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Promoting worker protection through the class-action device

IDENTIFYING WHAT MAKES A SUITABLE CLASS CASE; WAGE THEFT AND NON-WAGE-AND-HOUR CASES

A quick case-law search will bring up dozens of cases citing the repeated holding of the California Supreme Court that this State has a public policy encouraging the use of the class-action device. But the plaintiffs' bar is repeatedly told by defense counsel and mediators that we will never get our specific case certified. Where is the disconnect? The answer boils down to case selection. When trying to decide if your case should be pursued as a class action or wondering whether to refer out a case, the key is identifying what makes a suitable class case from the get-go.

Components of a class case

Let's start with the basics. All class-certification motions must demonstrate that the requested class meets certain well-worn standards – numerosity, ascertainability, community, and manageability.

Numerosity is a short-hand way of saying "impracticality of joinder." Courts are to consider judicial economy by avoiding multiple individual actions through class cases. There is no set number. (*Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1030 [certification involving as few as 28 class members may be appropriate]; *Henderson v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1222-23 [suggesting that a class of nine may make joinder impracticable and constitute a sufficiently numerous class].) At intake, try to get a sense of how many employees worked in the same or similar position and whether there are multiple locations that may be separately incorporated, but can be tied together as an integrated or single employer.

Ascertainability is determined by the "class definition, the size of the class and the means of identifying class members." (*Reyes v. Bd. Of Supervisors* (1987) 196 Cal.App.3d 1263, 1274.) Unlike many consumer class actions, employers have record-keeping requirements, which simplifies the identification of potential class members. A word of caution: Defining a class too broadly has pitfalls that can cause a court to find common issues do not predominate or that trying the case will be unmanageable.

Commonality of interest includes three subparts: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. This is where the rubber hits the road in most class certification proceedings. As we review what makes a suitable class case below, keep these concepts in mind:

Predominant common questions

The focus here is on the theory of recovery and whether it is likely to prove amenable to class treatment. (See *Jaimez v. DAIOHS, Inc.* (2010) 181 Cal.App.4th 1286, 1298.) The plaintiff must propose a theory of recovery based, for example, on a uniform policy that measured against the law is a common question that is "eminently suited for class treatment." (*Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1033.) It is not necessary that the class members' claims or circumstances be identical. (*L.A. Fire & Police Protective League v. Los Angeles* (1972) 23 Cal.App.3d 67, 74.)

Typicality

A plaintiff's claim is "typical" if it arises from the same event, practice, or course of conduct that gives rise to the claims of the other class members, and their claims are based on the same legal theory. (*Classen v. Weller* (1983) 145 Cal.App.3d 27, 47.) The named plaintiffs need to be class members.

Adequacy

There are two requirements for the adequacy of representation requirement to be satisfied. First, "[a]dequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation." (*McGhee v. Bank of Am.* (1976) 60 Cal.App.3d 442, 450.) Second, the adequacy of representation depends on whether the "plaintiff's interests are…antagonistic to the interests of the class." (*Ibid.*) No California case has held that a representative plaintiff cannot have other claims against the employer, for example, a wrongful termination claim.

Manageability is also a frequent battleground in class cases. Plaintiffs need to demonstrate to the court that adjudicating the case as a class action is the superior method for an efficient adjudication of the claims. Superiority is "manifest in the determination that a class action…would produce substantial benefits to the litigants and the judicial system." (*Schneider v. Vennard* (1986) 183 Cal.App.3d 1340, 1347.) Trial courts are "accorded the flexibility to adopt innovative procedures" to manage class actions. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 440.) Picture how you plan to try the case.

Wage theft – Issue spotting

Worker wage-theft actions dominate the employee class-action field. This is no surprise when viewed through the lens of the Economic Policy Institute's 2021 report finding that more than $3 billion in wages have been recovered for workers between 2017 and 2020. A prior report by the Little Hoover Commission in 2015, found that the consequences for Labor

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Code violations did not incentivize voluntary compliance: The rewards of breaking the law outweigh the risk, it concluded.

