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- From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.
January 2015

Dear Clients:

The last few years have seen an explosion in class action and collective action litigation involving workplace issues. This came to a head in 2013 and 2014 with several major class action rulings from the U.S. Supreme Court. Likewise, the present economic climate is likely to fuel even more lawsuits. The stakes in these types of employment lawsuits can be extremely significant, as the financial risks of such cases are enormous. More often than not, class actions adversely affect the market share of a corporation and impact its reputation in the marketplace. It is a legal exposure which keeps corporate counsel and business executives awake at night.

Defense of corporations in complex, high-stakes workplace litigation is one of the hallmarks of Seyfarth Shaw’s practice. Through that work, our attorneys are on the forefront of the myriad of issues confronting employers in class action litigation.

In order to assist our clients in understanding and avoiding such litigation, we are pleased to present the 2015 Edition of the Seyfarth Shaw Annual Workplace Class Action Litigation Report. This edition, authored by the class action attorneys in our Labor & Employment Department, contains a circuit-by-circuit and state-by-state review of significant class action rulings rendered in 2014, and analyzes the most significant settlements over the past twelve months in class actions and collective actions. We hope this Annual Report will assist our clients in understanding class action and collective action exposures and the developing case law under both federal and state law.

Very truly yours,

J. Stephen Poor
Firm Managing Partner
Our Annual Report analyzes the leading class action and collective action decisions of 2014 involving claims against employers brought in federal courts under Title VII of the Civil Rights Act of 1964 (“Title VII”), the Age Discrimination in Employment Act (“ADEA”), the Fair Labor Standards Act (“FLSA”), the Employee Retirement Income Security Act (“ERISA”), and a host of other federal statutes applicable to workplace issues. The Report also analyzes class action and collective action rulings involving claims brought against employers in all 50 state court systems, including decisions pertaining to employment laws, wage & hour laws, and breach of employment contract actions. The key class action and collective action settlements over the past year are also analyzed, both in terms of gross settlement dollars in private plaintiff and government-initiated lawsuits as well as injunctive relief provisions in consent decrees. Finally, the Report also discusses important federal and state court rulings in non-workplace cases which are significant in their impact on the defense of workplace class action litigation. In total, there are 1,219 decisions analyzed in the Report.

The cases decided in 2014 foreshadow the direction of class action litigation in the coming year. One certain conclusion is that employment law class action and collective action litigation is becoming ever more sophisticated and will continue to be a source of significant financial exposure to employers well into the future. Employers also can expect that class action and collective action lawsuits increasingly will combine claims under multiple statutes, thereby requiring the defense bar to have a cross-disciplinary understanding of substantive employment law as well as the procedural peculiarities of opt-out classes under Rule 23 of the Federal Rules of Civil Procedure and the opt-in procedures in FLSA and ADEA collective actions.


Our goal is for this Report to guide clients through the thicket of class action and collective action decisional law, and to enable corporate counsel to make sound and informed litigation decisions while minimizing risk. We hope that you find the Seyfarth Shaw Annual Workplace Class Action Litigation Report to be useful.

Gerald L. Maatman, Jr./General Editor
Co-Chair, Class Action Litigation Practice Group of Seyfarth Shaw LLP

January 2015
As corporate counsel utilize the Report for research, we have attempted to cite the West bound volumes wherever possible (e.g., *EEOC v. Kaplan Higher Education Corp.*, 748 F.3d 749 (6th Cir. 2014)). If a decision is unavailable in bound format, we have utilized a LEXIS cite from its electronic database (e.g., *Dimond, et al. v. Darden Restaurants, Inc.*, 2014 U.S. Dist. LEXIS 94004 (S.D.N.Y. July 9, 2014)), and if a LEXIS cite is not available, then to a Westlaw cite from its electronic database (e.g., *Rodriguez, et al. v. Instagram, LLC*, 2014 WL 895438 (Cal. Super. Ct. Feb. 28, 2014)). If a ruling is not contained in an electronic database, the full docketing information is provided (e.g., *Zackaria, et al. v. Wal-Mart Stores, Inc.*, Case No. 12-CV-1520).

Search Functionality

This Report is fully searchable. Case names, Rule 23 terms, and class action topics can be searched by selecting Edit and then Find (or Ctrl+F), and then by typing in the word or phrase to be searched, and then either selecting Next or hitting Enter.

eBook Features

The 2015 Workplace Class Action Litigation Report is also available as an eBook. The downloaded eBook is accessible via freely available eBook reader apps like iBook, Kobo, Aldiko, etc. The eBook provides a rich and immersive reading experience to the users.

Some of the notable features include:

1. The eBook is completely searchable.
2. Users can increase or decrease the font sizes.
3. Active links are set for the table of contents to their respective sections.
4. Bookmarking is offered for notable pages.
5. Readers can drag to navigate through various pages.
A Note On Class Action And Collective Action Terms And Laws

References are made to Rule 23 of the Federal Rules of Civil Procedure and 29 U.S.C. § 216(b) throughout this Report. These are the two main statutory sources for class action and collective action decisional law. Both are procedural devices used in federal courts for determining the rights and remedies of litigants whose cases involve common questions of law and fact. The following summary provides a brief overview of Rule 23 and § 216(b).

Class Action Terms

The Report uses the term class action to mean any civil case in which parties indicated their intent to sue on behalf of themselves as well as others not specifically named in the suit at some point prior to the final resolution of the matter. This definition includes a case in which a class was formally approved by a judge (a certified class action), as well as a putative class action, in which a judge denied a motion for certification, in which a motion for certification had been made but a decision was still pending at the time of final resolution, or in which no formal motion had been made but other indications were present suggesting that class treatment was a distinct possibility (such as a statement in a complaint that the plaintiffs intended to bring the action on behalf of others similarly-situated).

Although certified class actions may receive considerable attention if they are reported publicly, defendants also must confront putative class actions that contain the potential for class treatment as a result of filing a motion for certification or because of allegations in the original complaint that assert that the named plaintiffs seek to represent others similarly-situated. Even if such cases are never actually certified, the possibility of the litigation expanding into a formal class action raises the stakes significantly, perhaps requiring a more aggressive (and costlier) defense or resulting in a settlement on an individual basis at a premium.

Rule 23

Rule 23 governs class actions in federal courts, and typically involves lawsuits that affect potential class members in different states or that have a nexus with federal law. Rule 23 requires a party seeking class certification to satisfy the four requirements of section (a) of the rule and at least one of three conditions of section (b) of the rule. Under U.S. Supreme Court precedent, a district court must undertake a “rigorous analysis of Rule 23 prerequisites” before certifying a class. General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982). More often than not, plaintiffs will support their motion for class certification with deposition testimony, declarations of putative class members, and expert opinions in the form of affidavits of expert witnesses. Courts often observe that the appropriate analysis in reviewing this evidence is not equivalent to an examination of the merits or a battle between the parties’ experts. Rather, the salient issue is whether plaintiffs’ legal theories and factual materials satisfy the Rule 23 requirements.

The Rule 23(a) requirements include:

- Numerosity – The individuals who would comprise the class must be so numerous that joinder of them all into the lawsuit would be impracticable.
- Commonality – There must be questions of law and fact common to the proposed class.
- Typicality – The claims or defenses of the representative parties must be typical of the claims and defenses of putative class members.
- Adequacy of Representation – The representative plaintiffs and their counsel must be capable of fairly and adequately protecting the interests of the class.
The standards for analyzing the commonality requirement of Rule 23(a)(2) were tightened in 2011 with the U.S. Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes, et al.*, 131 S. Ct. 2541 (2011). As a result, a “common” issue is one that is “capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke.” *Id.* at 2551.

Once a plaintiff establishes the four requirements of Rule 23(a), he or she must satisfy one of the three requirements of Rule 23(b). In practice, a plaintiff typically establishes the propriety of class certification under either Rule 23(b)(2) or Rule 23(b)(3) in an employment-related case.

Because application of each rule depends on the nature of the injuries alleged and the relief sought, and imposes different certification standards on the class, the differences between Rule 23(b)(2) and (b)(3) are critical in employment-related class action litigation. In the words of the rule, a class may be certified under Rule 23(b)(2) if the party opposing the class “has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” In other words, plaintiffs seeking to certify class actions under Rule 23(b)(2) are restricted to those cases where the primary relief sought is injunctive or declaratory in nature. Rule 23(b)(2) does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Rule 23(b)(2) provides for a binding litigation order as to all class members without guarantees of personal notice and the opportunity to opt-out of the suit.

Rule 23(b)(3) is designed for circumstances in which class action treatment is not as clearly called for as in Rule 23(b)(1) and Rule 23(b)(2) situations, when a class action may nevertheless be convenient and desirable. A class may be certified under Rule 23(b)(3) if the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Pertinent considerations include the interest of the members of the class in individually controlling the prosecution of separate actions; the extent and nature of any litigation concerning the controversy already commenced by members of the class; the desirability of concentrating the litigation of the claims in one particular forum; and the difficulties likely to be encountered in the management of a class action.

To qualify for certification under Rule 23(b)(3), therefore, a class must meet not only the requirements of Rule 23(a), but also two additional requirements: “(1) common questions must predominate over any questions affecting only individual members; and (2) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997). While the common question requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) overlap, the predominance requirement is more stringent than the common question requirement. Thus, even though a case may present common questions of law or fact, those questions may not always predominate and class certification would be inappropriate.

Rule 23(b)(3) applies to cases where the primary relief sought is money damages. The Supreme Court has determined – in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) – that unlike in Rule 23(b)(2) class actions, each class member in a Rule 23(b)(3) class action for money damages is entitled as a matter of due process to personal notice and an opportunity to opt-out of the class action. Accordingly, Rule 23(c)(2) guarantees those rights for each member of a class certified under Rule 23(b)(3). There are no comparable procedural guarantees for class members under Rule 23(b)(2).
29 U.S.C. § 216(b)

This statute governs multi-plaintiff lawsuits under the ADEA and the FLSA. Generally, such lawsuits are known as collective actions (as opposed to class actions).

