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Q: The Supreme Court ruled this week that female employees of Wal-Mart Stores Inc. were too diverse to form a class to sue for sex discrimination. What fallout do you foresee on U.S. class-action lawsuits in general?

A: The case itself was pushing the limits of class-action status. It involved millions of employees over many years whose claim was based largely upon the fact that Wal-Mart managers made subjective decisions about whom to promote. If it had been certified by the Supreme Court, that would have really signaled a strong shift in favor of employee rights and class actions from a fairly conservative Supreme Court. The fact that the decision was so close (5-4) indicates that this type of case was right on the line of what can and cannot be certified. More than the decision itself, I think that the biggest problem for class actions in the future is simply the headline that comes out of this story, that the Supreme Court rejects this employment class-action lawsuit, without a lot of analysis of what the decision actually says. In terms of what judges will be focusing on—what the written decision itself says—there are few absolute statements of the law. Therefore, it is hard to assess what is going to happen. Much of the decision is grounded in the facts of

that particular case, and particularly how large and amorphous the majority saw the claims in the Wal-Mart case. The future of class actions will depend on how lawyers argue and the courts fill in the blanks left by that decision, as well as the facts of the cases that are at issue.

Q: What effect might the ruling have on other employment claims such as wage-and-hour and age and race discrimination complaints?

A: The decision will have the most application to other discrimination cases (sex, race, religion, etc.) and particularly for mega-size cases in those areas. At this point, I don't see a lot in that decision that carries over as easily to other areas of the law—for example, wage-and-hour litigation. These other areas involve different underlying legal standards that are much more easily handled in class actions. I've always told employers that although discrimination cases attract more notoriety, employers need to be much more careful in terms of other employment statutes, like wage-and-hour compliance. The requirements on employers in wage-and-hour compliance are much higher, and there is a general attitude of non-compliance among employers. The events over the past week are a perfect example: Although the Supreme Court

rejected class actions in the *Dukes* case, a few days before the Pennsylvania Supreme Court affirmed a \$187 million class-action judgment against Wal-Mart for wage-and-hour violations—and those claims were only for the state of Pennsylvania.

Q: The U.S. Supreme Court decision has been widely anticipated for months. What talk, if any, is there among employment and class-action plaintiffs' attorneys of strategies to work around it?

A: Given the uniqueness of the facts of that case, I think plaintiffs' attorneys will differentiate that situation from the facts of the normal class-action lawsuit.

Q: In the *Lily Ledbetter Fair Pay Act of 2009*, Congress voted to counter a 2007 Supreme Court ruling that would have protected employers against unequal-pay claims. Would you foresee a similar move in this case?

A: I think that is not likely, given the relatively limited reach of the case's holdings. More likely, courts around the country will flesh out where this decision ends up going.

—Will Astor