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New Equal Pay Challenges to Employers: *En Banc* Decision in *Dukes v. Wal-Mart* Affirms Certification of Massive Gender Discrimination Class, While Congress Considers Aggressive New Legislation

On April 26, 2010, a closely-divided Ninth Circuit *en banc* panel issued a long-awaited decision affirming certification of a class in *Dukes v. Wal-Mart* — the largest sex discrimination class action in U.S. history. In *Dukes*, plaintiffs filed suit under Title VII of the Civil Rights Act of 1964, alleging that, despite having higher performance ratings and greater seniority, women employed in Wal-Mart stores were paid less than men in comparable positions. Noting that "mere size does not render a case unmanageable," the panel affirmed certification of a class of at least 500,000 women. This precedent poses a dramatic risk of potential liability for employers throughout the country.

The court's timing could not be more striking. President Obama made eliminating pay bias a theme of his campaign, and he has continued to champion the issue since taking office. On March 11, 2010, the Senate Committee on Health, Education, Labor and Pensions ("HELP") held a hearing to reignite the push for new equal pay legislation that they hope to pass this Congress. Among other things, the new legislation would make it even easier for employees to pursue class actions for equal pay claims.

Given these important developments, employers are well-advised to carefully scrutinize their pay policies and records and consider fixing past problems to better defend themselves against potentially crippling future wage discrimination claims.

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The Ninth Circuit Affirms Certification of a Massive Gender Discrimination Class

Background

In 2004, the *Dukes* plaintiffs filed suit under Title VII on behalf of what has become a diverse putative class of roughly 1.5 million women, including both salaried and hourly employees in various positions who are or were employed at one or more of Wal-Mart's 3,400 stores across the country. They allege that Wal-Mart's centralized structure facilitates gender discrimination throughout Wal-Mart stores in a way that impacts all women who work or have worked at Wal-Mart. The district court found that adjudicating the case as a class action (rather than through individual suits) is appropriate because plaintiffs presented: (1) facts reflecting a common practice of decentralized, subjective decision-making; (2) expert opinions suggesting a culture of gender stereotyping; (3) statistical evidence of universal pay disparities attributable to gender discrimination; and (4) anecdotal evidence from putative class members of management's discriminatory attitudes. Despite Wal-Mart's vigorous challenge to such a massive class, the district court held that the employees' equal pay claims could be manageable on a class-wide basis because individuals who were paid less for comparable work could be identified by objective criteria through the use of computer software and would not require an individualized inquiry.

The Ninth Circuit Paves the Way for a 500,000+ Woman Class

A slim 6-judge majority of the 11-member *en banc* panel agreed with the district court and voted to affirm certification of a class under Federal Rule 23(b)(2). The employees' "factual evidence, expert opinions, statistical evidence, and anecdotal evidence" were sufficient to "raise the common question whether Wal-Mart's female employees nationwide were subjected to a single set of [discriminatory] corporate policies (not merely a number of independent discriminatory acts)." The panel chose not to opine on the district court's particular plan for managing

such a huge class. However, it noted that there are a "range of possibilities" – including the one offered by the district court – that would allow the action to be manageable and fair, citing to one case in which a randomly-selected statistical sampling was used. *Dukes* demonstrates that courts may accept objective criteria such as job descriptions and pay grades as common proof of an employer's practice or policy of discrimination. Similarly, computer software can potentially identify employees and pay disparities quickly and assess damages on a class-wide basis.

While the *en banc* panel limited the class to current employees' claims for injunctive relief, declaratory relief and back pay, it recognized that the class is still about 500,000 women strong. Further, it did not reject the possibility of additional classes. Rather, it remanded to the district court to determine whether to certify an additional class or classes involving punitive damages or claims of former employees.

New and Proposed Equal Pay Legislation Magnifies the Impact of *Dukes*

Employers should continue to monitor *Dukes* closely, as it foreshadows the types of class actions that will appear more frequently, particularly if Congress continues to pass new aggressive equal pay laws.

