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# CLASS ACTION TRENDS REPORT

## Computer-age class action traps

Social media and other technological developments have altered just about every aspect of modern life. That includes employment law and class action litigation. Developments over the past decade have changed the way employers do business. These changes have produced new causes of action, new theories of liability under *old* causes of action, and new methods of litigating class claims.

In this issue of the Jackson Lewis *Class Action Trends Report*, we look at some novel class-action employment traps. We survey some of the biggest litigation risks that have arisen in this digital age, including the #MeToo movement, website accessibility for individuals with disabilities, and the growing use and value of employee biometric information. For each of these traps and more, we also discuss strategies employers can utilize to prevent falling into them.

### #MeToo: A viral movement, a wave of claims

October 2017 marked a turning point for sexual harassment. On October 4, the Equal Employment Opportunity Commission (EEOC) announced the launch of new harassment-prevention trainings for employers, focused less on “legal definitions and standards for liability” and more on “respect” and “workplace civility.” This suggested a new “broken windows” approach to combatting harassment. Indeed, “workplace incivility often acts as a ‘gateway drug’ to workplace harassment,” EEOC Commissioner Chai Feldblum said. The EEOC’s new offerings aim to stop such conduct, she added, “before it ever rises to the level of illegal harassment.” The news generated little buzz at the time.

The next day, *The New York Times* exposed film producer Harvey Weinstein as a serial sexual harasser going back decades. The revelations elicited a wave of disclosures from actresses — more than 60 accusers by month’s end — who allegedly were subjected to the movie mogul’s unwelcome advances or sexual assaults. Since then, sexual harassment has dominated the headlines. The initial focus on celebrities shifted to politicians, business leaders, and their high-profile victims. Soon it became clear that the problem was not confined to Hollywood or Washington, D.C. Individuals — mostly women — from all walks of life told similar tales of harassment or abuse in workplaces across the country. Social media amplified the stories, encouraging other victims to tell their own stories. With this, the #MeToo movement was born.

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## A WORD FROM STEPHANIE, ERIC, AND DAVID

With spring upon us, we look to renewal. So we've turned the soil in this issue of the Jackson Lewis *Class Action Trends Report* to survey several budding trends, sowed in our modern technological age, that have proven fertile ground for class litigation.

Wage-hour claims and discrimination suits have vexed employers for decades and, over the years, employers have developed compliance and defense strategies to shield them from liability as best they can. However, even the most sophisticated employers may find themselves unaware of, and ill-prepared for, the cutting-edge issues and claims we discuss in these pages. Technology offers efficiency, convenience, and previously unimagined ways of communicating and doing business. But these modern tools have also presented new compliance challenges, legal risks, and potent means of reaching potential class members and spreading litigation trends.

Online hiring assessments and time-tracking with biometric scanning, for example, are undoubtedly useful tools for employers in recruiting and managing their workforce. But they raise compliance obligations and present potential legal traps. As these tools go mainstream, we can expect legislative measures to regulate their use to spread like proverbial weeds — giving rise to new obligations and setting additional traps.

Moreover, as our brick-and-mortar economy increasingly moves into cyberspace, the legal requirements of operating a business often carry over in unanticipated ways. Businesses have found—frequently after being

served with a lawsuit — that the Americans with Disabilities Act (ADA) and its state counterparts mandate that websites be fully accessible by customers of all abilities. Class actions targeting technical violations of this requirement are in full bloom.

Of course, those “analog” discrimination and wage-hour lawsuits aren't going away anytime soon. Indeed, with social media — that most transformational and sweeping of modern advancements — such litigation can go viral. The #MeToo movement has powerfully illustrated that social media's potency can rapidly shift the cultural terrain, and the legal landscape along with it. Heightened consciousness can plant the seeds of a litigation thicket.

Please reach out to us if you have questions about the nascent trends we highlight in this *Report*. Additionally, let us know what class action topics you'd like to see us take up in future issues.

Warm regards,

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### About the *Class Action Trends Report*

The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Law & Business *Employment Law Daily*, the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

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Employers long have had to contend with and respond to sexual harassment and its consequences. EEOC statistics show that what may appear to be new is hardly new at all. From 2010 through 2016, the EEOC received

*Employers must take stock of their own strategies for preventing and responding to sexual harassment and prepare for a potential increase in claims.*

more than 12,000 charges of sex-based harassment each year. Nearly one-third of the approximately 90,000 charges received in fiscal year 2015 included an allegation of workplace harassment.

“Sexual harassment has been a long-term problem in the workplace,” said Stephanie Adler-Paindiris, Co-Leader of Jackson Lewis’ Class Actions and Complex Litigation Practice Group. “What has changed is the increased media focus on harassment and the willingness of victims to report harassment.”

**EEOC steps up**

The EEOC views workplace harassment as such a pervasive problem that it launched an 18-month study of the issue. In 2016, the EEOC Select Task Force on the Study of Harassment in the Workplace released a roughly 100-page report detailing findings on harassment in the workplace. The Task Force concluded that despite the progress made over the three decades since the U.S. Supreme Court first held workplace harassment is actionable discrimination prohibited by Title VII, we “sadly and too often still have far to go.”

The EEOC has responded quickly and forcefully in the #MeToo era. The agency has announced a string of successes in class-based sexual harassment investigations, including:

- \$340,000 settlement in January 2018 with restaurant chain Indi’s Fast Food Restaurant, Inc., concerning claims of 15 former female employees, some of whom were teenagers at the time of the alleged harassment.
- \$75,000 settlement in November 2017 with Trans Ocean Seafoods, Inc., on behalf of three female employees who complained of persistent, sexually explicit comments by a male colleague.

- \$100,000 settlement in October 2017 with Clougherty Packing, LLC, on behalf of a class of female employees alleging sexual harassment by supervisors and other employees.

Also, in anticipation of an impending wave of complaints, the EEOC launched an online portal for employees to file charges of harassment and other discrimination online from the

convenience and privacy of their homes, making it easier than ever for employees to get the EEOC involved if they feel their employer is not doing enough to prevent abusive behavior in the workplace.

**How can employers prevent their #MeToo moment?**

The heightened public awareness ushered in by the #MeToo movement has created a surge of government investigations and discrimination lawsuits, along with potentially crippling punitive damages awards and debilitating negative publicity. So far, no industry has been immune. Employers must take stock of their own strategies for preventing and responding to sexual harassment and prepare for a potential increase in claims.

The following measures should be addressed to mitigate the risks:

**Harassment policy.** Review the company’s harassment policy. An effective policy is widely disseminated throughout the organization and clearly spells out the employer’s prohibition against all forms of harassment. The policy should state that employees have a duty to report harassment when they see it or experience it, and sets forth the specific procedures for doing so. The policy should also expressly prohibit retaliation against employees who file a complaint or report of harassment, Adler-Paindiris pointed out. In addition, the policy must be compliant with federal and applicable state law.

**Harassment training.** Implement harassment training for all employees, supervisory and nonsupervisory. Training should define discrimination and harassment and discuss

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**#METOO: A VIRAL MOVEMENT** continued from page 3

reporting procedures and prohibitions on retaliation, including the consequences for reprisal. It should address what employees *should* do, as well as what they should *not* do, and include how to appropriately respond when they witness harassment or are subject to it. Adler-Paindiris noted: “An effective sexual harassment training includes real-life hypothetical examples that call for employees and supervisors to ask themselves how they would respond in the scenarios posed. It is interactive and engaging. It includes a review of the employer’s specific policies. It covers not only sexual harassment but harassment against all protected classes. And, it is conducted regularly and updated as the law evolves.”

