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REPORT

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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 in 2014 to 2018 with several 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 2019 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 2018, 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 2018 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 1,453 decisions analyzed in the Report.

The cases decided in 2018 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 Richard L. Alfred, Lorie Almon, Raymond C. Baldwin, Brett C. Bartlett, 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, Rebecca DeGroff, Pamela Devata, Ada Dolph, Alex Drummond, Noah A. Finkel, Timothy F. Haley, Eric Janson, David D. Kadue, Lynn Kappelman, Daniel B. Klein, Ronald J. Kramer, Richard B. Lapp, Richard P. McArdle, Jon Meer, Ian H. Morrison, Camille A. Olson, Andrew Paley, Katherine E. Perrelli, Kyle Peterson, Thomas J. Piskorski, Jennifer Riley, David Ross, Jeffrey K. Ross, David J. Rowland, Sam Schwartz-Fenwick, Frederick T. Smith, Amanda Sonneborn, Diana Tabacopoulos, Joseph S. Turner, Annette Tyman, Peter A. Walker, Timothy M. Watson, 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 2019

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.*, *Langan, et al. v. Johnson & Johnson*, 897 F.3d 88 (2d Cir. 2018)). If a decision is unavailable in bound format, we have utilized a LEXIS cite from its electronic database (*e.g.*, *In Re Jimmy John's Overtime Litigation*, 2018 U.S. Dist. LEXIS 107157 (N.D. Ill. June 14, 2018)). If a ruling is not contained in an electronic database, the full docketing information is provided (*e.g.*, *Durling, et al. v. Papa John's International, Inc.*, Case No. 16-CV-3592 (S.D.N.Y. Mar. 1, 2018)).

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 *2018 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%.

TABLE OF CONTENTS

I. Overview Of The Year In Workplace Class Action Litigation

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 has become readily apparent in the #MeToo era, an adverse judgment in a class action has the potential to bankrupt a business and adverse publicity can eviscerate its 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. Hence, workplace class actions can impair a corporation's business operations, jeopardize or cut short 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 with worries 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 risk 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 transition to new leadership in the White House with the Trump Administration, governmental enforcement litigation pursued by the U.S. Equal Employment Commission ("EEOC") and other federal agencies continued to manifest an aggressive agenda, with regulatory oversight of workplace issues continuing as a high priority.

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 2019 is the continuing evolution in federal policies emanating from the Trump White House, the recent appointments of new Supreme Court Justices, and mid-term elections placing the Senate in control of Republicans and the House in control of Democrats.

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, the one sure bet is that change is inevitable and corporate America will continue to face new litigation challenges.

B. Key Trends Of 2018

An overview of workplace class action litigation developments in 2018 reveals five key trends.

First, 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, *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) – which upheld the legality of class action waivers in mandatory arbitration agreements – is a transformative decision that is one of the most important workplace class action rulings in the last two decades. It is already having 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 appointments of Justices Neil Gorsuch and Brett Kavanaugh to the Supreme Court in 2018, litigation may well be reshaped in ways that change the playbook for prosecuting and defending class actions.

Second, 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, while suffering significant defeats in employment discrimination litigation. While evolving case law precedents and new defense approaches resulted in good outcomes for employers in opposing class certification requests, federal and state courts issued many favorable class certification rulings for the plaintiffs' bar in 2018. 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 2018 (over comparative figures for 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 2018 increased as compared to last year, and plaintiffs fared better in litigating those class certification motions in federal court than in the prior year. Of the 273 wage & hour certification decisions in 2018, plaintiffs won 196 of 248 conditional certification rulings (approximately 79%), and lost only 13 of 25 decertification rulings (approximately 52%). By comparison, there were 257 wage & hour certification decisions in 2017, where plaintiffs won 170 of 233 conditional certification rulings (approximately 73%) and lost 15 of 24 decertification rulings (approximately 63%). In sum, employers lost more first stage conditional certification motions in 2018, and saw a reduction of their odds – a decrease of 11% – of fracturing cases with successful decertification motions.

Third, filings and settlements of government enforcement litigation in 2018 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. Instead, as compared to 2016 (the last year of the Obama Administration), government enforcement litigation actually increased in 2018. As an example, the EEOC alone brought 199 lawsuits in 2018 as compared to 184 lawsuits in 2017 and 86 lawsuits in 2016. However, the settlement value of the top ten settlements in government enforcement cases decreased dramatically – from $485.25 million in 2017 to $126.7 million in 2018. 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 year; and the "hold-over" effect whereby Obama-appointed policy-makers remained in their positions long enough to continue their enforcement efforts before being replaced in the last half of 2018. This is especially true at the EEOC, where the Trump nominations for the Commission's Chair, two Commissioners, and its general counsel were stalled in the Senate waiting for votes of approval (or rejection), and one of the two nominees withdrew at year-end due to the delay. 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 2019 opens, it appears that the content and scope of enforcement litigation undertaken by the DOL

and the EEOC in the Trump Administration will continue to tilt away from the pro-employee/anti-big business mindset of the previous Administration. Trump appointees at the EEOC and the DOL are slowly but surely "peeling back" on positions previously advocated under the Obama Administration. As a result, it appears inevitable that the volume of government enforcement litigation and value of settlement numbers from those cases will decrease in 2019.

Fourth, the monetary value of the top workplace class action settlements decreased dramatically in 2018. These settlement numbers had been increasing on an annual basis over the past decade, and reached all-time highs in 2017. While 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, they did so at decidedly lower values in 2018 than in previous years. The top ten settlements in various employment-related class action categories totaled $1.32 billion in 2018, a decrease of over $1.4 billion from $2.72 billion in 2017 and a decrease of $430 million from $1.75 billion in 2016. Furthermore, settlements of wage & hour class actions experienced over a 50% decrease in value (from $525 million in 2017 down to $253 million in 2018); ERISA class actions saw nearly a three-fold decrease (from $927 million in 2017 down to $313.4 million in 2018); and government enforcement litigation registered nearly a four-fold decrease (from $485.2 million in 2017 down to $126.7 million in 2018). Whether this is the beginning of a long-range trend or a short-term aberration remains to be seen as 2019 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 new 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 2018 that stemmed at least in part from #MeToo initiatives. Likewise, the EEOC's enforcement litigation activity in 2018 focused on the filing of #MeToo lawsuits while riding the wave of social media attention to such workplace issues; in fact, fully 74% of the EEOC's Title VII filings this past year targeted sex-based discrimination (compared to 2017, where sex based-discrimination claims accounted for 65% of Title VII filings). Of the EEOC's 2018 sex discrimination lawsuit filings, 41 filings included claims of sexual harassment. The total number of sexual harassment filings increased notably as compared to 2017, where sexual harassment claims accounted for 33 filings. Employers can expect more of the same in the coming year.

C. Significant Trends In Workplace Class Action Litigation In 2018

(i) 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 requirements for pursuing employment-related class actions under Rule 23 of the Federal Rules of Civil Procedure.

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.

This year saw another signal ruling in *Epic Systems Corp. v. Lewis*, which marks a gateway device to block prosecution of class actions in the judicial system and forces adjudication of claims on an individual, bi-lateral basis in arbitration.

To that end, federal and state courts cited *Wal-Mart* in 608 rulings in 2018; they cited *Comcast* in 235 cases in 2018; and despite its issuance in May of 2018, they cited *Epic Systems* in 119 decisions by year's end.

The past year also saw a change in the composition of the Supreme Court in April of 2018, with Justice Neil Gorsuch assuming the seat of Antonin Scalia after his passing in 2016, and Justice Brett Kavanaugh taking the seat of Anthony Kennedy in October 2018, after Kennedy's retirement and a bruising Senate confirmation battle.

Given the age of some of the other sitting Justices, President Trump may have the opportunity to fill additional seats on the Supreme Court in 2019 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 2018

In terms of decisions by the Supreme Court impacting workplace class actions, this past year was no exception. In 2018, the Supreme Court decided seven cases – four employment-related cases and three class action cases – that will influence complex employment-related litigation in the coming years.

The employment-related rulings included two wage & hour collective actions and two union cases, and in class actions that involved securities and human rights. A rough scorecard of the decisions reflects one distinct plaintiff/worker-side victory, and defense-oriented rulings in six cases.

- ***Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612 (2018)** – Decided on May 21, 2018, this employment case involved the interpretation of mandatory workplace arbitration agreements between employers and employees and whether class action waivers within such agreements – which require workers to arbitrate any claims on an individual, bi-lateral basis (and waive the ability to bring or participate in a class action or collective action) – violate employees' rights under the National Labor Relations Act to engage in "concerted activities" in pursuit. In a 5 to 4 ruling, the Supreme Court held that class action waivers in arbitration agreements are valid. The decision is likely to have far-reaching implications for litigation of class actions and collective actions.

- ***Cyan, Inc., et al. v. Beaver County Employees Retirement Fund,* 138 S. Ct. 1061 (2018)** – Decided on March 20, 2018, this class action case posed the issue of whether federal law bars state courts from hearing certain securities class actions. The case turned on interpretation of the Private Securities Litigation Reform Act of 1995 ("SLUSA") – which imposes tougher standards on securities class actions brought in federal courts – and whether it mandated that state courts can no longer hear class actions based on the Securities Act of 1933. In a 9 to 0 decision, the Supreme Court held that SLUSA did not strip state courts of jurisdiction over class actions alleging violations of securities laws and that defendants cannot remove such lawsuits from federal court to state court. In this regard, it did not spell the end of what many have viewed as a "cottage industry" of state court-based class action filings in states such as California where class action lawyers target public companies with securities claims over drops in stock process.

- ***Encino Motors, LLC v. Navarro, et al.,* 138 S. Ct. 1134 (2018)** – Decided on April 2, 2018, in this wage & hour case the Supreme Court examined whether service advisors at car dealerships are exempt under 29 U.S.C. § 213(b)(10)(A) from the overtime pay provisions of the Fair Labor Standards Act ("FLSA"). The Supreme Court held 5 to 4 that service advisors are exempt under the FLSA. The ruling is apt to have far-reaching implications on the legal tests for interpretation of statutory exemptions under the FLSA, as the broader reading of the exemption potentially could reduce the number of workers allowed to assert wage & hour claims against their employers.

- ***CNH Industrial N.V. v. Reese, et al.,* 138 S. Ct. 761 (2018)** – Decided on February 20, 2018, in this employment case the Supreme Court held in a *per curium* opinion that collective bargaining agreements are to be interpreted according to ordinary principles of contract law, including the rule that a contract is not ambiguous unless it is subject to more than one reasonable interpretation. The case involved a collective bargaining agreement, which provided health care benefits under a group benefit plan to certain employees who retired under the pension plan. The agreement expired by its terms in May 2004. At that time, a class of CNH retirees and surviving spouses filed a lawsuit seeking a declaration that their health care benefits vested for

life. In reversing lower court rulings that determined that the collective bargaining agreement was ambiguous and they therefore could rely on extrinsic evidence in interpreting the contract to favor the claims of the union members, the Supreme Court held that the "only reasonable interpretation of the 1998 agreement was that the health care benefits expired when the collective bargaining agreement expired in 2004.

- ***Janus, et al. v. AFSCME,* 138 S. Ct. 2448 (2018)** – Decided on June 27, 2018, in this employment case the Supreme Court considered whether *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment so as to prevent public-sector unions from collecting mandatory fees from non-members. In ruling 5 to 4, the Supreme Court held that the application of a mandatory public sector union fee requirement is a violation of the First Amendment, thereby overruling *Abood.* This ruling had an immediate impact on millions of workers in 22 states that do not have right-to-work laws. Since many workers are apt to cease paying union dues with the abolishment of the fair share fee payments requirement, the decision will have a significant impact on the ability of public-sector unions to conduct their business.

