Seyfarth

16th Annual Workplace Class Action Litigation Report

2020 EDITION

Seyfarth Shaw LLP

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Dear Clients:

The last few years have seen a transformation in class action and collective action litigation involving workplace issues. This came to a head from 2014 to 2019 with numerous major class action rulings from the U.S. Supreme Court.

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 2020 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 2019, and analyzes the most significant settlements over the past 12 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,

Peter C. Miller
Chairman, Seyfarth Shaw LLP

Author's Note

Our Annual Report analyzes the leading class action and collective action decisions of 2020 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 1,467 decisions analyzed in the Report.

The cases decided in 2019 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.

This report represents the collective contributions of a significant number of our colleagues at Seyfarth Shaw LLP. We wish to thank and acknowledge those contributions by Tom Ahlering, Richard L. Alfred, Lorie Almon, Brian Ashe, Raymond C. Baldwin, Patrick Bannon, Brett C. Bartlett, Alnisa Bell, Edward W. Bergmann, Holger Besch, Daniel Blouin, Michael J. Burns, Robert J. Carty, Jr., Mark A. Casciari, John L. Collins, Ariel Cudkowicz, Catherine M. Dacre, Joseph R. Damato, Christopher J. DeGroff, Pamela Devata, Ada Dolph, Alex Drummond, Noah A. Finkel, Matt Gagnon, Loren Gesinsky, Mark Grajskim Timothy F. Haley, Ari Hersher, Eric Janson, David D. Kadue, Lynn Kappelman, Daniel B. Klein, Ronald J. Kramer, Ashley K. Laken, Richard B. Lapp, Kristina Launey, Aaron Lubeley, Richard P. McArdle, Kristin McGurn, Jon Meer, Katherine Mendez, Gina Merrill, Barry Miller, Ian H. Morrison, Lorraine O'Hara, Camille A. Olson, Andrew Paley, Gerald Pauling, Katherine E. Perrelli, Kyle Peterson, Thomas J. Piskorski, Jennifer Riley, David Ross, David J. Rowland, Christian Rowley, Emily Schroeder, Sam Schwartz-Fenwick, Andrew Scroggins, Laura Shelby, Frederick T. Smith, Amanda Sonneborn, Robert Stevens, Robert Szyba, Diana Tabacopoulos, Coby Turner, Joseph Turner, Annette Tyman, Peter A. Walker, Timothy M. Watson, Geoffrey Westbrook, Robert S. Whitman, and Tom Wybenga.

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 2020

Guide To Citation Formats

As corporate counsel utilize the Report for research, we have attempted to cite the West bound volumes wherever possible (*e.g.*, *Calon, et al. v. Bank Of America, N.A.*, 915 F.3d 528 (8th Cir. 2019)). If a decision is unavailable in bound format, we have utilized a Lexis cite from its electronic database (*e.g.*, *Kis, et al. v. Covelli Enterprises*, 2019 U.S. Dist. LEXIS 125005 (N.D. Ohio July 26, 2019), or a Westlaw site from its electronic database (*e.g.*, *In Re General Motors LLC Ignition Switch Litigation*, 2019 WL 6827277 (S.D.N.Y. Dec. 12, 2019)). If a ruling is not contained in an electronic database, the full docketing information is provided (*e.g.*, *Morgan, et al. v. United States Soccer Federation, Inc.*, Case No. 19-CV-1717 (C.D. Cal. Nov. 8, 2019)).

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 *2020 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.*, 564 U.S. 338 (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).

Finally, two recent decisions of the U.S. Supreme Court have established a gloss on the Rule 23 requirements that play out in class certification proceedings in a significant manner, including: (i) *Wal-Mart Stores, Inc. v. Dukes, et al.*, 564 U.S. 338 (2011), as referenced above, which tightened

commonality standards under Rule 23(a)(2); and (ii) *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), which interpreted Rule 23(b)(3) – that 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 *Wal-Mart* and *Comcast*, the Supreme Court reaffirmed that lower federal 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.

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 5% to 40%.

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A. Executive Summary

The prosecution of workplace class action litigation by the plaintiffs' bar has continued to escalate over the past decade. Class actions often pose unique "bet-the-company" risks for employers.

As cost-effective approaches to class action litigation involve complex variables, these risks have grown exponentially since 2010. At the same time, the prosecution and defense of class action litigation has been transformed over the past decade.

As has become readily apparent in the #MeToo era, an adverse judgment in a class action has the potential to bankrupt a business. Further, adverse publicity eviscerate a company's market share. Likewise, the on-going defense of a class action can drain corporate resources long before the case even reaches a decision point.

Companies that do business in multiple states are also susceptible to "copy-cat" class actions, whereby plaintiffs' lawyers create a domino effect of litigation filings that challenge corporate policies and practices in numerous jurisdictions at the same time. This risk is particularly acute in wage & hour cases. Hence, workplace class actions can impair a corporation's business operations, jeopardize the careers of senior management, and cost millions of dollars to defend.

For these reasons, workplace class actions remain at the top of the list of challenges that keep business leaders up late at night worrying about compliance and litigation.

Skilled plaintiffs' class action lawyers and governmental enforcement litigators are not making this challenge any easier for companies. They are continuing to develop new theories and approaches to the successful prosecution of complex employment litigation and government-backed lawsuits. New rulings by federal and state courts have added to this patchwork quilt of compliance problems and litigation management issues.

In turn, the events of the past year in the workplace class action world demonstrate that the array of litigation issues facing businesses are continuing to accelerate at a rapid pace while also undergoing significant change. Notwithstanding the business-friendly policies of the Trump Administration, governmental enforcement litigation pursued by the U.S. Equal Employment Commission ("EEOC") and other federal agencies continue to manifest an aggressive agenda. Conversely, litigation issues stemming from the U.S. Department of Labor ("DOL") reflected a slight pull-back from previous efforts to push a pronounced pro-worker/anti-business agenda.

The combination of these factors are challenging businesses to integrate their litigation and risk mitigation strategies to navigate these exposures. These challenges are especially acute for businesses in the context of complex workplace litigation.

Adding to this mosaic of challenges in 2020 is the continuing evolution in federal policies emanating from the Trump White House, the recent appointments of new Supreme Court Justices and lower federal court judges, and the uncertainty over impeachment inquiries and the upcoming Presidential election.

Furthermore, while changes to government priorities started on the previous Inauguration Day and are on-going, others are being carried out by new leadership at the agency level who were appointed over this past year. As expected, many changes represent stark reversals in policy that are sure to have a cascading impact on private class action litigation.

While predictions about the future of workplace class action litigation may cover a wide array of potential outcomes, one sure bet is that the plaintiffs' class action bar will continue to evolve and adapt to changes in case law precedents. As a result, class action litigation will remain fluid and dynamic, and corporate America will continue to face new litigation challenges.

B. Key Trends Of 2019

An overview of workplace class action litigation developments in 2019 reveals five key trends.

First, the plaintiffs' bar was successful in prosecuting class certification motions at the highest rates ever as compared to previous years in the areas of ERISA and wage & hour litigation, as well as employment discrimination class actions. While evolving case law precedents and new defense approaches resulted in many good outcomes for employers in opposing class certification requests, federal and state courts issued more favorable class certification rulings for the plaintiffs' bar in 2019 than in any other year in the past decade. Plaintiffs' lawyers continued to craft refined class certification theories to counter the more 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 wage & hour and ERISA class actions, the plaintiffs' bar scored exceedingly well in securing class certification rulings in federal courts in 2019 (over comparative figures for 2018 and 2017). Class actions were certified in significantly higher 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. Furthermore, the sheer volume of wage & hour certification decisions in 2019 equated to similar levels as last year, while plaintiffs fared better in litigating those class certification motions in federal court than in the prior year. Of the 271 wage & hour certification decisions in 2019, plaintiffs won 199 of 245 conditional certification rulings (approximately 81%), and lost 15 of 26 decertification rulings (approximately 58%). By comparison, there were 273 wage & hour certification decisions in 2018, where plaintiffs won 196 of 248 conditional certification rulings (approximately 79%) and lost 13 of 25 decertification rulings (approximately 52%). In sum, employers lost more first stage conditional certification motions in 2019, while bettering their odds – an increase of nearly 6% – of fracturing cases with successful decertification motions.

Second, class action litigation has been shaped and influenced to a large degree by recent rulings of the U.S. Supreme Court. Over the past several years, the U.S. Supreme Court has accepted more cases for review than in previous years – and as a result, has 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 terms. Among those rulings, *Lamps Plus v. Varela* and *Nutraceutical Corp. v. Lambert* reflected a conservative, strict constructionist reading of statutes and class action procedures. Furthermore, a case decided last year – *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612 (2018), which upheld the legality of class action waivers in mandatory arbitration agreements – proved to be a transformative decision that is one of the most important workplace class action rulings in the last two decades. In 2019, it had a profound impact on the prosecution and defense of workplace class action litigation, and in the long run, *Epic Systems* may well shift class action litigation dynamics in critical ways. Coupled with the possibility of more appointments to the Supreme Court by the Republican-controlled White House, litigation may well be reshaped by Supreme Court decisional law in ways that change the playbook for prosecuting and defending class actions.

Third, while filings and settlements of government enforcement litigation in 2019 did not reflect a head-snapping pivot from the ideological pro-worker outlook of the Obama Administration to a pro-business, less regulation/litigation viewpoint of the Trump Administration, the numbers began to trend downward in terms of a diminishment in the aggressive agenda of prior government enforcement litigation. As an example, the EEOC brought 144 lawsuits in 2019, as compared to 199 lawsuits in 2018, and 184 lawsuits in 2017 (though the 2019 numbers still outpaced 2016, the last year of the Obama Administration, when the EEOC filed 86 lawsuits). Furthermore, the settlement value of the top ten settlements in government enforcement cases decreased dramatically to $57.52 million, which was down from $126.7 million in 2018 and from $485.25 million in 2017. The explanations for this phenomenon are 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 two years; 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 2018 or in 2019. This is especially true at the EEOC, where the Trump nominations for the Commission's Chair, two Commissioners, and its general counsel did not reach the Senate floor until the second half on 2019.

These factors are critical to employers, as both the DOL and the EEOC have had a focus on "big impact" lawsuits against companies and "lead by example" in terms of areas that the private plaintiffs' bar aims to pursue. As 2020 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 EEOC and the DOL are slowly but surely "peeling back" on aggressive litigation enforcement tactics that were the watchwords under the Obama Administration. As a result, it appears inevitable that the volume of government enforcement litigation and the value of settlement numbers from those cases will decrease even further in 2020.

Fourth, the monetary value of the overall aggregate workplace class action settlements increased slightly in 2019, but as compared to the last several years, it was one of the lowest marks for settlements after those values plummeted to their lowest level ever in 2018. For most of the past decade, these settlement numbers had been increasing on an annual basis, and reached all-time highs in 2017. The 2019 numbers, showed increases in settlement values for ERISA and wage & hour class action settlements, while there were large drop-offs in the values of settlements for employment discrimination and other workplace statutory class actions. The plaintiffs' employment class action bar and governmental enforcement litigators were exceedingly successful in monetizing their case filings into large class-wide settlements this past year, but they did so at decidedly lower values in 2019 than in previous years. The top ten settlements in various employment-related class action categories totaled $1.34 billion in 2019, as compared to $1.32 billion in 2018 (and a stark decrease of over $1.38 billion from the $2.72 billion total in 2017 and a decrease of $410 million from the $1.75 billion total in 2016). At the same time, the settlement figure of $449.05 million in wage & hour class actions constituted nearly a 50% increase in value – up from $253 million in 2018 (while considerably less, however, from the high-water mark of $525 million in 2017); ERISA class actions also saw an increase to $376.35 million from $313.4 million in 2018 (but still a far cry from the 2017 level at $927 million). Conversely, the top employment discrimination class actions decreased to $139.2 million (down from 216 million in 2018). Finally, government enforcement litigation settlements registered a significant decrease to $57.52 million (as compared to $125.8 million in 2018, and $485.2 million in 2017). Whether this is the beginning of a long-range trend or a short-term aberration remains to be seen as 2020 unfolds.

Fifth and finally, as it continues to gain momentum on a worldwide basis, the #MeToo movement is fueling employment litigation issues in general and workplace class action litigation in particular. On account of news reports and social media, it has raised the level of awareness of workplace rights and emboldened many to utilize the judicial system to vindicate those rights. Several large sex harassment class-based settlements were effectuated in 2019 that stemmed at least in part from #MeToo initiatives. Likewise, the EEOC's enforcement litigation activity in 2019 focused in large part on the filing of #MeToo lawsuits while riding the wave of social media attention to such workplace issues. Of the EEOC's 2019 sex discrimination lawsuit filings, 28 cases included claims of sexual harassment, and 57 of the 84 Title VII lawsuits were based on gender discrimination allegations. The total number of sexual harassment filings decreased slightly in 2019 as compared to 2018 and 2017, when sexual harassment claims accounted for 41 and 33 filings, respectively. Employers can expect that #MeToo issues will remain in the limelight in 2020, and litigation over these issues is not apt to slow down in the coming year.

C. Significant Trends In Workplace Class Action Litigation In 2019

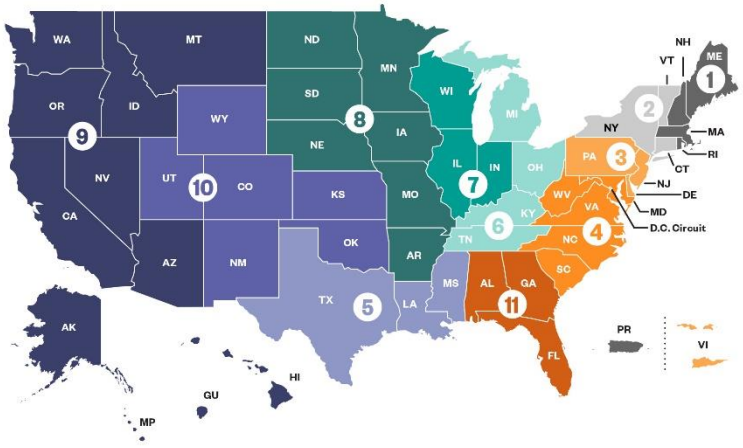
(i) Class Certification Trends In 2019

Anecdotally, surveys of corporate counsel confirm that complex workplace litigation – and especially class actions and multi-plaintiff lawsuits – remains one of the chief exposures driving corporate legal budgetary expenditures, as well as the type of legal dispute that causes the most concern for companies.

The prime component in that array of risks is indisputably complex wage & hour litigation.

The circuit-by-circuit analysis of 303 class certification decisions in all varieties of workplace class action litigation is detailed in the following map:

U.S. Circuit Courts Of Appeal



Analysis Of Decisions By Circuit Court

CIRCUIT COURT	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit	Court of Federal Claims	EEOC
Employment Discrimination Decisions														
Certification Motions Granted	0	0	1	0	0	2	1	1	2	0	0	0	0	0
Certification Motions Denied	0	0	0	0	1	1	1	0	1	0	0	0	0	0
Decertification Motions Granted	0	0	0	0	0	0	1	2	0	0	0	0	0	1
Decertification Motions Denied	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sub-Total: 7 Conditional Certifications Granted / 4 Conditional Certifications Denied 4 Decertification Motions Granted / 0 Decertification Motions Denied														
ERISA Decisions														
Certification Motions Granted	0	4	2	0	0	0	0	0	5	0	0	0	0	0
Certification Motions Denied	0	0	0	2	0	1	1	0	2	0	0	0	0	0
Sub-Total: 11 Granted / 6 Denied														
FLSA Certification Decisions														
Conditional Certification Motions Granted	5	36	11	10	31	36	10	13	31	7	7	0	2	0
Conditional Certification Motions Denied	1	9	2	2	8	6	4	5	8	0	1	0	0	0
Decertification Motions Granted	0	1	0	0	7	0	2	0	4	1	0	0	0	0
Decertification Motions Denied	2	0	1	1	0	3	1	1	1	0	1	0	0	0
Sub-Total: 199 Conditional Certifications Granted / 46 Conditional Certifications Denied 15 Decertification Motions Granted / 11 Decertification Motions Denied														
Total: 217 Total Certification Motions Granted / 56 Total Certification Motions Denied 19 Decertification Motions Granted / 11 Decertification Motions Denied														

Wage & Hour Certification Trends

Plaintiffs achieved robust numbers of initial conditional certification rulings of wage & hour collective actions in 2019, while employers secured less defeats of conditional certification motions and decertification of § 216(b) collective actions.[1] The percentage of successful motions for decertification brought by employers saw a slight increase in 2019 to 58%. This compared to 52% in 2018, an increase of 6%. At the same time, this was 5% less than the figure of 63% in 2017.

Most significantly, for the fourth year in a row, wage & hour filings in federal courts decreased; moreover, the number of filings in 2019 were at the lowest level in the past decade. That being said, the volume of FLSA lawsuit filings for the preceding four years – during 2015, 2016, 2017, and 2018 – were at the highest levels in

[1] An analysis of rulings in FLSA collective actions in 2019 is set forth in Chapter V, and analysis of rulings in state law wage & hour class action in 2019 is set forth in Chapter VII, Section B.

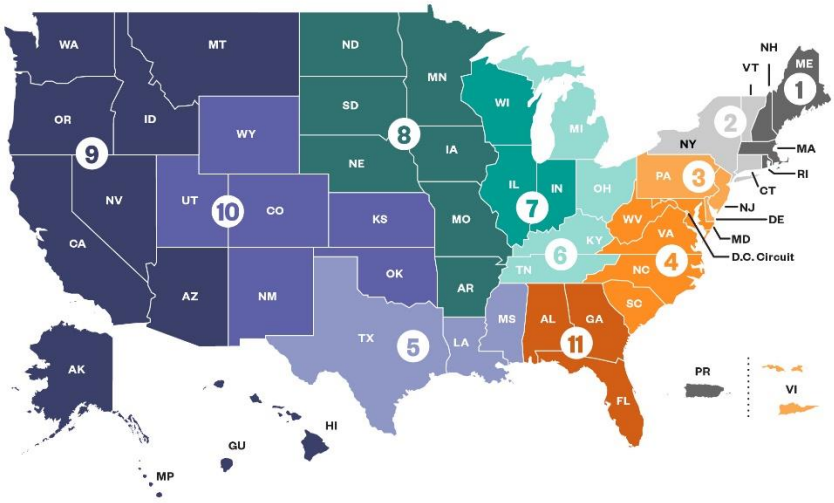
the last several decades. Many of these cases remain in the pipeline within federal courts, and the result is a burgeoning case load of wage & hour issues.