*Hold all business leaders and managers accountable for enforcing the employer’s policies and practices — not just HR or the legal department.*

Supervisors and managers must also be trained how to handle and escalate harassment claims as well as how to create and maintain a harassment-free workplace. They must be instructed that they will be held accountable for upholding the antiretaliation policy, and advised of the consequences for failing to do so.

Employers that operate in states with mandatory harassment training (California, Connecticut, and Maine) must ensure their training program satisfies the established requirements under applicable statutory provisions.

**Modeling and messaging.** “Policies cannot simply sit in a handbook,” Adler-Paindiris cautioned. “Expected behavior must be modeled from the top. Managers and leaders must repeatedly communicate the message of the policies and the expectations for workplace conduct.”

Moreover, an employer’s harassment policy must be enforced even when the alleged harasser is a key executive. “It is very challenging for an employer when a high-level and valuable employee upon which the company heavily relies, is the subject of a complaint,” Adler-Paindiris acknowledged. “However,” she added, “these situations test the company’s zero-tolerance policy and set the tone

for the entire organization. An employer should treat a claim against a top performer the same as a claim against any other employee. The golden rule is to treat employees equally when handling complaints.”

**Reporting procedure.** Establish and communicate a clear and effective reporting mechanism that specifies the steps an employee must take to report harassment. Provide multiple avenues for bringing complaints, including, if feasible, an anonymous complaint hotline. Emphasize that employees have a duty to report harassment promptly.

“Workplaces that do not have an open door policy and where employees do not feel safe reporting harassment may be at a greater risk of creating a harassing work environment,” according to Adler-Paindiris.

**Prompt, effective response.**

Quickly respond to employee complaints when they arise. Investigate any allegations of harassment quickly and thoroughly. Take prompt remedial action to resolve the matter effectively and fully, with minimal disruption. HR, legal, and employee relations professionals should be trained in conducting thorough and effective investigations and taking appropriate remedial action against those who perpetrate harassment as well as those who knowingly permit its occurrence.

**Monitoring.** Monitor harassment policies, trainings, reporting and response procedures, and other preventive practices to ensure they continue to remain effective and work as intended to prevent sexual harassment in the workplace.

**Accountability.** Hold all business leaders and managers accountable for enforcing the employer’s policies and practices — not just HR or the legal department. Communicate to all levels of the organization that, now more than ever, inappropriate conduct may result in disciplinary action up to and including termination. The failure to take these measures — and allowing a culture of harassment to continue — can have dire consequences. ■

## The ADA applies in cyberspace, too

By Joseph J. Lynett

For years, “public accommodation” lawsuits under Title III were confined to brick-and-mortar physical barriers, such as steps, excessive slopes in parking lots, and routes that were too narrow for individuals in wheelchairs to use. In the e-commerce age, however, cyberspace is a place of public accommodation, and, increasingly, Title III claims are challenging the accessibility of websites.

Title III of the ADA prohibits discrimination against persons with disabilities in places of public accommodation and commercial facilities. Practically all types of businesses that serve the public are covered by Title III, including restaurants, hotels, theaters, convention centers, hospitals,

*Courts are divided, however, over whether all commercial websites must be ADA-compliant, or just websites associated with brick-and-mortar businesses.*

doctors’ offices, retail stores, museums, libraries, private schools, health spas, and day care centers. Title III requires these businesses to take affirmative steps to make “reasonable modifications” to their usual policies and procedures when necessary to serve customers with disabilities. Regardless of the size of the business — or the age of the building the business occupies — places of public accommodation that fail to comply may face litigation.

Individuals who are blind or visually impaired access the internet through the use of screen-reading software. Websites that comply with “WCAG 2.0 Guidelines,” developed by a think tank focused on global website standards, generally are considered accessible to these consumers. If a website does not adhere to this standard, however, visually impaired individuals may potentially be unable to fully access its content — potentially giving rise to a violation of Title III of the ADA. That’s the contention of a recent wave of class actions targeting websites that are not fully accessible.

### No clear guidance

While the ADA was enacted before the internet as we know it today existed, most courts to have addressed the issue have held that websites are indeed covered under

Title III and must be accessible to disabled users. Courts are divided, however, over whether *all* commercial websites must be ADA-compliant, or just websites associated with brick-and-mortar businesses. The public accommodations case law is relatively underdeveloped, particularly with respect to website accessibility. Thus far, most courts require that a website have an actual nexus to a brick-and-mortar location to be covered by Title III. The question is increasingly relevant, of course, given the rapid growth of e-commerce and internet-only businesses.

Under the Obama Administration, the U.S. Department of Justice (DOJ), which enforces Title III, took the position that “stand-alone” websites must be accessible. Rules providing specific guidance to businesses as to what constitutes an accessible website for Title III purposes have yet to be issued, however. The Trump Administration is expected to issue regulations in 2018.

Meanwhile, millions of businesses with U.S. websites have the worst of both worlds: mandates without directions. The DOJ’s position, coupled with the lack of a regulatory standard for what constitutes accessibility under Title III, has created a “perfect storm” for litigation. Website accessibility lawsuits are being filed in droves.

While U.S. companies typically decry an overly burdensome regulatory environment, this is a situation in which regulations would help businesses. In the absence of regulation, the plaintiff’s bar has eagerly filled the regulatory void.

### A litigation surge

Few businesses understand the potential legal risks of website accessibility requirements until they are sued. Just a few years ago, such lawsuits were uncommon. According to federal court dockets, though, in 2016, more than 260 website accessibility lawsuits were filed. There have been thousands more since. The surge came largely after a federal court in Florida held in June 2017 that a regional grocery chain must ensure its website is ADA-compliant.

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**THE ADA APPLIES IN CYBERSPACE, TOO** continued from page 5

Website accommodation complaints typically contend a business is in violation of the ADA (or state law) because it denies full and equal access to its website and, thus, its products and services and, in conjunction, its physical locations. Plaintiffs allege these businesses have engaged in both intentional and disparate impact discrimination against individuals who are visually impaired by failing to conform to WCAG Guidelines. They often seek injunctive relief ordering the defendants to comply with the law. The main targets are the retail and hospitality industries, including restaurants. Businesses being sued range from small “mom and pop” restaurants to Fortune 50 corporations. California and New York, in particular, have been hotbeds of such litigation.

*Compliance, of course, is the best defense. However, 100-percent compliance with every detail of Title III’s requirements is exceedingly difficult.*

While Title III claimants cannot pursue monetary damages in public accommodation cases (though some state laws do provide for damages), the ADA is a fee-shifting statute. Therefore, plaintiff’s attorneys may be entitled to upwards of \$25,000 in legal fees. Moreover, because it is a strict-liability law, a plaintiff need not establish discriminatory intent. The relatively low bar to prevail, paired with the potential to be awarded fees in these cases, is an attractive draw.

In the past, businesses have tended to view public accommodation claims in general as “nuisance” suits. They would promptly resolve the claims and quickly make whatever modifications needed to be made to the property. However, with the sharp rise in these cases comes growing frustration, and defendants are increasingly reluctant to settle. The *issue* is genuine, most businesses acknowledge. The lawsuits, however, are viewed with skepticism. Thus, there is an increased appetite to vigorously defend these cases.

**Defending website accessibility lawsuits**

Businesses involved in website accessibility lawsuits have raised various legal arguments seeking to dismiss these cases at the earliest possible stage, including:

- The plaintiff lacks standing to bring the lawsuit because he or she does not intend to return to the place of public accommodation (or to use the website again).
- Websites are not covered under Title III.
- The website is compliant, there is no violation.
- The business is already taking steps to make the website accessible, rendering the case moot.
- The court should defer to the primary jurisdiction of the DOJ on this issue.
- There is no legal standard for website accessibility; thus, it violates a defendant’s due process rights to hold a business liable without notice of what the law requires.

