Six Questions Every Lawyer Must Answer Before Filing an Employment Discrimination Class Action

By Anna P. Prakash**

The employment discrimination class action is alive and well. This is due, in large part, to the plaintiffs' bar approaching case evaluation with a critical eye and selectively accepting only the best cases. The following list provides an overview of important questions to work through with a potential client and co-counsel before filing an employment discrimination class action.

1. **Is there a viable theory of class discrimination?** After determining whether there is a sound basis to allege that the employer illegally discriminated against the potential client, counsel should evaluate whether the discriminatory conduct at issue can be addressed in the class context. Remember, not all discrimination cases require a showing purposeful disparate treatment. Rather, if an employer implemented a policy that has a negative and disproportionate effect on a protected group, that policy could give rise to a disparate impact theory of class-wide liability. It is also important to remember that even employment practices that involve discretion or subjectivity can be challenged through a class action. *See e.g., McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012); *Ellis v. Costco Wholesale Corp.*, 285 F.R.D. 492 (N.D. Cal. 2012).
2. **Is there a common question capable of generating answers common to the class?** Any class case should have at least one common question capable of generating common answers applicable to the class. The best cases often involve one policy or set of policies that is applied to the whole class. But this does not mean that cases should be limited to those where every issue can be resolved on a class-wide basis. There is no requirement that every issue in a case be capable of class-wide resolution. A single common question is enough. *See* Fed. R. Civ. P. 23(a)(2); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 359 (2011); *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1196 (2013).
3. **Is there a plan for dealing with both common and individualized issues?** Given the foregoing, counsel should develop a plan for how to handle common and individualized issues at the class certification stage and at trial. For example, counsel could move to certify an injunctive relief class, or an issue class on liability with damages to be determined later through individual trials. See Fed. R. Civ. P. 23(b)(2), (b)(3), (c)(4); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).
4. **Is there common evidence?** Counsel should determine whether the potential client has or is aware of non-confidential documentary or other evidence that is common to the class. An employment handbook, for example, could prove a uniform employment policy and the basis for a class disparate impact claim. *See Fed. R. Civ. P. 23(b)(3); Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) ("[A] common question is one where the same evidence will suffice for each member… [or] the issue is susceptible to generalized, class-wide proof.") (internal quotations and citation omitted).
5. **Is the potential client typical and an adequate representative of the proposed class?** The proposed class representative should belong to the protected group and have suffered the same general type of discrimination as the proposed class. While the class representative need not be perfect or understand the intricacies of employment law, she should be committed to seeking justice for the entire class, willing to participate in discovery, and capable of understanding of the basic nature of the class claims and goals of litigation. See Fed. R. Civ. P. 23(a)(3), (4).
6. **Is the story compelling?** Legal strategy in a class action is not limited to just the law. There is always a story to be told. While class litigation that focuses on technical violations of law can be meritorious, the story is more compelling—and the case likely more successful—if focused on injustice that is plain to the eye or easily understandable as unfair to the entire class. Counsel should evaluate cases with this in mind.

By thoroughly considering liability, certification, and proof, and evaluating class representative adequacy and the gut appeal of the case, plaintiffs' counsel can avoid costly mistakes down the road and build a strong foundation for future litigation and trial.

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