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CLASS ACTION TRENDS REPORT

Using data analytics

We live in a data-driven world. Employers have adopted GPS devices, biometric swipes, recruiting and hiring tools with complex algorithms, and other digital ways to manage the workforce and streamline HR functions. These technologies generate massive amounts of data about how, where, and when employees work, and the composition of a company's workforce. Increasingly, employers harness and analyze this data to evaluate their employment practices and other operations to make smarter, more informed business decisions. The data also can be utilized to ensure legal compliance. For a growing number of organizations, in fact, data analytics is an integral component of their risk management program.

When faced with high-stakes litigation, employers, aided by defense counsel, also can harness data from courts and other external sources to inform the defense strategy. The ability to leverage and interpret this historical data about prior litigations is particularly essential when facing a class action suit, when the potential liability may be exponentially larger.

Predictive analytics is an essential weapon in the class action defense arsenal, as well as an important mechanism for avoiding such claims.

Driving the defense strategy

When defending a class action, it is important to know as much as possible about the legal environment in which the case will unfold to decide how best to proceed. That is where analytics comes in. An analysis of historical litigation data allows for more informed, data-driven predictions about what is likely to happen, and thus, whether to settle a case or defend the claims at trial.

With detailed information, broken down by jurisdiction, about judge's ruling histories, plaintiff's counsel, the parties, the industry, employer size, the prevalence and duration of certain claims, and how these and other variables have shaped prior outcomes, defense counsel can chart a well-lit path. What percentage of cases settle, and what percentage go to trial? What are the values of these types of claims? From there, the litigation strategy takes shape.

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A WORD FROM STEPHANIE, DAVID AND ERIC

As an American executive once commented, "Information is the oil of the 21st century, and analytics is the combustion engine." While criminal cases adapted to the so-called "CSI Effect," class and collective action litigations have, in many ways, adapted to a "Sabermetrics Effect." Data analytics drive wage and hour, pay equity, and disparate impact claims as the bar – both plaintiffs and defense – have adapted to the available technology.

Indeed, businesses utilize technology at this very minute that may serve as the basis for a claim or defense in a litigation. Humans create digital footprints by logging on/off computers, carrying mobile devices, swiping in/out of buildings, or operating motor vehicles. Business, in an effort to streamline practices for efficiency, utilize biometric timeclocks, digital timeclocks, and fully integrated payroll systems to process checks based upon the time data. There is hardly a part of an individual's work life – from start time, to lunch, to end time, to pay – not captured by a company's data and information systems. Additionally, many businesses' information systems capture company demographics, headcounts, and compensation levels, providing a one-stop shop for much of the data needed to defend and/or prosecute claims for misclassification/overtime, off-the-clock work, disparate impact, and pay equity.

Practically, an employee's compensation, work hours, break practices, etc., are all reflected in data. To the extent the data reflects uncompensated time, pay disparities, or other potential risks, data analytics uncover those risks to enable a company to develop a strategy to minimize any such potential. Data does not necessarily serve solely as a peril to your company's operations. Instead, when properly analyzed and used during the course of a litigation, data analytics may provide a formidable defense to class or collective action claims.

In this edition, we will discuss the use of data analytics in class and collective action litigation. We will discuss the use of analytics in a preventive manner to minimize the risks associated with class and collective action litigation. This edition also discusses the use of these analytics by government agencies, risks associated with the applicability of the attorney-client privilege, and, of course, practical pointers for your company.

We hope that this report provides you with a deeper understanding of the role data analytics plays in your company's operations with respect to risk management. By embracing the technology and data available, your organization can be in a better position to identify risks to address them accordingly.

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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.

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"If we know the particular judge and the ruling history of this particular judge, this information can inform our decisions," said Eric J. Felsberg, National Director of the Jackson Lewis Data Analytics Group, a Jackson Lewis resource group launched in 2016. Looking at aggregate data, defendants can better determine when it is best to seek a change of venue, challenge the adequacy of class counsel, or move to decertify the class, for example.

