

EMPLOYMENT PRACTICES LIABILITY CONSULTANT

SEYFARTH SHAW *WORKPLACE CLASS ACTION* *LITIGATION REPORT FOR 2019*

By Sean Jordan, CPCU, MLIS, RPLU

For the ninth consecutive year, we are pleased to offer a short summary of (now in its 15th edition) Seyfarth Shaw's *Workplace Class Action Litigation Report 2018*. (Read the [2018](#), [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." 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 cochair 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, 830-page 2019 annual *Workplace Class Action Litigation Report* insightfully examines and analyzes a total of 1,453 class action case decisions. In addition, all

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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 15th 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 2018, addresses key developments in workplace class action litigation in 2018, and assesses the implications these developments will have on litigation in 2019 and beyond.
- ◆ **Significant class action settlements in 2018.** 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, the Fair Labor Standards Act, 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 2018, 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.

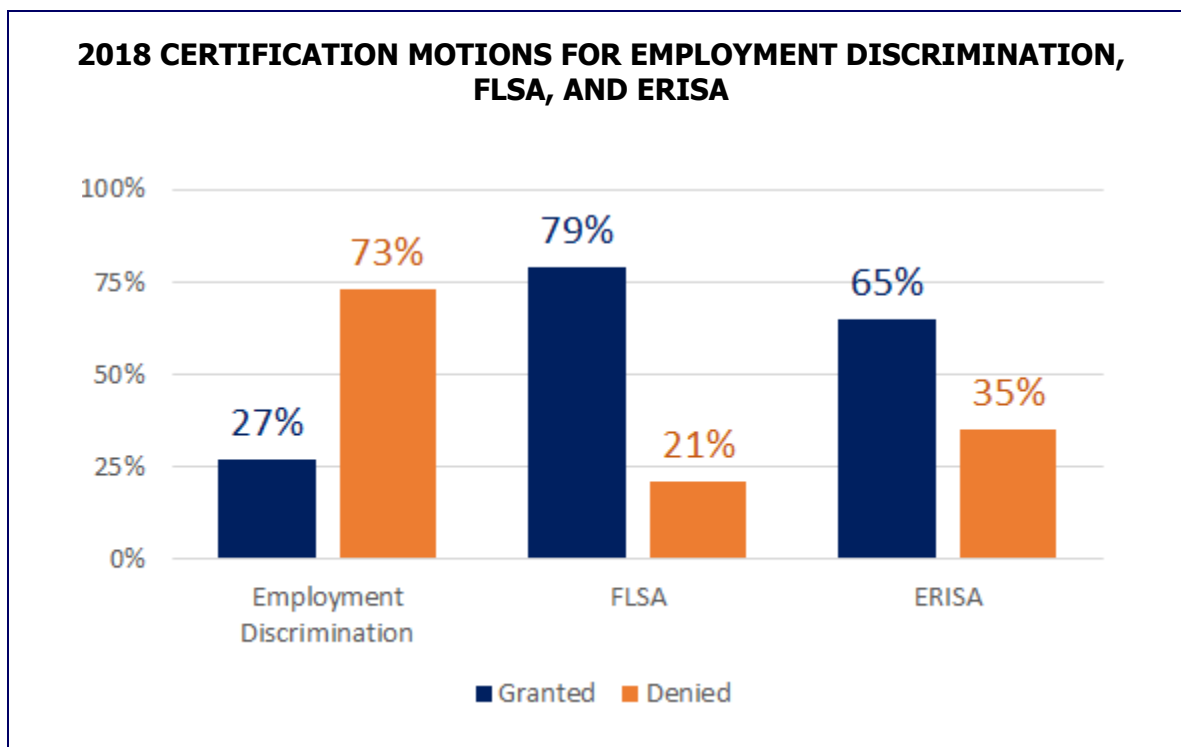
Five Key Trends in Workplace Class Actions during 2018

The *Report* notes five important developments in class actions during 2018. They are as follows.

