CLASS ACTION OUTLOOK

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Tyson Foods decision is expected to have sweeping implications for wage and hour litigation, use of statistical proof

By Naveen Kabir
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On November 10, the U.S. Supreme Court heard oral argument in a case that some are predicting will usher in the next chapter in workplace class actions, ***Tyson Foods, Inc. v. Bouaphakeo***. The case is expected to have repercussions for defending wage-and-hour claims generally, and it has the potential to affect the use of statistical proof in other class contexts as well.

Background

The named plaintiffs sued Tyson Foods for overtime based on time spent donning and doffing sanitation and protective gear. Although Tyson paid them for 4 to 8 minutes for this time, the plaintiffs contended they should have been paid for the additional time it took them to change and walk to the time clock to punch in for their shift.

Tyson asserted that the claims of 3,300 employees could not be maintained as a class when they worked more than 400 jobs and spent varying amounts of time donning and doffing, depending on their assigned job and locations for each shift. Nevertheless, a federal district court in Iowa **certified the case** under both Rule 23 of the Federal Rules of Civil Procedure and the less-exacting collective action standard under the Fair Labor Standards Act. The court relied on statistical proof presented by the plaintiffs' expert, who calculated the amount of donning, doffing and walking times based on videotaped evidence of 744 employees. The times were then averaged and extrapolated to the class to estimate the amount of donning and doffing time that was not captured by Tyson's time records.

The same proof was presented to the jury at trial, who awarded a $5.9 million lump-sum verdict to the class — significantly less than the plaintiffs' expert had calculated. Despite the Supreme Court's mandate rejecting a trial-by-formula approach to class actions in ***Wal-Mart v. Dukes***, the U.S. Court of Appeals for the **Eighth Circuit upheld** the class certification on appeal — even though Tyson had managed to prove that more than 200 class members were not owed any overtime at all, either because they did not work overtime or because they were

not underpaid. Tyson petitioned for certiorari by the Supreme Court, which was granted in June.

The Supreme Court Review

The Supreme Court will review two main issues: (1) whether it was proper to ignore individual differences when the statistical model used to prove liability and damages class-wide was based on averages and extrapolations, and assumed all class members were identical; and (2) whether it was proper to maintain a Rule 23 class or FLSA collective action when hundreds of class members had no legal injury entitling them to recover damages in the first place.

In *Dukes*, the Supreme Court rejected the notion that a class-wide back pay award could be established by the trial-by-formula methodology that had been endorsed by the U.S. Court of Appeals for the **Ninth Circuit**:

$$\left(\frac{\#Valid\ Claims\ from\ Sample}{\#Sample\ Class\ Members}\right) * (Avg.Back\ Pay\ Award) * (Total\ Class\ Members) = \$X$$

Similar to the statistical model at issue in *Tyson Foods*, such a formula allowed for recovery for all of the class members — even if some individuals did not actually have valid claims. Furthermore, it prevented Wal-Mart from litigating its defenses to back pay awards in further individualized proceedings — something it would ordinarily be entitled to do *after* liability has been established in a Title VII pattern-or-practice case. The *Dukes* Court held that this violated the **Rules Enabling Act** because "a [Rule 23] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."

If the Supreme Court were to extend this reasoning to *Tyson Foods*, then it is possible that district courts may find themselves denying (or limiting) class certification upon a showing that a significant number of class members did not in fact suffer any injury. Alternatively, district courts could require separate individualized proceedings, to the extent they would be necessary to vindicate defendants' rights to present certain defenses.

At oral argument, the Justices appeared to be focused on a narrower issue that was raised in the U.S. Department of Labor's amicus brief: whether this case ultimately turns on a nearly 70-year-old decision interpreting the FLSA, ***Anderson v. Mt. Clemens Pottery***.