With some exceptions, motions to dismiss such lawsuits based on these legal arguments have generally been unsuccessful.

To the extent that businesses are considering whether to settle or litigate these cases, court decisions denying summary dismissal of lawsuits might embolden the filing of more of these cases.

**Preventing website accessibility claims**

Compliance, of course, is the best defense. However, 100-percent compliance with every detail of Title III’s requirements is exceedingly difficult, both with respect to

**The ADA applies in cyberspace, too** continued on page 7

**Employment ADA claims differ**

Companies that accept online job applications also risk lawsuits by vision-impaired job applicants if their online application systems are inaccessible. These cases are pursued under Title I of the ADA which, in contrast to Title III, allows plaintiffs to seek money damages, and thus provides even more incentive to sue. In addition, while the bulk of Title III claims are brought on an individual basis, Title I claims are ripe for class action treatment, and are more likely to give rise to claims of systemic discrimination brought by the EEOC or similar state agencies.

**THE ADA APPLIES IN CYBERSPACE, TOO** continued from page 6  
brick-and-mortar facilities and with websites. In this area of the law, there is no such thing as “substantial compliance.”

Certainly, adherence to WCAG Guidelines is a strong defense to website accessibility claims. The easiest preventive measure is to run an accessibility scan of the webpages using a free online tool, such as [www.wave.webaim.org](http://www.wave.webaim.org), to evaluate your website’s compliance. The report will show areas of the webpage that may

*If enacted, H.R. 620 would require that individuals first provide written notice to a business that it allegedly is out of compliance before they can pursue legal action.*

not be accessible and recommend a solution. What if a business doesn’t meet that standard but conforms to some other accessibility standard? What if the business does use WCAG guidelines, but part of a website page is inaccessible? These questions are, as yet, unanswered, either by the DOJ or the courts.

One case to be made is that there are alternative means of providing accessibility, regardless of conformance to WCAG standards, to satisfy the ADA’s requirements. In theory, an individual with a disability must *request* an accommodation before he or she can be *denied* the accommodation — the obligation to provide auxiliary aides or other services as an accommodation does not trigger until such a request has been made. Most businesses have customer service lines that would allow an individual with a vision disability to obtain the information or service they require, quickly and efficiently, in verbal form, if requested. Such alternative means, arguably, are sufficient to satisfy the obligations of Title III.

It should be noted, though, that even proactive companies that have been rigorous in ensuring their websites are fully accessible (spending a considerable amount of time and money in the process) have been sued nonetheless. Thus, while the plaintiff’s bar argues that these lawsuits wouldn’t be filed if websites were just made accessible, this notion

is largely a fallacy — and it underscores why the lack of regulations are hurting companies, and the need for reform in this area.

## Reform legislation pending

Legislation that would make it easier to comply with Title III’s mandates recently passed in the U.S. House of Representatives as H.R. 620, the ADA Education and Reform Act. If enacted, this bill would amend the statute’s public accommodation provisions to require that individuals first provide written notice to a business that it allegedly is out of compliance before they can pursue legal action. Businesses would then have 60 days to acknowledge the violation in writing and an additional 120 days to make “substantial progress” toward fixing the problem before being subjected to a civil lawsuit. However, the measure passed by only a narrow margin, amid vocal opposition from the disability community. Moreover, a companion bill has yet to be introduced in the Senate. Consequently, final passage is by no means certain and remains a long way off.

While a pre-suit notice requirement would be a step in the right direction, the potential impact of such a reform may be overstated. A notice requirement would provide businesses a meaningful opportunity to make their public accommodations fully accessible for individuals of all abilities. However, dissatisfied customers will continue to file lawsuits if they deem the changes to be unsatisfactory. In other words, the proposed reform may simply delay, rather than prevent, these lawsuits. Moreover, reforms at the federal level will not prevent plaintiffs from seeking recourse under state law. Plaintiffs may simply pursue these lawsuits in state court under applicable state-law provisions rather than under Title III.

Companies should consult with counsel for assistance identifying additional preventive measures that can be taken to reduce or eliminate legal risk under Title III and in staying on top of legislative and regulatory developments impacting public accommodations and website accessibility. ■

## Online job assessments can be an ADA minefield

To narrow their applicant pool when recruiting new employees, employers increasingly administer online assessment tests. These tests measure a job candidate's fit for a particular position by evaluating whether the individual possesses personality attributes that align with potential success in that role. For example, a business recruiting sales representatives may use an online assessment to evaluate social acumen through questions that identify whether the applicant is an extrovert (an obvious plus in a sales position) or an introvert.

*The legal danger is that screening out candidates who lack certain personality traits may result in the blanket exclusion of otherwise qualified individuals with mental disabilities.*

The benefit of these tools in streamlining the labor-intensive recruitment process is clear. Online assessments often are used when hiring for entry-level jobs involving customer contact, so the ability to pare down a large number of applications without having to interview every candidate is invaluable. As the technology improves, the algorithms are becoming more finely calibrated, and these assessments have even greater predictive value.

### Disability discrimination

Despite the obvious benefits, there is a risk these tools may exclude individuals with a particular disability, in violation of the ADA. It is, of course, unlawful for an employer to discriminate against a job applicant based on the individual's protected status, including disability and — critically — based on assumptions about whether that disability would prevent him or her from successfully performing the functions of the job. The legal danger is that screening out candidates who lack certain personality traits may result in the blanket exclusion of otherwise qualified individuals with mental disabilities.

The EEOC has delved deeply into the issue. With the large number of individuals screened through online assessments and a vast amount of standardized data, the practice is ripe for a systemic discrimination enforcement

action. In addition, some courts have interpreted the ADA to hold that, unlike Title VII, disability discrimination claimants are not required to establish a disparate impact (*i.e.*, to show that disabled individuals are disproportionately screened out by online assessments), making it easier to state a viable claim. Consequently, the circumstances can be enticing for the plaintiff's bar as the use of online assessment tools proliferates. Indeed, *The Wall Street Journal* reported that only 26 percent of the nation's largest employers used pre-hire assessment tools in 2001. By 2013, this number more than doubled, with 57 percent of the nation's largest employers using online testing as part of their hiring process.

The use of online assessments must be carefully targeted to identify only those personality traits that are clearly job-related and consistent with business necessity. Employers must resist the temptation to expand the use of an assessment tool beyond this limited scope. A tool that has been carefully designed for the recruitment of sales representatives, for example, should not be used when recruiting for other positions. If the assessment tool has not been validated for use in screening for other jobs, an employer risks running afoul of the ADA or equivalent state laws.

With the rapid ascent of human resource analytics, some employers have begun to use customized assessments, measuring proven markers of success in their existing workforce and screening job applicants for the same attributes. Employers must ensure these customized tools are rigorously validated as well, to confirm they provide accurate predictors of performance and do not inadvertently exclude job applicants based on protected status. Most commercial assessment vendors document the validity of their tests, but employers must also ensure that any customized assessments are valid under federal guidelines known as the Uniform Guidelines on Employee Selection Procedures (UGESP).

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## More online recruiting traps

Disability discrimination is not the only concern. The law prohibits discrimination in hiring with respect to other protected characteristics as well. Hiring practices can come under legal scrutiny if they appear to exclude individuals based on sex, age, race, national origin, or any other protected characteristic. In the context of online assessments, for example, an English proficiency test may have a disparate impact on certain applicants based on their national origin. Therefore, employers using such a test must validate that English proficiency is in fact an important qualification for the position they seek to fill.

