Pitfalls in Litigating Labor and Employment Class Actions

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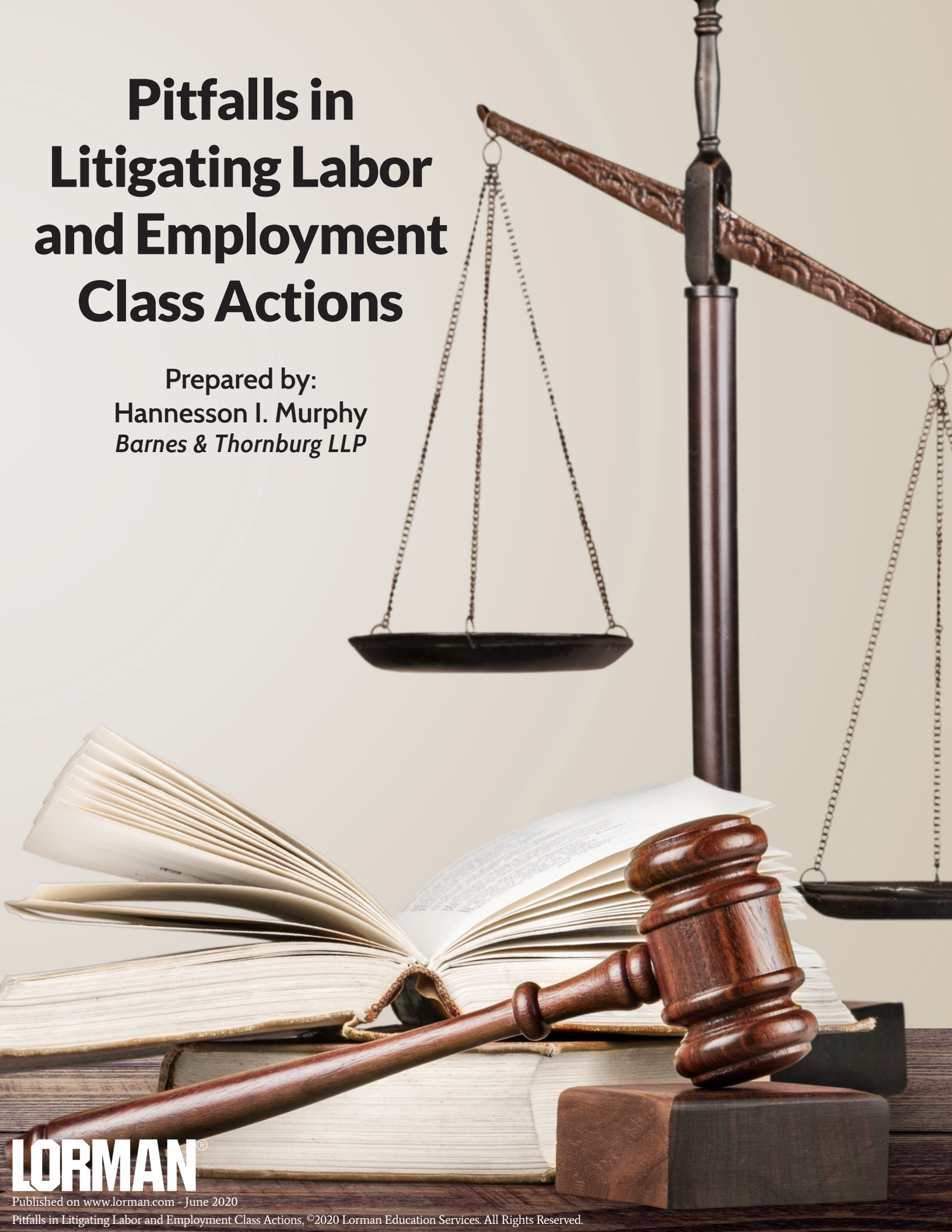

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I. INTRODUCTION

"Class action." This phrase can send tremors through the boardrooms of corporations across the country, and for good reason. Class actions are the bane of companies and employers. Originally intended to provide efficiency for the courts -- to enable them to swiftly adjudicate disputes from large numbers of people at one time rather than having to deal with multiple, separate and individual lawsuits -- class actions now tend to clog court dockets for years as the opposing parties engage in endless sparring matches over allegations, discovery, evidence and virtually everything else involved in the case. If litigation can be contentious, class actions tend to be doubly so. The reason is simple: the stakes to a company (and the costs incurred by plaintiffs' lawyers) are usually much higher than they would be in a case involving a single plaintiff.