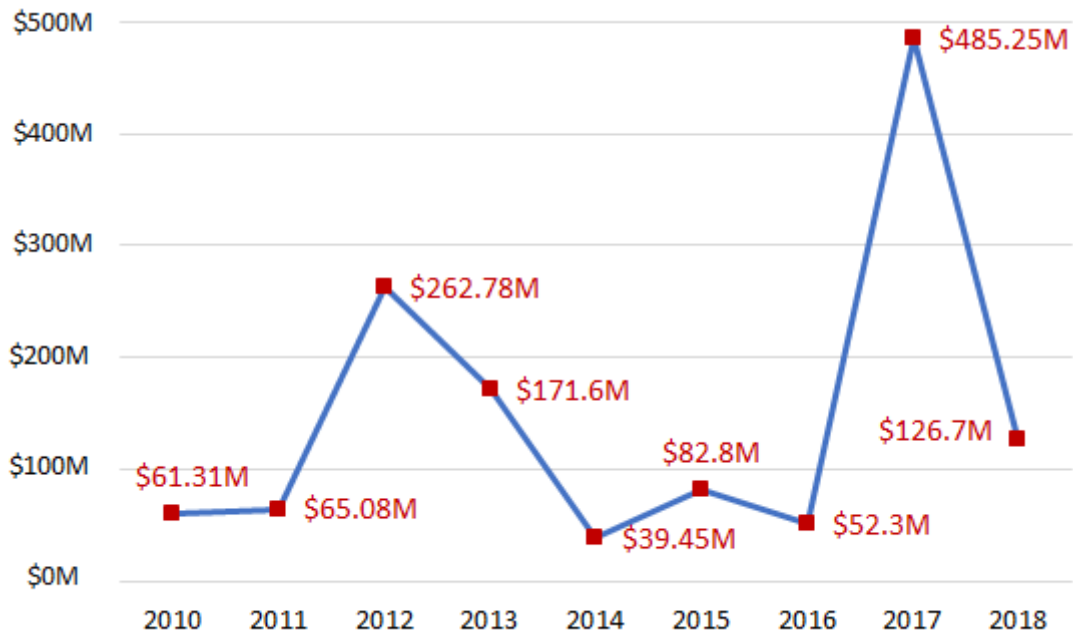
1. Recent rulings of the US Supreme Court have had a substantial impact on class action litigation. As a result of accepting more cases for review, the Supreme Court has had a higher number of rulings that have had significant impacts on the class action and government enforcement landscape. Among several pro-business decisions, the ruling in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), is especially noteworthy. In this ruling, described in the Report as “one of the most important workplace class action rulings in the last two decades,” the

legality of class action waivers in mandatory arbitration agreements was upheld. Furthermore, relatively business-friendly appointments of Justices Neil Gorsuch and Brett Kavanaugh will continue to be impactful for years to come.

2. Class certification motions had a mixed bag of results: while the plaintiffs’ bar had unprecedented success with regard to ERISA and wage and hour litigation, employers scored victories in the area of employment discrimination litigation. 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). 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



VALUE OF TOP 10 GOVERNMENT ENFORCEMENT LITIGATION SETTLEMENTS



of claims through class-wide mechanisms. Furthermore, the volume of wage and hour certification decisions in 2018 increased as compared to last year, and plaintiffs fared better in litigating those class certification motions in federal court than last year. Of the 273 wage and hour certification decisions in 2018, plaintiffs won 196 of 248 conditional certification rulings (approximately 79 percent) and lost only 13 of 25 decertification rulings (approximately 52 percent). By way of comparison, there were 257 wage and hour certification decisions in 2017 where plaintiffs won 170 of 233 conditional certification rulings (approximately 73 percent) and lost 15 of 24 decertification rulings (approximately 63 percent). In sum, employers lost more first-stage conditional certification motions in 2018 and reduced their odds—a decrease of 11 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 pages iii through v of the annual *Workplace Class Action Litigation Report*.

