Breakout Sessions – Series 2

CREATING YOUR CLASS ACTION
“DEFENSE IN A BOX”

STRATEGIC CONSIDERATIONS

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Most employment litigation does not get a lot of attention from the C-Suite. But class action litigation is different. Even the smallest class actions impose a degree of exposure several times higher than the typical single plaintiff case, and the largest class actions can be “bet the company” type cases, where the company’s very business model and tens or hundreds of millions of dollars are at stake.

While it is likely impossible to completely inoculate your company from all class action risk, we posit that employers should stop focusing their compliance efforts (and dollars) on trying to achieve perfection and then, after a lawsuit hits, finding themselves surprised and scrambling to develop evidence to support a defense. Instead, employers may want to assume a lawsuit is coming and then prioritize their compliance resources on those tasks that will make it impossible for that action to proceed on a class or collective basis. In other words, the goal should not be perfection – the goal should be elimination of the largest pockets of risk by developing the evidence you need to challenge class certification years before you need to do so.

Toward that end, we have several goals in mind:

1) We want you to have evidence that makes class or collective treatment impossible. Our primary goal is to ensure that you are constantly developing evidence to prove that – even if an individual plaintiff has a legitimate claim – a judge cannot allow that plaintiff’s experience to be extrapolated to a larger group. We work with you to ensure that you have raw data and physical exhibits sufficient to prove that deviations from your lawful policies are outlier situations.

2) We want you to never again have to scramble for evidence. By the time you receive a demand letter, it’s often too late. Years have passed. Documents are lost. Memories have faded. Key witnesses are unavailable. Putative class members are already thinking about the money they may recover if they join the lawsuit. Our goal is to ensure that you have your evidence gathered and stored in your litigation “box” years before you need it. Further, we want you to be able to locate the information without digging through thousands of individual employee files.

3) We want to make you an unattractive target. Odds are good that your employee policies, handbooks, and training documents are being drafted for the wrong audience. Sure, it’s important that your employees are advised of their rights and obligations. But if we know your documentation is going to eventually find its way into the hands of a plaintiff’s attorney, isn’t it just as important to draft with that audience in mind? You need seasoned litigators helping you prepare documents that act like shark-repellant. We want your documentation to scream out that you have anticipated class certification issues and any plaintiffs’ attorneys should spend their resources pursuing easier targets.

4) We want to maximize your leverage. We want you to be in a position where, the minute a class action hits your desk, you can – if you choose to do so – slam a box full of evidence in front of the plaintiff’s attorneys and tell them they are in for a fight. We mean this literally.

5) We want to reduce the cost and burden of litigation. Most of the expense and administrative burden of class action litigation arises because we are trying to either prove a negative (e.g., “we did not tell you to work off the clock!”) or we are trying to develop evidence that is almost impossible to obtain after-the-fact (e.g., proof that an employee voluntarily skipped his meal breaks three years ago). Our goal is to ensure
you document that evidence before you need it – and are able to locate it when it's needed. A proactive approach is much more efficient than conducting a massive witness interview project or representative survey after you are already involved in litigation.

Examples of a Defense in a Box Strategy

1) Attestation/Acknowledgment Forms

Don’t you love that feeling at deposition when you show a witness a document he signed that contradicts his claims? Now imagine you have an identical killer exhibit with respect to each of the thousands of employees at issue in a putative class action. And, better yet, imagine the pleasure of slamming those documents down during a motion for class certification. We can turn this scenario into a reality through the strategic and regular use of attestation forms.

Attestation forms (in which employees memorialize their understanding or conduct) are one of the most powerful and least expensive tools for managing employment litigation. However, they also are one of the least effectively utilized. Attestation forms are typically used by employers to acknowledge receipt of employee handbooks and recognition of status as at-will employees. But this is their least valuable use. Consider, for example, a class action lawsuit in which two plaintiffs allege that a supervisor consistently prohibited employees from taking meal breaks.

The supervisor has passed away, and the employer has no evidence to demonstrate that any employees actually took any those breaks. This is not a positive situation. At best, the employer will have to engage in an expensive and time-consuming effort to interview and gather declarations from putative class members in the hope of developing evidence that may rebut plaintiffs' allegations. But there is no guarantee that such evidence can be obtained or, even if it is obtained, that such evidence will be admissible or persuasive.

Imagine the same situation, but this time you pull out your defense box containing documents signed by every hourly employee on a quarterly basis confirming that the employee: (1) received training about how and when to take meal breaks; (2) read and understands the company policy requiring employees to take their meal breaks; (3) actually took all of his or her meal breaks; (4) understands that the company is relying on the accuracy and honesty of the information contained in the attestation; (5) is aware of the company's process for reporting meal break violations; and (6) did not report any meal break violations to any managerial employee.

The use of attestation forms can often be automated through e-signatures, electronic time clocks, email acknowledgments and various other tools.

2) Reporting/Response Protocols

From a judge’s perspective, there is nothing worse than an employer that does not care enough to give employees a clear mechanism for reporting complaints to someone other than their direct supervisors. Therefore, as a bare minimum, employers should develop, implement, and publicize to employees formal complaint reporting protocols. These protocols can come in varying levels of sophistication and formality.

On one end of the spectrum, employers can simply distribute a policy that encourages employees to voice their concerns and provides guidance regarding how and to whom complaints should be raised. On the other end of the spectrum, employers can develop or
outsource a formal complaint hotline and monitoring system that provides statistical analyses of any concerning trends. But regardless of the system used, the ultimate goal should be to establish evidence that you individually resolve complaints rather than treating all complaints in an identical fashion. This individualized process does not need to be time-consuming or expensive. It merely needs to be documented so you can use it to help avoid common class certification arguments.

