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Certification and Decertification

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Seyfarth Shaw LLP

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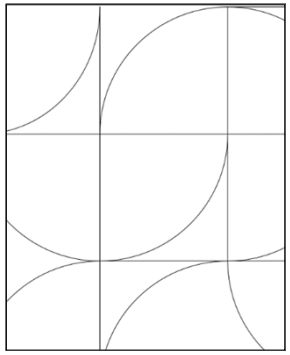

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FLSA Collective vs. Rule 23 Class Certification

FLSA

- Opt-in procedure, requiring members to actively consent in writing to join the action
- “Similarly situated” standard
- May not require judicial approval of settlement

Rule 23

- Opt-out procedure, where all class members are automatically included unless they affirmatively take action to exit the case
- More demanding certification requirements: numerosity, commonality, typicality, and adequacy of representation + predominance and superiority
- Settlement requires judicial approval

Why Pursue Rule 23 Class Certification?

- Longer statute of limitations
  - E.g., 2 or 3 years under FLSA vs. 6 years under New York Labor Law
- Additional liability
  - E.g., meal and rest breaks in California; wage notice and wage statement requirements in New York
- Filing in state court could lower barrier to certification
  - Under *Wal-Mart v. Dukes*, federal courts must rigorously scrutinize whether plaintiffs have satisfied the requirements of Rule 23
- Response to personal jurisdiction decisions after *Bristol-Myers Squibb v. Superior Court of California*
  - *Fischer v. Federal Express Corp*., 42 F.4th 366 (3d Cir. 2022); *Canaday v. Anthem Cos., Inc*., 9 F.4th 392 (6th Cir. 2021); and *Vallone v. CJS Solutions Group, LLC*, 9 F.4th 861 (8th Cir. 2021)
  - These courts have ruled that non-resident opt-in plaintiffs may not join collective actions against out-of-state companies for out-of-state work

Responding to Rule 23 Class Actions

- Removal
  - In hybrid cases, federal question jurisdiction
  - In state law-only cases:
    - Diversity jurisdiction
    - CAFA
- Motion to Dismiss/Motion for Summary Judgment
- Motion to Strike Class Allegations
  - Rule 12(f): seeks to strike any “redundant, immaterial, impertinent, or scandalous matter in any pleading”
  - Requires taking all well-pleaded facts in the complaint as true
  - Some courts treat a Rule 12(f) motion to strike class allegations as a motion to deny class certification under Rule 23
- Affirmatively Moving for Denial of Class Certification Under Rule 23
  - Can rely on evidence outside the complaint, but no need to wait until end of discovery
  - Trial court has the discretion to decide when to rule on a certification or decertification motion and that there is no rule that the court must wait for the discovery period to end
- Hybrid Cases
  - Impact of *Swales v. KLLM Transport Services, Inc.*, 985 F.3d 430 (2021)
- Moving under State Law
  - E.g., NY CPLR § 902: 60-day limit to move for class certification

Recent Cases on Rule 23 Requirements – Arbitration and Numerosity

- Arbitration
  - *Monplaisir v. Integrated Tech Group, LLC*, 2021 WL 810259 (N.D. Cal. March 3, 2021): no numerosity because only 16 potential class members remained after arbitration agreement held to be enforceable
  - Boumaiz v. Charter Communications, LLC, 2021 WL 2189481 at *7 (C.D. Cal. May 19, 2021): lack of typicality because named plaintiff was not subject to arbitration agreement, so she lacked standing to assert defenses on behalf of putative class members bound by such agreements
- Numerosity in hybrid cases
  - *Anderson v. Weinert Enterprises, Inc.*, 986 F.3d 773 (7th Cir. 2021)
    - plaintiff must show "'that it is extremely difficult or inconvenient to join all the members of the class"
    - district court properly denied class certification because proposed class of 37 all worked in same facility and FLSA certification was a practicable means to accomplish joinder

Recent Cases on Rule 23 Requirements – Superiority, and Damages, and Importance of Trial Plan

