CLASS ACTION TRENDS REPORT

Disparate impact—discrimination by the numbers

ABC Discount Superstores prides itself on undercutting any competitor's prices—and on the diversity of its workforce. Always on the cutting edge, the company was among the first in the retail industry to embrace online recruiting and to adopt screening tools to narrow the field of job applicants when hiring for positions at stores nationwide. ABC's use of objective, competency-based tests ensures the candidate pool for any given opening has been whittled down based solely on merit, and without regard to race, gender, or other protected categories.

Consequently, ABC's executive vice president for human resources, who is African-American, was stunned to discover that an African-American applicant for a store associate position has filed a complaint with the Equal Employment Opportunity Commission (EEOC). The applicant was rejected after failing to achieve a minimum required score on ABC's online skills assessment, and he complained to the EEOC that the test was discriminatory.

Now, the EEOC is looking closely at ABC's pre-employment testing practices. The federal agency asked to see ABC's recruiting data, seeking statistics and demographic information on all individuals who have applied online for jobs at ABC, going back five years. ABC's general counsel turned to the VP for HR. "We've got reams of data," the VP assured the company's top lawyer. "We've never really crunched the numbers, but I'm sure they'll bear out," she said confidently. After all, ABC Discount Superstores prides itself on its diverse workforce....

Allegations that your company has engaged in discriminatory conduct are always troubling, particularly for employers that dedicate considerable effort instilling a workplace culture of equal opportunity and respect. Allegations that the company has engaged in unintentional discrimination, though, can be especially hard to take. An employer can feel blind-sided by claims that its facially neutral employment policies or practices have an unlawful disparate impact on members of a protected class. Indeed, employers often adopt such assessments with the aim, at least in part, of *avoiding* unlawful discrimination—by minimizing the risk that subjective decision-making might produce such undesired outcomes. But this does not shield employers from potential liability.

DISPARATE IMPACT continued on page 3

CONTENTS

A WORD FROM STEPHANIE, ERIC & DAVID

Facing perpetual decisions regarding hiring, staffing, policy, discipline, and strategy, American businesses live the philosophical law of unintended consequences on a daily basis. While that philosophical law may absolve an individual of the unintended negative consequences of an otherwise well-meaning act under certain circumstances, no such protection exists for businesses faced with disparate impact claims: it may all be in the numbers. And so it goes in the realm of disparate impact claims. If an otherwise facially neutral policy disproportionately excludes—albeit unintentionally—a protected class from employment, promotion, or other work-related benefits, your company may face a disparate impact claim.

Given the nature of disparate impact claims, it is hardly surprising that classwide litigation is the favored vehicle. Disparate impact claims may arise from the unlikeliest of places (*e.g.,* dated job advertisements, application forms, job descriptions, policies, and even interview questions) or the more obvious practices (*e.g.,* hiring, promotions, and salary level). With respect to the unlikely sources of disparate impact claims, consider this: do your company's job advertisements require academic degrees such as high school, regardless of the position? Is it necessary to have a high school diploma or a college degree to perform the functions of the position your company seeks to fill? Does that requirement exclude a particular class of persons such as individuals with learning disabilities? Do you only hire employees without criminal records? While your company may not intend to exclude a class of persons, a seemingly neutral qualification may produce the unintended consequence of excluding a protected category of individuals. Likewise, while a company may have the best of intentions in promotion and salary decisions, those decisions (and the criteria utilized in making them) may disproportionately affect protected classes.

In this issue, we delve into disparate impact claims. We will discuss areas of possible vulnerability, neutral policies frequently challenged in disparate impact lawsuits, and, of course, class action litigation of disparate impact claims. This issue will discuss discovery, certification of class claims, and defenses (such as business necessity) against disparate impact claims. Consequently—but not unintentionally—the issue will include a discussion of data analytics. As you can imagine, removing intent from the equation necessarily focuses disparate impact litigation on statistical analysis.

Additionally, we will discuss preventive measures to avoid disparate impact claims. Training, of course, remains at the forefront in preventing all types of claims including those for disparate impact. The very same data analytics used in prosecuting and defending claims also may be utilized in self-audits to identify potential exposure. We encourage you to take a deeper dive into your company's numbers, dust off the old forms, revisit those policies, and mitigate any potential risks from disparate impact claims.

Stephanie L. Adler-Paindiris
Co-Leader • Class Actions and Complex Litigation Practice Group

Eric R. Magnus
Co-Leader • Class Actions and Complex Litigation Practice Group

David R. Golder
Co-Leader • Class Actions and Complex Litigation Practice Group

About the *Class Action Trends Report*

The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Law & Business *Employment Law Daily,* the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

Jackson Lewis editorial team

Stephanie L. Adler-Paindiris
Co-Leader, Class Actions & Complex Litigation Practice Group

David R. Golder
Co-Leader, Class Actions & Complex Litigation Practice Group

Eric R. Magnus
Co-Leader, Class Actions & Complex Litigation Practice Group

Stephanie L. Goutos
Editorial Leader, Class Action Trends Report

Brett M. Anders
William J. Anthony
Justin R. Barnes
Brian T. Benkstein
Alison B. Crane
Elizabeth S. Gerling
Douglas J. Klein
James M. McDonnell
Tony H. McGrath
Jonathan M. Minear
Cary G. Palmer
Paul Patten
Robert M. Pattison
Scott M. Pechaitis
Vincent E. Polsinelli
T. Chase Samples
Christine A. Slattery
Christopher J. Stevens
Jesse I. Unruh
Robert D. Vogel
David T. Wiley
Victoria Woodin Chavey

Employment Law Daily editorial team

Joy P. Waltemath, J.D., *Managing Editor* Lisa Milam, J.D., *Senior Employment Law Analyst*

Mail regarding your subscription should be sent to contactus@jacksonlewis.com or Jackson Lewis P.C. 666 Third Avenue, New York, NY 10017. Attn: Client Services. Please include the title of this publication.

DISPARATE IMPACT continued from page 1

"Disparate impact" is a theory of discrimination under equal employment laws such as Title VII of the Civil Rights Act. Unlike claims of "disparate treatment," which require a showing of intent, disparate impact claims can be established by showing that a facially neutral employment policy or practice had a disproportionate impact on a protected group.

"A disparate impact claim can be a tough pill for an employer to swallow because it does not require a showing of intent or any bad facts."

"A disparate impact claim can be a tough pill for an employer to swallow because it does not require a showing of intent or any bad facts," says Scott Pechaitis, a Principal in the Denver office of Jackson Lewis who works closely with the firm's unique group of in-house statisticians and data analysts. An employer can find itself defending a disparate impact claim despite having the best intentions to develop a fair employment process. And the employer is often left with the feeling that "no good deed goes unpunished."

