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Litigating Wage and Hour Class Actions: Certification and Decertification

Continuing Lessons From Dukes, Comcast, and Duran to Evaluate Evidence on Liability and Damages

THURSDAY, JULY 28, 2022

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LITIGATING WAGE & HOUR CLASS ACTIONS:
Certification and Decertification

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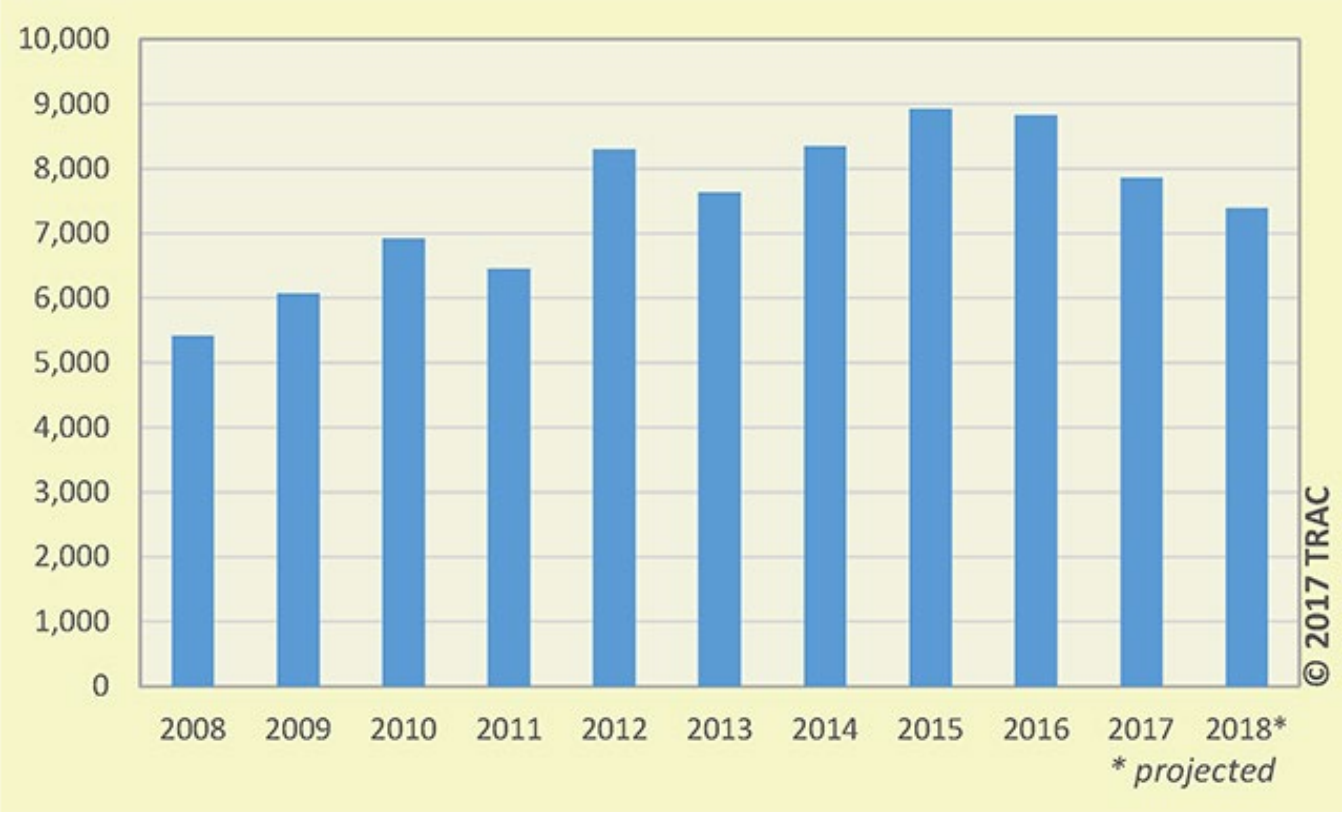
Overview

