

# Executive Briefing

Employment & Labor Law / Employee Benefits



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## Largest Employment Discrimination Class Action in Nation's History Certified by Ninth Circuit

On April 26, 2010, in [\*Dukes v. Wal-Mart Stores, Inc.\*](#), the full U.S. Court of Appeals for the Ninth Circuit certified a nationwide class of about 500,000 current female employees of Wal-Mart Stores, Inc. (Wal-Mart). This decision allows the women to proceed against the company in a sex discrimination case that alleges violations under Title VII of the Civil Rights Act. This class certification could result in the largest employment discrimination class action in history and will have a profound effect on class actions nationwide if other courts follow suit.

The original plaintiffs in the *Dukes* case sued Wal-Mart in the U.S. District Court for the Northern District of California in 2001 alleging Wal-Mart paid women less than men in comparable positions and made women wait longer for fewer promotions. The plaintiffs claimed the company's corporate structure, policies and practices created consistent and common sex discrimination. The plaintiffs sought back pay and punitive damages, as well as declaratory and injunctive relief. The District Court originally certified a class of approximately 1.5 million female employees who had worked for the company since 1998. Wal-Mart appealed the order, and a three-judge panel of the Ninth Circuit affirmed the District Court's decision. After a motion for rehearing, the full Court issued its divided 6-5 decision certifying the claims of current employees, but remanding as to the ex-employees and the issue of punitive damages.

In its decision to certify the class, the Ninth Circuit performed a "rigorous analysis" under Federal Rule of Civil Procedure 23, and noted that the certification analysis may at times overlap with the merits of the case. The basis for the division within the Court was the level of proof required for certification. The dissenting judges believed *significant proof* of the company's discriminatory actions should be established at the certification stage while the majority ultimately held the plaintiffs' *allegations* of common, discriminatory actions were sufficient. Addressing Rule 23(a), the Court examined whether the class met each of four requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. The Court also provided some clarification with respect to three of those factors:

- **Commonality:** The plaintiffs need only raise the common *question* of whether Wal-Mart's female employees were subject to a single set of corporate policies instead of independent discriminatory acts; they did not need to *answer* that question at this time.
- **Typicality:** The court found the seven named plaintiffs "typical" of the class because the alleged discrimination occurred through common practices within the company, even though the claimed discriminatory treatment, like promotion levels and pay rates, varied.

In addition, a class representative for *each management category* the class intends to represent is not necessary. The fact that only one named plaintiff was a low-level manager did

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not defeat typicality, even though the class purports to represent female employees in *all* levels of management.

- **Adequacy of representation:** Although the class includes both supervisory and non-supervisory employees, there is *no conflict of interest* or need for separate legal counsel.

After finding the class of current female employees met each factor of Rule 23(a), the court determined the class also met the requirements of Rule 23(b)(2). In order to certify a class under Rule 23(b), a court must find (in addition to the four factors in Rule 23(a)) that the class fits one of three conditions: (1) prosecution of separate suits would create the risk of inconsistent adjudications; (2) the party opposing class certification has acted or refused to act on grounds generally applicable to the class; or (3) common questions of law or fact predominate over questions affecting only individual members.

In its analysis of Rule 23(b)(2), the Ninth Circuit concluded that certification under Rule 23(b)(2) is not appropriate where monetary relief is predominant over injunctive or declaratory relief. The *Dukes* plaintiffs' claims for back pay certainly are monetary claims, however, according to the opinion in *Dukes*, even substantial claims for back pay do not preclude class certification under Rule 23(b)(2). The Court clarified that the actual size of the monetary relief sought does not determine whether those claims predominate. Instead, while the monetary claims against Wal-Mart could amount to billions of dollars, the Court dismissed the potential size of the claims as "principally a function of Wal-Mart's size." The Court also dismissed concerns about manageability of the class action, concluding that Wal-Mart's database of employee information makes investigation into promotion and back pay issues "manageable." The Court did find, however, that the district court failed to consider whether the claims for punitive damages predominated over the injunctive and declaratory relief. As a result, the Court remanded the punitive damages claim for further analysis, noting that those claims may be certified under Rule 23(b)(3) instead of Rule 23(b)(2).

**Bottom line:** This decision will most likely open the door to more courts certifying larger classes in complex employment cases. The Ninth Circuit's standards for Rule 23(a) commonality, typicality and adequacy of legal representation are broad and allow for very diverse classes to be certified. Likewise, classes can request significant monetary relief and still be certified under Rule 23(b)(2) because of the court's flexible application of the "predominates" standard. It is anticipated that Wal-Mart will appeal this decision, so watch for developments in future e-Briefs.