It's all about the data

The general trend in employment law has been toward class and collective actions, "and the disparate impact theory of discrimination is fueling that trend," Pechaitis notes. That fact makes these cases especially enticing to the plaintiff's bar. The growing prevalence of electronic data merely adds to the allure. "More and more, employers are relying on robust data systems to track employee records—including HRIS systems, compensation systems, and applicant tracking systems. Data from these systems is usually the first (and sometimes only) item sought by class action plaintiffs' attorneys," he explained. "Disparate impact class claims have definitely been on the rise because of the boom in digital employment recordkeeping."

EEOC, Office of Federal Contract Compliance Programs (OFCCP), and other federal enforcement agencies also are focusing on data and disparate impact issues in investigations. "Focusing on data makes sense for the agencies," says Pechaitis, "There is the thought that for every individual brave enough to bring a complaint, there could be dozens or hundreds of similarly situated employees in the data." Focusing on data and class actions allows the agencies to affect a lot of potentially aggrieved individuals with one investigation. Theoretically, the agencies can get the biggest bang for the taxpayer buck.

Federal agencies and class action plaintiffs often see employment record databases as "low-hanging fruit" because employers rarely are proactive about analyzing their data for disparate impact or other exposure issues, and often hand databases over to adversaries without first thoroughly evaluating whether the files are accurate and complete. According to Pechaitis, "disparate impact cases are generally won or lost based on the data." Savvy employers will embrace their data when facing these claims, and use analytics to help shape the defense strategy. But "far too many employers are still using 'the ostrich defense,'" says Pechaitis. "They hide their head in the sand and hope problems will just go away. In this digital age, with the agencies and plaintiffs becoming so sophisticated with data and statistical analyses, this approach rarely works."

Policies and practices

Class discrimination allegations can take the form of "disparate treatment" or "disparate impact." Disparate treatment claims allege that an employer has engaged in intentional discrimination against, and makes adverse employment decisions based on an individual's race, gender, national origin, disability, or other protected characteristic. Disparate *impact* claims, in contrast, assert that an employment policy or practice, while neutral on its face, has the effect of discriminating against a specific protected group of individuals. Under a disparate impact theory, an employer's intent is irrelevant. Consequently, it is not enough simply to argue that the employer acted in good faith, without bias or animus, in implementing the challenged policy or practice.

DISPARATE IMPACT continued on page 4

DISPARATE IMPACT continued from page 3

Any employment practice or policy can be subject to a disparate impact claim. Class-based claims can arise at all stages of the employment life cycle, and frequently include challenges to company-wide hiring, pay, promotion, and termination practices or policies. Below are examples of facially neutral employer policies that can draw disparate impact claims:

- A call center uses a reemployment assessment to help screen applicants.
- A financial firm has a policy setting starting salaries based on the new hires' old salaries from their prior employers, which leads to women generally making less than men.
- A waste management company rejects all applicants who have a criminal history, which disproportionately affects minorities.
- A fire department imposes a minimum-height requirement for firefighter positions, which adversely affects female applicants.
- A tech company recruits only graduates of Ivy League colleges, essentially excluding groups historically under-represented at those institutions.
- A police department imposes a written test for promotion to lieutenant, which disproportionately disqualifies Latino and African-American officers.
- A manufacturer identifies "pension-eligible" employees for inclusion in a reduction in force, thus targeting long-term older workers for layoff.

A common target: pre-employment testing. In the above scenario, ABC Discount Superstores was confident that its pre-employment screening test was nondiscriminatory, and that the objective measures it had put in place for evaluating the influx of online job applicants helped to streamline their hiring practices and were also in keeping with the key company value of nondiscrimination. Yet, to its surprise, ABC found itself answering an EEOC charge. In fact, pre-employment tests present the "classic disparate impact pitfall," according to Pechaitis, and are among the most common targets of disparate impact lawsuits. "Pre-employment tests are ripe for these claims. You have a facially neutral employment practice or policy, and large numbers of selections or rejections, which can be aggregated to show patterns and statistical trends."

Here's how such a claim typically arises: A job applicant takes an online hiring test, doesn't pass, and is therefore rejected from further consideration for employment. She brings a discrimination complaint to the EEOC. "If one group tests at a significantly higher rate than another, that disproportionate impact is enough to make a *prima facie* disparate impact case," Pechaitis explained. "The individual could be of any race or gender—it can go in any direction—so long as there is a statistically significant difference in selection rates." This often leads to EEOC, OFCCP, and plaintiffs looking at data several ways through several "cuts" of analyses. "The government often will slice and dice several ways to see what trends it might find before discussing any theories or allegations with the employer."

An employer can defend itself from disparate impact challenges to pre-employment tests by showing that its

DISPARATE IMPACT continued on page 5

Either theory, or both?

Class plaintiffs and the EEOC often assert both disparate treatment and disparate impact theories arising from the same set of facts. They may also assert "pattern or practice" claims—a blend, of sorts, of the two. The EEOC and plaintiff's bar also have been known to commit strategic blunders, asserting only one of the two theories, when the other might more aptly have applied. For example, in one recent case, in which the EEOC alleged an employer's no-dreadlock policy discriminated against African-American employees, the EEOC erroneously conflated these distinct theories, proceeding solely on one and expressly disclaiming the other. A federal appeals court affirmed a lower court decision denying the agency's motion for leave to amend their claims.

With disparate treatment and pattern or practice claims, plaintiffs still must make some showing of intent or animus, presenting facts in support of that showing—which disparate impact claims do not require. On the other hand, with respect to statistical evidence, there is a higher standard of proof to establish disparate impact discrimination than disparate treatment discrimination.

DISPARATE IMPACT continued from page 4

test has been validated in accordance with the Uniform Guidelines on Employee Selection Procedures (UGESP). This federal protocol, adopted jointly by the EEOC and other agencies, requires that employers using a pre-employment testing procedure that has an adverse impact demonstrate the test evaluates factors that are going to be predictive of success in the specific position for which the employer is recruiting.

Employers cannot assume that using an "off-the-shelf" commercial testing product will satisfy their obligations in this regard, Pechaitis warns—even though vendors often boast that their test has been validated by years of studies. To ensure that a pre-employment test is properly validated for purposes of avoiding disparate impact liability, an employer must be able to point to an actual job study of incumbent employees carried out by an expert (typically, with an industrial psychology background) who has observed how employees perform the job and has evaluated what skills and qualities make them successful in that role.

Making the disparate impact case

In disparate treatment cases, class plaintiffs must show an intent to discriminate. In pattern or practice cases, this is usually done through a combination of statistics and anecdotal evidence. Disparate impact claims, by contrast, require proof of a statistically significant disparity that has been caused by a specific, facially neutral, company-wide policy. In disparate impact cases, then, class plaintiffs must make a *prima facie* showing that a facially neutral policy or practice has a "statistically significant," disproportionate adverse effect on a particular group.

Again, in determining whether an employer is liable for disparate impact discrimination, intent doesn't matter—so there is no need for employees to present anecdotal testimony about discriminatory treatment at the hands of a biased supervisor. Rather, notes Pechaitis, "the *prima facie* case can be made based on the numbers alone." At that point, the burden shifts to the employer to defend its practice by showing that a particular competency being evaluated (or another challenged policy or practice) is job-related and consistent with business necessity.