- Superiority
  - *In re Citizens Bank, N.A.*, 15 F.4th 607 (3d Cir. 2021)
    - district court erred in sending FLSA collective claims to trial before deciding class certification
    - "One serious impediment to certifying a class after an FLSA trial is Rule 23(b)(3)'s requirement of superiority. How can a district court conclude that 'a class action is superior to other available methods for fairly and efficiently adjudicating the controversy' if an FLSA collective action trial has already decided the central question posed by the class action? As a practical matter, what work is left for the class action device to do?"
    - a "trial-before-certification" approach ignores Rule 23's mandate to decide certification "[a]t an early practicable time after a person sues"
    - trial-before-certification would expose employers to class-wide liability but deprive them of the full preclusive effect of the class action judgment
- Damages
  - *Trevino v. Golden State FC LLC*, 2021 WL 2328414 (E.D. Cal. 2021) (citing *Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods*, 993 F.3d 774 (9th Cir. 2021)
    - in wake of *Tyson Foods*, certain cases may allow for representative sampling or other forms of statistical evidence at the certification stage to establish commonality and predominance
    - but that's not enough: "[s]tatistical evidence is not a talisman. Courts must still rigorously analyze the use of such evidence to test its reliability" (*Olean*)
    - denied certification of bag check/security screening claims because declarations detailing plaintiffs' own individualized experiences with exit screening was not enough
  - *Solis v. American Airlines, Inc.*, 2022 WL 4359556 (C.D. Cal. Sept. 13, 2022)
    - denied certification of on 4,000 airline employees' off-the-clock class claims
    - "damages calculations are likely to be excessively difficult. With hundreds—or thousands—of class and subclass members and no proposed plan for determining damages, any trial will likely 'devolve into an endless series of mini-trials.'"
    - also denied certification of four proposed California law subclasses (asserting a separate overtime claim, a uniform cleaning cost claim, a sick leave claim, and a wage statement claim) largely based on manageability concerns, including those arising out of individualized damages determinations

Settlement Approval

- Rule 23(e)
  - Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval.
- *Evans v. Centurion Managed Care of Arizona LLC*, 2023 WL 5095201 (D. Ariz. Aug. 9, 2023)
  - "nothing in the text of the FLSA indicates that judicial approval of settlement agreements is required"
  - *But see* Eleventh Circuit and Second Circuit, which require judicial approval or supervision by the Department of Labor
- Other cases saying judicial approval not necessary
  - *Walker v. Marathon Petroleum Corp.* (W.D. Pa. July 28, 2023)
  - *Jackson v. Dovenmuehle Mortgage, Inc.* (E.D. Wis. June 30, 2023)

California Class Issues

What We're Seeing In California

- Why the explosion of PAGA cases has decreased the number of wage-hour class actions in California
  - Where did all the procedural requirements go?
- Class action jurisprudence has continued to develop
  - Meal periods
  - Regular rate
  - Rounding
- Continuing impact of Cal. Supreme Court's *Donohue* decision 2021
  - Attempt to use *Donohue's* "rebuttable presumption" of liability in other areas of wage-hour law.

California Class Issues

What We're Seeing In California

- Toolbox to address these novel arguments opposing certification
  - Emphasis on compliant policies and individualized issues
  - The substantive law of "providing" meal periods have not changed.
- Trial plan requirement still remains for plaintiffs.
- Decertification based on new facts after certification
- Using *Estrada's* manageability holding* to attack the viability of trying alleged PAGA claims on any representative basis.

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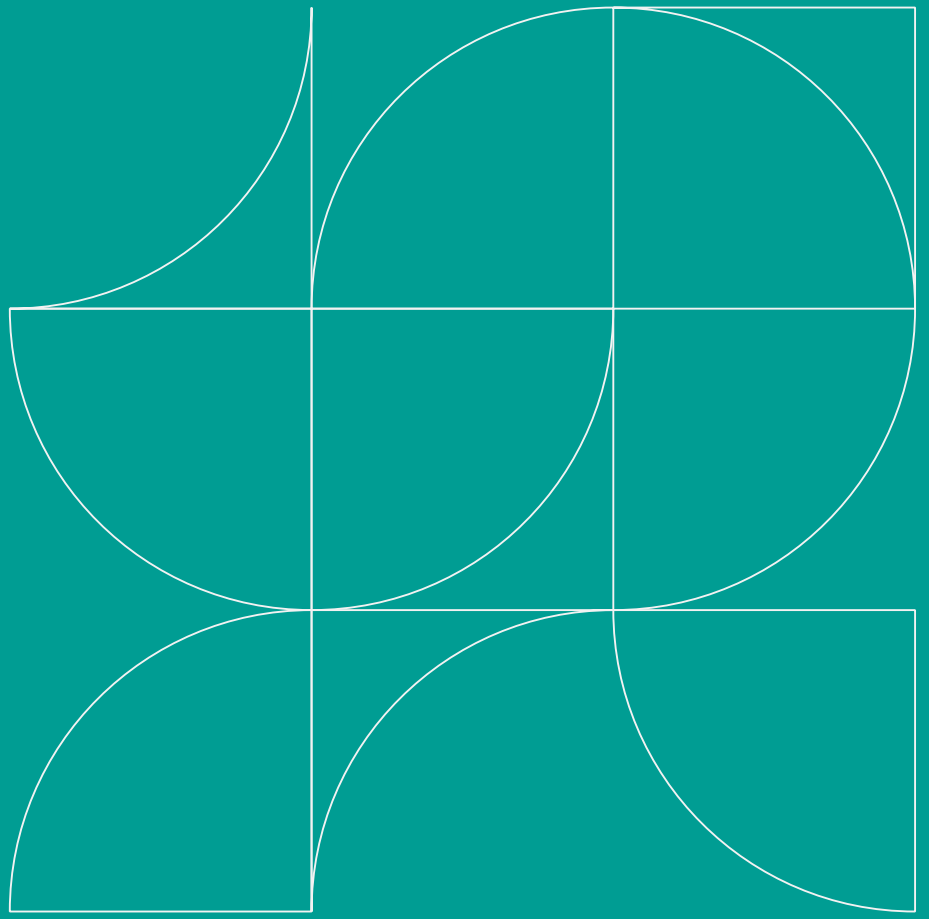



