

# class actions starts

BY ANNE DILL AND ANGELIQUE LYONS



**MANY LAWYERS CRINGE AND SHUDDER** when they hear the word statistics. Most of us became lawyers because we cannot “do” math. In today’s employment litigation landscape, however, statistics play a vital role — one that cannot be overlooked or ignored. Class actions in particular specifically focus on statistical analysis of a company’s employment practices in determining both class certification and liability. Applying these same analyses pre-litigation can help prevent class claims and arm in-house counsel with the best defense in the event of a lawsuit.



A meaningful discussion of the role of statistics in employment litigation requires a brief review of the legal framework of discrimination. Discrimination cases come in one of two varieties — disparate treatment or disparate impact. In a disparate treatment case, the plaintiff must prove that he was intentionally discriminated against based on membership in a protected category. Disparate treatment cases can involve an isolated incident of discrimination against a single individual or allegations of a “pattern or practice” of discrimination affecting an entire class of individuals. When a disparate treatment case involves only one individual, the case often focuses on either direct evidence of discrimination (“Fire Earl. He is too old.”) or circumstantial evidence of discrimination (a set of facts from which one can infer a discriminatory motive). Occasionally, statistics play a role in these types of cases, although this is rare. In a “pattern or practice” disparate treatment case, the plaintiff is alleging, on behalf of a group of individuals, that discrimination was the company’s standard operating procedure, thereby raising an inference that the decision affecting the plaintiff was pursuant to this discriminatory policy or practice. To establish the pattern or practice, the plaintiff will frequently rely on statistical evidence, such as the number of women who were promoted versus the number of men who were promoted. In these cases, the statistical evidence is often coupled with anecdotal evidence showing an animus toward the protected group, such as disparaging comments by managers.

In a disparate impact case, the plaintiff must prove that a neutral policy or practice of the employer had a disparate impact on a protected group. Intent of the employer is not an element of the case. To prove a disparate impact, the plaintiff frequently attempts to rely on statistics from the employer. For example, a plaintiff may bring suit alleging that the company’s practice of requiring employees to take a test to qualify for a promotion has a disparate impact on employees over the age of 40. To prove this, the employee would argue that a gross disparity exists between the number of employees over the age of 40 who pass the test and those under 40 who pass the test.

In both pattern or practice and disparate impact cases, statistics often determine liability on the substantive issues. Equally important, however, is the fact that many of these types of cases are brought as class actions because a large group of protected individuals is affected; in determining



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motions for class certification, statistics are also relied upon by plaintiffs to prove commonality, which is one of the elements that must be established to proceed as a class action.

Class action litigation is always a concern for large companies because of the cost of defending these claims and the potential for large damages awards. This concern has grown due to the recent case of *Dukes v. Wal-Mart*, currently pending before the United States Supreme Court. In that case, the plaintiff is alleging that Wal-Mart violated Title VII in its pay and promotion practices affecting female employees. One of the central issues in the case is whether Wal-Mart’s practice of allowing its local management officials discretion when making pay and promotion decisions has created a culture of subjective promotion and compensation practices that has had an adverse impact on female employees. As with most class actions, the “proof” of such discrimination will come in the form of expert statistical analysis of its employment numbers. At the class action certification stage, company statistics are being used by both sides to prove or disprove commonality.

Because of the increasingly common use of statistics at all phases of class action litigation, and the potential increase in class actions following the *Dukes* case, in-house counsel should be viewing their employment activity data proactively and determining if their numbers are a potential litigation minefield.

It is also important to consider your exposure risk either because of your industry, location or potentially risky practice. Not all companies need to conduct a detailed analysis on a regular basis. However, knowing your options and understanding the use of statistics will enable in-house counsel to best protect against class claims.