Making the case

- Was the asserted disparate impact statistically significant?
- Was the policy or practice consistent with a business necessity?
- Even so, was there an alternative policy or practice that could have met the employer's business need without adversely impacting the protected group?

The best move for employers facing a claim of disparate impact is to be proactive about collecting and analyzing data right away. "Looking at the data should be the first thing you do upon learning of a potential statistical claim," said Pechaitis. "You need to analyze the data to find your strengths and weaknesses, and then use those insights to shape your strategy and responses."

What is "statistically significant"? In order to state a viable claim, it's not enough for plaintiffs simply to show a policy had a disproportionate impact on a protected group—they need to show that the policy had a "statistically significant" disproportionate impact. What is statistically significant? The answer turns on a battle of experts, who will dispute standard deviations and similar principles, with the factfinder ultimately deciding which party's expert is more credible.

What does the EEOC say? The EEOC used to rely on a "four-fifths rule," a rule of thumb. If an employment practice results in a "selection rate" for any protected group less than four-fifths of the "selection rate" for another group, this is evidence of disparate impact. This test is largely disfavored since the arrival of more sophisticated statistical modeling. "The four-fifths rule was before high-powered computers," Pechaitis said. "Now statisticians use a standard deviation analysis, which is a more scientific approach."

Moreover, courts require a differential to be "practically significant," not just statistically significant, to establish causation. They recognize that with a large enough data

DISPARATE IMPACT continued on page 6

DISPARATE IMPACT continued from page 5

set, even very small differences can become statistically significant, in terms of the number of standard deviations. However, not all statistically significant results are *practically* meaningful for establishing a disparate impact on a particular protected group. The disparity must be so significant that it creates an "inference of discrimination."

A numbers game. Disparate impact litigation involves data, and lots of it. Statistics are in play as the relevant evidence, and expert witnesses give meaning and context to the data. Statistical evidence typically involves an expert's report and testimony analyzing data such as hiring rates (broken down by race, gender, or other characteristic) and explaining whether the disparity cannot be explained by random variation but must be the result of the particular policy or practice being challenged.

For example, in a suit by black laborers alleging disparate impact, statistical evidence could include an expert's comparing termination rates of recently hired laborers and testifying that black laborers are disproportionately likely to be fired soon after being hired due to "inability to perform tasks" as compared to recently hired white laborers.

"It all comes down to the numbers—who should be included in the data set, why or why not," Pechaitis explained. "And once in court, it becomes a matter of dueling experts and it turns on which expert has more credibility. The facts often don't matter; typically, there are

DISPARATE IMPACT continued on page 7

JL spotlight

When it comes to disparate impact litigation, statistical analysis of employment data is the driving force. Jackson Lewis has a unique in-house group of data professionals dedicated to analyzing, understanding, and exploring the power of data and statistics in class and collective actions. The firm's in-house data team is comprised of Ph.D. and Masters-level statisticians, econometricians, data management, and computer programming analysts who use statistical tools to harness and analyze client data and assist attorneys in evaluating the strength of a systemic discrimination case and to help craft the optimal defense strategy.

Krystal Welland, Lead Statistician in the Denver office of Jackson Lewis, notes that data can present unique challenges and opportunities in litigation. "Most HRIS [Human Resource Information Systems] were not designed with litigation in mind," says Welland. "As a result, employee data is often messy, difficult to interpret or incomplete. And, because class actions can cover so much time and so many people, the volume of data can be very difficult to manage, which further complicates an already-complicated situation." That's a real problem for employers when they face an audit or a lawsuit, as many employers see no choice but to hand over their data without reconciling, analyzing and making sure everything is accurate.

That's where Jackson Lewis' data analytics team comes in. While the data can present huge challenges in a class action, it can also be your greatest weapon if used well. "It's hard to argue with numbers," notes Welland, "so having them on your side in a case can be critically important."

Of course, prevention is the best defense and, to that end, the analytics group conducts for Jackson Lewis clients data-driven compliance assessments, including pay equity analyses and other EEO audits, to identify potential trouble spots so that clients can proactively address them before the government or class action attorneys come knocking.

"Our statistical team sets Jackson Lewis apart," notes Pechaitis. "Having our in-house group also means we have immense control over the analysis; we can really get into the data with them, and we gain so many efficiencies in terms of cost." Another important benefit, Pechaitis adds, "Having the team in-house allows us to have the strongest argument that these ultra-sensitive analyses are protected by the attorney-client privilege."

DISPARATE IMPACT continued from page 6

no employee declarations, no anecdotal circumstantial evidence, nothing but the data and analyses."

Job-related? Once a disparity is deemed statistically significant, the burden shifts to the employer to demonstrate that the challenged job qualification (or other policy or practice) is job-related and consistent with business necessity. In our ABC scenario, for example, the key question is: Is there a relationship between the skills being tested and the position for which the company is recruiting?

If the answer is "yes," the burden shifts back to the plaintiff to show the employer's stated justification for the policy is pretext or, alternatively, that a different test (or policy or practice) is available—one that could have effectively accomplished the asserted business purpose but with less disparate impact. Is there another means of evaluating for this skill set that doesn't unintentionally impact a protected group?

Consider a requirement that employees be authorized to work in the United States. Many employers see many overseas applicants seeking visa sponsorship. If the employer rejects them all on that basis, this could create disparate impact against minorities. However, employers are required to ensure their employees can lawfully be employed in the U.S. Further, employers have no obligation to pay for sponsorship. Therefore, this disparate impact may be justifiable. "We see this situation all the time," says Pechaitis. "As long as the rejections are based on the candidates' need for sponsorship, they are lawful. But once recruiters start *assuming* a need for sponsorship and rejecting candidates based on their ethnic origin or last name, that is when disparate impact can present a real danger for a company."

Are there policies or practices that courts routinely uphold (or reject) based on business necessity, regardless of adverse impact? It's always a case-by-case question: whether business needs justify the statistical indicator of discrimination. If a court concluded the justification served a legitimate need, the plaintiffs could still succeed by showing there was an alternate approach that would have served the same need, but with no or less disparate impact. For example, an auto shop may require employees working in a mechanic position to be able to lift 100-pound truck tires. This requirement may disproportionately screen out women and create actionable, gender-based disparate impact. In court, the burden would shift to the auto shop to defend the statistical indicator of discrimination, which the shop could do by showing that employees need to be able to regularly move the tools and materials to perform their jobs (therefore, the requirement was job-related and consistent with business necessity). However, the plaintiffs could still succeed if they show the employer could have used an alternate approach that would have served the same business need, but with a lesser or no disparate impact. For example, the plaintiffs could argue the employer could have allowed mechanics to use the shop's portable pneumatic jacks to move the tires, which would eliminate the need for the discriminatory physical job requirement.