What employers most want to know when responding to a lawsuit, however, is how much the litigation may cost the company.

"When a client is served with a complaint, it invariably wants to understand the potential exposure," Felsberg said. "Clients want a damage analysis of the best and worst-case scenarios. Every Jackson Lewis lawyer has some intuition as to the value of a case—these are experienced attorneys, and they have a gut sense of how a case is going to go. Now, in addition to that collective experience, we have access to a wealth of other data about similar cases that have been asserted in the past. Now we can quantify and validate that gut reaction." Armed with the analytics, defense counsel can forecast a likely outcome with greater precision, which is especially important in a class litigation, where the sheer volume of data makes it even harder to value the case.

Data analytics are utilized to great advantage in all types of lawsuits, and the steps for crunching the data differ very little by type of claim or the nature of the case. Whether an overtime collective action or a systemic gender discrimination suit, the data team deploys sophisticated proprietary algorithms to model an employer's prospects for winning or losing a case, and the likely damages. There is no on-site storehouse of data; rather, the team customizes the data collection and the analysis based on the specifics of the client's case.

After gathering the pertinent data ("sometimes it's readily available, sometimes not," Felsberg explained), the team proceeds to stage two: performing the analysis and constructing the forecast and predictions. This happens as early as the class certification stage.

New types of proof

Analytics also can help an employer present the evidence needed to make its case. For example, in a disparate impact class action, the datasets, properly constructed and analyzed, can demonstrate the *absence* of discrimination and the employer's full compliance with the law.

In this regard, analytics are of growing importance in the wage and hour context. In the contemporary mobile workplace, employees increasingly work from home, in airports, and out of their cars. Are nonexempt employees working off the clock? How is an employer to know? And how is an employer to *disprove* allegations of off-the-clock work should a claim arise?

"In litigation, we often have to look beyond the data that is immediately available," said Felsberg, because time allegedly worked off-the-clock seldom has a traditional paper trail. Now employers can leverage digital footprints, door swipes, keystrokes, the timing of emails, GPS coordinates, and other data, he noted, to demonstrate that the employee was *not* engaged in work outside of her standard working hours.

Preventive analytics

Analytics can also help *prevent* legal claims. Prevention is the best defense to class litigation and a growing number of employers leverage their data proactively to that end. Organizations have access to a wealth of internal data that, when paired with powerful analytical tools, can mitigate legal risk. The data analytics group conducts data-driven compliance assessments, including pay equity analyses and other EEO audits, and conveys these findings in sharp graphic display to readily identify potential trouble spots. In this way, clients can address any inequities before class action attorneys come knocking at their door.

Eliminating potential discrimination. "Currently pay equity is a huge concern, so the data analytics team has been performing pay equity analyses for many clients," Felsberg said. The team collects the employer's pay data, including the forms of compensation used, the factors the employer considers in setting pay, and other data to devise regression models for those various pay drivers. Accounting for all those factors, the statisticians and data

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scientists can then determine whether there is a statistically significant difference—a pay disparity that requiring possible address. "If we identify a pay gap, we advise the employer how best to proceed."

With the knowledge gleaned from data analytics comes responsibility, however. "We generally advise employers to evaluate at the outset how it will respond if a pay inequity is identified," Felsberg cautions. "So, before we undertake a pay analysis, we discuss the employer's intentions. Is the organization in a position to address an inequity? The response to this question will inform next steps."

"We also work with clients on diversity trend analyses, trying to predict the future demographic makeup of their headcount," said Felsberg. "Again, though, these services are only as good as what the client is going to do about it. In response to the analytics, employers may employers may adopt more effective measures to retain individuals to ensure diversity within their organization—such as launching a mentoring program or providing managerial training for example.

