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## Class Action Lawsuits Now More Difficult to Certify Under “Commonality” Requirement

The U. S. Supreme Court in Wal-Mart Stores, Inc. v. Dukes made historic changes to the commonality requirement to class certification in a class-action lawsuit. 131 S. Ct. 2541, 2561-62 (2011). Following the 5-4 opinion by Justice Scalia, it is now significantly more difficult for employees to pursue class action lawsuits against their employers.

A party seeking certification must demonstrate that “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Following Wal-Mart, a class seeking certification has an additional burden. There must be more than common questions, or violation of a common law. Wal-Mart, 131 S.Ct. at 2551. There must be “. . . a common contention . . . 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.” Id. In other words, the action must generate “common *answers* apt to drive the resolution of the litigation.” Id.

The U. S. Supreme Court’s decision is significant because class certification is often the defining moment in a lawsuit. For employers, class certification creates considerable monetary exposures and costs of defense.

### Key Facts and Points of Law

In the Wal-Mart case, approximately 1.5 million current and former female employees of Wal-Mart alleged local supervisors abused their individual discretion by denying female employees equal pay, promotions and treatment. Wal-Mart, 131 S. Ct. at 2548. The District Court for the Northern District of California certified the class, with commonality satisfied by statistical evidence, anecdotal reports of discrimination by 120 employees, and the testimony of a sociological expert. Id. at 2549. The Ninth Circuit Court of Appeals affirmed.

In argument before the U. S. Supreme Court, plaintiffs offered expert testimony that Wal-Mart had a “corporate culture” of bias against women. Id. at 2549. The Court refused to rely on the expert testimony to determine that plaintiffs had established commonality, because the expert could not verify how regularly gender bias contributed to employment decisions. Id. at 2553-54.

The Court observed that if the case had involved claims of discriminatory bias by one particular supervisor, or an announced policy of discrimination, the commonality requirement may have been met. Id. at 2551, 2553. But Wal-Mart’s announced policy expressly forbids sexual discrimination, and without any common direction, it is unlikely that the managers in thousands of stores across the country would have exercised their discretion over pay and promotions in a common way. Id. at 2554-55. The Court therefore viewed the class as suing over innumerable employment decisions in one fell swoop. Id. at 2552-53.

The Court also held that plaintiffs' claims for back pay were improperly certified under Rule 23(b)(2). Id. at 2357. Rule 23(b)(3), it held, is the appropriate rule for class members with individualized claims of relief for damages. Id. at 2558. The class was accordingly decertified.

### **Implications for Employers**

- It will now be more difficult for classes to be certified when companies have decentralized practices whose implementation is subject to the discretion of regional managers or supervisors. E.g., McReynolds v. Merrill Lynch, 2011 U.S. Dist. LEXIS 115431 (N. D. Ill. Sept. 19, 2011) (Gettleman, J.) (denying class certification where two policies allegedly caused discrimination in earnings but implementing those policies depended on discretionary decisions by various individuals, destroying commonality); Bennet v. Nucor Corp., 2011 U.S. App. LEXIS 19395 (8th Cir. Sept. 22, 2011) (denial of class certification affirmed where plaintiffs alleging class-wide racial discrimination were subjected to varying employment practices, working environments and departmental functions, nullifying commonality).
- Conversely, a company may be vulnerable to class certification when a centralized company policy or practice, consistently implemented in the same way, affects all of its employees, customers, or clients. E.g., Gray v. Hearst Communications, Inc. 2011 U.S. App. LEXIS 17890 (4th Cir. Aug. 25, 2011) (commonality satisfied when class members entered into advertising contracts on alleged misrepresentations – even though sales associates had broad discretion as to the sales pitch, they had no discretion as to the ultimate contractual obligations); Ramos v. SimplexGrinnell, 2011 U.S. Dist. LEXIS 65593 (E.D.N.Y. June 21, 2011) (commonality satisfied when various New York offices had uniform problem of having no reliable method of ensuring prevailing wages were paid, in violation of New York labor laws).
- If certified under the proper rule, Rule 23(b)(3), each member of the class may have individualized damages and still satisfy commonality. E.g., Ramos, 2011 U.S. Dist. LEXIS 65593, at \*13 (plaintiffs had individualized claims of hours worked and compensation owed, but the common practice at issue will predominate at trial). However, individualized claims for damages are not appropriate for a 23(b)(2) class. Janes v. Triborough Bridge & Tunnel Auth., 2011 U.S. Dist. LEXIS 115831 (S.D.N.Y. Oct. 4, 2011) (declining to certify a 23(b)(2) class where individualized claims for damages are more appropriate to a 23(b)(3) class, in light of Wal-Mart).

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