

## EMPLOYMENT PRACTICES LIABILITY CONSULTANT

### **Seyfarth Shaw *Workplace Class Action Litigation Report* for 2018**

*By Bob Bregman, CPCU, MLIS, RPLU, and Sean Jordan, CPCU, MLIS*

For the eighth consecutive year, we are pleased to offer a short summary of (now in its 14th edition) Seyfarth Shaw's *Workplace Class Action Litigation Report 2018*. (Read the [2017](#), [2016](#), [2015](#), [2014](#), [2013](#), [2012](#), and [2011](#) overviews.)

The *Report* is a must-have resource for legal research and in-depth analysis of employment-related class action litigation. Anyone who practices in this area, whether as a corporate counsel, a private attorney, a business executive, a risk manager, an underwriter, a consultant, or a broker, cannot afford to be without it. Importantly, the *Report* is the only publication of its kind in the United States. It is the sole compendium that analyzes workplace class actions from "A to Z." Adding to its utility is the fact that the 2018 edition of the *Report* is also available as an e-book. (Previously, it was published solely as a hard-bound volume or in CD format.) In short, it is "the bible" for class action legal practitioners, corporate counsel, employment practices liability insurers, and anyone who works in related areas.

Gerald L. Maatman Jr., a partner with Seyfarth Shaw LLP, compiles and edits the *Report*. Mr. Maatman's practice focuses on defending employers involved in employment-related class actions and in Equal Employment Opportunity Commission (EEOC) pattern or practice cases. He is co-chair of the firm's Class Action Defense Group and authors the firm's [class action blog](#). Mr. Maatman pioneered the process of conducting employment practices audits to assist employers in structuring effective and practical personnel policies and protocols. His work in this area has been profiled in the *Wall Street Journal*, the *Economist*, and *Time* magazine. He was selected for 2 years running by Law360 as one of the top 4 employment lawyers in the United States.

#### **A Brief Overview of What's Inside**

The encyclopedic, 861-page 2018 annual *Workplace Class Action Litigation Report* insightfully examines and analyzes a total of

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1,408 class action case decisions. In addition, all of the federal cases examined in the *Report* are indexed by federal circuit—an invaluable feature that further enhances the report’s utility.

The following is a synopsis of the 14th annual *Workplace Class Action Litigation Report*.