Other compliance uses. With analytics, employers not only can monitor for systemic discrimination; analytics enable employers to minimize other potential vulnerabilities. Employers can collect and analyze its data to audit for improper time recording or other inadvertent wage and hour violations.

For example, a manufacturing company utilized a timekeeping system that rounded employees' clock-in times to the nearest 10-minute mark, reasoning that the "rounding up" and "rounding down" would be neutral in the aggregate. However, an analysis of its daily time records revealed that employees lost nearly 11.76 minutes per day as a result of the rounding practice. Given that the plant employs 980 hourly workers, the potential liability for off-the-clock violations over time could be significant. A careful, detailed analysis of the data gives the employer the opportunity to correct a practice that could result in a costly breach of wage and hour law.

Know your data. There is an important additional benefit to the proactive use of analytics for compliance purposes. It allows an employer to gain control over its myriad data—to ensure its accuracy, to reconcile, organize, and analyze the data and see the "big picture" *before* having to fight a legal claim. An employer must have a solid grasp of what the data show before it is forced to hand it over during an audit or lawsuit. Having already fully dissected the data to a granular level, by worksite, by division, by position, for example, the organization will be best prepared to argue *which* of this data is relevant to a given legal dispute.

Human resource analytics

Employers also apply "people analytics" to a variety of human resources functions such as recruiting and retention. Using data harnessed from new technologies as well as traditional sources like job descriptions and performance appraisals, analytics can assist employers in identifying the best candidates and in preventing unwanted turnover.

Talent analytics can help recruiters identify the best hires among a formidable stack of resumes. "If a client asks, 'I want you to predict of these 10,000 applicants who will be most successful, with the proper datasets and analyses, our data scientists can develop models and perform predictions,'" Felsberg said.

The analytics team also performs attrition analyses for clients to identify which employees are most likely to leave the organization. "Employers provide their termination data from the last several years so that we can predict, based on employees who have left in the past, what trends may likely emerge that will impact their headcount and other business initiatives," he explained. Datapoints such as "Who is their manager? What is their job title? etc. If we have these types of data, we can help identify the types of employees most likely to leave and even possibly file a claim."

Managing the risks

Proper safeguards must be used when applying data analytics to drive employment decisions such as recruiting and hiring, pay and promotions, or reductions in force. One of the biggest risks is that analytics, if used improperly, can have a disparate impact on certain protected groups of employees or job applicants. Because faulty algorithms can lead to biased outputs, it's critical that the analytic models are validated through a statistical, adverse-impact analysis. The data "inputs" must correspond to legitimate hiring characteristics and not reflect unconscious bias.

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"Our data scientists and statisticians are very skilled. So long as they have reliable data, they can make the data sing. We need to make sure the data is complete, reliable, and accurate, however. If not, the analyses can be skewed," Felsberg said.

When constructing a hiring algorithm, the employer and the data team must guard against including unlawful criteria into the analysis to avoid a disparate impact. "An employer hiring employees for its warehouse generally cannot just focus on male applicants because of their perceived strength given the position is responsible for moving a lot of merchandise around. You can't build sex into the model," Felsberg said. "If the same warehouse manager does not express a preference for one sex over another, but just wants employees who can lift a certain weight, that criteria can also be a problem—unless they can show that the ability to lift a certain amount of weight is consistent with a business necessity. If we build in a series of factors that are not on their face discriminatory, but have the effect of being discriminatory, then it's just as unlawful as 'women need not apply.'"

Additional caveats. When an employer makes programmatic employment decisions based on analyses of aggregated applicant or employee data sets, an employer may be more vulnerable to class action lawsuits. This

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Federal agencies embrace analytics

The Equal Employment Opportunity Commission (EEOC) has established an Office of Enterprise Data and Analytics (OEDA) to provide "timely, accurate, and bias-free data and information to prevent and remedy unlawful employment discrimination, and improve organizational performance." The OEDA's principal goal, the agency stated, is to "use state of the art data and information science tools and techniques to collect, utilize and share data and information, efficiently leveraging data to reduce burden and costs while protecting individual and employer privacy, and promoting program transparency."