To be sure, an increase in FLSA filings over the past several years has caused the issuance of more FLSA certification rulings than in any other substantive area of complex employment litigation – 271 certification rulings in 2019, as compared to 273 certification rulings in 2018, 257 certification rulings in 2017, 224 certification rulings in 2016, and 175 certification rulings in 2015.

The analysis of these rulings – discussed in Chapter V of this Report – shows that a high predominance of cases are brought against employers in "plaintiff-friendly" jurisdictions such as the judicial districts within the Second and Ninth Circuits. For the first time in a decade, however, rulings were equally voluminous out of the Fifth and Sixth Circuits, which also tended to favor workers over employers in conditional certification rulings.

This trend is shown in the following map:

U.S. Courts Of Appeal – Analysis Of FLSA Certification Decisions



	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit	Court of Federal Claims
Conditional Certification Motions Granted	5	36	11	10	31	36	10	13	31	7	7	0	2
Conditional Certification Motions Denied	1	9	2	2	8	6	4	5	8	0	1	0	0
Decertification Motions Granted	0	1	0	0	7	0	2	0	4	1	0	0	0
Decertification Motions Denied	2	0	1	1	0	3	1	1	1	0	1	0	0

Total: 199 Conditional Certifications Granted / 46 Conditional Certifications Denied
15 Decertification Motions Granted / 11 Decertification Motions Denied

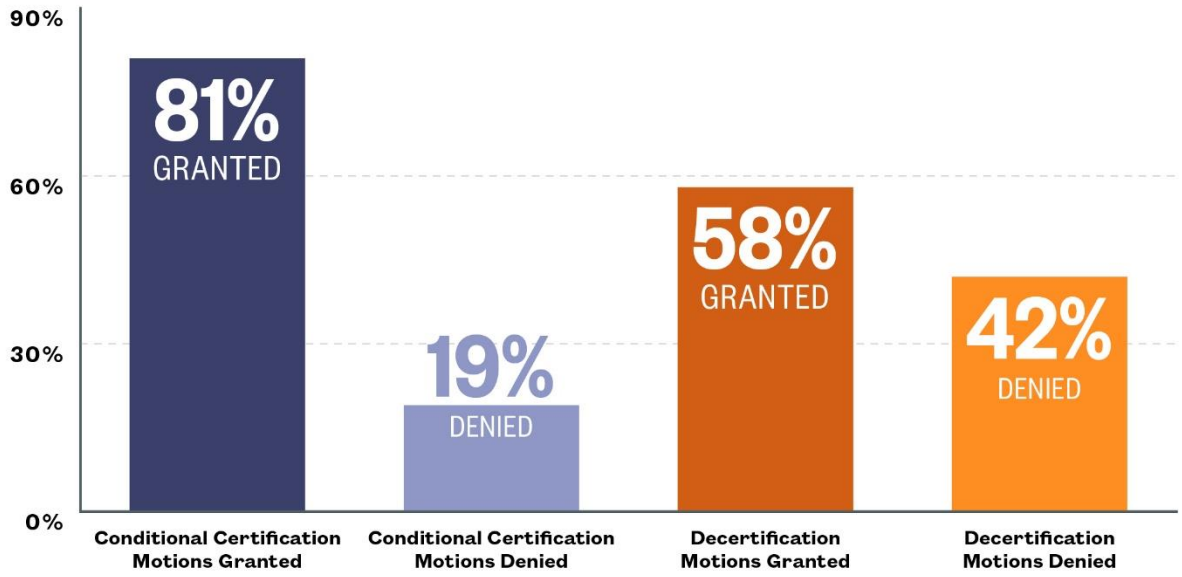
The statistical underpinnings of this circuit-by-circuit analysis of FLSA certification rulings is telling in several respects.

First, it substantiates that the district courts within the Second, Fifth, Sixth and Ninth Circuits are the epi-centers of wage & hour class actions and collective actions. More cases were prosecuted and conditionally certified – 36 certification orders in the Sixth Circuit, 36 certification orders in the Second Circuit, 31 certification orders in the Ninth Circuit, and 31 certification orders in the Fifth Circuit – in the district courts in those circuits than in any other areas of the country. For the first time in recent memory, the Sixth Circuit – which encompasses the states of Kentucky, Michigan, Ohio, and Tennessee – had as many or more certifications than either the Second or Ninth Circuits.

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 (199 of 245 rulings, or approximately 81%) in 2019, which was even higher than the 2018 numbers (196 of 248 rulings, or approximately 79%, which was the highest percentage of plaintiff wins ever recorded in the last decade). Furthermore, in terms of "second stage" decertification motions, employers prevailed in roughly 58% of those rulings (15 of 26 rulings).

Overall, these statistics show robust numbers for the plaintiffs' bar. The "first stage" conditional certification statistics for plaintiffs at 81% in 2019 were even more favorable to workers than in 2018, when plaintiffs won 79% of "first stage" conditional certification motions (and relative to 2017, when plaintiffs won 73% of "first stage" conditional certification motions). However, employers fared better in 2019 on "second stage" decertification motions. Employers won decertification motions at a rate of 58%, which was up from 52% 2018 (although down from 63% in 2017).

The following chart illustrates this trend for 2019:



2019 FLSA Conditional Certification Motions And Decertification Motions

Third, this reflects that there has been an on-going migration of skilled plaintiffs' class action lawyers into the wage & hour litigation space for close to a decade. Experienced and able plaintiffs' class action counsel typically secure better results. Further, securing initial "first stage" conditional certification – and foisting settlement pressure on an employer – can be done quickly (almost right after the case is filed), with a minimal monetary investment in the case (*e.g.*, no expert is needed, unlike when certification is sought in an employment discrimination class action or an ERISA class action), and without having to conduct significant discovery in accordance with the case law that has developed under 29 U.S.C. § 216(b).

As a result, to the extent litigation of class actions and collective actions by plaintiffs' lawyers is viewed as an investment of time and money, prosecution of wage & hour lawsuits is a relatively low cost investment, without significant barriers to entry, and with the prospect of immediate returns as compared to other types of workplace class action litigation.

Hence, as compared to ERISA and employment discrimination class actions, FLSA litigation is less difficult or protracted for the plaintiffs' bar, and more cost-effective and predictable. In terms of their "rate of return," the plaintiffs' bar can convert their case filings more readily into certification orders, and create the conditions for opportunistic settlements over shorter periods of time.

The certification statistics for 2019 confirm these factors.

The great unknown for workplace class action litigation is the impact of the *Epic Systems* ruling, and whether it reduces class action activity in the judicial system and depresses settlement values of workplace lawsuits. At least insofar as 2019 is concerned, the fact that there were less conditional certification rulings suggests that a percentage of lawsuits were exited from the court systems either voluntarily or via motions to compel arbitration before courts ever passed on motions for conditional certification. Likewise, employers achieved many key victories in precluding class and collective actions from being litigated in federal courts (and conversely, successfully compelling such disputes to be litigated on a single plaintiff, bi-lateral basis in arbitration).

At the same time, a future Congress may effectuate a legislative response to abrogate or limit the impact of workplace arbitration agreements with class action waivers, but that will be dependent upon ideological and political dynamics based on future elections.

As a result, *Epic Systems* may well impact case filing numbers in the near term.

Employment Discrimination & ERISA Certification Trends

Against the backdrop of wage & hour litigation, the ruling in *Wal-Mart* also fueled more critical thinking and crafting of case theories in employment discrimination and ERISA class action filings in 2019.

The Supreme Court's Rule 23 decisions have had the effect of forcing the plaintiffs' bar to "re-boot" the architecture of their class action theories.[2]

At least one result was the decision three years ago in *Tyson Foods v. Bouaphakeo,* 136 S. Ct. 1036 (2016), in which the Supreme Court accepted the plaintiffs' arguments that, in effect, appeared to soften the requirements previously imposed in *Wal-Mart* for maintaining and proving class claims, at least in wage & hour litigation.

Hence, it is clear that the playbook on Rule 23 strategies is undergoing a continuous process of evolution.

Filings of "smaller" employment discrimination class actions have increased due to a strategy whereby state or regional-type classes are asserted more often than the type of nationwide mega-cases that *Wal-Mart* discouraged. Plaintiffs' counsel are more selective, strategic, and savvy relative to calibrating the focus of their cases and aligning the size of the proposed class to the limits of Rule 23 certification theories.

In essence, at least in the employment discrimination area, the plaintiffs' litigation playbook is more akin to a strategy of "aim small to secure certification, and if unsuccessful, then miss small."

In turn, the plaintiffs' bar did considerably better in 2019 in employment discrimination class actions, as success on certification motions in 2019 was more than double over the year before. In 2019, 7 of 11 motions were granted and 4 of 11 motions were denied. This was a significant uptick as compared to 2018 when only 3 of 11 motions were granted for plaintiffs and 8 of 11 motions were denied. Instead, the past year was more closely comparable to 2017, when 7 of 11 motions were granted and 4 of 11 motions were denied.

The initial certification rate of 64% was one of the highest on record over the last decade for employment discrimination class actions. That being said, in the 4 decertification motions brought in this substantive area, employers won 100% of those motions.

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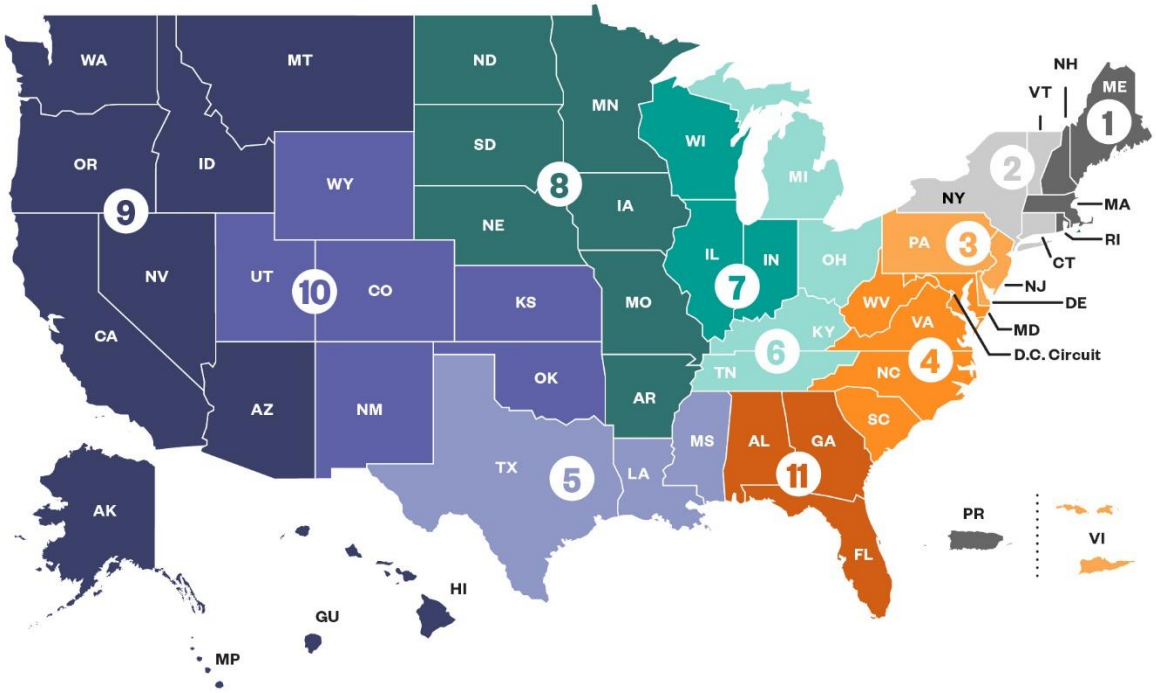
[2] An analysis of certification rulings in Title VII employment discrimination class actions in 2019 is set forth in Chapter III, Section A; an analysis of ADEA collective action certification rulings is set forth in Chapter IV, Section A; and an analysis of state court employment discrimination certification decisions is set forth in Chapter VII, Section A. In addition, an analysis of non-workplace class action rulings that impact employment-related cases is set forth in Chapter IX.

The following map demonstrates the array of certification rulings in Title VII and ADEA discrimination cases:

U.S. Courts Of Appeal – Analysis Of Employment Discrimination Decisions



	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit	Court of Federal Claims	EEOC
Conditional Certification Motions Granted	0	0	1	0	0	2	1	1	2	0	0	0	0	0
Conditional Certification Motions Denied	0	0	0	0	1	1	1	0	1	0	0	0	0	0
Decertification Motions Granted	0	0	0	0	0	0	1	2	0	0	0	0	1	0
Decertification Motions Denied	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Total: 7 Conditional Certifications Granted / 4 Conditional Certifications Denied
4 Decertification Motions Granted / 0 Decertification Motions Denied

In terms of the ERISA class action litigation scene in 2019,[3] the focus continued to rest on precedents of the U.S. Supreme Court as it shaped and refined the scope of potential liability and defenses in ERISA class actions.

The *Wal-Mart* decision also has changed the ERISA certification playing field by giving employers more grounds to oppose class certification.

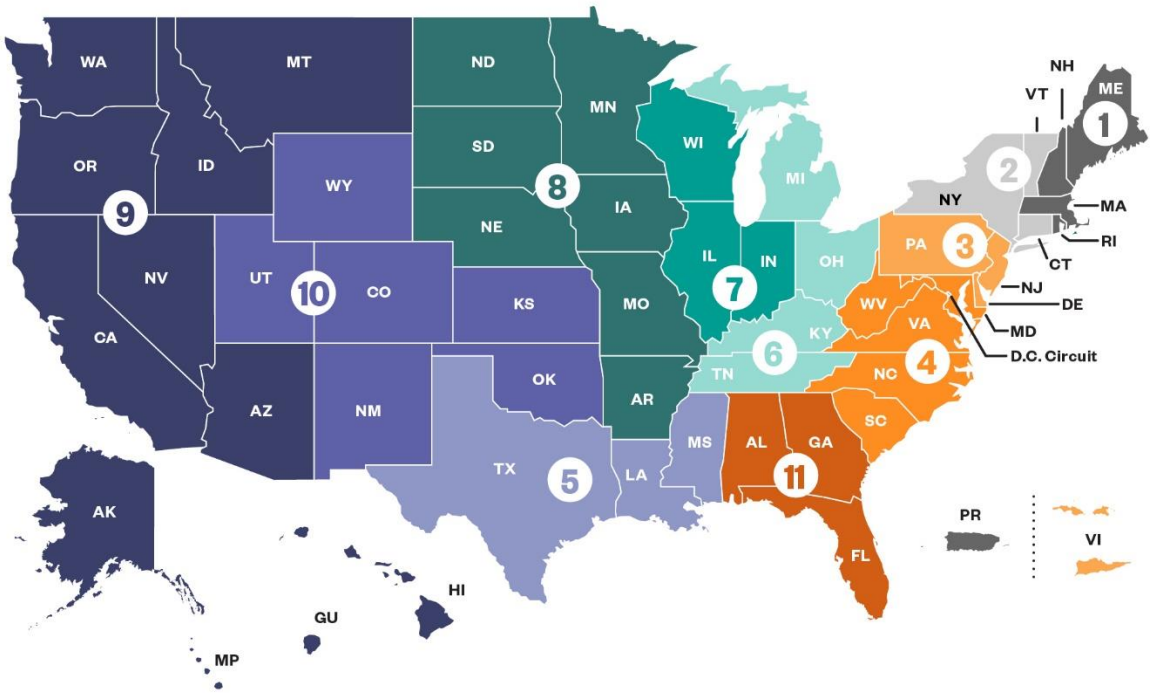
The decisions in 2019 show that class certification motions have the best chance of denial in the context of ERISA welfare plans, and ERISA defined contribution pension plans, where individualized notions of liability and damages are prevalent.

[3] An analysis of rulings in ERISA class actions in 2019 is set forth in Chapter VI, Section A.

While plaintiffs were more successful than employers in litigating certification motions in ERISA class actions, their success rate was on par with previous years. In 2019, plaintiffs won 11 of 17 certification rulings, a success rate of 65%. By comparison, in 2018 plaintiffs won 11 of 17 certification rulings for a nearly identical success rate; in contrast, in 2017, plaintiffs won 17 of 22 certification motions, with a success rate of 77%.

A map illustrating these trends is shown below:

U.S. Courts Of Appeal – Analysis Of ERISA Decisions



	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit	Court of Federal Claims	EEOC
Certification Motions Granted	0	4	2	0	0	0	0	0	5	0	0	0	0	0
Certification Motions Denied	0	0	0	2	0	1	1	0	2	0	0	0	0	0

Total: 11 Granted / 6 Denied

Overall Trends

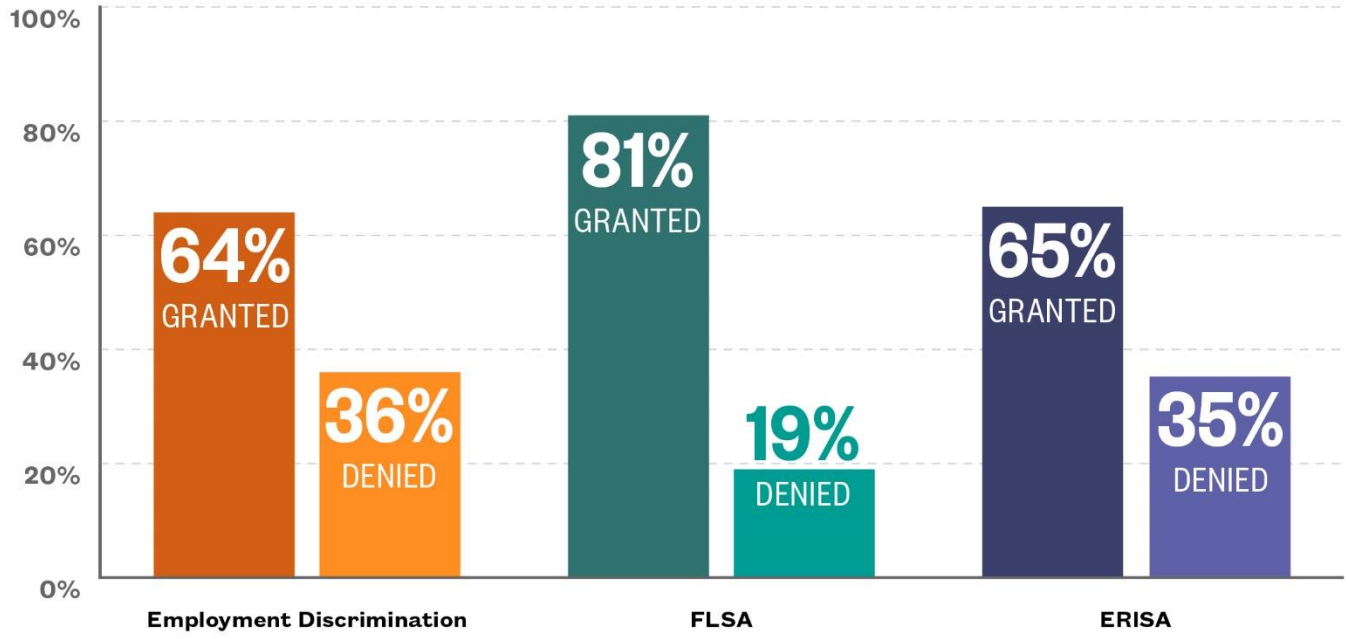
So what conclusions overall can be drawn on class certification trends in 2019?