Defending disparate impact claims

It's the EEOC, mostly. The plaintiff's bar is eager to take on disparate impact claims and the rise of data analytics offers some tempting low-hanging fruit. Indeed, a well-publicized $160 million settlement reached in a 2013 race discrimination suit (after the U.S. Court of Appeals for the Seventh Circuit affirmed class certification of a disparate impact claim seeking injunctive relief) is reason enough for the plaintiffs' bar to continue to bring disparate impact class action claims.

Yet, the bigger concern for employers with respect to disparate impact claims is the EEOC. "The EEOC is focused on using data to build big cases and address discrimination against lots of people through a single investigation," Pechaitis says, "and the agency regularly relies on disparate impact allegations to do so. Disparate impact-prone claims make up two of the five initiatives in the EEOC's current Strategic Enforcement Plan: equal pay and pre-employment testing, both of which are usually brought under a disparate impact theory."

While the plaintiff's bar is bringing disparate impact claims as well—and increasingly so—"the reality is the EEOC is just a lot better at this," according to Pechaitis. "The plaintiff's attorneys don't seem to grasp the statistical concepts, so they rely on outside experts, and things get

DISPARATE IMPACT continued on page 8

DISPARATE IMPACT continued from page 7

lost in translation." (In a similar vein, while disparate impact theories exist under most state laws, just as with Title VII, such claims are primarily brought under federal law.)

"When an employee goes to the EEOC, the EEOC's first question is: who else was working under a similar situation? And the first thing an employer is going to see is a request for data," Pechaitis explained. When the EEOC challenges a facially neutral employment process, it will seek data on every individual who took a particular test for the last several years, and the employer must grapple with how to collect, reconcile, and produce that information.

"[G]et ahead of the data right away to understand where there might be exposure. It's the first thing you need to do when you catch wind of such a claim."

"You'll fight with the EEOC for six or seven years before you get to court," says Pechaitis. "The EEOC is doing its own analysis and the agency is going to proceed under a moving target, often without sharing any results or insights. It can be very frustrating."

Class certification. Challenges to company-wide policies or practices are class-based, almost by their very nature. Moreover, plaintiffs have an easier time obtaining class certification of disparate impact claims, and these classes typically are substantially larger than average, thus subjecting employers to even greater potential liability. "Rule 23 criteria are often easier to establish because all the putative class members took the same test, or were subjected to the same policy," Pechaitis explains.

Disparate treatment and disparate impact claims must meet the same Rule 23 requirements, though there is some variation when it comes to proving commonality (*i.e.,* whether the class action will generate a common answer to the crucial question of why class members were disfavored). Because disparate treatment claims, by their very nature, are individual, it can be harder to establish commonality, particularly if the case involves multiple decision-makers. Not so, however, for disparate impact claims: plaintiffs must identify a specific company practice responsible for the disparity. And while in disparate treatment cases an employer can argue that the class should be restricted to employees working under a particular decision-maker or the like, that argument may not be available in disparate impact cases involving a company-wide policy or practice.

Take control of the data. Plaintiffs will look to rely on expert statistical evidence to support not only their commonality argument, but damages and other aspects of their disparate impact claims. In the event an employer gets hit with a disparate impact claim, Pechaitis recommends the employer "get ahead of the data right away to understand where there might be exposure. It's the first thing you need to do when you catch wind of such a claim. Analyze the data, and make sure it's complete. From there, you can make strategic decisions about how to proceed." To that end, it's useful for employers to engage statistical consulting experts early in the case to analyze company data and make observations and recommendations on how to use the data to defend the claim.

The key issue: who gets counted? The unique thing about disparate impact claims, in contrast with other discrimination cases, is that they are won or lost based on statistical analyses. Something either is "statistically significant" or it is not. If the analysis demonstrates a statistically significant difference in selection rates, that is enough to make a *prima facie* case and shift the burden to the employer to defend the selections or show a business need for the disparate impact. Once you have your results, there can be little dispute whether the numbers are statistically significant. Thus, the fight at this stage is all about what is the right analysis—What is the right population to analyze? How should people or decisions be grouped to look for trends?

Damages. In both disparate treatment and disparate impact cases, injunctive relief may be awarded to stop the discriminatory practice. Attorneys' fees also may be awarded. There is some variation with respect to damages, though. Title VII and the Americans with Disabilities Act (ADA) authorize compensatory damages for plaintiffs asserting disparate treatment claims,

DISPARATE IMPACT continued on page 9

DISPARATE IMPACT continued from page 9

but *not* for disparate impact claims. Compensatory damages include future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. Punitive damages, however, are not available for disparate impact claims under Title VII, the ADA, or the Age Discrimination in Employment Act (the basis for a sizeable number of disparate impact claims).

Preventing disparate impact claims

What preemptive measures can employers take to shield themselves from disparate impact claims? When seeking to prevent pre-employment claims, in particular, "the aim is to remove hidden barriers in your hiring process," Pechaitis says. "The unintentional barriers often come into view only when you pull back the lens and aggregate your hiring decisions over a period of time."

Pulling back the lens means looking at your data.

The key preventive strategy, then—for *all* potential disparate impact claims—is: "Don't wait for a claim," he advises. "Be proactive about analyzing your data on a regular basis and making adjustments based on the results. There are a growing number of employers that use data analytics for their predictive value, but if the data is not properly calibrated, its value won't be fully optimized."

Use data analytics to conduct self-audits to identify potential disparate impact exposure and to promptly mitigate any liability risks.

Pointers. How to avoid the plight facing the hypothetical ABC Discount Superstores? Here are some tips to minimize potential liability when using online pre-employment tests for recruiting purposes—and for reducing the prospect that *any* company-wide policies and practices will be the subject of a disparate impact claim:

- Pre-employment tests must be properly validated for specific job-related qualifications that are consistent with a business purpose—particularly when using an off-the-shelf test. A properly validated test is one reviewed by an industrial/organizational psychologist for a particular position.
- A test that has been validated for one job cannot be presumed to be valid for assessing candidates for different jobs. An employer cannot use online assessment tools to evaluate all job applicants, without regard to position, or for "nice to have" personality traits that do not coincide with specific job duties.
- If an online assessment may have an adverse impact on individuals within a particular protected group, consider whether there are alternative, effective tools for evaluating job candidates that would be less likely to have a disparate impact.
- Use quantitative criteria for recruitment and promotion where possible, which allows for more objective comparisons of candidates for hiring and promotion.
- Review job descriptions and hiring criteria to ensure the stated requirements for each position are justified by business necessity. Routinely re-evaluate the jobs (and job descriptions) for which you use online assessments. As jobs evolve and duties change, the qualifications change too. Online testing tools may need to be updated accordingly, and validated anew to ensure they continue to be accurate measures of job success.
- Carefully review all policies and procedures with an eye toward whether they may have a potential unintended adverse impact on a particular group or groups of individuals.
- Use data analytics to conduct self-audits to identify potential disparate impact exposure and to promptly mitigate any liability risks. Effectively using data to proactively identify "red flags" is an important strategy for reducing the risk of disparate impact litigation. It also provides critical strategic value when defending such claims as they arise.
- Train your management team and decision-makers throughout the organization about the risks of unintended discrimination and the importance of enforcing the organization's policies and practices in a manner that does not adversely affect a protected group. ■

Is the FCRA class the new FLSA wage and hour class?