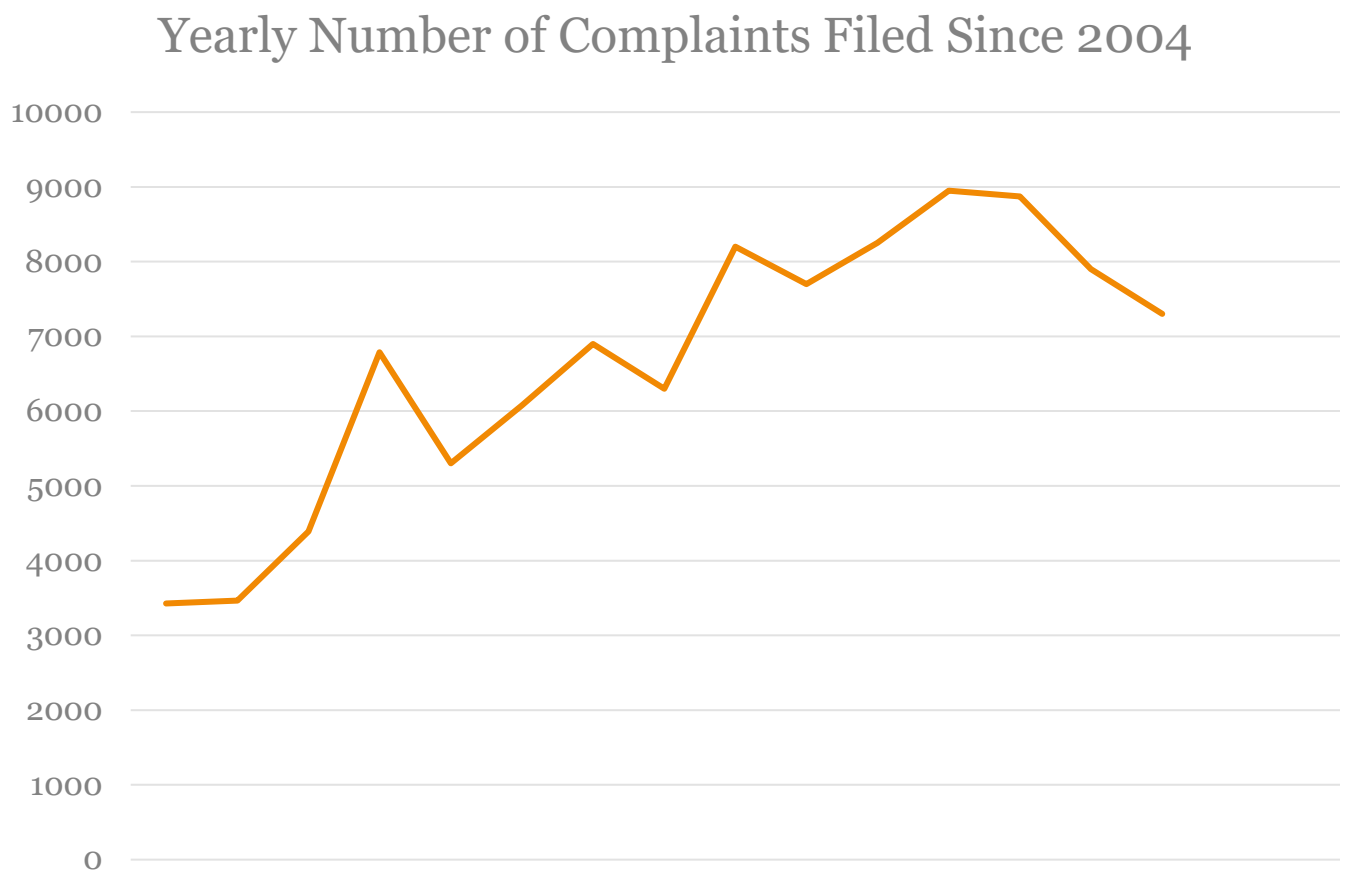
1. Introduction and Background – The Form and Procedure of Class Claims
2. Evolution of the Traditional Framework
3. Key Considerations Regarding Class Discovery
4. Supreme Court Guidance on Class Issues
5. Some Special California Considerations
6. The Use of Statistics in Class Cases
7. Corporate Representative Depositions in Class Cases

Introduction & Background

Wage and Hour Class Actions: Federal FLSA Complaints



Wage and Hour Class Actions: Federal FLSA Complaints



FLSA Overview

- The FLSA authorizes actions to recover damages for violation of the Act's minimum wage and overtime provisions and to enforce the retaliation prohibition. 29 U.S.C. § 216(b) and (c).
- FLSA actions can be "individual" or "collective." If collective, employees "opt in" to join the case. Those who do not opt-in are not bound by the result and can pursue their own lawsuits.
- There is a two-year statute of limitations, which can be extended to three years for violations that are "willful." 29 U.S.C. § 255(a).
- Most courts apply a "two-tier" framework – (1) notice phase – whether to conditionally certify the action (lenient standard); and (2) decertification phase (more stringent standard).
- The focus is on whether sufficient evidence exists to suggest that the named plaintiffs and putative class members are "similarly situated."

FLSA Theories

- Recent filings highlight several areas of focus
- Traditional theories:
  - Misclassification
  - “Off the clock”
  - Miscalculation of overtime
- Plus some newer wrinkles:
  - Automatic Deductions
  - Rounding
  - Remote work and the challenges of technology
  - Tip pooling and tip credits

Typical FLSA Case Sequence

1. Filing
2. Preliminary, limited discovery
3. Early motion for conditional certification
4. If conditionally certified, broadened discovery
5. Potential motion to decertify
6. Resolution – dismissal, settlement or trial

Common FLSA "Two Tier" Framework

Most courts apply a "two-tier" framework:

- "Notice" phase, typically early in case to facilitate class-wide discovery.
- "Decertification" phase, typically after full discovery and close to trial.

Lusardi v. Xerox Corp., 118 F.R.D. 351, 359 (D.N.J. 1987); *see also Millan v. Cascade Water Servs., Inc.*, 310 F.R.D. 593, 607 (E.D. Cal. 2015); *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 170 (1989). *But see Swales v. KLLM Transport Services, L.L.C.*, (5th Cir. 2021) (rejecting the two-tier framework and holding that initial discovery must be sufficient to ensure notice is only sent to "similarly situated" individuals).

Step 1: The "Notice" Phase

- The issue during the early "notice" phase is whether to notify other potential opt-in plaintiffs that the case is pending.
- If granted, certification during this phase is conditional. It is revisited during the decertification phase, following the opt-in process and discovery.
- The focus at the "notice" stage is on whether sufficient evidence exists to suggest that the named plaintiffs and putative class members are similarly situated as to the violation alleged. *E.g., Heath v. Google Inc.*, 215 F. Supp. 3d 844, 850-51 (N.D. Cal. 2016).
- The court determines whether plaintiffs have made the necessary "modest factual showing" that they are similarly situated to absent class members.
- A lenient standard, but not automatic.

What is "similarly situated?" – Understanding the Discovery Focus

- An action under the FLSA may be maintained against any employer…"in any Federal or State court of competent jurisdiction by any one or more employees for and [on] behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b) (emphasis added).
- In the absence of statutory or regulatory guidance defining the term "similarly situated," various tests have developed to determine when notice may be distributed. Rule 23 "commonality" requirement is more stringent than the "similarly situated" requirement of Rule 216(b).

What is "similarly situated?" – Continued

Key factors in assessing whether members of a collective action are "similarly situated" typically include:

- The employment and factual settings of plaintiffs;
- Evidence of a company-wide policy;
- The various defenses available to defendants; and
- Considerations of fairness, procedure, and manageability.

