



# Workplace Class Action Webinar - Litigation Trends For 2012/2013

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# Today's Discussion Leaders

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# Today's Discussion Points

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What Is Hot In The Workplace Class Action World?

Key Trends & Developments In 2012 & 2013

Noteworthy Settlements & And What They Mean For Employers

Leading Decisions & How They Affect Defense Strategies In 2013

What Should Be In Your Compliance Tool Kit?



# Some Key Terms For Today's Discussion

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## Rule 23(a) Requirements

- ***Numerosity*** – The individuals who would comprise the class must be so numerous that joinder of them all to the lawsuit would be impracticable.
- ***Commonality*** – There must be questions of law and fact common to the proposed class.
- ***Typicality*** – The claims or defenses of the representative parties must be typical of the claims and defenses of putative class members.
- ***Adequacy Of Representation*** – The representative plaintiffs and their counsel must be capable of fairly and adequately protecting the interests of the class.



# Some Key Terms For Today's Discussion

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## Rule 23(b) Requirements

- **(b)(1)** – Decision as to one class member's claim dispositive of all others
- **(b)(2)** – Injunctive/equitable relief
- **(b)(3)** – Money damages



# Some Key Terms For Today's Discussion

## Rule 23(b)(2) Requirements

- A class may be certified under Rule 23(b)(2) if the party opposing the class “has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.”
- Plaintiffs seeking to certify class actions under Rule 23(b)(2) are restricted to those cases where the primary relief sought is injunctive or declaratory in nature.
- Rule 23(b)(2) does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Rule 23(b)(2) provides for a binding order on all class members without guarantees of personal notice and the opportunity to opt-out of the suit.



# Some Key Terms For Today's Discussion (Cont'd)

## Rule 23(b)(3) Requirements

- A class may be certified under Rule 23(b)(3) if the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
- To qualify for certification under Rule 23(b)(3), a class must meet two additional requirements: *[1] common questions must predominate over any questions affecting only individual members; and [2] class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy.*
- Rule 23(b)(3) applies to cases where the primary relief sought is money damages. Each class member is entitled as a matter of due process to personal notice and an opportunity to opt-out of the class action.



# Introduction

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The 2013 Annual Class Action Report

Overview Of 2012/2013 Developments – A Transformative Year!

Our Topics Today Relative To Employment Discrimination, Wage & Hour, Government Enforcement, And ERISA Class Actions





# What Is Hot In The Workplace Class Action World?

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**The Fallout From *Wal-Mart*** – Wholesale review of certification orders and growing judicial acceptance of new defense tactics to allow early challenges to the validity of class theories.

**Evolving Class Certification Theories** – “Re-booting” of certification theories by the plaintiffs’ class action bar and how this process is impacting defense strategies.

**Class Arbitration Comes To The Forefront** – After *Stolt-Nielson* and *Concepcion*, employers are increasingly utilizing workplace arbitration agreements to manage class action risks.



# What Is Hot In The Workplace Class Action World?

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**The Shifting Focus Of The EEOC** – The EEOC’s shifting focus from one-off cases toward investigation and litigation of nationwide pattern or practice cases.

**Intensified Level Of DOL Enforcement** – The DOL’s enforcement activities and 24/7/365 enforcement strategies.

**Rapid Changes In Theories And Defenses** – Rule 23 issues are in flux, and “change” is a consistent and constant theme as class action issues evolve post-*Wal-Mart*.



## Key Trends In 2012/2013

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The influence of the SCOTUS opinions in *Wal-Mart v. Dukes* and *AT&T Mobility v. Concepcion* on class certification rulings and class arbitration issues in 2012/2013.

The EEOC's Systemic Program experienced major growth and focused on high-impact, big stakes litigation.

Continued economic challenges fueled an increase in class action and collective action litigation, as well as employment-related case filings.



## Key Trends In 2012/2013

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An increase in wage & hour class actions, especially those brought under state law. In 2013, will the wave crest?

ERISA class actions took center stage in 2012; and 2013 is expected to be another key year on the ERISA front.