At intake for any worker, here are areas to probe to see if potential class claims exist:

Misclassification – Independent contractor: Look for common evidence an independent contractor was misclassified either under the Dynamex/AB5 "ABC" test or the *Borello* test – depending on the industry.

- How much control did the hirer exercise over the worker in performing their work?
- Did the worker perform work that was outside the usual business of the hirer?
- Was the worker engaged in a customarily independent, established trade?
- How much skill was required?
- Who supplied the tools needed to perform the work?
- How was the worker paid, by the job or hour?

Misclassification – Exempt (Salaried): Look for common evidence the position should have been classified as an hourly, non-exempt position.

- There are three key exemptions: executive, administrative, and professional. Ask the employee if they know what the basis is for paying them on salary.
- Walk the employee through what work was performed in a typical day and how much time was spent on usual daily tasks. The goal is to determine whether the employee performed non-exempt work more than 51% of the time.
- Probe for the level of decision-making discretion, how much autonomy was given to make important business decisions. For example, the authority to hire or fire.
- For employees falling under the executive exemption, get to know how many employees they supervised, how much control they exercised over those employees, what tasks they performed in that supervision.
- For employees falling under the administrative exemption, probe what tasks they performed to help operate the business.
- For employees falling under the professional exemption, see if they are licensed, for example, to practice law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting.

Meal breaks (Non-exempt employees): Look for common evidence the employer knowingly failed to provide a bona fide meal break.

- Is there a written policy? Does it provide for a thirty-minute break for each five hours worked occurring before the end of the fifth hour?
- Is the employee required to remain on the premises?
- Is the employee required to respond to work communications during the break?
- Probe what prevented the worker from being able to take compliant breaks. Did the employer do anything to discourage or impede taking a compliant meal break? What class of employees did this affect?

Rest breaks (Non-exempt employees): Look for common evidence the employer knowingly failed to authorize or permit a bona fide rest break.

- Is there a written policy? Does it allow for a 10-minute rest break every four hours or *major fraction thereof*? (This specific language is important.)
- Are they able to take the rest break in the middle of that four-hour period? If not, what impedes taking it then?
- Does the employer require combining meal breaks with rest breaks?
- For employees working on a piece rate or commission basis, are they paid separately for this 10-minute period?
- Probe what prevented the worker from being able to take compliant breaks. Did the employer do anything to discourage or impede taking a compliant rest break? What class of employees did this affect?

Off the clock (Non-exempt employees): Look for common evidence the employer knew employees were performing unpaid work.

- Are the employer time records accurate? For example, have they been manipulated or rounded?
- Is the employee performing tasks before or after clocking in or out of work? Is there common evidence the employer is aware of that work?
- For employees working on a piece rate or commission basis, are they separately paid for what is referred to as "non-productive" time? For example, for truck drivers paid per mile that could be pre-trip inspections, waiting time at ports or customer locations.
- Was the employee required to be "on call" for a shift, violating reporting time regulations?

Tips (Non-exempt employees): Look for common evidence the employer violated regulations covering how gratuities are collected and distributed.

- Did the worker have a clear understanding of how tips were collected and distributed?
- If there is a tip pool, are any managers or workers not in the line of service included?
- For tip pools, did the servers retain 85% or more of the tips?
- When the employer calculated the tip pool, was it based on actual tips collected or a percentage of gross sales?
- Was the minimum wage paid in addition to tips?

Expenses (All employees): Look for common evidence the employer shifted the cost of doing business to the worker.

- Was it necessary for employees to use cell phones at work? If so, how where they reimbursed?
- During the pandemic, if an employee was required to work from home, did the employer reimburse for the cost of internet, electricity? Did the employer provide a computer, if needed to complete work?
- If an employee was required to do any driving beyond a normal work commute, were they reimbursed for mileage?
- What items did the employee pay out of pocket to perform their work?

Equal Pay Act (All employees): Look for common evidence the employer pays employees less because of their gender, race or ethnicity.

- Is the worker aware of disparities in pay between workers of different genders, race or ethnicity?