For more information regarding this decision or defending against class action claims, please contact [Pat Konopka](#) or [Sara Welch](#). Special thanks to Jennifer Artman, summer associate, for her assistance in preparing this article.

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## IRS Issues Guidance on the Tax Treatment of Dependent Coverage

On April 27, 2010, the IRS issued [Notice 2010-38](#) (the Notice), which provides guidance on the tax treatment of health care coverage for children up to age 27 pursuant to the health care reform legislation. In addition to clarifying the applicable age limitations, the Notice provides guidance on who qualifies as a dependent for purposes of tax-free employer-paid coverage.

By way of background, the recent health care reform legislation required group health plans and health care issuers to extend dependent child coverage to an employee's adult children up to the age of 26. Parallel to those changes, legislation amended the tax code to provide favorable tax treatment for covering adult children. Specifically, the amendments excluded reimbursement for medical care from an employee's income when the reimbursements are received under an employer-provided accident or health plan and the employee's child had not reached age 27 by the end of the taxable year, which the employer may assume is the calendar year. This exclusion from gross income applies both to employer-provided coverage under an accident or health plan and the amounts paid or reimbursed under such a plan for medical care expenses.

The tax-free coverage applies to any child, stepchild, and legal or eligible foster child who meets the age requirement. The employer may rely on an employee's representation as to the child's date of birth. There are no additional age limits, residency, support, or other tests to determine if a child is a dependent for the purpose of tax-free employer-paid coverage. Consequently, this definition has the potential to include an employee's child who would not qualify as a Section 152 dependent.

**Bottom Line:** Employers should begin considering amending health plans for compliance with this new requirement, and begin introducing the expanded coverage during the next open enrollment period.

For more information on how the recent health care reform legislation affects your company or the specific requirements for the expanded coverage of adult children, please contact [Tom Dowling](#). You may also want to attend our June 8, 2010, seminar on this topic: [Health Care Reform: What's an Employer To Do?](#)

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## Inside the United States Supreme Court: A Mid-Year Analysis of Cases Affecting Employers

The United States Supreme Court term is wrapping up and the Court has begun issuing decisions. Following is a summary of employment related decisions that have been issued, cases that are awaiting a decision this term, and cases that are set for hearing next term, which begins October 4, 2010.

### **Recent Opinions Issued by the Court:**

**Statute of Limitations:** On May 25, 2010, a unanimous Supreme Court in [Lewis v. City of Chicago](#) held that an employer's actual application of an unfair employment practice triggers the statute of limitations under Title VII - even if the employment practice was previously announced to workers. Under a Title VII claim, a plaintiff seeking to bring suit for employment discrimination must file a charge of discrimination with the EEOC within 300 days after the unlawful employment practice. In this case, black job applicants filed charges of race discrimination more than 400 days after the results of an alleged discriminatory firefighter applicant test, but within 300 days of when the city employer used the test results to begin hiring applicants. The Court held that a claim may be triggered when an employer uses or applies an unlawful practice, in addition to when an unlawful practice is announced. The black job applicants' claims were therefore timely filed.

**Arbitration in Class Actions:** On April 27, 2010, the Supreme Court in [Stolt-Nielsen S.A. v. Animal Feeds International Corp.](#) ruled that a class action lawsuit is not subject to arbitration unless the arbitration clause in the parties' agreement specifically includes class actions within its scope. A contract stating only that "any dispute" is subject to the arbitration clause is not sufficient to cover potential class action claims.

**Diversity Jurisdiction:** On February 23, 2010, a unanimous Supreme Court in [Hertz Corp. v. Friend](#) held that a corporation's "principal place of business" is its "nerve center," which is where the corporation's high level officers direct, control and coordinate the corporation's activities. Managers of Hertz, who claimed they were not properly paid under California law, wanted to litigate their dispute in California state court. Hertz removed the dispute to federal court under diversity jurisdiction laws on the basis that its corporate headquarters are in New Jersey. The managers argued against removal, claiming Hertz was a California citizen because Hertz conducted significant business there. The Court rejected the managers' arguments that a "principal place of business" depends upon whether the amount of a company's business activity is "significantly larger" or "substantially predominates" in one state, finding instead that the "nerve center" test controls.

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### **Pending Decisions – Cases Heard But Not Yet Decided:**

**Arbitration Clause:** On April 26, 2010, the Supreme Court heard oral arguments in [Rent-A-Center West v. Jackson](#), a case from the Ninth Circuit involving an employee who challenged an agreement to arbitrate as unconscionable. Under the Federal Arbitration Act, challenges to the validity of an agreement to arbitrate are generally decided by the court. In this case, however, the Court will determine whether an employee can contractually agree to have the arbitrator, as opposed to the court, decide such challenges.

