CLASS ACTION EMPLOYMENT LITIGATION:
NEW RULES, NEW OBSTACLES, NEW STRATEGIES

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John V. Jansonius
Judy Bennett Garner
Jackson Walker LLP
2323 Ross Avenue, Suite 600
Dallas, Texas 75201
(214) 953-6000
jjansonius@jw.com
jgarner@jw.com

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As plaintiffs lawyers and defense lawyers, we all want big class action cases from time to time. There is money in numbers. The odds for identifying a viable class claim and pressing it through to certification have not been favorable in employment litigation for a very long time, however, and nowhere has that been more true than in Texas and the Fifth Circuit.

Low odds do not negate the purpose served by class actions, however, and employment lawyers continue to use Rule 23 to contest policies and practices that adversely affect a large number of applicants or employees in a common manner. This paper discusses developments in employment class action litigation over the past few years. We start with an overview of the various forms of class actions and the December 2018 amendments to the Federal Rules of Civil Procedure concerning class action litigation.

I. Five Non-Exclusive Categories Of Class Actions In Employment Cases.

Class or collective actions in the employment context are governed by Rule 23 of the Federal Rules of Civil Procedure or state counterparts to Rule 23 and in the wage-hour context by Section 16 of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 216(b). Combining Rule 16(b) class requests with Rule 23 state law class certification requests has become relatively common even the past 15 years.

A. Class Actions Under Rule 23 of the Federal Rules of Civil Procedure.

Rule 23(a) sets out the prerequisites to bringing a class action lawsuit in federal court. First is numerosity. The class must be so numerous that joinder of all members to the class is impractical. Classes have been certified with as few as 35-40 members, but generally there are hundreds or thousands of persons in a proposed class.

Second is commonality. The named plaintiff(s) and the putative class members' claims must share common questions of law or fact, which would yield common answers for all class members.

Third, the interests and injuries must be sufficiently similar among the class members.

Finally, there may be no conflicts among the proposed class. The named plaintiff(s) must have common interests with the putative members of the class and the named plaintiff(s) must diligently prosecute the interests of the class through qualified counsel.

The four requirements are frequently referred to as numerosity, commonality, typicality, and adequacy of representation, respectively. If the Rule 23(a) requirements are met, then the plaintiffs must show that the putative class action meets one of the prongs of Rule 23(b):

1. Rule 23(b)(1)—Limited Fund/Third Party Impact Cases.

Class actions filed pursuant to Rule 23(b)(1) are permissible if: (a) separate lawsuits would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (b) if tried

separately, the outcome of the lawsuits would be dispositive of the interests of the other putative class members who are not parties to the individual adjudications or would substantially impair or impede other putative class members' ability to protect their interests. Fed. R. Civ. P. 23(b)(1)(A)-(B). An example of a Rule 23(b)(1)(A) class action could be a riparian rights case in which the parties adjudicate a particular group's rights to a body of water. Class action lawsuits under Rule 23(b)(1)(B) have generally been limited to cases in which the defendant's available assets for payment of damages are severely limited to ensure that recovery by some plaintiffs does not prevent other plaintiffs from recovering at a later date. *See generally Ortiz v. Fiberboard Corp.*, 527 U.S. 815 (1999). Rule 23(b)(1) suits are uncommon in the employment context.

2. Rule 23(b)(2)—Injunction Cases.

Class action lawsuits are permissible under Rule 23(b)(2) if the party opposing the class has acted or refused to act on grounds generally applicable to the class, making final injunctive relief or declaratory relief appropriate for the class as a whole. Relief under this rule is limited to injunctive or equitable relief. Monetary relief may only be awarded if incidental to the requested injunctive or equitable relief.

Generally, plaintiffs file class action lawsuits pursuant to this rule to challenge an employer's policy or decision that affects all class members in a fairly similar manner. There is no "opt-out" requirement, as opposed to other Rule 23 class action litigation that allows plaintiffs who are not satisfied with the litigation to withdraw from the class. In Rule 23(b)(2) cases, all of the class members are bound by the determination and may not opt-out.

3. Rule 23(b)(3)—Damages.

Under Rule 23(b)(3), a party may bring an action if common questions of law or fact predominate, taking into account matters such as individual interests of the class members, any litigation concerning the controversy that is already pending by or against class members, the desirability or undesirability of concentrating litigation of the claims in the particular forum, and the likely difficulties in managing a class action. The class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy. Class actions under this rule account for most of the employment class action lawsuits.

B. Wage and Hour Collective and Class Actions.

1. Section 16 Collective Actions.

The FLSA permits collective actions for "similarly situated" employees. A collective action is similar to a class action, but there are notable differences. As an initial matter, instead of applying the Rule 23(a) requirements, the court must determine whether claims and circumstances of the putative class members are "similar" or not. "Similarly situated" is the guiding standard under Section 16(B), not numerosity, commonality, or typicality, as under Rule 23.

Further, a collective action is an "opt-in" process (as opposed to an "opt-out" process), so members of a collective action class must affirmatively opt into the litigation. Section 16 requires

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