See, e.g., *Kutzback v. LMS Intellibound, LLC*, 301 F. Supp. 3d 807, 817 (W.D. Tenn. 2018); *Heath v. Google Inc.*, 215 F. Supp. 3d 844, 850 (N.D. Cal. 2016) (court looks to whether "the putative class members were together the victims of a single decision, policy, or plan"); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 956 (W.D. Wisc. 2008).

Rule 23 Class Actions

Rule 23(a)

- One or more members of a class may sue on behalf of a class if:
  - The class is so numerous that joinder of all members is impracticable;
  - There are questions of law or fact common to the class;
  - The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
  - The representative parties will fairly and adequately protect the interests of the class.

Rule 23 Class Actions

- Rule 23(b)(3): a class action may be maintained if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy
- Unlike collective actions under Section 216(b), Rule 23 requires class members to opt out of the case to avoid being bound by judgment

Rule 23 and Section 216(b) in Wage and Hour Cases

- Section 216(b) Collective Action
  - Federal Fair Labor Standards Act claims
  - Filing of FLSA collective action does not toll the statute of limitations (which is only tolled for a class member when she files written consent to opt in)
  - Class members must opt in
- Rule 23 Class Action
  - State law wage and hour claims
  - Filing of Rule 23 class action tolls the statute of limitations
  - Class members may opt out

Evolution of the Traditional Framework

Swales v. KLLM Transportation Services, 985 F.3d 430 (5th Cir. 2021)

- The Fifth Circuit rejected the two-step approach followed as a "near-universal practice" by the majority of district courts.
- In KLLM, the Fifth Circuit found the two-step process was unsupported by the statutory language of the Fair Labor Standards Act and that it could foster an approach that coerced settlements based on minimal evidence. The court also did not find support for a more demanding Rule 23 class action approach. Rather, the Fifth Circuit noted:

  > A district court should identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of "employees" is "similarly situated." And then it should authorize preliminary discovery accordingly. The amount of discovery necessary to make that determination will vary case by case, but the initial determination must be made, and as early as possible.

- Essentially, the Fifth Circuit sets forth a new standard for certifying FLSA collective actions – particularly, a new focus on judicial management of the discovery process as well as the conditional certification process itself.

In re: A&L Home Care and Training Center, et al. (6th Cir.)

- Currently pending
- Sixth Circuit granted interlocutory appeal
  - District court judge declined Defendants' request to follow Swales, noted the Southern District of Ohio "routinely appl[ies] the two-step process in FLSA cases
  - District judge found "Defendants' challenge of two-step certification raises issues that merit the Sixth circuit's attention" and certified the case for immediate review under 28 U.S.C. 1292(b)

Key Considerations Regarding Class Discovery

Pre-Conditional Certification Fact Gathering

Pre-Discovery Efforts By Plaintiffs' Counsel

- Factual Interviews
- Declarations
- Key Policies
- Investigators
- Advertising
- Emails, Letters and Websites

Pre-Conditional Certification Discovery of Contact Information for Potential Opt-Ins Plaintiffs

- Early-Discovery Strategy Considerations
  - Some courts, in granting motions to compel the production of names and addresses of class members prior to conditional certification, have stated the production is to assist plaintiffs in supporting their claims of class-wide FLSA violations and to identify individuals who may wish to join. *See, e.g., Baldozier v. American Family Mut. Ins. Co.*, 375 F. Supp. 2d 1089, 1091-93 (D. Colo. 2005).
  - Courts that have denied such discovery have held such requests to be premature prior to a decision on whether notice should be approved. *See, e.g., Barton v. The Pantry, Inc.*, 2006 U.S. Dist. LEXIS 62989, at *4-6 (M.D. N.C. Aug. 31, 2006).

Step 2: The “Decertification” Phase

- During the “decertification” phase, a more stringent standard is applied.
- Courts analyze the full discovery presented in order to evaluate the:
  - Impact of factual and employment settings of opt-in plaintiffs.
  - Defenses available to defendants that are individual to the opt-in plaintiffs.
  - Fairness and procedural considerations.

In the Middle: The Opt-In Process

- If the action is conditionally certified, notice is sent to potential class members.
- Eligible individuals must opt-in by filing consent forms with the Court.
- Not an opt-out process like a Rule 23 class.
- Employees who do not opt-in cannot be bound by the result and can pursue separate lawsuits.

Background on Notice Contents

In general, notices contain a description of some or all of the following:

1. The purpose of the notice;
2. The nature of the lawsuit filed and the relief being sought;
3. The proposed class composition;
4. The legal effect of joining the lawsuit;
5. The fact that the court has not taken any position regarding the merits of the lawsuit;
6. How to join the lawsuit;
7. The purely voluntary nature of the decision and the legal effect of not joining the lawsuit;
8. The prohibition against retaliation;
9. The relevant contact information for any inquiries.

Notice Contents, Cont.

- A blank consent form is then attached to the notice. Sample notices can be found in cases where a copy of the court-approved notice is appended to the actual opinion.
- Courts require that the notice be drafted in neutral, clear, and objective language. *Ayers v. SGS Control Servs., Inc.*, 2004 WL 2978296, at *2 (S.D.N.Y. Dec. 21, 2004) (language should be "fair and balanced").

Foundational Concepts for Pre-Conditional Certification Discovery

- Prior to conditional certification, plaintiffs' discovery focus is to make a threshold showing that they and members of the proposed collective action are "similarly situated." Most courts require only a "modest factual showing."

- Courts generally do not evaluate the merits of the claims or make credibility determinations during the initial evaluation.

