CLIENT ALERT

What Should Large Employers Do Now? Implications of *Dukes v. Wal-Mart*

Apr.29.2010

Earlier this week, the Ninth Circuit issued its long-anticipated *en banc* opinion in *Dukes v. Wal-Mart*. *Dukes v. Wal-Mart Stores, Inc.*, __ F.3d. __, 2010 WL 1644259 (9th Cir. April 26, 2010). The six-judge majority affirmed the trial court's decision to certify a nationwide Title VII class action against Wal-Mart Stores, Inc. Beyond the simply breathtaking result and practical implications of the decision in the *Dukes* case -- approval of a class action involving up to 1.5 million current and former employees -- the opinion provides another wake-up call to all large employers regarding the risks they face in 2010 and beyond as they administer pay, promotion, and performance management systems that will be characterized by plaintiffs as involving subjectivity and discretion. *Dukes*, following on the heels of the Lilly Ledbetter Fair Pay Act in January 2009 and renewed attention at the federal level to the Paycheck Fairness Act, underscores the importance of conducting privileged, real-time analyses of employment decisions involving pay increases, performance ratings, bonuses, stock awards, promotions, and other rewards that involve some degree of subjectivity.

Suing on behalf of all women employed by Wal-Mart after December 26, 1998, the *Dukes* plaintiffs alleged that women at Wal-Mart are paid less and receive fewer promotions than their male counterparts. This occurs, they claimed, as a result of a company structure and culture that "fosters or facilitates gender stereotyping and discrimination." *Id.* at *1. Upholding the lower court's grant of class certification, the Ninth Circuit relied heavily on the evidence of "subjective" and "discretionary" payment and promotion decisions. *Id.* at *18, 22-26, 30-32.

Notwithstanding the argument that subjective and discretionary decision-making, likely yielding uneven practices from manager to manager, would be particularly *ill-suited* to support the use of a class mechanism to litigate the case, the Ninth Circuit upheld a finding of commonality where the evidence tended to show a companywide *policy* of subjective decision making. *Id.* at *23; *cf. id.* at *30-31 (explaining that "managerial discretion was but one of *several* factors that supported a finding of commonality"). As the majority saw it, "subjective decision-making is a ready mechanism for discrimination" because it can serve as a conduit for management bias. *Id.* at *30 (internal quotation marks and alteration omitted). The Ninth Circuit instructed lower courts to "scrutinize [] carefully" payment and promotion policies that rely on subjective impressions and management discretion. *Id.*

Employers across the nation, and large employers in particular, should not view the Ninth Circuit's decision as an outlier or a development that merits no response in terms of employment practices and class action readiness. While there are no silver bullets to insulate employers from claims of the type asserted in *Dukes*, employers -- and large employers in particular -- are not without mechanisms to reduce their exposure to such claims. First and foremost, employers should regularly seek legal advice regarding their vulnerability to claims of systemic discrimination in pay, performance management systems, and promotions -- key employment decisions that regularly involve some level of subjectivity. To provide such legal advice, counsel should commission analyses by labor economists of employees' base pay and real-time analyses of preliminary ratings and rewards, all subject to the attorney-client privilege and all using the same analytical techniques that would be used in class action litigation. By employing regression analyses that account for the factors that impact decisions regarding pay, promotions, bonuses, stock grants and other company-sponsored rewards, counsel will be able to identify -- and the Company, in turn, will be able to assess

and address -- areas of vulnerability. Such analyses should be employed to assess differences in rewards as between men and women and as between the various racial subcategories.

For employers already facing putative class actions, the *Dukes* opinion also offers guidance on (1) the trial court's duty to consider certification issues that overlap the merits; (2) the role of expert testimony at the certification stage; and (3) the rules regarding class actions brought under Rule 23(b)(2). The strong dissent, joined by five judges, noted that "[n]o court has ever certified a class like this one, until now." *Id.* at *44 (Ikuta, J., dissenting)

For more information about the *Dukes* case or about how Crowell & Moring can assist you with privileged analyses of your performance management, compensation and promotion systems, all with an eye toward providing legal advice in light of *Dukes* and other class action threats, please contact one of the attorneys listed to the left or your regular Crowell & Moring contact.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Kris D. Meade
Partner – Washington, D.C.
Phone: +1 202.624.2854
Email: kmeade@crowell.com

Thomas P. Gies
Partner – Washington, D.C.
Phone: +1 202.624.2690
Email: tgies@crowell.com

Rebecca L. Springer
Partner – Washington, D.C.
Phone: +1 202.624.2569
Email: rspringer@crowell.com