The OEDA, established in May 2018, will equip agency investigators and enforcement officials with new data and analytical resources. Its specific functions include:

- Performing data collection and survey methodology;
- Supporting EEOC charge-handling by linking EEOC charges with EEO-1 reports and provide analyses of EEOC charge data;
- Providing research and information services in support of the agency's enforcement litigation efforts; and
- Offering systemic investigations analytical support and analytics on various data "to identify geographic, industry and other drivers of discrimination charges and emerging trends."

The EEOC also indicated that it will make valuable data and data-related products available to employers.

"While access to new collections of data and data products from the EEOC will be of great value, employers should take note that these, and additional, resources also will be at the EEOC's disposal and potentially bolster its enforcement efforts," Felsberg said. "Therefore, it is critical for employers to embrace the use of data to help analyze and manage the workplace and to better identify positive and negative trends. The launch of the OEDA should prompt employers to reconsider waiting to leverage data and analytics in managing their workplace. Using data and analytics in the workplace is not a passing fad."

Department of Labor. In October 2019, the Department of Labor's Wage and Hour Division (WHD) launched its own Office of Enterprise Data and Analytics. "WHD is constantly improving and expanding a data-driven approach coupled with stakeholder engagement allows the Agency to identify accurately the industries and sectors in which to focus resources most efficiently," the DOL asserted in a press statement. The new office "will ensure WHD uses the most cutting-edge tools and data sources available to guide decision making and secure the largest possible impact."

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is because it may be easier for a plaintiff to show that potential class members are subject to a common employer policy or practice for purposes of establishing the requisite "commonality" to proceed on a classwide basis.

Moreover, if an employer conducts an audit and discovers that it is not in compliance with a statute, then the employer is now on notice that it is in breach of the law, and can be charged with knowing, or having reason to know, of the violation. For example, if a wage-hour audit reveals, through an analysis of employee keystroke data, that hourly employees are engaged in significant off-the-clock work, a plaintiff may be able to establish that the violation is willful as a matter of law if left unaddressed by the employer—thus carrying an extended liability period, or the prospect of liquidated (double) damages.

[I]t is crucial that data analyses be conducted under the guidance of experienced counsel who will ensure that the analytical models are properly validated.

Some states have safe-harbor provisions that provide an affirmative defense to employers that undertake a proactive compensation analysis and make reasonable attempts to remedy unexplained pay disparities. To take advantage of the safe harbor, though, an employer may have to demonstrate that it has in fact conducted the analysis—and that the analysis was reasonable, which may subject the audit to scrutiny.

To navigate these risks, it is crucial that data analyses be conducted under the guidance of experienced counsel who will ensure that the analytical models are properly validated, that the analysis complies with the range of applicable employment discrimination statutes, privacy laws, and other legal obligations, and who fully understands the risks of getting it wrong.

Practical pointers

Adopt these safeguards to reduce the risks when collecting data and using data analytics:

- Ensure that human resources, payroll, and other parts of the organization involved in data collection understand how the data is to be used, as well as the risks of misuse.
- Give notice to employees if you intend to monitor them through GPS devices or other tools. Confirm that they understand how the data may be used, and obtain their consent.
- There are many vendors in the HR analytics space, and the use of these "off-the-shelf" tools in hiring, promotions, or layoffs must be carefully managed. Conduct a thorough due diligence of the vendor, the product, and the algorithms it uses. Require the vendor to indemnify your organization from liability resulting from use of the product in HR decision-making.
- Strip personally identifiable information from the data, when collected, to screen out unintentional bias as well as to protect employees' personal information from identity theft.
- Implement appropriate data-security measures identifying where the data will be hosted, and who has

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Attorney-client privilege

An important benefit of having counsel conduct the data analysis is that there is a much greater likelihood that the analytics are protected by the attorney-client privilege, and are not subject to discovery in litigation. "We set up these analytics projects to maximize the likelihood that privilege will be upheld," Felsberg said. He cautioned, though, that "it's never a guarantee that the privilege will attach."