Added to the pressures incurred by a company in having to litigate a class action, these types of lawsuits also tend to generate unwanted and often damaging publicity. We have all seen massive jury verdicts from class actions splashed across headlines in the news. In short, class actions offer nothing positive for companies or employers: they usually involve large and high profile cases that are expensive and risky to litigate and the potential jury awards can be staggering.

In the employment context, class actions normally involve allegations that an employer has treated a large group of employees in a discriminatory manner. While there is no ironclad rule about the type of allegations that a class action plaintiff can bring, these usually involve claims of discriminatory treatment in things such as performance evaluations, compensation, promotions and advancement, job assignments, and terminations. A recurring theme in employment class actions is that the employer's policies or practices place too much discretion in the hands of individual supervisors whose discriminatory bias can run unchecked. Employers that allow unfettered discretion to supervisors with respect to personnel decisions or employers that engage in only casual (or worse -- no) monitoring of decision-makers, are therefore, at greater risk of exposure from a class action than employers which have procedures in place to check a rogue and potentially biased decision-maker.

Many employers dismiss class actions as nothing more than a form of legal extortion or blackmail. While there may be some cases that actually are frivolous from a legal point of view, most of these cases tend to survive at least until the summary judgment stage. As a result, employers should develop a healthy understanding of the seriousness of class action litigation to their businesses, in terms of costs and potential exposure, as well as the practical aspects of litigating a class action once it is unavoidable and also how to enact proactive steps to try to avoid class actions in the first place.

II. WHAT ARE THE REQUIREMENTS FOR CREATING A "CLASS?"

Class actions represent "an exception to the usual rule that litigation is conducted by and on behalf of individual parties." *General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982). Because they may overwhelm courts' resources and jeopardize defendants' due process right to defend against each claim, a class "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id*. at 161.

1. Timeline of Typical Events in a Class Action Case.

Class actions normally begin life as would any other lawsuit. One or more plaintiffs -- designated as the class representatives or named plaintiffs -- files a complaint in court against the defendant containing their allegations. At this point in time no "class" is certified. Therefore, the case proceeds as any other case filed in court between a group of plaintiffs and a defendant. As the case progresses, the plaintiffs eventually will file a motion to have the court certify a "class." There is no specific requirement as to when this motion should be filed. The 2003 amendments to Rule 23(c)(1) allow the court to consider class certification "at an early practicable time." Many federal court's local rules suggest that the class certification motion be filed within 90, 120, or 180 days of filing the action. However, there is no bright line requirement and in practice, this typically takes much longer. Additionally, it should be noted that from a defense perspective, there is a benefit to having the court address the issues with respect to the named plaintiffs and the merits of their action *before* turning to class certification: if there is no merit to the individual plaintiffs claims, there is a good chance that the case could be dismissed or that the defendant could prevail on summary judgment -- thereby avoiding class issues altogether.

Below is a roadmap of the general sequence of events that can happen in a typical class action case:[1]

1. The named plaintiffs file a complaint against the defendant company. The complaint is served on the company.

2. After evaluating the case, the defendant company will either file a motion to dismiss some or all of the claims, or (more frequently) file an answer to the complaint.

3. Thereafter, the parties will engage in discovery to assess the merits of each side's respective strengths and weaknesses. Since the plaintiffs typically have little or no information other than about themselves and since the defendant-company usually is the one with the vast majority of information regarding its employees and employment practices, the

[1] Obviously, the facts of each case are different and this is in no way intended to act as a guide for what will happen in a particular case, but rather to illustrate what may happen and what to generally expect.

burden of discovery tends to fall more on the defendant-companies in these cases than on the plaintiffs.

4. At the end of the discovery period (which could take years), the defendant may choose to file a motion for summary judgment to demonstrate that no genuine issue as to any material fact exists as to the claims of the named plaintiffs and that the defendant is entitled to a judgment as a matter of law. The defendant-company also may elect to file a motion to deny class certification (even if the plaintiff has not yet filed to certify the class).