In the areas of wage & hour, employment discrimination, and ERISA claims, the plaintiffs' bar is converting their case filings into certification of classes at a high rate. To the extent class certification aids the plaintiffs' bar in monetizing their lawsuit filings and converting them into class action settlements, the conversion rate is robust.

Whereas class certification for employment discrimination cases (7 motions granted and 4 motions denied in 2019) and in ERISA cases (11 motions granted and 6 motions denied in 2019) showed an approximate 64% to 65% success rate for plaintiffs, the plaintiffs' success rate factor in wage & hour litigation (with 199 conditional certification motions granted and 46 motions denied) is pronounced.

The following bar graph details the win/loss percentages in each of these substantive areas:

- a success rate of 64% for certification of employment discrimination class actions (both Title VII and age discrimination cases);
- a success rate of 65% for certification of ERISA class actions; and,
- a success rate of 81% for conditional certification of wage & hour collective actions.



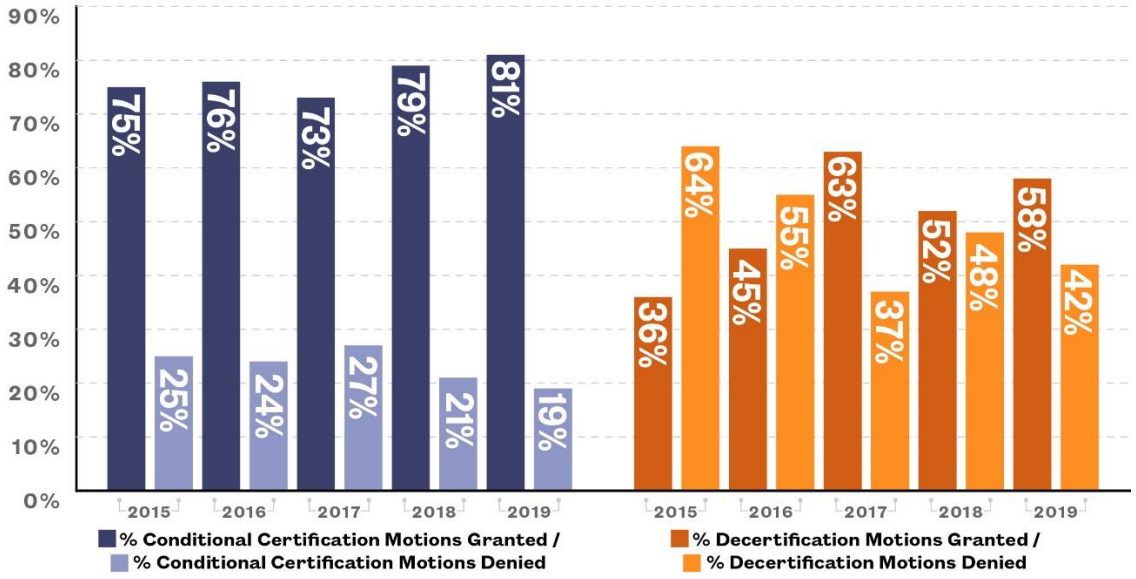
2019 Certification Motions For Employment Discrimination, FLSA, And ERISA

Obviously, the most certification activity in workplace class action litigation is in the wage & hour space.

The trend over the last three years in the wage & hour space reflects a steady success rate that ranged from a low of 70% to a high of 81% (with 2019 representing the highest success rate ever) for the plaintiffs' bar, which is tilted toward plaintiff-friendly "magnet" jurisdictions where the case law favors workers and presents challenges to employers seeking to block certification.

The key statistic and bright spot in 2019 for employers was an increase in the odds of successful decertification of wage & hour cases to 58%, as compared to 52% in 2018 (and comparatively, of 63% in 2017).

Comparatively, the trend over the past five years for certification orders is illustrated in the following chart:



2015 - 2019 FLSA Conditional Certification Motions And Decertification Motions

While each case is different and no two class actions or collective actions are identical, these statistics paint the all-too familiar picture that employers have experienced over the last several years. Plaintiffs have done exceedingly well in certification proceedings.

The new wrinkle to influence these factors in 2019 was the Supreme Court's ruling in 2018 in *Epic Systems*. Overall case filing numbers were down. This reflects that lawsuits moved out of the court system and into arbitration at greater rates than ever before. The bottom line is that the most effective tool to defeating class action litigation is to avoid lawsuits altogether (where plaintiffs' lawyers voluntarily agree to proceed to arbitration) or to win a motion to compel arbitration before a certification motion is ever litigated.

Lessons From 2019

There are multiple lessons to be drawn from these trends in 2019.

First, while the *Wal-Mart* ruling undoubtedly heightened commonality standards under Rule 23(a)(2) starting in 2011, and the *Comcast* decision tightened the predominance factors at least for damages under Rule 23(b) in 2013, the plaintiffs' bar has crafted theories and "work arounds" to maintain or increase their chances of successfully securing certification orders in ERISA, wage & hour, and employment discrimination lawsuits. In 2019, their certification conversion rate for ERISA and employment discrimination cases was 65% and 64% respectively, while wage & hour cases showed an 81% conversion rate. This was the highest conversion rate ever for FLSA and employment discrimination cases.

Second, the defense-minded decisions in *Wal-Mart* and *Comcast* have not taken hold in any significant respect in the context of FLSA certification decisions for wage & hour cases. Efforts by the defense bar to use the commonality standards from *Wal-Mart* and the predominance analysis from *Comcast* have not impacted the ability of the plaintiffs' bar to secure first-stage conditional certification orders under 29 U.S.C. § 216(b). If anything, the ruling three years ago in *Tyson Foods* has made certification prospects even easier for plaintiffs in the wage & hour space, insofar as conditional certification motions are concerned. The conversion rate of successful certification motions hit an all-time high of 81% in 2019, which further confirms this evolution of the case law in this space.

Third, while monetary relief in a Rule 23(b)(2) context is severely limited, certification is the "holy grail" in class action litigation, and certification of any type of class – even a non-monetary injunctive relief class claim – often drives settlement decisions. This is especially true for employment discrimination and ERISA class actions, as plaintiffs' lawyers can recover awards of attorneys' fees under fee-shifting statutes in an employment litigation context. In this respect, the plaintiffs' bar is nothing if not ingenuous, and targeted certification theories (*e.g.*, issue certification on a limited discrete aspect of a case) are the new norm in federal and state courthouses.

Fourth, during the certification stage, courts are more willing than ever before to assess facts that overlap with both certification and merits issues, and to apply a more practical assessment of the Rule 23(b) requirement of predominance, which focuses on the utility and superiority of a preclusive class-wide trial of common issues. Courts are also more willing to apply a heightened degree of scrutiny to expert opinions offered to establish proof of the Rule 23 requirements.

Finally, employers now have an effective weapon to short-circuit the decision points for class action exposure through use of mandatory workplace arbitration agreements. Based on the *Epic Systems* ruling, a class waiver in an arbitration agreement is now an effective first-line defense to class-based litigation. Throughout 2019, employers used arbitration defenses to fracture class actions and convert them into individual, bi-lateral arbitration proceedings.

In sum, notwithstanding these shifts in proof standards and the contours of judicial decision-making, the likelihood of class certification rulings favoring plaintiffs are not only "alive and well" in the post-*Wal-Mart* and post-*Comcast* era, but also thriving.

The battle ground is likely to shift in the coming years, as employers may create a bulwark against such class-based claims based on the *Epic Systems* ruling.

(ii) The Impact Of U.S. Supreme Court Rulings

Over the past decade, the U.S. Supreme Court – led by Chief Justice John Roberts – increasingly has shaped the contours of complex litigation exposures through its rulings on class action and governmental enforcement litigation issues.

Many of these decisions have elucidated the procedural requirements for pursuing employment-related class actions under Rule 23 of the Federal Rules of Civil Procedure. These rulings are very important to success or failure in class action litigation. Outcomes on procedural issues often have an outsized influence on class certification rulings and appeals.

The 2011 decision in *Wal-Mart Stores, Inc. v. Dukes* and the 2013 decision in *Comcast Corp. v. Behrend* are the two most significant examples. Those rulings are at the core of class certification issues under Rule 23.

The 2018 ruling in *Epic Systems Corp. v. Lewis* is another example. It green-lighted a gateway device to block prosecution of class and collective actions in the judicial system and force adjudication of claims on an individual, bi-lateral basis in arbitration. *Epic Systems* built upon a group of pro-employer, pro-arbitration rulings over the past decade – including *AT&T v. Concepcion*, *Italian Colors v. American Express*, and this past year's ruling in *Lamps Plus v. Varela* – that allow defendants to manage the risks of class actions through arbitration agreements with class action waivers.

To that end, federal and state courts cited *Wal-Mart* in 641 rulings in 2019; they cited *Comcast* in 219 cases in 2019; and they cited *Epic Systems* in 177 decisions by year's end.

Given the age of some of the sitting Justices of the Supreme Court, President Trump may have the opportunity to fill additional seats on the Supreme Court in 2020 and beyond, and thereby influence a shift in the ideology of the Supreme Court toward a more conservative and strict constructionist jurisprudence. In turn, this is apt to change legal precedents that shape and define the playing field for workplace class action litigation.

Rulings In 2019

In terms of decisions by the Supreme Court impacting workplace class actions, this past year was no exception. In 2019, the Supreme Court decided six cases – two employment-related cases and four class action cases – that will influence complex employment-related litigation in the coming years.

The employment-related rulings came in two wage & hour collective actions, whereas the class action rulings involved appeal rights, settlement requirements, class arbitration, and removal rights under the Class Action Fairness Act. A rough scorecard of the decisions reflects one distinct plaintiff/worker-side victory, defense-oriented rulings in three cases, and two rulings that may impact all litigants equally.

- ***New Prime, Inc. v. Oliveira, et al.,* 139 S. Ct. 532 (2019)** – Decided on January 15, 2019, this collective action under the Fair Labor Standards Act involved a driver for a trucking company under an agreement that classified him as an independent contractor and contained a mandatory arbitration provision with a class/collective action waiver. Defendant invoked the Federal Arbitration Act ("FAA"), arguing that questions regarding arbitrability should be resolved by the arbitrator. Agreeing that a court should determine whether the FAA's exclusion in § 1 applies before ordering arbitration, the Supreme Court reasoned that the FAA does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Because a "contract of employment" refers to any agreement to perform work, the Supreme Court concluded that Plaintiff's contract fell within that exception. The Supreme Court opined that at the time of the adoption of the FAA in 1925, the phrase "contract of employment" was not a term of art and did not require a formal employer-employee relationship, as Congress used the term "contracts of employment" broadly.
- ***Nutraceutical Corp. v. Lambert, et al.,* 139 S. Ct. 710 (2019)** – Decided on February 26, 2019, this class action involved allegations that Nutraceutical's marketing of a dietary supplement violated California consumer protection law. After decertification of the class, Plaintiff had 14 days under Rule 23(f) to ask for permission to appeal the order. Instead, Plaintiff moved for reconsideration more than 14 days later, and the motion was subsequently denied. Fourteen days thereafter, Plaintiff petitioned the Ninth Circuit for permission to appeal the decertification order. The Ninth Circuit held that Rule 23(f)'s deadline should be tolled because Plaintiff had acted diligently and it reversed the decertification order. A unanimous Supreme Court reversed on the basis that Rule 23(f) is "a non-jurisdictional claim-processing rule," which is not subject to equitable tolling. The Supreme Court concluded that the Federal Rules of Civil Procedure express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist. As a result, the decision provides bright-line clarity for time limits on Rule 23(f) appeals of class certification orders.
- ***Frank, et al. v. Gaos,* 139 S. Ct. 1041 (2019)** – Decided on March 20, 2019, this case involved a class action brought against Google claiming violations of the Stored Communications Act (Plaintiffs alleged that when an Internet user conducted a Google search and clicked on a hyperlink listed on the search results, Google transmitted information, including the terms of the search, to the server that hosted the selected webpage). As the Act prohibits a person or entity providing an electronic communication service to the public from knowingly divulging to any person or entity the contents of a communication while in electronic storage by that service, Plaintiffs brought a class action for breach or privacy. The parties negotiated a class-wide settlement that required Google to include disclosures on three of its webpages and to pay $8.5 million, whereby most of the money would be distributed to *cy pres* recipients (in a class action, *cy pres* refers to distributing settlement funds not amenable to individual claims or meaningful *pro rata* distribution to non-profit organizations whose work indirectly benefits class members). The Ninth Circuit affirmed approval of the settlement without addressing standing issues that had been the subject of dispute. On review, the U.S. Supreme Court vacated the order. Although the Supreme Court had granted *certiorari* to decide whether a class action settlement that provides a *cy pres* award but no direct relief to class members is fair, reasonable, and adequate for purposes of Rule 23(e)(2), it concluded that there is a

substantial open question about whether any named Plaintiff had standing. As a proposed class settlement cannot be approved if the reviewing court lacks jurisdiction over the dispute, and jurisdiction might be lacking if no named Plaintiff had standing, the Supreme Court did not decide the *cy pres* question. As a result, the decision underscores that standing is always a required element of class certification, either as to the contested claim or settlement.

- ***Lamps Plus, Inc., et al. v. Varela, et al.,* 139 S. Ct. 1407 (2019)** – Decided on April 24, 2019, this case involved a data breach involving approximately 1,300 employees of Defendant. After a fraudulent federal income tax return was filed in the name of Plaintiff, he filed a putative class action on behalf of employees whose information had been compromised. Relying on the arbitration agreement in Plaintiff's employment contract, Defendant sought to compel arbitration on an individual rather than a class-wide basis. The Ninth Circuit affirmed the rejection of the individual arbitration request, and thereby authorized a class arbitration. Although Supreme Court case law precedents held that a court may not compel class-wide arbitration when an agreement is silent on the availability of such arbitration, the Ninth Circuit concluded that those case law precedents did not apply because Defendant's agreement was ambiguous, not silent, concerning class arbitration. The Supreme Court reversed. It held that under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration. It reasoned that class arbitration, unlike the individualized arbitration envisioned by the FAA, sacrifices the principal advantage of arbitration (its informality) and makes the process slower, more costly, and more likely to generate procedural problems than final judgment. The Supreme Court held that consent to participate in class arbitration cannot be inferred absent an affirmative contractual basis for concluding that the party agreed to do so. Therefore, contractual silence is not enough and ambiguity does not provide a sufficient basis to infer consent. As a result, the opinion confirms that an employer cannot be coerced into a class arbitration without signing an arbitration agreement with an unambiguous contract provision expressly stating its intent to do so.
- ***Home Depot U.S.A., Inc. v. Jackson, et al.,* 139 S. Ct. 1743 (2019)** – Decided on May 28, 2019, this case involved the interpretation of the Class Action Fairness Act ("CAFA"). Citibank had filed a state court debt collection action, alleging that consumer was liable for charges incurred on a Home Depot credit card. The consumer responded by filing third-party class action claims against Home Depot and another entity, alleging that they had engaged in unlawful referral sales and deceptive and unfair trade practices under state law. Home Depot filed a notice to remove the case pursuant to the CAFA. Finding that controlling precedent barred removal by a third-party counterclaim Defendant, the District Court dismissed the case (which was reversed by the Fourth Circuit). The U.S. Supreme Court affirmed on the basis that the general removal provision at 28 U.S.C. § 1441(a) does not permit removal by a third-party counterclaim Defendant. The Supreme Court opined that § 1453(b) of the CAFA did not alter § 1441(a)'s limitation on who can remove, suggesting that Congress intended to leave that limit in place. As a result, removal under the CAFA is not allowed for third-part counterclaims.
- ***Parker Drilling Management Services, Ltd. v. Newton, et al.,* 139 S. Ct. 1881 (2019)** – Decided on June 10, 2019, this employment class action concerned work on drilling platforms off the California coast where workers received pay for on-duty time, but not time spent on stand-by, during which they could not leave the platform. Plaintiff filed a class action, alleging that California laws required compensation for stand-by time. The platforms were subject to the Outer Continental Shelf Lands Act ("OCSLA"), which provides that all law on the Outer Continental Shelf ("OCS") is federal law and deems an adjacent state's laws to be inferior to federal law only to "the extent that they are applicable and not inconsistent with" federal law under 43 U.S.C. 1333(a)(2)(A). A unanimous Supreme Court vacated a decision of the Ninth Circuit in favor of Plaintiff on the grounds that where federal law address the relevant issue, state law is not adopted as surrogate federal law on the OCS. The Supreme Court rejected Plaintiff's proposed preemption analysis and ruled that federal law is the only law on the OCS and there is no overlapping state and federal jurisdiction. The Supreme Court held that as Plaintiff's claims were premised on California law requiring payment for

all stand-by time, the Fair Labor Standards Act already addressed that issue and provides for a minimum wage.

The decisions in *New Prime, Lambert, Frank, Lamps Plus, Jackson,* and *Parker Drilling* are sure to shape and influence workplace class action litigation in a profound manner.

New Prime and *Lamps Plus* further elucidate arbitration principles, and when coupled with *Epic Systems*, these decisions may turn out to be one of the most important trio of workplace class action decisions over the last several decades in terms of their ultimate impact on class action litigation dynamics.

Rulings Expected In 2020

Equally important for the coming year, the Supreme Court accepted three additional cases for review in 2019 – that will be decided in 2020 – that also will impact and shape class action litigation and government enforcement lawsuits faced by employers.

All three cases are ERISA class actions.

The Supreme Court undertook oral arguments on two of these cases in 2019; the other case underwent oral argument in early 2020.