- ***China Agritech, Inc. v. Resh, et al.,* 138 S. Ct. 1800 (2018)** – Decided on June 11, 2018, in this class action case the Supreme Court examined whether the tolling rule for class actions established in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), tolled the statute of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period. *American Pipe* had held that the filing of a class action tolls the running of the statute of limitations for all putative members of the class who make timely motions to intervene after the lawsuit is deemed inappropriate for class action status. The Supreme Court interpreted *American Pipe* more narrowly, and held that it does not permit the maintenance of a follow-on class action past the expiration of the statute of limitations. In essence, the ruling limits the tolling rule in *American Pipe* to apply only to subsequent individual claims.

- ***Jesner, et al. v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018)** – Decided on April 24, 2018, this class action posed the issue of whether foreign-based corporations can be sued in U.S. courts for alleged violations of the Alien Tort Statute. The Supreme Court decided 5 to 4 that Plaintiffs may not do so. The end result will be to bring a halt to class actions brought to hold foreign-based corporations responsible in U.S. courts for alleged human rights violations committed overseas.

The decisions in *Epic Systems, Beaver County, Navarro, Reese, Janus, China Agritech,* and *Jesner* are sure to shape and influence workplace class action litigation in a profound manner.

These cases will impact rules on *American Pipe* tolling and application of statute of limitations in class actions; the ability of foreign-based claimants to prosecute class actions based on overseas labor and human rights abuses; the obligations of corporations to fund lifetime retiree benefits under collective bargaining agreements; the scope of exemptions in wage & hour litigation; union fee litigation and membership rights; securities fraud class action litigation in state courts; and defenses to workplace class actions based on class waivers in mandatory arbitration agreements.

In addition, *Epic Systems* may turn out to be one of the most important workplace class action decisions over the last several decades in terms of its ultimate impact on litigation dynamics.

Rulings Expected In 2019

Equally important for the coming year, the Supreme Court accepted five additional cases for review in 2018 – that will be decided in 2019 – that also will impact and shape class action litigation and government enforcement lawsuits faced by employers.

Those cases include two employment lawsuits and three class action cases.

The Supreme Court undertook oral arguments on four of these cases in 2018; the other case underwent oral argument in early 2019.

- ***Frank, et al. v. Gaos,* No. 17-961** – Argued on October 31, 2018, this case concerns whether and in what circumstances a *cy pres* award in a class action – that supplies no direct relief to class members – nonetheless comports with the Rule 23 requirement that a settlement binding class members must be fair, reasonable, and adequate. The ultimate ruling by the Supreme Court likely will determine the legality of *cy pres* awards, and if approved, create guidelines for the appropriateness of *cy pres* awards in class action settlements.

- ***Home Depot U.S.A. v. Jackson, et al.,* No. 17-1471** – Argued on January 15, 2019, this case involves the Class Action Fairness Act and the circumstances under which Defendants may remove a class action to federal court where Defendants file a counter-claim. The ultimate decision likely will determine if the Supreme Court's earlier ruling in *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100 (1941) – that a Plaintiff may not remove a counter-claim against it – extends to third-party Defendants bringing counter-claims.

- ***Lamps Plus, Inc. v. Varela, et al.,* No. 17-988** – Argued on October 29, 2018, this case poses the issue of whether the Federal Arbitration Act ("FAA") forecloses a broad interpretation of an arbitration agreement that allows prosecution of a class arbitration based solely on general language commonly used in arbitration agreements. Given the ruling in *Epic Systems* in 2018, the upcoming decision in this case will be of critical significance to employers involved in arbitration of workplace disputes.

- ***New Prime Inc. v. Oliveria, et al.,* No. 17-340** – Argued on October 29, 2018, this case presents the issue of whether a court or an arbitrator must determine the applicability of § 1 of the FAA – which applies only to "contracts of employment" – to independent contractor agreements. The future decision in this case will be important to employers seeking to use class action waivers in workplace arbitration agreements used with independent contractors.

- ***Mount Lemon Fire District v. Guido,* No. 17-587** – Argued on October 1, 2018, this case raises the issue of whether the Age Discrimination in Employment Act ("ADEA") applies to state and local governmental entities. A future decision will determine the coverage of the ADEA relative to the public sector employees.

The Supreme Court is expected to issue decisions in these five cases by the end of the 2018/2019 term in June of 2019.

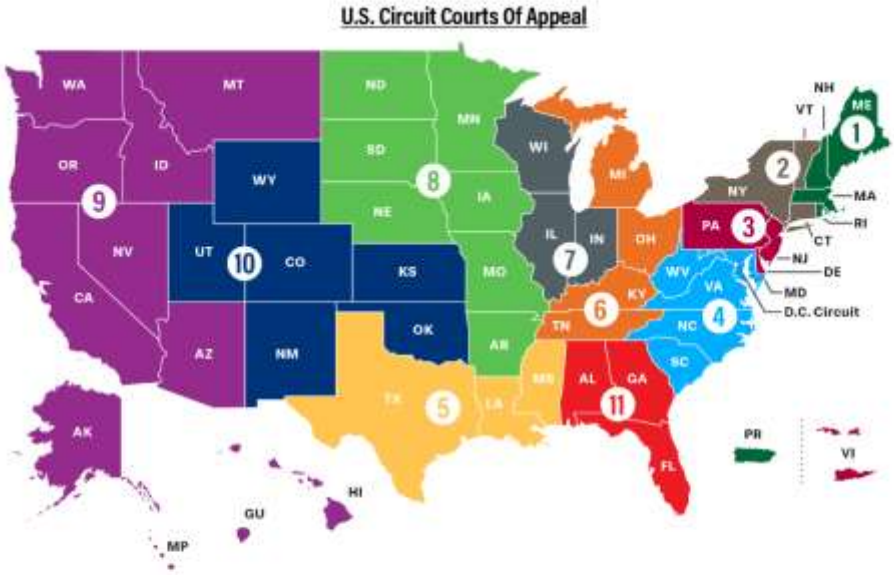
Rulings in these cases will have significance for employers in complying with employment discrimination laws, structuring arbitration proceedings, and defending class action litigation.

(ii) Class Certification Trends In 2018

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 301 class certification decisions in all varieties of workplace class action litigation is detailed in the following map:



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
Employment Discrimination Decisions													
Certification Motions Granted	0	1	1	0	0	0	0	0	1	0	0	0	0
Certification Motions Denied	0	1	0	0	0	1	2	0	3	0	0	1	0
Sub-Total: 3 Granted / 8 Denied													
ERISA Decisions													
Certification Motions Granted	1	3	0	1	0	2	1	0	0	1	2	0	0
Certification Motions Denied	0	1	2	0	0	1	0	0	0	2	0	0	0
Sub-Total: 11 Granted / 6 Denied													
FLSA Certification Decisions													
Conditional Certification Motions Granted	4	23	16	20	30	22	5	10	37	15	9	2	3
Conditional Certification Motions Denied	1	7	6	2	10	4	3	6	9	1	3	0	0
Decertification Motions Granted	0	0	0	0	1	1	3	2	3	1	2	0	0
Decertification Motions Denied	0	2	0	1	1	2	4	0	1	0	1	0	0
Sub-Total: 196 Conditional Certifications Granted / 52 Conditional Certifications Denied 13 Decertification Motions Granted / 12 Decertification Motions Denied													
Total: 210 Total Certification Motions Granted / 66 Total Certification Motions Denied 13 Decertification Motions Granted / 12 Decertification Motions Denied													

Wage & Hour Certification Trends

Plaintiffs achieved robust numbers of initial conditional certification rulings of wage & hour collective actions in 2018, 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 significant dip in 2018 to 52%. This was fully 11% less than the figure of 63% in 2017.

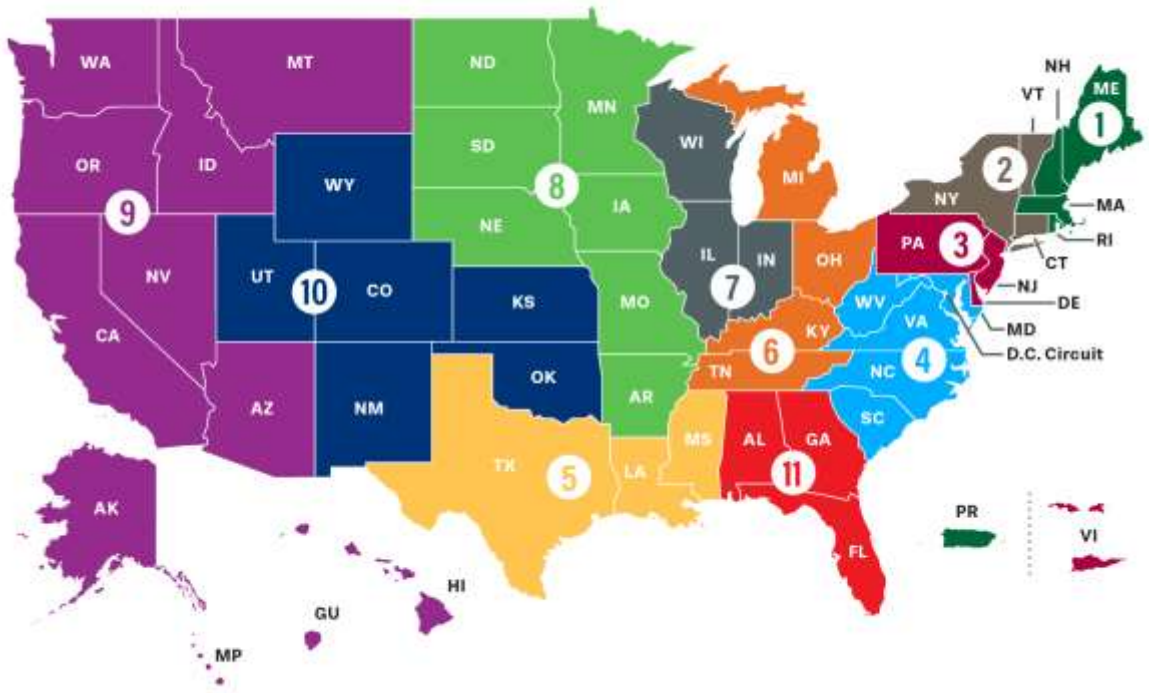
[1] An analysis of rulings in FLSA collective actions in 2018 is set forth in Chapter V, and analysis of rulings in state law wage & hour class action in 2018 is set forth in Chapter VII, Section B.

Most significantly, for only the second time in over a decade, and for the second year in a row, wage & hour lawsuit filings in federal courts decreased. That being said, the volume of FLSA lawsuit filings for the preceding four years – during 2014, 2015, 2016, and 2017 – were at the highest levels in the last several decades.

As a result, an increase in FLSA filings over the past several years had caused the issuance of more FLSA certification rulings than in any other substantive area of complex employment litigation – 273 certification rulings in 2018, as compared to 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 Circuit, 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	4	23	16	20	30	22	5	10	37	15	9	2	3
Conditional Certification Motions Denied	1	7	6	2	10	4	3	6	9	1	3	0	0
Decertification Motions Granted	0	0	0	0	1	1	3	2	3	1	2	0	0
Decertification Motions Denied	0	2	0	1	1	2	4	0	1	0	1	0	0

Total: 196 Conditional Certifications Granted / 52 Conditional Certifications Denied
13 Decertification Motions Granted / 12 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, and Ninth Circuits are the epi-centers of wage & hour class actions and collective actions. More cases were prosecuted and conditionally certified – 50 certification orders in the Ninth Circuit, 42 certification orders in the Fifth Circuit, and 32 certification orders in the Second Circuit – in the district courts in those circuits than in any other areas of the country. That being said, the district courts in the Third, Fourth, and Sixth Circuits were not far behind, with 22, 23, and 29 certification orders respectively in those jurisdictions.

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 (196 of 248 rulings, or approximately 79%). However, in terms of "second stage" decertification motions, employers prevailed in just over half of those cases (13 of 25 rulings, or approximately 52% of the time).

The "first stage" conditional certification statistics for plaintiffs at 79% for 2018 were even more favorable to workers than in 2017, when plaintiffs won 73% of "first stage" conditional certification motions. However, employers fared much worse in 2018 on "second stage" decertification motions. Employers won decertification motions at a rate of 52%, which was down from 63% in 2017 (but up slightly from 45% in 2016).