5. During or at the end of the discovery period, the named plaintiffs will file a motion for class certification. Prior to a decision on class certification, plaintiffs may be required to make several attempts to define a proper class or classes. The defendant-company will oppose the class certification motion. The court may deny the motion or grant the motion and certify the entire class proposed by the plaintiffs or only some of the class requested by plaintiffs.

6. Assuming the class certification motion is granted by the court, a class notice drafted by the plaintiffs and approved by the court will be distributed to the putative class members to advise them of the lawsuit and the fact that they may opt out if they choose to do so.

7. Following class certification, a period of merits discovery related to liability issues involving the class will take place.

8. At the close of merits discovery, if the case has not settled or if the class claims have not been dismissed, the case will proceed to trial.

9. The parties may appeal the result of the trial and the determination and award (if any) of damages to the class.

2. The Requirements To Certify A Class.

When employment plaintiffs alleging discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act ("ADA"), ultimately move for class certification, their motion will be governed by the requirements of Federal Rule of Civil Procedure 23.[2]

[2] Cases brought under the Equal Pay Act ("EPA"), the Fair Labor Standards Act ("FLSA"), and the Age Discrimination in Employment Act ("ADEA") are subject to the "collective action" requirements of FLSA § 216(b). Large scale claims under these statutes are not brought as class actions, but rather as collective actions -- meaning that potential plaintiffs must affirmatively *opt into* the lawsuit by filing a written consent with the court. This is significantly different from a class action where class members typically are bound by whatever judgment is issued by the court unless they *opt out* of the class.

In an employment context, Rule 23 requires that the plaintiffs provide evidence that raise an inference of a "pattern and practice" of discrimination. In other words, the plaintiffs need to prove that discrimination was the employer's "standard operating procedure." If the plaintiffs fail to satisfy a single one of the requirements of Rule 23, they will not be able to certify the matter as a class action.[3] Plaintiffs -- the party seeking class certification -- bear the burden of establishing that all of the requirements for class treatment are met.

Rule 23(a) provides that:

> [o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Rule 23 thus sets forth four prerequisites for class action treatment: typically referred to as Commonality, Adequacy, Numerosity and Typicality. "CANT" is a handy mnemonic that can be used to remember the requirements of Rule 23(a). Two of the factors focus on the class as a whole: Commonality and Numerosity; while the other two factors focus on the individual plaintiffs and their relationship to the proposed class: Adequacy and Typicality. Each of these factors is addressed below:

- *Commonality*. This requires a plaintiff to demonstrate that there are questions of law or fact common to the class, thereby ensuring that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class. The ability to articulate a common question, however, is not enough. For a plaintiff alleging a general policy of discrimination, she must offer "significant proof" that the alleged policy manifested itself in the "same general fashion" as to all putative class members. *Falcon*, 457 U.S. at 159, n. 15.

- *Adequacy*. This requirement has two components. First, adequacy requires that the class representatives -- the named plaintiffs -- be part of the class and

[3] Many class action cases also involve allegations of "disparate impact" and "disparate treatment." A "disparate impact" case involves a challenge to a facially neutral policy or practice that falls more harshly on a protected group and cannot be justified by business necessity. For example, say a company requires a college degree for all applicants to an entry level position. A protected class could argue that requiring the college degree -- a facially neutral policy -- has a disproportionate impact on them, thereby arguably giving them a common claim of discrimination. A "disparate treatment" case, by contrast, addresses a policy or practice that is allegedly discriminatory on its face.

possess the same interest and suffer the same injury as the class members. *Amchem Prods., Inc. v. Windsor et al.*, 521 U.S. 591, 625-26 (1997). In other words, if the named plaintiffs do not satisfy the requirements of the class, they cannot be adequate representatives of the class and therefore, a class should not be certified. The second component focuses on class counsel -- the plaintiffs' lawyer -- and whether he or she has the ability to appropriately represent the interests of the class.

- *Numerosity*. As one might expect, this requirement mandates that the class be too numerous to handle via individual lawsuits. There is no magic number for numerosity. More than 40 people likely will satisfy the requirement. Below that number depends on the jurisdiction: some courts have rejected classes of less than 40 people; others have permitted certified classes with less than 40.

- *Typicality*. This requirement can be summed up simply: "as goes the claim of the named plaintiff, so go the claims of the class." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998). To satisfy this requirement, the representatives must have the same interests and have suffered the same injury as members of the proposed class. In short, proving the elements of the named plaintiffs' individual claims should also prove the class members' claims. *Falcon*, 457 U.S. at 161.