Employers must not advertise job openings in a place or manner that would tend to unlawfully exclude certain individuals. This is hardly new — even in the old days, when job ads were largely confined to print newspapers, it was unlawful to advertise a preference for a particular gender or race, for example, and seemingly neutral job ads seeking “recent college graduates” could spark allegations of age discrimination. Ad content aside, the location or form of recruiting has long invited scrutiny. (As the EEOC has noted, recruiting through word-of-mouth employee referrals unfairly favors Hispanic individuals if a company’s existing workforce is largely

Hispanic, as would placing job ads solely in Spanish-language newspapers.)

Recently, the plaintiff’s bar has actively sought to extend this scrutiny to online advertising. Online recruiting casts a wider net, which may mean a broader class. The concern, however, is that the targeted, precision marketing enabled by online platforms can spur allegations that an employer is impermissibly recruiting from specific demographic groups, even if the exclusion of specific groups is hidden with imbedded coding. Moreover, in addition to job postings, employers can now screen those applicants who do apply, tracking them by zip code or surname, so employers may be presumed to know applicants’ racial and gender composition. Even the common search function can pose problems if a recruiter uses selection criteria that have an adverse impact on certain categories of applicants.

Employers must review their online hiring and recruitment practices continually to ensure they comport with federal, state, and local discrimination laws. Consult with outside counsel for assistance in auditing your practices to ensure they best serve your business needs while ensuring legal compliance.

### ONLINE JOB ASSESSMENTS continued from page 8

Consider also that an applicant with a disability may lack a desired trait (at least according to the online assessment) but may nonetheless be able to perform in the position with or without a reasonable accommodation. There may be some jobs for which an accommodation will allow a candidate to perform the essential job functions. For example, an individual with Asperger’s Syndrome may not score high on online “friendliness” measures, yet might perform admirably in a call center position with the use of prepared “scripts.” There are indications the EEOC is thinking along similar lines.

## Compliance pointers

Here are some pointers for employers that utilize online assessment tools, or are considering adopting such tools:

- Remember that online assessment tools must screen for specific, job-related qualifications that are consistent with a business necessity. An employer cannot use online assessment tools to evaluate all job applicants, without regard to position, for “nice to have” personality traits that do not correspond to specific job duties.

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**ONLINE JOB ASSESSMENTS** continued from page 9

- Online assessments must be properly validated for a particular position; a test that is validated for one job is not presumed to be valid for use in assessing candidates for different jobs. Similarly, test vendors’ “off the shelf” validity studies are often inadequate; employers need tests validated for their own jobs.

*Employers often adopt online assessments and related objective measures with the aim, at least in part, of avoiding unlawful discrimination.*

- If an online assessment may have an adverse impact on individuals with disabilities, consider whether there are alternative tools for evaluating job candidates effectively that would be less likely to have that effect.
- Consider whether a job applicant requires a testing accommodation to complete the online assessment. A prospective employer must provide such an accommodation for an applicant with a disability if reasonable unless doing so would be an undue hardship.
- Certain online psychological tests assessing a job applicant’s mental health may constitute an unlawful pre-hire “medical inquiry” under the ADA. The use of standardized assessments that diagnose abnormal personalities, for example, might violate the ADA. Be wary of implementing these types of tests.
- Routinely review the job duties (and job descriptions) of any positions for which you use online assessments in hiring. As jobs evolve and duties

change, the qualifications change too. Online testing tools may need to be updated accordingly and (re) validated to ensure they continue to be accurate predictors of success.

- Be careful that online assessment tools are administered through the company’s professional HR recruiters who are trained to understand the legal implications of their use and misuse. Such tools should not fall into the hands of hiring managers, who may use them in ways that could expose the company to legal liability.
- If the online assessment is used to screen out candidates, those candidates must not be rejected without being informed of how they can request an accommodation to the application process.

Businesses must carefully weigh the benefits of using these tools against the risks that they create. Employers often adopt online assessments and related objective measures with the aim, at least in part, of *avoiding* unlawful discrimination — seeking to minimize the risk that subjective decision-making might produce such undesired hiring outcomes. This does not shield employers from potential liability. Nor does a properly validated and appropriately administered use of these tools guarantee that an employer will be able to deter class litigation. It does, however, provide an important defense in the face of such claims and, as a practical matter and ensures an employer has recruited the best talent for the company and furthered its related goal of providing equal employment opportunities. ■

## Use of biometric data prompts class litigation

By Joseph J. Lazzarotti

Fingerprints, voice prints, vein patterns in a person's palm. The use of biometric identifiers may seem futuristic and high-tech, but the technology has been around for a while and is now commonly used for such routine functions as unlocking smartphones and laptops. The use of biometrics is no longer something seen only in science fiction movies or television police dramas. It is entering the mainstream, including the workplace. Be prepared.

### A simple scan ... a compliance challenge

Employers increasingly use biometric data for business purposes. For example, employers that utilize the proverbial timeclock for capturing employees' work hours rightly worry about "buddy punching," a practice in which employees have

*There are already a number of state laws addressing the collection, use, and safeguarding of biometric information.*

coworkers clock in and out for them in the company's time management system at the start or end of shifts and lunch breaks. Additionally, in an ever more security-conscious environment, employers have stepped up measures to control and track who is entering their premises. Now, with a simple scan of an individual's fingerprint, biometric tools can validate that the individual is indeed the employee whose time is being recorded or who is entering the building. But that simple scan can come with some significant compliance obligations, as well as exposure to litigation.

Employers that currently utilize biometric tools, or that are considering implementing such tools, must be aware that there are already a number of state laws addressing the collection, use, and safeguarding of biometric information. Employers already have begun to face class litigation under these statutory provisions. Companies need to carefully think through the adoption and implementation of these tools, particularly in the workplace.

### State laws

As the use of biometrics and biometric identifiers in the workplace grows, so does the number of state laws to protect this kind of data. Some states have encompassed

biometric data amid the types of information protected under existing privacy laws and others have enacted specific provisions regulating the use of biometric information. So far, the latter include California, Colorado, Illinois, Massachusetts, Michigan, New York, Texas, and Washington.

Let's look at the Washington statute, the most recent enactment, for purposes of illustration. H.B. 1493, which took effect July 23, 2017, prohibits "persons" from "enrolling" "biometric identifiers" in a database for a "commercial purpose" without first providing notice, obtaining consent, or providing a mechanism to prevent the subsequent use of the biometric identifiers for a commercial purpose. "Biometric identifiers" are defined as data generated by automatic measurements

of an individual's biological characteristics, such as a fingerprint, voiceprint, eye retinas, irises, or other unique biological patterns or characteristics used

to identify a specific individual. To "enroll" means to capture an individual's biometric identifier, convert it into a reference template that cannot be reconstructed into the original output image, and store it in a database that matches the biometric identifier to a specific individual.

Note, though, that the Washington statute requires notice and consent *only* if the person collects biometric identifiers for a "commercial purpose." What is a "commercial purpose"? Under this particular statute, it is one that is in furtherance of the sale or disclosure to a third party, or for marketing goods or services unrelated to the initial transaction in which a person first gains possession of an individual's biometric identifier. The statute does not mandate notice and consent if the person captures or enrolls a biometric identifier and stores it in a biometric system, in furtherance of a security (or other non-commercial) purpose — which presumably includes the kinds of uses for which employers typically capture employees' biometric data. In this sense, Washington's measure is narrower than other state-law provisions, which more broadly regulate the use of biometric information without regard to whether it will be sold to a third party.