Developments in Rule 23 and § 216(b) case law caused an evolution of new case theories, defense litigation strategies, and class certification approaches for workplace class action litigation.



# Headlines Of 2012 Relevant To Employers

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***Wal-Mart Stores, Inc. v. Dukes*** – In a 5-4 opinion, the Supreme Court held that Plaintiffs failed to satisfy the Rule 23(a) commonality requirement.

***AT&T Mobility LLC v. Concepcion*** – Subordinated state law to the Federal Arbitration Act (FAA) and allows the broad use of arbitration and class action waiver clauses in consumer and employment contracts.

## End-Of-Year Statistics

- (i) Employment discrimination filings decreased slightly from 14,771 lawsuits in 2011 to 14,260 lawsuits in 2012
- (ii) More EEOC charges were filed in 2011 than all but one previous year since the founding of the Commission in 1964 (99,412 charges)



## ***Wal-Mart Stores v. Dukes***

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Impact of SCOTUS ruling on “class certification architecture”

Impact of SCOTUS ruling on damages recovery

Unanswered questions/issues inherent in the SCOTUS ruling

Anticipated “second generation issues” from *Wal-Mart*



## ***AT&T Mobility v. Concepcion***

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How SCOTUS ruling impacts class action waivers in the context of workplace arbitration agreements

Plaintiffs' strategies to "work around" *Concepcion* – initial 2012 case law developments, and predictions for 2013



# Pre-Emptive Defense Strategies

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The “second bite at the apple” defense tactic based on *Wal-Mart*

Pre-emptive motions to dismiss based on Rule 23(d)(1)(D)  
Defense precedents -

- *Scott, et al. v. Family Dollar Stores, Inc.*, 2012 U.S. Dist. LEXIS 4669 (W.D.N.C. Jan. 13, 2012) [Pages 24-25]
- *Dovgin, et al. v. McDonald’s Corp.*, Case No. 11-CV-7883 (N.D. Ill. May 25, 2012) [Page 541]





## Leading Settlements – Employment Discrimination [Pages 11-12 of the CAR]

Top 10 Settlements Totaled \$48.65 Million, A Decrease From \$123.2 Million In 2011. The 5 Biggest Settlements In 2012 Were:

- *Womack, et al. v. Dolgencorp., Inc.* (N.D. Ala.) - \$22 Million
- *Cookson, et al. v. Toyota Motor Corp.* (N.D. Cal.) - \$6 Million
- *Hester, et al. v. New Jersey Transit* (N.J. Super. Ct.) - \$5.8 Million
- *Wagner, et al. v. University Of Medicine & Dentistry Of New Jersey* (N.J. Super. Ct.) - \$4.6 Million
- *Waters, et al. v. Cook's Pest Control, Inc.* (N.D. Ala.) - \$2.5 Million



## Leading Settlements – Wage & Hour [Pages 12-14 of the CAR]

Top 10 Settlements Totaled \$292 Million, An Increase From \$221.1 Million In 2011. The 5 Biggest Settlements In 2012 Were:

- *In Re Novartis Wage & Hour Litigation* (S.D.N.Y.) - \$99 Million
- *Chambers, et al. v. Merril Lynch & Co., Inc.* (S.D.N.Y.) - \$40 Million
- *Lemus, et al. v. H&R Block Enterprises, LLC* (N.D. Cal.) - \$35 Million
- *Craig, et al. v. Rite Aid Corp.* (M.D. Pa.) - \$21 Million
- *Mullins, et al. v. City of New York* (S.D.N.Y.) - \$20 Million



## Leading Settlements – ERISA [Pages 14-15 of the CAR]

Top 10 Settlements Totaled \$237 Million, Significantly Less Than \$898.95 Million In 2011. The 5 Biggest Settlements In 2012 Were:

- *In Re Aetna UCR Litigation* (D.N.J.) - \$120 Million
- *Allen, et al. v. Honeywell Retirement Earnings Plan* (D. Ariz.) – \$24 Million
- *Beaty, et al. v. Continental Automotive Systems U.S., Inc.* (N.D. Ala.) - \$23.8 Million
- *Lowther, et al. v. AK Steel Corp.* (S.D. Ohio) - \$15.8 Million
- *In Re Schering-Plough Corp. Enhance ERISA Litigation* (D.N.J.) - \$12.5 Million