- If so, could the disparity be properly justified by a difference in education, experience, or training?
- Was the work performed substantially similar to the work performed by their counterparts with regard to the skill, effort, and responsibility required when performed under similar circumstances?
- Are job positions divided into categories, sections, or assigned specific identifying codes?
- If so, are job positions categorized by the skill, effort, and responsibility required to perform the job position?
- How and by whom are pay scales, bonus, and stock shares for each job position set?

Wage theft – Problem spotting

The two most common hurdles to class certification are commonality and manageability. A great case theory can fall apart if the class is defined too broadly or the court is not presented with a workable trial plan. Here are some examples:

Carefully defining classes to highlight commonality

In *Castillo v. Bank of America* (9th Cir. 2020) 960 F.3d 1172, the denial of class certification was upheld. There the question was the proper method of calculating overtime wages for a proposed class of call-center employees who were entitled to a flat-sum nondiscretionary bonus each month. The issue turned on two separate pay policies over two separate time periods that raised separate questions of liability. While there may have been common questions, the class was defined too broadly to include employees who were not subject to the potentially unlawful policy by including employees who did not work overtime, who did not earn a bonus and who were not subjected to the policy at issue.

Wilson v. The La Jolla Group (2021) 61 Cal.App.5th 897, is another appeal from a denial of class certification. In *Wilson*, the proposed class of signature gatherers were classified as independent contractors. The case centered on the ABC test – specifically whether the workers performed the work the business existed to perform. The Court of Appeal agreed that because the company did not tell the workers how long to work, there was no commonality on misclassification. Claims for overtime pay and break violations are dependent on the number of hours worked and there was no class-wide proof of hours worked.

Presenting a workable trial plan

In *Salazar v. See's Candy Shops* (2021) 64 Cal.App.5th 85, a denial of class certification was upheld. There the case theory seemed solid: While a written policy provided for second meal breaks (after the tenth hour of work), a preprinted form used to schedule employees did not include space for the second break. However, time records showed 24% of shifts over 10 hours recorded a second meal break and the court – rightly or wrongly – concluded some class members were offered a second break. The conclusion reached by the court was that the high percentage of no recorded breaks did not mean the employer had a consistent practice of denying breaks. The trial plan failed to offer a manageable method to try the case.

Equal Pay Act – Establishing commonality

Recent litigation in Northern California against behemoth technology companies are paving the way for Equal Pay Act ("EPA") class actions. The California EPA, Labor Code section 1197.5, makes it unlawful for an employer to pay employees of a particular sex, race or ethnicity less "for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions," unless the disparity can be justified by seniority, merit, quality/quantity of work output, or another bona fide non-sex, race or ethnicity-based factor such as education, training, or experience.

Ellis v. Google, LLC, San Francisco County Superior Court Case No. CGC-17-561299 and *Jewett v. Oracle Corp.,* San Mateo Superior Court, Case No. 17CIV0266 were both successful surmounting the hurdle of establishing commonality. The following factual showings were particularly compelling to the courts in certifying each class:

- Both Google and Oracle categorized their employees and assigned them specific "job codes." The *Ellis* and *Jewett* plaintiffs used evidence to demonstrate that employees assigned the same job code did substantially similar work. Now, the law does not require that female-identifying and male-identifying employees do exactly the same thing. It is ultimately a question of fact as to whether the employees performed "substantially similar work" in the context of the skill, effort, and responsibility required under similar working conditions.
- Within those job codes, the *Ellis* and *Jewett* plaintiffs used statistical analysis of data provided by the employer to show that female-identifying employees were paid less than the male-identifying employees with the same job code. It is important that this difference was supported by evidence across similarly situated workers. Remember, it is not a question of whether each employee suffered the same amount of harm, but rather a question of whether all female-identifying employees were uniformly paid less than their male-identifying coworkers, or vice versa.
- Finally, a showing that the employer has a standardized system for setting pay rates, awarding bonuses, and issuing other forms of compensation further supports a finding of commonality because disparities in pay cannot be boiled down to exercises of individual discretion among a litany of decisionmakers. The centralized system shows that it was the regular policy and practice to pay female-identifying workers less than their male-identifying colleagues.