Felsberg also emphasized, however, that the underlying employer data will *not* generally be privileged. "If we're just pulling an employer's data, that's not going to be privileged. Employees' salary, tenure, performance, experience, education, position—we're not generating those data; they exist already in most instances, sitting there idle. It's the *analysis* we perform on that data, how we set up comparators and pay groupings, that may be privileged."

The Jackson Lewis Data Analytics Group

Jackson Lewis has a unique in-house group of data professionals dedicated to analyzing, understanding, and exploring the powers of data and statistics in class and collective actions. The Jackson Lewis Data Analytics Group's services include:

- **Recruiting.** Using cutting-edge machine learning models to empower employers to make data-driven talent recruitment decisions, including providing predictive models that identify attributes possessed by successful applicants and automated applicant pool synthesis based on qualification similarity models.
- **Talent management.** Building ensemble models to assess and reduce employee turnover and help employers develop data-driven retention plans. The team offers predictive models of attrition and workforce plans based on learned factors affecting employee attrition.
- **Equity and policy assessments**. Analyzing compensation and selection equity using rich internal and external datasets, providing rigorous data-driven and statistical assessments of policy impacts, and building models to predict the effectiveness of new policies. Services include assessing internal equity beyond race and sex differences; determining market equity to align talent needs with budgetary constraints, statistical assessments of policy decisions to determine if goals were obtained, and predictive models to assess whether new policy decisions will succeed.
- **Litigation support.** Using proprietary algorithms to model employers' exposure to a wide range of legal claims involving a variety of issues, such as leave entitlement, performance assessments, disciplinary records, minimum wage, overtime, and tip credit calculations.
- **Compensation policies.** Aided by state-of-the-art modeling techniques, the team can assess employer compensation systems and identify risk areas with respect to government enforcement agencies and other potential litigants. Services in this area include forming defensible "pay groups" for analysis; statistical assessments of sex-, race-, and ethnicity-based compensation differences, and model validation and specification tests.
- **Reorganizations/selection decisions.** We customize and build statistical models that mirror employers' selection processes to minimize liability stemming from employer selection decisions, including construction of appropriate comparator pools; statistical assessments of sex-, race-, and ethnicity-based selection differences, and geospatial analysis to detect WARN-triggering events.
- **Strategic labor relations.** Calculating long-term costs of collectively bargained contracts, ensuring compliance with the administration of collectively bargained compensation plans, and quantitatively assessing the efficacy of training programs.

The firm's multidisciplinary in-house data team consists of Ph.D. and Master's-level data scientists, statisticians, and 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 thus devise the optimal defense strategy. ■

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access. Comply with federal and state laws and other regulations governing data privacy.

- Similarly, the underlying data comprising the datasets remain subject to myriad document retention obligations imposed by federal and state laws and regulations. Maintain strict accordance with these requirements even after a carefully conducted audit concludes that your organization is "in the clear."
- Quantify the organization's return on investment. Data analytics are often complex, consuming significant resources. However, the costs and effort must be measured against the prospect of liability in a classwide, bet-the-company litigation.
- Take data inventory to evaluate the data being collected and how it will be used.
- Ensure that internal policies governing data collection, storage, and disclosure are being followed.
- Conduct regular self-audits of data. Determine how your organization stores and protects data and how it responds to requests to produce or delete data. Don't trust your vendors alone to deal with all of these issues.
- Regularly review your organization's data retention, destructions, and security protocols.

