th Cir. 2011)

Arbitration with Class Action Waiver

AT&T Mobility v. Concepcion (U.S. Sup. Ct. 4/27/11)

- Court enforced mandatory arbitration agreement according to its terms, which required individual rather than class arbitration
- FAA preempts state law restrictions that rely on uniqueness of arbitration agreements, have a disproportionate impact on arbitration agreements, put arbitration agreements on less than equal footing with other contracts
- But may be unenforceable under *generally applicable* state law contract defenses: fraud, duress, unconscionability
- AT&T's procedure was "sufficient to provide incentive for individual prosecution of meritorious claims"

Concepcion / Employment Claims

Sonic-Calabasas v. Moreno (U.S. Sup. Ct. 10/31/11)

- Cal. Sup. Ct. found agreement requiring arbitration of wage claim in lieu of Labor Commissioner hearing was unconsionable
- U.S. Sup. Ct. granted petition for mandate, remanded to Cal. Sup. Ct. for further consideration in light of *Concepcion*

D.R. Horton (NLRB 1/3/12, pending before 5th Cir.)

- NLRB found employment arbitration agreement with class action waiver was unfair labor practice under NLRA, violated employees' right to engage in concerted activity for mutual aid or protection
- Appellate review pending before Fifth Circuit

Representative Actions

Private Attorneys' General Act ("PAGA"), Cal. Labor Code § 2699

- Allows employees to sue on behalf of other current and former employees for Labor Code civil penalties (75% to state)
- Vehicle for private right of action (*i.e.*, seating cases)
- Issue: enforcability of mandatory individual arbitration agreement when plaintiff is acting as private attorney general
  - *Brown v. Ralph's Grocery* (Cal.App. 7/12/11): unenforceable
  - *Iskanian v. CLS* (Cal.App. 6/4/12): enforceable

Cases on the Horizon

Comcast v. Behrand (U.S. Sup. Ct., cert. granted 6/25/12)

- Issue: Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show the case is susceptible to awarding damages on a class-wide basis.

Duran v. U.S. Bank (Cal. Sup. Ct., review granted 5/16/12)

- Issues: (1) In a wage and hour misclassification action, does the defendant have a due process right to assert its affirmative defense against every class member? (2) Can a plaintiff satisfy the requirement for class certification if a defendant has a due process right to assert its affirmative defense against every class member?

Pending Legislation

Equal Employment Opportunity Restoration Act (S 3317)

- Would permit a "group action" for certain employment discrimination claims as an alternative to FRCP 23 class certification
- Would permit challeges to "subjective employment practices"
- Available remedy may be denied to a member of the group only if the employer can prove the member would not have received it even in absence of a violation

Arbitration Fairness Act (S 987)

- Would bar predispute arbitration agreements for employment, consumer and civil rights disputes

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III. Best Practices for Minimizing Class Action Exposure

July 17, 2012

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Preventive Strategies and Positive Solutions for the Workplace

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Best Practices for Minimizing Class Action Exposure

A. Interplay of managers' discretion and objective criteria regarding pay and promotion

B. Increased attention to responses to individual charges of discrimination

C. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies

D. Self-audits and use of statistics

E. Other strategies including arbitration and class action waivers

New Areas of Focus in Systemic Investigations and Claims

- In addition to race and sex discrimination/harassment we are seeing increased focus by both the EEOC and the plaintiffs' bar on:
  - Age
  - Disability: Leave and Attendance Policies
  - Gender: Alleged Discriminatory Pay and Promotion Practices
  - Employee Testing
  - Credit/Background Checks

Best Practices for Minimizing Class Action Exposure

A. Interplay of managers' discretion and objective criteria regarding pay and promotion

- "[Allowing managers discretion] is … a very common and presumptively reasonable way of doing business" which should raise no inference of discriminatory conduct.
- Allow managers discretion but do so within a paradigm setting forth certain demonstrable criteria:
  - Sales
  - Attendance (beware of ADA pitfalls)
  - Quotas
  - Meeting plan objectives

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Best Practices for Minimizing Class Action Exposure

A. Interplay of managers' discretion and objective criteria regarding pay and promotion

- Have policies on factors to consider, but do not limit decision to such factors, i.e., "You should consider the proscribed objective factors but you should also use your discretion, based on your business unit's needs and your managerial experience, to evaluate subjective factors, which might include…."
- Consider forms documenting the factors considered and the weight assigned to such factors
- Use job postings or other methods of communicating open positions. You don't want promotions to be a "tap on the shoulder," especially if management is disproportionately male and/or white.