- 3. Filings and settlements of government enforcement litigation in 2018 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 2018. As an example, the EEOC alone brought 199 lawsuits in

2018 as compared to 184 lawsuits in 2017 and 86 lawsuits in 2016. However, the settlement value of the top 10 settlements in government enforcement cases did decrease dramatically—from \$485.25 million in 2017 to \$126.7 million in 2018. The explanations for this phenomenon of the maintained level of litigation frequency (if not severity) 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 policymakers remained in their positions long enough to continue their enforcement efforts before being replaced in the last half of 2017. For example, the EEOC has Trump nominations for chair, two commissioners, and general counsel that have experienced stalls in the Senate.

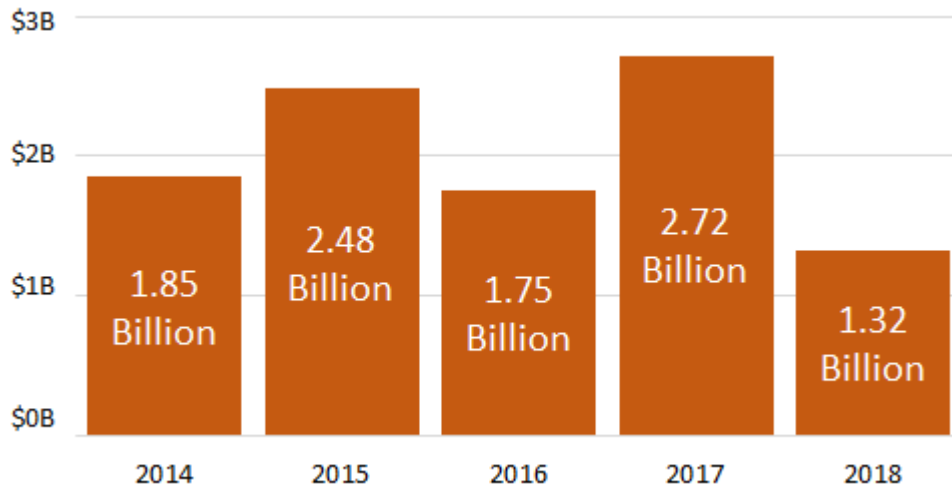
These factors are critical to employers, as both the Department of Labor (DOL) and the EEOC have had a focus on the “big impact” lawsuits against companies and “lead by example” in terms of areas that the private plaintiffs’ bar aims to pursue.

As 2019 opens, it appears that the content and scope of enforcement litigation undertaken by the DOL and the EEOC in the Trump administration will continue to 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

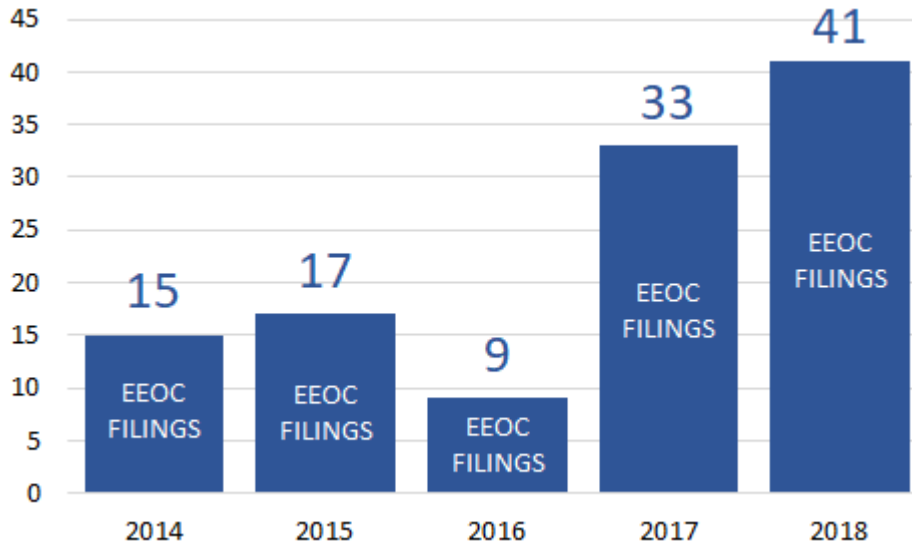
and value of settlement numbers from those cases will decrease in 2019.