In *Mt. Clemens*, the Court allowed for the use of representative proof in FLSA cases where, as in *Tyson Foods*, the employer did not maintain time records for the violation at hand. Reasoning that plaintiffs should not be penalized for their employer's recordkeeping failures, the *Mt. Clemens* Court held that if employees come forward with "sufficient evidence to show the amount and extent of [uncompensated] work as a matter of just and reasonable inference," then the burden of proof shifts to the employer to negate the inference. If the employer ultimately fails, then an employee is entitled to damages, "even though the result may only be approximate." Indeed, the employer "cannot … complain that the damages lack the exactness and precision of measurement that would [have been] possible had he kept [accurate] records" as required by the FLSA.

If the issues presented in *Tyson Foods* can be decided within the framework of the *Mt. Clemens* decision, then the Supreme Court will not have to reach the issue of whether the lower courts' rulings run afoul of the trial-by-formula prohibition for Rule 23 cases set forth under *Dukes*.

What Employers Should Look For

The Court's decision is expected before its term ends in June 2016. It is impossible to predict the outcome, but here are some reasons employers should pay attention.

First, even a narrow decision is likely to affect the manner in which wage-and-hour cases should be litigated generally. Multiple federal appellate courts – for example, the U.S. Court of Appeals for the **Eleventh Circuit** in ***Morgan v. Family Dollar Stores*** – have already applied *Mt. Clemens* to establish liability on FLSA claims on the basis of representative proof.

However, as the U.S. Department of Labor acknowledged at oral argument in the *Tyson* case, this would be the first time the Supreme Court extended *Mt. Clemens*' application of "approximations" and burden-shifting outside of the damages context. Given that the rate of wage-and-hour class and collective actions filed each year shows no signs of slowing down, any Supreme Court decision elaborating on the merits of FLSA cases can help guide employers on early case assessment.

Second, employers should consider being creative when it comes to their class action defense strategies. Even though Tyson challenged the cohesiveness of the class at every opportunity, the company still ended up with a jury award that was overly inclusive with respect to "undeserving" class members. At the same time, the final lump sum had been somewhat mysteriously reduced. At oral argument, the Supreme Court justices highlighted some alternatives that may have avoided such consequences, such as bifurcating the damages and liability phases for trial, precluding the problematic expert testimony on statistical averages with a ***Daubert*** **challenge**, or requesting a special jury verdict form to account for the allocation of damages.

Finally, *Tyson Foods* is a good reminder that employers should audit business practices that affect their wage-and-hour recordkeeping. Although employers may not be able to monitor every minute of their employees' workday, implementing operational changes — like moving a time clock closer to the employee locker room if compensable donning and doffing is taking place there — may well be preferable to "bridging the gap" with statistical evidence in costly litigation. This is just as true in donning-and-doffing cases as it is in misclassification cases (where employees contend their "primary duty" consisted of non-exempt work) or tip credit cases (where employees claim they spent more than 20 percent of their time on non-tipped work).

The **Class Action Practice Group** can help you explore how to integrate wage-and-hour compliance into your business operations to minimize your risk of trial-by-formula.

When plaintiffs won't take "yes" for an answer: Supreme Court revisits mooting class claims through offers of settlement

By Kate Scarbrough
Nashville Office

On January 20, the U.S. Supreme Court issued the second opinion in what is likely to be a continuing line of cases grappling with a defendant's ability to force settlement of a class action by offering full relief to the named plaintiffs.

In ***Campbell-Ewald v. Gomez***, Justice Ruth Bader Ginsburg wrote for a 6-3 majority and held that an unaccepted offer of judgment does not moot a plaintiff's case and is not sufficient to cut off potential class action claims in a Rule 23 action. Many are heralding this case as a victory for plaintiffs, but it might also contain a road map for defendants who seek to avoid such an outcome in the future.

Mr. Gomez filed a nationwide class action against Campbell-Ewald, a marketing firm contracting with the U.S. Navy, arising from a text message that attempted to recruit him to join the Navy. Mr. Gomez never consented to receive the text, and thus he alleged the company violated a federal law prohibiting "unsolicited advertisement." Campbell-Ewald, in turn, proposed resolving the case by filing an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure, and agreeing to pay Mr. Gomez about three times what federal law would allow him to recover. Mr. Gomez refused to accept the offer and persisted in his efforts to lead a class action against the company.