### What statistics are important?

Statistics in class action cases can be used to support claims and defenses in the areas of hiring, promotion and termination. These numbers are easy to track and provide an easy format for a statistical analysis. For example, a plaintiff may allege that the company had a practice of not promoting women into management positions. To prove her case, the plaintiff would analyze the promotion rate of women versus the promotion rate of men. If there is a statistically significant difference between those two promotion rates, the plaintiff would argue that this difference could not happen but for the company’s discriminatory practices. In addition to

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these traditional areas, additional areas of employment activity that should also be analyzed, depending on your potential risk, are those that relate specifically to the various steps of the hiring process. Traditionally, cases involving hiring focused on the end result — the number of protected individuals hired versus the number of non-protected individuals hired. This is changing, and the focus is shifting to the various stages of the hiring process. In 2007, the Equal Employment Opportunity Commission (EEOC) stated that it would be shifting its focus to the selection process itself, and analyzing the various methods and procedures companies use during the application process to determine whether there is an adverse impact on protected groups.

Since that time, there has been an increase in government scrutiny of employers' use of criminal conviction records and other types of background information in the hiring process. In October 2010, the EEOC held a public meeting in which it examined the impact of companies' use of credit history information in the hiring process. Since then, at least two lawsuits, one of which was filed by the EEOC, have been brought based on that very issue. Loudy Applon brought suit in the Southern District of Florida against the University of Miami and Leonard M. Miller School of Medicine, alleging that she was discriminatorily denied a position as a Senior Medical Collector for the University. Applon has brought her claim as a class action, claiming that the defendants' practice of considering negative credit history has an adverse impact on African American and Hispanic job applicants. Just two months after its public meeting, the EEOC brought a similar suit against Kaplan Higher Education, alleging a pattern or practice of discrimination based upon the company's use of credit information in the hiring process.

In addition to information on specific employment activities, a review of compensation data for disparity should be an area of focus. Specifically, companies should be looking at individuals with the same job titles to determine whether a protected group, as a whole, is being paid less than the non-protected group. On an individual level, the analysis should focus on whether individuals with the same skill and experience performing the same job functions are paid the same.

### **What do I do with the numbers?**

Most HRIS systems contain the relevant information for many of the employment activities to be analyzed. Once the relevant information is extracted from the HRIS system, a statistical analysis should be conducted to determine if any protected category is being adversely affected by the employment decisions. Adverse impact is defined as a

**Specifically, companies should be looking at individuals with the same job titles to determine whether a protected group, as a whole, is being paid less than the non-protected group.**

substantially different rate of selection, which works to the disadvantage of one group.

There are several different ways to conduct the necessary analysis. One method, which is the easiest for us non-math majors to understand, is application of the 80 Percent Rule. This is the method of analysis advocated by the EEOC in its Uniform Guidelines on Employee Selection Procedures (1978). The 80 Percent Rule essentially examines whether the protected group was treated less favorably than the non-protected group using a simple mathematical formula. For example, were women hired at 80 percent of the rate men were hired? A simple example serves to further explain: ABC Company hired 100 people, 40 of whom were women and 60 of whom were men; the company received 100 applications from males and 100 from females. Under the 80 Percent Rule, ABC Company would determine whether women were hired at less than 80 percent of the rate men were hired.


Men were hired 60 percent of the time (60 men hired out of 100 male applicants).

Women were hired 40 percent of the time (40 women hired out of 100 female applicants).

The calculation of 40 percent ÷ 60 percent (the rate women were hired divided by the rate men were hired) gives the percentage (66 percent) at which women were hired as compared to men. In this case, women were not hired at 80 percent of the rate of men, and thus, this result is considered statistical discrimination.

This same analysis using the 80 Percent Rule can be applied easily to all identifiable protected groups (race, national origin, gender and age). This analysis provides a base-line determination of whether the employment activity exhibits a significant adverse impact on the protected group.

A more advanced method to analyze employment activity is to use the standard deviation method. Under this statistical analysis, the effect of the employment activity on the two groups (the protected group versus the non-protected group) is compared to determine whether the differ-



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## Areas of Activity for Analysis

Companies that are proactive in analyzing their workforces and employment activity in an attempt to minimize class action exposure have many areas on which to focus their review.

In-house counsel should consider the following areas of activity for analysis:

- terminations
- promotions
- layoffs/reductions in force
- recalls
- compensation
- hiring (as a whole); and
- each identifiable stage of the hiring process: credit history, background checks and tests.

