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TRENDS
EMPLOYMENT LAW

The private plaintiffs' bar and government enforcement attorneys are apt to be equally, if not more, aggressive through 2014 in bringing class and collective actions against employers, attorneys Gerald L. Maatman, Jr. and Jennifer A. Riley say in this BNA Insight.

The authors provide an overview of Comcast, AMEX, Knowles and other important decisions in 2013. They also offer their perspectives on the year ahead for class actions including those related to ERISA, wage & hour and employment discrimination, novel litigation theories, and continued fallout from Wal-Mart.

BNA Insight

Workplace Class Actions: Looking Back at 2013 and Ahead to 2014



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Workplace class action litigation is in a state of flux. The events of the past year in the workplace class action world demonstrate that the array of bet-the-company litigation issues that businesses face are evolving on a landscape that is continuing to undergo significant change. At the same time, governmental enforcement litigation remains "white hot," and regulatory oversight of workplace issues continues to be a priority, thereby challenging businesses to integrate their litigation and risk mitigation strategies to navigate these exposures. These trends in 2013 set the table for continued change in the workplace class action world in 2014.

A Year of 'Evolving Changes'

By almost any measure, 2013 was a year of evolving changes for workplace class action litigation. The U.S. Supreme Court issued several class action rulings in 2013—*Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), *American Express Co. v. Italian Restaurant*, 133 S. Ct. 2304 (2013), and *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013)—that impacted all varieties of complex litigation in a profound manner.

More than any other development in 2013, the decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), continued to have a wide-ranging impact on virtually all types of class actions pending in both federal and state courts throughout the country. As is well-known by now, the Supreme Court's decision in *Wal-Mart* elucidated whether plaintiffs could use Rule 23(b)(2) to recover individualized monetary relief for a class (and held it may not), and established a heightened

standard for the Rule 23(a)(2) commonality requirement (and determined that common questions for a class must have common answers). In many respects, *Wal-Mart* was the "800-pound gorilla" in courtrooms in 2013 as litigants argued and judges analyzed class certification issues. Rule 23 decisions in 2013 in large part pivoted off of *Wal-Mart*, and leverage points in class action litigation increased or decreased depending on the manner in which judges interpreted and applied *Wal-Mart*. As of the close of the year, *Wal-Mart* had been cited a total of 561 times in lower federal and state court rulings.

The ruling in *Comcast Corp.* also added a new weapon to employers' arsenals in challenging class certification. The Supreme Court interpreted Rule 23(b)(3)—which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members"—to mandate that plaintiffs' proposed damages model show damages on a classwide basis. This decision provides companies with a significant and rational defense to class certification in class actions. Much like *Wal-Mart*, the ruling in *Comcast Corp.* reverberated throughout the lower federal and state courts, and was cited a total of 178 times by the close of the year, a rather remarkable figure for a decision rendered in March of 2013.

Against this backdrop, the plaintiffs' class action employment bar filed and prosecuted significant class actions and collective actions against employers in 2013. In turn, employers litigated an increasing number of novel defenses to these class action theories, fueled, in part, by the new standards enunciated in *Wal-Mart* and *Comcast Corp.* Federal and state courts addressed a myriad of new theories and defenses in ruling on class action and collective action litigation issues. The impact and meaning of "*Wal-Mart* issues" and "*Comcast Corp.* issues" were at the forefront of these case law developments.

Key Trends in 2013 In the Workplace Litigation World

An overview of workplace class action developments in 2013 reveals seven key trends.

First, the Supreme Court's opinions in *Wal-Mart* and *Comcast Corp.* had a profound influence in shaping the course of class action litigation rulings throughout 2013. *Wal-Mart* and *Comcast Corp.* prompted defendants to mount challenges to class certification based on all sorts of theories, and not just those modeled after the nationwide class claims rejected in *Wal-Mart* and the antitrust damages issues discussed in *Comcast Corp.* This resulted in new types of case law rulings on a myriad of Rule 23-related issues. As many class action issues are in a state of flux post-*Wal-Mart* and post-*Comcast Corp.*, these evolving precedents are expected to continue to develop in the coming year.

Second, government enforcement litigation in 2013 increased over levels in 2012. As an inevitable by-product of the economy's unemployment rates, more discrimination charges were filed with the U.S. Equal Employment Opportunity Commission ("EEOC") in 2013 than in all but three previous years since the founding of the Commission in 1964—a total of 93,727 discrimination charges against private sector employers. By comparison, the EEOC in 2012 reported receiving a then record high of 99,412 discrimination charges.

Employers can expect a significant jump in litigation during the coming year; due to the time-lag in the period from the filing of a charge to the filing of a subsequent lawsuit, the charges in the EEOC's inventory will become ripe for initiation of lawsuits in 2014. The Obama Administration's emphasis on administrative enforcement litigation also spawned more government-initiated investigations over workplace issues.