- ***Retirement Plans Committee Of IBM v. Jander, et al.,* No. 18-1165** – Argued on November 6, 2019, this ERISA class action concerns whether and in what circumstances the "more harm than good" pleading standard from *Fifth Third Bancorp. v. Dedenhoeffer* can be satisfied by general allegations relative to the harm of inevitable disclosure of alleged fraud increases over time. The ultimate ruling by the Supreme Court likely will determine the relative difficulty of prosecuting and defending ERISA class actions based on how 401k plans are impacted by corporate disclosures disclosures and the viability of ERISA stock drop cases.
- ***Intel Corp. Investment Policy Committee v. Sulyma, et al.,* No. 18-1116** – Argued on December 4, 2019, this ERISA class action involves application of the proper statute of limitations and what quantum of information triggers the date on which an employee has knowledge of the breach or violation of the statute. The ultimate decision likely will determine the ease or difficulty that Plaintiffs have in suing over ERISA issues and establish whether workers get three years or six years to file ERISA class actions.
- ***Thole, et al. v. U.S. Bank, N.A.,* No. 17-1712** – Argued on January 13, 2020, this ERISA class action poses the issue of whether plan participants or beneficiaries may seek injunctive relief against fiduciary misconduct without demonstrating actual or imminent financial loss. The Supreme Court's ultimate ruling is apt to establish significant guideposts for standing defenses in ERISA class actions and the contours of fiduciary duty class actions against fully funded defined benefit plans..

The Supreme Court is expected to issue decisions in these cases by the end of the 2019/2020 term in June of 2020.

Rulings in these cases will have significance for employers in complying with the ERISA and in defending class action litigation.

(iii) Governmental Enforcement Litigation Trends In 2019

On the governmental enforcement front, the past several years have demonstrated that the Trump Administration and its appointed officials at the EEOC have not appreciably deviated from the Commission's spirited pursuit of litigation filings and settlements.

This past year, however, posed unique challenges beyond the control of the EEOC. The Commission is a five-seat agency that has operated without a full panel of five Commissioners for the entirety of the Trump

Administration.[4] When former Commissioner Chai Feldblum's term expired at the end of last year, the result was a lack of quorum on the Commission, which hobbled the EEOC's efforts to pursue its mission. Although President Trump had re-nominated Commissioner Feldblum for another term, she was not confirmed by the Senate due to her perceived views on LGBT issues. This resulted in an empty Commissioner seat and a loss of quorum for roughly one-third of the year. Either by coincidence or as a result, the pace of EEOC lawsuit filings and settlements slowed significantly. Despite this setback, there was only a modest 4% reduction in aggregate recoveries relative to the totals from 2018, thereby demonstrating the Commission's commitment to resolving disputes expediently.

Although the total number of new lawsuits filed by the EEOC decreased, when considered on a percentage basis, the distribution of cases filed in terms of the theory of discrimination alleged remained broadly consistent compared to 2018. Title VII and ADA cases once again comprised the majority of cases filed by the Commission. This suggests that the priorities and patterns of government enforcement litigation have not shifted dramatically under the Trump Administration. During 2019, the new agency appointees were installed during the latter half of the year, which inevitably will result in delayed policy changes. Compounded by the lack of quorum at the Commission for part of this past year, additional time may be necessary for the EEOC to incubate and execute fundamental changes to enforcement priorities. Stepping into a new year with the new EEOC officials in place and a quorum at the Commission, 2020 may finally reveal what changes are in store for governmental enforcement litigation.

During 2019, the Commission filed 144 merits lawsuits and 8 subpoena enforcement actions. This is a stark decline relative to the 197 merits suits and 20 subpoena enforcement actions of 2018, which constituted an over 30% reduction in total actions commenced by the Commission year over year. This past year also marked the third year of the EEOC's 2017-2021 Strategic Enforcement Plan ("SEP"), which was implemented to guide enforcement activity. The six enforcement priorities include: (1) the elimination of systemic barriers in recruitment and hiring; (2) protection of immigrant, migrant, and other vulnerable workers; (3) addressing emerging and developing issues; (4) enforcing equal pay laws; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach.[5]

The Commission maintains discretion to interpret and pursue these priorities as it deems appropriate. While the priorities are defined, they are broad and apply to an expansive landscape of issues. For example, the EEOC has consistently focused on the protection of lesbian, gay, bisexual, and transgender individuals as a primary emerging and developing issue in the workplace. The EEOC's efforts in this area have resulted in a body of case law across many jurisdictions, which holds that discrimination against transgender individuals or on the basis of sexual orientation is a form of discrimination prohibited by Title VII. This issue is set to be decided once and for all by the U.S. Supreme Court in a trio of high-profile cases, *R.G. & G.R. Harris Funeral Homes v. EEOC*, *Altitude Express, Inc. v. Zarda*, and *Bostock v. Clayton County, Georgia*.[6] *Harris Funeral Homes* was brought by a transgender woman who was terminated after putting her employer on notice of her forthcoming transition. *Zarda* and *Bostock* involve sexual-orientation discrimination. The issues at stake even divide government policy-makers, for the U.S. Department of Justice under President Trump filed briefs with the Supreme Court stating that Title VII protections do not extend to transgender and sexual orientation discrimination, confirming the Administration's position on this issue.

Additionally, the EEOC issued landmark determinations addressing digital bias in July 2019, which it has identified as an emerging trend and a potential barrier in recruitment and hiring. The EEOC has especially

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[4] One view of the situation is that the Trump Administration has prioritized confirmation of federal judges over federal agency appointments. Coupled with the Senate's focus on year-end legislative business, federal agency nominations at the EEOC and DOL have largely gone unfilled or experienced long delays during much of the Trump Administration.

[5] U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 – 2021, *available at* https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[6] *See* 139 S. Ct. 2049 (May 13, 2019).

targeted on-line advertising that uses algorithms that have the potential to allow employers to deliberately target and exclude certain classes of people by age, gender, and race when disseminating job advertisements. The Communications Workers of America filed discrimination charges against 66 employers for engaging in discriminatory advertising on Facebook, alleging that their advertising excluded women and older workers from receiving the job ads.[7] Of the employers charged, seven were subject to an EEOC finding of "reasonable cause" to believe that the employers violated Title VII and/or the ADEA.[8] While findings of reasonable cause do not affirmatively indicate that the employers violated federal law, they do provide insight as to how the EEOC is apt to analyze claims of digital bias in the years ahead.

In its FY 2019 Congressional Budget Justification, the EEOC stated that one of its strategic objectives is to prevent employment discrimination through education and outreach.[9] This was reiterated in the inaugural Agency Financial Report ("AFR") released on November 15, 2019.[10] The EEOC conducts both free and fee-based events targeting particularly vulnerable communities that may be unfamiliar with employment law protections (*i.e.*, low-skilled workers, new immigrant workers, etc.). This past year, the White House also launched the Initiative on Asian-Americans and Pacific Islanders and the Initiative on Historically Black Colleges and Universities. In conjunction with the White House programs, the EEOC hosted outreach events involving over 100,000 participants nationally. Based on statements made throughout the AFR, the Commission is expected to further expand its outreach efforts in 2020.

The EEOC has also prioritized initiatives to mitigate sexual harassment in the workplace that rose to prominence through the #MeToo movement. The EEOC now offers a customizable fee-based harassment prevention training for supervisors. Furthermore, the Commission held an Industry Leaders Roundtable discussion on harassment prevention. Prominently highlighted was the hospitality industry, resulting in a published statement by leaders of that industry committing themselves to various safety measures, including furnishing employees with security devices and trainings to improve hotel safety for employees and guests.[11] The EEOC's continued focus on #MeToo claims is reflected in its filing numbers as well. Of the 2019 Title VII filings, 68% arose out of claims of sex-based discrimination.

Arguably, the most significant step the EEOC has taken in the last few years relating to its priority of ensuring equal pay for all workers is its attempted modifications to the EEO-1 reporting obligations. Employers with more than 100 employees, and federal contractors or sub-contractors with more than 50 employees, are required to collect and provide to the EEOC demographic information (gender, race, and ethnicity) in each of ten job categories. Under the Obama Administration, the EEOC tried to expand those reporting obligations to include salary and wage data. Shortly after President Trump's inauguration, those changes were stayed by the Office of Management and Budget ("OMB"). In 2019, a federal district court unexpectedly ordered those changes reinstated – for a time – finding that the OMB's decision to stay those regulations was "arbitrary and capricious."[12] Ultimately, it was held that the EEOC must complete 2017-2018 pay data collection, according to the Obama-era rules, by January 31, 2020. When completed, that collection will provide the Commission with

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[7] *Communications Workers of America, et al. v. T-Mobile US Inc.*, No. 17-CV-07232 (N.D. Cal. 2017).

[8] Mindy Weinstein, Equal Employment Opportunity Commission Determination Letters, *available at* https://www.onlineagediscrimination.com/sites/default/files/documents/eeoc-determinations.pdf.

[9] U.S. Equal Employment Opportunity Commission, Fiscal Year 2019 Congressional Budget Justification, *available at* https://www.eeoc.gov/eeoc/plan/2019budget.cfm.

[10] U.S. Equal Employment Opportunity Commission, Fiscal Year 2019 Agency Financial Report, at 9, *available at* https://www.eeoc.gov/eeoc/plan/upload/2019afr.pdf.

[11] Statement of Rosanna Maietta, American Hotel & Lodging Association and American Hotel & Lodging Educational Foundation, *available at* https://www.eeoc.gov/eeoc/task_force/harassment/3-20-19/ahla.cfm.

[12] *National Women's Law Center v. Office of Management & Budget*, No. 17-CV-2458, 2019 U.S. Dist. LEXIS 33828, at *18 (D.D.C. Mar. 4, 2019).

data regarding potential pay disparities across gender, race, and ethnicity. Whether and to what extent it will make use of this data to guide its enforcement efforts remains to be seen.

The EEOC also changed how it will report its financial and performance results. In November of 2019, it announced that the new AFR will replace the combined Performance Accountability Report ("PAR") that was customarily published annually in November. The EEOC explained in the 2019 AFR that it will separate the information that had been contained in the combined PAR into two separate reports. The AFR will continue to be published in November and will focus on financial results and a high-level discussion of performance results. A new Annual Performance Report will be published in February of 2020 in coordination with the EEOC's Congressional Budget Justification, which will provide a more detailed analysis of performance results. The 2019 AFR provided a snapshot of FY 2019 performance highlights, including the following:

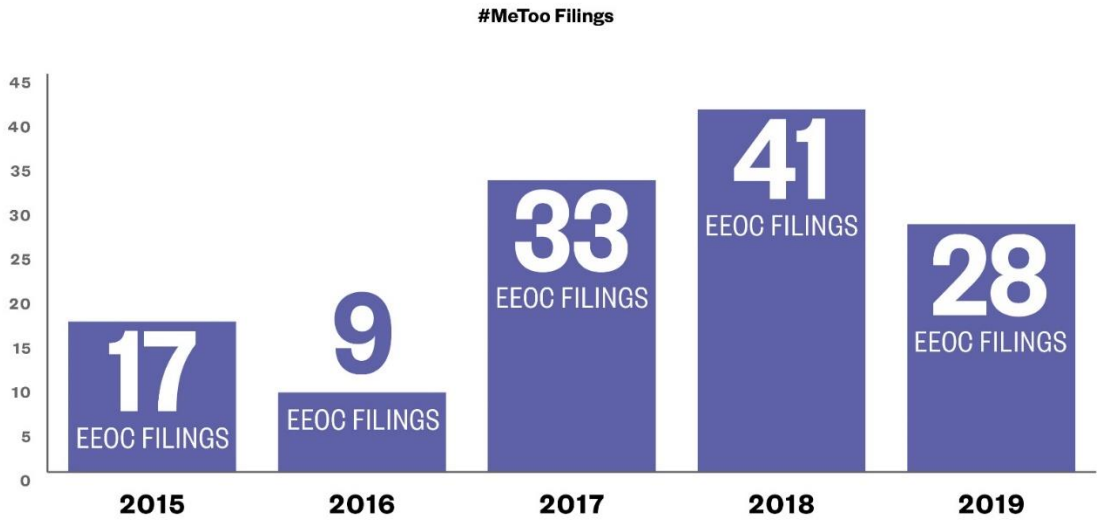
- The Commission reported a 12.1% decrease in the backlog of pending charges as compared with the previous year. The total number of pending private sector charges was 43,850 – the lowest reported backlog number in 13 years.

- The EEOC secured approximately $486 million in relief for victims of discrimination through litigation and pre-litigation investigations. This represented a significant decrease from the total relief figure of $505 million for 2018, and was closely aligned with the recovery total of $484 million for 2017.

- The total relief figures in 2019 included $347 million for victims of employment discrimination in private sector and state and local government workplaces through mediation, conciliation, and settlements, a slight decrease from the $354 million obtained in 2018.

- Recoveries through litigation dropped significantly. The EEOC secured $39.1 million in litigation recoveries on behalf of charging parties and other aggrieved individuals this past year, as compared to the $53.5 million in recoveries in 2018. The 2019 number reflects a significant drop from the last several years as well as compared to 2015 ($65.3 million), 2016 ($52.2 million), and 2017 ($42.4 million).

Furthermore, the EEOC has continued to focus on #MeToo issues with more intensity than ever before over the past three years. In 2019, the EEOC reported a 14% increase in claims of sexual harassment. In turn, the Commission filed 28 lawsuits that advanced #MeToo-type allegations. This is a drop-off from the filings of sex discrimination lawsuit filings in 2018, when 41 cases included claims of sexual harassment. The total number of sexual harassment lawsuit filings in 2019 was closer to the total in 2017, where sexual harassment claims accounted for 33 lawsuit filings. Nonetheless, the 2019 lawsuit filing patterns reflected a consistent focus on workplace harassment litigation.



In contrast to the EEOC, the DOL's agenda in 2018 reflected that its new Republican-appointed decision-makers had been in place for the better part of the past year. That being said, however, the DOL's Wage & Hour Division ("WHD") still did not have a Senate-confirmed Administrator nominated by the Trump Administration. Despite the lack of a confirmed leader (or perhaps because of it), the WHD continued its aggressive enforcement activities, setting a new record of $304 million in back wages recovered during 2018, which represents an increase of more than $30 million over the previous year.

With a confirmed Wage & Hour Administrator and a new Secretary of Labor, the WHD was in full swing in 2019. This year, WHD had a record-setting enforcement program, with a focus on improvement and expansion of its data-driven approach. By targeting relevant industries and sectors, WHD was able to deploy its resources in an effective manner, resulting in back wage recoveries of $322 million.

The WHD was not, however, singularly tasked with enforcement. Indeed, its 3,700 educational outreach events represent another record for the agency. In addition, WHD issued more than a dozen opinion letters, providing valuable guidance on such critical issues as overtime exemptions, independent contractors in the gig economy, rounding, commissioned sales, and regular rate of pay.

The year also saw WHD with a busy regulatory agenda. The WHD issued a final regulation increasing the salary threshold for the FLSA's white-collar overtime rule and exemptions, and is expected to issue final rules providing much needed clarity on computing the regular rate of pay and establishing joint employment.

The WHD has also proposed revisions to the fluctuating workweek method of computing overtime and a number of provisions related to tipped employees, both of which are anticipated to be finalized in 2020.

Not to be outdone, the National Labor Relations Board ("NLRB") also undertook an ambitious agenda in 2019. It swung the pendulum back toward more conservative views of labor laws, and in certain respects, peeled back on Obama-era Board precedents. 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. By the end of the year, however, the Trump Administration's appointees began to roll-back NLRB precedents and positions that had been espoused during the Obama Administration, such as a reversal of the expansive view of joint employer liability, allowing more deference to employer workplace rules, and eliminating protections for obscene, vulgar, and inappropriate activity under the NLRA.

(iv) Lower Class Action Settlement Numbers In 2019

As measured by the top ten largest case resolutions in various workplace class action categories, overall settlement numbers increased slightly in 2019, as compared to 2018.

After settlement numbers were at an all-time high in 2017, those numbers fell dramatically in 2018, and then leveled off over the past year. In sum, the ability of the plaintiffs' bar to monetize their class action filings hit a proverbial wall over the past two years.

This trend harkened back to the U.S. Supreme Court's decision in *Wal-Mart, Inc. v. Dukes* in 2011. By tightening Rule 23 standards and raising the bar for class certification, *Wal-Mart* made it more difficult for plaintiffs to certify class actions, and to convert their class action filings into substantial settlements.

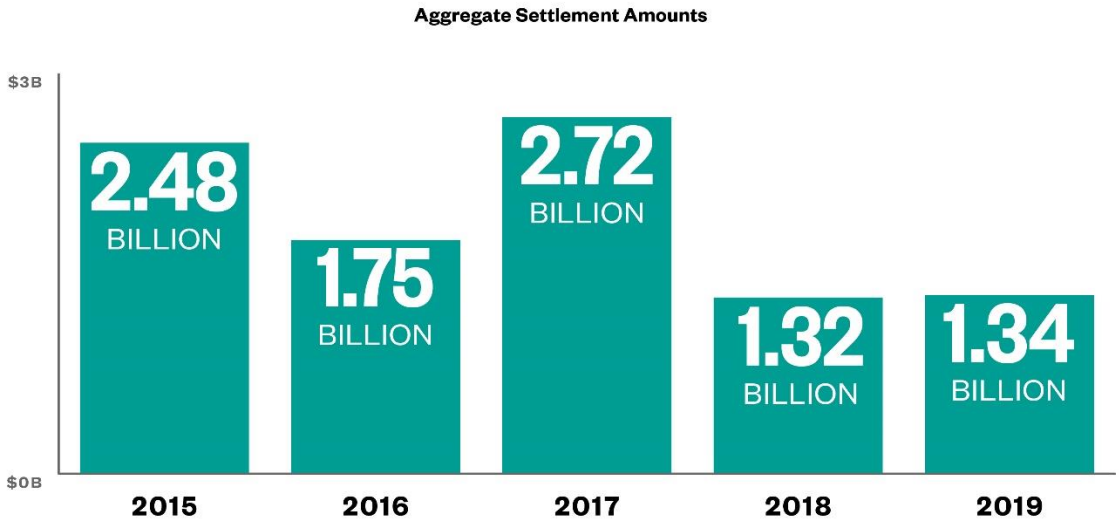
These barriers became more formidable in 2018 with the Supreme Court's ruling in *Epic Systems v. Lewis,* which upheld the validity of class action waivers in mandatory workplace arbitration agreements.

The "*Wal-Mart/Epic Systems*" phenomenon is still being played out, as well as manifesting itself in settlement dynamics. It is expected that the force of this barrier will be felt more profoundly in 2020. Considering all types of workplace class actions, settlement numbers in 2019 totaled $1.34 billion.

This compared to settlements in 2018, which totaled $1.32 billion.