Additionally, if a company has any other unique aspects to the hiring process, those areas should be separated out and reviewed for potential adverse impact as well.

## Reduction in Force Disparity

A reduction in force (RIF) is one area that companies should always analyze for any gross statistical disparity prior to implementing the reduction. Unlike most other employment activities discussed in this article, a reduction in force generally occurs at one time. Any potential adverse impact can be determined prior to implementation, and can be more easily corrected to eliminate the disparity. When considering a RIF, the proposed reduction list should be vetted to determine if there is any statistically significant disparity for any group (gender, race, national origin, age). The analysis should be done based on the workforce as a whole, and individually for each decisional unit.

If adverse impact is noted, you need to determine whether the selection criteria was applied appropriately, and correct any mistakes. If that does not eliminate the disparity, then the selection criteria should be re-evaluated.

Sometimes simply replacing one person on a RIF list can eliminate any adverse action, and eliminate the potential for a class action lawsuit relating to the reduction.

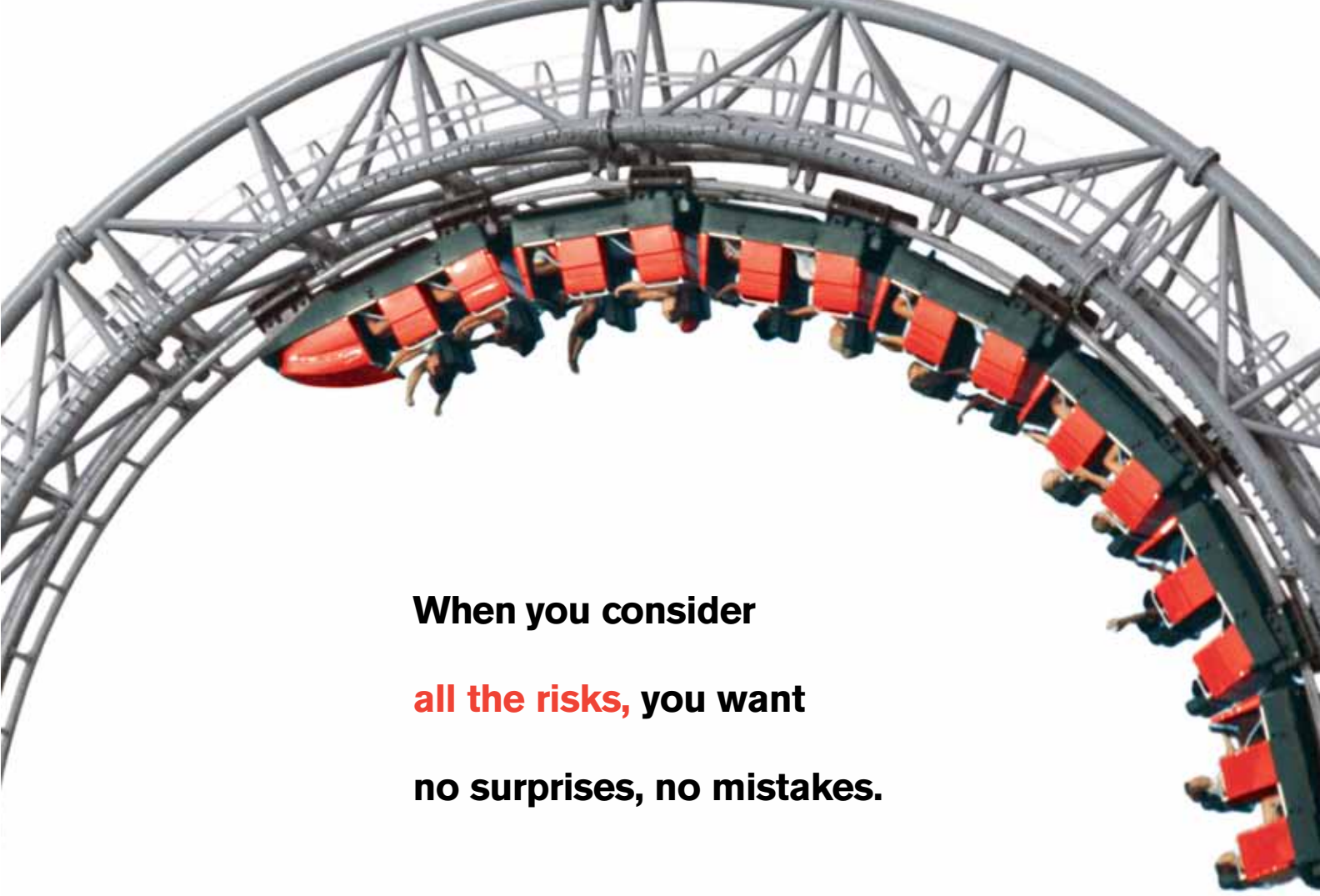
ences are statistically significant. Generally, the accepted theory is that anything at two standard deviations or higher is statistically significant, and the adverse effect on the protected group could not have happened by mere chance, but rather must be the result of discrimination.