The following chart illustrates this trend for 2018:

2018 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 the situation when certification is sought in an employment discrimination class action or an ERISA class action), and without having to conduct significant discovery (per the case law that has developed under 29 U.S.C. § 216(b)).

As a result, to the extent litigation of class actions 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 2018 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 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, and as a result, class action settlement numbers are likely to decrease.

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 2018.

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 two 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.

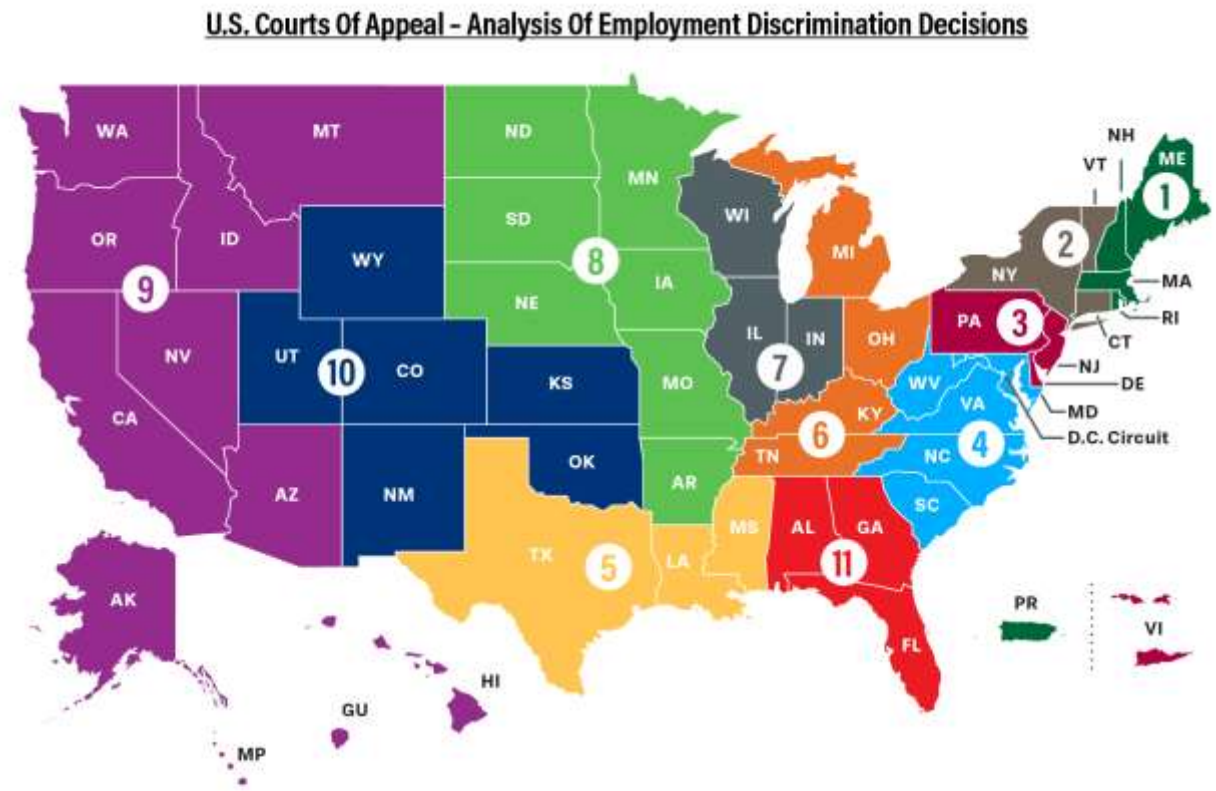
In essence, at least in the employment discrimination area, the plaintiffs' litigation playbook is more akin to a strategy of "aim small to secure certification, and if unsuccessful, then miss small."

In turn, whereas employment-related class certification motions were a mixed bag or tantamount to a "jump ball" in 2017 – when 7 of 11 motions were granted and 4 of 11 were denied – employers were far more successful in 2018, where only 3 of 11 motions were granted for plaintiffs and 8 of 11 were denied.

The certification rate of 27% was the lowest on record over the last decade.

[2] An analysis of certification rulings in Title VII employment discrimination class actions in 2018 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 this array of certification rulings in Title VII and ADEA discrimination cases:



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

Total: 3 Granted / 8 Denied

In terms of the ERISA class action litigation scene in 2018,[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.

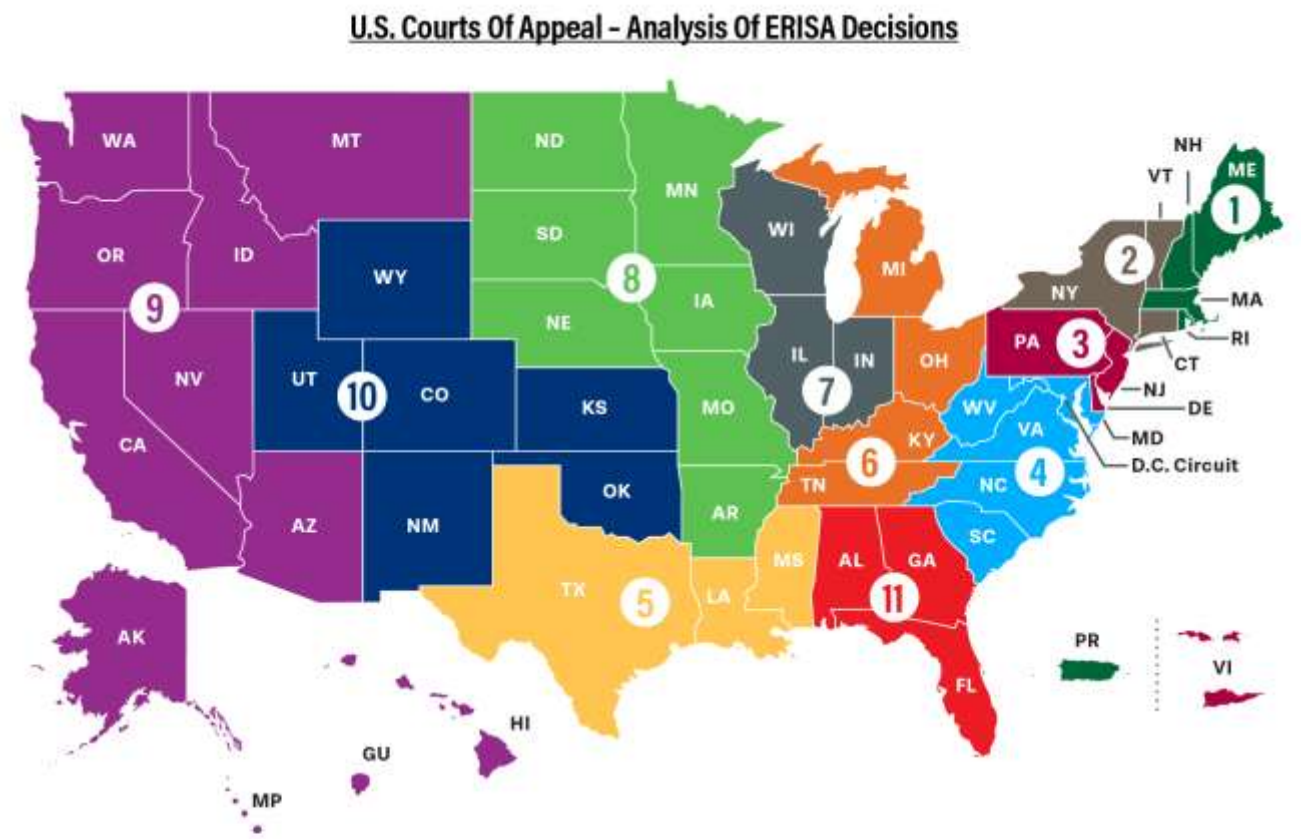
The *Wal-Mart* decision also has changed the ERISA certification playing field by giving employers more grounds to oppose class certification.

The decisions in 2018 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.

While plaintiffs were more successful than employers in litigating certification motions in ERISA class actions, their success rate was less than in previous years. In 2018, plaintiffs won 11 of 17 certification rulings or 65%. By comparison, in 2017, plaintiffs won 17 of 22 certification motions, with a success rate of 77%.

[3] An analysis of rulings in ERISA class actions in 2018 is set forth in Chapter VI, Section A.

A map illustrating these trends is shown below:



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

Total: 11 Granted / 6 Denied

Overall Trends

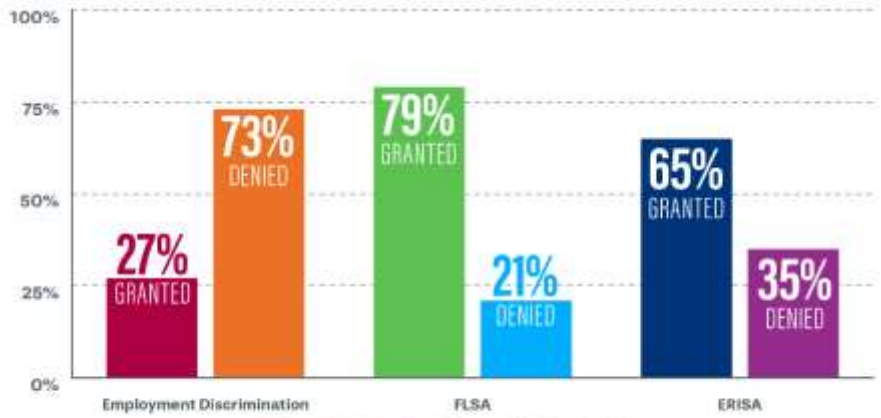
So what conclusions overall can be drawn on class certification trends in 2018?

In the areas of wage & hour 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. Conversely, plaintiffs' success rate in the context of employment discrimination class actions is modest, as employers have a high success rate in blocking such certification motions.

Whereas class certification for employment discrimination cases (3 motions granted and 8 motions denied in 2018) was far less possible, class certification is relatively easier in ERISA cases 11 motions granted and 6 motions denied in 2018), but most prevalent in wage & hour litigation (with 196 conditional certification motions granted and 52 motions denied, as well as 13 decertification motions granted and 12 motions denied).

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

- a 27% success rate for certification of employment discrimination class actions (both Title VII and age discrimination cases);
- a 65% success rate for certification of ERISA class actions; and,
- a 79% success rate for conditional certification of wage & hour collective actions.



2018 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 79% (with 2018 representing the highest success rate ever) for the plaintiffs' bar, which is tilted toward plaintiff-friendly "magnet" jurisdictions were the case law favors workers and presents challenges to employers seeking to block certification.

Yet, the key statistic in 2018 for employers was a significant decrease in the odds of successful decertification of wage & hour cases to 52%, as compared to 63% in 2017, a decrease of 11%.

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

2014 - 2018 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. The new wrinkle to influence these factors in 2018 was the Supreme Court's ruling in 2018 in *Epic Systems* and in 2016 in *Tyson Foods*. To the extent it assists plaintiffs in their certification theories, future certification decisions may well trend further upward for workers.

Lessons From 2018

There are multiple lessons to be drawn from these trends in 2018.

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 and wage & hour cases. This did not hold true in the context of employment discrimination lawsuits. In 2018, their certification numbers were up for ERISA and wage & hour case, and down for employment discrimination litigation.

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 two 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 79% in 2018.

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 a 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.

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 may shift, however, as employers may create a bulwark against such class-based claims based on the *Epic Systems* ruling.

(iii) Governmental Enforcement Litigation Trends In 2018

On the governmental enforcement front, the change-over from the Obama Administration to the Trump Administration had little to no impact on reducing the pace of litigation filings and settlements in 2018 at least insofar as EEOC litigation was concerned. At the same time, while the number of lawsuits filed went up, the aggregate recoveries – measured by the top 10 settlements in government enforcement litigation – went down.