**Use of biometric data continued on page 12**

## Consider discrimination laws, too

Other federal and state anti-discrimination statutes can be implicated when using biometric tools. For example, in a widely reported case, the EEOC brought a Title VII religious discrimination claim on behalf of an Evangelical Christian who alleged he could not use his employer's newly implemented biometric hand scanner to track time and attendance because it carried the "mark of the beast." The employer offered alternatives to the hand scanner for employees with nonreligious objections but it had refused to accommodate the claimant's sincerely held religious belief. A jury ruled in the EEOC's favor and, in June 2017, the U.S. Court of Appeals for the Fourth Circuit affirmed the court's order upholding the verdict.

Retinal scans, another biometric technology that can be used for identification and security purposes, also can assist in diagnosing chronic health conditions and hereditary diseases. The data captured by such scans can alert employers to employees' serious health conditions, and thus raise a range of medical privacy, medical inquiry and discrimination issues under the ADA and state-law equivalents.

**USE OF BIOMETRIC DATA** continued from page 11

### State lawsuits

Washington's biometric protection statute does not provide for a private right of action. Instead, the measure is enforced by the state attorney general, which is fairly typical of existing state biometric protection laws. The Illinois Biometric Information Privacy Act (BIPA), however, permits individuals to sue for violations. Successful claimants can recover liquidated damages of \$1,000 or actual damages, whichever is greater, along with attorneys' fees and other costs. The liquidated damages amount increases to \$5,000 if the violation is intentional or reckless. The availability of statutory damages makes the Illinois measure particularly attractive to the plaintiffs' bar, and

explains why the state is currently the epicenter of a burgeoning wave of biometric privacy class actions.

The measure has been quietly on the books since 2008. However, since July 2017, more than 30 employment class actions have been filed in Illinois state court alleging BIPA violations. The flood of employee class actions allege employers have misused timekeeping systems that collect fingerprint scans. They claim the employer failed to provide proper notification and obtain written consent, or neglected to institute a valid use policy.

A December 2017 decision by an Illinois appellate court could help stem this tide. In a non-employment class action suit contending that a theme park unlawfully collected fingerprints from season pass holders without written consent, the appeals court held that a plaintiff must claim actual harm resulting from the breach to be an "aggrieved person" entitled to recovery under BIPA. Because the plaintiffs did not suffer actual harm in that case, they did not have standing to bring a claim. The appeals court reversed the trial court decision which had held that the law allows plaintiffs to sue without regard to whether they suffered actual harm.

The case is a significant victory for employers and other businesses that collect biometric information from employees or consumers. Still, plaintiffs will continue to bring these claims using a variety of legal arguments to allege that they are "aggrieved." Currently pending, for example, is a putative class action filed by employees alleging their employer's practice of requiring daily biometric fingerprint scans violates their privacy rights under BIPA. The prospects for this and similar claims will turn largely on the extent to which a breach results in real harm, affording the plaintiff standing to sue.

### Questions to ask

When deciding whether to implement technologies that capture employees' biometric information, consider the following:

- **Can we collect this biometric information?** In some states, the answer may be no. For example, in New York, Labor Law Section 201-a prohibits private employers from fingerprinting employees unless

**Use of biometric data** continued on page 13

**USE OF BIOMETRIC DATA** continued from page 13

required by law. Other states *may* permit the collection of biometric information if certain steps are taken. The Illinois statute restricts private entities from obtaining a person’s biometric identifier or biometric information unless the person is given notice in writing, and provides consent in writing.

- **Can we require employees to share biometric information?** Can an employer mandate consent as a condition of employment? That issue is in dispute under the Illinois law. What happens, as a practical matter, if an employee objects? Do you provide work-arounds? Can you terminate the employee? What if an entire group of employees objects? These questions will invite litigation.
- **Is this really “biometric information”?** The meaning of “biometric information” varies under different state laws. For example, while New York law prohibits fingerprinting of employees, a biometric time management system may not actually be capturing a “fingerprint.” According to a 2010 opinion letter by the state’s Department of Labor, a device that measures the geometry of the hand is permissible as long as it does not scan the surface details of the hand and fingers in a manner similar or comparable to a fingerprint. It is important to understand the technology and, specifically, the exact type of information being captured.
- **Do we have to safeguard biometric information?** Some states require a reasonable standard of care when storing, transmitting, or disclosing biometric information. It is a best practice to do so even in the absence of a specific legal requirement to safeguard such information. As with other personal data, if it is accessible to or stored by a third-party services provider, obtain written assurances from the vendor that it complies with minimum safeguards.
- **Are we ready to handle a breach of biometric data?** All 50 states have passed laws requiring notification of a breach of “personal information.” Some states, including Connecticut, Illinois, Iowa, Michigan, and Nebraska, include biometric data in the definition of personal information — and the list will certainly grow. Accordingly, employers should include biometric data as part of their written incident response plans.

■ **How long must we retain biometric information?**

A good rule of thumb: Avoid keeping personal information for longer than needed. Some state laws codify retention requirements. Under the Illinois statute, biometric identifiers and biometric information must be permanently destroyed when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within three years of the individual’s last interaction with the entity collecting it, whichever occurs first. Implement a standard practice for disposing the biometric data of terminated employees. Work with the IT department to ensure the information has been deleted in all places. Many companies hire third-party vendors for data retention. Here, too, employers must obtain detailed written assurances that the vendor follows proper retention practices.

■ **How are we to dispose of biometric information?**

A number of states have specific disposal requirements. Colorado and Massachusetts, for example, require that certain entities meet minimum standards for properly disposing records containing biometric information.

**The takeaway**

Employers considering the use of employee biometric information first must determine whether there is a state statute that applies and, if so, carefully consider what steps must be taken to comply. Human resources offices are becoming increasingly sophisticated about the use of various technologies, such as GPS and similar tools, and their implications in the workplace. Here, too, they must get up to speed as the use of biometric technologies goes mainstream. IT departments will be critical partners in implementing the technology and thinking through the practical considerations for the company.

Stay apprised of emerging legislation regulating the use of biometric information. Even if there is currently not a law on the books in the employer’s state, if it using or considering the use of such technologies, it will need to continue to monitor the legal landscape to manage the risks in this increasingly regulated area. ■

## Other class action developments

A sampling of important developments in class litigation since our last issue:

**Supreme Court: Service advisors are overtime-exempt.** After years of litigation, including two trips to the U.S. Supreme Court, the Court has held, in a 5-4 decision, that service advisors who work in an automobile dealership are exempt from overtime under the Fair Labor Standards Act's "automobile dealer" exemption applicable to salesmen, partsmen, and mechanics. But the case has implications far beyond the industry-specific exemption. The Court has finally put to rest the "narrow construction" principle, long a thorn in the side of employers litigating FLSA exemption

*The Supreme Court now squarely rejects this principle, lifting the thumb off the scale and noting that exemptions are just as much a part of the FLSA as is the overtime requirement.*

cases. Under this oft-stated principle, exemptions were "narrowly construed" against the employer due to the FLSA's status as a "remedial" statute. This canon put a thumb on the scale in favor of employees in exemption cases and is cited routinely in cases involving application of an FLSA exemption. The Supreme Court now squarely rejects this principle, lifting the thumb off the scale and noting that exemptions are just as much a part of the FLSA as is the overtime requirement.