Upcoming Webinars

Webinar Series . . .

1 | Defeating or Limiting Plaintiffs' Motions to Distribute Collective Action Notice

2 | Winning the Battle over Class Action Certification and Collective Action Decertification

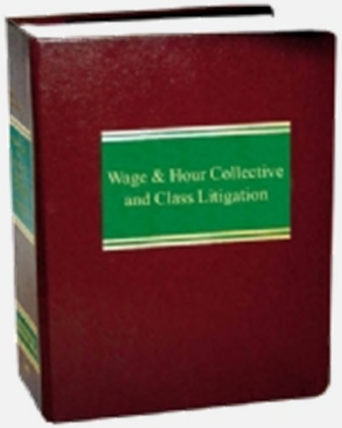
Still to Come in the Series:

3 | The Rise of Mandatory Arbitration Programs

4 | Developing and Defending Exempt Status Classifications

5 | The Shifting Concept of Employment

6 | What is "Work?"



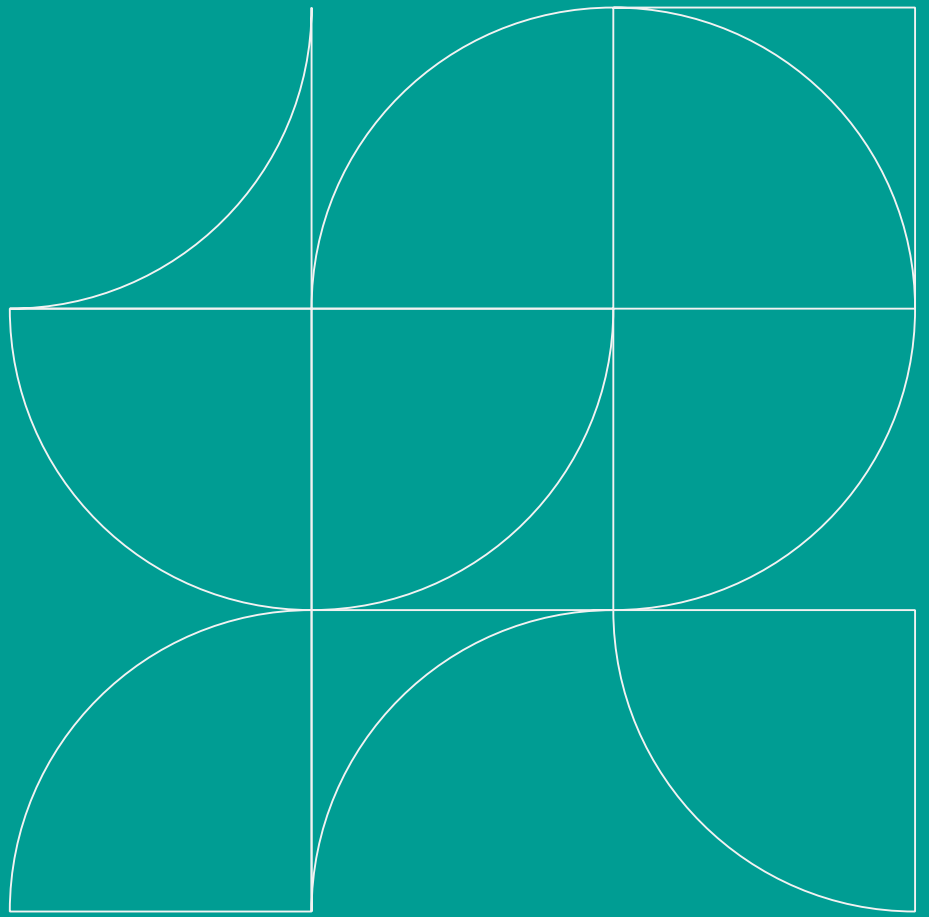
The Authoritative Wage
& Hour Litigation Treatise

If you don't already have a copy of the treatise, the book can be purchased here:

https://www.lawcatalog.com/wage-hour-collective-and-class-litigation.html

The order link will be provided in our webinar follow up materials, or please reach out to your favorite Seyfarth attorney to order a copy.

Questions?



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