In addition to satisfying the requirements of Rule 23(a), in order to obtain class certification, plaintiffs must also satisfy at least one of the categories of Rule 23(b). Plaintiffs typically seek certification under Rule 23(b)(2) or Rule 23(b)(3).[4]

Rule 23(b)(2) provides that a class action may be maintainable where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

- If plaintiffs fail to prove the existence of a specific policy that is applicable to all employees, this can undermine class certification under Rule 23(b)(2).

- If plaintiffs seek exclusively or predominately money damages, this can also undermine class certification under Rule 23(b)(2).

Rule 23(b)(3) provides that a class action may be maintainable where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

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[4] Rule 23(b)(1) applies where separate actions would result in inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class, or adjudications that would impair or impede the ability of putative class members to bring their own lawsuits.

- Under this prong, plaintiffs must show that common questions of law and fact predominate over individualized questions of discrimination. This analysis is more demanding that the commonality and typicality inquiry under Rule 23(a) because the plaintiffs must show that the class action method is *superior* to individual actions.

III. DEFENDING AGAINST A CLASS ACTION

As seen above, the mere filing of a class action lawsuit does not mean that a class will actually be certified or that the class claims will be successful. The rigorous requirements to certify a class, and the numerous steps that must take place in order to do so, provide employers with some advantages to negate any inference of a pattern and practice of discrimination and to successfully defend against a class action lawsuit.

1. Actions To Take Upon Learning Of A Class Action.

As soon as possible after a class action complaint is filed and in consultation with counsel, an employer should act as soon as possible to evaluate the claims and the nature of the putative class. Even though a class is not certified, the class action nature of a complaint usually can be determined fairly easily. Most courts require that cases which are anticipated to be class actions be designated as a "class action" in the caption of the lawsuit. Additionally, the plaintiff typically is designated by their name, followed immediately by language such as "and on behalf of a class . . ." or similar words to this effect. Accordingly, it should be obvious from the complaint that the plaintiffs intend to bring the matter as a class action. If an employer has any doubts about the nature of the complaint, they should immediately check with counsel.

a. Thoroughly Evaluate the Charges.

The first thing an employer should do is identify the named plaintiffs, the nature of their claims, their supervisors and managers and any similarly situated employees. This normally can be discreetly done by examining the charge/complaint and the employees' personnel files. Determine whether the named plaintiffs have been treated differently from their co-workers and whether there are any defenses the company could have that are unique to the named plaintiffs (*i.e.,* if the named plaintiffs owe the company money). Also, check to see if the claims are covered by the company's insurance policies and if so, advise the insurer immediately.

b. Evaluate the Putative Class.

Identify the size and composition of the putative class described in the complaint. Assess whether there are any differences among the class members that might make it difficult for the named plaintiffs to establish discrimination on a class wide basis (*i.e.*, different departments, job responsibilities and job duties, supervisors). Evaluate the role of a union, if any, in the class action and whether the claim implicates the terms of a collective bargaining agreement. Consider having counsel retain an expert -- to preserve

the attorney-client and work product privileges --- so that the company can run statistical analyses to determine if there are any significant disparities in the comparisons of the proposed class with other employees in terms of compensation, promotions, terminations or other employment actions that may be alleged in the complaint.

c. Investigate the Merits of the Named Plaintiffs' Claims.

A thorough investigation is critical to defending the lawsuit. This will uncover potential defenses and will enable the company to quickly identify and resolve a problem if there truly is one. In addition to reviewing the relevant personnel files and data, consider interviewing the plaintiffs' supervisors and other corporate witnesses to determine those persuasive individuals who may testify about the company's good faith efforts toward compliance with anti-discrimination laws. This process also will flush out whether the supervisory and managerial witnesses are prepared to testify concerning the level and detail of their training on EEO and antidiscriminatory matters. Additionally, this process will help determine whether there are any key witnesses who no longer are employed by the company or are planning to leave the company in the near future.

d. Collect And Preserve All Documents For The Relevant Time Period.

Document production can be one of the most time consuming and laborious parts of class action litigation. While the scope of a class may not be readily ascertainable from an early juncture, the company should still take every effort to ensure that relevant documents are not destroyed. Failing to do so could give rise to a separate claim from the plaintiffs for spoliation of evidence.