Best Practices for Minimizing Class Action Exposure

A. Interplay of managers' discretion and objective criteria regarding pay and promotion

- Beware factors that may be viewed as inherently prejudicial:
  - Willingness to relocate (Ginsburg dissent), entertain clients, work nights
  - Lifting or other physical requirements that might not really be necessary
  - Degree requirement that are not completely necessary to do the jog or do not allow for "comparable work experience"
  - Computer proficiency that is either not really necessary or can be taught
  - Test and Pre-Employment requirements, such as education and criminal records

B. Increased Attention to Responses to Individual Charges of Discrimination

- Are there skeletons in the closet?
- Expanding the scope of a potential lawsuit:
  - Inadvertent disclosure of information not even requested; or
  - Providing the EEOC with everything they request.

B. Increased Attention to Responses to Individual Charges of Discrimination

Inadvertent Disclosures

- Position Statements.
- Handbooks.
- Spreadsheets or Other E-Data.
- Discussion of ALL Hiring or Promotion Procedures or Practices.

B. Increased Attention to Responses to Individual Charges of Discrimination

Disclosure: Options

- Flat-out object.
- Try to negotiate.
- Send in what you believe is reasonable and might fly.
- Same as above, but call investigator to let her know what is coming.

➢ If compromise fails and a subpoena is issued, remember you only have <u>five</u> days to file a petition to revoke or modify!

B. Increased Attention to Responses to Individual Charges of Discrimination

EEOC v. Burlington Northern Santa Fe Railroad

(10th Cir. February 27, 2012)

- Trial Court denied EEOC's request to enforce administrative subpoena.
- Court of Appeals affirmed, describing EEOC's request for information as "incredibly broad."
- "Not every charge of discrimination warrants a pattern or practice investigation."
- Information sought was not relevant to the specific charge.
- EEOC "had no jurisdiction or power to seek it."

Best Practices for Minimizing Class Action Exposure

C. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies

- The *Dukes* decision placed great significance on Wal-Mart's policy against sex discrimination. Make sure your EEO policies are up to date, widely and consistently disseminated, given to employees, and included in training for current employees. You should not rely on your handbook only.
- Give more in-depth training to managers regarding EEO policies, than to rank and file. Emphasize that "managing" is what distinguishes them from those they supervise and that failing to address EEO concerns or enforce EEO polices is a serious management performance deficiency.

Best Practices for Minimizing Class Action Exposure

C. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies

- Consider alternative or multiple training options: in person, online, interactive, completion of stepped training marked by notations to personnel records.

- Enhanced grievance procedures not just "open door" policy but hotlines and review panels.

Best Practices for Minimizing Class Action Exposure

C. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies

- Make managers and executives aware that the EEO policies are not the only ones that will be considered. Also at issue will be:
  - Leave policies (are they consistent with the position being taken by the EEOC). Beware "line in the sand" policies or handbooks that fail to address leave as possible accommodation.
  - Light duty (is it only available to those with on the job injuries; is it freely given or typically denied)
  - Qualification Tests (do they test the truly necessary attributes)
  - Personality Tests (if used, make sure they are appropriately validated)
  - Fitness or Physical Tests
  - Benefits (what things are covered, e.g. Viagra but not birth control)
  - Wage and Hour concerns
  - Credit checks/Criminal Background checks – recent EEOC Guidelines
  - English only or literacy requirements

Best Practices for Minimizing Class Action Exposure

C. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies

Disability Leave Issues/Concerns

- Handbooks do not specifically state that leaves will be extended as accommodations to persons with disabilities.
- Letters sent at the end of leave stating that the leave expires on a date certain, and if you are not able to return, you will be considered to have voluntarily resigned.
- No documentation of communications with employees showing interactive process or that return was not foreseeable.
- Third party vendors' (workers' compensation/STD/TSPs) knowledge implied to company.

Best Practices for Minimizing Class Action Exposure

C. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies

Employee or Pre-Employment Testing

- What Might be a Biased Testing Procedure?
  - Physical fitness/agility tests.
  - Criminal background checks, see EEOC's recent guidance on criminal background checks.
  - Personality tests (hiring and promotion).
  - Credit history checks.

Best Practices for Minimizing Class Action Exposure

C. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies

Employment Tests in Light of EEOC Hostility

- Testing vendors typically claim that tests are validated—but the EEOC will expect validation to be done with your workforce.
- "Off the shelf" assessments may have a disparate impact on people seeking jobs with your company.
- Better not to use off the shelf assessments.
- Consider developing an applicant flow tracking system in which race and gender is collected and measure potential disparate impact.
- Use only assessments in which there is an indemnification agreement from the vendor.