- Courts have observed that it makes sense for the FLSA conditional certification standard to be less stringent than under FRCP 23 because the FLSA's opt-in procedure provides an opportunity for potential plaintiffs to join, but does not bind those who do not (unlike R. 23). *See, e.g., Patton v. Thomson Corp.*, 364 F. Supp 2d 263, 267 (E.D.N.Y. 2005).

Foundational Concepts, Cont.

- Determinations as to collective action conditional certification are sometimes made based on detailed allegations in a complaint, as supported by sworn statements, and not through expansive discovery.
- Some courts require nothing more than sufficient allegations in the complaint. *See, e.g.*, *Gayle v. United States*, 85 Fed. Cl. 72 (2008) (deeming plaintiff's allegations sufficient to support granting conditional certification).

Foundational Concepts, Cont.

- Therefore, the conditional certification decision may be made prior to discovery being conducted at all.

- Some courts will, however, allow for some discovery to be completed prior to deciding whether notice should be allowed.

- Importantly, the amount of discovery that is actually taken prior to filing a motion for conditional certification can, in some courts, affect the standard that the court will apply in deciding certification. *See, e.g., Valcho v. Dallas Cnty. Hosp. Dist.*, 574 F. Supp. 2d 618, 622 (N.D. Tex. 2008) (explaining that the reasons for lenient standard typically disappear once discovery has been conducted).

Foundational Concepts for Post-Conditional Certification Discovery

- Discovery in the post-certification phase of FLSA cases will be broadened – the parties will be looking ahead to the decertification stage, which involves a much more stringent standard as to the "similarly situated" question.
- At the decertification stage, courts will be looking to three factors:
  - The disparity or similarity of the factual employment settings of the individual plaintiffs;
  - The various defenses available to the defendant and whether those may be asserted collectively or individually as to each plaintiff; and
  - Fairness and procedural considerations.
- Therefore, post-certification discovery will aim at these issues.

Post-Conditional Certification Discovery – Contours

- Generally, more broadly allowed and more extensive.
- But, courts expect parties to work together to develop the contours and scope.
- The case proceeds as a representative action, therefore, representative sampling for discovery will be a part of the discussion – depending on the number of opt-ins.
- If opt-ins number in the few hundred – individualized discovery more likely. If greater, a representative approach and related collaboration on sampling nearly certain.

Why Is More Discovery Not Allowed pre-Notice?

- Courts denying more extensive discovery sought by defendants generally do so on the grounds that such discovery is inconsistent with the two-step process for certification, generally reasoning that extended discovery:
  - Leads defendants to argue for applying the more stringent second-stage standard; or
  - Causes unacceptable delay, given that the statute of limitations will continue to run until a decision is made.

- Other courts have focused more on the need for early notice due to the running of the statute of limitations in rejecting efforts by defendants to obtain discovery prior to a ruling on notice. *See Doucoure v. Matlyn Foods Inc.*, 554 F. Supp. 2d 369, 374 (E.D.N.Y. 2008).

Supreme Court Guidance on Class Issues

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011)

Supreme Court reversed certification of 1.6 million Wal-Mart employees, holding that class could not satisfy Rule 23:

- Commonality: Common question "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is *central* to the validity of each one of the claims *in one stroke*."
  - A corporate policy "*allowing discretion* by local supervisors" is "just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices."
- Compliance with Rule 23 requires a "rigorous analysis" entailing "some overlap with the merits of the plaintiff's underlying claim"
- Rejected Plaintiffs proposed "Trial by Formula," as contrary to the Rules Enabling Act, because Wal-Mart would "not be entitled to litigate its statutory defenses to individual claims"

Comcast Corp. v. Behrend, 569 U.S. 27 (2013)

- Third Circuit affirmed certification of a class of more than two million current and former cable subscribers in antitrust suit
- Supreme Court reversed, holding that class could not satisfy Rule 23(b)(3)'s predominance requirement:
  - Reiterated its statement in *Dukes* that a Court must probe behind the pleading and examine the merits, and thus the district court erred in declining to review plaintiffs' damages model
  - Damages model must "tie each theory of antitrust impact to a calculation of damages"
  - Without a satisfactory class-wide damages methodology, individualized damages questions "will inevitably overwhelm questions common to the class," eliminating any possibility of certification under Rule 23(b)(3)

Recent Developments After *Dukes* and *Comcast*:

- Do individualized damages defeat predominance?
- Is *Daubert* applicable at the class certification state?
- Fewer classes being certified, and those that are certified are smaller and narrower
- Fights over the proper forum for class actions—state or federal court?

Recent Developments After *Dukes* and *Comcast*: Do Individualized Damages Defeat Predominance?

- **Yes**: D.C., First, and Tenth Circuits
  - "No damages model, no predominance, no class certification." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, --- F.3d --- (D.C. Cir. Aug. 16, 2019)
  - *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213 (10th Cir. 2013); *but see Naylor Farms v. Chaparral Energy*, 923 F.3d 779 (10th Cir. 2019) (individualized damages issues alone insufficient to defeat class certification)
  - *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018)
- **No:** Ninth, Sixth, Seventh, Fifth, and Second Circuit
  - *Leyva v. Medline Indus. Inc.*, 716 F.3d 510 (9th Cir. 2013)
    - In CA wage and hour case, certification still appropriate where "the amount of pay owed" is the only individualized issue and computerized records could easily determine damages
    - But *Leyva* inapplicable in the "absence of records that are easily aggregated and analyzed." *Ordonez v. Radio Shack, Inc.*, 2014 WL 4180958 (C.D. Cal. Aug. 15, 2014).
  - *Chicago Teachers Union v. Bd. of Educ.*, 797 F.3d 426 (7th Cir. 2015)
  - *In re Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013)
  - *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014)
  - *Roach v. T.L. Cannon Corp.*, 778 F.3d 401 (2d Cir. Feb. 10, 2015).

Recent Developments After *Dukes* and *Comcast*: *Daubert* at Class Certification?