In January 2009, President Obama and the new House majority swiftly approved a sweeping bill on pay bias that not only overturned the Supreme Court's 2007 decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, but also dramatically changed and expanded equal pay law. Most notably, the Lilly Ledbetter Fair Pay Act ("Ledbetter Act"):

1. Reset the statute of limitations for filing a wage claim to each time an employee receives a paycheck, allowing employees to bring wage claims years after the alleged discrimination initially occurred; and

2. Expanded the definition of an unlawful employment practice to not only include discreet "decisions" regarding compensation, but to include any "other practice" that affects an employee's compensation.

President Obama and various members of Congress have made clear that passing the Ledbetter Act was only the first step of their quest to crack down on employers and close the purported gender wage gap. They are now pushing legislation to modify the Equal Pay Act ("EPA") and close what they view as "loopholes" in existing laws and "barriers to effective enforcement." Indeed, the House's January 2009 Ledbetter Act bill also included the Paycheck Fairness Act ("PFA"), which the Senate detached

included the Paycheck Fairness Act ("PFA"), which the Senate detached and decided to consider at a later date. On March 11, 2010, the Senate HELP Committee held a hearing on the PFA to further their goal of passing additional equal pay legislation during this Congress.

The PFA would materially alter the EPA by:

- Limiting the affirmative defenses currently available to employers;
- Enhancing employees' ability to seek un-capped compensatory and punitive damages; and
- Making it easier to pursue class actions for equal pay claims.

Changes to the affirmative defenses are especially noteworthy. Under the current EPA, employers can defeat a pay discrimination claim by proving the pay decision was based on "any factor other than sex." The pending legislation would shift the burden to employers to prove that the factor other than sex: (1) is not based upon or derived from a sex-based differential in compensation; (2) is job-related with respect to the position in question; and (3) is consistent with business necessity. Furthermore, the new law would allow employees to rebut the defense by showing that the employer would have been able, but refused to, adopt an alternative practice that would serve the same purpose without producing the same result. The new law would create huge obstacles for employers in establishing a "factor other than sex" defense.

The proposed legislation would create even greater risk for employers in the class action context, as it would change the EPA to mirror Title VII and allow for "opt-out" class actions. In other words, class members would be included in the class unless they specifically excluded themselves. The current EPA allows for collective actions only where class members affirmatively opt in through written consent. The change, coupled with the *Dukes* decision, would greatly increase the number of employees participating in equal pay class actions and would undoubtedly embolden plaintiffs' attorneys to file more cases.

While the March 11 Senate HELP Committee hearing was dedicated to the PFA, most of the participants present also discussed a more aggressive equal pay bill – the Fair Pay Act of 2009 ("FPA"). The FPA would go further than the PFA by requiring employers to provide equal pay for men and women not only in the same jobs, but also "comparable" jobs – *i.e.*, those that "may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions." This change in the degree of similarity required by courts would make it dramatically easier for women to sue their employers for gender pay discrimination and could potentially make class

employers for gender pay discrimination and could potentially make class sizes even larger.

Implications for Employers

Though the health care debate sidelined President Obama and the Democratic-controlled Congress in 2009, employers should expect to see great strides made to change the EPA in 2010. The *Dukes* decision and the Ledbetter Act, coupled with the passage of either the PFA or the FPA, would pave the way for a flood of equal pay claims that would be dramatically more challenging and expensive for employers to defend. Even innocent employers would be vulnerable, since many of those faced with gender discrimination suits would feel pressured to settle after weighing the possibility of a massive certified class and excessive damage awards against their slimmer chance of success under the new statutory framework. This would be particularly unfortunate given that several independent studies suggest that the gender wage gap is not due to any employer bias, but due to societal and other "unexplained" factors. So, while closing the wage gap is undoubtedly important, Congress may be misdirecting a massive statutory remedy to undeserving employers. It is therefore important for all employers to assess compensation policies and current pay decisions and take reasonable steps to identify any areas of potential disparity.

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- Reviewing pay and related policies
- Creating training materials for HR, legal and decision-makers
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