To the extent the Trump Administration aims to change those dynamics, its agency appointees at the DOL either were not nominated in time to influence their respective agencies or were not put into place until mid to late 2018. Insofar as the EEOC is concerned, the Trump nominees for the Chair, two Commissioners, and the general counsel were never voted upon by the Senate in 2018. The result was a delay in changes to agency policies and priorities. In this respect, fundamental changes to patterns in government enforcement litigation are more akin to changing the direction of a large sea-going cargo tanker than a small motor boat. Change is inevitable, but it takes time. Thus, the impact of change on governmental litigation enforcement trends is not likely to be felt until well into 2019.

As a result, the EEOC's lawsuit count increased again in 2018. It filed 199 merits lawsuits, and 20 subpoena enforcement actions. By continuing to follow through on the systemic enforcement and litigation strategy plan it announced in April of 2006 (that centers on the government bringing more systemic discrimination cases affecting large numbers of workers), the EEOC filed more cases as well as more systemic lawsuits. As 2018 demonstrated, the EEOC's prosecution of pattern or practice lawsuits remained an agency-wide priority backed up by the numbers. Many of the high-level investigations started in the last three years mushroomed into the institution of EEOC pattern or practice lawsuits in 2018.

By comparison to previous years, 2018 was a big one for the EEOC in terms of the number of lawsuits filed. Total merits filings were up more than 100% as compared to 2016. In fact, the EEOC filed more lawsuits in the month of September of 2018 than it did in all of the months of 2016 combined.

This past year also marked the second year of the EEOC's new Strategic Enforcement Plan ("SEP"), which is intended to guide enforcement activity for 2017 to 2021. Although the new SEP outlines the same six enforcement priorities as in prior years, few people familiar with how the agency pursues its objectives expect that the EEOC will continue to enforce those priorities in the same way under the Trump Administration. 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.

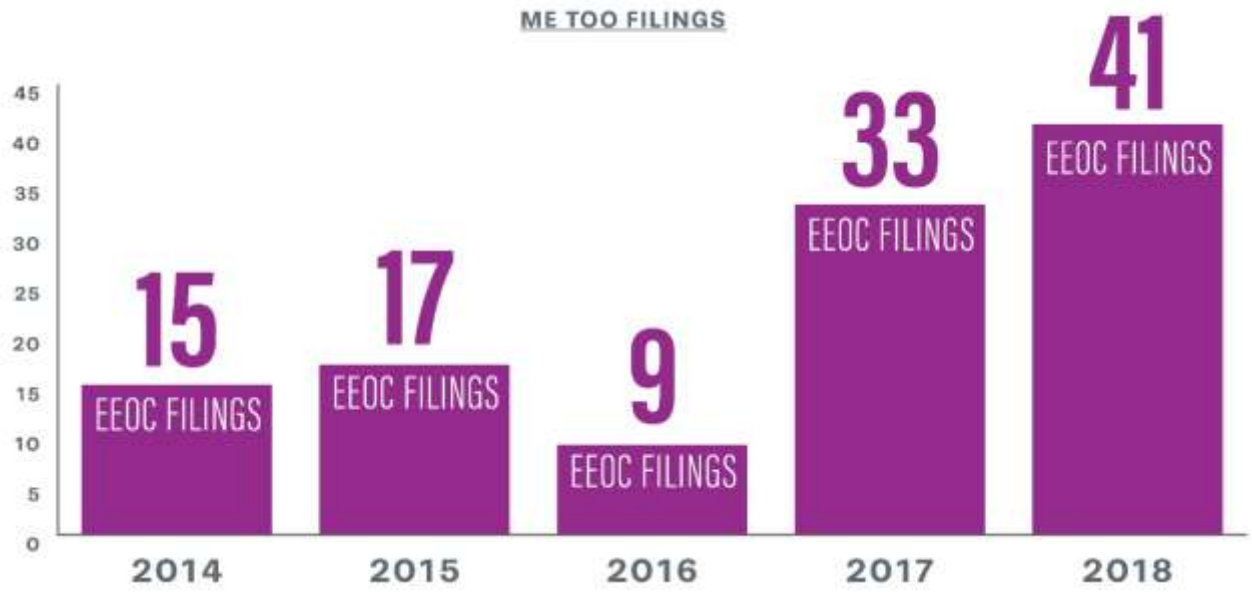
Each of these priorities can be interpreted in multiple ways. For example, the EEOC has consistently focused on the protection of lesbians, gay men, bisexuals, and transgender people as one of the most important emerging and developing issues in the workplace. The EEOC's efforts in this area have resulted in a body of case law in many jurisdictions over the past several years that now holds that discrimination against transgender individuals, or on the basis of sexual orientation, is a form of sex discrimination prohibited by Title VII. However, the Department of Justice under President Trump has recently disagreed with that interpretation. This may signal that this is one area that will shift in 2019 as high-level personnel changes are made within the EEOC.

The EEOC also focused in the past year on employers' utilization of social media and the use of algorithms and information available on the internet to screen job applicants. Recent comments by the EEOC's staff indicate that this may be one of the "barriers to recruitment and hiring" that the agency will focus on in 2019 and beyond. Along the same lines, the EEOC has shown an increased willingness to bring ADEA lawsuits against employers – especially in the hospitality industry – that it believes are discriminating against hiring applicants aged 40 and over.

The EEOC also recently issued new guidance impacting two of its enforcement priorities, including preserving access to the legal system (*i.e.*, through increased enforcement of the anti-retaliation provisions of Title VII, the ADA, and the ADEA) and preventing harassment in the workplace. Among other things, the retaliation guidance expands the definition of "adverse action" to include one-off incidents and warnings, as well as anything that reasonably could be likely to deter protected activity. With respect to preventing harassment, the new guidance clarifies the EEOC's thinking about what constitutes a hostile work environment and the defenses available to employers when that hostile work environment is the result of supervisors' misconduct. Although important developments in their own right, the real impact of these new guidelines may not be clear until employers see

how they are interpreted by the EEOC in active litigation situations. Like the priorities themselves, that will be impacted by whatever new policies and directives are put in place by the new Trump appointees.

Furthermore, the EEOC has focused on #MeToo issues with more intensity than ever before. The most striking trend of all is the substantial increase in sex-based discrimination filings, as 74% of the EEOC's Title VII filings this past year targeted sex-based discrimination. By comparison, in 2017, sex-based discrimination accounted for 65% of Title VII filings. Of the 2018 sex discrimination filings, 41 filings included claims of sexual harassment. The total number of sexual harassment filings was notably more than 2017, where sexual harassment claims accounted for 33 filings.



It also appears that the EEOC is finally executing on its oft-stated intention to increase enforcement under the Equal Pay Act ("EPA"). The EEOC filed 11 EPA lawsuits in 2018. This is a significant increase over prior years (six EPA lawsuits were filed in 2016, five in 2015, and two in 2014). However, its enforcement efforts in this area may have suffered a setback when the changes the EEOC planned to make to the EEO-1 reporting requirements were put on hold in 2018. It was widely speculated that the new reporting requirements would have assisted the EEOC in bringing more claims under the EPA. Under the leadership of the new Administration, the Office of Management and Budget, pursuant to its authority under the Paperwork Reduction Act, stayed implementation of the EEOC's new EEO-1 regulations this past year.

The Commission's 2018 Performance Accountability Report[8] announced that its systemic litigation program continues to be a focus for the EEOC. The EEOC labels a case "systemic" if it "has a broad impact on an industry, company, or geographic area." The EEOC's FY 2018 report[4] outlined the EEOC's activity from October 1, 2017 to September 30, 2018. It showed the following:

- The EEOC's field offices resolved 409 systemic investigations and collected $30 million in remedies (compared to 329 systemic investigations and $38.4 million in 2017). The figures for 2018 constitute a significant increase in the number of investigations over the previous year, but a marked decrease in the amounts for monetary relief for systemic cases.

[4] The EEOC's 2018 Performance Accountability Report is at https://www.eeoc.gov/eeoc/plan/upload/2018par.pdf

- The EEOC also issued cause determinations finding discrimination in 204 systemic investigations (compared to 167 in 2017 and 113 in 2016). Hence, the EEOC resolve more systemic investigations compared to 2017, and made considerably more cause determinations that may well result in an increase in systemic lawsuits filed in the coming year.
- The EEOC secured approximately $505 million in total relief in 2018 in litigation, mediations, and pre-litigation investigations. This tracks closely the total relief figure of $484 million for 2017. It also includes $354 million obtained through mediation, conciliation, and settlement for victims of discrimination in private, state and local government, and federal workplaces. That number was marginally down from 2017, which saw $355.6 million in such recoveries.
- Litigation recoveries, on the other hand, were relatively flat as compared to the past few years, hitting only $53.5 million in 2018. This was slightly higher than in 2017 and 2016, which saw the EEOC obtain $42.4 million and $52.2 million respectively, and lower than in 2015 when the EEOC obtained $65.3 million in litigation recoveries.
- The EEOC filed 199 merits lawsuits in 2018. This is up from 184 lawsuits in 2017, and more than double the 86 merits lawsuits that were filed in 2016. Of the lawsuits, 117 were on behalf of individuals, 45 were non-systemic suits with multiple victims, and the other 37 were systemic claims. The EEOC also filed 20 subpoena enforcement actions in 2018. Hence, the EEOC in the first and second years of the Trump Administration was far more active in filing lawsuits than in the final year of the Obama Administration.
- In FY 2018, the EEOC received 76,418 charges, as compared to 99,109 charges in 2017. Furthermore, the EEOC decreased its charge inventory by 19.5%, to 49,607 charges. This is the lowest level of charge inventory in 10 years and represents a significant reduction compared to FY 2017, when the EEOC reduced its outstanding charges by 16.2%.

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.

At the same time, however, the DOL increased its focus on compliance assistance, holding more than 3,600 outreach events, which also represented a record high for the agency. The DOL also returned to its historical practice (abandoned during the Obama Administration) of issuing opinion letters, which allows employers and employees alike to seek formal guidance from the WHD on some of the most challenging wage & hour issues. In 2018, the WHD issued nearly 30 such letters, which addressed tipped employees, the salary basis test, volunteer status, travel time obligation, and pay required by the FMLA, among a number of other topics.

This past year also brought the return of another program – the WHD's supervision of wage & hour back pay awards following an employer's self-audit or similar practice. Early in the year, the DOL announced the Payroll Audit Independent Determination ("PAID") program. The PAID program allows employers to identify potential violations, the affected employees, the relevant time frame, and the amounts due, and then present that information to the WHD, in addition to some additional certifications regarding compliance. Upon review by the DOL, the back wages are paid, and, if the employee accepts the back wages, the employee waives his or her right to a private right of action. That waiver, however, is limited to the scope of the issues and timeframe. Initially launched as a six-month pilot program, the PAID program was extended for an additional six months, thereby keeping this option open for employers well into 2019.

Not to be outdone, the National Labor Relations Board ("NLRB") also undertook an ambitious agenda in 2018. 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 2018

As measured by the top ten largest case resolutions in various workplace class action categories, overall settlement numbers decreased significantly in 2018 as compared to 2017. After settlement numbers were at an all-time high in 2017, those numbers fell dramatically over the past year. In sum, the ability of the plaintiffs' bar to monetize their class action filings hit a significant wall.

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 2019.