Under 29 U.S.C. § 216(b), courts generally recognize that plaintiffs and other “non-party” individuals may not proceed collectively until they establish that they should be permitted to do so as a class. Under § 216(b), courts have held that “similarly-situated” individuals may proceed collectively as a class. The federal circuits have not agreed on the standard according to which such a class should be certified. Two competing standards for certification are recognized.

The first approach adopts the view that the “similarly-situated” inquiry is coextensive with the procedure used in class actions brought pursuant to Rule 23. Using this methodology, the court analyzes the putative class for factors including numerosity, commonality, typicality, and adequacy of representation. This typically occurs after some discovery has taken place. This approach is unusual and is not favored.

The second approach is a two-tiered approach involving a first stage conditioned certification process and a second stage potential decertification process. It is more commonly used and is the prevailing test in federal courts. In practice, it tends to be a “plaintiff-friendly” standard.

In the context of the first stage of conditional certification, plaintiffs typically move for conditional certification and permission to send notices to prospective class members. This generally occurs at an early stage of the case, and often before discovery even commences. Courts have held that a plaintiff’s burden at this stage is minimal. A ruling at this stage of the litigation often is based upon allegations in the complaint and any affidavits submitted in favor of or in objection to conditional certification.

Courts have not clearly defined the qualitative or quantitative standards of evidence that should be applied at this stage. Courts are often reluctant to grant or deny certification on the merits of a plaintiff’s case. This frustrates defendants with clearly meritorious arguments in defense of the litigation, such as those based on compelling proof that would establish the exempt status of the plaintiffs and other employees alleged to be similarly-situated.

Instead, courts appear to find the most convincing proof that certification is improper based on evidence that putative class members perform different jobs in different locations or facilities, under different supervisors, and potentially pursuant to differing policies and practices. Courts also have held that certification is inappropriate when individualized inquiries into applicable defenses are required, such as when the employer asserts that the relevant employees are exempt.

Where conditional certification is granted, a defendant has the opportunity to request that the class be decertified after discovery is wholly or partially completed in the subsequent, second stage of decertification. Courts engage in a more rigorous scrutiny of the similarities and differences that exist amongst members of the class at the decertification stage. The scrutiny is based upon a more developed, if not entirely complete, record of evidence. Upon an employer’s motion for decertification, a court assesses the issue of similarity more critically and may revisit questions concerning the locations where employees work, the employees’ supervisors, their employment histories, the policies and practices according to which they perform work and are paid, and the distinct defenses that may require individualized analyses.
**Opt-In/Opt-Out Procedures**

Certification procedures are different under Rule 23 and 29 U.S.C. § 216(b). Under Rule 23(b)(2), a court’s order binds the class; under Rule 23(b)(3), however, a class member must opt-out of the class action (after receiving a class action notice). If he or she does not do so, they are bound by the judgment. Conversely, under § 216(b), a class member must opt-in to the lawsuit before he or she will be bound. While at or near 100% of class members are effectively bound by a Rule 23 order, opt-in rates in most § 216(b) collective actions typically range from 10% to 30%.
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I. Overview Of The Year In Workplace Class Action Litigation

**Executive Summary**

Workplace class action litigation continues to accelerate, grow, and pose extraordinary risks for employers. Skilled plaintiffs’ lawyers are continually developing new theories and approaches to complex employment litigation. Hence, the events of the past year in the workplace class action world demonstrate that the array of bet-the-company litigation issues that businesses face are continuing to widen and undergo significant change. At the same time, governmental enforcement litigation pursued by the U.S. Equal Employment Commission and the U.S. Department of Labor manifests the aggressive “push-the-envelope” agenda of two activist agencies, and regulatory oversight of workplace issues continues to be a priority. All of these factors combine to challenge businesses to integrate their litigation and risk mitigation strategies to navigate these exposures.


More than any other development in 2014, however, the decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), continued to have a wide-ranging impact on virtually all types of class actions pending in both federal and state courts throughout the country. In many respects, *Wal-Mart* continued to be the “seminal precedent” in courtrooms in 2014 as litigants argued and judges analyzed class certification issues. Rule 23 decisions in 2014 in large part pivoted off of *Wal-Mart*, and leverage points in class action litigation increased or decreased depending on the manner in which judges interpreted and applied *Wal-Mart*. At the same time, the ruling in *Comcast Corp.* fueled defense arguments by undermining attacks on class certification in a wide range of contexts, which were met with mixed success for employers.

As is well-known by now, the Supreme Court’s decision in *Wal-Mart* elucidated whether Rule 23(b)(2) can be used to recover individualized monetary relief for a class (and held it may not), established a heightened standard for the Rule 23(a)(2) commonality requirement (and determined that common questions for a class must have common answers), and rejected previous lower court interpretations of Supreme Court precedent on Rule 23 burdens of proof (and found that to the extent factual determinations that go to the merits also overlap with the Rule 23 requirements, those factual issues must be analyzed to determine the propriety of class certification). As a result, *Wal-Mart* continued to foster a tidal wave of Rule 23 decisions in 2014, as litigants and courts grappled with the ruling’s implications in a wide variety of workplace class action litigation contexts. As of the close of 2014, *Wal-Mart* had been cited a total of 571 times in lower federal and state court rulings.

Last year’s ruling in *Comcast Corp.* also added a new weapon to employers’ arsenals in challenging class certification. In *Comcast Corp.*, the Supreme Court interpreted Rule 23(b)(3) – which requires “questions of law or fact common to class members predominate over any questions affecting only individual members” – to mandate that plaintiffs’ proposed damages model show damages on a class-wide basis. In so determining, the Supreme Court reaffirmed that lower courts must undertake a "rigorous analysis" of whether a putative class satisfies the predominance criterion set forth in Rule 23(b)(3), even if that analysis...
overlaps with the merits of the underlying claims, and held that individual issues of damages may preclude class certification. This decision provides companies with a significant and rational defense to class certification in class actions. Much like Wal-Mart, the decision in Comcast Corp. reverberated throughout the lower federal and state courts in 2014, and was cited a total of 261 times by the close of the year, a rather remarkable figure for a decision rendered in March of 2013.

Against this backdrop, the plaintiffs’ class action employment bar filed and prosecuted significant class action and collective action lawsuits against employers in 2014. In turn, employers litigated an increasing number of novel defenses to these class action theories, which were fueled, in part, by the new requirements enunciated in Wal-Mart and Comcast Corp. As this Report reflects, federal and state courts addressed a myriad of new theories and defenses in ruling on workplace class action litigation issues. The impact and meaning of “Wal-Mart issues” and “Comcast Corp. issues” were at the forefront of these case law developments in the debate over the role and meaning of Rule 23 in workplace class action litigation.

**Key Trends Of 2014**

An overview of workplace class action developments in 2014 reveals six key trends.

First, the Supreme Court’s opinions in Wal-Mart and Comcast Corp. have had a profound influence in shaping settlement strategies. Employers are settling fewer employment discrimination class actions than at any time over the past decade, and at a fraction of the levels as in 2006 to 2013. On the wage & hour front, settlements in the aggregate were relatively flat, and in terms of governmental enforcement litigation, settlement numbers and aggregate totals were significantly lower than in any year since 2006. In contrast, ERISA class actions experienced a renaissance of sorts, and settlement numbers were nearly ten times greater than the aggregate amount in 2013.

Second, more than any other litigation risk, wage & hour class actions dwarfed all other types of filings (as compared to employment discrimination and ERISA class actions, as well as governmental enforcement litigation). Wage & hour litigation now represents the prime litigation risk in the workplace. The “crest” of the wage & hour litigation wave is not yet in sight. Employers can expect more of the same in terms of increased filings in 2015.

Third, FLSA collective actions and state law wage & hour class actions produced more decisions from federal and state courts than any other area of complex employment litigation. The magnet federal jurisdictions were the Second and Ninth Circuits, and state law claims were congregated in plaintiff-friendly venues such as California, Florida, Massachusetts, New Jersey, New York, and Pennsylvania. Statistically, plaintiffs won 70% of conditional certification motions, and won (by defeating) 52% of decertification motions in federal courts.

Fourth, the U.S. Department of Labor (“DOL”) and the U.S. Equal Employment Opportunity Commission (“EEOC”) continued their aggressive litigation approaches, albeit with mixed success. The agencies suffered losses on a myriad of litigation issues in the federal courts in 2014, and their aggregate settlement recoveries were significantly lower in 2014 than at any time since 2006. At the same time, the EEOC’s systemic investigation program – in which the Commission emphasizes the identification, investigation, and litigation of discrimination claims affecting large groups of “alleged victims” – expanded yet again over prior years. The EEOC’s docket of systemic suits comprised nearly 20% of all merits filings of 2014, and by the end of the year, represented nearly 25% of the Commission’s active litigation docket. This development is of critical importance to employers, for it evidences an agency with a laser-focus on high-impact, big stakes litigation.

Fifth, 2014 was a transformative year in case law developments under the Class Action Fairness Act of 2005 (“CAFA”). Jurisprudence under the CAFA continued to mature after the U.S. Supreme Court decided
its first case on the law in 2013 in *Standard Fire Insurance Co. v. Knowles*. In 2014, the Supreme Court held in *Dart Cherokee Basin Operating Co., LLC v. Owens* that defendants are not required to submit evidence in support of a removal petition under the CAFA, and that a short and plain statement of fact is enough. The Supreme Court also reaffirmed that there is no presumption against removals under the CAFA. Case law under the CAFA has certainly turned the corner in this regard for employers, thereby solidifying defense strategies to secure removal of class actions to federal court.