Other class action developments

Seventh Circuit adopts collective action notice rule. In a case of first impression, the Seventh Circuit held that a district court may not authorize notice of a collective action to individuals who have signed arbitration agreements waiving the right to join collective actions, and the court must allow the employer to make that showing. Announcing a new standard, the appeals court held that when an employer opposes notice by asserting that proposed notice recipients have entered into mutual arbitration agreements with collective action waivers, the trial court must:

1. Determine whether a plaintiff contests the defendant's assertions about the existence of valid arbitration agreements entered by the proposed notice recipients.
2. If no plaintiff contests those assertions, then the court may not authorize notice to the employees whom the defendant alleged entered valid arbitration agreements. However, if a plaintiff does contest the defendant's assertions that a valid arbitration agreement exists, then, before authorizing notice, the court must permit

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Ninth Circuit affirms denial of class certification in national gender bias suit against Microsoft

Reinforcing the burden on any putative class to satisfy all of the requirements of Federal Rule of Civil Procedure 23, the U.S. Court of Appeals for the Ninth Circuit held that a Title VII gender discrimination case against Microsoft Corp. may not proceed as a class action. The appeals court affirmed a district court's denial of class certification in a discrimination suit brought by two employees who alleged that the technology company engaged in systemic discrimination in pay and promotions against female technical employees. The district court concluded that the plaintiffs could not show that the putative class members were victims of a standard, companywide policy, and denied their motion to certify a proposed class of more than 8,600 women nationwide on their disparate impact and disparate treatment claims.

Microsoft argued that pay and promotion decisions were made by individual managers using their own discretion, rather than a uniform corporate policy, making classwide resolution of the claims untenable. Counsel for the plaintiffs countered that managers were restricted in their discretion by designated pay bands that employees were already locked into under corporate policy when determining how much to pay them. During oral argument in the Ninth Circuit, the judges asked plaintiffs' counsel to point to a specific corporate policy that the plaintiffs were challenging, yet counsel could not convince the court of any specific policy in the record.

As for the employees' disparate impact claims, the proposed class did not satisfy the "commonality" requirement of Rule 23. There were no common questions because the proposed class consisted of more than 8,600 women holding more than 8,000 different positions in various facilities throughout the country. Moreover, as to their disparate treatment claims, the plaintiffs' proposed class did not satisfy the "adequacy or representation" requirement of Rule 23. A named plaintiff of the proposed class was a manager and three of the putative class members reported to her; consequently, she had a conflict of interest with other putative class members. Accordingly, the Ninth Circuit found that the district court did not abuse its discretion in refusing to certify the discrimination class.

"While courts and employees are continuing to look for ways in which to efficiently address claims of discrimination, the court followed the *Dukes* decision by requiring that the employees identify a common policy or practice which can be scrutinized at trial," commented Stephanie Adler-Paindiris, Co-Leader of the Class Actions and Complex Litigation Practice Group at Jackson Lewis. "The court properly considered the nature of the claims and the difficulty that Microsoft would encounter at trial if it were forced to defend thousands of individual employment decisions," said Adler-Paindiris.

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the parties to submit additional evidence on the agreements' existence and validity.

3. If the employer shows that an employee has entered into a valid arbitration agreement, the court may not authorize notice to that employee, unless the record reveals that nothing in the agreement would prohibit that employee from participating in the action.

Truck drivers keep multimillion-dollar verdict. The Ninth Circuit affirmed a judgment awarding tens of millions of dollars in damages in a class action brought by long-haul truck drivers for a large retail chain. The court held that the district court did not err in granting partial summary judgment awarding damages to the drivers for layovers, rest breaks, and inspections after the court correctly determined that the employer exercised control over the drivers' layover and break time as a matter of California law. The appeals court also affirmed the district court's ruling denying liquidated damages to the truck drivers, holding that the lower court did not err in finding that the employer acted in good faith and with a reasonable belief in the legality of its action.