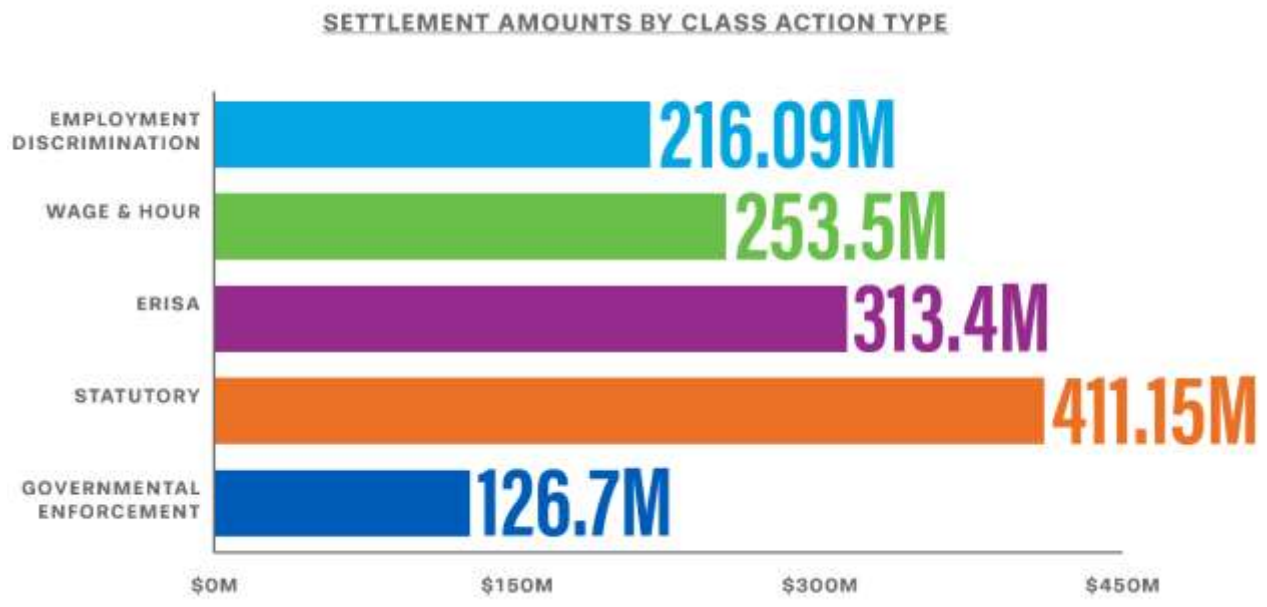
Considering all types of workplace class actions, settlement numbers in 2018 totaled $1.32 billion, which decreased significantly from 2017 when such settlements totaled $2.72 billion and in 2016 when such settlements totaled $1.75 billion.

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 2018, there was a significant downward trend for the value of settlement of ERISA and wage & hour class action settlements, as well as for government enforcement lawsuits. In addition, there were significant decreases across-the-board for resolutions of class actions involving employment discrimination claims and statutory workplace laws. By any measure, class action recoveries were down.

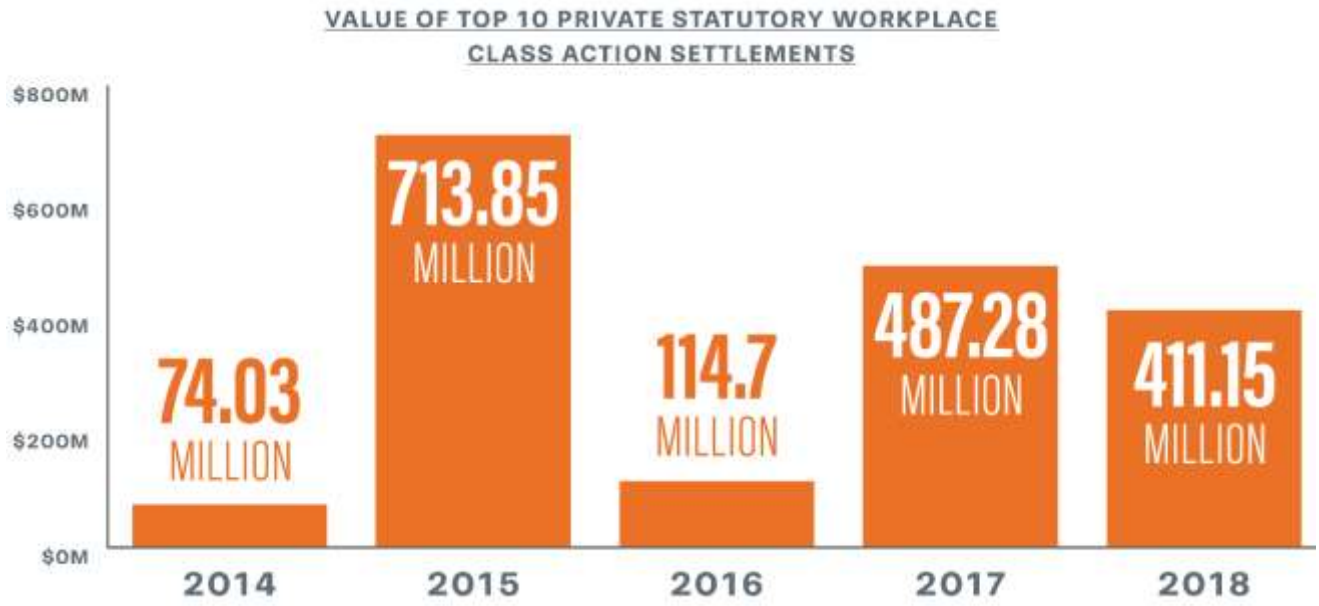
This phenomenon is shown by the following chart for 2018 settlement numbers:



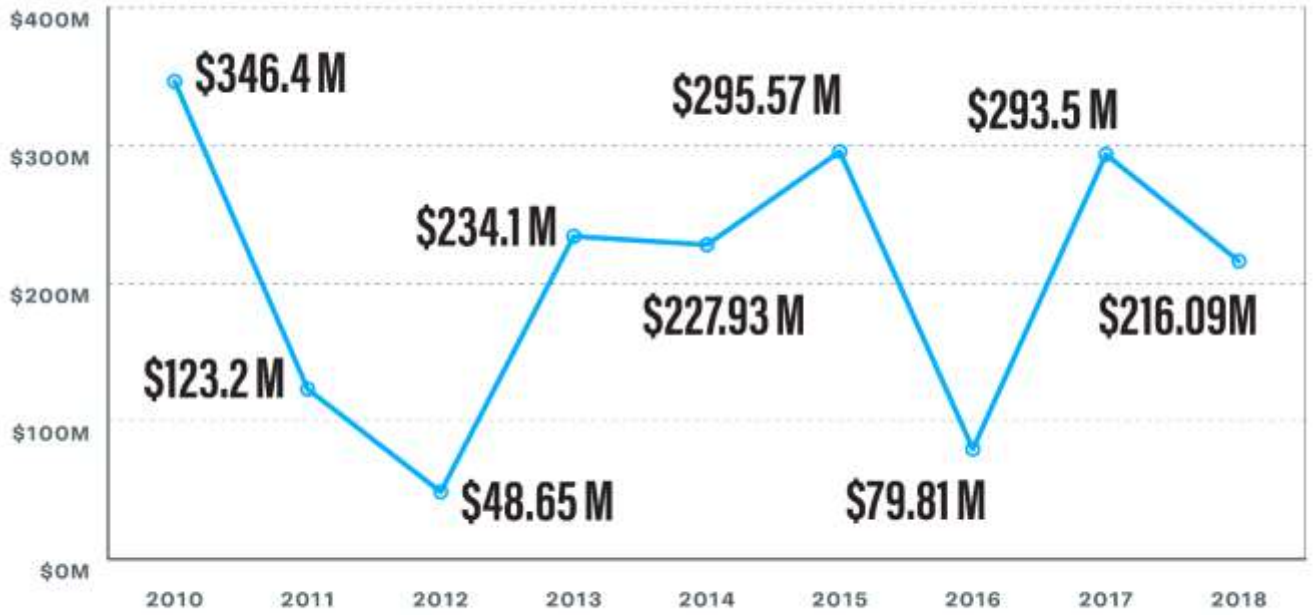
By type of case, settlements values in ERISA class actions, wage & hour class actions, and government enforcement cases experienced the most significant decreases.

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 anti-trust laws and statutes such as the Fair Credit Reporting Act or the Worker Adjustment and Retraining Notification Act) totaled $411.15 million, which represented a slight decrease 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 2018. The top ten settlements totaled $216.09 million as compared to $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 2018, the value of the top ten largest employment discrimination class action settlements of $216.09 million was the fourth lowest figure since 2010,[5] 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 also held for wage & hour class action settlements. In 2018, the value of the top ten wage & hour settlements was $253.18 million. This was a significant 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. When coupled together, the two-year period of 2016 and 2017 saw over $1.2 billion in the top wage & hour settlements. 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.[6] Given the ruling in *Epic Systems* this past year, settlement numbers are apt to remain on a downward trajectory in 2019.

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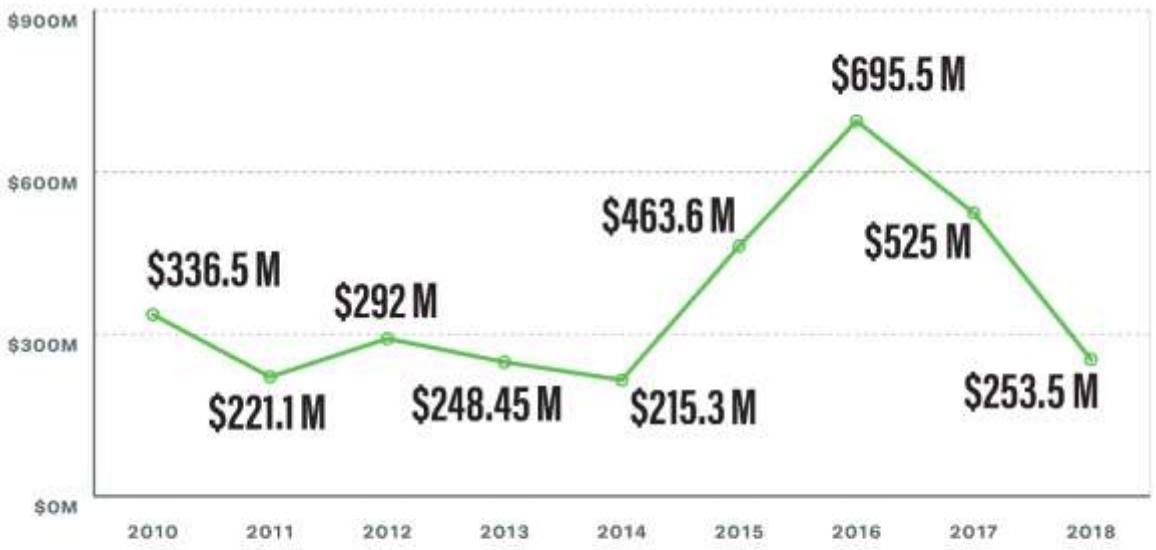
[5] An analysis of class action settlement activity is discussed in Chapter II of this Report. The total of $216.09 million in 2018 was the fourth lowest total since the *Wal-Mart* ruling in 2011. By comparison, the total of $79.81 million for the top ten largest employment discrimination class action settlements in 2016 was the second lowest total since 2006; the figures for each year were as follows: 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 2013 and 2014, and with the fourth lowest total in 2018 since the *Wal-Mart* ruling.

[6] 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.

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 downward arc, as they decreased nearly four-fold to $126.7 million. This compared to the figure of $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.[7] This trend is illustrated by the following chart of settlements from 2010 to 2018:

VALUE OF TOP 10 GOVERNMENT ENFORCEMENT LITIGATION SETTLEMENTS

[7] 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, and $262.78 million in 2012. 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 2016 was the second lowest figure for the past decade.

ERISA class action settlements fell precipitously in 2018. The top ten settlements fell nearly three-fold to $313.4 million, which were down from $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 2018 represents a clear reversal for the plaintiffs' bar.[8]

This trend is illustrated by the following chart of settlements from 2010 to 2018:

VALUE OF TOP 10 ERISA CLASS ACTION SETTLEMENTS

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. 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 2018 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 year 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. Several states also

[8] 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.

explored extending or ending 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.

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 2018, as plaintiffs' lawyers secured a $215 million class action settlement for victims of sexual abuse from the University of Southern California, and a $500 million settlement for victims of sexual assaults from Michigan State University.

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 2018. 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 2019, as the #MeToo movement continues to expand.

D. Complex Employment-Related Litigation Trends In 2018

While shareholder and securities class action filings witnessed an increase in 2018, employment-related class action filings remained relatively stable and aligned with case filing numbers of previous years.