Sixth, the Supreme Court’s opinions in *Wal-Mart and Comcast Corp.* had a profound influence in shaping the course of class action litigation rulings throughout 2014. *Wal-Mart and Comcast Corp.* prompted defendants to mount challenges to class certification based on all sorts of theories (and not just those modeled after the nationwide class claims rejected in *Wal-Mart* and the antitrust damages issues discussed in *Comcast Corp.*). This resulted in new types of case law rulings on a myriad of Rule 23-related issues. The result was a year of decisions on class action issues the likes of which have never been seen before. This wave of new case law is still in its infancy. As many class action issues are in a state of flux post-*Wal-Mart* and post-*Comcast Corp.*, these evolving precedents are expected to continue to develop in the coming year.

### A. Significant Trends In Workplace Class Action Litigation In 2014

**Settlement Activity**

As measured by the top ten largest case resolutions, settlements numbers were down in 2014, except for ERISA class actions. With that exception, this follows a trend since the U.S. Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). By tightening Rule 23 standards and raising the bar for class certification, *Wal-Mart* has made it more difficult for plaintiffs to convert their class action filings into substantial settlements.

The statistics for 2014 show this downward trend, which is most pronounced for employment discrimination class action settlements.¹ This trend is illustrated in the following chart:

![Value Of Top 10 Employment Discrimination Class Action Settlements](chart.png)

¹ An analysis of settlement activity is set forth in Chapter II of this Report. The total of $227.93 million for the top ten largest employment discrimination class action settlements in 2014 is the second lowest total since 2010; the figures for each year were as follows: 2013 – $234.1 million; 2012 – $48.6 million; 2011 – $123.2 million; 2010 – $346.4 million; 2009 – $86.2 million; 2008 – $118.36 million; 2007 – $282.1 million; and 2006 – $91 million. The figure for 2013 is a result of one large settlement of $160 million; when that settlement is factored out, the 2013 total is the second lowest since 2006. A chart of the all-time largest employment discrimination class action settlements is set out at Appendix II of the Report.
The impact is less pronounced in wage & hour class action settlements, although in 2014 the value of the top ten wage & hour settlements declined for the third year in a row. Wal-Mart has less of an impact in this substantive legal area, as FLSA settlements are not explicitly tied to the concepts on class certification addressed in Wal-Mart (and instead, are related to the standards under 29 U.S.C. § 216(b)). This trend is illustrated by the following chart:

Relatedly, government enforcement litigation also followed this trend, and settlements in 2014 were the lowest in the last eight years. This trend is illustrated by the following chart:

In contrast, ERISA class action settlements topped $1.3 billion in 2014. This aggregate number was nearly ten times greater than in 2013. ERISA class action settlements were fueled by several mega-settlements

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2 The total for the top ten wage & hour class action settlements in 2014 was $215.3 million compared to $248.45 million in 2013.

3 The total for the top ten government enforcement litigation settlements was $39.45 million compared to $171.6 million in 2013 and $262.78 million in 2012. The aggregate totals make 2014 the lowest year overall since 2006.

4 The total for the top ten ERISA class action settlements in 2014 was $1.31 billion compared to $155.6 million in 2013.
this past year, which pushed the settlement numbers higher than at any time in the recent past. This trend is illustrated by the following chart:

![Graph showing annual workplace class action settlements](image)

**Litigation Filings**

While shareholder and securities class action filings and settlements witnessed a sharp downtick to record lows in 2014, employment-related class action filings remained relatively flat, but with a pronounced increase in certain categories, especially wage & hour cases. Anecdotally, surveys of corporate counsel confirm that workplace litigation – and especially class action and multi-plaintiff lawsuits – remains one of the chief exposures driving corporate legal budget expenditures, as well as the type of legal dispute that causes the most concern for their companies. The prime concern in that array of risks is now wage & hour litigation exposure.

By the numbers, workplace litigation filings stayed constant over the past year, while wage & hour cases increased. By the close of the year, ERISA lawsuits totaled 7,163 (down slightly as compared to 7,279 in 2013), FLSA lawsuits totaled 8,066 (up significantly as compared to 7,882 in 2014), and employment discrimination filings totaled 11,867 lawsuits (a decrease from 12,311 in 2013). In terms of employment discrimination cases, employers can expect a significant jump in the coming year, as the charge number totals at the EEOC in 2013 and 2014 were among the highest in the 48-year history of the Commission; due to the time-lag in the period from the filing of a charge to the filing of a subsequent lawsuit, the charges in the EEOC’s inventory will become ripe for initiation of lawsuits in 2015.

By the numbers, FLSA collective action litigation increased yet again in 2014 and far outpaced other types of employment-related class action filings. These filings represented another year-after-year increase in wage & hour litigation filed in federal courts. Virtually all FLSA lawsuits are filed as collective actions, so these filings represent the most significant exposure to employers in terms of any workplace laws. Statistics are harder to come by for state court filings, but this trend is also evident in various “plaintiff-friendly” jurisdictions, such as California, Florida, Massachusetts, New Jersey, New York, Pennsylvania, and Washington.
This trend is illustrated by the following chart:

![FLSA Filings In Federal Court](chart.png)

Wage & hour class actions filed in state court also represented an increasingly important part of this trend. Most pronounced in this respect were filings in the state courts of California, Florida, Massachusetts, New Jersey, New York, and Pennsylvania. California, in particular, continued to be a breeding ground for wage & hour class action litigation due to laxer class certification standards under state law, generous damages remedies for workers, and more plaintiff-friendly approaches to wage & hour issues under the California Labor Code. For the second year in a row, the American Tort Reform Association selected California as one of the prime “judicial hellholes” as measured by the systematic application of laws and court procedures in an unfair and unbalanced manner.5

**Wage & Hour Class Certification Rulings**

While plaintiffs continued to achieve initial conditional certification of wage & hour collective actions in 2014, employers also secured significant victories in defeating conditional certification motions and obtaining decertification of § 216(b) collective actions.6 It is expected that the vigorous pursuit of nationwide FLSA collective actions by the plaintiffs’ bar will continue in 2015 and that the pace of wage & hour filings will increase yet again over the next year.

An increase in FLSA filings likewise caused the issuance of more FLSA rulings than in any other substantive area of complex employment litigation. The analysis of these rulings – discussed in Chapter V of this Report – shows that more cases are brought against employers in more plaintiff-friendly jurisdictions such as the Second and Ninth Circuits. This trend is shown by the following map:

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6 An analysis of FLSA collective actions in 2014 is set forth in Chapter V, and analysis of state law wage & hour class action rulings in 2014 is set forth in Chapter VII.
The map of FLSA certification rulings is telling. First, it substantiates that the Ninth Circuit and the Second Circuit are the hotbeds of wage & hour litigation. More cases were brought and certified – 47 in the Ninth Circuit and 33 in the Second Circuit – in those circuits than in any other areas of the country. Second, as the burdens of proof reflect under 29 U.S.C. § 216(b), plaintiffs won the overwhelming majority of “first stage” conditional certification motions (87 of 124 rulings, or approximately 70%); in terms of “second stage” decertification motions, plaintiffs prevailed in a slight majority of those cases (12 of 23 rulings, or approximately 52% of the time). Third, it reflects that there has been an on-going migration of skilled plaintiffs’ class action lawyers into the wage & hour space. Securing initial “first stage” conditional certification – and foisting settlement pressure on an employer – can be done without much of an investment in the case (e.g., no expert is needed unlike the situation when certification is sought in an employment discrimination class action) and without conducting significant discovery (per the case law that has developed under 29 U.S.C. § 216(b)). As a result, to the extent litigation of class actions by plaintiffs’
lawyers are viewed as an investment, prosecution of wage & hour lawsuits is a relatively low cost investment without significant barriers to entry as compared to other types of workplace class action litigation.

Wage & Hour Class Action Case Trends

So what about the case law trends behind the numbers? A key FLSA litigation issue that percolated in the courts in 2014 is how Wal-Mart – to the extent it held that “trial by formula” via representative or statistical proof as to damages is inappropriate on a class-wide basis – and Comcast Corp. – to the extent it held that a viable class certification theory must present a damages model to adjudicate damages on a class-wide basis – impacted conditional certification under 29 U.S.C. § 216(b) and/or Rule 23 class certification in wage & hour litigation. An emerging trend suggests that employers can more readily block certification – or secure decertification – in misclassification cases by targeting and challenging plaintiffs’ representative evidence, although use of Wal-Mart and Comcast Corp. has not yet gained significant traction in blocking certification § 216(b) contexts. Employers can expect this issue to continue to heat up with rulings throughout 2015.

Many plaintiffs’ wage & hour lawyers and a fair share of employers nationally have viewed the increasing number of court rulings endorsing class action waivers and seemingly stricter standards for class certification as harkening the demise of class, collective, and multi-plaintiff wage & hour litigation. Plaintiffs’ attorneys were diligent in 2014, however, in their efforts to remain the veritable thorn in employers’ collective sides by accepting as fact that class waivers are enforceable and that their class and collective actions are likely to be decertified, even if certified – or conditionally certified – earlier in a case. A number of those plaintiffs’ class action firms willingly, almost gleefully, pursued claims in arbitration or court on behalf of individual claimants or plaintiffs. Because of their zeal, in 2014 a number of employers faced hundreds of individual claims in arbitration after compelling several away from the courts where a sole or several plaintiffs sought class or collective action relief. Other employers faced a similar surge of individual or multi-plaintiff cases filed in separate courts by former class or putative class members across multiple jurisdictions after convincing a court to decertify or refuse to certify a class that would otherwise have contained them. The plaintiffs’ lawyers’ mantra seems to have been that they will give employers the arbitrations and decertification they desire, followed by the scourge of numerous individual actions (and the concomitant pressure to settle due to the cost of defense).