Agreement that at least *some* sort of *Daubert* analysis is required of expert evidence

- **Full *Daubert* – Second, Third, Fifth, Sixth, Seventh, and Eleventh Circuits:**
  - *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 129 (2d Cir. 2013)
  - *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015)
  - *Prantil v. Arkema Inc.*, 986 F.3d 570, 575 (5th Cir. 2021)
  - *In re Carpenter Co.*, 2014 WL 12809636, at *3 (6th Cir. Sept. 29, 2014)
  - *Messner v. Northshore Univ. Health Sys.*, 669 F.3d 802, 812 (7th Cir. 2012)
  - *Sher v. Raytheon Co.*, 419 Fed.Appx. 887, 890-91 (11th Cir. 2011)
- **"*Daubert-Lite*" – Eighth and Ninth Circuits**
  - *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 618 (8th Cir. 2011)
  - *Sali v. Corona Regional Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018)

Recent Developments After *Dukes* and *Comcast*: Trend towards fewer class certifications

For example, FLSA executive exemption cases:

- *Lindsey v. Tire Discounters, Inc.*, 2017 WL 5972104 (S.D. Ohio Dec. 1, 2017)
  - District court decertified collective action because service managers' experiences varied widely and service managers had disparate and inconsistent job duties. They were therefore not similarly situated.
  - District court denied Rule 23 certification because oversight obligations and job duties varied, and the named plaintiffs did not satisfy the predominance and typicality requirements.
- *Rea v. Michaels Stores, Inc.*, 2014 WL 1921754 (C.D. Cal. May 8, 2014)
  - District court refused to certify class of store managers. Because "[a] uniform, consistent performance practice for store managers simply does not exist," "any class proceeding . . . would almost necessarily devolve into individual mini-trials regarding whether each particular class member actually met the requirements for exempt status."

Recent Developments After *Dukes* and *Comcast*: Trend towards fewer class certifications, cont.

- Fewer class certifications in other wage and hour areas:
  - Meal and rest breaks
  - Off-the-clock
  - Misclassification
- When certified, classes are typically smaller
  - Instead of nationwide, classes are regional, statewide, or even one specific location
  - Classes limited to specific job positions
  - Narrower time periods, based on specific policies, practices, or supervisors

Recent Developments After *Dukes* and *Comcast*: State and Federal Court Developments

- Given difficulty certifying classes under Rule 23, Plaintiffs have tried to avoid federal court at all costs
- Try to stipulate to damages below the CAFA $5 million threshold?
  - *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013)
- Naming Non-Diverse Defendants
  - *E.g.*, Trying to take advantage of expansion of joint employers in *Dynamex Operations W., Inc. v. Superior Court*, 4 Cal. 5th 903 (2018)
- Result is more motions to remand to state court
  - *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-719 (Dec. 15, 2014) – Notice of removal need include only plausible allegations of removal grounds, not evidentiary submissions.

China Agritech v. Resh, 138 S. Ct. 1800 (2018)

- *China Agritech* analyzed the *American Pipe* equitable tolling rule:
  - The Supreme Court held in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974) that the filing of a putative class action tolls the time for absent class members to bring individual claims while the case remains pending as a potential class action.
  - *China Agritech* asked whether *American Pipe* tolling applies beyond the context of individual actions and also allows absent class members to file a successive putative class action after the statute of limitations period has run.
- In an opinion for an eight-Justice majority, Justice Ginsburg explained that the **"answer is no"**:
  - "*American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims if the class fails. But *American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations."
- For these reasons, the Court held "that *American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action"

Epic Systems & Lamps Plus

- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)
  - Bottom Line: Arbitration agreements requiring individual proceedings in employment contracts must be enforced, notwithstanding NLRA's protection of "concerted activities."
- *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019)
  - Bottom Line: Class arbitration is not available where arbitration agreement is silent on issue.
- Consequences and Strategy Considerations
  - Pros and Cons of Arbitration
  - Note exception for certain employment contracts for certain transportation workers. 9 U.S.C. § 1; *New Prime Inc. v. Oliveira*, 139 S.Ct. 532 (2019) (applies to independent contractors and employees)
  - Requiring Employees to Sign Arbitration Agreement After Litigation has Commenced?
    - *Cordua Restaurants Inc.*, 368 NLRB No. 43 (2019)

Arbitration and Class Certification

- Certification may be denied where a proposed class includes members that have agreed to arbitration and those that have not.
  - *O'Connor v. Uber Technologies, Inc.*, 904 F.3d 1087 (9th Cir. 2018) (reversing certification "premised upon the incorrect conclusion that the arbitration agreements were unenforceable" and remanding for further proceedings)
- Courts are split on this issue. *See Berman v. Freedom Fin. Network, LLC*, 400 F. Supp. 3d 964, 985-86 (N.D. Cal. 2019) (collecting cases on both sides).
- Certification issues will likely depend on whether challenges to arbitration appear to be case-specific. *See, e.g., Heredia v. Sunrise Senior Living LLC*, No. 8:18-cv-01974, 2021 WL 811856, *2-4 (C.D. Cal. Feb. 9, 2021) (denying certification of class in which 85% agreed to arbitration while inviting amended motion to certify class of those not subject to arbitration).

Rule 68 Offers of Judgment

- Strategy by defendants to block a class action from proceeding by making a Rule 68 offer of judgment for the full value of the named plaintiffs' individual claims
- *Campbell-Ewald Co. v. Gomez,* 136 S. Ct. 663 (2016)
  - An unaccepted offer of judgment does not moot an individual class action
  - Adopted analysis from Justice Kagan's dissent in *Genesis v. HealthCare Corp. v. Symczyk* (S. Ct. 2013) that an "unaccepted settlement offer – like any unaccepted contract offer – is a legal nullity, with no operative effect."
  - The rejection could only mean that the settlement offer was no longer operative, and the parties "retained the same stake in the litigation they had at the outset."
  - The court did not reach the issue of whether a defendant moots a claim by making an actual payment of full relief, but explained that a claim might be mooted when a defendant "deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."