Additionally, at an early juncture the company should, at a minimum, collect materials regarding the named plaintiffs -- including their personnel files, medical files, payroll data and information regarding any complaints they may have made. Collecting this material quickly will facilitate the company's ability to grasp the scope of the named plaintiffs' claims and aid in the determination of whether the case can be successfully defended or should be settled.

Other items that should be collected as part of the company's preliminary investigation process include copies of all relevant EEO and anti-harassment policies, notices, posters, brochures and reminders/reaffirmations as well as any materials related to employee and managerial training. Additionally, organization charts, annual reports, and/or position descriptions reflecting those personnel responsible and qualified to handle corporate EEO concerns can be useful in defending the allegations at issue (as well as explaining the company's structure to an unfamiliar audience such as a judge or jury).

e. Public Relations Concerns.

Allegations of discriminatory treatment, harassment, and other unacceptable conduct can have a negative effect on a company's image in the community as well as on its business. Consider alerting the company's public relations staff about the allegations of the complaint as soon as possible. This will enable the company to formulate a

strategy on whether it makes sense to address the allegations with the company's employees, customers and others, who should be tapped to handle the communications and also when such communications -- if they take place at all -- should occur.

2. Options For Opposing Class Certification.

Since all class actions are initially dependent upon the merits of the named plaintiffs' claims, this typically provides the best opportunity for a company to challenge the merits of the claims brought against it, as well as class certification. If the company could dismiss or obtain summary judgment against the named plaintiffs, no class would be certified and the case as to the named plaintiffs would be resolved with a favorable result for the company.

To the extent the named plaintiffs' claims can survive a motion to dismiss or summary judgment, the company still can raise valid defenses against class certification. As seen above, the standards for certifying a class are quite rigorous. Therefore, a company still can successfully oppose certification if it can show that the named plaintiffs' lack standing to represent the class, or demonstrate that the named plaintiffs' claims are not typical of the class they seek to represent, that they are not adequate representatives of the class as a whole, that the class is not too numerous to be resolved in independent lawsuits or that there is no commonality among the putative class members.

In addition to the threshold requirements of commonality, adequacy, numerosity and typicality, the plaintiffs also must prove that their claims fit within with Rule 23(b)(2) or 23(b)(3). These provisions open up many additional strategies for opposing class certification. For example, under 23(b)(2), the company can try to:

- Demonstrate that injunctive or declaratory relief would be moot. For example, if the plaintiff is claiming discrimination, the employer could show that anti-discrimination or unlawful workplace harassment policies are already in place or have been implemented since the inception of the action (and are working), or that handicapped facilities have been installed and/or certain accommodations made.

- Demonstrate that money damages are really plaintiffs' primary focus instead of injunctive or declaratory relief.

- Identify alleged incidents specific to the named plaintiffs and show that they do not apply to the entire putative class.

- Point out -- in cases where the putative class includes former employees -- that injunctive relief will not make the former employees whole. Since they no longer work for the company, they have no interest in having the company's policies or practices fixed.

Similarly, under Rule 23(b)(3), the company can try to:

- Distinguish the named plaintiffs from the claims of other putative class members, and from the alleged pattern and practice of discrimination. This will illustrate that common questions of law and fact do not predominate and, in fact, many aspects of the purported class action will require individualized inquiries into the unique circumstances surrounding each plaintiffs' employment with the employer.

- Assert that certification is not superior because it will devolve into a series of individual mini-trials on issues peculiar to each plaintiff. For example, in cases where the named plaintiffs make claims of emotional distress and psychological damages, these necessarily will require an examination of each individual plaintiffs' unique circumstances, complicating the class action and making it unmanageable to litigate.

3. The Perils of Exhaustive Discovery

Discovery is the often the most contentious and expensive aspect of modern litigation. Even if the company wins the case, it still could spend a fortune in legal bills fending off massive discovery requests. In employment class actions, consider that the employer retains almost all of the materials that will be sought in discovery: personnel files, medical records, e-mails, payroll databases, employment polices, etc. By contrast, the plaintiffs will have only information about their own employment background, possibly some documents, their alleged damages and mitigation information. As a result of this incongruity, employers typically enter the discovery process by being hit with voluminous discovery requests from plaintiffs that essentially amount to "give me everything you have about every employee in the company going back to the beginning of time." Fortunately, these requests usually can be negotiated down to something more manageable and realistic. However, employers should be cautioned that many courts will usually allow discovery -- even what employers can view as excessive discovery -- to give the plaintiffs an opportunity to gather information to formulate their proposed class.