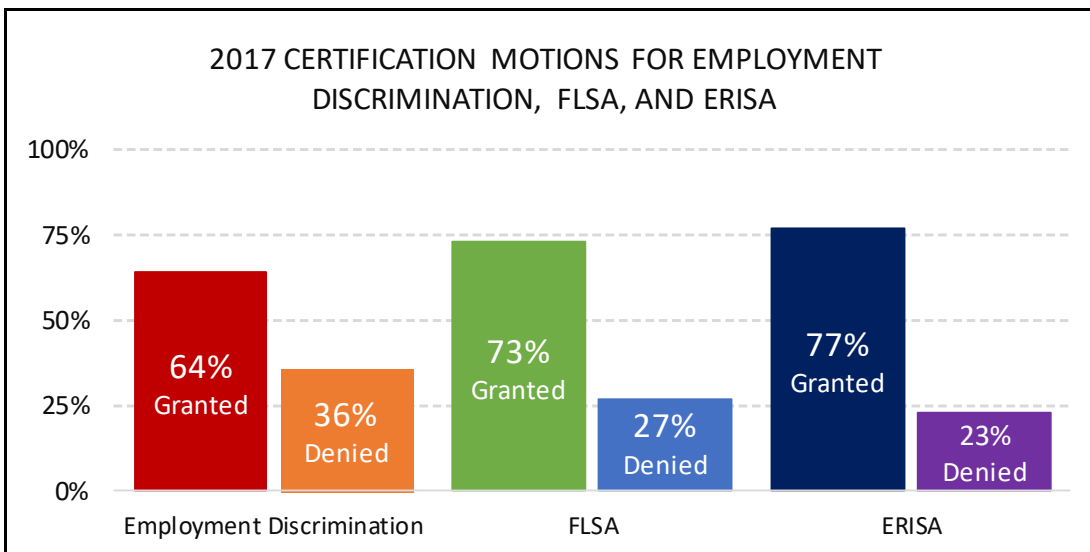
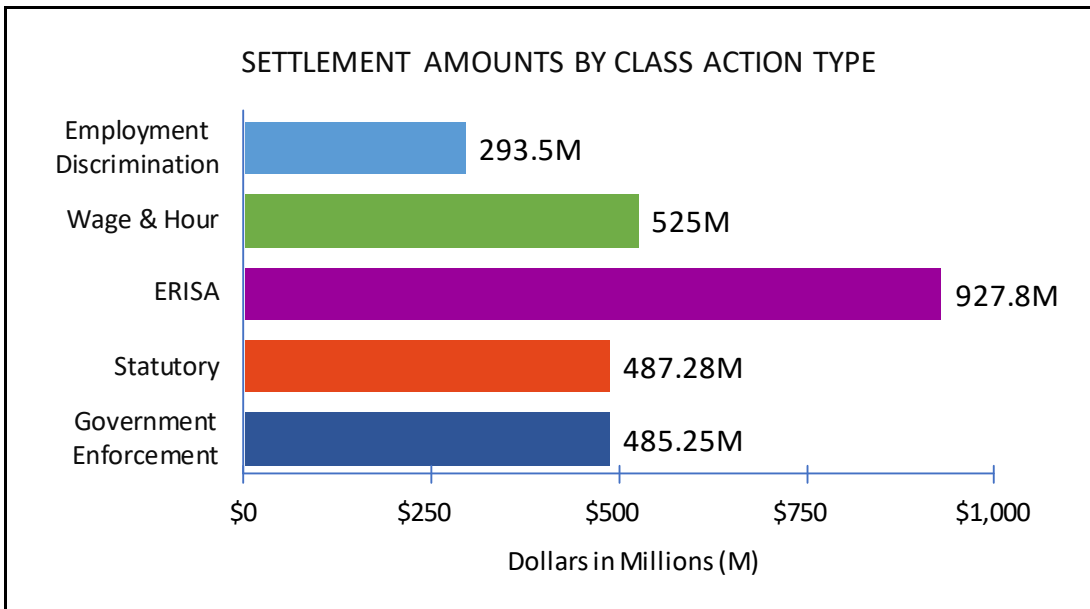
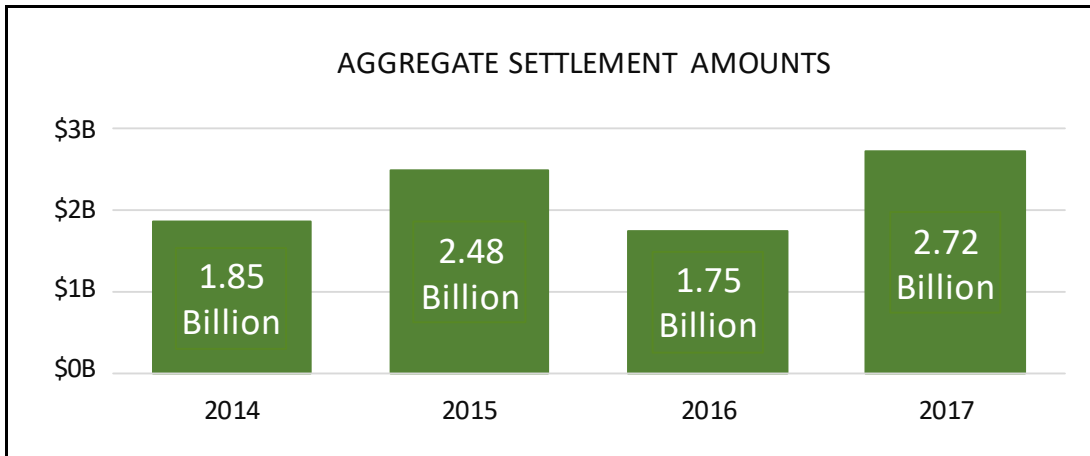
- ♣ **Overview of the Year in Workplace Class Action Litigation.** This section summarizes the key legal and procedural trends that emerged in 2017, addresses key developments in workplace class action litigation in 2017, and assesses the implications these developments will have on litigation in 2018.
- ♣ **Significant Class Action Settlements in 2017.** This section lists the top 10 settlements in (a) private plaintiff employment discrimination lawsuits, (b) private plaintiff wage and hour class actions, (c) private plaintiff Employee Retirement Income Security Act (ERISA) of 1974 actions, (d) government-initiated enforcement actions and pattern or practice suits, and (e) the top 10 injunctive relief rulings issued by various courts that were a part of certain class action settlements. Items (a), (b), (c), and (d) are reproduced later in this article.
- ♣ **Significant Federal Employment Discrimination Class Action and EEOC Pattern or Practice Rulings.** This section of the *Report* analyzes discrimination class action cases brought under (a) Title VII of the Civil Rights Act of 1964 and (b) “pattern or practice” enforcement actions brought by the EEOC.
- ♣ **Significant Collective Action Rulings under the Age Discrimination in Employment Act (ADEA), the Fair Labor Standards Act (FLSA), and ERISA.** Cases brought under these federal statutes constitute a substantial portion of all employment-related class action litigation. Therefore, court interpretations of these statutes are important for future cases and understanding corporate risks on the workplace front.