Regardless of whether the actions are individual, class, or collective, the trend of wage & hour claims has not slowed. The trend is unlikely to slow, as employers and employees are drawn into the well-publicized debate around whether federal, state, and local governments should increase the minimum wage and about how the regulations that define who is eligible to receive overtime pay should be revised after President Obama directed the U.S. Department of Labor in 2014 to develop new rules that will further restrict the so-called “white collar” exemptions under federal law. When those exemptions were last revised in 2003 and 2004, the number of FLSA lawsuits filed nationally increased materially compared to the number filed in 2002. Although a direct correlation between the increase in suits filed in that timeframe and the rule-making process initiated in 2003 cannot be definitively established, it should not be discounted as an indicator of what employers will experience as the DOL makes a new round of revisions in 2015.

In the meantime, courts actively examined the substance of FLSA claims in 2014, and demonstrated a willingness on the whole to hold plaintiffs accountable for proving the claims they made. In Davis v. Abington Memorial Hospital, 765 F.3d 236 (3d Cir. 2014), and Landers v. Quality Communications, Inc., 771 F.3d 638 (9th Cir. 2014), for example, the Third and the Ninth Circuits joined the First and the Second Circuits in ruling that plaintiffs must satisfy Iqbal and Twombly pleading standards when filing their complaints, necessitating assertions of specific facts to support an FLSA claim; hence, vague assertions of alleged wage & hour violations will not suffice. Further, the U.S. Supreme Court in Integrity Staffing Solutions, Inc. v. Busk, 2014 U.S. LEXIS 8293 (U.S. Dec. 9, 2014), ruled late in the year that the mere fact
that an employee devotes time to a task – undergoing a security screening – before being permitted to begin work, and that is consequently a time-consuming task that his or her employer requires, does not necessitate the treatment of that time as compensable under the FLSA and the Portal-to-Portal Act, absent proof that the task is of intrinsic element of an employee’s job. Of course, of the hundreds of cases reaching resolution in 2014, not all were favorable to employers. These decisions suggest nonetheless a willingness among the courts to rule against employees despite the many presumptions that weigh against employers because of state and federal wage & hour laws’ purpose of providing protection to hourly wage-earners.

**Employment Discrimination Class Action Case Trends**

At the same time, the ruling in *Wal-Mart* also fueled more critical thinking and crafting of case theories in employment discrimination class action filings in 2014. The Supreme Court’s decision had the effect of forcing the plaintiffs’ bar to “re-boot” the architecture of their class action theories. It is clear that the playbook on Rule 23 strategies is undergoing an overhaul.

In contrast, Plaintiffs have started to prune class definitions by size, geography, unit, and policy, and have also relied on a little-used provision of Rule 23 – Rule 23(c)(4) – which provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.” Prior to *Wal-Mart*, views of Rule 23(c)(4) fell into two opposing camps – it was either (1) a “housekeeping” rule that could not be used to “manufacture predominance,” or (2) an acceptable way to certify a claim that would not ordinarily meet Rule 23(b)(3)’s stringent predominance requirement. This rule is now experiencing a renaissance after *Wal-Mart*. In particular, plaintiffs’ counsel have relied on *McReynolds v. Merrill Lynch & Co.*, 672 F.3d 482 (7th Cir. 2012), perhaps the leading post-*Wal-Mart* ruling certifying an employment discrimination disparate impact class claim for injunctive relief under Rule 23(c)(4). In *McReynolds*, the Seventh Circuit reversed the decision to deny certification of a race discrimination class challenging the impact of two Merrill Lynch policies – one that allowed brokers to decide to work in “teams,” and one that suggested success-based criteria for distribution of departing brokers’ accounts – even though managers had discretion regarding implementation of both policies. In permitting such a class certification theory, the Seventh Circuit distinguished *Wal-Mart* from the facts before it in *McReynolds*, and concluded that the only “company-wide” policies at issue in *Wal-Mart* forbade discrimination and delegated employment decisions to local managers. In contrast, *McReynolds* involved “company-wide” policies that permitted individuals to exercise discretion in a manner that allegedly disparately impact African-American employees. Therefore, the Seventh Circuit reversed the denial of class certification and permitted the class to proceed under Rule 23(c)(4) notwithstanding its recognition that separate trials could be necessary if plaintiffs prevailed to determine which class members were actually impacted by one or both of the challenged policies, and the extent and nature of their individualized damages. The Seventh Circuit concluded, however, that the individualized nature of such damage calculations were insufficient to defeat class certification for claims brought under Rule 23(c)(4) and Rule 23(b)(2).

The ability of plaintiffs to obtain Rule 23(b)(3) certification on damages, however, is sharply curtailed by *Comcast Corp.*, which holds that plaintiffs must adequately explain how a class-wide determination of damages is possible. If there is no certification of a class as to damages, it is likely that plaintiffs will bootstrap the initial liability finding to any later hearing on damages, arguing under *Teamsters v. United States*, 431 U.S. 324 (1977), that they are entitled to a presumption that they were discriminated against

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7 An analysis of rulings in employment discrimination class actions in 2014 is set forth in Chapter III.

8 *Castano v. American Tobacco*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

9 *In Re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006).
and their individual damages should be heard in mini-trials per Teamsters. Defendants will be forced to consider the transaction costs of hundreds or perhaps thousands of mini-hearings, but it is unclear how many class members would actually take the time to participate in such mini-trials, and it may be worth the gamble.

In sum, as the plaintiffs’ bar “re-boots” to take account of the Supreme Court’s ruling in Wal-Mart, and adapts through strategies based on McReynolds, future employment discrimination class action filings are likely to increase due to a strategy whereby state or regional-type classes are asserted rather than nationwide mega-cases.

**ERISA Class Action Case Trends**

Several trends dominated the ERISA class action litigation scene in 2014. In certain respects, the focus continued to rest on the Supreme Court as it shaped and reshaped the scope of potential liability and defenses in ERISA cases.

Wal-Mart has changed the ERISA certification playing field by giving employers more grounds to oppose class certification. The decisions in 2014 show that class certification motions have the best chance of denial in the context of ERISA welfare plans, and ERISA defined contribution pension plans, where individualized notions of liability and damages are prevalent.

In June 2014, the Supreme Court issued a major class action ruling in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), that is expected to revitalize ERISA “stock drop” litigation. The Supreme Court disposed unanimously of a legal presumption in favor of ERISA fiduciaries. The “Moench” presumption – from *Moench v. Robertson*, 62 F.3d 533 (3d Cir. 1995) – allowed courts to presume at both the motion to dismiss and summary judgment stages that a plan’s fiduciaries had acted prudently in continuing to offer stock of the plan sponsor as a 401(k) plan investment unless the plaintiffs provided evidence that the company was on the “verge of collapse.” While *Dudenhoeffer* contains some assuring language for fiduciaries, including that the ERISA cannot compel them to disclose insider information to participants in violation of securities insider trading laws, it is likely to spawn more ERISA class action litigation if there is another market downturn. The Ninth Circuit has already applied *Dudenhoeffer* to reverse the dismissal of an ERISA “stock drop” class action in *Amgen v. Harris*, 770 F.3d 865 (9th Cir. 2014), and employers can expect such reversals to continue, as well as more class actions to survive motion to dismiss challenges. Undoubtedly, this will increase litigation costs, and may increase risks for ERISA fiduciaries who oversee plans offering employer stock investments.

The obituary for another long-applied ERISA presumption – the so called *Yard-Man* presumption, named after a Sixth Circuit case entitled *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983) – seems all but written. In November of 2014, the Supreme Court heard oral argument in *M&G Polymers USA, LLC v. Tackett*, No. 13-1010 (U.S. Nov. 10, 2014), regarding whether the *Yard-Man* presumption that collectively-bargained retiree welfare benefits were vested for life should continue to be applied. Likely because of *Dudenhoeffer*’s denouncing of judge-made presumptions, both sides appeared to abandon *Yard-Man* in favor of what Justice Sotomayor termed “ordinary contract principles” in the oral argument. A ruling for the defense could make it much harder for plaintiffs to prevail in retiree benefit disputes, but a resort to ordinary contract principles could lead to more litigation over collective bargaining agreements (or other contracts) that are ambiguous, because testimony may be allowed to shed light on the parties’ intent.

Long-held beliefs about the limitations on the remedies available under the ERISA continued to be challenged after the Supreme Court’s 2011 decision in *Cigna v. Amara* and plaintiff’s counsel have

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10 An analysis of rulings in ERISA class actions in 2014 is set forth in Chapter VI.
continued to push the envelope to recover money damages beyond benefits that may be due under plan terms. In the class action context, novel equitable remedy claims can exponentially raise the exposure for employers beyond the value of denied benefits. Finally, 2014 saw an increase in litigation over healthcare billing practices, with healthcare providers filing numerous quasi-class actions against hundreds of employers asserting that they or their third-party claims administered improperly denied coverage for out-of-network treatment. As scrutiny of medical costs increases under healthcare reform, employers can expect to see more of the same in 2015.

**Governmental Enforcement Litigation Trends**

Meanwhile, on the governmental enforcement front, both the EEOC and the U.S. Department of Labor expanded and intensified their administrative enforcement activities and litigation filings in 2014. At the same time, recoveries by settlement – measured by the top 10 settlements in government enforcement litigation – were at the lowest levels in nearly a decade. Simply stated, government enforcement litigation did not convert to significant settlement numbers this past year.

