



Identifying and Preventing Employment Class Actions

An attorney discusses what warning signs you should watch for and what steps to take now to avoid a lawsuit.

By Jonathan Harmon

In June, a federal judge in San Francisco ruled that a lawsuit by six female employees at Wal-Mart can proceed as a massive class-action case in behalf of 1.6 million current and former female employees who worked at Wal-Mart for the last eight years. The suit, filed in June 2001, alleges that Wal-Mart systematically denied women workers equal pay and opportunities for promotion. The retailing giant currently is appealing the judge's decision.

If the case is allowed to move forward as a class-action suit, it will be the largest such suit in the United States and could cost Wal-Mart billions in either a judgment or a settlement. In recent years, employee class-action suits have proven to be expensive problems for many well-known U.S. corporations.

For instance, on October 4, 2002, final approval was granted to a \$47 million class-action lawsuit brought by 4,800 former and current female employees of Rent-A-Center. Just a few days earlier, on September 24, 2002, the Coca-Cola diversity task force issued its first annual report. This task force was created as part of a \$192.5 million settlement of a class-action discrimination suit filed by African-American employees at Coca-Cola. These incredibly large settlements illustrate the risk that companies face of being hit with a class-action lawsuit that could significantly hurt their bottom line and shareholder value.

Statistics recently released by the U.S. Department of Labor show that class actions are on the rise. Because of this increase, proactive executives in the workforce-management field should enact preventive measures to help their companies avoid class-action lawsuits. These include recognizing the early warning signs of employment claim actions and implementing practical steps to avoid class-action exposure.

Before I became an employment lawyer, I was a platoon leader in an armored cavalry battalion. My job was to provide "early warnings" to the battalion--that is, early notice when enemy aircraft were approaching. To be prepared, my platoon was continually trained in recognizing enemy aircraft and other warning signs, and in anticipating the most likely direction from which the enemy would come. In many respects, you're the "early warning" officer for your company. Consequently, you must know *what* a class action's early warning signs are and *where* they are likely to come from.

Warning Signs

Equal Employment Opportunity Commission charges or litigation can often be a breeding ground for class-action litigation. In many cases, during the EEOC process, the plaintiff's attorneys, current or former employees, or governmental agencies have access to information otherwise unavailable. Be aware that such information, even from the most meritless EEOC charges or lawsuits, may support or fuel a future class action. There are several "early warning" signs:

- **FOR-CAUSE FINDINGS**--A "for-cause" finding from the EEOC or local/state agency can be the starting point for a class action. In some cases, plaintiff's attorneys or even current employees will use the "for-cause" determination as a marketing tool to recruit other class members. Consequently, employers must be wary of any charge involving outspoken and/or charismatic employees. Great care should be taken in handling EEOC charges, especially charges that can easily form the basis of a future class action, such as claims involving hiring or promotion practices.
- **NUMEROUS EEOC CHARGES WITH THE SAME OR SIMILAR ALLEGATIONS**--A number of similar EEOC charges may indicate that a plaintiff's attorney or firm is considering a class action. While numerous charges originating from the same facility are easy to discern, similar charges from different geographic areas are potentially problematic because different people inside a company may be responsible for handling these. For this reason, it is important that one person within the company be familiar with the types of charges being filed against the company from across the country.
- **HIGH-PROFILE ATTORNEYS' OR CLASS-ACTION FIRMS' INVOLVEMENT AT THE EEOC STAGE**--Another warning sign for employers is when high-profile attorneys or class-action law firms are involved in what seems to be a routine Title VII claim. Sometimes these attorneys will develop a case to test the waters and get information and admissions that will be helpful in building a subsequent class-action lawsuit.
- **A PATTERN OF IRRELEVANT QUESTIONS DURING MANAGEMENT DEPOSITIONS**--The plaintiffs' bar is adept at getting damaging information on companies' employment practices. Sometimes a plaintiff's firm planning to bring a class action will get other plaintiffs' attorneys handling current litigation against the target company to ask questions of a deponent that are designed to assist in future class-action litigation. For example, a pattern of questions relating to pay classification and overtime asked in a straightforward Title VII case may indicate that a plaintiff's attorney is attempting to gather information for a future Fair Labor Standards Act (FLSA) lawsuit or collective action.

Warning Signs to Monitor from Current Employees

In addition to being alert for signs of potential class actions that evolve from EEOC legal actions filed against your company, you need to watch out for signals that indicate that current employees may be considering a class-action lawsuit.