**Supreme Court resolves jurisdictional issue in securities case.** In a non-employment case, the Supreme Court unanimously held the Securities Litigation Uniform Standards Act (SLUSA) did not eliminate state-court jurisdiction over claims alleging only violations of the Securities Act of 1933 and that defendants cannot remove such cases to federal court. Congress had enacted the SLUSA to prevent plaintiffs from skirting the substantive and procedural reforms enacted with passage of the Private Securities Litigation Reform Act, which aimed to prevent abusive practices associated with securities class actions. A group of pension funds and other investors brought suit against a corporation after the value of its stock declined. They sued in California state court, but

they did not assert state-law claims; rather, they sued under the SLUSA. The defendant moved to dismiss their claims on jurisdictional grounds, arguing that the "except clause" in the 1933 Securities Act deprived state courts of jurisdiction over these claims in "covered class actions." The state court rejected this argument. Ultimately, the Supreme Court did, too.

**Ninth Circuit vacates multi-million dollar deal.** In what the dissenting judge called a "major blow to multistate class actions," the U.S. Court of Appeals for the Ninth Circuit vacated a nationwide multidistrict class action settlement after more than six years of litigation, concluding the lower court had failed to conduct the "rigorous analysis" required to determine whether common questions predominated. The decision was handed down in a consumer class action, brought under state common law and statutory theories, alleging automakers had misrepresented

the fuel efficiency of certain models. In rejecting the settlement, the appeals court primarily took issue with the district court's certification of the class, not with the substance of the parties' agreement. What troubled the Ninth Circuit was that the lower court had improperly treated the settlement as relieving the court of its duty to perform a rigorous analysis of whether the requirements for class certification were satisfied. As a result, class certification was vacated, and the action was remanded for further proceedings. The Ninth Circuit's decision likely could mean that district courts within the circuit will need to apply a higher standard of scrutiny when deciding whether to certify class cases.

**Expanding the definition of sex discrimination.** Broadly expanding the field of potential Title VII "pattern or practice" liability, a divided U.S. Court of Appeals for the Second Circuit, sitting *en banc*, reversed a panel decision and held that Title VII prohibits discrimination based on sexual orientation, as a subset of sex discrimination. Sexual orientation discrimination is based on gender stereotypes (which has long been deemed unlawful sex discrimination), including to whom an employee

**Other class action developments continued on page 15**

**OTHER CLASS ACTION DEVELOPMENTS** continued from page 14 should be attracted, and also constitutes associational discrimination because it is motivated by opposition to association between members of certain sexes. The Second Circuit joined the Seventh Circuit which, in 2017, had also made an *en banc* about-face in so holding. (The Eleventh Circuit has ruled to the contrary.) Weeks later, the Sixth Circuit, in a suit brought by the EEOC, held that employees can assert sex discrimination claims based on their failure to conform to sex stereotypes or because of their transgender and transitioning status.

**Consumer class challenges forced tipping.** A national restaurant chain's diners who claim that three New York City franchisees imposed a mandatory tipping policy through automated tabletop order-and-pay tablets may move forward with their proposed class action alleging unfair business practices under New York General Business Law § 349 and other state-law claims. The tablets require diners, when paying their check, to select tip options of at least 15 or 18 percent, but there is no option for *no tip*. Moreover, the restaurants do not disclose this mandatory "surcharge" on the menu, thus misrepresenting the true cost of meals, the plaintiffs allege. A federal district court denied the franchisees' motion for judgment on the pleadings on the diners' proposed class action claims under New York law, including unfair business practices, false advertising, breach of contract, negligent misrepresentation, and unjust enrichment. Among other rejected arguments were the franchisees' contentions that: (1) because tipping is such a well-accepted social norm, customers *expect* to leave a tip, so there was no deception here and no contract breach; (2) the diners would have left a 15- to 18-percent tip anyway, so the plaintiffs did not plead actual harm; and (3) the tips collected through the tabletop tablets went entirely to the servers, so the restaurants were not unjustly enriched.

**Former Dukes plaintiffs cannot get Dukes docs.** A federal court overseeing a "spin-off" class action brought by former members of the *Wal-Mart Stores, Inc. v. Dukes* class refused to order the company to produce documents prepared by a consultant the retailer had hired while defending itself against the landmark discrimination suit. The case is one of several smaller class action suits filed by *Dukes* class members after the

Supreme Court held the massive nationwide class could not proceed. The plaintiffs filed a motion to compel production of documents prepared by the third-party consultant analyzing and recommending changes to Wal-Mart's compensation and promotion policies. They contended the documents were "highly relevant" to their disparate impact claims. Wal-Mart raised general

**Other class action developments continued on page 16**

## Tip rule update

The federal budget bill passed in March resolves ongoing uncertainty over the status of a proposed DOL tip rule. The FLSA imposes certain restrictions on employers that take the tip credit against the minimum wage, including prohibiting employers from including nontipped employees (and managers) in an employer's mandatory tip pool. A 2011 DOL rule extended those restrictions to employers that pay their tipped employees the full minimum wage. In 2017, the DOL moved to pull back that Obama-era regulation. The move generated a good deal of controversy, particularly after reports surfaced that the DOL withheld internal estimates showing that the rule change would mean \$4.6 billion in lost tips for tipped workers. (Labor Secretary R. Alexander Acosta took issue with the estimate and balked at its assumption that employers would withhold tips rather than distribute them among employees.) At any rate, the omnibus spending bill addresses concerns that the proposed rule would allow employers to pocket employees' tips instead of distributing them to other employees, as contemplated. Specifically, it includes a provision to amend the FLSA to provide that: "An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit." The provision gives employees the right to sue to recover improperly withheld tips with added damages, regardless of whether they are paid the full minimum wage rate, and empowers the DOL to sue to recover tips and impose civil penalties for violations.

**OTHER CLASS ACTION DEVELOPMENTS** continued from page 15

objections as to the relevance and the scope and proportionality of the discovery request. The defendant had produced some 1,500 documents related to the consultant's work, but drew the line on the remaining documents. The court found the work product doctrine (but not the attorney-client privilege) shielded the third-party documents from discovery. It denied the plaintiff's motion to compel; it also granted Wal-Mart's motion to quash the plaintiffs' third-party subpoena seeking the documents directly from the consultant.

**Arbitrator cannot opt in on behalf of potential class members.** An arbitrator lacked authority to decide whether an employer's dispute resolution agreement permitted class action arbitral procedures for anyone other than the named plaintiffs who chose to present the arbitrator with that question and the other individuals who chose to opt in

*The court held the arbitrator could not bind absent class members to class arbitration given that they had not submitted themselves to the arbitrator's authority in any way.*

to the proceeding before her, a federal court in New York found. The long-running case against a national jewelry retail chain has been ongoing since 2008, when a group of current and former female employees alleged the defendant had discriminated against them in pay and promotion on the basis of their gender. In what the court called "the latest chapter in a rather convoluted litigation," which has made its way to the Second Circuit and back, the court held the arbitrator could not bind absent class members to class arbitration given that they had not submitted themselves to the arbitrator's authority in any way. "Nowhere in the Federal Arbitration Act does Congress confer upon these private citizens the power to bind individuals and businesses except in so far as the relevant individuals and businesses have bound themselves," it wrote. Therefore, the court vacated the arbitrator's class determination award certifying a Title VII disparate impact claim including an estimated 70,000 "absent" class members.

**Out-of-state plaintiffs excluded.** A federal court in Illinois refused to allow out-of-state class members in a Telephone Consumer Protection Act case to piggyback

on the personal specific jurisdiction of named plaintiffs within the state, in a class action suit brought under the statute. Applying the rationale of the U.S. Supreme Court's decision in *Bristol-Myers Squibb v. Superior Court*, a mass tort case, to consumer class actions, the court refused to certify a nationwide class including nonresident plaintiffs and instead certified a narrow class comprised only of Illinois residents. The district court concluded the same due process concerns implicated in *Bristol-Myers Squibb* applied with equal force in the class action context. In so ruling, the court offered class action defendants an important strategy for shrinking the size of nationwide Rule 23 class actions.