By the numbers, filings for employment discrimination claims were slightly higher over the past year, and the volume of ERISA lawsuits decreased slightly. By comparison, FLSA filings essentially were flat (2018 filing numbers were 20 lawsuits less than 2017 filings), and decreased for only the second time in over two decades.

By the close of the year, ERISA lawsuits totaled 6,334 filings (as compared to 6,695 in 2017, 6,530 in 2016, and 6,925 in 2015), FLSA lawsuits totaled 7,494 filings (as compared to 7,514 in 2017, 8,308 in 2016, and 8,954 in 2015), and employment discrimination lawsuits totaled 12,488 filings (as compared to 11,981 in 2018, 11,593 in 2016, and 11,500 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 in the fourth quarter of 2018, as the #MeToo movement squarely place 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 2018 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 second annual decrease in FLSA lawsuit filings in 17 years is noteworthy in and of itself.

However, a peek behind these numbers confirms that with 7,494 lawsuit filings, 2018 was the 7th highest year ever in the filing of such cases (only eclipsed by levels in 2012, 2013, 2014, 2015, 2016, and 2017). 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 a record-breaking increase in the number of FLSA filings in 2019. Various factors are contributing to the fueling of these lawsuits, including: (i) minimum wage hikes in 21 states that will take effect in 2019, 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 2019, which is apt to fuel filings by the private plaintiffs' bar.

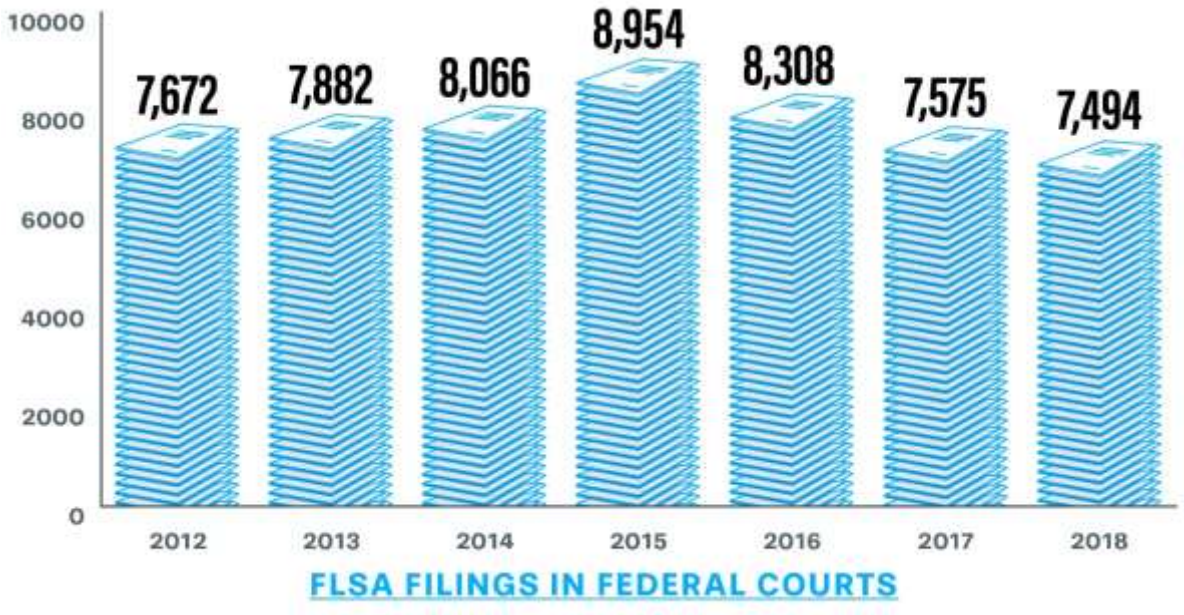
Layered on top of those issues is the difficulty of applying a New Deal piece of legislation to the realities of the digital workplace that no lawmakers could have contemplated in 1938.

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 2018.

This trend is illustrated by the following chart:



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 2018 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 2018 as a breeding ground for wage & hour class action litigation under the California Labor Code. For the fifth year out of the last six, the American Tort Reform Association ("ATRA") selected California as the nation's worst "judicial hellhole" as measured by the systematic application of laws and court procedures in an unfair and unbalanced manner.[9] Calling California the "worst of the worst jurisdictions," the ATRA described the Golden State as "a magnet for class actions."[10]

E. Likely Trends For The Future Of Workplace Class Actions In 2019

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 2019?

The ruling of the Supreme Court in *Epic Systems* this past year is apt to cast a long shadow in 2019. In authorizing class action waivers in mandatory workplace arbitration agreements, the ruling provides employers with a powerful risk management tool to manage and ameliorate the risks of costly collective 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.

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

[9] The ATR Foundation's 2018 Report is available at http://www.judicialhellholes.org/wp-content/uploads/2018/12/judicial-hellholes-report-2018-2019.pdf

[10] *Id.* at 1. According to the ATRA report, the "nine worst" jurisdictions for employers to be sued in 2018 were: (1) California, (2) Florida, (3) New York (and, in particular, New York City), (4) Missouri (and, in particular, St. Louis), (5) Louisiana, (6) Pennsylvania (and, in particular, Philadelphia), (7) New Jersey, (8) Illinois (and, in particular, Cook, Madison, and St. Clair Counties), and (9) Minnesota (and, in particular, Minneapolis-St. Paul). *Id.* at 1-2.

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 2018, including: (i) defined contribution plan (401(k) and 403(b) plan fees) litigation, and (ii) whether the Supreme Court's rulings in favor of arbitration and enforcing class action waivers in arbitration agreements apply with equal force to ERISA plans.

As to the first trend, the past year has seen nearly 20 lawsuits against institutions of higher education battling ERISA class actions over fees paid in their Section 403(b) employee contribution plans. These cases resulted in diverse outcomes with at least one settling (*Daughtery et al. v. The University of Chicago* settled for a $6.5 million) and a similar case against Duke University has settled for an as yet undisclosed amount. Courts have dismissed several other cases at the pleadings stage. Finally, in *Sacerdote, et al. v. New York University*, the defense won a complete victory after trial. Because the cases all involve similar allegations, these results reinforce that venue is a key factor in how a class action will turn out.

In addition, while to date plaintiffs' class action law firms have focused fee litigation on larger plans (with billions of dollars in assets) in order to drive larger settlements, 2018 saw more claims against small plan ($100 million in assets and less). Corporate counsel should be mindful of this trend and implement processes to review 401(k) plan fees and expenses at regular intervals. Multiple ERISA class actions also arose in 2018 against defined benefit plans alleging they improperly use outdated mortality assumptions in converting the standard form of benefit to optional forms allowed under the plan. These cases involve complex actuarial questions and implicate a number of unique ERISA procedural issues.

The second headline-grabbing ERISA trend is arbitration. In *Munro, et al. v. University of Southern California* (a 403(b) plan excessive fees case), the Ninth Circuit upheld the district court's denial of a motion to compel arbitration of collective claims for breach of fiduciary duty. While plaintiffs, a group of current and former employees of USC, signed arbitration agreements as part of their employment contracts, the Ninth Circuit held that the claims fell outside the scope of the agreement because they were brought on behalf of the ERISA plans, not the individuals. An appeal to the Supreme Court is expected.

Against this backdrop, 2018 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 2019 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.

Given the volume of ERISA class action filings in 2018, corporate counsel can also expect to see further litigation regarding the reasonableness of 401(k) and 403(b) plan fees and expenses in the numerous class

action lawsuits pending around the country on these issues. Further, courts are likely to continue to grapple with the complicated and intertwined issues relating to who has standing to bring claims under the ERISA and when those claims accrue, following the Supreme Court's decision in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016).

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 2019 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 –

In 2019, employers can expect more changes based on the Trump Administration's business-friendly priorities. Overall, employers also can anticipate 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 of 2018 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. According to the EEOC's data, the agency filed 66 harassment lawsuits in 2018, which reflects more than a 50% increase over 2017. Charges filed with the EEOC alleging sexual harassment were also up more than 12% over 2017.

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 online 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.

The EEOC's Continued Focus On LGBT Discrimination: Over the past few years, the EEOC has expended significant litigation resources advocating for the protection of LGBT rights under the existing anti-discrimination laws. It has done this through multiple avenues, including using its own administrative rule-making and quasi-judicial powers to decree that transgender and sexual orientation discrimination are forms of sex discrimination because they are tantamount to discrimination on the basis of a perceived failure to adhere to stereotypical gender norms. Although the Department of Justice under the Trump Administration has broken with the EEOC on this issue in dramatic fashion – including filing *amicus* briefs directly in opposition to the EEOC's position – the EEOC itself has maintained a steadfast course. That may change when new leadership of the EEOC is confirmed by the Senate. But the Trump administration's biggest impact on this issue may come in the form of judicial appointments, especially with the appointment of Justices Gorsuch and Kavanaugh to the Supreme Court. Many observers of the Supreme Court believe that it is inevitable that inevitably it will have the occasion to weigh in on this issue to decide a developing circuit split.

A Renewed Focus On Age Discrimination As A Barrier To Recruitment And Hiring: In 2018, the EEOC released its anticipated "Report of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act." The Report noted a significant increase in the number of older workers filing ADEA charges. According to the Report, more charges are now filed by workers who are 55 to 64 years of age than by those who are 40 to 54 years of age, and the percentage of charges filed by workers age 65 and older has doubled since 1990. According to the EEOC, this reflects a change in the demographics of the American workforce itself, which has gotten progressively older, and has only exacerbated the damage wrought by outdated assumptions about age and older workers' capabilities. The EEOC has brought a handful of pattern or practice age discrimination cases over the past few years. This EEOC's Report could portend more to come, and an evolving change in the EEOC's enforcement priorities.

Potential Changes At The EEOC Under The Trump Administration: The most significant development that will shape the EEOC's agenda in the coming years is the agenda of the Trump Administration. That agenda has yet to take hold at the EEOC due, in part, to the fact that the Senate did not confirm two nominated Republican Commissioners, including one who is set to become Chair of the Commission, or the President's pick to be the EEOC's General Counsel. In particular, the EEOC has focused on the strategic use of large, high-impact "systemic" cases to push forward its strategic goals. These types of cases can have a significant impact on employers because they tend to affect a larger number of employees and employers. At the same time, EEOC systemic lawsuits also tend to result in overly aggressive litigation positions and a "push the envelope" mentality

with respect to the substantive legal theories advanced. Given how disruptive these types of cases can be to the employers that are caught in the crosshairs, this area seems ripe for adjustment and realignment by a new, more business-friendly administration.

NLRB Changes Brought By The Trump Administration: At the NLRB, 2019 is apt to have changes in store for "joint employment" regulations and union election rules. On the litigation front, the NLRB is posed to consider employee email use for union purposes and possibly settle the long-running McDonald's litigation over joint employer issues. With Trump appointees now exercising decision-making authority at the NLRB, many believe that the pro-union tilt of the Board during the Obama Administration will swing back to a more balanced administration of workplace laws.

Wage & Hour Class Action Litigation –

For the second year in a row, federal courts saw a decrease in FLSA filings, and, with some reservations, we expect employers to continue to see that trend in 2019, particularly at the federal level. This can be attributed largely to four developments.