- ♣ **Significant State Law Class Action Rulings.** These rulings are significant because, during the past several years, plaintiffs’ attorneys have been increasingly resorting to state courts as a forum for pursuing employment-related class action litigation.
- ♣ **Rulings on the Class Action Fairness Act (CAFA).** This law facilitates removal of class actions from state court to federal court. In addition, the CAFA regulates the selection of class counsel, tightens control of attorneys’ fees awarded to class counsel, toughens pleading standards, reduces the ability of class counsel to dictate the choice of forum, facilitates interlocutory appeals of class certification rulings, and regulates settlements of class actions. Given these profound effects on underlying case strategy and the structuring of class actions, the annual *Workplace Class Action Litigation Report* analyzes CAFA-related cases.
- ♣ **Other Federal Rulings Affecting the Defense of Workplace Class Action Litigation.** Throughout 2017, federal courts issued key rulings in class action lawsuits on Rule 23 issues, which significantly impact the defense of workplace actions. As the plaintiffs’ class action bar has pressed new theories, and the nature of claim allegations continues to morph, these rulings are important in formulating effective defense strategies for workplace class actions.

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LITIGATION REPORT  
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The following sections highlight some of the *Report's* most noteworthy contents.

## **Four Key Trends in Workplace Class Actions during 2017**

The *Report* notes four important developments in class actions during 2017. They are as follows.

- 1. The monetary value of the top workplace class action settlements rose dramatically in 2017.** These numbers increased over past years, even after they had reached all-time highs in 2014 to 2016. The plaintiffs' employment class action bar and governmental enforcement litigators were exceedingly successful in monetizing their case filings into large class action settlements, and they did so at decidedly higher values than in previous years, as the graphics show. The top 10 settlements in various employment-related class action categories totaled \$2.72 billion in 2017, an increase of over \$970 million from \$1.75 billion in 2016.

Furthermore, settlements of employment discrimination class actions experienced more than a three-fold increase in value; statutory workplace class actions saw nearly a five-fold increase; and government enforcement litigation registered nearly a ten-fold increase.

Whether this is the beginning of a long-range trend or a short-term aberration remains to be seen as 2018 unfolds. But the determinative markers suggest that this upward trend will rise further in 2018, at least insofar as private plaintiff class actions are concerned.