The EEOC continued to follow through on the enforcement and litigation strategy plan it announced in April of 2006; that plan centers on the government bringing more systemic discrimination cases affecting large numbers of workers. As 2014 demonstrated, the EEOC’s prosecution of pattern or practice lawsuits is now an agency-wide priority. Many of the high-level investigations started in 2006 mushroomed into the institution of EEOC pattern or practice lawsuits in 2014. Under the Obama Administration, increases in funding expanded the number of investigators.

The Commission’s 2014 Annual Report\(^\text{11}\) also announced that it expects to continue the dramatic shift in the composition of its litigation docket from small individual cases to systemic pattern or practice lawsuits on behalf of larger groups of workers. The EEOC’s Annual Report detailed the EEOC’s activities from October 1, 2013 to September 30, 2014. The EEOC’s Report indicated that:

- The Commission completed work on 260 systemic investigations in FY 2014, which resulted in 78 settlements or conciliation agreements that yielded a total recovery of $13 million for systemic claims. The FY 2014 recoveries represent a decrease over recoveries in FY 2013 when the Commission netted $40 million.

- The EEOC’s litigation enforcement activities secured $294 million in recoveries in FY 2014. However, the EEOC resolved fewer lawsuits than it did last year, and recovered less money from those cases. Specifically, the EEOC resolved 136 lawsuits during FY 2014 for a total recovery of $22.5 million; this was down significantly from the 209 lawsuits it settled in 2013 for $39 million, making 2014 the EEOC’s lowest year in recoveries the past 17 years.

- The EEOC filed 133 lawsuits in 2014 (up slightly from 131 lawsuits filed in 2013), of which 17 involved claims of systemic discrimination on behalf of more than 20 workers, and 11 cases involved multiple alleged discrimination victims of up to 20 individuals. The EEOC had 228 cases on its active lawsuit docket by year end, of which 14% involved multiple aggrieved parties and 25% involved challenges to alleged systemic discrimination. Overall, this represented increases in these categories in terms of the make-up of the Commission’s litigation being tilted toward systemic cases.

- More than in any other time in its history, the EEOC encountered significant criticism in the manner in which it enforced anti-discrimination laws. This criticism took various forms in

terms of judicial sanctions, suits against the Commission by private litigants and States, and issuance of a Congregational Report questioning the EEOC’s lack of transparency.

Against this back-drop, 2014 saw the lowest recovery numbers in recent years on the part of the EEOC.

This is illustrated by the following chart:

While the inevitable by-product of these governmental enforcement efforts is that employers are likely to face even more such claims in 2015, the EEOC’s systemic litigation program is not without its detractors. Several federal judges entered significant sanctions against the EEOC – some in excess of seven figures – for its pursuit of pattern or practice cases that were deemed to be without a good faith basis in fact or law. Nonetheless, the EEOC shows no signs of adjusting its litigation strategy in light of those sanction rulings, and employers can expect that the coming year will entail aggressive “push-the-envelope” litigation filings and prosecutions by the EEOC, as well as the filing of larger systemic cases.

Fiscal year 2014 marks another mid-point year in the EEOC’s 2012-2016 Strategic Enforcement Plan (“SEP”). The SEP was created in 2012 as a blueprint to guide the EEOC’s enforcement activity. Its most controversial and perhaps most far-reaching effect on the agency’s activity is the priority it gives to systemic cases: those pattern or practice, policy, or class-like cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area. Systemic cases have been the main driver of EEOC litigation over the past few years, and likely will be well into the future. The EEOC is now fighting challenges to its power to bring those cases on a number of fronts. Among other things, it is aggressively challenging any court’s ability to review how it conducts certain statutorily-mandated procedures before bringing suit, including how it investigates its cases and tries to conciliate those cases with employers. If successful in those efforts, the EEOC will have greatly eased its path to pursuing systemic cases.

The EEOC is not only expanding its reach in procedural terms, but also it is attempting to broaden the scope of its authority through an expansion of the scope of anti-discrimination laws themselves. In a number of recent cases, the EEOC has advanced novel legal theories that would, among other things, expand EEO protections to cover transgender employees and require employers to reasonably accommodate pregnant employees, even those who are experiencing normal pregnancies. The EEOC continues to push the edge of the envelope in any way it can, viewing itself as an agency that not only enforces the law, but one that expands the scope of those laws as well.

An analysis of rulings in EEOC cases in 2014 is set forth in Chapter III, Section B.
For this and other reasons, the agency has come under increasing scrutiny and criticism by Republican members of Congress. Such criticism is unlikely to stem the tide of systemic cases or deter the EEOC from continuing to try to expand its enforcement powers. There are still two years left to go in the 2012 SEP. Employers can expect the EEOC will use the next two years to continue to challenge its procedural and substantive limits.

The DOL also undertook aggressive enforcement activities in 2014. Over the past several years, the DOL’s Wage & Hour Division (“WHD”) fundamentally changed the way in which it pursues its investigations. According to the DOL, since early 2009, the WHD has closed 145,884 cases nationwide, resulting in more than $1 billion in back wages for over 250,000 workers. Hence, in 2014, employers finally saw the impact of these changes on the WHD’s enforcement priorities, and 2015 is apt to bring much of the same. With new DOL leadership in place, employers can expect the WHD to find renewed vigor in its enforcement program.

The DOL also focused its activities on wage & hour enforcement on what it terms “24/7.” Notably, the Senate confirmed an Administrator for the DOL’s Wage & Hour Division (“WHD”) for the first time since 2004. The new Administrator, Dr. David Weil, is an architect of WHD’s fissured industry initiative. This initiative focuses on several priority industries, including eating (both limited service/full service establishments), hotel/motel, residential construction, janitorial services, moving companies/logistics providers, agricultural products, landscaping/horticultural services, healthcare services, home healthcare services, grocery stores, and retail trade.

In 2015, the WHD is likely to continue its pursuit of strategies that focus at the top of industry structures -- the companies that affect how markets operate. Employers can expect the WHD to engage in coordinated investigation procedures, focus on related business entities (e.g., franchisees, sub-contractors, staffing companies, etc.), rather than individual workplaces. As part of those investigations, the WHD will use its full spectrum of enforcement tools, including persuasion, education, penalties, hot goods provisions, and other legal tools.

Not to be outdone, the National Labor Relations Board (“NLRB”) undertook an ambitious agenda in 2014 too. It reconsidered well-settled NLRB principles on joint employer rules and representative elections, entertained the possibility of extending the protections of the National Labor Relations Act (“NLRA”) to college athletes, and litigated novel claims seeking to hold franchisors liable for the personnel decisions of franchisees. More than any other area impacting workplace litigation, the NLRB also remained steadfast in its view that workplace arbitration agreements limiting class or collective claims are void under § 7 of the NLRA.

**CAFA Litigation Trends**

A certitude of the modern American workplace is that class action and collective action litigation is a magnet that attracts skilled members of the plaintiffs’ bar. The passage of the Class Action Fairness Act (“CAFA”) has had little impact on the pace and volume of overall workplace class action filings since 2005. Instead, the impact of the CAFA has been limited primarily to determine the proper venue, which often has a dramatic impact on the outcome of workplace class actions.13

The Supreme Court’s first ruling in 2013 on the CAFA – in *Standard Fire Insurance Co. v. Knowles* – and in 2014 – in *Dart Cherokee Basin Operating Co., LLC v. Owens* – ought to assist employers in removing more class actions from state courts to federal courts, thereby effectuating the purposes of the CAFA. Both of the Supreme Court’s rulings were pro-business. *Knowles* rejected a common strategy of Plaintiffs

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13 An analysis of key CAFA rulings in 2014 is set forth in Chapter VIII.
of stipulating that damages were $4.99 million or less to avoid the CAFA’s minimum $5 million amount-in-controversy requirement. *Knowles* held that Plaintiffs cannot bind members of the propose class before a class is certified. *Dart Cherokee Basin* held that Defendants do not have to submit evidence in support of removal, and instead must simply advance plausible allegations of the CAFA’s jurisdictional requirements in a notice of removal. Furthermore, *Dark Cherokee Basin* expressly acknowledged there is no presumption under the CAFA against federal jurisdiction over class actions.

In these respects, 2014 was a transformative year for developments under the CAFA. As a result of *Knowles* and *Dart Cherokee Basin*, employers can expect that more class actions will be litigated in federal courts, and the impediments to removal under the CAFA should be less formidable than in the past.

### B. Impact Of Changing Rule 23 Standards On Workplace Arbitration Issues

The U.S. Supreme Court’s seminal ruling in *Wal-Mart* is as significant a ruling for employers as any decision in the history of workplace class action litigation. The lessons of *Wal-Mart* are wide and varied for a myriad of issues involving workplace class action litigation. The result is that Rule 23 law is undergoing a transformation.\(^\text{14}\)

A corresponding development has been the continual removal of roadblocks to the use of workplace arbitration agreements to manage and control the risks of workplace class action litigation. Beginning with the decision in *Stolt-Nielsen v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), the Supreme Court limited the ability of plaintiffs to pursue class-wide arbitration without an explicit agreement to class-wide adjudication. Then, in *AT&T Mobility LLC v. Concepcion, et al.*, 131 S. Ct. 1740 (2011), the Supreme Court held that the Federal Arbitration Act (“FAA”) preempts state laws that stand as an impediment to enforcing class action waivers, and opened the door for the broad use of arbitration and class action waiver clauses in consumer and employment contracts.

Even after *Concepcion*, the plaintiffs’ bar pressed “public policy” arguments that class adjudication is essential to the vindication of employment rights under Title VII and the FLSA. In 2013, the Supreme Court rejected those arguments in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (“AMEX”), holding that class-wide arbitration is not essential to the vindication of federal statutory rights.