Some Special California Considerations

The Private Attorney General's Act (PAGA)

PAGA claims are unique in several respects.

Gaasterland v. Ameriprise Fin. Servs., Inc.,
2016 WL 4917018 (N.D. Cal. Sept. 15, 2016)

PAGA and Class Certification

- Class action requirements are not required to bring a PAGA claim in state court. *Arias v. Superior Ct.*, 46 Cal. 4th 969 (2009).
- The Ninth Circuit recently indicated PAGA claims are not subject to Rule 23 either. *Canela v. Costco Wholesale Corp.*, 971 F.3d 845 (9th Cir. 2020).
- But an open and contentious question about whether PAGA claims must be "manageable."

Manageability of PAGA Claims – Dividing Courts

- The California Supreme Court has indicated proof of manageability may be required to pursue a PAGA claim. *Williams v. Superior Ct.*, 3 Cal. 5th 531, 559 (2017)
- Both state and federal trial courts are "largely divided as to whether plaintiffs may bring representative PAGA claims without satisfying the requirement of manageability." *Harper v. Charter Commc'ns, LLC*, 2020 WL 916877, at *5 (E.D. Cal. Feb. 26, 2020); *Vazquez v. Warren Distrib., Inc.*, 2020 WL 3888067, at *18 (Cal. Ct. App. July 10, 2020) (unpublished).

Explaining and Raising Manageability Concerns

- To proceed to trial, a PAGA claim must be subject to common proof.
- Required to secure employer's due process rights.
- Manageability raises several overlapping issues with certification when individualized inquiries are necessary.
- Important to identify and educate courts about manageability issues early and often.

Viking River Cruises v. Moriana, 596 U.S. ___ (2022)

- FAA requires enforcement of arbitration agreement that requires arbitration of an employee's individual PAGA claims
- Once those individual claims are compelled to arbitration, there is no standing for representative clams for violations of the CA Labor Code on behalf of other aggrieved employees, and non-individual PAGA claims must be dismissed
- Reversed California Court of Appeal's *Iskanian* decision (59 Cal. 4th 348 (2014)): *Iskanian*'s rule "that PAGA actions cannot be divided into individual and non-individual claims" is preempted by FAA

Strategy Considerations…

- From defendants' and plaintiffs' perspectives

The Use of Statistics in Class Cases

Random Sampling in Discovery

- With opt-in class cases, courts will typically limit discovery to a fraction of the total class. Often that sample is chosen randomly
- Parties have jointly agreed to random selection. *See, e.g.*, *Scott v. Chipotle Mexican Grill, Inc.*, --- F.R.D. ---, 2014 WL 2600034 (S.D.N.Y. June 6, 2014) (Permitting discovery of 10% of opt-ins, 50% chosen by defendant, 25% chosen by plaintiff, and 25% chosen randomly).
  - "Although there is no "bright line formulation" or "percentage threshold" for determining the adequacy of representational evidence, "it is well-established that the [plaintiff] may present the testimony of a representative sample of employees as part of his proof of the prima facie case under the FLSA."
- Courts have also ordered random selection over defendant's objections. *See, e.g.*, *Helmert v. Butterball, LLC*, 2010 U.S. Dist. LEXIS 143134 (E.D. Ark. Nov. 5, 2010); *Scott v. Bimbo Bakeries, USA, Inc.*, No. 10-3145 (E.D. Pa. Dec. 11, 2012) (written discovery of 10% of opt ins and 20 depositions from a representative sample of 650 opt-ins).

Random Sampling in Discovery

- Courts are often persuaded by statistical principles in choosing random selection as method of deciding who would respond to discovery.
  - *Nelson v. American Standard, Inc.*, 2009 WL 4730166 at *3 (E.D. Tex. 2009) (limiting discovery to 84 selected at random from 1,328 individuals who opted into action)
  - "[T]he fundamental precept of statistics and sampling is that meaningful differences among class members can be determined from a sampling of individuals," and thus if decertification is appropriate, it will be revealed with discovery of a random sample of individuals."
- But not all samples have to be "statistically significant" so long as they are "representative."
  - *Craig v. Rite Aid Corp.*, 4:08-CV-2317, 2011 WL 9686065 (M.D. Pa. Feb. 7, 2011) (ordering 50 randomly selected opt-ins (out of 1000) respond to discovery and refusing to use Defendant's experts proposed stratified sample)
  - "We are also unpersuaded by Defendants' argument regarding their proposal for deriving a statistically significant sampling, developed by Defendants' own expert, in order to fairly conduct representative discovery of the Opt-ins."

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Damages

- Historically, damages in FLSA cases could be awarded to non-testifying class members based on representative testimony. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946)
- If employer failed to keep records, employees could recover upon showing "the amount and extent of that work as a matter of just and reasonable inference." *Id.*
- Same principle applied in using statistical evidence, such as time studies. *Perez v. Mountaire Farms*, 610 F. Supp 2d 499 (D. Md. 2009), aff'd in part 650 F.3d 350 (4th Cir. 2011)

Refuting Statistical Sampling

- *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), rejected "trial-by-formula"—extrapolating back-pay for sample set of plaintiffs to entire class
  - Impermissible under Rules Enabling Act
- The proposed method of analyzing class claims rejected by the Supreme Court:
  - A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.

