Published on *The National Law Review* https://natlawreview.com

Employment Litigation post-COVID-19 & Other Class Action Developments

Article By:

Stephanie L. Adler-Paindiris

David R. Golder

Eric R. Magnus

The COVID-19 pandemic has affected virtually every aspect of our lives. How will the pandemic change employment litigation and jury trials?

COVID-19 has changed the way attorneys work, particularly litigators. As a practical matter, depositions, oral arguments, witness interviews, and settlement negotiations must take place by phone or videoconferencing, altering the dynamics of the interaction, hindering the ability to assess witness credibility, and requiring the use of other subtle tools of persuasion and communication.

As for trials, it is uncertain when they will resume; the answer will vary by region and with the ebbs and flows of the pandemic. What will those trials look like?

With an eye to reopening, the U.S. courts' COVID-19 Judicial Task Force on June 4, 2020, issued guidance on conducting jury trials and convening grand juries during the pandemic. The guidance notes that each tribunal will set its own rules for jury trials based on location, budget, and courtroom facilities. However, the task force offered recommendations applicable to all courts regarding ensuring jurors of their safety; the use of PPE in the courtroom; the possible use of virtual *voir dire,* with prospective jurors participating from home; the use of apps to conduct sidebars, and other means of limiting physical contact between litigants; and courtroom modifications to maximize social distancing.

Practical considerations aside, the pandemic will have a significant *substantive* impact on jury trials — as it will have a profound effect on jurors.

> *"There will not be a single juror who was unaffected by*
>
> *this pandemic..."* —*Stephanie Adler-Paindiris*

Co-Leader of the Jackson Lewis Class Actions and Complex Litigation Practice Group. The critical question for litigants: “Will jurors be sympathetic to employers that are struggling to stay afloat to employ people, or will they be viewed harshly and in an untrusting light?”

What factors may have shaped (or will reveal) jurors’ perceptions of the claims and the parties?

- Whether they reside in an area hard-hit by the pandemic, or a region that suffered comparably minimal impact Whether they contracted COVID-19
- Whether a loved one fell ill or died from the disease Whether they or a family member were furloughed or laid off
- Whether they were eager or reluctant to return to work Whether they were front-line essential workers or safely working from home
- Whether their employer was shut down; and if so, whether due to the economic downturn or a government mandate
- Whether their own employer adopted ample safety measures and provided paid leave to affected employees Whether they wore masks and followed social distancing protocol or believed the COVID-19 panic was overblown.

Counsel for both parties will query the jury pool to glean how potential jurors’ personal experience of the pandemic may form their impressions of the case before them.

Other class action developments

Important developments in class litigation since our last issue:

Putative class members are nonparties. Addressing a significant procedural issue, a divided federal appeals court panel held that a district court cannot dismiss putative class members in a not-yet-certified class action because, absent class certification, those individuals are not parties before the court. Denying a grocer’s motion to narrow the putative class in a lost wages suit, the court noted that unnamed class members are treated as nonparties for other purposes in litigation. Furthermore, the U.S. Supreme Court has held in *Smith v. Bayer Corp.* that putative class members “are always treated as nonparties.” Thus, the employer’s motion was premature.

Court won’t enjoin 10,000 individual arbitrations. A federal district court held that an app-based delivery service was unlikely to succeed on the merits of its argument that a court should enjoin the arbitration demands in a misclassification claim brought by a single law firm on behalf of 10,356 couriers because they constitute a *de facto* class arbitration in violation of the arbitration provisions of the company’s agreement with its couriers. The question whether the arbitration demands violate the arbitration provisions is one that should be decided by the arbitrator; thus, the court denied the company’s emergency TRO motion. Further, the court was not persuaded that the company’s $4.6 million in arbitration fees or the possibility of arbitrating a dispute that was not covered by their agreement would result in irreparable harm. Litigation expenses alone, even if not recoverable, are not irreparable harm.

Decade-long litigation battle goes to arbitration. A federal court has ruled that 1,000 putative class members in a lengthy gender discrimination suit against a multinational investment bank will have to arbitrate their claims individually, pursuant to the arbitration agreements they signed as part of their separation, promotion, or compensation agreements. However, employees who may have been misled into agreeing to arbitrate as part of their equity award agreements — more than six years after the suit commenced — will be given the chance to opt out. A magistrate judge rejected the employees' contention that the employer waived its right to compel arbitration, finding all four categories of operative arbitration agreements were enforceable. The employees also failed to convince the court that the arbitration provisions in all 1,220 agreements that were entered into by class members after this action was filed should be voided pursuant to the court's duty to manage communications with putative class members under Rule 23(d).

Pregnancy discrimination suit ends for $14 million. A federal district court granted final approval of a settlement resolving a lengthy pregnancy discrimination class action brought by employees of a large retailer. The employer agreed to pay $14 million to resolve employees' claims that the company denied accommodations, such as light-duty, to workers with pregnancy-related medical restrictions between 2013-2014. The claimants will receive $2,221.65, on average, and the deal grants attorneys' fees to class counsel in the amount of $4.6 million, which represents one-third of the common fund.