- 4. The monetary value of the largest workplace class action settlements decreased dramatically in 2018.** Contrary to the pattern of annual increases over the last decade, including all-time highs in 2017, the value of the largest workplace class action settlements dropped significantly in 2018. Although class-wide settlements were successfully reached at a high frequency, the values were decidedly lower. The top 10 settlements in a variety of employment-related class actions totaled \$1.32 billion in 2018, less than half of the \$2.72 billion secured in 2017. Wage and hour class actions were also less than half of their 2017 values (from \$525 million down to \$253 million). The decrease was even more dramatic with ERISA class actions, which were barely a third of their 2017 values (from \$927 million down to \$313.4 million). Finally, and most dramatically, government enforcement litigation was barely a fourth of its 2017 values (from \$485.2 million down to \$126.7 million).
- 5. The #MeToo movement continues to fuel workplace class action litigation.** Last year featured the settlement of several large sex harassment class action settlements partially stemming from the #MeToo movement. A closer look at the EEOC’s enforcement litigation activity in 2018 also shows a focus on #MeToo-related lawsuits. Seventy-four percent of the Commission’s Title VII filings in 2018 targeted sex-based discrimination, up 9 percent from 2017. Furthermore, 41 of the EEOC’s sex discrimination filings in 2018 also included claims of sexual harassment, up from 33 in 2017.

AGGREGATE SETTLEMENT AMOUNTS



ME TOO FILINGS



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 2018 totaled \$216.09 million, which represented a decrease from 2017, during which the total was \$293.5 million. The totals for the 3 years prior to 2017 were \$79.8 million (2016), \$295.57 million (2015), and \$227.93 million (2014).

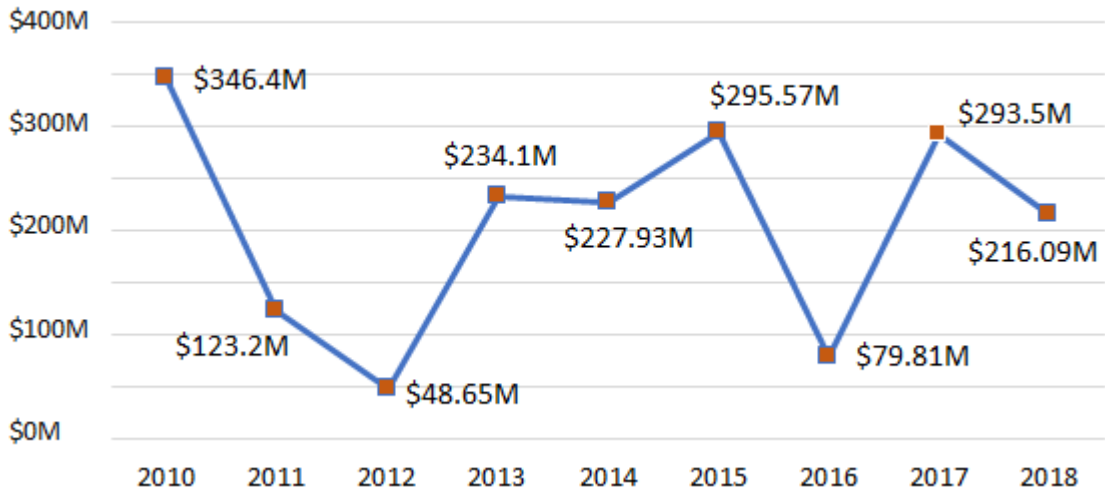
#	Amount	Defendant
1.	\$90 million	Twenty-First Century Fox, Inc.
2.	\$45 million	Family Dollar Stores, Inc.
3.	\$24 million	JPMorgan Chase Bank, N.A.
4.	\$22.5 million	Nucor Corp.
5.	\$10 million	Twenty-First Century Fox, Inc.
6.	\$10 million	Uber Technologies, Inc.
7.	\$4 million	Forest Laboratories, Inc.
8.	\$3.75 million	Koch Foods of Mississippi LLC
9.	\$3.74 million	Target Corp.
10.	\$3.1 million	Chadbourne & Park