Although *AMEX* did not involve wage & hour claims, it had an immediate impact on wage & hour cases across the country. Indeed, relying on the Supreme Court’s pronouncements, many federal district courts enforced class waivers in FLSA suits. In addition, in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), the Fifth Circuit overruled the National Labor Relations Board’s controversial decision of 2012 in which the Board held that arbitral class waivers violate employees’ rights under the National Labor Relations Act to engage in protected concerted activity. Basing its decision on *Concepcion* and *AMEX*, the Fifth Circuit ruled that nothing in federal labor law forbids employers and employees from agreeing to resolve disputes through individual rather than class or collective arbitration.

A critical question left unanswered by the Supreme Court was whether a court or an arbitrator should decide whether an employer that has agreed to arbitrate “all disputes” with its employees can be required to participate in class arbitration, even if its arbitration agreement does not mention class proceedings. In the wake of *Concepcion* and *AMEX*, the Third Circuit – in *Opalinski v. Robert Half International, Inc.*, 761 F.3d 326 (3d Cir. 2014) – addressed that very question and ruled that the “who decides” issue is presumptively for a judge, not an arbitrator.

\(^{14}\) An analysis of rulings in non-workplace class actions in 2014 is set forth in Chapter IX.
Concepcion and AMEX received almost as much attention as Wal-Mart by federal and state courts in 2014, in passing upon workplace arbitration issues in the class action context. Though the Supreme Court’s rulings pertained to consumer and antitrust contracts, 2014 saw widespread case law rulings on the application of these principles to workplace arbitration agreements. As of the close of the year, Concepcion had been cited in 296 rulings and AMEX had been cited in 99 rulings.

As a result, 2014 witnessed a seismic shift in the approaches of courts to motions to compel arbitration in general, and in particular to the use of workplace arbitration by employers to control workplace class action risks. The key battleground issues for the future are whether class action bans in arbitration agreements should not be enforced due to waiver, defects in formation, or under unconscionability defenses, but arbitration seems designed to leave its marks on workplace class action litigation for the foreseeable future.

That being said, employers will continue to face challenges to use of class waivers in workplace arbitration programs, although in more limited contexts. First, the NLRB is still a hold-out. In a series of rulings in 2014, the NLRB challenged, litigated, and blocked use of workplace arbitration agreements with class action waivers on the grounds that such waivers effectively interfere with the right to engage in concerted protected activity under § 7 of the NLRA. Despite the Fifth Circuit’s rejection of the NLRB’s position in D.R. Horton, the NLRB consistently challenged class action waivers on the grounds that unless and until the Supreme Court rules otherwise, it will adhere to the position that such waivers violate the NLRA (notwithstanding the Fifth Circuit’s rejection of the NLRB’s position). Hence, employers can expect that the NLRB will continue to align itself with the plaintiffs’ class action lawyers who seek to attack class action waivers. Second, in California, the plaintiffs’ bar will continue to “end run” class action waivers based on a slight window left open by the California Supreme Court’s ruling this past year in Iskanian, et al. v. CLS Transportation Los Angeles, LLC, 59 Cal. 4th 348 (2014), in which it held that plaintiffs may enforce the California Labor Code – by bringing wage & hour class action claims – through representative actions under the Private Attorney General Act (“PAGA”) as waivers cannot block PAGA representative actions. As a result, plaintiffs asserting PAGA claims in California can assert “class-like” claims without being subject to a class waiver in a workplace arbitration agreement.

C. Implications Of These Developments For 2015

The one constant in workplace class action litigation is change. More than any other year in recent memory, 2014 was a year of great change in the landscape of Rule 23. As these issues play out in 2015, additional chapters in the class action playbook will be written.

So what will 2015 bring?

Overall, in 2015, the Wal-Mart and Comcast Corp. decisions are unlikely to dampen the focus of government enforcement litigators and the plaintiffs’ class action bar. Instead, case structuring theories will continue to undergo a wholesale “re-booting” process, and case law developments are expected to evolve and reflect these new creative litigation strategies.

On the ERISA front, corporate counsel can expect to see the following developments:

• Wal-Mart continues to play a central role in the certification of ERISA class actions, although it remains to be seen how much plaintiffs are able to make of issue certification under Rule 23(c)(4) and sub-class certification to avoid common defenses.

• Following Dudenhoeffer, more ERISA “stock drop” class actions are apt to be filed, after years of success by the defense bar in beating back these cases.

• A ruling by the Supreme Court in Tibble v. Edison on whether the ERISA statute of limitations permits suits to challenge investment decisions initially made more than six years
before a suit was filed, where the investment remained in the plan during the limitations period.

On the wage & hour front, the deluge of FLSA filings – making wage & hour claims the most predominant type of workplace class action pursued against corporate America – is expected to continue with no end in sight. The wave of wage & hour filings has yet to crest. Corporate counsel, therefore, can expect to see a consistent level of significant litigation activity. Key areas to watch include:

- In terms of novel litigation theories, employers can expect an increase in off-the-clock litigation brought by non-exempt employees, fueled by new theories attacking employer rounding practices, and increased off-duty use of PDA’s and other mobile electronic devices vis-à-vis the application of the continuous workday rule.

- Increased litigation also is expected over issues in independent contractor misclassification and joint employer liability cases, as well as off-the-clock work (including donning and doffing cases), unpaid overtime, missed or late meal and rest breaks, time-shaving, and improper tip pooling.

- Continued developments in the case law are virtually certain relative to § 216(b) certification defenses, as Wal-Mart continues to impact FLSA certification questions and rulings, and as some courts narrow their conception of the "similarly-situated" requirement in collective actions based on the commonality requirement as reformulated by Wal-Mart.

Last but not least, employment discrimination class action litigation – both in terms of private plaintiff cases and government enforcement litigation brought by the EEOC – is expected to remain “white hot” in 2015. On the employment discrimination front, corporate counsel can expect to see the following developments:

- The plaintiffs’ bar will continue to "re-boot" the architecture of employment discrimination class actions to increase their chances to secure class certification post-Wal-Mart. Their focus is likely to be on smaller class cases (e.g., confined to a single corporate facility or operations in one state) as opposed to nationwide, mega-class action cases, as well as cases confined to a discrete practice – such as a hiring screen (e.g., a criminal background check) – that impacts all workers in a similar fashion.

- In terms of certification theories, the plaintiffs' bar is apt to pursue hybrid or parallel class certification theories where injunctive relief is sought under Rule 23(b)(2) and monetary relief is sought under Rule 23(b)(3), as well as a range of partial "issues certification" theories under Rule 23(c)(4).

- Plaintiffs are also likely to pursue certification of liability-only classes, while deferring damages issues and determinations, and pressuring employers to settle due to the transaction costs of individualized mini-trials on damages. In effect, this tactic is an end-run around the limitations on Rule 23(b)(3) articulated in Comcast Corp.

- Employers and their defense counsel will use new post-Wal-Mart case law authorities to challenge class allegations at the earliest opportunity. An emerging trend of rulings in 2014 will continue to develop, as courts confront these pro-active defense strategies.

- The EEOC’s systemic litigation program is expected to expand in 2015, with more filings, larger cases, and bigger monetary demands as the agency continues its aggressive enforcement activities. Corporate counsel also can expect to see more systemic administrative investigations relative to hiring issues (e.g., use of criminal histories in
background checks) and those based on pay and promotions disparate impact theories due to alleged gender or race discrimination.

- Despite harsh criticism from employer groups and Republican members of Congress, as well as a series of courtroom setbacks for the EEOC in 2014 (with federal judges entering significant sanctions and fee awards against the Commission, which the government has uniformly appealed), it is expected that these rulings will embolden rather than damper the EEOC’s aggressive enforcement of workplace bias laws.

- The DOL, the NLRB, and the WHD will continue to “push the legal envelope” on joint employer, franchisor/franchisee, and class waiver issues.

In sum, the lesson to draw from 2014 is that the private plaintiffs’ bar and government enforcement attorneys are apt to be equally, if not more, aggressive in 2015 in bringing class action and collective action litigation against employers. These novel challenges demand a shift of thinking in the way companies formulate their strategies. As class actions and collective actions are a pervasive aspect of litigation in Corporate America, defending and defeating this type of litigation is a top priority for corporate counsel. Identifying, addressing, and remediating class action vulnerabilities, therefore, deserves a place at the top of corporate counsel’s priorities list for 2015.
II. Significant Class Action Settlements In 2014

Similar to the trend over the last several years, the plaintiffs’ bar and government enforcement attorneys obtained many significant settlements in 2014. Particularly in the areas of employment discrimination class actions, wage & hour collective actions, ERISA class actions, and governmental enforcement lawsuits, the settlements were for very significant amounts. In the area of ERISA class actions, the settlement values represented increases over settlements obtained in 2013. In all other categories, aggregate settlement numbers decreased. This Chapter evaluates the top ten private plaintiff-initiated monetary settlements, government-initiated monetary settlements, and noteworthy injunctive relief provisions in class action settlements.

A. Top Ten Private Plaintiff-Initiated Monetary Settlements

Plaintiffs’ lawyers secured many large settlements in 2014 for employment discrimination, wage & hour, and ERISA class actions. The top ten settlements from these categories totaled $1.8 billion in 2014. This is a significant increase from 2013, when the top ten settlements in these categories totaled $638.15 million.

The plaintiffs’ bar also pursued a myriad of other statutory workplace class actions. In recognition of the growing exposure these claims present to employers, this Chapter has been expanded to include a section discussing the top ten settlements in this area. These cases involve class actions for violations of workplace antitrust laws, the Fair Credit Reporting Act, and the Worker Adjustment and Retraining Notification Act.

Settlements In Private Plaintiff Employment Discrimination Class Action Lawsuits

For employment discrimination class actions, the monetary value of the top ten private plaintiff settlements entered into or paid in 2014 totaled $227.93 million. This represented a slight decrease from the prior year. By comparison, the top ten settlements in 2013 totaled $234.1 million.