Using the same example from above, the overall selection rate for the position was 50 percent (100 people were selected out of the 200 applicants, half of which were female). Therefore, one would expect that 50 of those hired would be female. Because only 40 of the new hires were female, there is a shortfall of 10. This translates into 2.82 standard deviations, which is a significant disparity.

So, which analysis should you use in analyzing your company's employment activities? The answer to that question depends. Several factors need to be considered in determining which method is right for you. As expected, the main criteria will be your budget and ability to conduct the analyses. Generally, someone in human resources or finance will be able to perform the analyses using the 80 Percent Rule. Most companies, however, will not have someone in-house who is capable of performing the Two Standard Deviation Analysis. An employment lawyer with experience in affirmative action, a consultant or a statistician generally performs this analysis.

Aside from the cost factor, the Two Standard Deviation Analysis is preferable because it is generally accepted in litigation as the preferred method. Few courts have accepted the 80 Percent Rule as proof of either commonality when deciding a motion for class certification or of discrimination (or lack thereof). Since the Supreme Court's decision in *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977), the rule of thumb has been a disparity of two or three standard deviations reflects a "gross disparity" that is probative of discrimination. Courts generally will accept this method of proof and allow evidence of the same as proof in employment lawsuits. For this reason, proactively analyzing your workforce using the standard deviation method provides the most valuable information.

Importantly, those companies that are affirmative action employers under Executive Order 12246 are most likely already conducting some of this analysis as part of preparing their affirmative action plans each year.<sup>1</sup> Such companies are required to analyze whether there is an adverse impact in hiring, termination, promotion, layoff and recall for each year. This analysis, however, does not provide a thorough examination for purposes of a self-audit because any analysis done as part of your affirmative action plan development only covers a one-year period, and is limited to those employees included in the affirmative action plan. However, you do have a head start and also someone in your organization who is familiar with pulling the necessary raw data from your HRIS.



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In performing a **proactive analysis**, the more **permeations that are analyzed**, the **better prepared** the company will be.

A note about reverse discrimination claims is necessary at this point. In the last few years, there has been an increase in reverse discrimination claims, most notably the case of *Ricci v. Destefano* recently decided by the US Supreme Court. In analyzing employment activity, and protecting companies from potential class actions, one must consider the situation from every angle, including whether those groups that are not generally considered “protected” are experiencing an adverse impact.

#### How do I structure the analysis?

There are numerous ways to look at your employment activity and develop a strategy that provides the most useful analysis. First, determine the relevant time period. Generally, this should correspond with the statute of limitations under the discrimination laws. Because the longest statute of limitations for the federal anti-discrimination laws is four years, this is oftentimes a useful analysis period. The analysis should be performed on at least an annual basis, covering a four-year period.