These totals, however, decreased significantly from 2017 when such settlements topped $2.72 billion and in 2016 when such settlements totaled $1.75 billion.

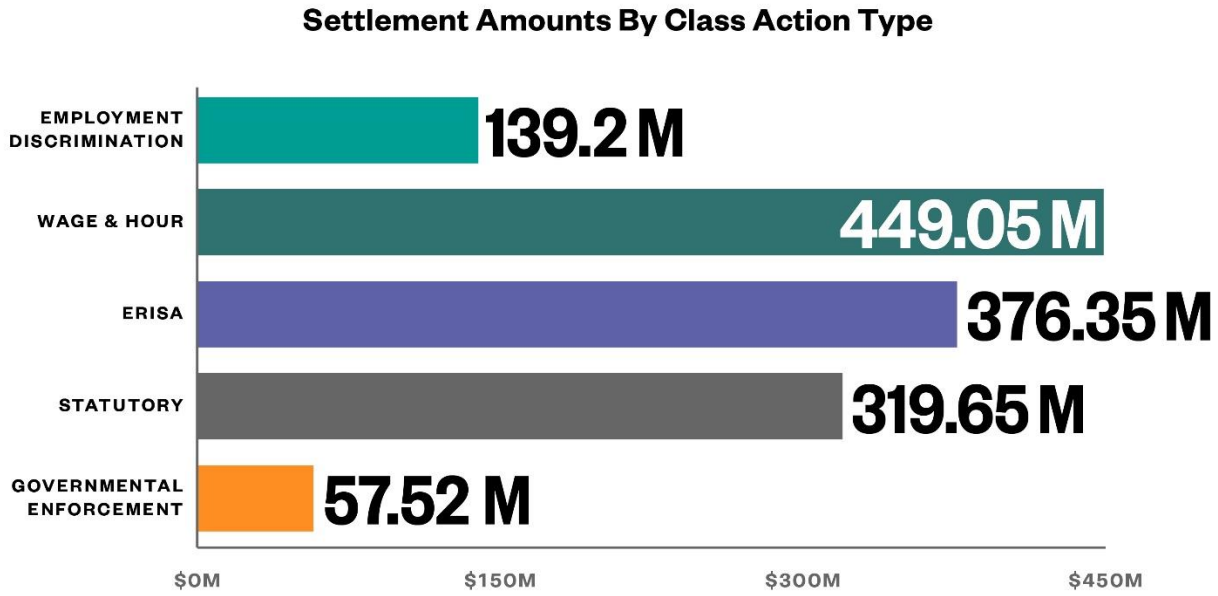
The following graphic shows this trend:



In terms of the story behind the numbers, the breakouts by types of workplace class action settlements are instructive.

In 2019, there was a significant downward trend for the value of settlement of government enforcement litigation, employment discrimination claims, and workplace statutory class actions. In contrast, there were significant increases across-the-board for resolutions of class actions involving wage & hour class and collective actions, as well as ERISA class actions.

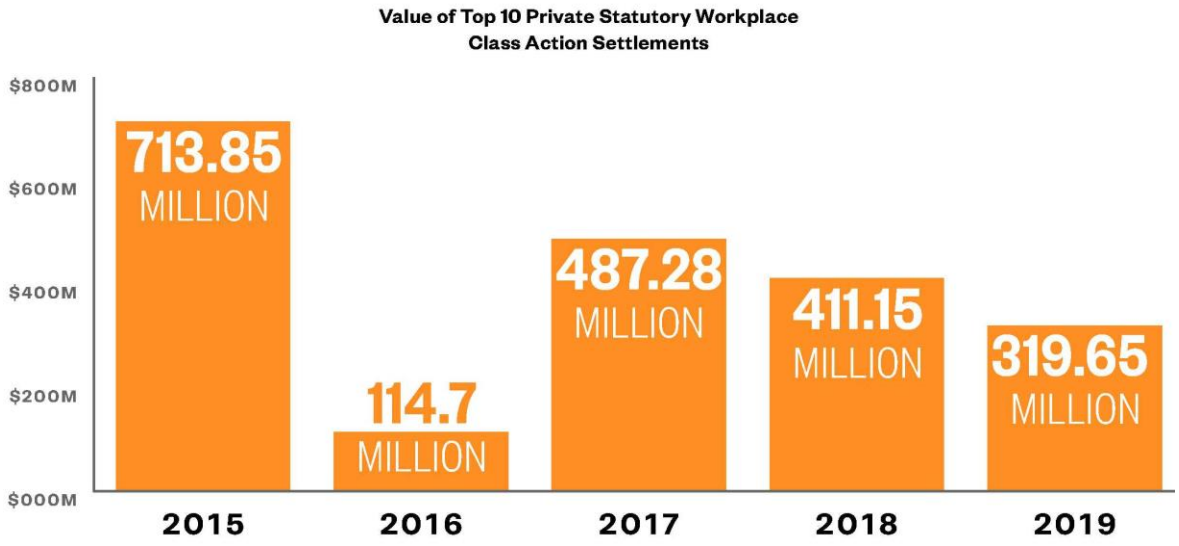
This phenomenon is shown by the following chart for 2019 settlement numbers:



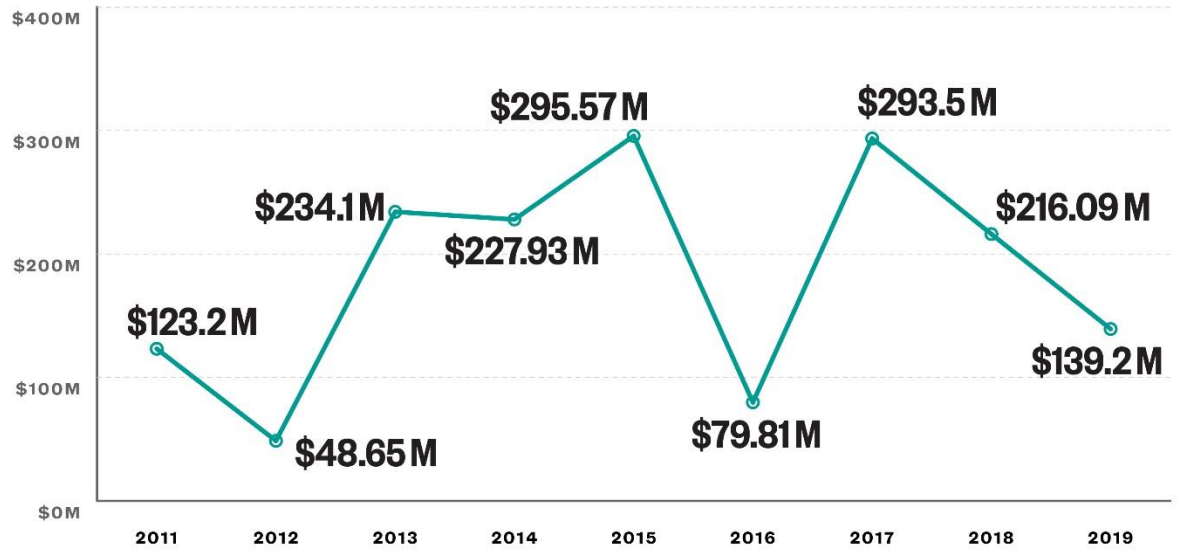
By type of case, settlements values in workplace statutory class actions and government enforcement cases experienced the most significant decreases.

The top ten settlements in the private plaintiff statutory class action category (*e.g.*, cases brought for breach of contract for employee benefits, and workplace antitrust laws and statutes such as the Fair Credit Reporting Act or the Worker Adjustment and Retraining Notification Act) totaled $319.65 million, which represented a large drop-off from 2018 when such settlements totaled $411.15 million, and still further from $487.28 million in 2017 (but an increase from $114.7 million in 2016).

The following chart tracks these figures:



The pattern for employment discrimination class action settlements likewise followed a slight downward trend in 2019. The top ten settlements totaled $139.20 million, as compared to $216.09 million in 2018 and $293.5 million in 2017. The comparison of the settlement figures with previous settlement activity over the last decade is illustrated in the following chart:



Value Of Top 10 Employment Discrimination Class Action Settlements

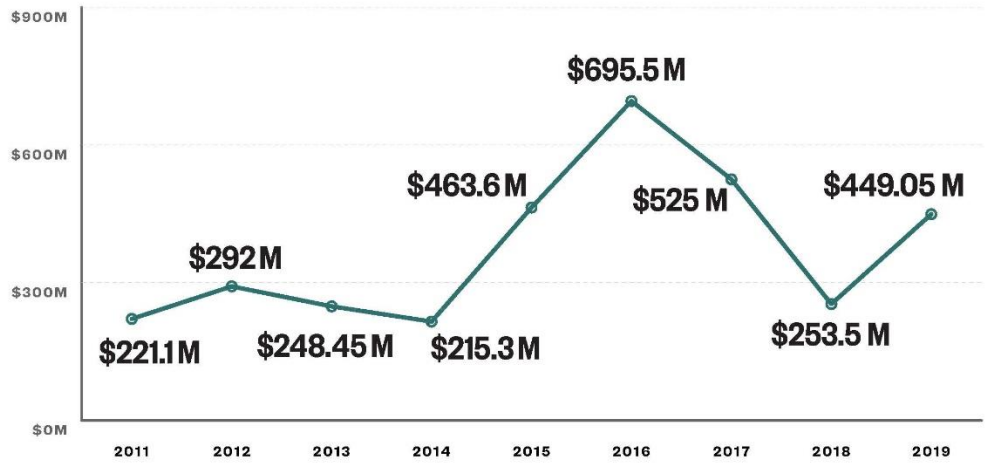
In 2019, the value of the top ten largest employment discrimination class action settlements of $139.2 million was the fourth lowest figure since 2010,[13] and largely aligned with the trend that started in 2011 (after *Wal-Mart* was decided) that showed decreases in settlement amounts over three years of that four-year period.

This trend did not hold for wage & hour class action settlements. The value of those settlements in 2019 nearly doubled from the previous year. In 2019, the value of the top ten wage & hour settlements was $449.05 million as compared to $253.18 million in 2018. This was a slight decrease from 2017, when the value of the top ten settlements spiked at $574.49 million, which was the second highest annual total in wage & hour class actions ever.

On a comparative basis, 2019 settlements were the fourth highest annual total over the past decade.

When coupled together, the two-year period of 2016 and 2017 saw over $1.2 billion in the top wage & hour settlements. Adding 2018 and 2019 settlements, corporate America saw over $2 billion in wage & hour settlements over the past four years. Further, this is most telling in examining the last four years, for 2016 represented almost a quadrupling (after two years of declining numbers in 2013 and 2014) in the value of the top wage & hour settlements as compared to 2014.[14] Given the ruling in *Epic Systems* in 2018, settlement numbers more likely to follow a downward trajectory in 2020.

This trend is illustrated by the following chart:



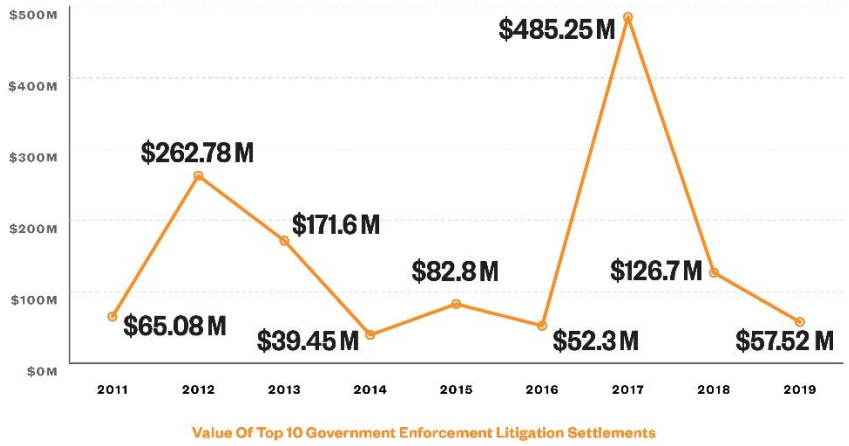
Value Of Top 10 Wage & Hour Class Action Settlements

Relatedly, the top ten settlements in government enforcement litigation experienced a steep downward arc, as they decreased to $57.52 million, which was a drop from $126.7 million in 2018. This compared to the figure of

[13] An analysis of class action settlement activity is discussed in Chapter II of this Report. The total of $139.20 million in 2019 was the fourth lowest total since the *Wal-Mart* ruling in 2011. By comparison, the total of $79.81 million for the top ten largest employment discrimination class action settlements in 2016 was the second lowest total since 2006; the figures for each year were as follows: 2018: – $216.09 million; 2017 – $293.5 million; 2016 – $79.81 million; 2015 – $295.57 million; 2014 – $227.93 million; 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. With the issuance of the *Wal-Mart* decision in June of 2011, settlements were decidedly lower in 2012, and relatively depressed in 2014 and 2016, and 2019 with the third lowest total since the *Wal-Mart* ruling.

[14] By comparison, the top ten wage & hour class action settlements in 2015 totaled $463.6 million, compared to $215.3 million in 2014 and $248.45 million in 2013. The figure of $695.5 million in 2016 is the highest amount over the last decade. The 2019 figure of $449.05 million was the fourth highest total over the past decade.

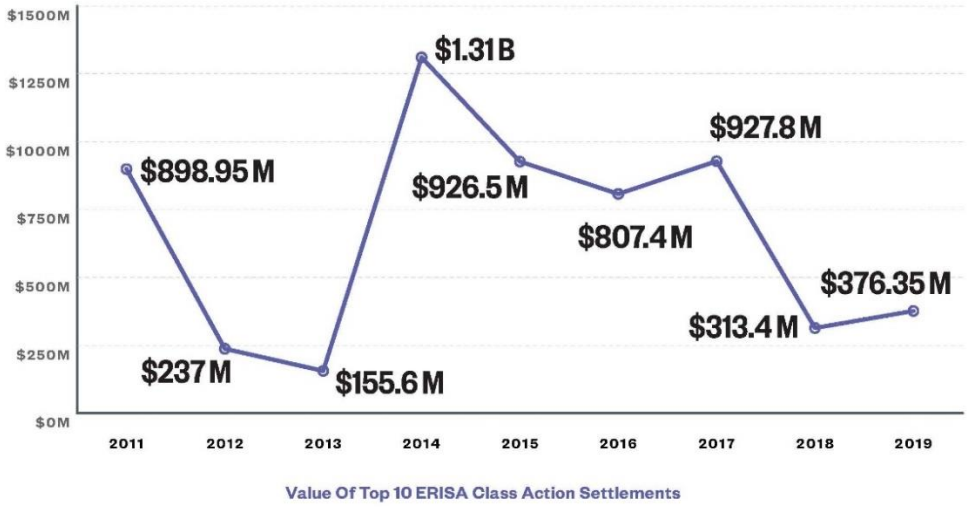
$485.2 million in 2017. That being said, these numbers were slightly above the three year trend from 2014 to 2016 when governmental enforcement litigation settlements trended under $100 million for three years running.[15] This trend is illustrated by the following chart of settlements from 2011 to 2019:



ERISA class action settlements rose slightly in 2019. The top ten settlements totaled $376.35 million, which topped the 2018 total of $313.4 million. Relatively, however, ERISA settlements in 2019 were still well below prior years, as those totals were $927 million in 2017 and $807.4 million in 2016.

Further, given that ERISA class action settlements for the two-year period of 2016 and 2018 were a combined $1.73 billion, the figure for 2019 on balance shows a lower conversion rate for the plaintiffs' bar.[16]

This trend is illustrated by the following chart of settlements from 2011 to 2019:



[15] The total for the top ten government enforcement litigation settlements was $82.8 million in 2015, compared to $39.45 million in 2014, $171.6 million in 2013, $262.78 million in 2012, and $65.05 million in 2011. Other than in 2014 (when governmental settlements hit their lowest point in the last decade at $39.45 million), the value of the top ten settlements in 2019 was the third lowest figure for the past decade.

[16] The total for the top ten ERISA class action settlements in 2015 was $926.5 million compared to $1.31 billion in 2014 and $155.6 million in 2013.

Settlement trends in workplace class action litigation are impacted by many factors.

In the coming year, settlement activity is apt to be influenced by developing case law interpreting U.S. Supreme Court rulings such as *Epic Systems*, the Trump Administration's labor and employment enforcement policies, case filing trends of the plaintiffs' class action bar, and class certification rulings.

(v) Impact Of The #MeToo Movement

Seemingly overnight, the #MeToo movement emerged as a worldwide social phenomenon with significant implications for the workplace and class action litigation. By 2019, it became clear that the movement is here to stay, and was not a passing fancy. In this age of connectivity, societal movements have unprecedented speed and reach. Traditional means of spreading information and generating social change have been supplemented – if not outright replaced – by the near-instantaneous ability of an idea or cause to go viral on social media. Nowhere over the past year was this more evident than with the #MeToo movement, as the chorus of victims' voices and the media spotlight exposed sexual misconduct in the workplace. Against this backdrop, many predicted that allegations of on-the-job sexual harassment would increase. The EEOC's release of data on workplace harassment data in October of 2019 confirmed that reality and the widespread impact of the #MeToo movement throughout the country.

At the same time, many states reviewed their laws in the past 24 months in response to the #MeToo movement. Washington and California changed their laws in 2018 to bar employers from use of mandatory non-disclosure agreements for employees asserting sexual harassment and abuse claims. Illinois also enacted comprehensive legislation in 2019 that became effective on January 1, 2020, which mandates workplace anti-harassment training, bans arbitration and non-disclosure agreements that cover harassment and discrimination complaints, and requires disclosure of adverse judgments or rulings where allegations of sexual harassment formed the complaints. Several states – such as New York and New Jersey – also extended statutes of limitations, spurred on by revelations of sexual abuse in the Catholic Church and in #MeToo reports. More than any other state, California has been in the forefront of introducing "#MeToo bills," including banning mandatory arbitration clauses in contracts, which require workers to waive the right to take an employer to court in the event of a dispute. In sum, these legislative changes lead to an uptick in #MeToo litigation in these states in 2019, and more case filings are expected in 2020.

The increasing number of sexual harassment claims in the corporate world as part of the #MeToo movement also has led to a number of high-profile employment-related claims. These types of settlements gained momentum in 2019, as plaintiffs' lawyers secured a $215 million class action settlement for victims of sexual abuse who had sued the University of Southern California.