Approval of dancers' wage settlement reversed. The Ninth Circuit reversed the district court's approval of a proposed settlement of a putative collective action, executed before class certification, to resolve a Fair Labor Standards Act (FLSA) independent contractor misclassification suit brought by exotic dancers at various local nightclubs. Under the proposed deal, the employer agreed to a two-tiered cash payout structure, an alternative fee payment, and to make changes to its business operations; the dancers would release their wage claims. Three dancers who filed individual FLSA claims objected to the proposed settlement. The appeals court found that the notice process was inadequate under Rule 23(c)(2)(B). The claims administrator sent notice of the settlement via mail only, and the employer set a up a website and hung a poster inside the clubs. Further, the district court erred by reviewing the agreement under Rule 23(e)'s "fair, reasonable, and adequate" standard, rather than the heightened standard of scrutiny required for pre-certification agreements. Under the heightened standard, the court expressed concerns that many of the terms of the settlement, such as the clear sailing agreement and attorneys' fees, were indicative of collusion or other conflicts of interest.

$550M data privacy settlement. A social media giant has agreed to pay $550 million to settle claims from users in Illinois that the company's facial tagging feature violated Illinois' Biometric Information Privacy Act (BIPA), which regulates the collection and storage of individuals' biometric data. In a suit filed in a California federal court, the plaintiffs alleged that the company used facial recognition technology to extract and store digital representations of users' faces without consent. Under BIPA, the company was required to, but failed to, inform users in writing that their biometric identifiers were being generated, collected or stored; properly inform users in writing of the specific purpose and length of time for which their biometric identifiers were being collected, stored, and used; provide a publicly available retention schedule and guidelines for permanently destroying the biometric identifiers of users who do not opt-out of the facial tagging feature; and receive a written release from users to collect, capture, or otherwise obtain their biometric identifiers. The settlement is subject to final approval.

Company ordered into over 5,000 individual arbitrations. A federal judge in California held that an online delivery company must arbitrate 5,000 individual minimum wage and overtime claims brought by delivery drivers. The court rebuffed the defendant's attempt to evade individual arbitration after it had imposed a mandatory arbitration agreement on the drivers. The company also moved to stay the arbitration proceedings until final approval of a settlement in a separate state-law case, but the court denied the motion, noting that, ironically, the employer had moved to dismiss the state-law claims arguing that the workers had a duty to arbitrate.

Employer uses expert study to defeat class certification. A federal district court in California granted a lifestyle brand's motion to decertify a class of sales associates who alleged they had to undergo unpaid, off-the-clock bag inspections before leaving the store. In a prior decision, the court granted class certification, finding the employer applied a uniform policy of off-the-clock inspections to all its employees within the state. After conducting an expert study that found that 80.3 percent of bag inspections occurred on the clock, the employer moved for summary judgment against the certified class. The court was persuaded by the study and found that no

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uniform policy or practice existed, the class was no longer ascertainable, lacked a common injury. Thus, the class no longer satisfied the requirements of Rule 23(a).

Class claims based on unwritten rules can't proceed. A federal district court in California declined to certify a class of food service employees who brought claims of race and national origin discrimination alleging that their employer maintained companywide policies that prohibited employees from speaking Spanish and required employees to demonstrate a subjective level of English proficiency before they are eligible for promotion to management positions. Although the employees assumed the policies at issue were uniformly implemented across the company's 400 California restaurants, they did not offer significant proof that the policies were standardized across the company such that there were questions of law or fact common to the class. They also failed to provide significant proof that the policies existed on a companywide basis so as to apply to all class members. There was no evidence of written policies and the record showed the individual managers had substantial discretion to determine when Spanish could be spoken in the workplace and the level of English proficiency necessary for promotion. The court determined that individualized inquiries would be required to determine the harm suffered by each class member, such that class certification would be inappropriate.