3) Training

Training becomes wasteful and counter-productive when it is rolled out in a scattershot manner intended to give an overview of all of your policies and procedures. This is a mistake. Training should be short and to the point – and focused on the areas of greatest litigation risk. Further, it is critically important that you create a record not only of the fact that employees received training, but also that they understood the training and agree to comply with it and report violations. Obtaining evidence that employees understood your policies is critical to developing a successful defense to class certification. If there is proof that an employee understood your rules, it becomes close to impossible for him to obtain class certification.

Consider, for example, a plaintiff who claims that she was forced to perform off-the-clock work. During her deposition, plaintiff admits that when she was first employed she sat through a four-hour training session, of which just three minutes were devoted to the company’s “accurate time reporting” policy. Despite this, plaintiff alleges that her manager constantly directs her to complete paperwork at home without pay. Plaintiff states that the employer’s timekeeping policy is often ignored without consequence, while disregard of the manager's directive will lead to her immediate termination. Plaintiff also states that she feared retaliation if she reported her manager’s behavior.

The above situation presents a difficult case for the employer. However, let’s reimagine this.

Consider the same deposition, but this time plaintiff admits that every three months she receives an email reminding her that hourly employees are prohibited from performing off-the-clock work (including work at home) and that anyone who is asked to perform off-the-clock work is required to report such behavior to HR. She admits that the emails explained that she would not be retaliated against for reporting off-the-clock work, and she admits that she has never raised any complaints. Finally, you confront plaintiff with a stack of emails in which she electronically confirmed receipt and understanding of all of the emailed reminders she received regarding prohibition of off-the-clock work. This is a situation where plaintiff's counsel is likely to abandon the lawsuit and look for an easier target.

Unfortunately, for most employers, this type of fact pattern is the exception rather than the rule. We want to change that. We work with our clients to create training opportunities that are focused not just on content, but also about developing a paper trail to defeat class certification.

Also, keep in mind that training does not have to be formal, time-consuming, or expensive. Training can be provided online, through written materials, videos, automated email response systems, or even through workplace postings. Training can be done in-house, outsourced, or conducted through a combination of both.
4) Evidence Retrieval

In class action litigation, the plaintiff’s best settlement leverage is often the perceived cost for the employer to defend the lawsuit. The Defense in a Box approach seeks to remove this leverage by ensuring that your defense is already pre-packaged and ready for use. By having your evidence ready-to-go and stored in a dedicated file, you can virtually eliminate the wasteful process of recreating evidence relating to thousands of employees with respect to events that took place years in the past.

We recommend segregating your Defense in a Box evidence from other files. Why spend weeks searching through individual, off-site personnel files for documents that can be stored at no cost in a dedicated file?
Creating Your Class Action “Defense in a Box”: Strategic Considerations

Presenters
A. Craig Cleland (Atlanta) and Elizabeth A. Falcone (Portland (OR))

Moderator
J. Howard Daniel (Greenville)

The Best Defense—Good Offense

- Identify areas of exposure
- Conduct targeted audits
- Catalog relevant data
- Create good “evidence”
- Augment training
- Give complaint channels a “check up”
Areas of Greatest Exposure

- Wage and hour claims
  - Large, dense non-exempt populations
    - Preliminary and post-liminary tasks
    - Working over unpaid breaks
    - Remote work
  - Exemption issues
    - Front line supervisors
    - Low level “administratively” exempt workers

- California
  - Meal and rest
  - Misclassification
  - Independent contractors (*Dynamex*)

- Less exposure, still a hassle
  - Expense reimbursement
  - Reporting time pay
Areas of Greatest Exposure

- Pay equity issues
- Independent contractor misclassification
- Targeted online job advertising
- Promotion/hiring issues

Targeted Auditing

- Privilege issues
- Timekeeping practices
  - Structural vulnerabilities?
  - Compare work time to reported time
- Classification review
  - Quality of job descriptions
  - Supervisor authority?
  - “Analyst” discretion?
Targeted Auditing

- Hiring practices
  - Posting?
  - Interview materials maintained?
- Usage of independent contractors
  - Functions
  - Durations
  - Types of contractors (individuals or companies?)

Catalog the Data

- The data will set you free
- IT is your new best friend
- Identify and assess retention of key data streams
  - Email and messaging
  - Voicemail
  - Proxy work time stamps
Catalog the Data

- Identify and assess retention of key data streams
  - Proxy work time stamps
    - Security badge access swipes
    - VPN logs
    - System access logs (AD/network authentication)
    - Work station event logs
    - Simultaneously-created records (e.g., patient data)

- Hiring/promotion decisions
  - Advertising for open positions
  - Applicant flow materials
  - Interviewer notes
Implement Shield Policies

- Stand-alone, pay-for-all-work policy
  - Signed by employee upon hire
  - Signed by supervisor upon promotion
  - Easily retrievable

- Employee attestations
  - Regular signed statements from non-exempts that they have been paid for all time
  - California working supervisors: > 50% time spent on management
  - Easily retrievable

Implement Shield Policies

- Starting salary discipline
  - Huge factor in pay equity cases
  - Establish and enforce uniform starting salary requirements
    - Well-documented exception process

- Job posting
Implement Shield Policies

- Independent Contractor Usage
  - Impose time limits or required gaps in service
  - Eliminate use of individual (non-corporate) contractors
  - California: Never in the core business


- Manager and supervisor training on preventing off-the-clock work
- Pre-interview training for hiring managers
  - Appropriate hiring/promotion factors
  - Smart documentation
Complaint Procedure Checkup

- Assess for ease of use?
- Complaints documented?
- Is each investigated? Quality of investigation?
- Presumption of privilege?
- Are documents maintained?

Class and Collective Action Waivers

- Arbitration agreement or stand alone?
- Benefits
- Disadvantages
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