Best Practices for Minimizing Class Action Exposure

C. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies

Credit/Criminal Background Checks

- Criminal background and credit history information should be reviewed by employers on an individual basis.
- Is a criminal record or a poor credit history related to the job the employee will perform?
- Examples: Criminal record of an applicant for a security guard position is more job-related than for an applicant for a production line employee. A bad credit history may be relevant to bank teller.

C. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies

EEOC's Guidance

- In April 2012, without public comment on proposed content, the EEOC approved, by a 4-1 vote, a revised Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964.
- The Guidance was effective immediately and issued over a strong dissent.
- The Guidance replaced a 1987 EEOC Policy Statement regarding Conviction Records and a 1990 Policy Guidance on the Consideration of Arrest Records.

C. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies

Summary of EEOC's Guidance

- Arrests itself – as opposed to underlying conduct – should not be considered in making employment decisions – no significant change – guidance respects employer's right to make credibility determination.
- Convictions – should be subject to individualized analysis and dialogue (that is already technically required under some state laws and was suggested – to a lesser extent – in the prior guidance).

Best Practices for Minimizing Class Action Exposure

C. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies

Other Criminal/Credit Background Issues

- Federal disqualifier prevails and employers not even required to seek waivers.
- State or local disqualifiers do not –what is an employer to do?
- Suggested implementation of "ban the box."
- Suggestion of claims for those discouraged from applying due to employer's reputation in community.

Best Practices for Minimizing Class Action Exposure

C. Creating and distributing well-drafted EEO policies, training executives and management on EEO policies, and advising executives regarding documents that may be considered evidence of EEO policies

Notable: FCRA Actions

- Fair Credit Reporting Act compliance issues are receiving interest of private plaintiffs' bar – recent $5.9 million class settlement in lawsuit alleging failure to properly obtain consumer report authorization and taking action without supplying report.

Best Practices for Minimizing Class Action Exposure

D. Self-audits and the use of statistics

- Consider scheduling self audits on regular intervals, or rotating by division or geographic region.
- Conduct self audits under the auspices of counsel to protect potentially negative findings.
- It's not just about sex based pay disparities. Consider analysis of other EEO factors.
- Do not limit the analysis to pay bands but look for disparities within those bands.

Best Practices for Minimizing Class Action Exposure

D. Self-audits and the use of statistics

- Affirmative Action Plans
  - Can be a good tool if you are required to do one.
  - Use counsel for privilege purposes.
  - Don't just do a cursory plan to meet OFCCP requirements, actually drill down on why you have deviation from industry standards and applicable geographic demographics.

- Do Not Just Take the First Step
  - Once you have done the analysis, take steps to address the perceived causes. Review and revise hiring practices, promotional guidelines and other related policies. Increase training. Enhance recruiting efforts, including job fairs and advertising in targeted periodicals.

Best Practices for Minimizing Class Action Exposure

E. Other strategies including arbitration and class action waivers

- Arbitration Agreements, including class action waivers (*AT&T Mobility v. Conception Et.*, 131 S. Ct. 1740 (2011))
  - If implementing now, must give consideration to extant employees, and promise of continued employment may not be adequate.
  - Consider jury trial and class action waivers, outside the arbitration context.
  - But beware *In Re D.R. Horton*, 357 N.L.R.B. No. 184 (Jan. 3, 2012), currently on appeal to the Fifth Circuit, to reverse the NLRB decision that class waivers are not viable in the employment context; Section 7 of the NLRA protects concerted action such as class actions, according to the NLRB.
- Plaintiffs' counsels are creative; they will find a way.
  - A series of divisional or geographic class actions is not a good thing. Beware of the "rogue" division or managers as that can still result in significant class litigation.

Best Practices for Minimizing Class Action Exposure

Action Items/Best Practices

- Review current policies.
- Limit per se disqualifiers and engage in appropriate analysis for any remaining per se disqualifiers.
- Be careful of automatic pre-adverse action letters and even ratings.
- Engage in individualized analysis and dialogue whenever possible.
- Train personnel with hiring responsibilities.

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Questions?

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Please join us for our next legal conference on, “Multinational Employers and Cross-Border Employment Arrangements- Evaluating the Options: Secondment, Transfer, GEC or Dual Employment ,” scheduled on Thursday, July 19, 2012 starting at 1pm EDT.

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