On the heels of those claims are a growing number of shareholder derivative and securities class actions. In 2017, 21st Century Fox reached a $90 million settlement with shareholders over losses related to two harassment scandals. Additional class actions were filed against other organizations in 2019, including a lawsuit that resulted in a $41 million settlement with Wynn Hotels. The derivative lawsuits are brought by plaintiff-shareholders purportedly acting on behalf of the company asserting claims for breaches of fiduciary duty and waste of corporate assets against board members and corporate executives. These complaints generally allege that these executives or board members had actual knowledge of or declined to act on sexual misconduct incidents and that, once aware of the incidents, they failed to take appropriate action or concealed the misconduct from shareholders and other stakeholders in the company. Derivative plaintiffs may also allege the misuse of corporate assets and legal resources for settlements and other payments to alleged harassers.

These derivative actions raise significant issues concerning the legal duties of corporations and their boards to monitor potential sexual misconduct by senior executives and other employees. While a corporate board generally has no duty to monitor a corporate officer's personal behavior, sexual misconduct by an executive in the workplace may trigger liability if the directors consciously allowed the unlawful conduct to occur or failed to establish a compliance system to facilitate employee reporting of sexual harassment and to ensure that the company appropriately investigates and addresses any such allegations. These types of claims are expected to increase in 2020, as the #MeToo movement continues to expand.

D. Complex Employment-Related Litigation Trends In 2019

While shareholder and securities class action filings witnessed an increase in 2019, employment-related class action filings remained relatively stable and aligned with case filing numbers of previous years.

By the numbers, filings for employment discrimination, FLSA, and ERISA claims were significantly lower over the past year. FLSA filings decreased for only the third time in over two decades. Furthermore, 2019 filing patterns were the first time in a decade when the number of lawsuit filings decreased across the board in all three categories. Most likely, this reflected the use of workplace arbitration agreements by employers, which led the plaintiffs' bar to assert their claims in arbitration as opposed to lawsuits.

By the close of the year, ERISA lawsuits totaled 5,732 filings (as compared to 6,334 in 2018, 6,727 in 2017, 6,530 in 2016, and 6,925 in 2015), FLSA lawsuits totaled 6,780 filings (as compared to 7,494 in 2018, 7,575 in 2017, 8,308 in 2016, and 8,954 in 2015), and employment discrimination lawsuits totaled 12,255 filings (as compared to 12,488 in 2018, 12,040 in 2017, 11,593 in 2016, and 11,550 in 2015).

In terms of employment discrimination cases, however, the potential exists for a significant jump in case filings in the coming year.

Workplace harassment issues dominated the news cycles throughout 2019, as the #MeToo movement squarely placed sex harassment litigation in the national debate. Inevitably, litigation filings are apt to increase over the next year as a result of this focus.

By the numbers, FLSA collective action litigation filings in 2019 far outpaced other types of employment-related class action filings; virtually all FLSA lawsuits are filed and litigated as collective actions.

Up until 2015, lawsuit filings reflected year-after-year increases in the volume of wage & hour litigation pursued in federal courts since 2000; statistically, wage & hour filings have increased by over 450% in the last 15 years.

The fact of the third annual decrease in FLSA lawsuit filings in 17 years is noteworthy in and of itself. Most likely, it reflects that *Epic Systems* has led the plaintiffs' bar to forego filing various lawsuits and proceeding directly to arbitration.

However, a peek behind these numbers confirms that with 6,780 lawsuit filings, 2019 was the 8th highest year ever in the filing of such cases (only eclipsed by levels in 2012, 2013, 2014, 2015, 2016, 2017, and 2018). When viewed on a continuum, the current volume of wage & hour cases within the "pipeline" in the federal courts is as large and vast as ever.

Given this trend, employers may well see an increase in the number of FLSA filings in 2020. Various factors are contributing to the fueling of these lawsuits, including: (i) minimum wage hikes in 25 states that will take effect in 2020, which will begin to surface as litigation exposures in the coming year; (ii) the intense focus on independent contractor classification and joint employer status, especially in the franchisor-franchisee context; and (iii) a decrease in expected filings by the DOL in 2020, which is apt to fuel filings by the private plaintiffs' bar.

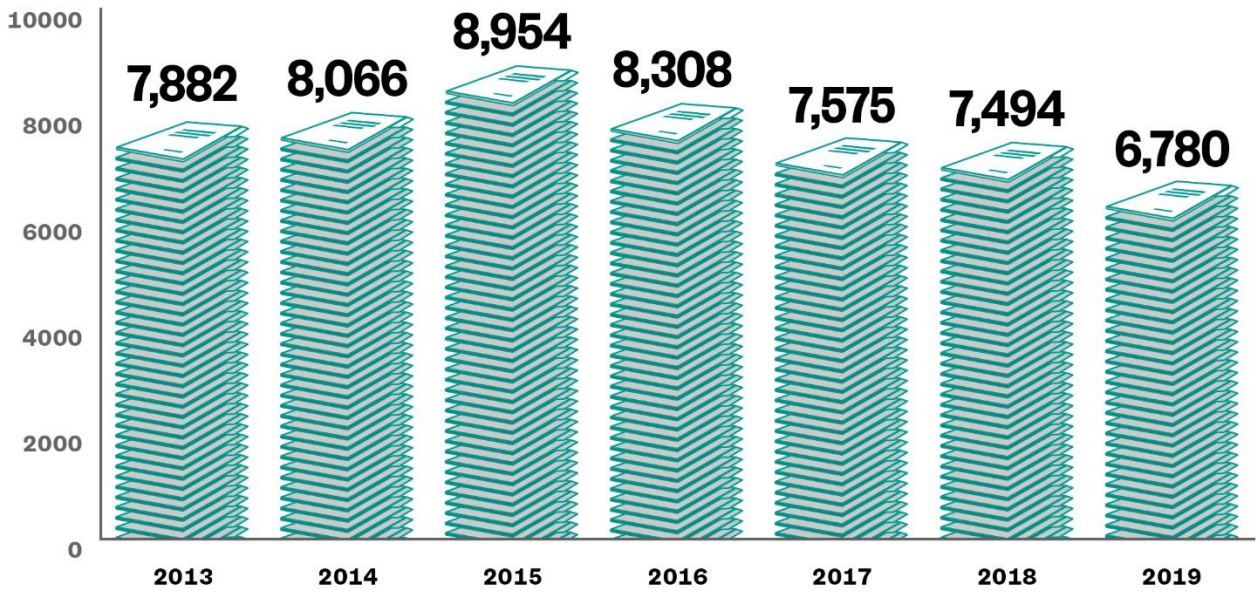
Layered on top of those issues is the difficulty of applying a New Deal piece of legislation to the realities of the digital workplace that no lawmakers could have contemplated in 1938.

The compromises that led to the passage of the legislation in the New Deal mean that ambiguities, omitted terms, and unanswered questions abound under the FLSA (something as basic as the definition of the word "work" does not exist in the statute), and the plaintiffs' bar is suing over those issues at a record pace.

Virtually all FLSA lawsuits are filed as collective actions; therefore, these filings represent the most significant exposure to employers in terms of any workplace laws.

By industry, retail and hospitality companies experienced a deluge of wage & hour class actions in 2019.

This trend is illustrated by the following chart:



FLSA Filings In Federal Courts

The story behind these numbers is indicative of how the plaintiffs' class action bar chooses cases to litigate. It has a diminished appetite to invest in long-term cases that are fought for years, and where the chance of a plaintiffs' victory is fraught with challenges either as to certification or on the merits. Hence, this reflects the various differences in success factors in bringing employment discrimination and ERISA class actions, as compared to FLSA collective actions.

An increasing phenomenon in the growth of wage & hour litigation is worker awareness. Wage & hour laws are usually the domain of specialists, but in 2019 wage & hour issues made front-page news. The widespread public attention as to how employees are paid almost certainly contributed to the sheer number of suits. Big verdicts and record settlements also played a part, as success typically begets copy-cats and litigation is no exception. Yet, the pervasive influence of technology is also helping to fuel this litigation trend. Technology has opened the doors for unprecedented levels of marketing and advertising by the plaintiffs' bar – either through direct soliciting of putative class members or in advancing the overall cause of lawsuits. Social media also allows for the virtual commercialization of wage & hour cases through the internet and digital technology.

Against this backdrop, 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, Illinois, Massachusetts, New Jersey, New York, and Pennsylvania. These states have longer statutes of limitation for state law claims, exceedingly generous damages remedies for workers, and more plaintiff-friendly approaches to class certification, which in combination serve to make each state a "plaintiff-friendly" venue for workplace class actions. In particular, California continued its status in 2019 as a breeding ground for wage & hour class action litigation under the California Labor Code. For the sixth year out of the last eight, the American Tort Reform Association ("ATRA") selected California as one of the nation's worst "judicial hellholes" as measured by the systematic application of laws and court procedures in an unfair and unbalanced manner.[17] Calling California

[17] The ATRA Foundation's 2019 Report, *available at* http://www.judicialhellholes.org/wp-content/uploads/2019/12/judicial-hellholes-report-2018-2019.pdf

"a perennial Judicial Hellhole," the ATRA described the Golden State as "a magnet for class actions."[18]

E. Likely Trends For The Future Of Workplace Class Actions In 2020

The developing trends in workplace class action litigation are continuing to evolve, morph, and adjust to the modern realities of the American workplace. These trends require corporate counsel to plan and re-order their compliance strategies to stay ahead of and mitigate these risks and exposures.

So, what can corporate counsel expect in 2020?

The ruling of the Supreme Court in *Epic Systems* in 2018 is apt to cast a long shadow in 2020. In authorizing class action waivers in mandatory workplace arbitration agreements, the ruling provides employers with a powerful litigation management tool to ameliorate the risks of costly collective actions or class-based litigation. The Supreme Court provided a measure of certainty that workplace arbitration agreements – if properly set up and carefully implemented – will be enforced. Yet, given the current state of our workplace culture, the debate now becomes the measure of the pros and cons of using workplace arbitration agreements, especially where companies fear an employee relations backlash from use of such a device or because they have an aversion to the arbitration process in non-class or collective action situations. In 2019, a group of prominent high tech companies ended their use of mandatory arbitration agreements for workplace harassment and sexual assault claims. Whether that trend becomes more widespread in 2020 remains to be seen.

The growing legislative trend to protect individual privacy and personal data in the employment context has resulted in an increase in class action litigation in this space. These types of class action are particularly challenging because they mandate damages regardless of whether a plaintiff can demonstrate actual harm or injury beyond a mere statutory violation. Prosecution of such claims are exceedingly attractive to the plaintiffs' class action bar. States like Illinois have seen an onslaught of privacy class actions against employers for breaches of privacy rights, as well as mistreatment of personal information and biometric data. Fueling the growth of these types of class actions are the proliferation of state laws relative to data breaches and individual privacy. California, Maine, Nevada, and New York each have new privacy laws taking effect in 2020. Inevitably, privacy class actions are expected to increase in 2020.

Based on these evolving trends, we anticipate significant developments in the coming year relative to certification rulings in employment discrimination and ERISA class actions; less aggressive governmental enforcement litigation prosecutions; and continuing growth in wage & hour litigation, either in courtrooms or in arbitrations.

ERISA Litigation –

Two issues demanded the attention of ERISA litigators and corporate counsel in 2019, including: (i) defined contribution plan (401(k) and 403(b) plan fees) litigation; and (ii) litigation concerning the appropriateness of the mortality tables used to calculate alternative forms of benefits paid from defined benefit plans.

The past year saw intense litigation challenging defined contribution plan fees. These cases resulted in diverse outcomes. One case, *Tussey v. ABB* settled after 13 years of litigation for $55 million, and multiple other class actions settled in excess of $10 million. In addition, while to date the plaintiffs' class action bar has historically focused fee litigation on larger plans (those with billions of dollars in assets) in order to drive larger settlements, 2019 saw an influx of claims against small plans (those with $100 million in assets and less). Corporate counsel

[18] *Id.* at 1. According to the ATRA report, the "nine worst" jurisdictions for employers to be sued in 2019 were: (1) Pennsylvania (including Philadelphia), (2) California, (3) New York (and, in particular, New York City), (4) Louisiana, (5) Missouri (and, in particular, St. Louis), (6) Georgia, (7) Illinois (and, in particular, Cook, Madison, and St. Clair Counties), (8) Oklahoma, (9) Minnesota (and, in particular, Minneapolis-St. Paul), and (10) New Jersey. *Id.* at 1-2.

for companies of all sizes need to be mindful of this trend and implement processes to review 401(k) plan fees and expenses at regular intervals.

A litigation trend that began in 2018 has picked up speed this past year. A flurry of class actions were filed alleging that defined benefit plans improperly use outdated mortality tables in converting the standard form of benefit to optional forms allowed under the plan. Each complaint has been met with a motion to dismiss, and courts have split on whether these claims are viable. Whether these lawsuits continue to be filed will in large part be determined by how courts view this initial round of cases.

Against this backdrop, 2019 saw relatively few ERISA class certification rulings, a by-product of the greater ease of obtaining class certification in ERISA cases than in other types of workplace class actions. Given the long odds, employers now seem more willing to consider stipulating to narrowed and more focused classes to avoid the cost of litigating certification issues. Furthermore, an improving economy and a drop in the number of DOL investigations also has contributed to fewer cases, lower damages recoveries, and fewer ERISA lawsuits over delinquent contributions to pension funds.

So what will 2020 bring?

As Trump Administration and certain states continue to challenge the Affordable Care Act, uncertainly will be the watchword in the health benefit arena. Moreover, one can expect that the surge in class actions regarding coverage by out-of-network providers will continue. As many plan sponsors experienced last year, various network providers have challenged the reimbursement rates from insurers and plans, thus dragging both administrators and plans into numerous litigation matters. Given the uncertainty in the future of the Affordable Care Act and the continuing disputes between insurers and out-of-network providers, it is anticipated that this variety of class action litigation will increase in the coming year. Similarly, litigation of so-called “Parity Act” claims (asserting that health plans pay lower benefits for mental health than physical health claims) has been largely confined to the Ninth Circuit but is poised to spread to the rest of the country.

Given the volume of ERISA class action filings in 2019, corporate counsel also can expect to see further litigation regarding claims as to the reasonableness of 401(k) and 403(b) plan fees and expenses, inappropriate plan investments, and misleading financial disclosures.

Finally, the Supreme Court is set to decide three ERISA cases in 2020. The cases will result in key rulings on whether routine plan disclosures can trigger ERISA’s three-year “actual knowledge” statute of limitations, when plaintiffs must plead to state an ERISA “stock drop” claim, and whether a participant in a defined benefit plan has standing to challenge the plan’s investments if the plan remains fully funded and thus able to pay out plan benefits. These cases are sure to shape the ERISA litigation landscape for many years.

Employment Discrimination Class Action Litigation –

In terms of private plaintiff employment discrimination class action litigation, employers can expect this area to remain an intense focus in 2020 by the private plaintiffs’ bar. Publicity from the #MeToo movement likely will be a driver in this context.

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

- The plaintiffs’ bar will continue the process of refining the architecture of employment discrimination class actions to increase their chances to secure class certification in the post *Wal-Mart* and *Comcast* era. Their focus is likely to be on smaller class cases (*e.g.*, confined to a single corporate facility or operations in one state) with “small and tight” certification requests 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.

- Given the Supreme Court's plaintiff-friendly ruling in 2016 in *Tyson Foods*, employers can expect more aggressive positions being advocated by plaintiffs' class action lawyers to try to "end run" *Wal-Mart* and *Comcast*, especially on damages theories under Rule 23(b)(3).
- 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). The take-away from this strategy is an effort to "aim small" in order to certify a piece of the litigation, and use fee-shifting statutes on attorneys' fees to pressure employers into class-wide settlements.
- 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 another end-run around the limitations on Rule 23(b)(3) articulated in *Comcast*.

Government Enforcement Litigation –

Given the change in leadership at the EEOC and the DOL that took place during 2019, it seems reasonable to expect that employers will see more changes to those agencies' enforcement priorities in 2020 that are more in line with the Trump Administration's business-friendly priorities. Overall, employers may be able to look forward to less aggressive enforcement of employment-related laws and regulations by the EEOC, the DOL, and the NLRB.

The Rise Of #MeToo Litigation: The biggest story over the past several years in terms of EEOC-initiated litigation centered on the drastic increase in lawsuits that alleged sexual harassment. This represented such a profound shift in priorities that the agency took the rather unusual step of announcing its preliminary 2018 sexual harassment data on October 4, 2018, just four days after the end of the Commission's fiscal year. That type of litigation data is usually not provided until the EEOC releases its Performance and Accountability Report in mid-November to early January. This year those statistics are expected in February. According to the EEOC's data, the agency filed 28 workplace harassment lawsuits over the past year.

A close analysis of the EEOC's sexual harassment lawsuits shows that the agency is targeting the hospitality industry, in particular. This is most likely due to the fact that the hospitality industry employs many young people, who are often unaware of their rights or who may be less familiar with the requirements of the law or the normal proprieties acceptable in the workplace. Among the forms of sexual harassment most frequently targeted by the EEOC were offensive comments about physical appearance and/or questions about sexuality or social life; showing or sharing pornographic images or videos, especially via cell phones or on-line postings; following or stalking; physical touching, up to and including assault or rape; *quid pro quo* harassment; and retaliation. Although most of these sexual harassment claims were brought on behalf of women, the EEOC also brought four new harassment cases on behalf of men; those cases tended to involve harassment targeting an individual's sexual orientation or perception of orientation.

While the number of sexual harassment cases that are brought by private plaintiffs are more difficult to track, anecdotally, the perception in the defense bar is that there has been an uptick in those types of filings as well. Sexual harassment can be a tricky theory of discrimination to prove, especially under the rubric of a "hostile work environment" claim. The harassment must be so severe or pervasive that it altered the employee's conditions of employment, and there must be some basis for holding the employer responsible for the actions of the alleged harasser. Proving such harassment on behalf of a class is even more challenging. However, it is often in times like these – when the attention of the nation and key federal agencies is intently focused on an issue – that the law tends to develop rapidly to meet new challenges. It is therefore more important now than ever for employers to keep a close eye on how the case law of sexual harassment develops over the course of 2019 and beyond.

A New Focus On Digital Bias: The EEOC has begun challenging employers' use of artificial intelligence, algorithms, and "big data" to recruit employees. In October 2016, at a panel in Washington D.C. featuring

industrial psychologists, attorneys, and labor economists, then-EEOC Chair Jenny Yang opined that big data mining and algorithmic tools have "the potential to drive innovations that reduce bias in employment decisions and help employers make better decisions in hiring, performance evaluations, and promotions," but cautioned that "it is critical that these tools are designed to promote fairness and opportunity, so that reliance on these expanding sources of data does not create new barriers to opportunity."[19]

The EEOC's focus on digital bias is just now beginning to manifest in enforcement activity. The nature of rapidly evolving technology lends itself to rapidly developing law to meet the on-going challenges such technology presents. On-line recruiting tools are used by many employers. They would be well advised to keep abreast of legal developments in this area.