Refuting Statistical Sampling

- *Duran v. U.S. Bank National Assn.*, 59 Cal.4th 1 (Cal. Sup. Ct. May 29, 2014)
  - In wage and hour case, attempts by class action plaintiffs to use statistical sampling and other procedural shortcuts to avoid individualized defense argument rejected as inconsistent with due process and California law.
  - The California trial court permitted the plaintiffs to prove liability and damages on behalf of the entire 260-member class using a small sample of nineteen class members and two named class representatives.
  - California Supreme Court reversed and ordered the class decertified. The statistical analysis employed was deemed a "manifest" injustice to U.S. Bank and was "profoundly flawed."
    1. Sample size of nineteen class members and two named representatives was too small relative to the variability of the class members
    2. Nonresponse and selection bias
    3. High margin of error, as is common with small sample sizes

Refuting Statistical Sampling

- Early Application of *Duran*:
  - *Cochran v. Schwan's Home Serv., Inc.*, 228 Cal. App. 4th 1137 (2014)
    - Remanded denial of class certification to trial court to apply principles set forth in *Duran* to analyze whether the class representative could use statistical sampling evidence to establish liability or damages.
    - Plaintiff had proposed to use statistical evidence (based on a 22-question survey) to establish his employer's liability for failing to reimburse employees for expenses pertaining to the work-related use of their personal cell phones.

Refuting Statistical Sampling

- Early Application of *Duran*:
  - *Jimenez v. Allstate*, 765 F.3d 1161 (9th Cir. 2014)
    - Differentiated *Duran*, noting that "[w]hile [*Duran*] reversed the result of a trial that had used statistical sampling… it did not place a wholesale bar on the use of such tactics."
    - In off-the-clock claim, "[s]tatistical sampling and representative testimony are acceptable ways to determine liability."
    - Court found the statistical analysis proposed by the plaintiff was capable of leading to a fair determination of Allstate's liability.
      - District court had rejected the plaintiffs' motion to use representative testimony and sampling at the damages phase, and bifurcated the proceedings, which preserved Allstate's due process right to present individualized defenses to damages claims and the plaintiffs' ability to pursue class certification on liability issues based on common questions.

Refuting Statistical Sampling

- More Recent Application of Duran:
  - *Santos v. UPS*, 2020 U.S. Dist. LEXIS 216176 (N.D. Cal. 2020)
    - Rejected Plaintiff's use of 9 declarations out of more than 2,000 putative class members; handpicked nine examples likely suffered from selection bias
      - "The minuscule sample size of supportive testimony" failed to support class certification on the Unpaid Time, Meal Break, and Meal Break Waiver subclass
    - The court cited *Duran*: putative classes may rely on statistical sampling from a qualified expert to show evidence of a consistently applied policy
      - Noted that the "degree of consistency" required to certify a class is likely to depend on the circumstances
      - Emphasized that statistical samples cannot be too variable, thus a court may conduct a preliminary assessment to determine the level of variability
      - Considerations: Sample cannot be too small, must be truly random, and avoid certain biases (including selection and nonresponse biases)

Refuting Statistical Sampling

- More Recent Application of Duran:
  - *Westfall v. Ball Metal Bev. Container Corp.*, 2019 U.S. Dist. LEXIS 71971 (E.D. Cal. 2019)
    - Defendant sought to depose 121 out of 169 class members
      - Alleged high level of variability in the class due to 8 jobs included
    - Court emphasized *Duran*: "A trial plan that relies on statistical sampling must be developed with expert input and must afford the defendant an opportunity to impeach the model or otherwise show its liability is reduced."
    - Court ordered that defendant may depose the 26 class members who filed declarations against it (defendant would be required to provide more statistical support in line with *Duran* to argue why additional depositions were necessary)

Tyson v. Bouaphakeo, 136 S. Ct. 1036

- Donning and doffing claims brought on behalf of collective action under FLSA as well as Rule 23 class under state law.
- Employer did not keep records of donning/doffing time
- Plaintiffs had expert conduct time study – videotaping a random selection of employees – to determine the amount of time at issue
- Supreme Court ruled 6-2 that plaintiffs could use representative statistical evidence by an expert to prove individual hours worked "to fill an evidentiary gap created by the employer's failure to keep adequate records." *Id.* at 1039
- Statistical evidence may be used for both liability and damages. *Id.* at 1046

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Tyson v. Bouaphakeo, 136 S. Ct. 1036

- In finding that the use of a sample was an appropriate method of proving classwide liability, the Supreme Court noted that "one way" to establish the sample was permissible was "by showing that each class member could have relied on that sample to establish liability if he or she had brought an individual action." *Id.* at 1046-47.
- "Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked. Petitioner, however, did not raise a challenge to respondents' experts' methodology under *Daubert*."

Id. at 1048-49

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Tyson v. Bouaphakeo, 136 S. Ct. 1036

- "Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as Mericle's has been permitted by the Court so long as the study is otherwise admissible. *Mt. Clemens*, *supra*, at 687, 66 S. Ct. 1187; see also Fed. Rules Evid. 402 and 702." *Id.* at 1049

Post-*Tyson*:

Vaquero v. Ashley Furniture Indus., Inc., 824 F.3d 1150 (9th Cir. 2016)

- Ninth Circuit affirmed certification of California wage and hour class
- Defendants relied on *Dukes* to argue that the use of representative evidence would inevitably change the substantive rights of the parties by preventing Defendants from individually cross-examining and challenging each class member's claims.
  - "Defendants' reliance on *Dukes*, in this regard, is misplaced. As the Court made clear in *Tyson Foods*: '[*Dukes*] does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability'"
  - "We also note that Defendants' concerns are hypothetical at this stage of the litigation. The district court has discretion to shape the proceedings. With a class of only about 600 members, the court could choose an option such as the use of individual claim forms or the appointment of a special master, which plainly would allow Defendants to raise any defenses they may have to individual claims."
  - "In this case, as in *Tyson Foods*, the district court's grant of class certification has not expanded Vaquero's substantive rights or those of the class. Defendants may challenge the viability of Vaquero's evidence at a later stage of the proceedings. Accordingly, the district court did not violate the Rules Enabling Act or abuse its discretion in certifying the class."

