



WAL-MART FACES BIGGEST CLASS ACTION IN HISTORY



Preston D. Pierce
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The federal appeals court in San Francisco has ruled that a sex discrimination class-action lawsuit involving almost two million plaintiffs may proceed nationwide against Wal-Mart. *Dukes v. Wal-Mart, Inc.*, 99 FEP Cases 1285 (C.A. 9, 2007). The court ruled 2-1 that the District Court for the Northern District of California did not abuse its discretion when it certified the huge

class of plaintiffs. "We hold that the district court acted within its broad discretion in concluding that it would be better to handle this case as a class action instead of clogging the federal courts with innumerable individual suits. . . . Although the size of this class action is large, mere size does not render the case unmanageable," it stated.

The case was initially brought in June 2001 by two current and four former employees in California, but the class certification will now include females who worked at Wal-Mart stores nationwide since December 1998. The plaintiffs claim that females were paid 5-15% less than men in comparable positions and received fewer promotions to management than men. One of the original plaintiffs stated she quit her job as store manager in 2000 after monthly sales meetings were held at a Hooter's Restaurant and she was taken to a strip club during a business trip. Defense counsel argued that it would take

13 years in daily court sessions to go through all the testimony of managers of all of the 3,473 U.S. stores discussing some 170 separate job classifications. Wal-Mart is considering an appeal to the full Ninth Circuit Court of Appeals and possibly even to the U.S. Supreme Court.

The dissenting judge faulted the majority for what he saw as a class certification that will not benefit those who really have been injured by Wal-Mart. He said that although class actions have the potential of "assuring equal justice to all class members," they also pose a "considerable risk of enriching class members and counsel" while "depriving thousands of women actually injured by sex discrimination of their just due. . . . This means that if the class loses, all women presently or formerly employed by Wal-Mart lose," the dissenting judge stated.

The majority decision was largely premised on the fact that Wal-Mart operated a highly centralized company that promoted uniform policies throughout its stores. The plaintiffs largely relied on expert "opinion" evidence that Wal-Mart's policies create gender bias vulnerabilities; and the plaintiffs' expert's "opinion" evidence that statistically significant disparities exist between men and women at Wal-Mart in terms of compensation and promotion, combined with an "opinion" that the use of subjective decision-making was a common practice resulting in discrimination.

Editor's note — Following the passage of the Civil Rights Act of 1964 which specifically set

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KNOW YOUR ATTORNEY

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PAYROLL CHECK FRAUD AND USE OF DIRECT DEPOSITS CREATE LEGAL ISSUES



Suzanne K. Roten
"...the existence of such scams may result in increased attention from government authorities, including ICE."

A number of employers are being plagued by payroll check counterfeiting and the like, often resulting in disputes with employees and/or local merchants. At the same time, the existence of such scams may result in increased attention from government authorities, including ICE (Immigrations & Customs Enforcement).

While in most cases wage-hour issues are not involved, there is a particular legal concern in the form of various state laws that deal with direct deposits or through other systems that provide for bank ATM-type "cards" that are convertible to cash. Many of these state laws allow such systems provided they are conducted "with the consent of the employee." It may be sufficient to establish such consent, that the employer provide notice to the employee of the actions, and the employees continue to work for the employer, thereby impliedly consenting to the process. Other states, such as California, require that the employee voluntarily consent to direct deposit, and prohibit an employer from requiring that an employee agree to direct deposit as a condition of employment. In any event, if there is no damage to the employee from the use of the process, and if the employee has access to the money on a charge-free basis, it is hard to assign any substantial legal exposure to the employer.

Employers may also wish to conduct investigations of these matters because any such issues can promote employee and community unrest and lead to the attention of governmental authorities.

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CONSIDERATIONS IN DESIGNING A WELLNESS PROGRAM



William R. Seale
"The company is in the best position to determine its objectives, preferably with reference to its health care cost history, disability, injury and absence history and employee demographics."

Last month we discussed the legal aspects of health and wellness programs. This month we are discussing some practical steps to follow in designing such a program.

Identify objectives or desired outcomes - the program must focus on a limited number of behaviors, actions or changes that it wants to achieve, i.e., reduce smoking, weight, cholesterol levels, blood pressure, etc. Consideration should be given to what currently prevents employees from achieving the desired results, i.e., insufficient time to exercise, lack of knowledge, etc. The company is in the best position to determine its objectives, preferably with reference to its health care cost history, disability, injury and absence history and employee demographics. Since participation will be voluntary, consulting with employees to determine what they see as their greatest needs could be helpful. Whatever the objectives and outcomes focus on, make sure they are achievable.