Workplace Arbitration – The Supreme Court continued its pro-arbitration jurisprudence when it issued its long-awaited blockbuster decision in a trio of cases consolidated for hearing – *Epic Systems Corp. v. Lewis, Ernst & Young LLP v. Morris,* and *NLRB v. Murphy Oil* – arising out of the Seventh, Ninth, and Fifth Circuits, respectively. Previous Supreme Court rulings had made clear that the command of the Federal Arbitration Act ("FAA") that arbitration agreements must be enforced according to their terms applies to the workplace (other than to transportation workers, who are excluded from the FAA's coverage); that a waiver of the right to bring a class action or collective action contained within an arbitration agreement should be enforced; and that even small claims that are difficult to vindicate on an individual basis can be subject to an arbitration agreement's class waiver provisions. These rulings caused many employers to adopt workplace arbitration programs that required employees, as a condition of employment, to arbitrate all workplace disputes with the employer on an individual, bi-lateral basis. The only significant legal question that remained was the argument that *workplace* class actions are different than others. This was the theory articulated by the National Labor Relations Board ("NLRB"), and ultimately adopted by three federal circuit courts, that Section 7 of the National Labor Relations Act ("NLRA") creates a right for employees to engage in protected concerted activities that extends to participation in a collective or class action against the employer designed to improve the terms and conditional of employment, and that when an employer requires employees to give up that right, the employer violates Section 8 of the NLRA. Therefore, the theory goes, an agreement to waive the right to participate in a collective or class action is illegal and thus cannot be enforced under the FAA.

In a 5-4 decision in May 2018, however, the Supreme Court rejected this theory in *Epic Systems.* The majority opinion, written by the Court's then-newest justice Neil Gorsuch, reasoned that Section 7 does not create a right to pursue a collective or class action; rather, it focuses on the right to organize unions and bargain collectively and other "things employees do for themselves in the course of exercising their right to free association in the workplace," does not mention collective or class action procedures, and cannot be read to "dictate the particular of dispute resolution procedures in Article III courts or arbitration proceedings – matters that are usually left to, *e.g.,* the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA." Thus, there is nothing unlawful about requiring employees, as a condition of employment, to waive their ability to participate in a collective or class action and to instead arbitrate workplace disputes on an individual, bi-lateral basis.

The Supreme Court's ruling removes the last significant potential legal hurdle in an employer's ability make a class action waiver a mandatory condition of employment, and thus protect itself against most forms of costly, distracting, and risky workplace collective and/or class actions, including FLSA and other wage & hour claims. While it remains to be seen how many employers will opt to adopt an arbitration program with a class waiver, the *Epic Systems* decision already has caused many to implement them, and makes clear that employers who already maintain such programs can use them as a highly-effective class action defense. While it is conceivable that Congress could enact legislation to ban mandatory arbitration of employment disputes that currently is

pending in both of its chambers, it is extremely unlikely that such legislation would be passed and signed into law in the current political environment. In the meantime, savvy plaintiff-side class action lawyers have been devoting substantial energy to the development of strategies they believe will allow them to pursue group action litigation notwithstanding the ruling in *Epic Systems*, thereby circumventing waivers that the decision endorsed. Thus far, the most effective of those strategies have involved brute force and substantial expense, as well-heeled plaintiffs' firms have pursued hundreds of individual arbitrations rather than resort to failed attempts in judicial forums to avoid the effects of class action waivers. This alone has led some to conclude that *Epic Systems* might not be the harbinger of the death of class and collective wage & hour litigation. Nevertheless, at least until the next federal election cycle, workplace arbitration agreements with class waivers, if they are well-drafted, should provide employers with some confidence that the risk of workplace class and collective action litigation will continue to diminish in the next several years.

A Limit On Nationwide Collective Actions – 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. Following the Supreme Court's 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court*, however, employers may have a new tool with which to fend off nationwide certification of some FLSA collective actions. *Bristol-Myers Squibb Co.* reiterated that a corporation is subject to general jurisdiction only in its state of incorporation or where it maintains its principle place of business, and that, in a case brought against a corporation where there is no general jurisdiction, specific jurisdiction does not extend to the claims of out-of-state plaintiffs who do not have a sufficient connection to the state where the case was brought. Courts in 2018 began to apply these principles to purported nationwide collective actions in cases brought against companies in states where they are neither incorporated nor headquartered. Effectively, this means that unless a nationwide collective action is brought against a company in its home state, the scope of conditional certification should be limited to the state where the case was brought. As 2019 unfolds, we expect to see more rulings of this ilk limiting the scope of collective actions.

A Level Playing Field On Exemption Litigation – Employers attacked for their classification of certain employees as exempt from the FLSA's overtime requirements often have faced hostility from courts that started from the premise that FLSA exemptions must be "construed narrowly" against employers, thus making overtime claims far easier to sustain for those claiming they were misclassified as salaried-exempt. However, in 2018, the Supreme Court cast this doctrine aside in its ruling in *Navarro v. Encino Motorcars LLC*. In an opinion by Justice Clarence Thomas, the Supreme Court reasoned that the "narrow construction" rule is not a "useful guidepost for interpreting the FLSA" and that FLSA exemptions are just as much a part of the FLSA as its overtime provisions and are not to be treated on a lower plane due to the FLSA's remedial purpose. Instead, exemptions must be given a "fair reading" in which they are construed plainly, with no bent one way or the other. *Navarro* already has been employed by lower courts in exemption cases and undoubtedly has helped some employers get out from under the mistaken impression that a judge should place a thumb on the scale of the side of a plaintiff when evaluating an exempt status misclassification case.

Tip Credit Litigation – The hospitality industry has been plagued with an onslaught of tip credit collective actions over the past decade. Much of that litigation has consisted of collective actions in which employees claim they all spent more than 20% of their time on so-called side work that did not produce tips, and thus are entitled to the full minimum wage for a large number of their hours of work. While these claims do not pose substantial financial risk to a restaurateur when brought individually, they have been a potent weapon for plaintiff's lawyers when brought on a collective or class action basis, especially because restaurateurs have a hard time tracking the time of servers and bartenders on various discrete tasks and also because the line between tip-producing work and "side work" is often hard to draw. In November 2018, however, the DOL's Wage-Hour Division issued an Opinion Letter that removed the 20% rule, stating that "no limit is placed on the amount of [related but non-tipped] duties that may be performed, whether or not they involve direct customer service, as long as they are performed contemporaneously with the duties involve direct service or for a reasonable time immediately before or after performing such direct-service duties." Because all courts that followed the 20% rule (and not all did) did so out due to deference to a federal administrative agency, this

Opinion Letter effectively means that, other than in a few states that independently adopted the 20% guidepost, the 20% rule no longer can be the basis of an FLSA collective action against a hospitality employer.

What else can employers expect in the wage & hour space in 2019?

At the state and local level, employers will continue to face significant wage & hour class action risks. State and local government laws and ordinances increasingly are adding new requirements for employers and providing the plaintiff's bar with new sources of wage & hour class litigation, including higher minimum wage requirements and new expense reimbursement laws, particularly in Illinois. The particular hotbed of state wage & hour law class actions will continue to be California, especially because claims brought under its Private Attorneys General Act ("PAGA") have been deemed by courts to not be subject to arbitration agreements and the class waivers contained in them.

California promises to be a continued trouble spot for the additional reason that the California Supreme Court in 2018 adopted the so-called ABC test for determining whether a worker is an employee or contractor under the California Wage Orders. That test provides a very narrow definition of a contractor and assuredly will cause an increase in independent contractor misclassification claims, usually filed on a class-wide basis.

Further, regulatory developments in 2019 even at the federal level could cause a spike in wage & hour litigation. As noted in the past few years, the DOL has long been considering revisions to its exempt status regulations, particularly the minimum salary that must be paid to employees to maintain their exempt status. A new minimum salary was to become effective December 1, 2016, but was enjoined and then withdrawn. The DOL is likely to issue a new minimum salary in 2019, albeit at a lower level than the ill-fated 2016 proposal. Though a new salary level likely will not be the direct source of wage & hour litigation, the fact of the proposal will generate media attention, which is when the number of FLSA and related wage & hour lawsuits tends to spike.

F. Conclusion

The one constant in workplace class action litigation is change. More than any other year in recent memory, 2018 was a year of great change in the landscape of Rule 23. As these issues play out in 2019, additional chapters in the class action playbook will be written.

The lesson to draw from 2018 is that the private plaintiffs' bar and government enforcement attorneys at the state level are apt to be equally, if not more, aggressive in 2019 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 2019.

II. Significant Class Action Settlements In 2018

While 2018 was a blockbuster year for class action settlement recoveries, overall settlement figures decreased in nearly all categories in 2018. Nonetheless, the plaintiffs' bar and government enforcement attorneys obtained many significant settlements in a wide range of areas. Yet, overall, the "top ten" settlement values in 2018 in workplace class actions were significantly lower than those from 2017. All five categories, including employment discrimination class actions, wage & hour class actions, ERISA class actions, governmental enforcement lawsuits, and other workplace statutory class actions all saw substantially lower settlement amounts than in past years.

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 $909.69 million in 2018. This represented a significant decline as compared to both 2017 and 2016, when the top ten settlements from these categories totaled $2.23 billion and $1.67 billion, respectively.

As the plaintiffs' bar has aggressively pursued various statutory workplace class actions, 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 $411.15 million, largely mirrored the $487.28 million total in 2017, and substantially eclipsed the $114.7 million in 2016.

In sum, based on all categories, the top ten aggregate settlement numbers in 2018 totaled $1.32 billion, a decrease from $2.72 billion in 2017 and $1.75 billion in 2016.

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 2018 totaled $216.09 million. This represented a decrease from 2017, when the total was $293.5 million. At the same time, the overall value of the top ten private plaintiff employment discrimination settlements was significantly higher than in 2016, where the total was $79.81 million.

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

The biggest settlements in 2018 involved gender and race discrimination. By category, there were five gender discrimination class action (based on either sexual harassment or pay practices), four race discrimination class actions, one hybrid gender and race discrimination class action.

1. **$90 million – *Twenty-First Century Fox, Inc., et al. v. Murdoch, et al.*, Case No. 2017-833 (Del. Ch. Feb. 9, 2018)** (final approval granted for a class action settlement of claims brought by multiple Fox news employees alleging violations for sexual harassment and a hostile work environment).

2. **$45 million – *Scott, et al. v. Family Dollar Stores, Inc.*, Case No. 08-CV-540 (W.D.N.C. Mar. 14, 2018)** (final approval granted for a class action settlement of gender discrimination claims involving female store managers who alleged discrimination with respect to their pay).

3. **$24 million – *Senegal, et al. v. JPMorgan Chase Bank, N.A.*, Case No. 18-CV-6006 (N.D. Ill. Sept. 12, 2018)** (preliminary approval granted for a class action settlement involving African-American financial advisers who claimed the company discriminated against them on the basis of their race).

4. **$22.5 million – *Brown, et al. v. Nucor Corp.*, Case No. 04-CV-22005 (D.S.C. Feb. 22, 2018)** (final approval granted for a class action involving African-American workers who claimed they were subjected to race discrimination and a hostile work environment).

5. **$10 million – *Brown, et al. v. Twenty-First Century Fox, Inc., et al.*, Case No. 22446-2017 (N.Y. Sup. May 15, 2018)** (settlement reached in a class action involving current and former employees of the network alleging violations of racial discrimination).

6. **$10 million – *Del Toro Lopez v. Uber Technologies, Inc.*, Case No. 17-CV-6255 (N.D. Cal. Nov. 14, 2018)** (final approval granted for a class action settlement of claims brought against Uber on behalf of women and minority software engineers who accused the ride-service company of gender and race discrimination).

7. **$4 million – *Barrett, et al. v. Forest Laboratories, Inc.*, Case No. 12-CV-5224 (S.D.N.Y. June 29, 2018)** (final approval granted for settlement of a class action alleging gender discrimination for pay and promotions).

8. **$3.75 million – *Cazorla, et al. v. Koch Foods Of Mississippi LLC, et al.*, Case No. 10-CV-135 (S.D. Miss. July 31, 2018)** (final approval granted in a class action settlement involving Hispanic female employees who claimed they were subjected to a hostile work environment and disparate treatment).

9. **$3.74 million – *Times, et al. v. Target Corp.*, Case No. 18-CV-2993 (S.D.N.Y. May 14, 2018)** (preliminary approval granted for a class action settlement involving African-American and Latino applicants who claimed that the company's hiring process discriminated against them on the basis of their criminal background).