Employer to pay $8.7 million for "shift-jamming." A federal district court preliminarily approved an $8.7-million settlement of a class action lawsuit asserting that under state law, a retailer owed 30 days' wages to approximately 4,300 class members who were terminated during the company's "shift-jamming" period. During this time, employees were required to work shifts beginning less than 16 hours after the end of their previous shift. In addition, employees were not paid daily overtime within 30 days. The court found the significant risk of continued litigation and the lawsuit's "specific, nuanced, and complex legal issues," some of which had been litigated and some of which the settlement would avoid, supported the proposed settlement amount. The court also approved an attorneys' fee award of $2.9 million — about one-third of the class settlement amount — finding it "well within the range of reasonable attorney fees in such cases."

IT workers get nod for $5.7-million settlement. Employees of an information technology company were granted preliminary approval of a proposed $5.7 million settlement to resolve their class claims for overtime pay. A federal district court found the proposed settlement was the product of serious, informed, noncollusive negotiations; it had no obvious deficiencies; it did not improperly grant preferential treatment to class representatives of segments of the class; and it fell within the range of possible approval.

Restaurant settles misclassification claim for $4.6 million. A federal court certified a settlement class of assistant managers for a restaurant franchisee who alleged they were misclassified as exempt and, therefore, denied overtime pay. The parties had reached an agreement on settlement after multiple mediations and sought final certification and approval from the court for a settlement of over $4.6 million, including a "clear sailing" agreement regarding attorneys' fees. The court approved the settlement agreement, although it modified the enhancement awards sought, as well as attorneys' fees, costs, and expenses.

Antitrust challenge to "no poach" pact survives. A former fast-food restaurant employee may proceed with her consolidated putative class action asserting that her employer violated the Sherman Act by agreeing with franchisees not to hire each other's current or former employees for a period of six months. Denying the company's motion to dismiss, a federal district court ruled that the employee

plausibly alleged Article III standing by asserting that the no-hire agreement depressed her wages; and established antitrust standing by asserting "the injury of depressed prices (wages) to sellers (employees) due to anticompetitive behavior of buyers (employers)." Nor was dismissal warranted on statute-of-limitations grounds; her claim accrued the last time she received a depressed wage, not when she initially became aware of the no-hire agreements

Companywide policy not enough to show predominance. A federal court rejected the bid for class certification of wage claims filed by an employee of an e-commerce company on behalf of himself and fellow shift managers. He contended the managers, who were treated as exempt and denied overtime wages, were in fact entitled to such wages under state law. However, the court concluded the employee failed to show that common issues predominated over individual ones. The existence of a policy treating the managers as exempt was not enough on its own to establish predominance. The managers' job description set forth key duties that did not include the types of nonexempt, manual labor the managers alleged they were required to perform.

Procedural BIPA violation not enough for standing. An employee lacked Article III standing to pursue a lawsuit alleging her former employer violated the Illinois Biometric Information Privacy Act (BIPA) by requiring workers to scan their fingerprints in its biometric time-tracking system. Her original complaint asserted only a procedural violation of the law. She claimed the employer failed to inform her in writing of the purpose for which her fingerprints were collected. And she admitted she was not alleging any "disclosure of biometric data to a third party such as a payroll company" and was not "presently aware of any data breach, identity theft, or other similar loss." Because she failed to allege an injury-in-fact as required by federal courts, a federal district court remanded the case to state court.

Delivery driver's class claims tossed under first-filed rule. A delivery driver for an e-commerce company's contractor could not advance her FLSA overtime lawsuit as a collective action since she sought to represent many of the same drivers already covered by a similar FLSA action that was filed before hers and had been conditionally certified. Allowing the named plaintiff in that prior lawsuit to intervene for limited purposes, a federal district court, joined by the federal judge overseeing the other lawsuit, dismissed the driver's collective action without prejudice under the first-filed rule, and denied her motion for conditional certification and settlement approval. She and the sole opt-in claimant were also given a deadline to decide if they would proceed with their individual claims or opt into the other action.

No refund of pre-*Janus* agency fees. A federal appeals court held that a lower court properly dismissed putative class claims brought by a nonunion teacher seeking reimbursement of "agency" fees collected by a teacher's union prior to the U.S. Supreme Court's 2018 *Janus* decision outlawing such fees. The appeals court concluded that private parties may invoke an affirmative defense of good faith to retrospective monetary liability under 42 U.S.C. §1983 when they acted in good faith in following existing state law and prior Supreme Court precedent, which had expressly permitted the union fees. The appeals court also affirmed the dismissal of the employee's state-law conversion claim.

National Law Review, Volume X, Number 225

developments