Second, determine the relevant group. For single facility companies, this is an easy task. For companies with more than one location, determining the appropriate group is much more difficult. Do you analyze each location’s employment activity separately, combine specific regions or other geographic areas, or just look at the company as a whole? There is no simple answer to this question. In fact, in most class action cases, the parties spend a great deal of time and resources arguing about the appropriate scope of the analysis. Dueling experts are common in class litigation, and usually the fight is over this very issue. The right answer often depends on the story told by the statistics and which analysis produces the best result to support each side’s argument. In performing a proactive analysis, the more permeations that are analyzed, the better prepared the company will be. Therefore, at a minimum, it is best to group the analysis by each individual location as well as the company as a whole.

For some employment activities, most notably reductions in force, you should also consider analyzing the data by

#### Sources for Additional Information:

- For further information on application of the 80 Percent Rule, see Uniform Employee Selection Guidelines Interpretation and Clarification (Questions and Answers). [www.uniformguidelines.com](http://www.uniformguidelines.com)
- For further information on discrimination in various stages of the hiring process, see EEOC Fact Sheet on Employment Tests and Selection Procedures. [www.eeoc.gov/policy/docs/factemployment\\_procedures.html](http://www.eeoc.gov/policy/docs/factemployment_procedures.html)
- For further information of the standard deviation analysis in class actions, please see “Statistical Dueling with Unconventional Weapons: What Courts Should Know About Experts in Employment Discrimination Class Actions.” Bielby, William and Conkos, Pamela. *Emory Law Journal* (2007).

decision maker. If the selection process involves subjective decision making, then each person making those decisions is arguably an individual unit worthy of review.

#### What do I do with the results of the analysis?

The purpose of performing a statistical analysis of your employment activity is to determine if there are any areas for concern. If such areas are identified, measures should be taken to determine whether changes in the processes and procedures being used should be implemented, or if there are explanations, such as performance or experience, that account for the deviations. For example, if your analysis reveals an adverse impact on a protected group because of a specific hiring practice, you will need to determine whether that practice needs to be modified or discontinued, whether an alternative selection method is available, or whether there is a legitimate business reason justifying the use of that practice. These are all very difficult decisions and will naturally depend on each company’s situation.

A word of caution: For those companies who perform the analysis but fail to do anything with the information, the company may be subject to even greater liability. In *Dukes v. Wal-Mart*, one factor considered by the lower court in certifying the class was evidence presented by plaintiff that Wal-Mart, like many companies, kept track of statistics regarding female employees, but did not do any systematic assessment of the statistics in order to determine whether discrimination existed as a barrier to promotion for females in the workplace. In its opinion,

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## ACC Extras on... Class Action Lawsuits


### ACC Docket

- *On the Road to Class Action Success: Mapping Out the Strategic Considerations and Challenges of the Class Action Fairness Act of 2005 (Nov. 2005)*. This article will help you navigate the potholes, detours, pit stops and dangerous curves of the CAFA. [www.acc.com/docket/cafa\\_nov05](http://www.acc.com/docket/cafa_nov05)

### InfoPAK<sup>SM</sup>

- *So, Your Corporation Has Been Sued? What to Do in the First 30 Days (March 2009)*. This InfoPAK is intended to guide in-house counsel on the steps to take in the first 30 days after his client has been sued. [www.acc.com/infopaks/sued\\_30days\\_mar09](http://www.acc.com/infopaks/sued_30days_mar09)

### Quick Reference

- *Class Action Mechanisms in the European Union (June 2010)*. This QuickCounsel provides an overview of class action mechanisms in the EU. It includes EU regulations, white papers and parliament responses. [www.acc.com/clm-EU\\_jun10](http://www.acc.com/clm-EU_jun10) 

### Article

- *Audits — The Key to Avoiding Class Action Lawsuits (Oct. 2010)*. This article discusses the best steps to take to avoid onset of a class action lawsuit against your company. [www.acc.com/audits-ca\\_oct10](http://www.acc.com/audits-ca_oct10)

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the lower court noted that, as concluded by the plaintiff's social psychologist, Wal-Mart not only stereotyped based on gender, but also ignored statistics that would have helped identify gender stereotyping in the company.