By Kevin D. Holden

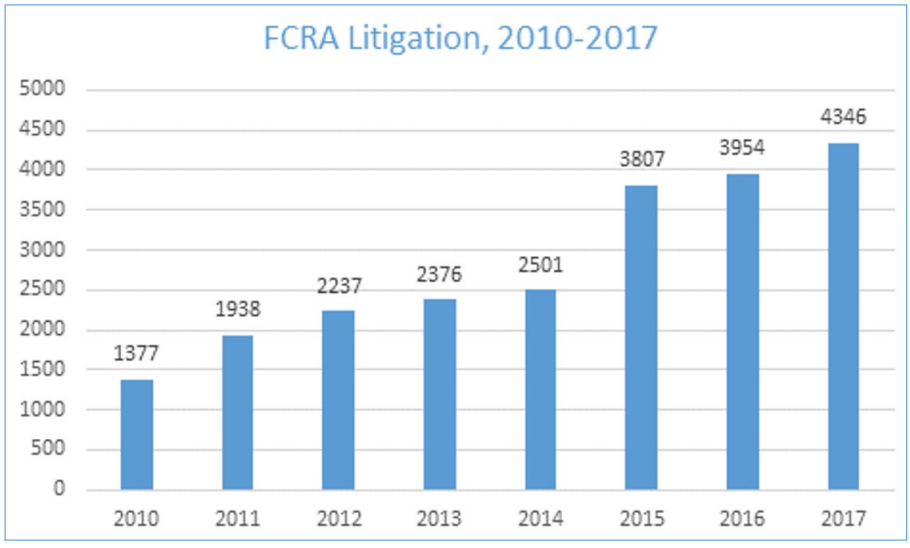
Over the past several years, class action litigation under the Fair Credit Reporting Act (FCRA) has flourished. According to WebRecon, LLC, a company that tracks consumer litigation statistics, as of May 31, 2018, there have been nearly 2,000 FCRA federal lawsuits filed since the first of the year, an increase of more than 12% when compared to the same six-month period in 2017. In 2017, we saw a total of 4,346 new FCRA federal lawsuits, an increase of almost 10% from the previous year. This does not count the number of FCRA claims in state court—state courts and federal courts have concurrent jurisdiction for claims asserted under the FCRA.

Why the continued increase? Because the FCRA is a complex, highly technical statute that is easy to violate. It also allows for recovery of statutory damages, actual damages, punitive damages, and attorney's fees—fees that can easily reach into seven figures.

For example, when a large company was sued in the U.S. District Court for the Eastern District of Virginia under the FCRA for not having certain consumer safeguards, the court approved a settlement that included a $5.3 million attorney's fee. More recently, the U.S. District Court for the Southern District of Ohio approved an attorney's fee of $5 million where a class of 588,000 claimed that a national staffing company procured backgrounds checks without providing a "stand alone" disclosure statement, one of the more common claims filed under the FCRA.

What is surprising is that the filing of these cases continue to surge even after the 2016 U.S. Supreme Court ruling in *Spokeo, Inc. v. Robins ("Spokeo")*. In *Spokeo*, the Court held that plaintiffs alleging a "bare procedural violation" of the FCRA (or, arguably, any other applicable federal statute) do not meet the "case or controversy" standing requirement of Article III of the U.S. Constitution. Writing for a majority of eight justices, Justice Samuel Alito emphasized that to establish injury-in-fact, a plaintiff must allege an injury that was both "concrete *and* particularized." Justice Alito reasoned that a concrete injury is required for standing "even in the context of a statutory violation," stating that "Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement."

Applying these principles, the Court in *Spokeo* stated that the overriding purpose of the FCRA was "to curb the dissemination of false information by adopting procedures designed to decrease that risk." In what businesses and FCRA practitioners likely will consider the key section of the opinion, the Court stated:



Source: WebRecon, LLC.

"Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm."

FCRA CLASS continued on page 11

FCRA CLASS continued from page 10

Although the impact of *Spokeo* on class actions generally was unclear, it appeared certain this ruling foretold the end of the FCRA class action. After all, a typical FCRA class action is based on nothing more than a technical violation (such as a disclosure form that included a one-line release of liability or listing of state-specific limitations) that did not really injure anyone, concretely or otherwise. Right?

Well, not according to the U.S. Court of Appeals for the Ninth Circuit, the court that issued the decision that resulted in the *Spokeo* decision in the first place. On remand, the Ninth Circuit, in what has become known as *Spokeo II*, concluded that the dissemination of false information in consumer reports (*i.e.*, one of the harms that the FCRA's procedural requirements were designed to prevent) is concrete harm given the ubiquity and importance of consumer credit reports in many facets of modern life, such as in employment decisions, home purchases, and loan applications. The court also noted that the interests protected by the FCRA resemble other reputational and privacy interests that have long been protected under the law, such as in the areas of defamation and libel. The Ninth Circuit acknowledged that not every FCRA violation will actually harm—or create a material risk of harm to—the plaintiff's concrete interests. For example, the court stated that an FCRA violation that does not result in the creation or dissemination of an inaccurate consumer report, or one that results in a trivial or meaningless inaccuracy, does not satisfy the applicable standard.

Courts outside of the Ninth Circuit have adopted different interpretations of the Supreme Court's ruling in *Spokeo*. The Third Circuit, for example, revived a putative class action alleging a data breach at a health care facility, holding that the plaintiffs did not need to prove their compromised data was misused but instead could rely on alleged violations of the FCRA to continue with their claims. The Seventh Circuit, however, dismissed a proposed class action alleging that a media company unlawfully retained former customers' personal information after finding the plaintiff had not alleged or offered any evidence of concrete harm and a purported statutory violation wasn't enough to continue.

In light of this growing split among the courts, it surprised no one that Spokeo sought a return trip to the Supreme Court, arguing that further review and guidance were needed to quell "widespread confusion among the scores of lower court decisions that have taken very different approaches" to the *Spokeo* opinion. Numerous *amici* filed briefs in support of Spokeo's petition for *certiorari*. But on January 22, 2018, the Supreme Court denied Spokeo's petition without comment or discussion.

Although the *Spokeo* decision did not stem the flood of FCRA class actions as expected, a more recent Supreme Court opinion may. On May 21, 2018, the Supreme Court issued its opinion in *Epic Systems Corp. v. Lewis*, ruling 5-4 that the Federal Arbitration Act (FAA) compels enforcement of an employer-employee arbitration agreement to resolve disputes on an individual basis, rejecting the employees' claim that the National Labor Relations Act (NLRA) authorizes the utilization of the class action procedure to resolve employee complaints. In short, the Supreme Court rejected the lower court's ruling that the "savings clause" of the FAA, 9 U.S.C. § 2, exempted from arbitration lawsuits that other federal laws permit to be brought as class actions, holding the savings clause "offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."