Bank to pay $35M overtime settlement. A federal court in New Jersey granted final approval of a $35 million settlement to resolve the class and collective overtime claims of nonexempt bank tellers. The tellers alleged that in order to make quarterly quotas for new accounts, they had to work off the clock to seek out potential new customers and work during lunch hours and after hours without overtime compensation. The claimants will receive a pro rata amount of the residual net settlement amount—the settlement fund minus attorneys' fees ($10.5 million) and costs, service awards (varying from $20,000 for the original lead plaintiffs to $5,000 to opt-in plaintiffs), and a $100,000 reserve—from the sum of the total number of qualifying workweeks for all claimants. The claimants' individual shares will be based on the number of qualifying workweeks they worked, according to the bank's payroll and personnel records.

Social media company defeats gender class claims. A California state appeals court affirmed a trial court's denial of a motion to certify a class of female software engineers on their claims of gender discrimination. The lawsuit alleged that the company's informal promotion process was greatly affected by gender bias and resulted in few female employees being promoted to leadership positions. Agreeing with the trial court, the appeals court found that individual managers exercised substantial discretion over promotions such that the class members' allegations were too diverse to satisfy the commonality and typicality requirements of Rule 23.

More gig worker classification issues. Drivers for an app-based food delivery service have filed suit in a federal court in California alleging that the employer misclassified them as independent contractors in violation of the FLSA and California, Illinois, and Massachusetts laws. The plaintiffs are seeking recovery of compensation allegedly due to them as employees including minimum wages, overtime compensation, tips, and business expense reimbursements. The plaintiffs argue that under the "ABC test," which has been adopted by California, Illinois, and Massachusetts, they should have been classified as employees. The ABC test allows employers to classify a worker as an independent contractor only if all of the following conditions are satisfied: (1) the worker is free from the control and direction of the hirer in connection with the performance of the work; (2) the worker performs work that is outside the usual course of the hiring entity's business; and (3) the worker is customarily engaged in an independently established business of the same nature as that involved in the work performed.

Another tech giant hit with BIPA claim. An Illinois resident has filed a proposed class action alleging that a technology company violated Illinois' BIPA by collecting and storing facial data on every user without their consent. The complaint alleges that when a user uploads a new photo, the company's facial recognition technology "creates a template for each face depicted therein, without consideration for whether a particular face belongs" to the user that uploaded the photo and then compares each template against photos previously uploaded to the company's face template database. The complaint, filed in a federal district court in California, seeks declaratory and injunctive relief as well as monetary damages. ■

On the JL docket

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

March 18, 2020	Focus on Connecticut: Trainings for Compliance with New Connecticut Harassment Requirements - Hartford, CT
March 19, 2020	By Popular Demand — Leave Management, Part I - Melville, NY Taking the High Road: Legalized Marijuana in The Workplace – San Diego, CA
March 25, 2020	2020 Vision: Preparing for a Crystal Clear Year – Jacksonville, FL
March 25 – 26, 2020	Remaining Union Free: Preparing Your Team in 2020 – Austin, TX
March 26, 2020	By Popular Demand — Leave Management, Part I - Riverhead, NY Atlanta Breakfast Seminar – Dunwoody, GA
April 1, 2020	Staying One Step Ahead of the Plaintiff's Lawyers: Mitigating the Risk of Employment Law Class Actions – Brooklyn, NY
April 14, 2020	Portsmouth Spring employment Law Update – Portsmouth, NH
April 23, 2020	By Popular Demand — Leave Management, Part II – Riverhead, NY By Popular Demand — Leave Management, Part II – Melville, NY
April 29, 2020	Hartford Breakfast Series – Hartford, CT
May 12 – 13, 2020	Remaining Union Free: Preparing Your Team in 2020 – Alpharetta, GA
May 13, 2020	Focus on Connecticut: Trainings for Compliance with New Connecticut Harassment Requirements – Hartford, CT
May 21, 2020	If I Had Known Then . . . Using Background Checks in 2020 – Melville, NY
May 28, 2020	If I Had Known Then . . . Using Background Checks in 2020 – Riverhead, NY

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