In re: Autozone, Inc., 2016 WL 4208200 (N.D. Cal. Aug. 10, 2016)

- Relied, in part, on *Duran* to reject representative sample.
  - "These problems with the survey are fundamental and demonstrate that it is an unreliable means of measuring Autozone's potential liability to individual employees"

- "The problem with the survey Plaintiffs seek to use here is that it is more like the representational evidence in *Dukes* than the representational evidence in *Tyson Foods*"
  - In *Tyson Foods*, representational evidence did not depend on individual employees' memories, it simply filled in a gap: there was a uniform policy "not to pay for those activities," and plaintiffs needed to establish "the amount of uncompensated work each employee did"
  - In *Dukes*, the plaintiffs sought to establish that a small number of employees had experienced sex discrimination, and then to extrapolate those results to the class as a whole. But an employee bringing an individual action would not have been able to rely on another employee's sex discrimination to establish her own claim.
  - Autozone employee in an individual action would not be able to point to other employees' varied experiences of when they were allowed rest breaks and how often they took rest breaks in order to establish her own claim, particularly in the absence of a uniform policy. This would unfairly deny Autozone the right to litigate individual issues of liability.

Reinig v. RBS Citizens, N.A., 912 F.3d 115 (3d Cir. 2018)

- Mortgage Loan Officers sued for unpaid overtime, alleging unofficial policy of requiring MLOs to work over 40 hours per week while discouraging MLOs from actually reporting those overtime hours
- The representative evidence at issue was testimony from "roughly two dozen MLOs" (351 plaintiffs had opted-in)
- Cited *Tyson*: "evidence must be sufficiently representative of the class as a whole such that each individual Plaintiff 'could have relied on [the] sample to establish liability if he or she had brought an individual action'"
- Court held that it could not make a "definitive determination as to whether Plaintiffs' representative evidence is sufficient" and remanded to the District Court

- “It is unclear how the District Court reconciled contradictory testimony and other evidence explicitly undermining Plaintiffs' assertion that Citizens maintained a companywide ‘policy-to-violate-the policy.’ For example, not only were Plaintiffs' experiences confined to interactions with specific managers in distinct offices, but their statements are dissimilar and oftentimes ambiguous, reflecting in many instances nothing more than typical workplace concerns about MLO work ethic and effectiveness.”
- “[I]n contrast to the plaintiffs' proffered evidence in *Tyson*, Plaintiffs’ evidence here comes not from a similarly situated group of MLOs but from individual employees who worked in distinct offices at various times throughout the relevant class period. Given the diversity of their testimony, we have serious doubts whether the evidence tendered by Plaintiffs is sufficiently representative of the class as a whole such that each individual plaintiff ‘could have relied on [the] sample to establish liability if he or she had brought an individual action.’ *Tyson*, 136 S. Ct. at 1046-47.”

Monroe v. FTS USA, LLC, 860 F.3d 389 (6th Cir. 2017)

- Cable technicians sought overtime pay due to Defendant's implementation of a company-wide time-shaving policy that required employees to systematically underreport their hours
- Defendants argued that because the plaintiffs did not present a statistical expert and study, Plaintiffs should not have been able to rely on the testimony of 17 technicians
  - "*Tyson* did not discuss expert statistical studies because they are the only way a plaintiff may prove an FLSA claim, but because those plaintiffs offered such a study—along with employee testimony and video recordings."
- *Tyson* did not create a rule limiting representative evidence beyond the well-established standards of admissibility.

Corporate Representative Depositions in Class Cases

Fed. R. Civ. P. 30(b)(6)

"In its notice or subpoena, **a party may name as the deponent a public or private corporation**, a partnership, an association, a governmental agency, or other entity and must **describe with reasonable particularity the matters for examination**. The named organization must then **designate one or more** officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify."

Obligations Imposed by R.30(b)(6)

(1) the deponent must be knowledgeable on the subject matter identified as the area of inquiry;

(2) the designating party must designate more than one deponent if necessary in order to respond to the relevant areas of inquiry specified by the party requesting the deposition;

(3) the designating party must prepare the witness to testify on matters not only known by the deponent, but those that should be known by the designating party; and

(4) the designating party must substitute an appropriate deponent when it becomes apparent that the previous deponent is unable to respond to certain relevant areas of inquiry.

7 James Wm. Moore et al., *Moore's Federal Practice*, ¶ 30.25[3] at 30.68.

Common Wage and Hour 30(b)(6) Topics

- Job duties, responsibilities, and activities of class members
- Payroll and time-keeping software and data
- Policies/practices re: compensation, timekeeping, evaluation, discipline, classification, etc.
- Efforts to comply with the law, good faith defense, willfulness
- Complaints, lawsuits, investigations, etc.
- Any studies, investigations, or reports relating to claims asserted

Common Class Action 30(b)(6) Topics

- Organizational structure
- Locations of class members and methods of identifying them
- Identities, locations, and job duties of key decision-makers
- Policies and procedures relating to challenged practices
- Changes made to policies and procedures
- Class-wide defenses
- Relevant databases: structure, contents, usage, coding

Dealing with Objections to the Notice

- Defendant cannot direct Plaintiff to interrogatory responses or documents in lieu of providing testimony
- Defendant cannot claim privilege simply because an attorney had to prepare the witness
- Defendant can send objections in writing or seek to confer, but cannot use such objections as a basis not to produce a prepared witness.
- If a meet and confer does not resolve the objection, defendant can seek a protective order, but if it does not, must produce a witness to testify on the topic
- 1 Rule 30(b)(6) notice = 1 deposition, regardless of number of topics listed or witnesses designated

LITIGATING WAGE & HOUR CLASS ACTIONS:
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