This ruling, layered upon the Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*, which held that class action waivers in arbitration agreements are valid under the FAA, suggests a new tactic for employers that are concerned about potential FCRA class actions (including staffing companies and credit reporting agencies that are at ever-present risk): use arbitration agreements that have class waivers in job applications or background check authorization forms (but *not* in the stand-alone disclosure document).

Arbitration agreements are not talismans, and an agreement to arbitrate would not effectively ward off an employee or job applicant who seeks to recover his or her actual damages from a FCRA violation. But given the nature of a typical FCRA class action, a properly drafted arbitration agreement with a class waiver just might prevent the FCRA class action that your company was hoping to avoid. ■

Other class action developments

A sampling of important developments in class litigation since our last issue:

U.S. Supreme Court

Time-barred is time-barred: no class action "stacking." Once class certification is denied, a putative class member may not start a new class action beyond the applicable statute of limitations, a unanimous Supreme Court ruled, clarifying the parameters of its *American Pipe* equitable tolling doctrine and reversing a decision from the U.S. Court of Appeals for the Ninth Circuit. The *American Pipe* rule provides that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." That rule allows individual plaintiffs to file their own suit that would otherwise be untimely. However, the doctrine does *not* apply, the Court held, when individual claimants band together to form a subsequent, otherwise untimely follow-on or "stacked" class action. To allow the "perpetual stacking of one class action after another," as the defendants put it, would defeat the purpose of statutes of limitations.

Although the underlying case was a securities class action, the Court's holding applies to class litigation across practice areas, including in the labor and employment arena. Note that this decision does *not* prevent a plaintiff from promptly joining an existing suit or filing an individual action once class certification has been denied. One consequence of the Court's decision is that employees may decide to file multiple class actions earlier, resulting in consolidation of cases or parallel actions.

NLRA does not bar class arbitration waivers. Class or collective action waivers in employment arbitration agreements do not violate the NLRA, a sharply divided Supreme Court held, resolving a circuit split in a much-anticipated decision and putting to rest the notion, first floated by the National Labor Relations Board (NLRB) in 2013, that class waivers interfered with employees' protected rights under federal labor law. The FAA states that arbitration agreements providing for individualized proceedings are enforceable, the Court majority observed, and neither the FAA nor the NLRA require otherwise.

In its 2013 decision in *D.R. Horton*, the NLRB ruled that employers violate the NLRA when they require employees, as a condition of employment, to assent to an agreement to resolve work-related disputes pursuant to an arbitration provision containing a class or collective action waiver. Appellate courts addressing the flurry of Board cases that followed had created a circuit split on whether such waivers interfere with employees' protected rights under Section 7 of the NLRA. The Supreme Court settled the matter, holding the NLRA does not trump the FAA. The decision leaves employers free to utilize class waivers in binding employee arbitration agreements—effective tools for controlling litigation costs and minimizing the risk of classwide liability—without having to defend against unfair labor practice charges.

OTHER CLASS ACTION DEVELOPMENTS continued on page 13

On the radar

The Supreme Court will take another bite at the arbitration waiver apple. In addition to its landmark decision in *Epic Systems Corp. v. Lewis*, where it held that class and collective action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act, the Supreme Court has agreed to review the Ninth Circuit's decision in *Varela v. Lamp Plus, Inc.* and will decide whether workers can arbitrate on a classwide basis where the agreement in question is silent on whether the workers who signed it can pursue their claims through class arbitration.

The Ninth Circuit held that the agreement's silence rendered it ambiguous on the issue, and thus the most reasonable reading of the broad contract language would allow employees to pursue their claims through class arbitration. While *Epic Systems* provides employers with a roadmap for crafting future arbitration agreements, the decision in *Varela* will affect the rights of employees and employers alike who have already entered into arbitration agreements that are silent on class arbitration.

OTHER CLASS ACTION DEVELOPMENTS continued from page 12

Other court decisions

In California, a broader definition of employee. Diverging from decades-old precedent, the California Supreme Court broadened the definition of "employee" in the context of state Industrial Work Commission (IWC) wage orders when undertaking the employee-versus-independent contractor analysis (an increasingly salient issue in class wage-hour litigation, with particular resonance in emerging "gig economy" cases). In a significant adverse decision for businesses facing such claims, California's highest court imposed a new "ABC" test for determining whether an individual is an independent contractor, and abandoned the longstanding common-law "control of work" test. The new standard presumes a worker is an employee subject to the requirements of the IWC wage orders unless the worker: (A) is free from the employer's control and direction; (B) performs a service that is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) customarily engages in an independently established trade, occupation, profession, or business. The court made clear that the employer has the burden of proving all three elements of the ABC test to establish independent contractor status.

The case is certain to significantly affect companies throughout California that rely on workforce configurations using independent contractors.

The case is certain to significantly affect companies throughout California that rely on workforce configurations using independent contractors. California businesses already entered into work arrangements with individuals other than those who traditionally have been deemed independent contractors (*e.g.,* electricians, plumbers, and HVAC professionals) should carefully review the status of those workers, particularly if they previously classified such individuals as employees.

Job applicants can bring ADEA disparate impact claims. The U.S. Court of Appeals for the Seventh Circuit held that job applicants can bring disparate impact discrimination claims under the Age Discrimination in Employment Act (ADEA), rejecting arguments that the statute's disparate impact provision protects only current employees. In this case, a 58-year-old attorney with significant experience applied for a senior counsel position with the defendant employer. In its job posting, the employer said it was seeking a lawyer with "3 to 7 years (no more than 7 years) of relevant legal experience." The attorney did not get an interview and he filed suit, contending the seven-year limitation was intended to weed out older applicants. The district court dismissed his disparate impact claim under 29 U.S.C. sec. 623(a)(2), holding that this provision does not cover outside job applicants. Reversing, a Seventh Circuit majority saw no plausible reason why Congress would choose to allow disparate impact claims by current employees, including internal job applicants, while excluding outside job applicants. The circuit court's holding "tracks" with the U.S. Supreme Court's reading, in *Griggs v. Duke Power Co.*, of nearly identical language of Title VII, which has been held to protect job seekers, the panel majority reasoned.

Past salary not a legitimate "factor other than sex." The Ninth Circuit Court of Appeals, sitting *en banc*, held that an employee's prior salary does not constitute a "factor other than sex" upon which a wage differential may be based under the Equal Pay Act's "catchall" exception set forth in 29 U.S.C. § 206(d)(1). Based on the history, text, and purpose of the EPA, the appeals court explained, "any factor other than sex" is limited to legitimate, job-related factors such as a prospective employee's experience, education, or ability. Consequently, the appeals court overruled its contrary 1982 decision in *Kouba v. Allstate Ins. Co.*, and affirmed a lower court's decision denying summary judgment to an employer that relied on prior salary to set a female employee's starting salary below her male peers in the same position. While prior salary might bear a "rough relationship" to legitimate factors like education or ability, the relationship is attenuated, and the use of prior salary "may well operate to perpetuate the wage disparities prohibited under the Act," the court

OTHER CLASS ACTION DEVELOPMENTS continued on page 14

OTHER CLASS ACTION DEVELOPMENTS continued from page 13
reasoned. Its holding applied, the court was careful to note, regardless of whether prior salary is considered alone or along with other factors.