A federal court in California granted summary judgment to Campbell-Ewald on grounds of sovereign immunity (because it was a contractor for the Navy). The U.S. Court of Appeals for the **Ninth Circuit** reversed. The U.S. Supreme Court granted Campbell-Ewald's petition for certiorari, not to review the immunity issue but to review whether the settlement proposal was enough to moot the case entirely.

The Supreme Court majority drew heavily from the dissent in the Court's 2013 opinion in ***Genesis HealthCare Corp. v. Symczyk***, in which the Court addressed the effect of full relief offered to a lead plaintiff in a purported collective action

brought under the Fair Labor Standards Act. In *Genesis*, the majority (opinion by Justice Clarence Thomas, joined by Chief Justice John Roberts and Justices Samuel Alito, Anthony Kennedy, and Antonin Scalia) said the mootness issue was not properly before the Court, and *assumed* the lead plaintiff's case was moot because she waived any argument to the contrary. The *Genesis* majority went on to decide that in light of the mootness of the lead plaintiff's claim, and in the absence of any other plaintiffs, a collective action could not be maintained. The *Genesis* dissenters, in an opinion by Justice Elena Kagan and joined by Justices Stephen Breyer, Ginsburg, and Sonia Sotomayor, vehemently disagreed with the majority on the mootness issue, forecasting the conclusion reached by the majority in the *Gomez* case.

The Supreme Court majority in *Gomez* (which included Justices Kennedy and Thomas) analyzed the issue according to basic contractual principles, and found that a mere offer to settle creates "no lasting right or obligation." So long as the defendant continues to deny liability and the parties remain adverse, the majority said, a constitutional "case or controversy" exists, giving the plaintiff access to the federal courts.

The majority opinion specifically declined to take a position on whether the outcome would have been different if the court had already entered judgment for Mr. Gomez and Campbell-Ewald had already deposited the funds into his account.

Chief Justice Roberts, joined by Justices Alito and Scalia, dissented, noting that Campbell-Ewald had offered all the relief that Mr. Gomez could recover in federal court, leaving no genuine "case or controversy" as contemplated by Article III of the Constitution. The dissent focused on the requirements of Article III, not contract law. Chief Justice Roberts noted that the effect of the majority's ruling was to put Mr. Gomez and other plaintiffs in the driver's seat, leaving them free to decide whether or not their case would move forward in federal court even when they had been offered full relief. Calling the notion that Campbell-Ewald might not make good on its promise to pay "mere pettifoggery," the dissent also suggested that had the defendant merely deposited the funds with the trial court, the outcome of this case could and should have been different.

The lesson of *Gomez* may well be that there is a path to a better outcome for defendants: in cases where the defendant can define and provide complete relief for the representative of the putative class, it should do so in such a way that the plaintiff cannot help but "take yes for an answer." Coupled with the ruling in *Genesis* and absent any other intervening circumstances, a successful effort at making the lead plaintiff whole may well dispose of both the individual's claim and the potential for a collective or class action.

Will the Supreme Court put the brakes on FCRA class action lawsuits?

By Heidi Wilbur
Denver Office

The U.S. Supreme Court is mulling over a high-stakes case that could potentially thwart the recent tide of Fair Credit Reporting Act lawsuits plaguing employers.

In ***Spokeo v. Robins***, the Supreme Court will decide whether a plaintiff who has not suffered any actual harm can nonetheless have standing to sue in federal court based on a technical violation of a statute. Spokeo was granted review of a **decision** by the U.S. Court of Appeals for the **Ninth Circuit**, which had held that the technical statutory violation was enough to confer standing.

Spokeo operates a "people search engine" that compiles publicly available information about people into a database that is searchable via the internet. Thomas Robins filed a putative class action against Spokeo, alleging that the company violated the FCRA by publishing inaccurate information about him, including his age, education, professional experience, and marital and financial status. Although Mr. Robins did not file suit as an employee or job applicant, the case may nonetheless have a major impact on employers who use credit reports and background checks in their employment screening process.