This trend was especially evident in terms of the systemic investigation program of the EEOC. The EEOC's systemic investigation program—in which the Commission emphasizes the identification, investigation, and litigation of discrimination claims affecting large groups of "alleged victims"—expanded yet again over prior years. EEOC systemic suits comprised 16 percent of all merits filings in 2013, and by the end of the year, represented 23.4 percent of the Commission's active litigation docket. This development is of critical importance to employers, for it evidences an agency with a laser-focus on high-impact, big stakes litigation.

Third, *Wal-Mart* and *Comcast Corp.* influenced settlement strategies in workplace class actions in a profound way. Employers settled fewer employment discrimination class actions than at any time over the past decade and at a fraction of the levels in 2006 to 2012. The same was true with wage & hour and ERISA class actions, as well as governmental enforcement litigation; settlement numbers and aggregate totals were down in each category. This reflected the impact of *Wal-Mart* and *Comcast Corp.*, and the notion that difficulties in certifying nationwide, massive class actions impaired the

ability of the plaintiffs' bar to convert their case filings into blockbuster settlements. It also manifested the ability of defendants to dismantle large class cases, or to devalue them for settlement purposes. Simply stated, *Wal-Mart* and *Comcast Corp.* aided employers to defeat, fracture, and/or devalue employment discrimination class actions, and resulted in fewer settlements at lower amounts.

Fourth, the continued dislocations in the economy during 2013 fueled more class action and collective action litigation over wage & hour laws. In particular, the plaintiffs' class action bar eclipsed the pace of filings of FLSA collective actions and wage & hour class actions as compared to previous years. FLSA lawsuits totaled 7,882—up significantly as compared to 7,672 in 2012. Further, these conditions spawned more employment-related case filings by government enforcement attorneys. As of the close of the year, filings held steady or were slightly down in the distinct categories of employment discrimination and ERISA class actions, and increased on an aggregate basis in wage & hour cases as well as government enforcement litigation. In turn, this resulted in more judicial rulings on wage & hour issues and EEOC lawsuits than any other area of workplace class action litigation. Even more wage & hour and EEOC litigation is expected in 2014. Indeed, the crest of the wave of wage & hour litigation is still not in sight, and this trend is likely to continue in 2014.

Fifth, case law developments under the Class Action Fairness Act of 2005 ("CAFA") continued to mature, and the U.S. Supreme Court decided its first case under the CAFA in 2013 in *Standard Fire Insurance Co. v. Knowles*. It rejected the increasingly frequent tactic of the plaintiffs' bar to stipulate to damages of less than $5 million, the CAFA's amount-in-controversy requirement, in an effort to prevent removal of class actions from state court to federal court. Case law under the CAFA turned the corner in this regard for employers in 2013, solidifying another defense strategy to secure removal of class actions to federal court.

Sixth, the Supreme Court's ruling in 2013 on class arbitration issues in *American Express Co. v. Italian Restaurant* ("*AMEX*") informed the ever-growing body of case law that allows employers to utilize carefully-crafted workplace arbitration agreements to manage their class action litigation risks. While ill-conceived arbitration programs can create significant litigation problems, the *AMEX* decision rejected attempts by the plaintiffs' bar to challenge arbitration as a violation of the public policies of federal statutory rights. This ought to help employers that choose to institute workplace arbitration agreements avoid wage & hour class action litigation more easily.

Seventh, and finally, the plaintiffs' class action bar is a tight-knit community, and developments in Rule 23 and § 216(b) case law in 2013 saw rapid strategic changes based on evolving decisions and developments. This fostered quick evolution in case theories, which in turn impacted defense litigation strategies. In reaction to the Supreme Court's rulings in *Wal-Mart* and *Comcast Corp.*, the plaintiffs' class action bar has continued the process of "re-booting" classwide theories of certification, as well as new methods for establishing liability and damages on a classwide basis. As a result, new certification approaches and cutting-edge strategies are rapidly evolving throughout the substantive areas encompassed by workplace class action law. More than any other trend, the on-going changes to strategy considerations in crafting class claims and litigating Rule 23 certification motions in the wake of *Wal-Mart* and *Comcast Corp.* drove case law developments in 2013.

Implications of These Developments for 2014

The one constant in workplace class action litigation is change. More than any other year in recent memory, 2013 was a year of great change in the landscape of Rule 23. As these issues play out in 2014, additional chapters in the class action playbook will be written.

So what will 2014 bring?

A certitude of the modern American workplace is that class action and collective action litigation is a magnet that attracts skilled members of the plaintiffs' bar. The passage of the CAFA has had little impact on the pace and volume of overall workplace class action filings since 2005. Instead, the impact of the CAFA has been limited primarily to determine the proper venue, which often has a dramatic impact on the outcome of workplace class actions. The *Knowles* decision ought to assist employers in removing more class actions from state courts to federal courts, thereby effectuating the purposes of the CAFA.