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

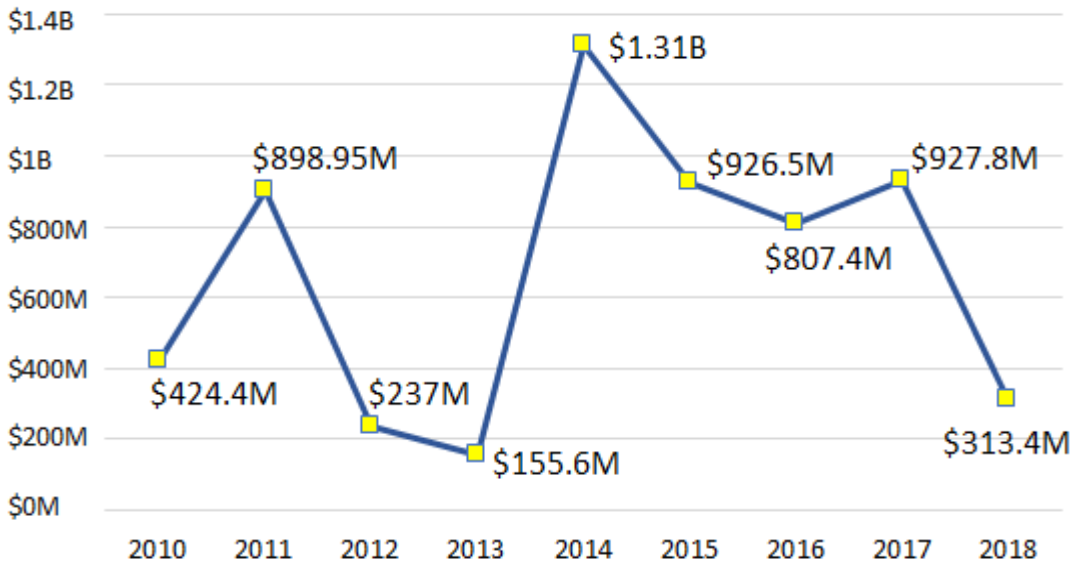
The monetary value of the top 10 private plaintiff wage and hour class action settlements entered into or paid in 2018 was \$253.5 million. This represents a large decrease from the value of the top settlements in 2017, which totaled \$574.49 million. The overall value of the top 10 wage and hour settlements also had lower values than in the 2 preceding years, which totaled \$695.5 million in 2016 and \$463.6 million in 2015.

#	Amount	Defendant
1.	\$65 million	Wal-Mart Stores, Inc.
2.	\$54.5 million	Bloomberg L.P.
3.	\$27.5 million	Wells Fargo
4.	\$25 million	Abercrombie & Fitch Co.
5.	\$19.1 million	Carlson Restaurants, Inc.
6.	\$16.8 million	Kellogg Co.
7.	\$15 million	J.B. Hunt Transport, Inc.
8.	\$11 million	Bank of America, N.A.
9.	\$10 million	CBS Television Studios
10.	\$9.6 million	Abercrombie & Fitch Trading Co.

VALUE OF TOP 10 EMPLOYMENT DISCRIMINATION CLASS ACTION SETTLEMENTS



VALUE OF TOP 10 ERISA CLASS ACTION SETTLEMENTS



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 2018 totaled \$313.4 million. This represented a massive decrease from 2017, when the total monetary value of the top 10 private settlements was \$927.8 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.	\$63 million	Mercy Health
2.	\$62.5 million	Hospital Sisters Health System
3.	\$30 million	Liberty Mutual Retirement Benefit Plan
4.	\$29.5 million	Wheaton Franciscan
5.	\$25 million	WAWA, Inc.
6.	\$25 million	Continental Casualty Co.
7.	\$24 million	BB&T Corp.
8.	\$21.9 million	Deutsche Bank Americas Holding Corp.
9.	\$17 million	Phillips North America LLC
10.	\$15.5 million	California Field Ironworkers Pension Trust