Determine the reward(s) to be used - most large companies have stated that they think some kind of financial incentive is necessary to significantly increase participation. Proper design requires that the incentives be things that will help motivate the particular employee population. We must also be careful not to create any unintended consequences, i.e., a reward for perfect attendance might cause people to come to work when they are sick, thereby infecting others. Again, consulting with employees to determine what would cause them to participate is a good idea.

Design incentive rules that clearly communicate to employees what is required to participate and to earn the incentives.

Design a communication plan that clearly and repeatedly communicates information about the program to employees using different means, i.e., posting, employee meetings, written document distributed with paychecks.

Design a record keeping system to record who qualifies for the rewards.

Determine the reward process and cycle, i.e., when and through what means rewards will be distributed. Generally the more immediate the reward the stronger the motivating effect.

Design a concrete evaluation plan to assess the success of the program and its component parts.

Some preventative measures that companies have implemented and/or offered include non-result based smoking cessation programs, on-site work out facilities, offering healthier foods in vending machines/cafeterias, etc., non-result based obesity/weight reduction programs, subsidized gym memberships, work/flex/comp time for exercise, flu shots, informational programs/materials, screening tests.

Some rewards that have been offered to encourage increased participation include waiving co-payments and/or deductibles and contributing to flexible spending accounts; also, gift certificates, cash or non-cash gifts based on various actions, i.e., enrollment, actual participation, completion and compliance with certain behaviors. Some companies have found that it has been effective to award points for participating in various wellness activities and to then provide a cash or non-cash reward based on the number of points accumulated. As discussed above, the amount or value of the reward necessary to obtain participation will likely vary depending on the workforce involved and, in particular, their income level. Additional time off that the employee would not otherwise be entitled to can be effective and it has the extra benefit of being a non-taxable event.

While perhaps not effective at significantly increasing participation, some employers have found that providing low cost morale boosting rewards does have some positive impact (for example, t-shirts and similar items that recognize an employee's participation and that promote some sense of group belonging).

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WAL-MART FACES BIGGEST CLASS ACTION IN HISTORY **continued from page 1**

forth all types of federal discrimination laws, the era of the “class action” method of litigation was most prevalent between 1970 and 1985. Judges during those time periods recognized the need for class actions to eradicate systemic discrimination. Beginning in the mid-1980’s, however, judges began realizing the abuses of class actions, and at the same time recognized that most employers did not engage in knowing and systemic discrimination. Therefore, they began looking much more closely at the appropriateness of the class action method of litigation. The current Wal-Mart case, to some extent, is a “throwback” to the “old days” of class action discrimination litigation.

As a practical matter, most courts are unwilling to take on the “manageability” aspects of a class action case that could tie up a court for years. Further, it is difficult for a plaintiff’s law firm to tie up its resources for so many years in a case, and at the same time corporate defendants often do not want to risk the litigation costs and even the possibility of losing a case that can result in millions or even billions of dollars in damages. For a variety of reasons, therefore, most employment discrimination class actions are settled. Plaintiffs’ law firms know this, and the rewards to a plaintiff’s firm are quite lucrative in such settlements, along with the named plaintiffs who generally receive considerably more in damages than the class members they supposedly represent. Oftentimes the benefits to the absent class member is modest, a factor relied upon by the dissenting judge in his dissent.

CONSIDERATIONS IN DESIGNING A WELLNESS PROGRAM **continued from page 3**

Although not nearly as common as incentives, and more likely to create complaints, some employers use penalties such as higher co-payments for those who do not participate in a health & wellness program. Some employers also refuse to hire individuals who engage in certain unhealthy behaviors, i.e., smoking. If this is being considered, the company must be very careful of state laws that prohibit taking action against an employee (or refusing to hire) because a person smokes or for other legal, off duty conduct.

Some companies also believe that it is advisable to integrate the health & wellness program with the company’s EAP program, if any, workers’ compensation and safety programs, since the issues that arise in these contexts are often related. Doing so, however, raises privacy issues and therefore a company should not allow information to be shared between these departments unless they first obtain a HIPAA compliant waiver allowing such sharing.

Another question that comes up is whether to limit participation to employees or whether to permit family members to participate and if family members can participate, whether they will be able to do so to the same extent. Depending on the particular aspect of the program, additional participants may or may not result in additional expense. On the other hand, family members contribute to the company’s health care costs and family illness may also contribute to absenteeism. Additionally, allowing family members to participate may help motivate employees.

Of course, any such wellness program must comply with all legal aspects, many of which were summarized in last month’s Perspective in this newsletter.