Opt-in plaintiffs not automatically dismissed. In "a question of first impression in every circuit," the U.S. Court of Appeals for the Eleventh Circuit ruled that individuals who opt into collective actions under the Fair Labor Standards Act (FLSA) need only file a written consent to become a named party to the case. An employee filed suit under the FLSA alleging that she and other similarly situated employees were improperly classified as independent contractors. Other employees opted into the litigation by filing consents to become party plaintiffs. More than a month after the close of discovery, the named plaintiff filed a motion for conditional certification. The district court denied the motion as untimely. The named plaintiff and the opt-in plaintiffs still believed they were party plaintiffs because the district court never dismissed their claims. However, the employer argued that only the named plaintiff was a party plaintiff because the opt-ins never formally became party plaintiffs. The district court concluded that the opt-in plaintiffs were never adjudicated to be similarly situated to the named plaintiff, therefore, they were never properly added as party plaintiffs. As non-parties, they effectively fell out of the case when the motion for conditional certification was denied. After the named plaintiff settled with the employer, the opt-in plaintiffs appealed. Reversing, the Eleventh Circuit observed that the plain language of Section 216(b) supports the conclusion that those who opt in become party plaintiffs upon the filing of a consent; nothing further, including conditional certification, is required. Thus, the opt-in plaintiffs were not automatically dismissed from the case when the district court denied the named plaintiff's motion for conditional certification. Because they were parties to this litigation upon filing consents, they could appeal the adverse judgments against them.

Evidence does not have to be admissible for it to be considered in support of class certification, the Ninth Circuit held in a putative wage-hour class action.

Admissibility not a factor in certification. Evidence does not have to be admissible for it to be considered in support of class certification, the Ninth Circuit held in a putative wage-hour class action. In this case, the evidence was a declaration from a paralegal at the plaintiffs' counsel's law office summarizing the named plaintiffs' injuries after a review of the time and payroll records for the named plaintiffs. The plaintiffs had submitted the declaration in support of their motion for class certification, and the defendants objected, arguing that it constituted improper (and unreliable) lay opinion testimony, it lacked foundation, and the data underlying the analysis was unauthenticated hearsay. The district court agreed. It struck the declaration based on inadmissibility; it then concluded that the motion for class certification did not offer any admissible evidence of plaintiffs' injuries and denied class certification. The Ninth Circuit reversed the district court's ruling and held, "Although we have not squarely addressed the nature of the 'evidentiary proof' a plaintiff must submit in support of class certification, we now hold that such proof need not be admissible evidence. Inadmissibility alone is not a proper basis to reject evidence submitted in support of class certification." Rather, it continued, "in evaluating a motion for class certification, a district court need only consider 'material sufficient to form a reasonable judgment on each [Rule 23(a)] requirement.'" The court's consideration should not be limited only to admissible evidence.

There is a split among several of the circuits on this issue; with this decision, employers in the Ninth Circuit have lost one arrow in their quiver to defeat class certification.

Insurance examiners' collective action certified. Mobile medical examiners for a medical diagnostic company were granted conditional certification of a nationwide FLSA collective action. The examiners visit insurance customers in their homes or at work to conduct physical exams and basic lab work for purposes of insurance eligibility or underwriting. The named plaintiff and each examiner who submitted affidavits

OTHER CLASS ACTION DEVELOPMENTS continued on page 16

Pre-employment testing problems

Employers' use of pre-employment testing, both online and in-person, continues to face litigation and enforcement actions:

- A nationwide retail pharmacy and health care company entered into a conciliation agreement with the EEOC to resolve claims that its use of personality tests/assessments during the job application process adversely affected applicants based on the applicants' race and national origin. The employer agreed to implement best practices nationally, such as modifying its hiring process, employing staff to recruit and monitor the hiring of minority applicants, and developing a comprehensive training curriculum for managers focused on diversity, inclusion, and the prevention of barriers to equal employment. The company also will conduct regular evaluations of its hiring practices and provide reports to the EEOC for several years. The employer stopped using the assessments after receiving the EEOC's discrimination charge to demonstrate its support of Title VII; it did not admit liability.
- The EEOC reached a conciliation agreement to resolve charges against a nationwide electronics retailer after an investigation. The investigation found it probable that the company's use of pre-hire personality tests/assessments adversely affected applicants based on the applicants' race and national origin. To demonstrate its support of Title VII, without admitting liability, the company stopped using the challenged assessments after receiving the discrimination charge. The company agreed to implement many best practices nationally, such as modifying its hiring process, adding staff to recruit and monitor the hiring of minorities, creating comprehensive in-house training modules for hiring managers, and forming regional diversity and inclusion committees where employees in the field and at the corporate level are empowered to address and prevent barriers to equal employment.
- A rail industry manufacturer will pay $4.4 million and furnish other relief to settle an EEOC disability discrimination class action suit. The suit charged the employer with unlawfully disqualifying job applicants based on the results of a nerve conduction test for carpal tunnel syndrome, rather than conducting an ADA-required individualized assessment of each applicant's ability to do the job safely. The parties entered into a consent decree after a court ruled the company's use of the nerve conduction test was unlawful, finding that the test had little or no value in predicting the likelihood of future injury. The consent decree requires the employer to provide lost wages and compensatory damages to 40 applicants who were unlawfully denied employment opportunities because of the company's unlawful hiring practices. In addition, the company will make job offers to some of the applicants and will adopt policies that will prevent similar discriminatory practices in the future.
- One of the nation's leading transportation companies will pay $3.2 million and furnish other relief to settle a company-wide disparate impact suit filed by the EEOC arising from the company's use of isokinetic strength testing as a requirement for workers to be hired for various jobs. The EEOC asserted that the test, known as the "IPCS Biodex" test, caused an unlawful discriminatory impact on female workers seeking jobs as conductors, material handler/clerks, and a number of other job categories. Two other employment tests used by the company as a requirement for selection into certain jobs (a three-minute step test seeking to measure aerobic capacity, and a discontinued arm endurance test) also had an unlawful disparate impact on female workers, the agency alleged. A consent decree settling the lawsuit received court approval. It requires the employer to cease the physical abilities testing practices that the EEOC charged were causing a disparate impact. The decree also requires the company to pay $3.2 million into a settlement fund to pay lost wages and benefits to a class of women in more than 20 states who were denied positions because of the testing. The employer also must retain expert consultants to conduct scientific studies before adopting certain types of physical abilities testing programs for use in its hiring.

OTHER CLASS ACTION DEVELOPMENTS continued from page 14

stated that they were principally paid by appointment, that they spent a significant amount of time preparing for appointments, travelling between appointments, and doing post-appointment work, and that they were not compensated for such work. They alleged they worked more than 10 hours per day and more than 40 hours per week, but their per-hour pay often fell below the federal minimum wage and they did not receive overtime.