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

In 2018, the EEOC and the US DOL continued their previous pattern of aggressively

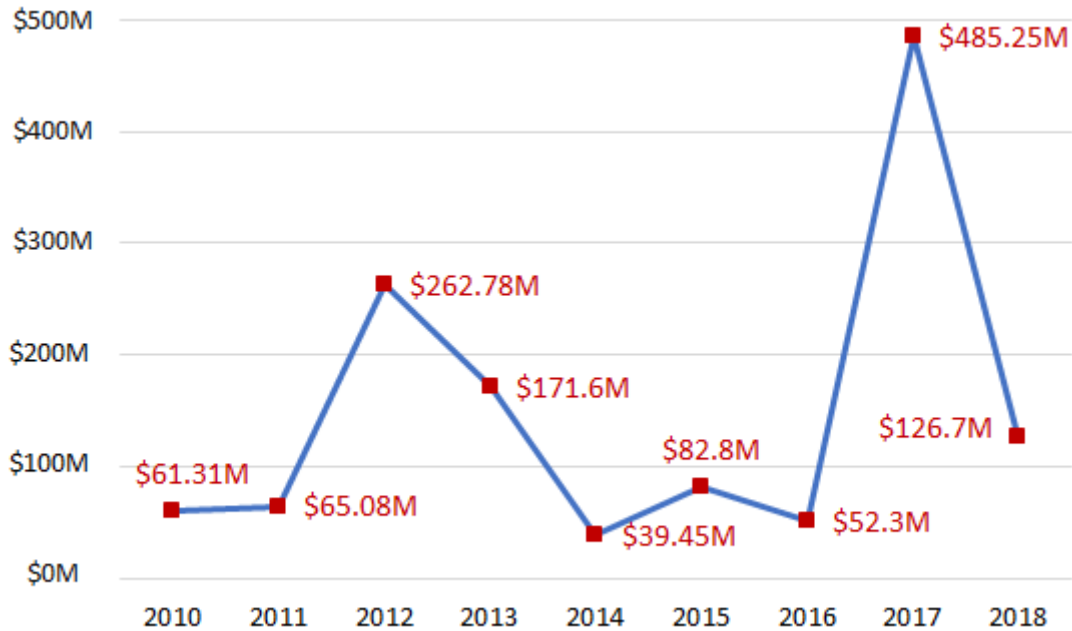
litigating government enforcement actions, albeit with mixed results.

Based on figures for the US government’s 2018 fiscal year, the EEOC filed 199 new merits lawsuits, including 45 nonsystemic multi-party suits (i.e., those involving fewer than 20 employee-plaintiffs) and 37 systemic lawsuits (i.e., those involving 20 or more employee-plaintiffs). The 37 systemic lawsuits represented a jump over prior years, as the EEOC filed 30 such cases in 2017 and 18 such cases in 2016. In 2018, the EEOC obtained \$505 million in total recoveries for alleged discrimination victims through mediation, conciliation, and settlements, a significant increase from the \$484 million it collected in 2017.

For all types of government-initiated enforcement actions, the monetary value of the top 10 settlements entered into or paid in 2018 totaled \$126.7 million. This represents a major decrease from 2017, when the total was \$485.25 million, but is nevertheless substantially above the 2016 total of \$52.3 million.

#	Amount	Defendant
1.	\$47 million	Credit Suisse Group AG
2.	\$20.8 million	The City of New York
3.	\$16 million	First Farmers Financial
4.	\$13.9 million	Imperial Pacific International
5.	\$5.5 million	Waste Management, Inc.
6.	\$5 million	A.C.E. Restaurant Group, Inc.
7.	\$5 million	City of Jacksonville, Florida
8.	\$4.9 million	United Parcel Service, Inc.
9.	\$4.4 million	Amsted Rail Co., Inc.
10.	\$4.2 million	Southwest Fuel Management, Inc.

VALUE OF TOP 10 GOVERNMENT ENFORCEMENT LITIGATION SETTLEMENTS



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*, 2019 edition, is free!

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