- 2. While federal and state courts issued many favorable class certification rulings for the plaintiffs' bar in 2017, evolving case law precedents and new defense approaches resulted in better outcomes for employers**

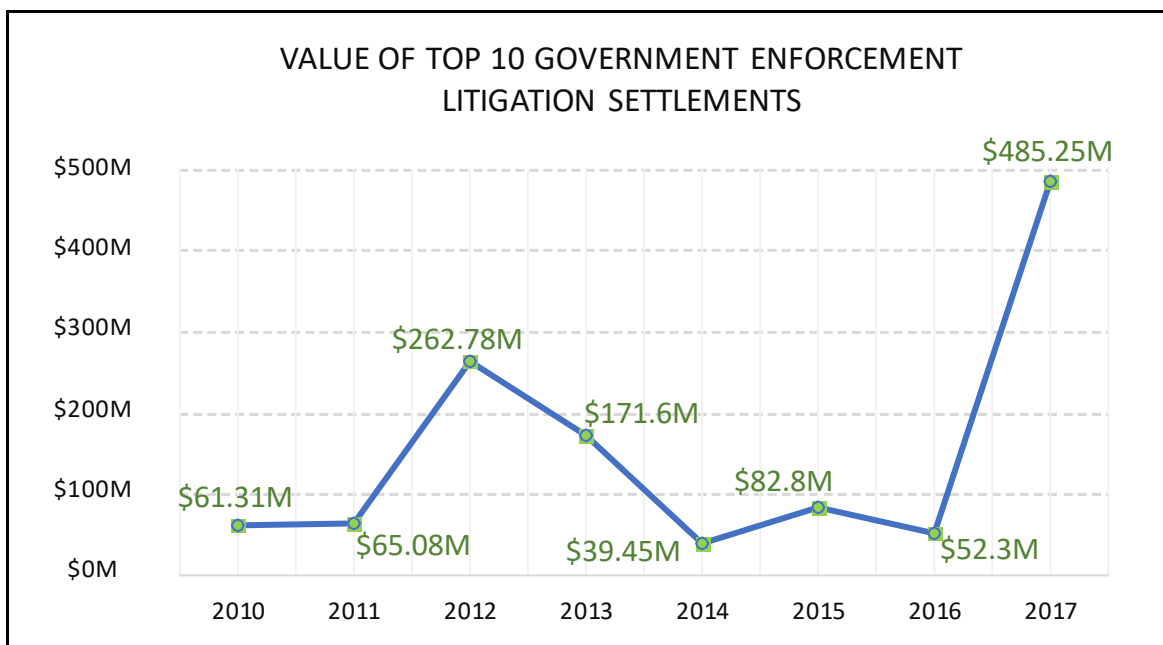
**in opposing class action certification requests.** Plaintiffs' lawyers continue to craft refined class certification theories to counter the stringent Rule 23 certification requirements established in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). As a result, in the areas of employment discrimination and ERISA class actions, the plaintiffs' bar scored well in securing class certification rulings in federal courts in 2017 (over comparative figures for 2016). Class actions were certified in significant numbers in "magnet" jurisdictions that continued to issue decisions that encourage—or in effect force—the resolution of large numbers of claims through class-wide mechanisms. Yet, while a significant volume of wage and hour certification decisions in 2017 increased as compared to last year, employers actually fared better in litigating those class certification motions in federal court than last year. Of the 257 wage and hour certification decisions in 2017, plaintiffs won 170 of 233 conditional certification rulings (approximately 73 percent) but lost 15 of 24 decertification rulings (approximately 63 percent). By way of comparison, there were 224 wage and hour certification decisions in 2016 where plaintiffs won 147 of 195 conditional certification rulings (approximately 76 percent) and lost 13 of 29 decertification rulings (approximately 45 percent). In sum, employers beat slightly more first-stage conditional certification motions in 2017 and dramatically increased their odds—a jump of 18 percent—of fracturing cases with successful decertification motions.