Employers have recently been bombarded with FCRA class action lawsuits based on various technical violations of the law. Chipotle, Chuck E. Cheese, Calvin Klein, and others have been targeted by lawsuits alleging FCRA violations such as minor defects in disclosure forms and statements. The FCRA provides that an employer who fails to comply with any of the law's many technical requirements may be liable for actual damages or statutory damages (ranging between $100 and $1,000), punitive

damages, and attorneys' fees and costs. FCRA lawsuits appear to be particularly attractive to plaintiffs' attorneys due to the draw of statutory damages, the potential ease of demonstrating commonality when the only alleged injury at stake is a technical defect, and widespread publication of seven-figure settlements. It's not unusual for FCRA class action lawsuits to settle for millions of dollars despite the fact that they often involve plaintiffs who have not suffered any actual injuries.

Spokeo contends that parties alleging mere statutory violations do not have standing to sue under Article III of the Constitution because they have not been harmed. In order to have standing, a plaintiff must have suffered an actual or imminent "injury in fact" that is "concrete and particularized." Many federal laws, however, including the FCRA, provide plaintiffs with remedies in federal court based on statutory violations. When these violations are aggregated into a class action lawsuit, employers are faced with millions of dollars in potential liability for what may be nothing more than a technical violation like including additional language in a disclosure statement.

If the Supreme Court sides with Spokeo, its decision could eviscerate a plaintiff's ability to sue in federal court based on statutory violations of the FCRA, as well as other federal laws. A plaintiff would not have standing unless he or she could show a real injury as a result of the violation. This would be a relief for employers because presumably very few plaintiffs would be able to show the required injury.

The Supreme Court oral argument was held in November, and it appeared that the five "conservative" members of the Court were sympathetic to Spokeo's argument. Chief Justice John Roberts said, "[W]e have a legion of cases that say you have to have actual injury." Justice Antonin Scalia said, "[V]iolation of a procedure, even if you are given a right to the procedure, that alone does not suffice for standing. . . . [T]hat is a procedure *in vacuo* that leads to nothing." On the other hand, the four "liberal" members of the Court seemed more sympathetic with Mr. Robins' argument, although they all seemed to agree that *some* type of "concrete injury" was required. Justice Elena Kagan asked whether false information in a credit report was not a "concrete injury" in itself, and said that dissemination of incorrect information about an individual was "the quintessential kind of injury that you will never be able to detect and surely not to prove."

Based on the Justices' comments, it appears that there are three potential outcomes. The worst-case scenario for employers would be if the Court upheld the Ninth Circuit opinion and held that plaintiffs do not have to show individualized harm. The best possible outcome would be a ruling that the plaintiff must point to actual individual harm caused by the statutory violation, rather than to sue based only on a statutory violation. In addition to these scenarios, it's possible that the Court will find that Mr. Robins himself suffered a real injury, which will allow him to move forward with his case but with continued uncertainty as to whether other plaintiffs can bring lawsuits based on statutory violations without real injuries.

As employers await a decision, they should audit their practices regarding background checks and credit reports to ensure compliance with the FCRA. Even if the Court rules to disallow suits in federal court based on mere technical violations, the plaintiffs' bar could become more aggressive about creatively arguing that actual damage has occurred as a result of a violation. Furthermore, in jurisdictions with state FCRA laws that have not been pre-empted, plaintiffs may still be able to bring state FCRA suits in state court. Therefore, it is important to continue providing training to employees handling FCRA-related matters and to continue to monitor FCRA policies and practices.

California's "new, improved" Fair Pay Act may result in flood of equal pay class claims

By Dawn Amos
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Los Angeles County Office

California now has arguably the strongest equal pay law in the nation, which is likely to lead to an increase in class litigation. The California Fair Pay Act was signed into law by Governor Jerry Brown in October 2015 and went into effect on January 1. The Act, **Senate Bill No. 358**, amends Section 1197.5 of the California Labor Code, and was passed with strong bipartisan support, including most state Republican lawmakers, as well as the Chamber of Commerce. Unlike many similar laws, the Act contains no exemption for small employers.