In summary, the California EPA claims may be suitable for class treatment if a pay gap exists among a specific group of employees who hold the same job position and who do the same or substantially similar work.

Non-wage-and-hour class actions

Class actions do not arise only in the

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wage-and-hour context. There has been a rise in non-wage-and-hour class actions as seen in the recent *Riot Games*, *Activision*, and (potential) *Tesla* actions. California courts have long expressed approval for use of the class-action mechanism in employment-discrimination suits arising under the California Fair Employment and Housing Act ("FEHA"). As the Court of Appeal stated in 1987, "Employment discrimination, by its very nature, is often class discrimination and therefore well suited for a class action." (*Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 418.) The main hurdle in certifying these classes, however, is establishing commonality. Engaging a statistician early on to help guide discovery in this type of case is recommended.

Similarly with wage-theft actions, commonality in an FEHA discrimination class can be shown by identifying a specific policy or practice that is uniformly applied to all aggrieved employees. The difference here, is that instead of job classifications, practitioners will be trying to identify a group of people who identify with the same protected category under FEHA, e.g., race, national origin, religion, sex, gender, sexual orientation, military status, etc.

For example, in 2014, the Ninth Circuit reversed the denial of certification of a class of police officers who claimed that policy pertaining to promotions uniformly disqualified them from investigative positions on the basis of their age (over forty). (*Stockwell v. City & Cty. of San Francisco* (9th Cir. 2014) 749 F.3d 1107, 1110-1111.) The Ninth Circuit specifically found that the claims of the police officers "rise and fall together" because they hinge on a single specific employment practice that could be shown to result in discriminatory disparate impact against a protected group. (*Id.* at 1115-1116.)

Here are areas to probe:

- Especially for large corporate entities with various locations, it will be important for an advocate to determine whether individual stores or managers have the ability to exercise discretion in the implementation of a company policy or practices. As discretion on the ground rises, commonality may tend to decrease. On the other hand, if a corporation is top heavy, in that its corporate headquarters decides policies from the top down with very little room for deviation, it may be easier to show commonality. To illustrate, the Court of Appeal in *Stephens* found that commonality existed among a class of women who were excluded from certain managerial and upper management positions because the plaintiff showed that the defendant's corporate structure and centralized control resulted in a uniform implementation of hiring and personnel decisions throughout the company that did not differ based on store location. (*Stephens*, *supra,* 193 Cal.App.3d at 421.)
- In disability cases, most employers will have some type of reasonable accommodation policy that facially states that accommodations will be permitted. However, if an employer has a blanket policy of never allowing or significantly impeding accommodations, a class of all those individuals affected may be ripe for class certification.
- In the harassment context, a showing of commonality would require that an employer subjected all of its employees of a single protected category to conduct that was offensive, oppressive, intimidating, hostile, or abusive to the entire class and outside the scope of personnel decisions (because then that would fall into the discrimination bucket). Look for common policies or procedures that have allowed a company culture of harassment to continue unabated.
- Practitioners may also consider attempting to certify FEHA retaliation and failure-to-prevent classes, which may also derive from top-down, uniform policies that result in systemic failures against employees who attempt to complain about discriminatory or harassing conduct and are – as part of regular policy and practice – disciplined or harmed for doing so.

In summary, in an FEHA class, commonality can be shown by demonstrating that the defendant employer has a policy or practice, which it uniformly implements without discretion from individual managers or officers. Case law demonstrates that supporting declarations and critically statistical analysis illustrating the alleged disparate impact or treatment can bolster the commonality argument. Similarly with wage and hour classes, the question is not one of damages or merits. The issue is simply whether the employer engages in a policy or practice that has discriminatory results.

Postscript

Careful case selection and early trial planning can smooth the path to certification in class cases. The class-action device is an important tool in our arsenal to hold employers accountable. We typically look to form classes out of wage-theft cases because the damages are lower than in FEHA cases where the individual damages typically range from six to seven figures. But many workers fear retaliation and do not challenge their employer's unlawful practices. Analyzing whether your potential client's case can and should be brought on a class-wide basis should keep these concepts in mind.

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