

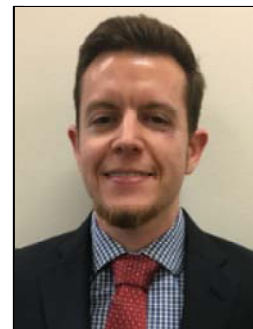
## New Class Action Bill's Impact On Employment Cases

Law360, New York (March 13, 2017, 10:38 AM EDT) -- On March 9, 2017, the U.S. House of Representatives passed the so-called "Fairness in Class Action Litigation Act of 2017," H.R. 985. The bill states that its purposes are to "assure fair and prompt recoveries for class members" and to "diminish abuses in class litigation." Neither of these goals would be accomplished by H.R. 985. Instead, the bill would make it even harder for employees to join together to demand lawful treatment and reimbursement of unpaid wages.

Rule 23 has evolved through careful input and deliberation by the bench and bar, who bring to bear expertise and jurisprudence in a wide variety of class actions, from securities and antitrust to consumer and employment cases. H.R. 985, on the other hand, was hastily adopted without a public hearing, and displays a lack of basic understanding of how class actions work. It would remove discretion from the federal judges who have the real expertise in overseeing class actions. Both the American Bar Association and the judges who chair the committees that oversee amendments to the Federal Rules have opposed the bill. Even defense-side commentators have warned readers to beware of its unintended consequences. We describe here some of the major flaws of H.R. 985 as they would affect employment class actions.



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### House Amendment to the Bill

Before passing the bill, the House struck a provision that would have prohibited the use of the same class counsel if the named plaintiff is a present or former client — a feature that would have led to First Amendment challenges. Although this was an improvement, the major problematic components of the bill remain in place.

### Heightened Typicality Requirement

The bill would require plaintiffs to "affirmatively demonstrate[] that each proposed class member suffered the same type and scope of injury as the named class representative" in order to obtain class certification. How courts would interpret this ambiguous language is anyone's guess, and there would surely be wide divergence. Some courts might view it as barely altering the existing typicality requirement, which already prevents a named plaintiff from representing absent class members who have a different "type" of claim.

But other courts might require an impossibly high showing of similarity of "scope" of

damages for every single class member before allowing a case to proceed on a class basis. The language could be used as an argument to foreclose whole categories of discrimination cases under Title VII. For example, if a pre-employment physical abilities test has an unlawful disparate impact on women, this new language could serve as a basis to require every female applicant to prove, at the class certification stage, that she would have passed a legitimate version of the test — otherwise, the “scope” of the injury of some class members would differ. Although such a showing might make sense at the damages phase, requiring it for class certification would immunize an unlawful test from being challenged. The language could also be construed to foreclose challenges to unlawful employment policies merely because they harm some employees more than others — e.g., preventing a challenge to an employer’s practice of promoting men over equally qualified women simply because some women happened to have been promoted.

To meet their burden of an “affirmative” showing for “each” class member at the class certification stage, plaintiffs would have to be entitled to discovery regarding every member of the proposed class prior to class certification — discovery that presently is often postponed until after class certification. The litigation burdens on all parties would increase accordingly.

The “type and scope” provision of the bill would not protect the interests of class members or employers. It would increase discovery costs and make it more difficult for employees to bring and to litigate meritorious cases.

## **Introduction of Procedural Delays**

Despite purporting to further the goal of “prompt” recoveries for class members, H.R. 985 creates an automatic stay of class discovery while certain defense motions are pending, and, even worse, it gives defendants an automatic right to appeal any grant of class certification. As a result, employees can expect at least one additional year of delay in the already years-long process of recovering unpaid wages. Plaintiffs would also receive an automatic right to appeal a denial of class certification. The workload of the appellate courts would increase as interlocutory appeals were filed from every grant or denial of class certification. The current system, under which Rule 23(f) gives appellate courts discretion to hear such appeals, is far more efficient.

## **Delaying the Determination and Distribution of Attorneys’ Fees**

The bill provides that “no attorneys’ fees may be determined or paid ... until the distribution of any monetary recovery to class members has been completed.” This would mean withholding from class members information about attorneys’ fees until after the class members decide whether to participate in the settlement of a class action, thus depriving them of important information about that decision. Currently, class members receive notice of the attorneys’ fees being sought in a class action settlement before having to decide whether to participate in or object to the settlement. H.R. 985 would take that information away from class members — hardly an increase in “fairness.”

This rule is also simply not workable because, in class actions involving a common fund settlement, distributions to class members cannot be calculated until after attorneys’ fees have been “determined” by the court. The amount to be distributed to the class in a settlement is not known until the attorneys’ fees are “determined.” While the present rule allows class members to be informed — before deciding whether to accept the settlement — of what their estimated individual payment will be after attorneys’ fees are deducted, it would be impossible to provide that information to class members under H.R. 985.