**Note:** Rule 23 governs class actions in federal courts, typically involving lawsuits affecting potential class members in different states or that have a connection with federal law. A detailed explanation appears on page iii of the annual *Workplace Class Action Litigation Report*.

**3. Filings and settlements of government enforcement litigation in 2017 did not reflect what some expected to be a head-snapping pivot from the pro-worker outlook of the Obama administration to a pro-business viewpoint of the Trump administration.** Instead, as compared to 2016, government enforcement litigation actually increased in 2017. As an example, the EEOC alone brought 194 lawsuits in 2017 as compared to 86 lawsuits in 2016. Further, the settlement value of the top 10 settlements in government enforcement cases jumped dramatically—from \$52.3 million in 2016 to \$485.25 million in 2017. The explanations for this phenomenon are wide and varied and include the time lag between Obama-appointed enforcement personnel vacating their offices and Trump-appointed personnel taking charge of agency decision-making power; the number of lawsuits “in the pipeline” that were filed during the Obama administration that came to conclusion in the past year; and the “hold-over” effect, whereby Obama-appointed

policy-makers remained in their positions long enough to continue their enforcement efforts before being replaced in the last half of 2017. This trend is critical to employers, as both the Department of Labor (DOL) and the EEOC have had a focus on the “big impact” lawsuits against companies and “lead by example” in terms of areas that the private plaintiffs’ bar aims to pursue.

As 2018 opens, it appears that the content and scope of enforcement litigation undertaken by the DOL and the EEOC in the Trump administration will tilt away from the pro-employee/anti-big business mindset of the previous administration. Trump appointees at the DOL and the EEOC are slowly but surely “peeling back” on positions previously advocated under the Obama administration. As a result, it appears inevitable that the volume of government enforcement litigation and value of settlement numbers from those cases will decrease in 2018. The ultimate effect, however, may well prompt the private plaintiffs’ class action bar to “fill the void”



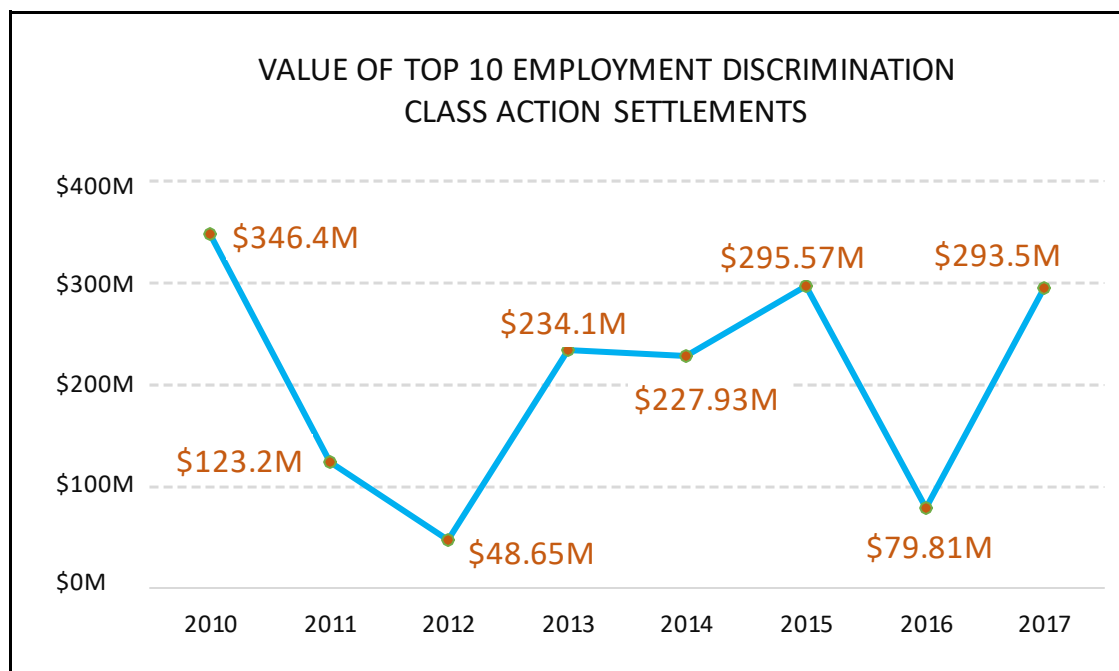
and expand the volume of workplace litigation pursued against employers over the coming year as the DOL and the EEOC adjust their litigation enforcement activities.