1. $98 million – City Of New York
2. $53 million – Airline Pilots Association
3. $38 million – City Of New York
4. $9.98 million – Social Security Administration
5. $8 million – Costco Wholesale Corp.
6. $6.5 million – Bashas’ Inc.
7. $6.15 million – United Airlines, Inc.
8. $4.3 million – City Of Chicago
9. $2 million – Peters Township School District
10. $2 million – McLennan County

The biggest settlements involved nationwide class actions. By category, there were three gender and two race discrimination class actions, as well as class actions based on age, veteran status, disability, national origin, and retaliation claims.

1. $98 million – *Vulcan Society, Inc., et al. v. City Of New York*, Case No. 07-CV-2067 (E.D.N.Y. Nov. 21, 2014) (approval of settlement agreement in a class action over a pair of civil service tests
administered by the New York Fire Department that were found to be discriminatory against African-American and Hispanic applicants).

2. **$53 million – Brady, et al. v. Airline Pilots Association, Case No. 02-CV-2917 (D.N.J. May 29, 2014)** (court approval of class action brought by TWA pilots over discriminatory application and breach of duty of fair representation relative to seniority lists).


4. **$9.98 million – Jantz, et al. v. Social Security Administration, Agency Case No. 06-2518-SSA (EEOC – Baltimore District Office Oct. 30, 2014)** (preliminary approval of class action settlement under the Americans With Disabilities Act involving current and former employees with targeted disabilities at the Social Security Administration who applied for but were not selected for promotion).


**Settlements In Private Plaintiff Wage & Hour Class Action Lawsuits**

For wage & hour class actions, the monetary value of the top ten private settlements entered into or paid in 2014 totaled $215.3 million. This is a significant decrease from the top ten settlements in 2013, which totaled $248.45 million.

1. **$56.5 million – Brinker Restaurant Corp.**

2. **$26 million – City Of Los Angeles**

3. **$23 million – Walgreen Co.**
4. $21 million – Wal-Mart Stores, Inc.
5. $16.5 million – Kindred Healthcare Operating, Inc.
7. $15 million – Verizon California, Inc.
8. $15 million – Wells Fargo
10. $12 million – JPMorgan Chase Bank, N.A.

The top ten settlements were split evenly between nationwide and state-specific claims, and all but one of the top ten settlements involved wage & hour lawsuits pending in either federal or state courts in New York and California.


2. $26 million – Gravina, et al. v. City Of Los Angeles, Case No. BC356014 (Cal. Super. Ct. Aug. 12, 2014) (approval of settlement of class action brought by 1,074 current and former city trash truck drivers who alleged a ban on naps and other activities during their meal breaks violated state labor laws).

3. $23 million – In Re Walgreen Co. Wage & Hour Litigation, Case No. 11-CV-07664 (C.D. Cal. Sept. 29, 2014) (final settlement approval of a class action lawsuit brought by employees who accused the company of failing to pay overtime for mandatory security checks and not allowing adequate rest periods).

4. $21 million – Carrillo, et al. v. Schneider Logistics Trans-Loading & Distribution, Inc. et al., Case No. 11-CV-8557 (C.D. Cal. May 14, 2014) (preliminary settlement agreement to resolve a proposed wage & hour class action claims against Wal-Mart amid several of its contractors).


7. $15 million – Banda, et al. v. Verizon California, Inc., Case No. BC434587 (Cal. Super. Ct. Oct. 21, 2014) (preliminary approval of settlement that resolved a class action accusing Verizon California, Inc. of issuing inaccurate wage statements that excluded crucial information that made it impossible for employees to determine whether they had been paid properly).

8. $15 million – In Re Wells Fargo Wage & Hour Employment Practices Litigation, Case No. 11-MD-2266 (S.D. Tex. April 4, 2014) (final approval of settlement involving class action claims of nearly 4,500 home mortgage consultants in a collective action alleging that the bank and its predecessors failed to pay them overtime).


Settlements In Private Plaintiff ERISA Class Action Lawsuits

For ERISA class actions, the monetary value of the top ten private settlements entered into or paid in 2014 totaled $1.31 billion. This amount is significantly higher – nearly a ten-fold increase – than in 2013, when the total monetary value of the top ten private settlements reached $155.6 million.

1. $480 million – Daimier Trucks North America, LLC
2. $415 million – ING Life Insurance & Annuity Co.
3. $140 million – Nationwide Life Insurance Co.
4. $82 million – Meriter Health Services
5. $60 million – State Street Corp.
6. $44 million – S.C. Johnson & Sons, Inc.
7. $39 million – Prudential Insurance Co. Of America
8. $22 million – Edison Mission Energy
9. $19.5 million – TIAA-CREF
10. $17 million – Alliance Holdings, Inc.

The largest ERISA class action settlements involved disputes over breach of fiduciary duty, use of revenue sharing agreements, reduction of retiree benefits, and/or investing pension or 401(k) assets into company stock.


2. $415 million – Healthcare Strategies, Inc., et al. v. ING Life Insurance & Annuity Co., Case No. 11-CV-282 (D. Conn. Sept. 25, 2014) (final approval of settlement agreement involving ERISA class action claims by 401(k) plan administrators challenging the service provider’s receipt of revenue-sharing payments from mutual funds and similar entities).


8. **$22.9 million** – *In Re Edison Mission Energy*, Case No. 12-CV-49219 (N.D. Ill. June 25, 2014) (final approval of settlement of an ERISA class action involving claims from retirees objecting to the company's bid to end their benefits following the company's reorganization plan).


10. **$17 million** – *Chesemore, et al. v. Alliance Holdings, Inc.*, Case No. 09-CV-413 (W.D. Wis. Sept. 5, 2014) (final approval to a group of class action settlements for participants in an employee stock ownership plan whose accounts were wiped out by prohibited transactions conducted by the plan's fiduciaries).

**Settlements In Private Plaintiff Statutory Workplace Class Actions**

Plaintiffs’ lawyers also pursued a myriad of statutory claims in workplace class actions brought against employers (outside of the areas of employment discrimination, wage & hour, and ERISA class actions). These cases involved statutory claims for workplace antitrust violations, Worker Adjustment and Retraining Notification Act (“WARN”) violations, and Fair Credit Reporting Act (“FCRA”) violations. The top ten settlements in this category totaled $74.03 million in 2014.

1. **$20 million** – Intuit, Inc.
2. **$18.6 million** – Intellicorp Records
3. **$8 million** – Experian Information Solutions
4. **$6.8 million** – Publix Super Markets, Inc.,
5. **$4.4 million** – Swift Transportation Co. Of Arizona LLC
6. **$4.5 million** – Dewey & LeBoeuf LLP
7. **$4.08 million** – Dolgencorp Inc.
8. **$3.2 million** – General Information Services
9. $2.75 million – U.S. Xpress, Inc.

10. $1.7 million – ClosetMaid Corp.

The 10 biggest settlements involved eight nationwide class actions for FCRA claims, as well as one WARN Act class action, and one workplace antitrust class action.

1. $20 million – In Re High-Tech Employee Antitrust Litigation, Case No. 11-CV-2509 (N.D. Cal. May 16, 2014) (final approval of settlement of workplace class action antitrust claims over “do not poach” information technology workers practices involving Intuit, Inc., Lucasfilm, and Pixar).


3. $8 million – Holman, et al. v. Experian Information Solutions, Case No. 11-CV-180 (N.D. Cal. Dec. 12, 2014) (final approval of settlement in class action alleging violations of 15 U.S.C. §§ 1681e(b) and 1681k(a) of the FCRA for a class of 547,165 individuals).


B. Top Ten Government-Initiated Monetary Settlements

The EEOC and the U.S. Department of Labor ("DOL") aggressively litigated government enforcement actions in 2014.
Based on preliminary figures for the U.S. Government’s 2014 fiscal year, the EEOC filed 133 new lawsuits, including 105 non-systemic class suits and 28 systemic pattern or practice lawsuits. In 2014, the EEOC resolved 136 pending lawsuits and secured $296.1 million in settlements for allegedly injured victims of job bias, a decrease of $75.9 million as compared to the previous year. The EEOC also received a total of 88,778 private sector charges of discrimination, which is approximately 5,000 fewer than the previous year (but still one of the highest totals in any year since 1964). In addition, the EEOC’s docket of systemic pattern or practice cases grew to over 25% of the Commission’s case load.

For all types of government-initiated enforcement actions, the monetary value of the top ten settlements entered into or paid in 2014 totaled $39.45 million. This entailed a significant decrease over 2013, as the top ten settlements totaled $171.6 million.

**Settlements Of Government-Initiated Enforcement Actions And Pattern Or Practice Lawsuits**

1. $6.8 million – Chickie’s & Pete’s
2. $5.8 million – LinkedIn
3. $5.25 million – GreatBanc Trust
4. $4.9 million – MDG Design
5. $3.9 million – NYC Car Wash Barons
6. $3.3 million – Common Destiny Care Homes
7. $2.9 million – Larino Masonry, Inc.
8. $2.4 million – MacFarms, Inc.
9. $2.2 million – Cargill
10. $2 million – Pitre, Inc., d/b/a Pitre Buick/Pontiac

Seven settlements involved federal DOL enforcement actions, two of the settlements involved EEOC pattern or practice lawsuits, and one settlement involved state DOL enforcement actions.


2. **$5.8 million – U.S. Department Of Labor v. LinkedIn (DOL Aug. 4, 2014)** (settlement of FLSA claims brought by the U.S. DOL against LinkedIn on behalf of 359 former and current employees alleging violations of overtime and record-keeping provisions).