The only purpose served by withholding attorneys’ fees until the “completion” of the distribution to class members is to make it even more difficult than it already is to bring class actions. This will penalize attorneys who bring meritorious cases, not those who bring

the supposed “abusive” case that the bill purports to target. Plaintiffs firms that bring successful cases do so by working on the case without payment, usually for years, and investing their own funds to cover litigation costs, without a guarantee of any recovery for their time or outlays. Once a class action settles and receives court approval, the attorneys’ fees are typically distributed at the same time as class member payments. The distribution to a large class often takes time before it is “complete.” Settlement checks may be returned as undeliverable, and employees may not deposit their checks for months. Requiring successful plaintiffs attorneys to wait during this period before attorneys’ fees can even be “determined” serves no valid purpose. It would deter important, meritorious cases, and reduce access to the courts for workers.

## **Fee Determinations Mechanically Tied to Class Distribution**

The bill appears to be motivated by a perception that plaintiffs attorneys’ fees are disproportionately large in relation to the funds distributed to class members, but there is already a robust body of law in place under which federal judges review attorney fee awards and reduce them or decline to approve settlements if the fees are not reasonable. In addition, class members can object to fee awards or opt out of settlements based upon the fee award. The bill proposes the following rule: “Unless otherwise specified by federal statute, if a judgment or proposed settlement in a class action provides for a monetary recovery, the portion of any attorneys’ fee award to class counsel that is attributed to the monetary recovery shall be limited to a reasonable percentage of any payments directly distributed to and received by class members. In no event shall the attorneys’ fee award exceed the total amount of money directly distributed to and received by all class members.”

In one way, this rule would have a positive effect for plaintiffs, because it would render it very difficult for defendants to obtain so-called “reversionary” settlements, under which a large portion of the settlement fund can “revert” back to the defendant if it is unclaimed by class members. As a result, defense-side commentators have already sounded the alarm about this aspect of H.R. 985. Because class counsel routinely battle against defense efforts to insist upon reversionary settlements, this feature of the bill would be helpful to employees, but it is not necessary. District court judges already look askance at reversionary settlements in the realm of employment law. Therefore, the present level of discretion entrusted to judges is preferable to the rigid rule prescribed in the bill. Judges are capable of distinguishing the rare cases when a reversionary settlement may truly be in the best interests of the class — for example, when a particular group of employees is transient and difficult to locate. There is no need to tie their hands.

The attorney fee provision of the bill is ambiguous about its effect on fee-shifting provisions in federal and state statutes. Although the bill appears to carve out an exception for federal fee-shifting statutes (“Unless otherwise specified by federal statute ...”) it then states, with respect to monetary settlements: “In no event shall the attorneys’ fee award exceed the total amount of money directly distributed to and received by all class members.” This latter language could be read to apply to fee-shifting cases, imperiling the enforceability of countless federal statutes. The provision also makes no express exception for state statutes with fee-shifting provisions. The clumsiness of the drafting suggests that the proponents of the bill did not think through these far-reaching consequences.

Similarly, for fee awards based on obtaining nonmonetary victories for employees, such as the elimination of a discriminatory policy, the bill would, “unless otherwise specified in a federal statute,” limit attorneys’ fees to “a reasonable percentage of the value of the equitable relief.” Presumably, the “unless otherwise specified” carveout would protect the fee-shifting provisions in injunctive relief cases — there is no equivalent “in no event” language in the bill’s provision on nonmonetary fee awards. But to the extent that fees for nonmonetary relief are not premised on a fee-shifting statute, the bill would create enormous uncertainty in Rule 23(b)(2) cases, where the relief obtained may be extremely

difficult to value in monetary terms. And like the monetary relief fee provision, this provision can be read as overriding state statutes' fee-shifting provisions.

## **Elimination of Rule 23(c)(4) "Issue" Class Certification**

The bill forbids "issue certification" under Rule 23(c)(4) "unless the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites of Rule 23(a) [and 23(b)]." In practical terms, this eliminates issue certification altogether — when the "entirety" of a cause of action satisfies all of the 23(a) and (b) requirements, there is no need for issue certification. There are good reasons that issue certification exists. As explained by the Advisory Committee when adopting the issue certification rule in 1966, "in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims."

Similarly, in the employment context, the bill would eliminate the ability of federal courts to make a classwide assessment of liability under 23(c)(4) while leaving the issue of damages to be resolved on a nonclass basis. This rule provides efficiency gains for all parties, allowing defendants to obtain classwide determinations of no liability. The bill's abrupt elimination a useful and sensible procedure that has been in effect for 50 years can be explained only by defendants' general desire to avoid classwide liability determinations.

## **Conclusion**

These are just a few of the flaws in H.R. 985 that would affect employment law cases. Any serious proponent of a workable class action rule that maximizes the utility of the legal system for all participants will recognize this bill as unworkable in parts and ill-considered in others. Some of its harmful effects are obvious now. Others would become clear only after it went into effect.

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