**4. Class action litigation increasingly has been shaped and influenced by recent rulings of the US Supreme Court.** Over the past several years, the US Supreme Court has accepted more cases for review—and issued more rulings—that have impacted the prosecution and defense of class actions and government enforcement litigation. The past year continued that trend, with several key decisions on complex employment litigation and class action issues that were arguably more pro-business than decisions in past years. More cases also were accepted for review in 2017 that are positioned for rulings in 2018, including what may be the most high-stakes issue impacting employers since the *Wal-Mart* ruling in 2011—the *Epic System*, *Murphy Oil*, and *E&Y* trilogy of cases on

the legality of workplace arbitration agreements with class action waivers. The ruling expected in the *Epic System*, *Murphy Oil*, and *E&Y* cases in 2018 may well change the class action field in profound ways. Coupled with the appointment of Justice Neil Gorsuch in 2017 and potential additional appointment to the Supreme Court by President Trump in 2018 and beyond, litigation dynamics may well be reshaped in ways that further change the playbook for prosecuting and defending class actions. A thorough, in-depth analysis of these trends appears within the *Report*.

### Top 10 Settlements in Private Plaintiff Employment Discrimination Class Action Lawsuits

The monetary value of the top 10 private plaintiff lawsuits entered into or paid in 2017 totaled \$293.5 million, which represents a nearly four-fold increase from 2016, during



which the total was \$79.81 million. The totals for the 3 years prior to 2016 were \$295.57 million (2015), \$227.93 million (2014), and \$234.1 million (2013).

#	Amount	Defendant
1.	\$90 million	Twenty-First Century Fox, Inc.
2.	\$45 million	Family Dollar Stores, Inc.
3.	\$35.5 million	Wells Fargo Advisors, LLC
4.	\$32.5 million	Metropolitan Life Insurance Co.
5.	\$24 million	US Department of Homeland Security
6.	\$20 million	US Department of Justice
7.	\$19.5 million	Qualcomm Inc.
8.	\$13 million	State of Washington
9.	\$7.5 million	Wal-Mart Stores, Inc.
10.	\$6.5 million	Washington Metropolitan Area Transit Authority

### Top 10 Settlements in Private Plaintiff Wage and Hour Class Action Lawsuits

The monetary value of the top 10 private plaintiff wage and hour class action settlements entered into or paid in 2017 was \$574.49 million. This represents a decrease from the value of the top settlements in 2016, which totaled \$695.5 million. At the same time, the overall value of the top 10 wage and hour settlements had higher values than in

