Perhaps more concerning for employers, in 2021, labor and employment class actions accounted for approximately 23.5% of the average class action budget. In 2022, that number jumped over 11 percentage points to 34.8%.

Employment issues that have led to the rise

The rise in labor and employment class actions is caused by a variety of factors, including a more employee-friendly regulatory atmosphere and economic environment that has emboldened employees and their counsel. Survey respondents cited wage and hour claims, a hotbed for collective actions, and general disgruntlement among employees, which is likely a side effect of the most employee-friendly market in decades, as factors that they believe are contributing to the rise in labor and employment class actions.

Although the rise in labor and employment class actions over the past few years is likely tied in part to employment issues associated with COVID-19, the current jump seems to be fueled by other factors, given that the employment issues caused by the pandemic were most acute years ago and have in many ways resolved.

The rise in costs associated with defending labor and employment class actions is unprecedented and may represent a combination of these claims being more hotly contested and a reflection by companies that labor and employment class actions pose increased business risks. Employment claims were reported as posing more risk than in previous years, remaining the second-largest threat in today's environment.

What does the future hold?

The growth of labor and employment class action claims (8% in the last year) seems almost unsustainable. But it seems likely that labor and employment class actions will remain at the forefront of class action litigation for the foreseeable future regardless of whether such actions continue to grow as a percentage of total open matters.

Potential economic changes in the next year may affect the prevalence of labor and employment class actions. The current regulatory environment, however, seems unlikely to change much within that time (though it could change later).

Tips for employers

There are tools employers can use to try to preempt at least some potential labor and employment class actions. Companies might consider, for example, conducting regular audits to ensure employees are properly classified, and adding class action waivers and mandatory arbitration provisions to select employment agreements.

Such provisions can be effective in some circumstances but can also face regulatory and other legal hurdles depending on the jurisdiction involved. Employers may want to consider preemptive action despite these hurdles in light of the major rise in labor and employment class actions and spending on such actions.

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Q & A: Handling breaks for employees who don't have access to a time clock during the day

by Jodi R. Bohr, Tiffany & Bosco, P.A.

Q For nonexempt, hourly employees who don't have access to the time clock during the day (they're delivery drivers), how should we handle their meal breaks? Can we automatically deduct 30 minutes from their hours?

Neither federal law nor Arizona law requires employers to provide employees with a meal period or rest breaks. Employers outside of the state of Arizona should consult with their own state's laws regarding meal periods or rest breaks. The U.S. Department of Labor (DOL), the agency for enforcing federal wage and hour laws, has a handy chart on state meal period requirements at https://www.dol.gov/agencies/whd/state/meal-breaks.

While breaks aren't required, once an employer opts to offer a meal period or rest breaks, employers must follow guidance from the DOL to ensure employees are being paid for all hours worked. The DOL has made clear that short breaks of 20 minutes or less are compensable hours worked. Off-duty periods that are longer than 20 minutes (i.e., meal periods in which an employee is completely relieved from work) may be excluded from hours worked under the Fair Labor Standards Act (FLSA). To be completely relieved from work, the employee must be told in advance that he may leave the job and that he won't have to commence work until a specified time more than 20 minutes later.

Because breaks shorter than 20 minutes or breaks in which the employee is not completely relieved of duty are hours worked, employees must be paid for those breaks.

Automatically deducting 30 minutes a day from an employee's hours when the employer is unaware that the employee actually took a lunch break that is not compensable could open the employer up to liability. Employees may later claim that they were not completely relieved from duty and are owed the 2.5 hours per week (likely in the form of overtime wages) that had been wrongfully deducted.

Luckily there are other options than automatically deducting meal breaks. One option would be to have the employees track their meal periods and accurately log them on a timecard. Or have the employees use one of the readily available time tracking apps, which can be downloaded to their phones. Time tracking apps have different features (GPS, notifications, or alerts to reduce errors), so research which one works best to use for your company.

Jodi R. Bohr, an attorney with Tiffany & Bosco, P.A., practices employment and labor law, with an emphasis in HR management counseling, litigation, class actions, and other HR matters. Jodi's determination and responsive style consistently earn client trust and confidence as well as successful results. She may be reached at jrb@tblaw.com or 602-255-6082. ■