5. $3.9 million – *State Of New York-Department Of Labor v. NYC Car Wash Barons* (N.Y. Mar. 6, 2014) (settlement agreement resulting from claims of the N.Y. DOL on behalf of 1,000 hourly workers who alleged widespread wage, unemployment insurance, and workers’ compensation violations).

6. $3.3 million – *U.S. Department Of Labor v. Common Destiny Care Homes* (DOL Oct. 30, 2014) (settlement agreement to several northern California residential care operators for failing to pay overtime and for missed breaks to employees who worked up to 20 hours a day care for elderly patients in million-dollar suburban homes).


8. $2.4 million – *EEOC v. MacFarms, Inc.*, Case No. 11-CV-257 (D. Haw. Sept. 3, 2014) (consent decree approved in national origin and retaliation pattern or practice lawsuit brought by the EEOC relative to claims on behalf of Asian and Thai farm workers against four employers).

9. $2.2 million – *U.S. Department Of Labor v. Cargill* (DOL Jan. 23, 2014) (entry of conciliation agreement stemming from an investigation of Defendant’s hiring practices at three facilities covering 2,959 job applicants who were rejected for production jobs allegedly due to race and gender discrimination).


C. **Noteworthy Injunctive Relief Provisions In Class Action Settlements**

Generally, the types of relief obtained in settlements of employment discrimination class actions can be grouped into five categories, including modification of internal personnel practices and procedures; oversight and monitoring of corporate practices; mandatory training of supervisory personnel and employees; compensation for named plaintiffs and class members; and an award of attorneys’ fees and costs for class counsel. In addition to substantial payments for overtime liability, settlements of FLSA collective actions often involve changes to payroll practices and procedures. In ERISA class action settlements, the terms typically include monetary payments along with injunctive orders barring fiduciaries and third-parties from serving as plan fiduciaries or managers.

Class action settlements involving private plaintiffs generally contain one or more of these items of non-monetary injunctive relief, but rarely contain all of them. Attorneys representing the U.S. Government in enforcement litigation actions also secured several settlements in 2014 that had noteworthy injunctive relief provisions. This reflects in some measure the significant “public interest” component of government-initiated class action litigation.

Among the more novel and/or onerous non-monetary relief requirements imposed on employers in 2014 are the following:

- Requirement to abstain from inquiring into the genetic background of an applicant or an applicant’s family members;
- Requirement to establish an internal employee “hotline” for reporting discrimination incidents;
• Requirement to adjust seniority lists in favor of employees who are class members, as well as to grant increases in seniority for purposes of salary increases and enhancement of employee benefits;
• Requirement to eliminate use of paper applications in the hiring process and convert to an electronic process through the Internet;
• Requirement that contracts with outside medical providers for pre-employment physicals incorporate training on ADA issues and an obligation to follow the consent decree’s requirements for the employer’s new hiring protocols;
• Requirement that an employer adjust its dress and grooming policy to allow employees to request a religious exemption to grow beards;
• Adoption of new testing and evaluation procedures for hiring, promotion, and compensation; and,
• Adoption of hiring goals for applicants based on minority status.

The top ten settlements in 2014 involving significant injunctive relief provisions include:

1. **U.S. v. New York City Board Of Education, Case No. 96-CV-374 (E.D.N.Y. April 4, 2014).** The Court approved a settlement agreement stemming from allegations that the New York City Board Of Education engaged in race, sex, national origin discrimination in hiring custodial engineers to work in the New York City public school system. As part of the Board of Education’s obligations under the settlement agreement, the Court ordered the Board of Education to provide monetary and injunctive relief to a class of individuals who had applied for or worked as custodial engineers. The injunctive relief included awards of retroactive, competitive seniority; the grant of seniority benefits to existing employees based on new seniority dates; transfer rights based on previous denials of transfers and accommodations; and adjustments to pension and salaries based on wrongful denial of transfers and seniority.

2. **U.S. Department Of Labor v. Great Plains, Inc. (OFCCP Sept. 8, 2014).** The Department of Labor undertook an investigation of Great Plains, Inc. for allegedly rejecting female applicants for merchandising, driving, production, and warehouse positions. As part of the settlement of the claims, Defendant agreed to pay $475,000 and change its corporate policies, practices, and procedures to recruit, attract, and hire applicants for its bottling and distribution facility positions. As part of the settlement, Defendant agreed to convert its application process from one that use offline approaches – such as paper, telephones, and kiosks – to an entirely electronic process. In addition, Defendant agreed to eliminate its pre-employment assessment test.

3. **EEOC v. ACM Services, Inc., Case No. 14-CV-2997 (D. Md. Nov. 10, 2014).** The Court approved a consent decree between the EEOC and Defendant stemming from allegations that the company engaged in a pattern or practice of race and sex discrimination in its recruitment hiring of field laborers. In addition to monetary relief under the consent decree, Defendant agreed to cease using exclusive word-of-mouth recruitment and hiring techniques. In addition, the consent decree obligates Defendant to establish numerical hiring goals based on both race and sex in filling available permanent and temporary or contingent field labor vacancies. The consent decree also requires Defendant to establish an applicant tracking system and to conduct annual goal attainment reviews to monitor and measure its efforts to recruit African-American and female applicants.

4. **In Re Falasca Mechanical Inc. & Plumbers & Pipefitters Local No. 332, Case No. EF14SB-61686 (N.J. Feb. 24, 2014).** The New Jersey Attorney General approved a settlement with Defendant stemming from an investigation that it violated state law regulations barring gender discrimination in employment by failing to employ female plumbers on jobs it handled, including numerous taxpayer-funded projects. Under the terms of the administrative consent order, Defendant agreed to make payments of $400,000 and to undertake efforts to increase female
recruitment and to augment training and employment opportunities for female plumbers over the
next three years. Under the terms of the administrative consent order, the company also agreed to
hiring goals for women on every public contract it is awarded, as well as to undertake outreach
efforts at vocational-technical schools to provide information about the plumbing industry in general,
and to encourage female students to pursue careers in the plumbing trades.

5. **EEOC v. All Star Seed, Case No. 13-CV-7196 (C.D. Cal. Nov. 7, 2014).** The Court approved a
consent decree stemming from an EEOC lawsuit alleging discrimination under the Americans With
Disabilities Act and the Genetic Information Non-Discrimination Act of 2008 ("GINA"). The EEOC
asserted that Defendants engaged in unlawful hiring practices, pre-offer medical examinations, and
medical inquiries intended to screen out job applicants and to make hiring decisions on the basis of
disabilities and genetic information. In addition to monetary relief of $187,500 to a class of allegedly
injured victims, Defendants agreed to hire an equal employment opportunity monitor; accept a
nationwide injunctive relief order requiring maintenance of employees' confidential medical
information; establish new policies prohibiting discrimination and retaliation prohibited by the ADA
and the GINA; undertake training for all managers and supervisory employees on non-
discrimination, including pre-employment and hiring practices compliant with the ADA and the
GINA; and submit annual reports to the EEOC on Defendants' compliance with these obligations.

Oct. 8, 2014).** The Court approved a consent decree stemming from allegations that the City's Fire
Department had engaged in a pattern or practice of discrimination against disabled applicants and
employees by requiring job applicants to submit to medical examinations before they could be
hired. As part of the consent decree, Defendant agreed to adopt new policies regarding how it uses
medical examinations and information from health-related inquiries and hiring, and to ensure that
employees involved in the hiring process have been trained on the ADA's requirements and
restrictions. Further, the consent decree requires the City to insert a provision requiring medical
examiners to comply with Defendants' policies and procedures on medical examinations in all
existing and future contracts between the City and any outside medical personnel. Finally, all
contracts between the City and outside medical personnel must include a requirement of training on
ADA issues, and each medical examiner must certify by contract that he or she has reviewed the
ADA training materials.

Sept. 10, 2014).** The Court approved a consent decree stemming from an investigation that the
school district's policy prohibiting police officers from having beards beyond a certain length violated
the Civil Rights Act of 1964. Under the terms of the consent decree, Defendant agreed to develop
a policy that will allow officers to request religious exemptions to grow beards longer than one-
quarter of an inch.

Court approved a consent decree stemming from allegations that Defendant refused to hire an
applicant because he was HIV positive. In addition to monetary relief of $75,000 to an anonymous
applicant at the center of the dispute, Defendant agreed to injunctive relief to prevent potential
future ADA violations. The consent decree obligates the Defendant to create and implement a
policy that explains, defines, and prohibits disability discrimination in all terms and conditions of
employment; to retain a consultant to provide at least four hours of ADA compliance training; and to
submit reports to the EEOC over the next three years detailing its efforts to comply with the consent
decree.

consent decree stemming from allegations that Defendant engaged in verbal abuse of minority
employees, and it violated Title VII's prohibitions against race and national origin harassment,
discrimination, and retaliation. In addition to the monetary settlement of $1.2 million, Defendants
must provide their employees with extensive training on employment discrimination laws, establish a toll-free anonymous complaint "hotline," and conduct annual surveys of employees to ensure that discrimination is not occurring at the company.

10. United States v. City Of Austin, Case No. 14-CV-533 (W.D. Tex. June 9, 2014). The Court approved a consent decree stemming from allegations that the City Of Austin utilized selection procedures for entry-level firefighters that had the effect of depriving African-Americans and Hispanics of employment opportunities because of the race and national origin. The competitive selective procedures at issue in the litigation were governed in part by the Texas Local Government Code, as well as a collective bargaining agreement with the City's firefighters union. As part of the consent decree, the City is specifically enjoined from using any written cognitive assessment test as part of its selection process for cadets that has any disparate impact upon African-American or Hispanic applicants; engage in affirmative recruitment of African-American and Hispanic candidates; appoint a consent decree compliance officer; and engage in affirmative outreach for recruitment for qualified candidates.