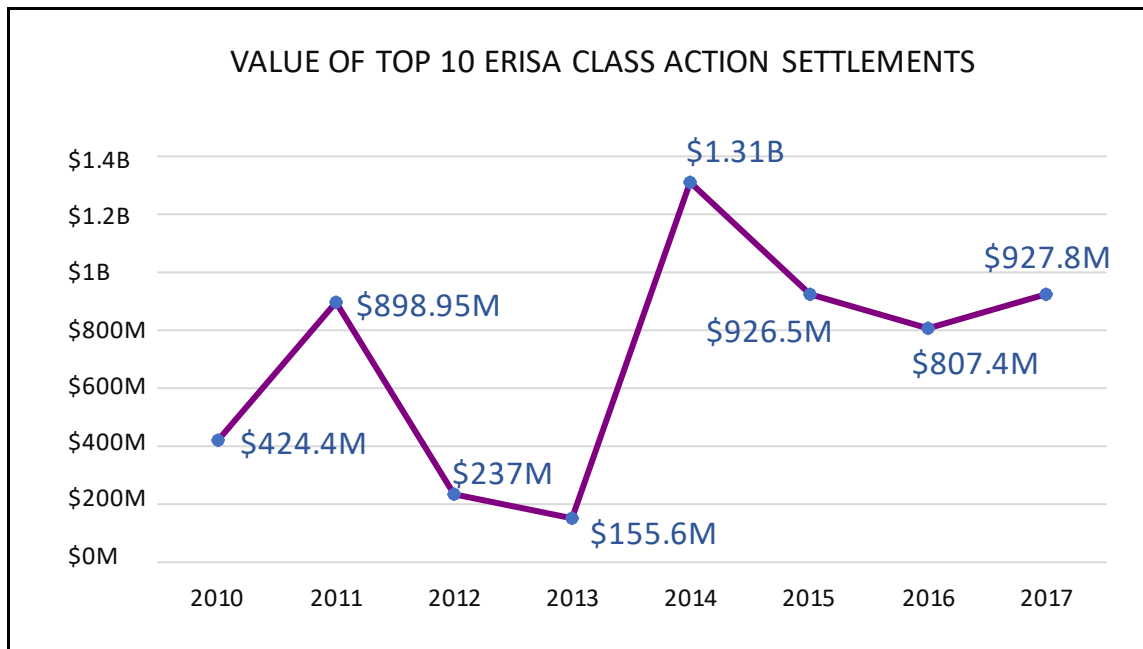
the 2 preceding years, which totaled \$463.6 million in 2015 and \$215 million in 2014.

#	Amount	Defendant
1.	\$227 million	FedEx Ground Package System, Inc.
2.	\$110 million	American Commercial Security
3.	\$61.69 million	The City of Dallas Texas
4.	\$27 million	Lyft, Inc.
5.	\$21 million	U.S. Security Associates
6.	\$19.1 million	Carlson Restaurants, Inc.
7.	\$16.7 million	JP Morgan Chase & Co.
8.	\$16 million	PNC Bank, N.A.
9.	\$13.5 million	Duane Reade, Inc.
10.	\$13 million	Wells Fargo

### Top 10 Settlements in Private Plaintiff ERISA Class Actions

For ERISA class actions, the monetary value of the top 10 private settlements entered into or paid in 2017 totaled \$927.8 million. This amount represents a noteworthy increase from 2016, when the total monetary value of the top 10 private settlements was \$807.4 million.

The largest ERISA class action settlements involved disputes over treating pension plans as “church plans” (i.e., ERISA-exempt plans), breaches of fiduciary duty, failures to make required contributions into retirement funds, and various theories of mismanagement.