The main purpose of the Act is to eliminate the wage gap between men and women. In California in 2014, women were paid approximately 84 cents for every dollar paid to men, and the gap was even larger for women of color. (It should be noted

that these wage comparisons do not control for position held, length of time in the workforce, career interruptions, or other non-sex-based criteria that may affect pay.) Although the state wage gap was lower than the national average, California seeks to eliminate it completely.

Before the amendments that took effect at the beginning of this year, California's Labor Code was essentially identical to the federal Equal Pay Act. As with EPA claims, the prior version of the Fair Pay Act required equal pay for "equal work," and had been interpreted to apply only to workers holding exactly the same jobs. Both the federal and the pre-amendment California laws also required that employees work in the same establishment to be true "comparators."

What's New

As amended, the California Fair Pay Act prohibits employers from paying employees wage rates that are lower than the wages paid to co-workers of the opposite sex who perform "substantially similar" work, viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions. In other words, the amended Fair Pay Act is as much a "comparable worth" law as an "equal pay" law.

The amendments also remove the limitation that the comparison be between workers in the same establishment. *Bona fide* pay differentials due to regional cost of living differences are permitted, but it will be the employer's burden to establish that the differentials are justified. It is not clear whether or how this will apply to employers' locations outside California.

Superficially, the amended Fair Pay Act has the same employer defenses as the older version. Exceptions may apply if the wage differential is based on a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a *bona fide* factor other than sex, such as education, training, or experience. However, the *bona fide* factor exception applies under the amended law only when the employer demonstrates that the wage differential is not based on sex, but is job-related and consistent with business necessity. Even then, an employee can override the exception by demonstrating that an alternative business practice would serve the same purpose without creating the wage differential. Finally, the employer factors must be "applied reasonably" and must account for the *"entire"* wage differential. If an employer cannot account for even a small portion of the differential, then the employer will be liable under the Act.

In addition to the wage provisions, the Act also prevents employers from retaliating against any employee trying to enforce the Act. Employers may not prohibit employees from disclosing or discussing their wages with others, or inquiring about other employees' wages. Although protections for disclosure of wages already existed under California law, the amended Act notes that employees have generally been either unaware of the protections or afraid to exercise their rights because of the fear of retaliation. Finally, the Act increases to three years the period during which employers must retain records related to wage rates, job classifications, and other terms and conditions of employment. (Before the amendments took effect, the record-retention period was two years.)

What Employers Can Expect

An employer who violates the Act can be liable for the wages lost as a result of the violation plus interest, liquidated damages, and attorneys' fees.

The amended Fair Pay Act – with its significant expansion of the potential pool of comparators – is expected to increase the volume of class action litigation in California based on pay equity. In addition, there is the possibility that employees could bring Private Attorney General Act claims based on the amendments. PAGA claims are limited to statutory penalties and have a shorter statute of limitations. Thus, they may not be as attractive to plaintiffs (and their attorneys) as traditional class claims when both types of claims are available. However, in some circumstances a PAGA claim will be available when a traditional class claim is not – for example, when the employer has an arbitration program that includes a class waiver. **According to current legal authority**, the arbitration clause would bar class, but not PAGA, claims. Thus, employees could bring PAGA claims as an alternative to arbitration.

Employers who operate in California should be cautious in the face of the amended Fair Pay Act. They should review their pay practices to determine whether there are any issues that could create potential liability. More specifically, any

wage differentials between male and female employees should be carefully examined to ensure that they are legitimately based on one of the limited exceptions available under the statute. Differentials must be examined not only on the basis of job titles, but on the basis of the skill, effort, responsibility, and working conditions going into each job, across different locations. Record retention policies and practices should also be revised to reflect the longer retention requirements. Employers should engage qualified employment counsel if they have any questions regarding application of the Act or potential disparities among their employees' salaries.

How employers can avoid the EEOC "pattern or practice" nightmare

By Stacy Mueller
Denver Office

A "pattern or practice" action brought by the Equal Employment Opportunity Commission can be a nightmare for an employer, with a class consisting of potentially thousands of employees being created almost overnight.

