

# Distinctions Among Class, Collective and Representative Actions Make a Difference

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**T**he terms "class," "collective" and "representative" actions sometimes are bandied about as though they were the same thing, but they have distinct meanings that employers benefit from understanding. This article, the second in a series ([www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/how-to-respond-to-class-actions.aspx](http://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/how-to-respond-to-class-actions.aspx)), examines the differences among these types of lawsuits and practical ramifications, such as how an employer might seek early resolution, as well as how certification of a class or collective action affects whether an employer's attorney may speak with plaintiffs.

The class-action process is the one typically used when employees bring claims for alleged violations of state laws, said Mike Kun, an attorney with Epstein Becker Green in Los Angeles.

Collective actions exist only under the Fair Labor Standards Act (FLSA) and the Age Discrimination in Employment Act, said Zachary Busey, an attorney with Baker Donelson in Memphis, Tenn.

A representative action refers to claims like those under California's Private Attorneys General Act (PAGA), Kun said. PAGA lets an employee stand in the shoes of the attorney general and represent all other employees in litigation, he explained.

## Class Action

If a court certifies a class, a notice will go out to the class members. "A class member will remain a part of the class unless they opt out," said Mark Wallin, an attorney with Barnes & Thornburg in Chicago.

There is a heavy burden on the plaintiffs to establish that a class should be certified, Kun said.

"If the employer can succeed in defeating the plaintiffs' motion for class certification, the case proceeds as to the named plaintiffs alone, rather than on a classwide basis," he said. So instead of defending a lawsuit involving hundreds or thousands of employees, the company may have to defend the claims of only one or two workers.

"In this way, the class certification hearing is the most significant battle in any class-action proceeding," Kun explained. "It can be the difference between defending a multimillion-dollar case and one with minimal potential exposure."

## Collective Action

With an FLSA collective action, a named plaintiff will typically seek conditional certification early in the litigation of similarly situated current and former employees, Wallin noted. Conditional certification tends to have a relatively low burden for plaintiffs to meet, but some courts are pushing back against this low burden, he said.

If certification is granted, notice to similarly situated employees is given, affording them the opportunity to opt in to participate in the litigation.

## Representative Action

"Because PAGA representative claims are not formally class actions, plaintiffs do not have to go through the class certification process," Kun explained. "But that does not mean that they automatically get to proceed to trial on behalf of all employees. We have had success in having the courts strike PAGA representative claims because they would not be manageable."

If several hundred or thousand employees have to take the stand for a PAGA trial to proceed, tying up a courtroom for a year or more, many judges would find that trial of PAGA representative claims would not be manageable, he said.

## Practical Ramifications of Certification

The employer also can ask to decertify a collective action, based on the record developed through the sharing of information between parties according to the process known as "discovery." At the decertification stage, courts scrutinize whether a collective action should proceed any further.

"While this standard on decertification is more beneficial for employers, the difficulty is that often by seeking early conditional certification, based upon a lower burden, plaintiffs gain leverage to force settlement of claims that may be somewhat weak," Wallin said. "The tenor of a potential collective action can change dramatically to the extent early conditional certification can be avoided or defeated."

In a collective-action case in which the employer discovers a bona fide pay issue such as missed overtime payments, the correct course of action likely will be to notify affected employees that the employer has fixed the issue and is providing back pay with interest for the missed overtime payments at least over the past two years, said John Zaloom, an attorney with Moore & Van Allen in Raleigh, N.C.

"After this action, there will be a diminished incentive for those employees to opt into a collective action," he said.

"The employer could even make the same arrangement for employees who are no longer with the company but were there within the past two years," Zaloom added. "Those employees would also have an opportunity to opt in to the class."

Whether an employer's attorney can interview class members other than named plaintiffs depends on whether such members are represented by lawyers, said Caroline Austin, an attorney with Duane Morris in Philadelphia. This generally depends on the status of class or collective action certification, she noted.

In a class action, named plaintiffs in the action are represented by attorneys and may not be contacted without permission from class counsel. The group of individuals who are alleged to be class members but aren't named plaintiffs (for example, all assembly line workers of a company from 2018 to 2021)—"putative" class members—aren't represented by class counsel before the class is certified and may be contacted by the employer's counsel until the class is certified, Austin said.

Under the FLSA, putative collective-action members—often referred to colloquially as putative "class" members—aren't represented by the collective action's counsel until they opt in to the case. "As a result, employer's counsel may contact putative class members—other than the named plaintiffs—who have not opted into the case," she said.

Even when communication by the employer's lawyer with putative class members is allowed, there are limitations on what the attorney can say, Austin noted.

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