Equal Pay Data Collection & Implications: Due to protracted litigation in the U.S. District Court for the District of Columbia regarding EEO-1 pay data collection, the EEOC was forced to collect extensive pay data for a two-year period under an Obama-era rule that it has since repudiated. This pre-Trump Administration data collection initiative required employers with at least 100 employees to report W-2 wage information and total hours worked for their workforce broken down by race, ethnicity and sex within twelve EEOC created pay bands. Ultimately the District Court held that the EEOC must take all requisite steps to complete the data collection for 2017 and 2018 by no later than January 31, 2020.[20] Once this collection is complete, the EEOC will have access to national metrics regarding possible pay disparities based on ethnicity, race, and sex. How the Commission may choose to act on such information remains to be seen.

LGBT Employee Protections: Over the past several years, the EEOC has vigorously pursued a theory in the federal courts that discrimination against LGBT employees is tantamount to sex discrimination and therefore already prohibited under Title VII. That theory is currently under review by the Supreme Court. The new Supreme Court composition leaves open questions about how the Justices may rule, particularly Justice Gorsuch, who repeatedly asked questions and made comments during oral argument in 2019 suggesting that Title VII might include protections for LGBT employees.

However this issue gets decided, it will have massive and important ramifications for all U.S. employers, and may particularly impact religiously-affiliated employers. Indeed, in one of the cases up for review by the Supreme Court, the employer argued that he was a devout Christian operating a Christian funeral home, and that his religious beliefs informed his understanding that a person cannot change their gender. The Sixth Circuit had held that Title VII inherently includes protections for transgender persons, and that the funeral home could not sufficiently prove that his freedom of religious expression had been infringed upon. If the Supreme Court agrees, the legal and political ramifications could be profound.

Wage & Hour Class Action Litigation –

For the third year in a row, federal courts saw a decrease in FLSA filings. Whether employers will continue to see that trend in 2020, particularly at the federal level, remains to be seen. On the state level, 25 states have raised their minimum wages levels effective in 2020, which typically drives the value of state-based wage & hour claims even higher. Against that backdrop, the plaintiffs' class action bar is more apt to pursue large-scale wage & hour class action litigation in state court venues.

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[19] *See* Press Release, Equal Employment Opportunity Commission, Use of Big Data Has Implications for Equal Employment Opportunity, Panel Tells EEOC (Oct. 13, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/10-13-16.cfm.

[20] *National Women's Law Center v. Office of Management & Budget,* No. 17-CV-2458 (D.D.C. Oct. 29, 2019) (ECF No. 91).

Despite another slight reduction in the number of wage & hour lawsuits filed against employers compared to the immediate year prior, employers nationwide remained on guard in 2019 against risks giving rise to litigation risk under the Fair Labor Standards Act and state law analogues.

In addition to an evident push by many employers to ensure compliance with relevant wage & hour laws, arbitration programs containing class and collective action waivers remained a central risk mitigation option following the U.S. Supreme Court's landmark ruling in *Epic Systems Corp. v. Lewis*; although the plaintiffs' bar complicated the question of such programs' overall effectiveness, as those with the resources and motivation to do so pursued mass arbitrations on behalf of hundreds of claimants. Furthermore, they are challenging arbitration agreements on grounds related to unconscionability.

On the state level, California's new A.B. 51, which became effective on January 1, 2020, calls into question the lawfulness of workplace arbitration programs in the state. It bans employers from requiring any job applicant or employee to waive any right or procedure in the California Labor Code or the Fair Employment and Housing Act through arbitration agreements. The possibility of federal preemption has cast a cloud over A.B. 51 since its enactment. The U.S. and California Chambers of Commerce filed suit on December 6, 2019, challenging its constitutionality on the grounds that it is preempted by the Federal Arbitration Act. This challenge and other court rulings on A.B. 51 will wind their way through the court system in 2020.

Regardless, plaintiffs' lawyers nationwide, not to be dissuaded by the threat to their pursuit of claims by class and collective action waivers or by employers' legal compliance measures, persisted over the past year in bringing new suits – novel and more typical – in court and in arbitration.

The types of claims plaintiffs pursued were not, generally speaking, weighted toward those seeking recovery for off-the-clock work, regular rate and overtime premium calculation, or exemption misclassification any more than they had been in past years. Hybrid Rule 23 state law class and FLSA collective action suits continued to proliferate in states like New York, whose six-year statute of limitations and wide cross-section of industries attract the more experienced wage & hour lawyers, as well as the fledglings alike. California was, as it always has been, a hot-bed for class and other representative actions brought under the state's strict laws, and Florida for FLSA cases brought by its very active plaintiffs' bar. A number of states not viewed historically to present grave wage & hour risks have seen upticks during recent years, including 2019, in FLSA litigation, largely because of zealous lawyers striving to create favorable precedent there – Arkansas, Colorado, Georgia, Illinois, New Jersey, Ohio, Pennsylvania, Tennessee, and Texas are the flag-bearers among those.

Notwithstanding the general stasis in the types of claims pursued, independent contractor misclassification claims were more prevalent in 2019 than in prior years. That might be because of a perceived relaxation of the test for employee versus independent contract status under federal law. Courts and some state legislatures seemed ready to reinforce the standards, with California leading the way in particular following the *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* ruling in 2018. California's newly enacted A.B. 5, which codified the *Dynamex* test on independent contractor rules, is viewed by some as a game-changer. A.B. 5 codifies and expands the three-pronged "ABC test" from *Dynamex* to assess whether businesses have correctly classified their workers as independent contractors (by analyzing whether the workers are free from their hiring entity's control, work outside its "usual business," and "customarily" perform work for their alleged employer as part of an "independent business"). Aside from California, other states' application of the so-called ABC test for employment status has opened the door for the increasing number of worker misclassification lawsuits nationally.

The overall regulatory and legislative landscape accentuated risk in other ways, as well Three years into the Trump Administration, changes to local, state, and federal laws have created unpredictability for employers. A handful of localities – cities and counties – and a variety of states have implemented minimum wage requirements at rates higher than federal law, and some have implemented "wage theft" prohibitions, giving enforcement rights to local and state agencies and the right to bring expansive, private litigation to employees. New Jersey's Wage Theft Law, enacted in August 2019, for instance, created one of the most daunting sets of wage & hour laws of any state; plaintiffs' lawyers were heartened to see the state promulgate a six-year statute

of limitations, mirroring New York's, and treble liquidated damages, mirroring Massachusetts. At the federal level, imminent changes to the federal tip credit, regular rate, exempt classification, and joint employer regulations have energized advocacy groups on the employees' and employers' sides of interest. Media attention, as well as the promise of controversy, surrounding all of these changes all but certainly inspired some of the litigation activity that 2019 brought.

The "lenient standard" that courts employ to evaluate plaintiffs' motions for conditional certification, in which a plaintiff need only carry a "low burden" or make a "modest showing," frequently results in a plaintiff's lawyer being able to obtain the ability to send notice to what is often a broad group of current and former employees inviting them to join a wage & hour lawsuit. In some cases, the scope of conditional certification for a large employer can be nationwide. Fortunately, however, employers were not left solely to rely on compliance measures and arbitration programs as their only means to avoid the risks of expansive wage & hour class and collective action litigation. A number of courts across the country applied the U.S. Supreme Court's ruling in *Bristol-Myers Squibb Co. v. Superior Court* to decline plaintiffs' motions for conditional certification of collective actions containing employees who did not work or live in the state where the underlying FLSA cases were filed. Employers no doubt will continue in 2020 to assert the *Bristol-Myers* rule as a jurisdictional defense against overbroad collective actions. If the precedential trend continues in 2020 as it did in 2019, then this will be among the more important collective action defenses available to employers with multi-state or national operations.

F. Conclusion

In the ever-changing economy and patchwork quilt of laws and regulations, corporations face new, unique, and challenging litigation risks and legal compliance problems.

Added to this challenge is that the one constant in workplace class action litigation is change. More than any other year in recent memory, 2019 was a year of great change in the landscape of Rule 23. As these issues play out in 2020, additional chapters in the class action playbook will be written.

The lesson to draw from 2019 is that the private plaintiffs' bar and government enforcement attorneys at the state level are apt to be equally, if not more, aggressive in 2020 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 2020.

II. Significant Class Action Settlements In 2019

While 2018 was not a "blockbuster year" for class action settlement recoveries as compared with 2017, overall aggregate settlement figures increased slightly in 2019. The plaintiffs' bar and government enforcement attorneys obtained many significant settlements in a wide range of areas, and the overall "top ten" settlement values in 2019 in workplace class actions rose from the 2018 totals. Many of the major categories of workplace class actions – particularly ERISA class actions and wage & hour class actions (which more than doubled in value) – saw settlement amounts increase from the prior year. However, settlement totals for employment discrimination class actions, government enforcement actions, and other workplace statutory class actions declined substantially and pulled the overall aggregate numbers well below the 2017 total.

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 and governmental enforcement attorneys secured many large settlements this past year for employment discrimination, wage & hour, and ERISA class actions, as well as governmental enforcement lawsuits. The top ten settlements from these categories totaled $1.022 billion in 2019. This represented an uptick as compared to 2018, when the top ten settlements from these categories totaled $909.69 million. However, the 2019 figures remained far below the 2017 total of $2.23 billion.

As the plaintiffs' bar has aggressively pursued various statutory workplace class actions over the past several years, the Workplace Class Action Report recently expanded Chapter 2 to include this category, which encompasses workplace personal injuries, the Fair Credit Reporting Act, and other various workplace-related statutory laws. The top ten settlements in this category, which totaled $319.65 million, declined from $411.15 million in 2018 and from $487.2 million in 2017.

In sum, based on all five categories, the top ten aggregate settlement numbers in 2019 totaled $1.34 billion, which was an increase from $1.32 billion in 2018, but a substantial decrease from $2.72 billion in 2017.

Comparatively, the figures in 2019 were the second lowest total for aggregate settlements over the decade of 2010 to 2019, with only 2018 having a lower aggregate total.

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 2019 totaled $139.20 million. This represented a substantial decrease from 2018, when the total was $216.09 million, and 2017, when the total was $293.5 million.

1. $41 million – Wynn Resorts Ltd.
2. $24 million – JPMorgan Chase Bank NA
3. $15.5 million – State Of Florida, Department Of Education
4. $14 million – Wal-Mart, Inc.
5. $11 million – Google, Inc.
6. $11 million – City Of New York
7. $7.75 million – Western Digital Corp.
8. $6.2 million – Merck & Co.
9. $5 million – JPMorgan Chase Bank NA

10. $3.75 million – Sarbanand Farms, LLC

The top ten settlement were spread out across the country, with California leading the way with two settlements in federal court and one in state court. Seven of the top ten settlements involved gender discrimination allegations in areas such as pay, pregnancy and sexual misconduct.

1. **$41 million – *In Re Wynn Resorts, Ltd. Derivative Litigation*, Case No. A-18-769630 (Nev. Cty. Ct. Nov. 27, 2019)** (settlement approval sought for a shareholder class action alleging sexual misconduct by senior company officials).

2. **$24 million – *Senegal, et al. v. JPMorgan Chase Bank*, N.A., Case No. 19 CV-6006 (N.D. Ill. Sept. 26, 2019)** (final approval for a class action settlement became effective after an appeal involving African-American financial advisors who claimed the company discriminated against them on the basis of their race).

3. **$15.5 million – *Florida Education Association, et al. v. State Of Florida, Department Of Education*, Case No. 17-CV-414 (N.D. Fla. Nov. 4, 2019)** (preliminary approval granted for a class action settlement of race discrimination claims involving a group of teachers who alleged that a state program paid bonuses to certain teachers who were rated "highly effective" while disadvantaging African-American and Hispanic educators).

4. **$14 million – *Borders, et al. v. Wal-Mart, Inc.*, Case No. 17-CV-506 (S.D. Ill. Nov. 14, 2019)** (preliminary approval granted for a class action settlement of pregnancy discrimination claims involving pregnant workers who claimed they were denied the benefits offered to other workers similar in their ability or inability to work).

5. **$11 million – *Heath, et al. v. Google LLC*, Case No. 15-CV-1824 (N.D. Cal. Aug. 15, 2019)** (final approval granted for settlement of a class action alleging age discrimination).

6. **$11 million – *Local 1180, Communications Workers Of America, AFL-CIO, et al. v. City Of New York*, Case No. 17-CV-3048 (S.D.N.Y. Aug. 7, 2019)** (final approval granted for settlement of a class action alleging race and gender discrimination for pay and promotions).

7. **$7.75 million – *Chen, et al. v. Western Digital Corp.*, Case No. 19-CV-909 (C.D. Cal. May 14, 2019)** (settlement approval sought for a class action alleging gender discrimination relative to pay and promotions).

8. **$6.2 million – *Smith, et al. v. Merck & Co.*, Case No. 13-CV-2970 (D.N.J. July 19, 2019)** (preliminary approval granted for settlement of a class action alleging gender discrimination for pay and promotions).

9. **$5 million – *Rotondo, et al. v. JPMorgan Chase Bank, NA*, Case No. 19-CV-2328 (S.D. Ohio Nov. 20, 2019)** (preliminary approval granted for a settlement of a class action alleging gender discrimination relative to parental leave).

10. **$3.75 million – *Rosas, et al. v. Sarbanand Farms, LLC*, Case No. 18-CV-112 (W.D. Wash. Dec. 31, 2019)** (preliminary approval granted for settlement of a class action brought by farm workers from Mexico alleging that they were subjected to a hostile work environment based on their national origin).

Settlements In Private Plaintiff Wage & Hour Class Actions

For wage & hour class actions, the monetary value of the top ten private plaintiff settlements entered into or paid in 2019 totaled $449.05 million. This amount was nearly double the 2018 total of $253.5 million, and only slightly below the 2017 total of $574.49 million. Of all the five categories of workplace class action settlements, wage & hour settlements had the most robust increase over the past year.

1. $100 million – Wackenhut Inc.
2. $100 million – Swift Transportation Co.
3. $98.8 million – C.R. England, Inc.
4. $35 million – Wells Fargo & Co.
5. $26 million – McDonald's Restaurants Of California, Inc.
6. $22.5 million – Pepperidge Farm, Inc.
7. $20 million – Uber Technologies, Inc.
8. $16.5 million – XPO Logistics, Inc.
9. $15.25 million – Tesoro Refining & Marketing Company
10. $15 million – Caremark

The top ten settlement primarily involved nationwide claims, while only two involved state-specific claims. Furthermore, six of the top ten wage & hour settlements involved lawsuits pending in either state or federal courts in California.

1. **$100 million – *In Re Wackenhut Wage & Hour Cases*, Case No. JCCP 4545 (Cal. Super. Ct. Oct. 21, 2019)** (final approval granted for a class action settlement regarding wage & hour claims brought by security officers who alleged a failure to provide meal and rest breaks under California law).

2. **$100 million – *Van Dusen, et al. v. Swift Transportation Co., Inc.*, Case No. 10-CV-899 (D. Ariz. April 18, 2019)** (preliminary approval granted for a class action settlement of wage & hour claims of drivers who asserted they were misclassified as independent contractors and deprived of proper wages and reimbursement of expenses).

3. **$98.8 million – *Roberts, et al. v. C.R. England, Inc.*, Case No. 12-CV-302 (D. Utah July 9, 2019)** (final approval granted for settlement of a class action involving a class of drivers who alleged defendants misrepresented the income that was available to them after they finished the company's training program).

4. **$35 million – *Merino, et al. v. Wells Fargo & Co.*, Case No. 16-CV-7840 (D.N.J. July 9, 2019)** (preliminary approval granted for a settlement of a class action involving 38,000 bank tellers alleging the company failed to pay proper overtime compensation).

5. **$26 million – *Sanchez, et al. v. McDonald's Restaurants Of California, Inc.*, Case No. BC499888 (Cal. Super. Ct. Nov. 22, 2019)** (settlement approval sought in an wage & hour class action involving thousands of workers alleging a failure to pay proper wages for hours worked).

6. **$22.5 million – *Alfred, et al. v. Pepperidge Farm, Inc.*, Case No. 14-CV-7086 (C.D. Cal. Oct. 10, 2019)** (final approval granted for settlement of a wage & hour class action brought by product distributors in three states who alleged they were denied employment benefits since they were misclassified as independent contractors).

7. **$20 million – *O'Connor, et al. v. Uber Technologies, Inc.*, Case No. 13-CV-3826 (N.D. Cal. Aug. 29, 2019)** (settlement approval sought in a wage & hour class action alleging the ride-sharing company

classified drivers as independent contractors to avoid paying them a minimum wage and to avoid providing benefits).

8. **$16.5 million – *Carter, et al. v. XPO Logistics, Inc.*, Case No. 16-CV-1231 (N.D. Cal. Oct. 18, 2019)** (final approval granted for a class action settlement of wage & hour claims involving allegations of misclassifying delivery drivers, which resulted in minimum wage and overtime pay violations).

9. **$15.25 million – *Valliere, et al. v. Tesoro Refining & Marketing Co., LLC*, Case No. 17-CV-123 (N.D. Cal. May 9, 2019)** (settlement approval sought for a class action regarding wage & hour claims of California-based oil refinery operators who alleged their employer failed to provide proper rest breaks).

10. **$15 million – *Woods, et al. v. Caremark*, Case No. 14-CV-583 (W.D. Mo. May 31, 2019)** (preliminary approval granted for a class action settlement of wage & hour claims brought by customer telephone representatives accusing the company of failing to pay for pre-shift work).

Settlements In Private Plaintiff ERISA Class Actions

For ERISA class actions, the monetary value of the top ten private plaintiff settlements entered into or paid in 2019 totaled $376.35 million. This represented an increase from 2018, when the total was $313.4, but remained far below the 2017 total of $927.8 million.

1. $80 million – Metropolitan Life Insurance Co.
2. $75 million – JP Morgan Stable Value Fund
3. $60 million – SSM Health
4. $55 million – ABB, Inc.
5. $24 million – Pension Committee of ATH Holding Company
6. $21.9 million – Deutsche Bank Americas Holding Corp.
7. $18.1 million – Massachusetts Institute Of Technology
8. $14.5 million – Vanderbilt University
9. $14 million – The John Hopkins University
10. $13.85 million – Franklin Resources, Inc.