## Leading Settlements – Government Enforcement Actions [Pages 15-17 of the CAR]

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Top 10 Settlements Totaled \$262.78 Million, An Increase From \$65.078 Million In 2011. The 5 Biggest Settlements In 2012 Were:

- *Solis v. Beacon Associates Management Corp.* (S.D.N.Y.) - \$220 Million
- *EEOC v. Yellow Transportation, Inc. And YRC, Inc.* (N.D. Ill.) - \$11 Million
- *Solis v. Mattingly* (E.D. Ky.) - \$10.7 Million
- *EEOC o/b/o Singleton v. BP Amoco Chemical Co.* (N.D. Ala.) - \$5.4 Million
- *EEOC v. Interstate Distributor Co.* (D. Colo.) - \$4.8 Million



# Significant Decisions – EEOC Enforcement Litigation

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*EEOC v. Kaplan Higher Education*, 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio Jan. 28, 2013)

*EEOC v. Interstate Distributor Co.*, Case No. 12-CV-02591 (D. Col. Nov. 8, 2012) [Page 17]

*EEOC v. McLane Company, Inc.*, 2012 U.S. Dist. LEXIS 164920 (D. Ariz. Nov. 19, 2012) [Pages 96-97]

*EEOC v. Houston Funding II, Ltd.*, 2012 U.S. Dist. LEXIS 13644 (S.D. Tex. Feb. 2, 2012) [Page 55]

*EEOC v. Global Horizons, Inc.*, 2012 U.S. Dist. LEXIS 105993 (E.D. Wash. July 27, 2012) [Pages 91-92]



# Significant Decisions – Employment Discrimination

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Location, Location, Location, And Location Is All Important

The U.S. District Courts For The Northern District Of California And The Southern District Of New York – And The Second & The Ninth Circuits – Remain “Ground Zero” For Plaintiff-Friendly Rulings

The California & New York Nexus To Significant Filings And Rulings



## Significant Decisions Of 2012 – Employment Discrimination, Cont'd.

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*Chen-Oster, et al. v. Goldman, Sachs & Co.*, 2012 U.S. Dist. LEXIS 99270 (S.D.N.Y. July 17, 2012) [Pages 21-22]

*Bolden, et al. v. Walsh Construction Co.*, 688 F.3d 893 (7th Cir. 2012) [Pages 27-28]

*McReynolds, et al. v. Merrill Lynch & Co.*, 672 F.3d 482 (7th Cir. 2012) [Pages 28-29]

*Ellis, et al. v. Costco Wholesale Corp.*, 2012 U.S. Dist. LEXIS 137418 (N.D. Cal. Sept. 25, 2012) [Pages 31-33]



## Significant Decisions in 2012 – Wage & Hour

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*Christopher, et al. v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) [Pages 241-242]

*Genesis Healthcare Corp. v. Symczyk*, No. 11-1059, 2012 WL 5998319 (U.S. Oral Arg. 2012)

*Schaefer-LaRose, et al. v. Eli Lilly & Co.*, 679 F.3d 560 (7th Cir. 2012) [Pages 252-253]

*Espenscheid, et al. v. DirectSat USA, LLC*, 688 F.3d 872 (7th Cir. 2012) [Page 790]





## Significant Decisions in 2012 – Wage & Hour, Cont'd.

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*Ojeda-Sanchez, et al. v. Bland Farms, LLC*, 2012 U.S. App. LEXIS 24586 (11th Cir. Nov. 29, 2012) [Pages 336-337]

*White, et al. v. Baptist Memorial HealthCare Corp.*, 699 F.3d 869 (6th Cir. 2012) [Pages 158-159]

*Brinker Restaurant Corp., et al. v. Superior Court*, 53 Cal. 4th 1004 (Cal. 2012) [Pages 402-403]

*Wang, et al. v. Hearst Corp.*, 2012 U.S. Dist. LEXIS 97043 (S.D.N.Y. July 12, 2012) [Page 132]