The potential class is huge: more than 41,000 African-American and Latino applicants were denied jobs based on the employer's criminal history screening process from May 2008 to December 2016 alone ...

Rejecting the employer's contention that the declarations should be disregarded because they were virtually identical, a federal court in New York concluded the members of the putative collective sufficiently alleged they were victims of a common policy. Moreover, taken together, the declarations provided sufficient indicia that the company maintained a common practice across geographic locations. More than 430 examiners from at least 43 states have opted in to the suit.

$54.5M resolves overtime action. A global information and technology company will pay $54.5 million to resolve class and collective overtime claims filed by "analytics desk representatives" under the FLSA, New York Labor Law, and California Labor Code. The proposed settlement agreement came after a week of trial through a mediator's proposal (it was the parties' second attempt at a mediated settlement). If approved, the employer will create a settlement fund from which costs, service payments, and attorneys' fees and costs will be deducted, with the net to be distributed to qualified class members on a *pro rata* basis. There are 50 FLSA opt-in class members; more than 1,000 New York putative class members, and more than 100 California class members.

Snack maker settles with truck drivers. A federal court in California gave final approval to a $6.5 million settlement in a wage-hour suit brought by truck drivers who make deliveries for a snack food manufacturer. (The manufacturer's corporate parent, as well as the transportation company that directly employed the drivers, also were named as defendants.) The plaintiffs alleged the employer paid the drivers on a piece-rate basis at predetermined rates based on mileage and the number of cases delivered. However, they often had to wait for their loads to be ready for delivery (for two hours or more, on some occasions), but they were not paid for this waiting time; nor were they compensated for pre-trip and post-trip inspections, completing mandatory paperwork (such as hours of service logs and vehicle inspection reports), and other required duties. In addition, they alleged they were denied 30-minute meal periods and 10-minute rest periods, as the California Labor Code requires. The $6.5 million agreement provides a payout fund of approximately $4.67 million for distribution to class members, 80 percent of which is to resolve state-law claims, and 20 percent for FLSA claims. The fund will be allocated to 254 class members on a *pro-rata* basis based on the number of weeks worked, with an average recovery of $18,377. Class counsel will receive $1.625 million (25 percent) of the settlement fund.

Criminal background check suit settled. A national retailer agreed to pay up to $3.74 million and reform its applicant screening process to settle claims that its criminal background check policy "has resulted in thousands of qualified African-Americans and Latinos being denied jobs in violation of Title VII." The plaintiffs contended that the company's assessment process and policies import "the racial and ethnic disparities that exist in the criminal justice system into the employment process, thereby multiplying the negative impact on African-American and Latino job applicants." The potential class is huge: more than 41,000 African-American and Latino applicants were denied jobs based on the employer's criminal history screening process from May 2008 to December 2016 alone, according to the retailer. The liability period would run from 2006 to the date of preliminary settlement approval.

If the settlement is approved, the retailer will retain two experts in industrial and organizational psychology to design and implement properly validated guidelines

OTHER CLASS ACTION DEVELOPMENTS continued on page 17

OTHER CLASS ACTION DEVELOPMENTS continued from page 16

for evaluating and hiring job applicants with criminal histories. The validated criteria would be used in future hiring and to determine class member eligibility for entry-level jobs pursuant to the settlement terms. Under the settlement, the employer would give class members priority hiring for entry-level jobs and consideration for team lead positions (or a monetary award in lieu of employment if they lack qualifications for the positions). The employer's total contribution toward cash awards for class members will not exceed $1.2 million; in addition, it will pay up to $1.9 million in attorneys' fees and give $600,000 to nonprofit organizations that provide support to individuals with criminal histories who are seeking to re-enter the workforce.

The employer denied liability, but it will pay more than $2.9 million in back pay and interest to the affected class members. It also will make salary adjustments and take steps to ensure its pay practices meet legal requirements.

Federal contractor settles pay discrimination charges. The U.S. Department of Labor entered into a conciliation agreement with a federal contractor that resolves allegations of pay discrimination at four locations in California and North Carolina. After routine compliance evaluations, the OFCCP found the contractor (a provider of computing, networking, and data storage solutions) systemically discriminated against females in engineering, marketing, and sales roles in one California facility, and against females in engineering and manufacturing roles at another California location. OFCCP investigators also determined that the company paid women and African-American employees in engineering roles at its Durham, North Carolina, facility less than white males, and paid African-American females in manufacturing roles less than white males in those roles at its North Carolina facility. The employer denied liability, but it will pay more than $2.9 million in back pay and interest to the affected class members. It also will make salary adjustments and take steps to ensure its pay practices meet legal requirements.

National restaurant chain resolves age bias claims. A restaurant chain (part of a larger corporate family of restaurant chains) based in Orlando, Florida, has agreed to pay $2.85 million and provide equitable relief to settle a nationwide age discrimination class suit. The EEOC contends that the restaurant chain violated the ADEA when it rejected applicants age 40 and older for front-of-the-house and back-of-the-house positions at 35 restaurants around the country. According to the EEOC, more than 135 applicants provided sworn testimony that restaurant managers asked them their age or made age-related comments during their interviews, including that the restaurant's "girls are younger and fresh," and "we are really looking for someone younger." The company hired applicants age 40 and older at a significantly lower rate than applicants under the age of 40, according to the EEOC.

Under the consent decree, a claims process will be set up to identify and compensate individuals age 40 and older who applied for a front-of-the-house or back-of-the-house position at one of the employer's restaurants, but were rejected based on their age. In addition to monetary relief, the employer must make significant changes to its recruitment and hiring processes; it is enjoined from discriminating based on age in the future; and it must pay for a compliance monitor who will ensure the company complies with the terms of the consent decree. ■

On the JL docket

Mark your calendars for these timely and informative Jackson Lewis events:

Breakfast Seminars

September 12 - *DC Region Workplace Law Breakfast Seminar*
Location: 10701 Parkridge Blvd - **Reston, VA**

September 12 - *Atlanta Breakfast Series: 8 Moves to Minimize Liability in Light of Employment Law Changes in 2018*
Location: 4400 Ashford Dunwoody Rd - **Dunwoody, GA**

Remaining Union Free

September 24-25 – **Las Vegas**
Location: 3400 Las Vegas Blvd S - Las Vegas, NV

October 3-4 – Chicago
Location: 205 N. Michigan Avenue, 10th Floor - Chicago, IL

Other Labor & Employment Issues

September 21 - *10th Annual Colorado Employment Law Summit*
Location: 1111 14th Street - **Denver, CO**

October 10 – *Connecticut Sexual Harassment Education and Training in the Workplace*
Location: 90 State House Square - **Hartford, CT**

December 14 – *Atlanta Symposium: Surveying the Workplace Law Landscape*
Location: 88 West Paces Ferry Rd NW - **Atlanta, GA**

Register at jacksonlewis.com

Watch for news on important developments affecting class litigation on Jackson Lewis' ***Employment Class and Collective Action Update*** *blog!*