The largest ERISA settlements primarily involved disputes over treating pension plans as “church plans,” breaches of fiduciary duty, failures to make required contributions into retirement funds, and various theories of mismanagement involving benefit plans of universities.

1. **$80 million – *Owens, et al. v. Metropolitan Life Insurance Co.*, Case No. 14-CV-74 (N.D. Ga. Nov. 19, 2019)** (final approval granted for settlement of an ERISA class action alleging mismanagement of pension plans).

2. **$75 million – *In Re JP Morgan Stable Value Fund ERISA Litigation*, Case No. 12-CV-2548 (S.D.N.Y. Sept. 23, 2019)** (settlement approval sought in an ERISA class action resolving claims that the Defendant mismanaged employee 401(k) investments).

3. **$60 million – *Feather, et al. v. SSM Health*, Case No. 16-CV-1669 (E.D. Mo. July 17, 2019)** (final approval granted for settlement of ERISA class action alleging an inaccurate classification of the plan as a "church plan" in order to under-fund the plan and to avoid disclosure obligations).

4. **$55 million – *Tussey, et al. v. ABB, Inc.*, Case No. 06-CV-4305 (W.D. Mo. Aug. 16, 2019)** (final approval granted for settlement of an ERISA class action relative to breach of fiduciary duties overpaying fees for fund investments).

5. **$24 million – *Bell, et al. v. Pension Committee Of ATH Holding Company, LLC*, Case No. 15-CV-2062 (S.D. Ind. April 5, 2019)** (final approval granted for settlement of an ERISA class action alleging mismanagement of workers' 401(k) retirement plan).

6. **$21.9 million – *Moreno, et al. v. Deutsche Bank Americas Holding Corp.*, Case No. 15-CV-9936 (S.D.N.Y. Mar. 1, 2019)** (final approval granted for settlement of an ERISA class action that alleged Deutsche Bank breached its duties to retirement plans and their participants).

7. **$18.1 million – *Tracey, et al. v. Massachusetts Institute Of Technology*, Case No. 16-CV-11620 (D. Mass. Oct. 28, 2019)** (settlement approval sought for ERISA class action relative to breach of fiduciary duties over payments of excessive 401(k) administration fees).

8. **$14.5 million – *Cassell, et al. v. Vanderbilt University*, Case No. 16-CV-2086 (M.D. Tenn. Oct. 25, 2019)** (final approval granted for settlement of ERISA class action relative to allegations of mismanagement).

9. **$14 million – *Kelly, et al. v. The Johns Hopkins University*, Case No. 16-CV-2835 (D. Md. Aug. 6, 2019)** (preliminary approval granted for ERISA class action involving 40,000 workers accusing the school of overcharging employee retirement plan participants with extensive administrative fees and investing in poorly performing investment options).

10. **$13.85 million – *Cryer, et al. v. Franklin Resources, Inc.*, Case No. 16-CV-4265 (N.D. Cal. Oct. 4, 2019)** (final approval granted for settlement of an ERISA class action accusing the financial company of profiting from unreasonable fees charged to 401(k) plans participants).

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 class claims for breach of contract and workplace personal injuries, the Fair Credit Reporting Act ("FCRA"), workplace antitrust claims, the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), the Worker Adjustment and Retraining Notification Act ("WARN"), and other federal and state statutory law violations. The top ten settlements in this category decreased in 2019, as they totaled $319.65 million; by contrast, the total in 2018 was $411.15 million.

1. $84.5 million – Regents Of University Of California

2. $70 million – CNN America, Inc.

3. $65.5 million – Interexchange, Inc.

4. $54.5 million – Duke University

5. $19 million – Southwest Airlines Co.

6. $14 million – Dartmouth College

7. $3.7 million – Global Radar Acquisition, LLC

8. $3.15 million – Genco I, Inc.

9. $3 million – CP OPCO, LLC

10. $2.3 million – Delta Air Lines, Inc.

The biggest settlements involved workplace injuries, FCRA, USERRA, and workplace antitrust claims.

1. **$84.5 million – *Moen, et al. v. Regents Of University Of California*, Case No. RG 10530492 (Cal. Super. Ct. Dec. 11, 2019)** (settlement approval sought for a class action alleging the employer improperly terminated contractual benefits to a class of 9,080 retirees).

2. **$70 million – *National Labor Relations Board v. CNN America, Inc.*, (NLRB July 5, 2019)** (settlement approval sought for class action involving claims of a network's unlawful replacement of unionized employees).

3. **$65.5 million – *Beltran, et al. v. Interexchange, Inc.*, Case No. 14-CV-3074 (D. Colo. Aug. 1, 2019)** (settlement approval sought for hybrid RICO and workplace antitrust class action alleging several sponsorship agencies conspired to suppress wages of au pairs).

4. **$54.5 million – *Seaman, et al. v. Duke University*, Case No. 15-CV-462 (M.D.N.C. Sept. 25, 2019)** (final approval granted for settlement of a workplace antitrust class action alleging Duke University and a medical school entered into an illegal employee-poaching agreement).

5. **$19 million – *Huntsman, et al. v. Southwest Airlines Co.*, Case No. 17-CV-3972 (N.D. Cal. Oct. 4, 2019)** (final approval granted for a class action settlement of claims that 2,000 Southwest Airlines pilots were denied benefits while on military leave under the USERRA).

6. **$14 million – *Rapuano, et al. v. Dartmouth College*, Case No. 18-CV-1070 (D.N.H. Aug. 6, 2019)** (settlement approval sought for class action involving claims that the university did not comply with its Title IX obligations on account of harassment and a hostile environment created by professors).

7. **$3.7 million – *Sanders, et al. v. Global Radar Acquisition, LLC*, Case No. 18-CV-555 (M.D. Fla. Nov. 12, 2019)** (final approval granted for settlement of a class action accusing a consumer reporting agency of violating the FCRA by providing employers with consumer reports and failing to provide statutory disclosures prior to obtaining consumer reports).

8. **$3.15 million – *Ortiz, et al. v. Genco I, Inc.*, Case Nos. 16-CV-4601 and 17-CV-3692 (N.D. Cal. April 23, 2019)** (settlement approval sought in two putative class action lawsuits alleging violations of the FCRA and California laws over background checks without proper pre-screening disclosures).

9. **$3 million – *McDonald, et al. v. CP OPCO, LLC*, Case No. 17-CV-4915 (N.D. Cal. May 13, 2019)** (final approval granted for settlement of a class action brought by employees asserting violations of the WARN Act in connection with their lay-offs).

10. **$2.3 million – *Schofield, et al. v. Delta Air Lines, Inc.*, Case No. 18-CV-382 (N.D. Cal. July 16, 2019)** (final approval granted for settlement of a class action alleging violations of the FCRA).

B. Top Ten Monetary Settlements In Government-Initiated Litigation

In 2019, the EEOC and the U.S. Department of Labor ("DOL") continued their previous pattern of aggressively litigating government enforcement actions, albeit with mixed results.

Based on figures for the U.S. Government's 2019 fiscal year, the EEOC filed 144 new merits lawsuits, including 27 non-systemic lawsuits with multiple victims, and 17 systemic lawsuits. The 17 systemic lawsuits represented a major decrease from prior years, as the EEOC filed 45 such cases in 2018 and 30 such cases in 2017. In terms of monetary relief, in 2019 the EEOC recovered more than $486 million for alleged discrimination victims, a significant decrease from $505 million it recovered in 2018 and on par with the $484 million it recovered in 2017.

For all types of government-initiated enforcement actions, the monetary value of the top ten settlements entered into or paid in 2019 totaled $57.52 million. This represented a major decline from the 2018 total of $125.8 million and the 2017 total of $485.25 million.

1. $9.995 million – Goldman Sachs & Co., LLC
2. $8.5 million – Sterling Infosystems, Inc.
3. $7 million – Dell Technologies
4. $6.25 million – AGL Industries, Inc.
5. $6 million – Dolgencorp, LLC
6. $5 million – Intel Corp.
7. $4.9 million – Jacksonville Association Of Fire Fighters, Local 122
8. $4.4 million – Uber Technologies, Inc.
9. $2.77 million – WSP USA Services, Inc.
10. $2.7 million – Crossmark, Inc.

The majority of the settlements, four total, involved EEOC pattern and practice litigation, while others included enforcement actions and investigations led by the OFCCP, DOJ and DOL investigations.

1. **$9.995 million – *Office Of Federal Contract Compliance Programs v. Goldman Sachs & Co. LLC*, Case No. R-00173894 (OFCCP Sept. 27, 2019)** (conciliation agreement approved stemming from an investigation of race and gender-based discrimination in wages).

2. **$8.5 million – *Bureau Of Consumer Financial Protection v. Sterling Infosystems, Inc.*, Case No. 19-CV-10824 (S.D.N.Y. Nov. 26, 2019)** (final approval granted for settlement of FCRA claims relating to the use of employment background screening reports issued to employers).

3. **$7 million – *Office Of Federal Contract Compliance Programs v. Dell Technologies, Inc.* (OFCCP Sept. 30, 2019)** (conciliation agreement approved stemming from an investigation relative to allegations of race and gender-based discrimination in wages).

4. **$6.25 million – *New York Department Of Labor v. AGL Industries, Inc.* (N.Y. DOL Aug. 13, 2019)** (settlement agreement resulting from the New York DOL's investigation of alleged unpaid overtime wages and reporting fraudulent financial information to the state to cover up violations).

5. **$6 million – *EEOC v. Dolgencorp, LLC*, Case No. 13-CV-4307 (N.D. Ill. Nov. 18, 2019)** (consent decree approved in an EEOC pattern or practice lawsuit involving hiring practices relative to African-American applicants).

6. **$5 million – *Office Of Federal Contract Compliance Programs v. Intel Corp.* (OFCCP Sept. 30, 2019)** (settlement agreement approved stemming from an investigation of race and gender-based discrimination in wages).

7. **$4.9 million – *EEOC v. Jacksonville Association Of Fire Fighters*, Local 122, Case No. 12-CV-491 (M.D. Fla. Feb. 5, 2019)** (consent decree approved in an EEOC pattern or practice lawsuit alleging race discrimination).

8. **$4.4 million – *EEOC v. Uber Technologies, Inc.* (EEOC Dec. 18, 2019)** (conciliation agreement stemming from an EEOC Commissioner's charge alleging sexual harassment against female employees).

9. **$2.77 million – *U.S. Department Of Labor v. WSP USA Services, Inc.* (DOL May 8, 2019)** (settlement agreement stemming from an investigation relative to prevailing wages, overtime wages, and fringe benefits).

10. **$2.7 million – *EEOC v. Crossmark, Inc.*, Case No. 18-CV-1760 (S.D. Ill. Nov. 20, 2019)** (consent decree approved in an EEOC pattern or practice lawsuit alleging violations of the ADA relative to accommodations of employees with disabilities).

C. Noteworthy Injunctive Relief Provisions In Class Action Settlements

Generally, the types of relief obtained in settlements of employment discrimination actions can be grouped into five categories, including: (i) modification of internal personnel practices and procedures; (ii) oversight and monitoring of corporate practices; (iii) mandatory training of supervisory personnel and employees; (iv) compensation for named plaintiffs and class members; and (v) 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.

Class action settlements often involving private plaintiffs generally contain one or more of these items of non-monetary relief, but rarely contain all of them. Attorneys representing the U.S. government in enforcement litigation actions also secured several settlements in 2019 that included noteworthy injunctive provisions. This reflects in some measure the significant "public interest" component of government-initiated enforcement litigation.

Among the more novel and/or onerous non-monetary relief requirements imposed on employers in 2019 were the following:

- Hire a criminology consultant to design a new criminal background check;
- Designate certain alleged harassers as ineligible for supervisory positions;
- Partner with a styling school that specializes in the care and styling of natural hair and hairstyles closely associated with African-Americans in order to train current salon employees;
- Create a multi-cultural internship program that will provide professional opportunities to hair stylists from underrepresented groups;
- Require a union to collect and maintain information about the race, ethnicity, and sex of its members, apprentices, and person referred for employment;
- Revise an accommodation policy to include obligations relative to childbirth and related medical conditions;
- Prohibit contracting with a third-party medical screener for three years;

- Not implement any physical or medical screening for conditional hires apart from the medical certification and a urine analysis allowed by the U.S. Department of Transportation for a period of three years;
- Affirmatively recruit applicants who are deaf and/or hearing-impaired;
- Conduct exit interviews with departing employees to determine if they were subjected to sex discrimination or retaliation; and,
- Disseminate a confidential, anonymous workplace climate survey, and provide the results to the EEOC.

The top ten settlements in 2019 involving significant injunctive relief provisions include:

1. ***EEOC v. Wal-Mart Stores, Inc.*, Case No. 18-CV-170 (D. Me. Nov. 13, 2019).** The EEOC alleged that the retailer violated the ADA by failing to provide reasonable accommodations and subsequently terminating a long-term employee because of her disability. The Court approved the consent decree that ordered both monetary and injunctive relief. In addition to providing $80,000 in monetary relief, the consent decree requires Wal-Mart to change its personnel policies so employees with a disability are eligible for job reassignment.

2. ***New York City Commission On Human Rights v. SDSH LLC*, Case No. M-E-R-19-70080 (NYCCHR Nov. 12, 2019).** The Court approved a settlement agreement stemming from allegations that the salon engaged in a pattern or practice of race discrimination by enforcing a workplace grooming code that discriminated against African-American employees on the basis of their hairstyles. In addition to monetary relief, the Court ordered the businesses to partner with a styling school that specializes in the care and styling of natural hair and hairstyles closely associated with African-Americans in order to train current salon employees; and to create a multi-cultural internship program that will provide professional opportunities to hair stylists from underrepresented groups.

3. ***EEOC v. Steamfitters, Pipefitters and Apprentices Local Union No. 475*, Case No. 19-CV-13309 (D.N.J. July 8, 2019).** The EEOC brought a lawsuit alleging that the labor union failed to maintain race/ethnicity and sex data for all its members and submit EEO-3 reports as required by law. Under the terms of the consent decree approved by the Court, Local 475 will collect and maintain information about the race, ethnicity, and sex of its members, apprentices, and person referred for employment, and will prepare and timely file EEO-3 reports.

4. ***EEOC v. Dolgencorp, LLC*, Case No. 13-CV-4307 (N.D. Ill. Nov. 18, 2019).** The EEOC brought a lawsuit against the retail chain alleging that its criminal background check violated federal law by denying employment to African-Americans at a significantly higher rate than white applicants. Under the terms of the consent decree that also included monetary relief, if the retail chain uses a criminal background check during the term of the decree, it must hire a criminology consultant to develop a new criminal background check based on several factors, including the time since conviction, the number of offenses, the nature and gravity of the offense, and the risk of recidivism. Once the consultant provides a recommendation, the decree enjoins Dollar General from using any other criminal background check for its hiring process.

5. ***EEOC v. Bisconti Farms, Inc.*, Case No. 18-CV-4166 (E.D. Pa. Nov. 8, 2019).** The EEOC alleged that the operators of a mushroom farm subjected eight female workers in various mushroom-harvesting positions to repeated sexual harassment in the form of unwanted sexual touching and comments. As part of a consent decree approved by the Court, three individuals charged by the EEOC as perpetrators of the harassment are barred from holding supervisory positions with Bisconti Farms. In addition, the employer must provide training on Title VII in Spanish and English, and must post and distribute to workers a bilingual notice about the settlement and employees' rights under Title VII.

6. ***EEOC v. United Parcel Service, Inc.*** **(EEOC Sept. 17, 2019).** The EEOC reached a conciliation agreement with UPS stemming from an investigation into allegations that the delivery company did not provide light duty work to pregnant employees. In addition to paying $2.25 million in monetary relief, the conciliation agreement entered into between the EEOC and UPS provides that UPS must revise its accommodation policy to include obligations relative to childbirth and related medical conditions, provide training for human resources and supervisory employees on this revised policy, notifying employees on the policy, and report to the EEOC on pregnancy accommodation requests and complaints.

7. ***EEOC v. JBS Carriers, Inc.*****, Case No. 18-CV-2498 (D. Colo. April 4, 2019).** The EEOC brought claims against a trucking company alleging that when it contracted with a third-party, ErgoMed Work Systems, Inc., to administer pre-employment screening of applicants for truck driving jobs, the process unlawfully screened out people with disabilities who were qualified for the truck driving jobs they sought. Under the terms of a consent decree entered by the Court, in addition to monetary relief, JBS agreed that it will not contract with ErgoMed for three years and will not implement any physical or medical screening for conditional hires apart from the medical certification and a urine analysis authorized by regulations of the U.S. Department of Transportation. JBS also must provide ADA training, appoint an ADA coordinator, review and revise its ADA policies, and report semi-annually to the EEOC on how the company has addressed reports of disability discrimination and requests for accommodation.

8. ***EEOC v. USA Parking System, Inc.*****, Case No. 18-CV-23984 (S.D. Fla. Feb. 27, 2019).** The EEOC brought a lawsuit against a parking services company alleging it failed to hire a qualified valet attendant because of his disability. Under the terms of a consent decree entered by the Court, in addition to monetary relief, the company must affirmatively recruit applicants who are deaf and/or hearing-impaired and add TTY capability to its discrimination hotline for the use of deaf and/or hearing-impaired applicants and employees. The company also agreed to change the essential qualifications of the valet attendant position to clarify that the job can be performed by anyone who can communicate effectively with customers, whether that communication is verbal or written.

9. ***EEOC v. Flash Market, Inc.*****, Case No. 17-CV-2717 (W.D. Tenn. Jan. 29, 2019).** The EEOC brought a lawsuit against an operator of convenience store gas stations alleging it created a hostile work environment that led to a cashier being propositioned for sex, subjected to touching and comments, and terminated in retaliation for complaining. Under the terms of a consent decree entered by the Court, in addition to monetary relief, Flash Market must conduct exit interviews with departing employees to determine if they were subjected to sex discrimination or retaliation during their employment.

10. ***EEOC v. Christini's, Inc. d/b/a Christini's Ristorante Italiano*****, Case No. 18-CV-1609 (S.D. Fla. Feb. 27, 2019).** The EEOC brought a lawsuit against a restaurant alleging the restaurant's owner created, permitted, and encouraged a work environment that made unwelcome, sexually charged comments and conduct permissible and commonplace. Under the terms of a consent decree entered by the Court, in addition to monetary and other relief, the restaurant must disseminate a confidential, anonymous workplace climate survey to be provided to the EEOC, hire an independent third-party to operate a telephone hotline for employees to report incidents of discrimination and harassment, and provide mandatory anti-harassment training for the owner and all employees led by a subject-matter expert approved by the EEOC.

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