Another point to consider with regard to discovery is that statistics are central to many class action cases. Under a disparate impact theory, plaintiffs commonly introduce statistical evidence that an employment practice has an adverse effect on one or more protected classes of individuals. Under a pattern and practice theory, plaintiffs have to show that purposeful discrimination was the employer's standard operating procedure. Presenting statistical evidence can show that individuals in the protected class were treated differently than similarly situated individuals who were not in the protected class. Thus, plaintiffs frequently seek personnel data (e.g., hiring, promotion, transfer and termination) to build statistical evidence that will support the certification of a class. Courts routinely allow plaintiffs to discover employers' personnel data for this purpose.

Given the importance of the personnel data kept by the company and the prospect that it will be a significant focus of the plaintiffs' discovery efforts, it is imperative that employer's familiarize themselves with the data and assist counsel and their experts defending a case to collect and understand this information. Since this data frequently is stored in different databases and can be in different formats (that could conflict with one

another), it may be necessary to synthesize the available data for review. It also may be prudent for the employer to conduct its own analysis of the personnel data prior to producing it in discovery. The employer should consider retaining a professional statistician as an expert for the purpose of helping the company understand the parameters and available fields of information in its database, as well as the significance of the available data, in order to help it determine how best to respond to database discovery demands. A statistician also can help identify fields of information which could provide legitimate business reasons for challenged employment decisions and also demonstrate that by looking at departments, jobs, salary grades or other identifying fields, that there is no pattern of discrimination or that the pattern is statically insignificant.

IV. THINKING THE UNTHINKABLE - SETTLEMENT.

There are only three ways a lawsuit can end: (1) pre-trial judicial determination on the merits (*i.e.*, dismissal or summary judgment); (2) judgment following a trial and (3) an agreed upon resolution (settlement). There is no question that employment discrimination class action lawsuits are risky and expensive. Settlement of the lawsuit can, for an employer, be more attractive than trial for a number of reasons:

- Settlement enables the company to focus on its business and not on litigation;
- Settlement avoids divisive battles with and among employees;
- Settlement minimizes negative publicity about the company and its business practices;
- Settlement reduces legal fees;
- Settlement avoids court-ordered injunctive relief that may not be as well-tailored to the company's business operations or philosophy;
- Settlement eliminates the risk of an unacceptably high monetary award; and
- Settlement maintains control and flexibility over how the company will modify its employment practices.

There are no guarantees about what will happen at trial. Unanticipated evidentiary rulings by the court, bad witness testimony, unforeseen jury sympathy for the plaintiffs, and a host of other unanticipated events can obliterate months of litigation and trial preparation and the best defenses. Accordingly, in light of the risk and expense, most class actions are settled at some stage.

There is no specific time in a case where settlement can or should be considered. However, there are various stages where the consideration of this issue is logical: presuit, before class certification, after class certification and before trial. At each stage of the litigation the factors for and against settlement should be balanced in order to determine whether the estimated costs of settlement are less than the estimated costs, burdens and impacts of continuing litigation.

Assuming the employer is considering the possibility of settlement, it should consider entering into a confidentiality agreement with the plaintiffs that includes ensuring that the settlement process itself is confidential as well as protecting the confidentiality of any data that may be exchange during the parties' negotiations. Additionally, the employer should consider alternatives for individual settlement amounts, including whether non-monetary relief (*i.e.* changes in policies/practices) should reduce the amount of the demand. Note also that many plaintiffs request that an "independent" body be established to set, monitor, investigate, alter, enforce and report upon changes to such corporate employment policies and practices to ensure that the company actually implements them. Finally, attorneys fees should be negotiated separately after settling on class relief or a court should decide the issue.

V. CONCLUSION

Class action litigation -- particularly class action employment litigation -- is on the rise. Employers are right to be concerned about the expenses associated in dealing with these cases and the impact that these cases will have on their businesses. Being faced with a class action lawsuit, however, is not the end of the world. Applying the proper steps and methods, these cases can be contained, managed, controlled and in many situations, can be defeated.