**Texting Privacy:** On April 19, 2010, the Supreme Court heard oral arguments in [City of Ontario v. Quon](#), a case from the Ninth Circuit involving Fourth Amendment privacy rights. The Court will determine whether an officer sending personal text messages on a government issued pager has a reasonable expectation of privacy. A key issue in this case that weakened the employer's position was that the employees' supervisor verbally informed employees that they would be allowed to use their pagers for personal reasons outside the scope of the employer's no-privacy policy if the employees paid for any excess usage charges.

### **Cases Selected for October 2010 Session:**

**"Cat's Paw" Theory:** The Supreme Court has agreed to review the Seventh Circuit's interpretation of the "cat's paw" theory of employment law in [Staub v. Proctor Hospital](#). Under the theory, an employer may be liable for unlawful discrimination by a nondecision-maker employee who influenced a primary decision-maker. The Seventh Circuit held that the theory requires sufficient evidence of "singular influence" by the nondecision-maker over the decision-maker, or "blind reliance" by the primary decision-maker. The Court will review this standard and ultimately determine when an employer may be liable under the "cat's paw" theory.

**Background Check:** The Supreme Court has agreed to review the Ninth Circuit decision of [NASA v. Nelson](#). In deciding this case, the Court will determine whether a federal contract employee's constitutional right to informational privacy was violated in connection with the employer's in-depth background investigation. Specifically, the Court has been asked to determine whether NASA had the right to require employees to answer questions in a background check related to private matters such as financial integrity, alcohol and drug abuse counseling, and mental and emotional stability. Plaintiffs, who were "low risk" contract employees, sought a preliminary injunction that the investigation violated their constitutional rights. The U.S. Court of Appeals for the Ninth Circuit granted the injunction.

For more information regarding the affects of these recent decisions by the Supreme Court and the status of any pending actions, please contact [Mindy McPheeters](#) or [Cicely Lubben](#).

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### Obesity: A New Claim for Employees?

A recent [study](#) by the Journal of American Medicine Association suggests more than 60 percent of all adults in the U.S. are overweight and 30 percent of these individuals are obese. What this means for employers is that a growing number of their workforce is likely to meet one of these conditions. In the past, the [courts](#) had consistently held that an obese individual was not disabled as defined by the Americans with Disabilities Act (ADA) unless his or her obesity was related to a psychological condition or the individual was morbidly obese. Based on the recent amendments to the ADA, there has been much speculation as to whether obesity will now *carte blanche* qualify as a disability.

The [proposed regulations](#) by the EEOC do not directly answer the question of whether obesity will qualify as a disability. Individuals who are substantially limited in their ability to walk, stand, lift, perform manual tasks or perform any other major life activity because of their weight, however, will most likely have a greater likelihood of stating a claim under the ADA. This is because of the expanded definition of a disability and a major life activity as well as the looser, "common-sense assessment" of whether an individual is "substantially limited" in the ability to perform a major life activity (comparing an individual's ability to perform a specific major life activity with that of most people in the general population).

It is clear that in most circumstances individuals who suffer from medical conditions, such as diabetes and hypertension caused by their weight, will be covered by the ADA. Previously, courts had held that certain conditions, for example Type II diabetes which could be controlled by food management and, occasionally, medicine, would not qualify as a disability. Because diabetes affects "the operation of a bodily function" and the consideration of medication is no longer allowed, this condition now will most likely qualify as a disability even if related primarily to the individual's weight.

Finally, the expanded definition of "regarded as" under the ADA may open a new avenue for employee claims. Employees who believe they are denied a job, promotion or some other employment opportunity because the employer perceived them as unable to perform the position because of a weight-related issue may now be in a stronger position to bring a claim. Under this type of claim, an employee need not establish that they are substantially limited in any major life activity, but that their employer misperceived them as unable to perform an essential function of the job because of their obesity.

The speculation that obese individuals will now be covered, if not by the ADA then by some other law, has been fueled by a recent decision that expanded the scope of Title VII to capture claims based on personal appearance. The [Eighth Circuit Court of Appeals](#) held in January 2010 that a terminated female employee who did not fit the mold of "pretty" that the hotel employer wanted to present because she wore male-styled clothing and did not wear make-up may be able to state a

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claim under Title VII. The court reasoned that the term "pretty," by its very nature, applies only to women and was a basis for protection due to gender under Title VII. If other courts follow in this same vein, the termination of a woman for not being "pretty" enough because of her weight may be sufficient to state a cause of action.

