

# Wage & Hour Insights

Guidance & Solutions for Employers



## What Wal-Mart v. Dukes Means for Wage & Hour Law, Employers

By [Bill Pokorny](#) on June 23, 2011



By now most of you who follow developments in employment law have likely heard about and possibly read the U.S. Supreme Court's [decision in \*Wal-Mart v. Dukes\*](#), overturning certification of a class action sex discrimination case brought on behalf of 1.5 million current and former female [Wal-Mart](#) employees. (If not, our recent [FR Alert on this case](#) will get you up to speed.) While *Dukes* is a sex discrimination case, it is likely to have a major impact upon class actions in other areas of the law, including wage and hour lawsuits.

- *Dukes* will likely make it more difficult for plaintiffs to argue that large classes should be certified absent concrete evidence of a common corporate policy or practice tying the claims of class-members together. This will be particularly important in cases where the actions of individual managers are at issue, such as where plaintiffs allege that employees were required to work "off the clock" contrary to established policies.
- It remains to be seen exactly how the courts will apply *Dukes* to collective actions under the Fair Labor Standards Act. The Supreme Court's decision in *Dukes* dealt with a class action certified under [Federal Rule of Civil Procedure 23](#), which governs most class actions in federal court. In contrast, FLSA collective actions proceed under a different set of rules specific to the FLSA. The standards for certifying a class or collective action are similar - Rule 23(a)(2) requires questions of law or fact common among the class members, while a collective action under [29 U.S.C. § 216\(b\)](#) requires class members to be "similarly situated." However, there are subtle but potentially important differences, and the standard for preliminary certification of a collective action is generally a lower bar than for certification of a Rule 23 class action. That being said, while *Dukes* may not apply directly to FLSA collective actions, it will likely exert a significant influence over courts' analysis of such cases.
- One likely effect of *Dukes* will be to push more wage and hour class action lawsuits into state court. Because *Dukes* governs class certification in federal courts, plaintiffs' attorneys in states with more liberal class certification rules now have a strong incentive to file their cases in state court under state minimum wage and overtime laws, without reference to the FLSA and federal law. While the impact of this shift will vary from state to state, federal courts are frequently regarded as a more favorable jurisdiction for employers than their state counterparts. Thus,

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while *Dukes* is a victory for employers, it may simply shift the wage and hour fight to less favorable ground.

## Insights for Employers

While the esoteric procedural issues raised in *Dukes* will be of great interest to wage and hour litigators, what if any practical implications does *Dukes* have for employers? While the ruling does not usher in any sweeping changes for how employers conduct their day to day compliance activities, it does emphasize the importance of organization-wide policies and practices as both a tool for defending against wage and hour claims and a potential source of vulnerability.

*Dukes* strengthens the case for employers to adopt and effectively implement strong policies prohibiting wage and hour violations. For example, a company policy strictly prohibiting off the clock work and requiring work hours to be accurately recorded, coupled with an effective training and compliance program, may go a long way to heading off class or collective action claims alleging that individual managers violated the policy by requiring or permitting off the clock work.

At the same time, *Dukes* may place an even stronger spotlight on cases based upon a widespread company policy or practice. For example, claims alleging that an employer systematically misclassified specific job titles as exempt may have the necessary element of commonality among members of the class that the Supreme Court found lacking in *Dukes*.

Consequently, we repeat our standard refrain: employers are strongly advised to regularly review and update their wage and hour policies, train their supervisors, and audit compliance.

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