**Online reviewers are similarly situated?** A federal court in Louisiana conditionally certified an FLSA collective action brought by a labor contractor's employees who relied in part on online reviews of the company, where "alleged" employees posted similar complaints about not getting paid, to establish there were similarly situated employees likely interested in joining the suit. The employees submitted affidavits stating

other potential plaintiffs were heard complaining about missing or delayed wages, too. Finding it a "close call," but noting that close calls should favor the plaintiff at the notice stage, the court granted conditional certification, stressing, however, that the plaintiffs would need more evidence to remain on "solid ground" at the next stage. That is what the discovery period is for, the court reasoned.

**GINA class bid fails.** Two janitors who filed suit alleging their former hospital employer violated the Genetic Information Nondiscrimination Act (GINA) by requiring them to submit a detailed "Family Medical History Form" about their family members, living and deceased, were unable to pursue their claims as a Rule 23 class. The hospital argued the janitors were covered by a GINA exception that allows employers to inquire into the health histories of employees who, like hospital custodians, may be exposed to blood-borne pathogens or carcinogens. Consequently, the hospital argued, the janitors could not adequately represent a proposed

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**OTHER CLASS ACTION DEVELOPMENTS** continued from page 16

class of approximately 3,915 individuals who held a wide range of jobs in departments throughout the hospital. But the magistrate judge was not convinced this OSHA-based exception applied. A failure to exhaust administrative remedies sharply narrowed the class, though, as class members who had not filed EEOC charges could not “piggyback” on the plaintiff’s charges to salvage their stale claims. Consequently, the plaintiffs could not satisfy the numerosity requirement. However, the magistrate recommended the plaintiffs be allowed to make a renewed showing and redefine their proposed class. Finally, the janitors’ claims for prospective injunctive relief were dismissed without prejudice because, as former employees, there was no danger they would be asked to complete the medical history form in the future. Thus, they could not show irreparable injury, so they lacked standing.

*A national retailer agreed to pay \$25 million to settle two class and collective actions involving 258,000 nonexempt, largely minimum-wage employees who allegedly were compelled to buy the retailer’s clothing and were not reimbursed for the expense.*

**Vexing objectors dodge sanctions.** In a non-employment case, an Illinois law firm that brings class litigation on behalf of consumer plaintiffs could not state criminal racketeering charges against a Texas law firm, its principal, and associated attorneys and firms based on their questionable litigation practices of filing meritless objections in class action suits, appealing dismissal of those objections, and only withdrawing their appeal in return for payments for themselves. While the actions in question are unethical and reprehensible, and the allegations regarding their conduct were apparently supported by the record, meritless litigation does not rise to the level of extortion, a federal court in Illinois held, dismissing the firm’s RICO and related claims. The court said it also will dismiss state-law claims for abuse of process and unauthorized practice of law unless plaintiffs could show why federal jurisdiction remains in the absence of federal law claims.

## Settlements

**Female dollar store managers.** A long-running class action claiming a national discount retail chain paid female store managers less than their male counterparts

for the same work was put to rest after a federal court in North Carolina granted final approval of a \$45 million settlement agreement. The litigation went back nearly 15 years, when 49 female employees first filed EEOC charges alleging a pattern and practice of discrimination. A putative nationwide class action was filed under Title VII and the Equal Pay Act. The hard-fought case was litigated over the last 10 years, including significant motion practice, discovery, unsuccessful mediation, and a trip to the Fourth Circuit to discern the effect of the Supreme Court’s decision in *Dukes*. The settlement includes attorneys’ fees of one-third of the common fund (\$15 million) in addition to litigation expenses of up to \$1 million.

**“Church plan” challenge.** Following the U.S. Supreme Court’s ruling that a pension plan need not be established by a church to qualify as a “church plan,” a federal court in Illinois granted final approval of a \$29.5 million settlement ending a class action ERISA suit against nonprofit church-affiliated health care employers and other defendants. The plaintiffs in this consolidated class action claimed they were denied the protections

of a defined benefit pension plan because the defendants incorrectly claimed that their plan qualified as an ERISA-exempt church plan. Consequently, the defendants allegedly underfunded the plan, required participants to complete five years of service to be fully vested, and failed to furnish required statements and reports. The settlement assured a payment of \$29.5 million in benefits “in the event trust assets attributable to the Plan become insufficient to pay such benefits.”

**Mandatory clothing buys.** A national retailer agreed to pay \$25 million (including \$7.5 million in attorneys’ fees) to settle two class and collective actions involving 258,000 nonexempt, largely minimum-wage employees who allegedly were compelled to buy the retailer’s clothing as a condition of employment and were not reimbursed for the expense, causing their wages to fall below the minimum rate under the FLSA and the laws of California, New York, Florida, and Massachusetts. In a complaint filed in 2013, the plaintiffs alleged they were forced to purchase certain clothing items to comply with the retailer’s

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“Look Policy” and internal sales demands. A federal court in Ohio certified multiple subclass claims. Central to its commonality analysis were management emails emphasizing the importance of “pushing” or “driving” sales of the store’s clothing to employees and tracking those sales. The defendant “adamantly” denied the claims have merit, noting that policies posted in stores expressly stated that the purchase of company clothing was not required. The defendant added that every purchase was

*A federal district court in New York granted class certification to a group of women alleging that a Wall Street banking giant has systemically and pervasively discriminated against female professional employees.*

accompanied by “a verified statement by the employee that the purchase was voluntary.” The employer also argued the claims could not be litigated as a class anyhow because the plaintiffs would be unable to present common proof that each class member was improperly coerced to purchase company clothing — including employees who never purchased the retailer’s clothing — and employees who testified they purchased items for themselves and others, without coercion, and simply because they loved the clothes, which they purchased at an enormous discount. Nonetheless, the defendant settled the dispute to avoid years of additional litigation, and the court signed off on the proposed settlement agreement.

**Rideshare tip share.** Under a proposed agreement, a rideshare company would pay up to \$3 million to settle breach of contract and other class claims brought by drivers in New York, largely focused on the company’s failure to remit tips to drivers and its practice of urging passengers not to tip. The complaint also alleged the drivers were misclassified as independent contractors. The deal, if approved by the court, would resolve the potential claims of an estimated 40,000-plus drivers and former drivers in New York who had opted out of arbitration (or whose agreements with the rideshare app did not include an arbitration provision).

**Yoga chain wage claims.** A federal court in California granted final approval to a \$1.4 million deal resolving class claims brought by yoga instructors who alleged

a franchise yoga chain violated California wage laws at its 40 studios in the state. According to the complaint, the national yoga chain did not pay its instructors the minimum wage or overtime, or compensate them for other tasks, such as running the studios’ receptions desks, completing mandated trainings, traveling between studios, and creating playlists for their classes. In addition, the complaint alleged the employer failed to provide the requisite meal and rest breaks or reimburse the instructors for their reasonable business expenses,

and did not properly pay them upon termination. The named plaintiff asserted claims under the California Labor Code, derivative claims under the Business & Professions Code, and statutory penalties under

the Private Attorneys General Act (PAGA). She sought to represent 1,870 potential class members employed as nonexempt/hourly yoga instructors, interns, or teachers in California during the relevant class period.

**Universities’ no-poach pact.** A federal court in North Carolina granted final approval to a settlement that partially resolves claims that two universities — two of the largest employers in the state — had entered into an unlawful no-poaching agreement, allegedly with the intent of reducing employee compensation and mobility by eliminating competition for skilled labor. The settlement resolved antitrust claims against one of the defendant universities, which agreed to eliminate restrictions on hiring or recruiting employees of the other university in exchange for a release of claims. The university also agreed to cooperate with the plaintiffs in the ongoing litigation against the remaining university defendant, among other injunctive relief.