## Significant Decisions In 2012 – ERISA

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*Nationwide Life Insurance Company v. Haddock, et al.*, 460 F. App'x 26 (2d Cir. 2012) [Pages 350-351]

*Johnson, et al. v. Meriter Health Services Employee Retirement Plan*, 2012 U.S. App. LEXIS 24854 (7th Cir. Dec. 4, 2012) [Pages 354-355]

*Griffin, et al. v. Flagstar Bancorp, Inc.*, 2012 U.S. App. LEXIS 15307 (6th Cir. July 23, 2012) [Page 360]

*Taylor, et al. v. KeyCorp*, 680 F.3d 609 (6th Cir. 2012) [Page 372]



## Significant Decisions In 2012 – ERISA, Cont'd.

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*Tussey, et al. v. ABB, Inc.*, 2012 U.S. Dist. LEXIS 45240 (W.D. Mo. Mar. 31, 2012) [Pages 365-366]

*Amara, et al. v. CIGNA Corp.*, 2012 U.S. Dist. LEXIS 180355 (D. Conn. Dec. 20, 2012) [Pages 347-348]

*Skinner, et al. v. Northrop Grumman Retirement Plan B*, 2012 U.S. App. LEXIS 5517 (9th Cir. Mar. 16, 2012) [Pages 390-391]

*McCorkle, et al. v. Bank Of America Corp.*, 688 F.3d 164 (4th Cir. 2012) [Page 374]



## Other Rule 23 Decisions Of Significance In 2012

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*Dukes, et al. v. Wal-Mart Stores, Inc.*, 2012 U.S. Dist. LEXIS 174720 (N.D. Cal. Dec. 10, 2012) [Pages 541-542 & 789-790]

*Barrett, et al. v. Option One Mortgage Corp.*, 2012 U.S. Dist. LEXIS 132775 (D. Mass. Sept. 18, 2012) [Pages 549-550]

*Karp, et al. v. Cigna Healthcare Inc.*, 2012 U.S. Dist. LEXIS 54215 (D. Mass. April 18, 2012) [Pages 584-585]

*Cobell, et al. v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012) [Pages 685-686]

*Plumbers Union Local No. 12 Pension Fund, et al. v. Ambassadors Group, Inc.*, Case No. 09-CV-214 (E.D. Wash. July 25, 2012) [Pages 711-712]



# How Can You Minimize Your eDiscovery Risks In The Class Action Context?

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Know what data your company has

Know who “owns” your company’s data

Get a handle on your key custodians early in litigation

Preserve liberally; collect and produce judiciously

Be proactive and drive e-discovery – don’t wait for plaintiffs or the government to drive it for you



# What Should Be In Your ERISA Compliance Tool Kit?

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Robust, ongoing fiduciary oversight

Fiduciary education and training

Disclosure, disclosure, and more disclosure

“Hardwire” investment options especially employer stock

Periodically review investment offerings and strategies, as well as service provider fees.



# What Should Be In Your Wage & Hour Compliance Tool Kit?

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Train managers of non-exempt employees on wage & hour compliance

Periodically audit for "off the clock" issues through timekeeping systems (e.g., Kronos) and payroll reports

Review closely any independent contractor relationships and document them properly

Pay extra attention to litigation trends with respect to particular job classifications and industries



# Corporate Tool Kit Issues For Employment Discrimination

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Ensure robust policies to ban discrimination and encourage internal appeals

Ensure objective elements in pay-setting and performance evaluations

Preemptively, in a privileged way, analyze adverse impact

Recruit diverse candidate pools

Avoid quotas





# How To Order The Workplace Class Action Report

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The 2013 Workplace Class Action Report is available to clients of the firm and interested corporate counsel. To request a free copy of the report, please e-mail your request to [ClassActionReport@seyfarth.com](mailto:ClassActionReport@seyfarth.com).

For The First Time, The 2013 Workplace Class Action Report Is Also Available In E-Book Format. To Download, Click Here: [2013 Workplace Class Action Report: E-Book](#)

For Updates And Analysis On Issues Impacting The Workplace Visit The Workplace Class Action Blog



# Questions

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