### Is the company's analysis discoverable?

A primary tenet of corporate counsel is to control liability, not create it. With that in mind, prudent corporate counsel are asking themselves if a statistical analysis as discussed in this article is discoverable in litigation. The answer, of course, depends. The simple scenario is when a company uses the fact that it has taken steps to prevent discrimination, including analyzing its workforce and implementing proactive changes, as an affirmative defense or to argue against punitive damages. In that case, the analysis is discoverable, regardless of any potential privilege, because the company has waived the privilege by placing the analysis at issue in the lawsuit.

If, however, the company does not want to use or rely on the analysis, then the issue of privilege becomes extremely important at the outset. Possible sources of privilege include attorney-client privilege and the self-critical analysis privilege.

Generally speaking, in-house counsel's communications will be protected by the attorney-client privilege if the primary purpose of the communication is to offer legal advice. Communication offering legal advice or educating recipients on an application of a law or regulation is most often considered privileged, provided it was treated as such by the company. Performing an analysis of your company's employment practices to determine potential liability and analyzing options to reduce that liability falls within this category. In communicating the results of such an analysis and identifying areas of potential adverse impact, it is crucially important to limit communication to the smallest number of management employees possible and clearly identify the communication as a privileged one. In working with management to develop strategies to address any identified potential problems, the actual statistical results need not be included in the communication. Instead, the lawyer can summarize the areas of concern and identify potential resolutions without going into significant detail about the actual statistics. Care should also be taken in verbal communications and meetings about any statistical analysis that has been done. All such communications

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## **A word of caution: For those companies who perform the analysis but fail to do anything with the information, the company may be subject to even greater liability.**

and meetings may likewise be privileged, but only if the lawyers control the communications and meetings, and make it clear that these are all being done in the context of providing legal advice.

The self-critical analysis privilege is fraught with controversy, with some courts refusing to recognize the privilege altogether. The privilege, where accepted, protects self-evaluative materials and results arising from a company's review of its compliance with laws and regulations. Those courts that recognize the privilege generally require the company to prove the following four elements:

- (1) the information arose from a self-critical analysis performed by the party claiming the privilege;
- (2) the purpose of engaging in such an analysis advances strong public interest;
- (3) this type of analysis would be curtailed if discovery of the information were allowed; and
- (4) the document was prepared with the expectation that it would be, and has been, kept confidential.

The best practice to maximize the privilege potential is to consider the analysis privileged. This means to limit its distribution and communication to a select few, and mark all documents as privileged and confidential. Additionally, when effectuating change, focus on the solution and not the underlying problem.


### **Red flags**

Obviously, when conducting an analysis of a company's employment activity, in-house counsel will be focused on eliminating any gross adverse impact. At the same time, however, you should be on the lookout for red flags signaling other potential problems.

*The repeat offender.* If you are analyzing your data by manager, department or facility, and notice adverse impact across more than one type of employment activity, you should investigate further to determine if there is a rogue manager who may be making poor business decisions.

*Promotions.* If you see adverse impact in promotions, make certain that promotion opportunities are being appropriately posted and communicated to all employees and that posting or other employment selection policies are being consistently followed. Making promotions decisions based on managers handpicking the successful candidates is part of what led to Wal-Mart's apparent trouble.

*Subjective decision-making.* If your company's practice or policy is to allow managers broad discretion in making hiring, promotion or compensation decisions, pay particular attention to the results in these areas. As we have learned from the Wal-Mart case, allowing such subjectivity can be a "pattern or practice" that forms the basis for a class action.

There is no way to completely insulate your company from a class action lawsuit. However, being proactive and identifying potential areas of liability can reduce your risk and provide your company with the most protection possible. A statistical review of your employment activity provides you with the information necessary to do so. 

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### NOTES

- 1 A company is subject to E.O. 11246 if it is a government contractor or subcontractor. A federal contractor has 50 or more employees and provides goods/services worth \$50,000 annually to the government or is a depository of federal funds. A federal subcontractor has 50 or more employees and furnishes non-personal services to a contractor that is necessary for the performance of the contract, or is performing, assuming or undertaking any portion of the contractor's obligation under the contract.



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