**Class certification granted**

**Wall Street gender discrimination case.** A federal district court in New York granted class certification to a group of women alleging that a Wall Street banking giant has systemically and pervasively discriminated against female professional employees in violation of Title VII and the New York City Human Rights Law. (In a lengthy opinion, the judge overruled the magistrate judge’s recommendation to deny certification—a fairly unusual

**Other class action developments** continued on page 19

**OTHER CLASS ACTION DEVELOPMENTS** continued from page 18 move.) The employees claim they were discriminated against in pay, promotions, and performance reviews, and that the firm: (1) employs facially neutral policies that disparately impact women; (2) knows of the policies' disparate impact on women; and (3) maintains a "boy's club" culture that discriminates against women. The class includes female associates and vice presidents who have worked in the firm's investment banking, investment management, and securities divisions since September 2004 (and employees in New York City since July 2002). It is estimated that more than 2,000 plaintiffs are included in the class.

*Immigration detainees at a private detention facility in Colorado met Rule 23 requirements for certification of a Trafficking Victims Protection Act class and a state-law "unjust enrichment class."*

**Au pairs allege wage-fixing.** Au pairs were granted certification of a 91,000-member Rule 23 class action alleging multiple sponsor agencies engaged in an illegal scheme to suppress wages and inflate their own fees, in violation of federal and state wage laws. According to the plaintiffs, the agencies maintained a uniform policy and had a "collective agreement" to "artificially suppress au pair wages at an unlawfully low level." A federal district court in Colorado concluded the au pairs' proposed classes satisfied the prerequisites of Rule 23(a), with the exception of one proposed nationwide state-law claim class. Further, agreeing with the plaintiffs that the agencies' alleged agreement to suppress wages was the "foundational liability issue" in the antitrust claim, the court found this common issue predominated over any individual issues.

**Off-the-clock bag checks.** A sales associate at one of a national clothing retailer's California stores was granted certification of a California Labor Code class action alleging employees were not paid for time spent undergoing off-the-clock "exit inspections" before leaving the store for breaks and at the end of their shifts, including time spent waiting for managers to be available to conduct those inspections. While the security inspection itself "lasted less than one minute," the plaintiff alleged that after closing shifts, she

typically had to wait 15-20 minutes, while off-the-clock, before the manager actually conducted the inspection. Opposing certification, the employer argued not all employees were subjected to the inspections. Employees were subject to inspection only if they carried a bag or parcel large enough that it could be used to steal store merchandise. Moreover, the employer asserted its written policy required that bag checks were to be conducted on-the-clock. The policy was silent, though, on whether inspections should be performed before or after an employee physically clocks out for the day (and the plaintiff said that "everybody waited until after they clocked out" to have their bags checked).

That dispute of fact must be resolved to determine whether nonexempt employees were not, and should have been, compensated for that time. After finding there were common questions of law and

fact that were susceptible to classwide determination, the answers to which "drive resolution of the litigation," the court certified a Rule 23 class of approximately 1,086 nonexempt employees who were subject to the inspection policy.

**Detainees' forced labor claims.** Immigration detainees at a private detention facility in Colorado met Rule 23 requirements for certification of a Trafficking Victims Protection Act (TVPA) class and a state-law "unjust enrichment class" in a lawsuit against the facility. Under the sanitation policy, detainees were required to perform cleaning tasks or be subject to sanctions, such as solitary confinement or criminal proceedings. The detainees also performed jobs through a voluntary work program that paid \$1 per day for tasks such as laundry and food services. The district court certified two classes: the TVPA class for the mandatory work and the unjust enrichment class for the voluntary work. Affirming a district court's holding on interlocutory appeal, the U.S. Court of Appeals for the Tenth Circuit found that all class members based their claims and theory of recovery on the facility's sanitation policy. Requirements for an unjust enrichment class were met because the detainees' claims were all based on the theory that the facility unjustly retained a benefit from their labor under the voluntary work program. ■

## On the radar

- The Supreme Court has heard oral arguments in two cases that raise significant issues affecting class and collective litigation: (1) whether arbitration agreements requiring employees to waive their right to bring class or collective actions violate employees' protected rights under the National Labor Relations Act; and (2) whether, under "American Pipe tolling" principles, previously absent class members can bring a subsequent class action suit outside of the applicable limitations period. Both decisions can have a massive impact on class and complex litigation. The Supreme Court will issue its rulings before its current term expires in June.
- The Department of Labor (DOL) has launched a self-audit pilot program that allows employers to report potential Fair Labor Standards Act (FLSA) violations and resolve them proactively, without the potential added exposure of collective action lawsuits. The Payroll Audit Independent Determination (PAID) program, which took effect on April 3, 2018, will give employers an opportunity to resolve possible wage and hour violations expeditiously, avoiding the cost and delay of litigation, as well as liquidated damages or civil monetary penalties. Under the program, employees would be required to sign a release of claims in order to receive back pay. At the end of an initial six-month trial run, the DOL will decide whether to make the PAID program permanent.
- An en banc Ninth Circuit will revisit a September 2017 panel decision refusing to give controlling deference to a provision in the DOL's Field Operations Handbook (FOH) related to tipped employees. The FOH states that, where "tipped employees spend a substantial amount of time (in excess of 20 percent) performing preparation work, no tip credit may be taken for the time spent on such duties." The panel held that this "80-20" provision was an impermissible attempt to create a "de facto" regulation, one that couldn't be squared with the DOL's actual dual jobs regulation, which addresses situations when an employee works two distinct jobs for an employer, and says nothing about individual tasks within a single job. In a February order, however, the Ninth Circuit said the full court will reconsider the panel's disposition, and that the decision was not to be cited as precedent. With this, the Ninth Circuit inserted further uncertainty into one of the most contentious wage-hour issues currently being litigated in the courts.

Watch for news on these and other important developments affecting class litigation on Jackson Lewis' Employment Class and Collective Action Update blog.

## On the JL docket

Mark your calendars for these timely and informative Jackson Lewis events:

### Webinar

#### Workplace Safety & Health Webinar Series: Preventing Safety Liability at Multi-Employer Worksites

##### June 20

Multiple employers work together at the same site all the time. So if someone gets hurt or if OSHA knocks, how do you know you have done enough to protect your company? Safety liability can be serious business if you have not taken proper precautions to establish each employer's roles and duty of care before beginning work. This presentation will arm you with the foresight to plan for the unexpected, steps you can take to minimize your legal exposure, and what OSHA looks for when identifying the responsible employer.

**Credits:** CLE – 1 / HRCI – 1.0 / SHRM – 1.0

### Events

#### 2018 Government Contractor Employment Law Symposium

##### May 3

Join Jackson Lewis P.C. for a look ahead to the anticipated trends for government contractors in 2018 and beyond. The full day program will include discussions on pay equity, cybersecurity concerns specific to federal contractors, immigration, joint ventures in government contracts, an executive order update and additional areas impacting the workplace.

**Credits:** Pending

#### Remaining Union Free

##### May 15-16 – Atlanta

##### September 24-25 – Las Vegas

With a newly seated Labor Board and a new General Counsel, we are likely to see a shift in initiatives and priorities which impact union organizing. As the Board shifts to the "right," organized labor is almost certain to reinvigorate organizing efforts in order to protect its market share. Is your organization prepared?

Register at [jacksonlewis.com](http://jacksonlewis.com)