The majority of pattern or practice actions are brought by the EEOC pursuant to Section 706 of Title VII – in other words, they arise because of a charge filed by one or more individual employees or applicants. The EEOC may file a pattern or practice case if, while investigating a charge of discrimination, the agency finds reasonable cause to believe that an employer's discriminatory conduct was systemic. This outcome is even more likely if the EEOC has received multiple similar charges from employees of the same employer.

The EEOC also may bring a pattern or practice action under Section 707 of Title VII. Section 707 actions typically arise in the context of a "Commissioner's Charge," in which an EEOC Commissioner is given the authority to file a charge on his or her own initiative. Although Commissioners' Charges are rare (only a handful are filed each year across the country), they are especially dangerous because they give the EEOC *carte blanche* to proceed with a regional or even nationwide investigation, and in many cases to file a lawsuit on behalf of a nationwide class, without a charge having been filed by an employee or applicant.

In a "regular" Rule 23 class action, the plaintiff must show that the putative class has numerosity, commonality, typicality, and adequate representation by counsel. If the plaintiff meets those initial requirements, it has to satisfy additional requirements depending on the type of class action being asserted. As a result, the initial strategic focus for an employer in a Rule 23 class action is defeating class certification. In contrast, the EEOC can bring a pattern or practice case without having to comply with the requirements of Rule 23. In other words, a pattern or practice action involves a class *by definition*.

Pattern or practice cases differ from Rule 23 class actions in other ways. Although pattern or practice cases are brought by the EEOC and do not have a class representative (as there is no need for one without Rule 23), individual plaintiffs do typically intervene in the litigation once the EEOC files suit. These plaintiff-intervenors usually are the employees who filed the initial EEOC charge(s). Significant to the litigation strategy is that the plaintiff-intervenors are represented by their own counsel and make their own settlement demands, separate from the relief requested by the EEOC.

Prevention Tips for Employers

The best strategy for an employer when it comes to a pattern or practice case is to ensure that it is not a target in the first place:

- Watch for early indicators of class exposure, such as numerous EEOC charges with the same or similar allegations, or an increase in the number of internal complaints.

- Ensure that the company has expertly drafted policies and procedures prohibiting discriminatory practices or conduct. Distribute in writing to each employee and, ideally, re-issue and require re-acknowledgment by the employees on an annual basis.

- Ensure that the company has a robust internal concern resolution procedure that provides employees with numerous

avenues to address concerns without the fear of retaliation, and that internal complaints are handled by managers or human resource professionals trained to knowledgeably do so. Make sure that all employees are aware of your procedures.

- Train all employees on EEO law and company procedures and policies, with additional training for employees at certain management or executive levels.

- Closely scrutinize individual charges of discrimination, and resolve them early when possible.

- When responding to requests for information issued by the EEOC during an investigation, limit your responses to the specific location or department (or even decision-maker) that is the subject of the charge. Answering questions on a broad basis, as to all facilities or all employees, opens up the possibility that the EEOC will later claim that its investigation was larger in scope, justifying a larger class.

- Be proactive about looking at the employer's own statistics, such as EEO-1 forms that are forwarded to the EEOC. If an employer notices on its own that the information in its surveys raises a red flag, then the EEOC is likely to be flagging the same thing.

Defense Strategy

Employers faced with a potential pattern or practice lawsuit should carefully and timely consider the prospect of early settlement. If settlement is reached *before* a lawsuit is filed, the EEOC is statutorily required to keep the settlement confidential. On the other hand, any settlement reached *after* the EEOC files suit will become a matter of public record. Indeed, the EEOC considers a public "Consent Decree," filed with and signed by the court, to be a non-negotiable term of settlement. To add insult to injury, the EEOC will issue a widely circulated press release immediately after the parties file the Consent Decree. For these reasons, a very significant strategy in defending an EEOC pattern or practice case is to explore settlement early, during either the administrative or conciliation phase of an action, and before a lawsuit is filed.

If the EEOC does file a pattern or practice case, there are certain steps an employer can take to increase its chances of success:

- **Hire a reputable expert.** Statistics are everything in these cases. A good expert can win the case. The opposite is also true, and the EEOC has had some high-profile losses because of poor methodology used by its experts.