Overall, in 2014, the *Wal-Mart* and *Comcast Corp.* decisions are unlikely to dampen the focus of government enforcement litigators and the plaintiffs' class action bar. Instead, case structuring theories will continue to undergo a wholesale "re-booting" process, and case law developments are expected to evolve and reflect these new creative litigation strategies.

On the ERISA front, corporate counsel can expect to see the following developments:

- ERISA class actions will continue to receive increased scrutiny at the class certification stage post-*Wal-Mart*, potentially making it increasingly more difficult for plaintiffs to secure certification of ERISA claims. Unlike in the employment discrimination arena, the focus is likely to be on whether it is possible to certify ERISA class actions under Rule 23 (b). Plaintiffs' counsel also are apt to begin to shift their case structuring from Rule 23(b) (1) and (b)(2), which have traditionally been used in ERISA cases, to Rule 23(b)(3).

- Plaintiffs' attorneys continue to push the envelope of available remedies under ERISA and have had some successes in the lower courts. The risk of increasing exposure on these theories will be a key driver of ERISA-related litigation in 2014. Employers also should pay special attention to the development of Rule 23 law in the Seventh Circuit, where Rule 23(c)(4) issue certification is favored, as well as certification of multiple sub-classes, in order to avoid *Wal-Mart* commonality issues. Corporate counsel can expect plaintiffs to rely more often on Rule 23(b)(3) for class certification, notwithstanding that opt-out classes have been historically disfavored in ERISA class certification litigation. Employers also should expect to see more arguments that Rule 23(b)(3), plus ERISA fiduciary requirements, protect a class broader than the precise contours of the class definition.

On the wage & hour front, the deluge of FLSA filings—making wage & hour claims the most predominant type of workplace class action pursued against Corporate America—is expected to continue with no end in sight. The wave of wage & hour filings has yet to crest. Corporate counsel, therefore, can expect to see a consistent level of significant litigation activity. Key areas to watch include:

- In terms of novel litigation theories, employers can expect an increase in off-the-clock litigation brought by non-exempt employees, fueled by new theories attacking employer rounding practices, and increased off-duty use of PDAs, or personal digital assistants, and other mobile electronic devices vis-a-vis the application of the continuous workday rule.

- Increased litigation also is expected over issues in independent contractor misclassification and joint employer liability cases, as well as off-the-clock work (including donning and doffing cases), unpaid overtime, missed or late meal and rest breaks, time-shaving, and improper tip pooling.

- Continued developments in the case law are virtually certain relative to § 216(b) certification defenses, as *Wal-Mart* continues to impact FLSA certification questions and rulings, and as some courts narrow their conception of the "similarly-situated" requirement in collective actions based on the commonality requirement as reformulated by *Wal-Mart*.

Last but not least, employment discrimination class action litigation—both in terms of private plaintiff cases and government enforcement litigation brought by the EEOC—is expected to remain "white hot" in 2014. On the employment discrimination front, corporate counsel can expect to see the following developments:

- The plaintiffs' bar will continue to "re-boot" the architecture of employment discrimination class actions to increase their chances to secure class certification post-*Wal-Mart*. Their focus is likely to be on smaller class cases (e.g., confined to a single corporate facility or operations in one state) as opposed to nationwide, mega-class cases. In terms of certification theories, the plaintiffs' bar is apt to pursue hybrid or parallel class certification theories where injunctive relief is sought under Rule 23(b)(2), and monetary relief is sought under Rule 23(b)(3), as well as a range of partial "issue certification" theories under Rule 23(c)(4).

- Employers and their defense counsel will use new post-*Wal-Mart* case law authorities to challenge class allegations at the earliest opportunity. An emerging trend of rulings in 2013 will continue to develop, as courts confront these pro-active defense strategies.

- The EEOC's systemic litigation program is expected to expand in 2014, with more filings, larger cases, and bigger monetary demands as the agency continues its aggressive enforcement activities. Corporate counsel also can expect to see more systemic administrative investigations relative to hiring issues (use of criminal histories in background checks), and those based on pay and promotion disparate impact theories due to alleged gender or race discrimination.

- Despite a series of setbacks for the EEOC in 2013, with federal judges entering significant sanctions and fee awards against the Commission (which the government has uniformly appealed), it is expected that these rulings will embolden rather than dampen the EEOC's aggressive enforcement of workplace bias laws.

Conclusion

In sum, the lesson to draw from 2013 is that the private plaintiffs' bar and government enforcement attorneys are apt to be equally, if not more, aggressive in 2014 in bringing class action and collective action litigation against employers.

These novel challenges demand a shift of thinking in the way companies formulate their strategies. As class actions and collective actions are a pervasive aspect of litigation in Corporate America, defending and defeating this type of litigation is a top priority for corporate counsel. Identifying, addressing, and remediating class action vulnerabilities, therefore, deserves a place at the top of corporate counsel's priorities list for 2014.

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