**Bottom Line:** As the size of the average American has grown, so has the potential for an employee to have a successful claim based on obesity discrimination. Employers can no longer safely assume that a decision based on an individual's weight, without a legitimate business reason, will not carry liability under federal law.

For more information on the expanded coverage of the ADA and, specifically, the protection of individuals on the basis of their physical appearance, please contact [Mindy McPheeters](#) or [Eric Tiritilli](#). Special thanks to Jarrod Reece, summer associate, for his assistance in preparing this article.

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## Inside Washington

### *New Laws, Regulations and Agency Guidance*

**ADEA.** . .Jacqueline Berrien, Chair of the Equal Employment Opportunity Commission (EEOC), provided [testimony](#) before Congress in support of the [Protecting Older Workers Against Discrimination Act](#), Senate Bill 1765. The proposed Bill would, according to Berrien, "restore and bolster the basic protections that applied to ADEA claims" before the U.S. Supreme Court's decision in *Gross v. FBL Financial Services*. The decision in *Gross* imposed a "but for" standard requiring an employee to prove that age was *the* cause of the adverse employment action. Senate Bill 1765 would reverse that decision and restore the potential of a mixed motive claim under the ADEA...Also on the ADEA front, the EEOC continues to face criticism for its proposed rule concerning [Reasonable Factors Other Than Age](#) issued February 18, 2010. The Society for Human Resources Management called for the EEOC to withdraw its proposed rule stating that the rule results in "less practical guidance" than exists under the current legal scheme and "is unsupported in law and infeasible in practice." Comments on the proposed rule were taken through April 19, 2010, and will now be considered by the EEOC before the final rule is published.

**DOL.** . .Labor Secretary Solis [called](#) upon employers to take efforts to employ youth this summer and at the same time encouraged Congress to extend unemployment and the current COBRA benefits. According to Solis, "if Emergency Unemployment Compensation is not extended, and the Extended Benefits program is not funded by the first week of June, more than 19,000 Americans could start losing these vital benefits. And, by mid-July, more than 2 million could be

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without benefits altogether." . . . On May 19, 2010, the DOL published the final rule updating protections for young employees in non-agricultural work. The regulations incorporate recommendations from OSHA and provide clear notice to employers that there are certain jobs young adults simply cannot perform. The final rule will go into effect July 19, 2010. A [side-by-side comparison](#) of the prior rule provision with the newly enacted rule is provided by the DOL.

**Immigration**...While debate and criticism of Arizona's immigration law continues, many are looking to the federal government for a resolution. On April 29, 2010, Democrats introduced a 26-page framework for federal immigration reform. In statements made that same day recognizing the efforts of Congress, President Obama [reiterated](#) the need for a federal approach. "It is the federal government's responsibility to enforce the law and secure our borders, as well as to set clear rules and priorities for future immigration. The continued failure of the federal government to fix the broken immigration system will leave the door open to a patchwork of actions at the state and local level that are inconsistent and as we have seen recently, often misguided." Many predict this will be a hot topic for the November 2010 congressional elections because few within Washington doubt that a resolution can be reached before then...While true reform may be lacking, many employers have reported an increase in the federal government's efforts to audit I-9 forms, as well as an increase in penalties for infractions in an effort to stymie the hiring of illegal immigrants. Industries that are receiving the most attention include: construction; pallet manufacturing and repair; landscaping; hotels/restaurants; manufacturing; agriculture/food processing; government contractors; and critical infrastructure. It is anticipated that based upon the [increase](#) in the number of I-9 forensic audits conducted by the U.S. Immigration and Customs Enforcement (ICE) agency of the Department of Homeland Security, employer penalties for serious and technical violations in 2010 will far exceed those in 2009.

**OSHA**. . . On May 24, 2010, OSHA published [proposed rulemaking](#) to prevent injuries from slips, trips and falls on walking-working surfaces. According to OSHA, the goal of the proposed rulemaking is to address incidents that result in 20 employee deaths annually. OSHA believes the current walking-working surfaces regulations "allow employers to provide outdated and dangerous fall protection equipment such as lanyards and body belts that can result in workers suffering greater injury from falls." Construction workers already have in place safer, more-effective fall protection devices such as self-retracting lanyards and ladder safety and rope descent systems, which these proposed revisions would require for general industry workers. In addition, OSHA inspectors would be able to fine employers who jeopardize their workers' safety and lives by climbing these ladders without proper fall protection, authority which inspectors currently lack...For those following the BP debacle, the DOL has issued updated [materials](#) which supplement OSHA-required training workers must receive before they can be hired to engage in the cleanup.

For more information regarding "Inside Washington," please contact [Mindy McPheeters](#).