- **LARGE NUMBERS OF EMPLOYEES ASKING FOR PERSONNEL FILES**--If many employees, especially in the same protected class, begin to ask for their personnel files, the company should keep track of these requests and investigate the files for similarities. If issues are spotted, the company should address them immediately.
- **A SIGNIFICANT INCREASE IN THE NUMBER OF INTERNAL COMPLAINTS**--Employees who lead the charge in getting a class action filed often are disgruntled, very vocal and potentially excellent recruiters. Consequently, they will often complain to many different employees about issues they believe are unjust and get employees to complain to management. Likewise, when there are many complaints or questions from the same protected group regarding the same policy, such as the promotion policy, the company should examine these allegations seriously.
- **A FAILED UNION ORGANIZING CAMPAIGN**--Not surprisingly, a class-action lawsuit can come on the heels of a failed union organizing campaign. The employees attempting to organize often develop a dislike for the company and believe they are being treated unfairly. So when the union campaign fails, these same employees may turn their attention to class-action litigation. To take the wind out of potential class action, the company must be aware of this dynamic and should correct problem issues spotted during the campaign.
- **COMPLAINTS AIRED ON WEB SITES**--Some current and former employees of corporations now form Web sites to discuss their concerns and air their complaints. Most of the issues discussed on these Web sites do not have class-action ramifications, but occasionally there are discussions that can lead to class actions. Prudent workforce-management executives will assign someone inside the company to routinely review discussions on blogs, message boards and other sites to see if there are employment practices or policies that are creating problems that should be addressed.

Steps to Take Now to Avoid a Class-Action Lawsuit

Along with paying close attention to the warning signs, you should take other preventive steps that will reduce the risk of being hit with a class action.

- **AUDIT PAY CLASSIFICATIONS AND PAYROLL PRODUCTS AND POLICIES**--Judging by recent statistics, I believe the next wave of class actions in the employment context will be under the FLSA. Auditing pay classifications and payroll procedures is important because in the FLSA arena, a small mistake

can result in massive liability. For instance, classifying employees as exempt who should be nonexempt can create a class of workers who argue that they have been denied many hours of overtime. That is why auditing your payroll-classification procedures is a critical step for avoiding such liability.

- **MAKE SURE OUTSIDE EMPLOYMENT COUNSEL IS AWARE OF THE WARNING SIGNS**--In some instances, your outside counsel will be the first person exposed to the early warning signs. If your counsel is not aware of these early warnings, he or she will be of little use to you in offering advice on ways to limit exposure if there is an indication that a class action may be brewing. Indeed, if outside counsel is unaware of the big picture, he or she could be winning the battle but losing the war for the company.
- **DO OUTREACH INTO MINORITY COMMUNITIES**--The recent Coca-Cola class-action settlement illustrates that even corporate citizens that have a good minority-outreach program in place can be hit with a class action. However, advertising in minority publications and fostering diversity programs within the workplace are good business and also are helpful in creating a good (and accurate) corporate image while recruiting minority applicants. Since the recruiting/hiring processes are often targets of class-action lawyers, outreach into minority communities is an important preventive step.
- **HOLD MANAGERS ACCOUNTABLE**--A class action can sometimes erupt from significant litigation within a business unit or geographic region of the company. Sometimes higher-level managers abandon sound company and EEO procedures in the pursuit of profit. If such a manager is not held accountable, he or she may cause significant problems for the company. While there are many ways to hold higher-level managers accountable, one of the most effective is to have litigation costs come out of the bottom line of any facility or department that is run by that manager, and possibly tie that measurement to his or her bonus potential.
- **RUN THE EEO NUMBERS**--One of the first things that good defense attorneys do after their clients are hit with a class-action Title VII lawsuit is to hire a statistician. Courts use various tests in determining whether a neutral policy has a disparate impact on minorities. It can sometimes be extremely advantageous to run the same tests on the workforce to see how the numbers look before a lawsuit is filed. However, such tests should be conducted only if the company is truly willing to act on negative test results. Failing to take corrective measures after conducting such self-analysis could make the problem worse in subsequent litigation.
- **REVIEW AND DO TRAINING ON EEO POLICIES**--Training all employees on the company's EEO policies decreases the risk of future liability in many kinds of employment litigation. Disciplinary and promotion policies should be reviewed and included in training sessions. Purely subjective decisions run a greater risk of class-action exposure and therefore should be monitored carefully. Promotion

panels and disciplinary review boards can be helpful in providing some scrutiny of subjective decisions.

Conclusion

No company is completely immune from a class-action lawsuit, and sometimes a class-action lawsuit is unavoidable. Nevertheless, the preventive steps mentioned above can significantly reduce a company's risk of an employment class-action lawsuit.

The information contained in this article is intended to provide useful information on the topic covered, but should not be construed as legal advice or a legal opinion. Also remember that state laws may differ from the federal law.

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