- **Prepare for massive discovery efforts.** Because these cases are statistics-driven, the EEOC commonly will ask for electronic records of all employees, going back a number of years. Even when the EEOC's requests are overbroad, courts are likely to allow them.

- **Keep your public relations department in the loop.** Settlements of pattern and practice cases brought by the EEOC in court are heavily publicized. A proactive public relations campaign, beginning before the EEOC's press release regarding the settlement, can go a long way to defuse the negative publicity that will inevitably result.

Three things every employer should know about e-discovery

By Susan Bassford Wilson

St. Louis Office

E-discovery. If this word strikes terror into your heart, you are not alone. Already a formidable task, discovery became exponentially more onerous with the advent of modern technology. Instead of just looking through a file cabinet or two, even routine litigation regularly requires scouring everything from computers to phones to third-party servers for relevant information. But in the case of class actions, e-discovery often requires even greater expense and effort. And the failure to properly handle it can lead to significant sanctions.

While it may seem overwhelming, here are three basic points that every company should keep in mind about e-discovery. In later articles, we'll explore each point in more depth.

A Company Must Preserve Potentially Relevant Information

When a company is involved in litigation, it has a duty to preserve any information in its possession that might be relevant to the claim. This duty generally arises when litigation is reasonably anticipated (which may be before suit is even filed) and continues until the action is completely concluded (either by settlement, voluntary dismissal with prejudice, or final judgment after all appeal periods have expired).

The failure to preserve potentially relevant information is called spoliation, and a court can order sanctions for this conduct. These sanctions range from imposing fines to instructing the jury that the missing evidence should be construed against the party who failed to preserve the evidence. Sanctions can be ordered even when the spoliation is innocent, if the harm cannot be remedied in any other way.

However, recent amendments to the Federal Rules of Civil Procedure bode well for employers facing class litigation. First, the amended discovery rules now provide that parties may obtain discovery regarding any matter that is both relevant to a claim or defense *and* proportional to the needs of the case. The amended rules also provide that any sanction imposed for a failure to preserve electronically stored information should be no greater than necessary to cure the loss or prejudice. Finally, a court cannot order the most serious sanctions – such as dismissing the lawsuit or instructing a jury to find that the missing information would have favored the opposing party – unless it finds that a party acted intentionally. Taken together, these rules should allow the court to more closely tailor the discovery (and any sanctions) to the specific facts of the case. It is often the sheer volume of the potentially relevant information that makes e-discovery in class actions expensive and time consuming, because the duty to preserve evidence can encompass everything from text messages to digital time punches. This duty to preserve has been found to extend beyond company equipment to personal devices, which brings us to the next point.

Establish Proactive Policies for the Digital Workplace

Even before the threat of litigation arises, every company should consider whether it has a comprehensive digital governance plan to address the issues inherent in the digital workplace. For example, if you allow or require employees to use their personal devices for work, then a clear policy setting forth the requirements and responsibilities of your bring-your-own-device plan is invaluable. If and when litigation arises, you will know where information could be stored and be better able to collect it.

Another prong of a thorough digital workplace governance program is a comprehensive litigation-hold scheme. For example, it should provide a way to inform all the relevant employees of the need to retain and produce information and materials related to the case, while ensuring that they don't delete anything going forward. It should also take into account any auto-delete program and confirm it is suspended during litigation. Further, it should ensure you revisit the issue on a regular basis throughout the litigation to remind everyone of the continuing obligation to preserve and produce information, which is particularly important in long-lasting class action cases.

Make It a Team Effort

Like any other digital quandary, implementing proactive policies and responding to active litigation should combine the professional expertise of your legal, technical and leadership teams. If you don't tell your lawyer that your management often texts about business, then she can't make an informed decision about what type of data collection is necessary. If your leadership doesn't understand the software issues underlying the preservation of electronic data, they may not implement the most effective policies. If your IT guru doesn't understand the seriousness of the duty to preserve all potentially relevant information, then you cannot take full advantage of his ability to assess and limit the scope of that data.

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E-Discovery Haiku

E-discovery –
Save all relevant data
Avoid huge sanctions.

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