



Best Policies to Avoid Class Actions

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In less than a decade, we have seen a soar in class actions in the employment legal arena against employers, from the infamous U.S. Supreme Court decision in the *Dukes v. Wal-Mart* discrimination class action, to the recent California Supreme Court decision in *Brinker v. Superior Court* and numerous other wage-and-hour class actions for meal breaks, rest periods, off-the-clock work, improper itemization of wage statements, improper reimbursement and unpaid overtime.

For many employment class actions, an employer can usually take proactive measures to prevent class action certification and treatment by maintaining policies in compliance with the law. This is because in determining whether to certify a class, courts analyze whether there are issues of law or fact common to the proposed class and whether those common questions predominate over individual questions.

Under some circumstances, if an employer implements and enforces lawful policies, there is a stronger argument that to determine whether a plaintiff's class action contention — that unlawful conduct occurred despite the employer's lawful policies — will require a highly individualized analysis, making certification inappropriate. For example, maintaining a strong, clear and concise equal employment opportunity policy that expressly forbids discrimination based on any protected category (e.g., gender-based discrimination), which also expressly states that disciplinary action will be taken including immediate termination if the policy is breached, can be an important factor in demonstrating that the only companywide policy is one that prohibits the alleged wrongful conduct.

Another example, if an employer has a policy providing meal breaks and rest periods to employees in compliance with the law and a policy prohibiting off-the-clock work, employers will have a stronger position because determining liability likely require an individualized inquiry of why an employee did not receive a break or worked off-the-clock; whether the reason for doing justifies legal recourse and liability for the employer; and whether there is sufficient common evidence that liability can be established and applied on a classwide basis.

While each and every company is different, every employer should take into consideration its company culture and institute policies and procedures that best suit its needs, it must ensure that such policies and procedures are consistent and in compliance with the law.

For best business practices, it is ideal to consult with an attorney to develop a plan of action for analyzing and determining whether a job position allows engaging individuals on an independent

contractor basis or whether the individuals holding such positions are employees. This is especially the case, if an employer has both independent contractors and employees holding the same position and performing the same duties and responsibilities.

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