

EMPLOYEE CLASS ACTIONS: WAGE AND HOUR, DISCRIMINATION AND BACKGROUND CHECKS

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I. WHAT IS A CLASS ACTION?

- A. If certain criteria are met, one person can file suit on behalf of a group of people who are “similarly situated.”
- B. The case is driven by rapacious class action counsel, seldom from concern about remedying any illegal conduct.
- C. Expensive to defend, expensive to settle and expensive to lose.
- D. No chance of recovering any costs, even if you win the case.
- E. You may or may not have insurance, depending on the nature of the claim.

II. THE GOOD.

- A. Employment discrimination claims harder to bring on a class basis. ***Dukes v. Wal-Mart Stores, Inc.***
- B. Individualized “micro” decisions concerning promotion, wages paid, work assignments do not lend themselves to determination on a “class basis.”
- C. It took decades of litigation to bring an end to abuse in discrimination class actions. The lawsuit was filed in 2000 and decided by the United States Supreme Court in 2011.

III. THE BAD.

- A. Plaintiffs do not need to prove a wage and hour violation for each member of a Fair Labor Standards Act (“FLSA”) case. ***Tyson Foods, Inc. v. Bouaphakeo***
- B. Verdict for the plaintiff class of \$5.9 million in case in which the plaintiffs alleged they should have been paid overtime for time they spent putting on and taking off mandated safety gear.
- C. Tyson did not keep time records of how long employees took to dress and undress so the plaintiff relied on “expert” testimony of how long it took a “typical” person to dress and undress. Tyson argued that they were not able to assert defenses to any individual’s claim and, therefore, denied the right to due process.
- D. Makes it very easy for a class to prove its case and establish damages in some cases.

IV. THE UGLY.

- A. Technical violations of consumer statutes can be ruinous to an innocent employer who does not update forms and procedures.
- B. For example, disclosures to job applicants when you intend to run a “consumer report” check as a condition of hiring.
- C. What does the disclosure need to include and what can it not include? This changes as various issues get litigated through the courts. A form that was valid in 2000 may not be by 2016.
- D. A small error can result in damages ranging from \$100 - \$1000 per person in the class, plus attorneys’ fees and costs.

E. Use of internet forms and services may not be a defense.

V. THE RESPONSE

A. Review existing insurance policies. Even if there is not a product that covers damages, you may be able to purchase one that will pay for your defense costs.

B. Review policies, applications, forms and disclosures on an annual basis. It's the "unknown unknowns" that may hurt you.