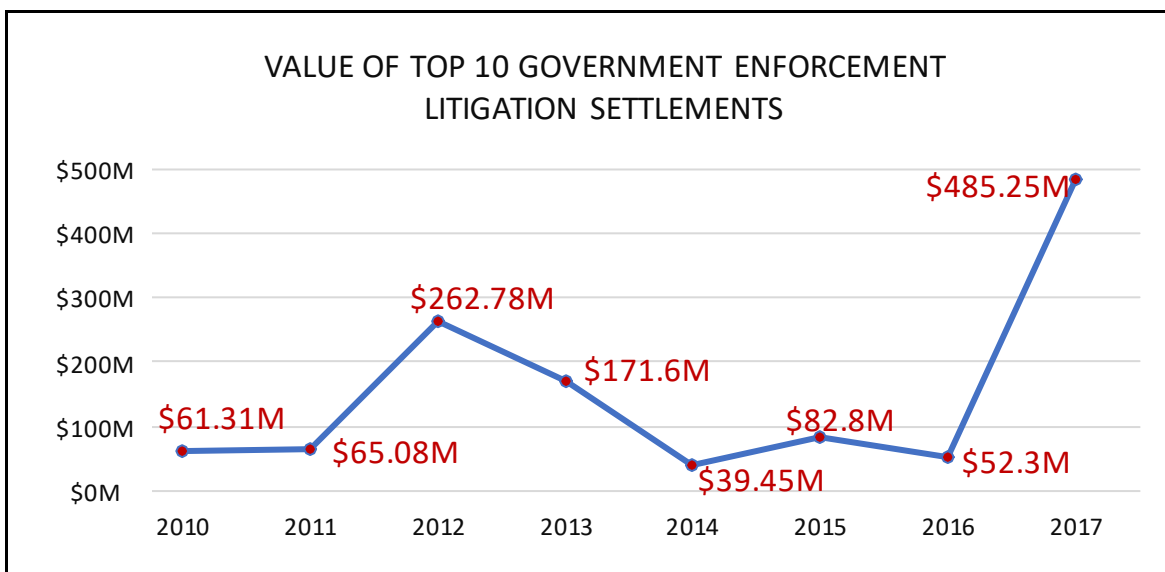
#	Amount	Defendant
1.	\$352 million	Providence Health & Services
2.	\$125 million	Franciscan Missionaries of Our Lady Health Systems
3.	\$98.3 million	Bon Secours Health System, Inc.
4.	\$75 million	Trinity Health Corp.
5.	\$75 million	Peabody Energy Corp.
6.	\$75 million	J.P. Morgan Chase & Co.
7.	\$42 million	St. Joseph's Hospital & Medical Center
8.	\$31 million	Holy Cross Hospital
9.	\$29.5 million	Wheaton Franciscan
10.	\$25 million	Merrill Lynch, Pierce, Fenner & Smith, Inc.

### Top 10 Settlements of Government-Initiated Enforcement Actions and Pattern or Practice Lawsuits

In 2017, the EEOC and the US DOL continued their previous pattern of aggressively litigating government enforcement actions, albeit with mixed results.

Based on figures for the US government's 2017 fiscal year, the EEOC filed 184 new merits lawsuits, including 30 nonsystemic multi-party suits (i.e., those involving fewer than 20 employee-plaintiffs) and 30 systemic lawsuits (i.e., those involving 20 or more employee-plaintiffs). The 30 systemic lawsuits represented a sizable jump over prior years, as the EEOC filed 18 such cases in 2016 and 16 such cases in 2015. In 2017, the EEOC increased the number of charges resolved to 99,109 charges, up slightly from the 97,443 in 2016. Furthermore, the EEOC reported that it recovered approximately \$38.4 million in relief for victims of systemic discrimination, up from \$20.5 million in 2016. In addition, the EEOC obtained \$484 million in total recoveries through mediation, conciliation, and settlements, a slight increase from the \$482 million it collected in 2016.





For all types of government-initiated enforcement actions, the monetary value of the top 10 settlements entered into or paid in 2017 totaled \$485.25 million. This represents a major increase from 2016, when the total was \$52.3 million.

### And this Is Just the Tip of the Iceberg

This article has provided only a brief sample of the depth and breadth of the information this authoritative, comprehensive report contains. No practitioner who deals with employment claims, whether as an underwriter, broker, risk manager, consultant, or attorney, should be without it. Even better, the Seyfarth Shaw annual *Workplace Class Action Litigation Report*, 2018 edition, is free!

#	Amount	Defendant
1.	\$300 million	Avaya, Inc.
2.	\$95 million	Asplundh Tree Expert Co.
3.	\$21.6 million	VIUSA, Inc.
4.	\$15.75 million	First Bankers Trust Services, Inc.
5.	\$12 million	Texas Roadhouse, Inc.
6.	\$10.5 million	Bass Pro Outdoor World, LLC
7.	\$10.1 million	Ford Motor Company
8.	\$9.8 million	American Airlines, Inc.
9.	\$5.5 million	Ginsberg
10.	\$5 million	State Street Corp.

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