10. **$3.1 million – *Campbell, et al. v. Chadbourne & Parke, et al.*, Case No. 16-CV-6832 (S.D.N.Y. Mar. 20, 2018)** (settlement approval granted for an Equal Pay Act class/collective action brought by females against their employer).

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 2018 totaled $253.5 million. This represented a substantial decrease from 2017 and 2016, when the totals were $574.49 and $695.5 million respectively.

1. $65 million – Wal-Mart Stores, Inc.

2. $54.5 million – Bloomberg L.P.

3. 27.5 million – Wells Fargo

4. $25 million – Abercrombie & Fitch Co.

5. $19.1 million – Carlson Restaurants, Inc.

6. $16.8 million – Kellogg Co.

7. $15 million – J.B. Hunt Transport, Inc.

8. 11 million –Bank Of America, N.A.

9. $10 million – CBS Television Studios

10. $9.6 million – Abercrombie & Fitch Trading Co.

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

1. **$65 million – *Brown, et al. v. Wal-Mart Stores, Inc.*, Case No. 09-CV-3339 (N.D. Cal. Dec. 6, 2018)** (preliminary approval granted for a class action settlement involving claims brought by current and former cashiers accusing the retailer of violating state law by refusing to provide them with seating while they worked).

2. **$54.5 million – *Roseman, et al. v. Bloomberg L.P.*, Case No. 14-CV-2657 (S.D.N.Y. Oct. 16, 2018)** (final approval granted for a class action settlement of wage & hour claims involving 1,300 customer support representatives alleging the company failed to pay proper overtime compensation).

   $27.5 million – *In Re Wells Fargo Bank Wage & Hour Cases*, Case No. JCCP-4702 (Cal. Super. Ct. Mar. 16, 2018) (final approval granted for a class action settlement of wage & hour claims involving bankers and sales representatives claiming that the Defendant failed to provide overtime pay and meal breaks).

3. **$25 million – *Bojorquez, et al. v. Abercrombie & Fitch Co.*, Case No. 16-CV-551 (S.D. Ohio Jan. 26, 2018)** (final approval granted for a class action settlement of wage & hour claims involving employees who accused the retailer of forcing hourly workers to buy the clothes they were being paid to sell, which reduced their wages below minimum wage).

4. **$19.1 million – *Zorrilla, et al. v. Carlson Restaurants, Inc.*, Case No. 14-CV-2740 (S.D.N.Y. April 9, 2018)** (final approval granted for a class action settlement of wage & hour claims involving tipped workers claiming the restaurant chain violated FLSA and state wage & hour laws in 19 states).

5. **$16.8 million – *Thomas, et al. v. Kellogg Co.*, Case No. 13-CV-5136 (W.D. Wash. May 18, 2018)** (final approval granted for a class action settlement of wage & hour claims alleging workers were misclassified and not paid an overtime premium).

6. **$15 million – *Ortega, et al. v. J.B. Hunt Transport, Inc.*, Case No. 07-CV-8336 (C.D. Cal. Oct. 1, 2018)** (request for settlement approval for a wage & hour class action involving allegations that truck drivers were not provided meal breaks, rest breaks and proper wage statements).

7. **$11 million – *McLeod v. Bank Of America, N.A.*, Case No. 16-CV-3294 (N.D. Cal. Nov. 14, 2018)** (preliminary approval granted for a class action settlement of wage & hour claims involving 1,900 loan officers who alleged the bank failed to reimburse them for work-related travel expenses).

8. **$10 million – *Hines, et al. v. CBS Television Studios*, Case No. 15-CV-7882 (S.D.N.Y. Aug. 24, 2018)** (preliminary approval granted for a class action settlement of wage & hour claims involving allegations of failing to pay overtime to parking production assistants).

9. **$9.6 million – *Jones, et al. v. Abercrombie & Fitch Trading Co.*, Case No. 15-CV-105 (C.D. Cal. Nov. 19, 2018)** (final approval granted for a class action settlement of wage & hour claims involving current and former employees alleging the company violated state labor laws with their "call-in" scheduling practices).

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 2018 totaled $313.4 million. This represented a tremendous decrease from 2017 and 2016, when the totals were $927.8 and $807.4 million respectively.

1. $63 million – Mercy Health

2. $62.5 million – Hospital Sisters Health System

3. 30 million – Liberty Mutual Retirement Benefit Plan

4. $29.5 million – Wheaton Franciscan

5. $25 million – WAWA, Inc.

6. $25 million – Continental Casualty Co.

7. $24 million – BB&T Corp.

8. $21.9 million – Deutsche Bank Americas Holding Corp.

9. $17 million – Phillips North America LLC

10. $15.5 million – California Field Ironworkers Pension Trust

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.

1. **$63 million – *In Re Mercy Health ERISA Litigation*, Case No. 16-CV-441 (S.D. Ohio Nov. 28, 2018)** (final approval granted for settlement of an ERISA class action alleging mismanagement of workers' pension plans).

2. **$62.5 million – *Holcomb, et al. v. Hospital Sisters Health System*, Case No. 16-CV-3282 (C.D. Ill. Oct. 30, 2018)** (preliminary approval granted for settlement of an ERISA class action alleging that the Defendant improperly claimed its plan was exempt as a "church plan" to avoid funding requirements).

3. **$30 million – *Moyle v. Liberty Mutual Retirement Benefit Plan*, Case No. 10-CV-2179 (S.D. Cal. Mar. 2, 2018)** (final approval granted for settlement of an ERISA class action alleging that Defendant denied pension credit for the year that employees worked at the subsidiary company before Defendant acquired the company).

4. **$29.5 million – *In Re Wheaton Franciscan ERISA Litigation*, Case No. 16-CV-4232 (N.D. Ill. Jan. 16, 2018)** (final approval granted for settlement of an ERISA class action alleging that Defendant denied statutory protections by improperly claiming that the plan qualifies as a "church plan").

5. **$25 million – *Pfeifer, et al. v. WAWA, Inc.*, Case No. 16-CV-497 (E.D. Pa. Aug. 31, 2018)** (final approval granted for settlement of an ERISA class action alleging former employees were deprived of benefits when they were forced to sell their company stocks due to the store chain amending its Employee Stock Ownership Plan).

6. **$25 million – *Dolins, et al. v. Continental Casualty Co.*, Case No. 16-CV-8898 (N.D. Ill. Sept. 20, 2018)** (final approval granted for settlement of an ERISA class action alleging that the Defendants breached fiduciary duties owed to plan participants).

7. **$24 million – *Sims, et al. v. BB&T Corp.*, Case No. 15-CV-732 (M.D.N.C. Dec. 3, 2018)** (settlement approval sought for an ERISA class action alleging BB&T profited off their 401(k) plan by filling the plan with poorly performing in-house funds that earned high fees for the company).

8. **$21.9 million – *Moreno, et al. v. Deutsche Bank Americas Holding Corp.*, Case No. 15-CV-9936 (S.D.N.Y. Oct. 9, 2018)** (preliminary approval granted for settlement of an ERISA class action alleging mismanagement of workers' 401(k) retirement fund).

9. **$17 million – *Ramsey, et al. v. Philips North America LLC*, Case No. 18-CV-1099 (S.D. Ill. Oct. 15, 2018)** (final approval granted for settlement of an ERISA class action filed by 401(k) plan participants alleging fiduciary breach violations).

10. **$15.4 million – *Allbaugh v. California Field Ironworkers Pension Trust*, Case No. 12-CV-561 (D. Nev. July 19, 2018)** (final approval granted for settlement of an ERISA class action alleging the California Field Ironworkers Pension Trust of failing to pay retirees the increase benefits to account for deferred benefits they accumulated while continuing to work after reaching retirement age).

Settlements In Private Plaintiff Statutory Workplace Class Actions

Plaintiffs' lawyers also pursued a myriad of statutory claims in workplace actions brought against employers (outside of the areas of employment discrimination, wage & hour, and ERISA class actions). These cases involved workplace personal injuries, the Fair Credit Reporting Act, the Uniformed Services Employment and Reemployment Rights Act, and other federal and state statutory law violations. The top ten settlements in this category slightly decreased in 2018, as they totaled $411.15 million; by contrast, the total in 2017 was $487.28 million.

1. $215 million – University Of Southern California

2. $125 million – St. Joseph's Health Services Of Rhode Island Retirement Plan

3. 19 million – Southwest Airlines Co.

4. $18.9 million – National Hockey League

5. $10.5 million – Cook County, Illinois

6. $7.5 million – Capstan Corp.

7. $5 million – Amazon.com DEDC LLC

8. $4.25 million – City Of Pontiac, Michigan

9. $3 million – CP OpCo, LLC

10. $3 million – Uber Technologies, Inc.

The biggest settlements involved workplace injuries, the Fair Credit Reporting Act ("FCRA"), and the Uniformed Services Employment and Reemployment Rights Act ("USERRA").

1. **$215 million – *Doe A.T. et al. v. University Of Southern California*, Case No. 18-CV-4940 (C.D. Cal. Oct. 19, 2018)** (settlement agreement in a class action filed by female students accusing the university of failing to hold accountable a staff gynecologist for sexually assaulting multiple women).

2. **$125 million – *St. Joseph Health Services Of Rhode Island, Inc., et al. v. St. Joseph's Health Services Of Rhode Island Retirement Plan*, Case No. PC-2017-3856 (R.I. Super. Ct. Oct. 29, 2018)** (preliminary approval of a settlement in class action brought by 2,700 plan participants alleging Defendants concealed financial problems with the pension fund).

3. **$19 million – *Huntsman, et al. v. Southwest Airlines Co.*, Case No. 17-CV-3972 (N.D. Cal. Dec. 5, 2018)** (preliminary approval granted for a class action settlement involving allegations that the airline violated the Uniformed Services Employment and Reemployment Rights Act by denying pilots their benefits during periods of Short-Term Military Leave).

4. **$18.9 million – *In Re National Hockey League Players' Concussion Injury Litigation*, Case No. 14-MD-2551 (D. Minn. Nov. 12, 2018)** (settlement agreement reached in a class action lawsuit against the NHL alleging that the league did not do enough to protect former players from concussions).

5. **$10.5 million – *Evans, et al. v. Cook County*, Case No. 17-CH-15851 (Ill. Cir. Ct. July 18, 2018)** (settlement of a class action brought by municipal employees over budgeted court system lay-offs).

6. **$7.5 million – *Holden, et al. v. Capstan Corp.*, Case No. 17-CV-636 (W.D. Wis. Nov. 8, 2018)** (final approval granted for a class action settlement involving claims that Defendant violated state's Safe Place Statute by failing to warn workers about toxins and concealing levels of toxicity in the workplace).

7. **$5 million – *Hargrett, et al. v. Amazon.com DEDC LLC*, Case No. 15-CV-2456 (M.D. Fla. July 16, 2018)** (final approval of a class action settlement brought by thousands of job applicants alleging the company violated the Fair Credit Reporting Act by conducting consumer background checks for employment purposes).

8. **$4.25 million – *The City Of Pontiac Retired Employees Association v. Schimmel, et al.*, Case No. 12-CV-12830 (E.D. Mich. Nov. 19, 2018)** (final approval granted for a class action settlement involving claims brought by retired municipal employees as to the reduction and eventual elimination of health benefits).

9. **$3 million – *McDonald, et al. v. CP OpCo, LLC*, Case No. 17-CV-4915 (N.D. Cal. Aug. 9, 2018)** (request for settlement approval in a class action brought by workers asserting violations of the WARN Act in connection with a mass lay-off).

10. **$3 million – *Ortega, et al. v. Uber Technologies, Inc.*, Case No. 15-CV-7387 (E.D.N.Y. Aug. 29, 2018)** (final approval granted for a class action settlement involving drivers alleging Uber miscalculated taxes and deductions from fares and misled them on guaranteed income).

B. Top Ten Government-Initiated Monetary Settlements

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

In 2018, 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 2018 fiscal year, the EEOC filed 199 new merits lawsuits, including 45 non-systemic lawsuits with multiple victims, and 37 systemic lawsuits. The 45 systemic lawsuits represented a sizable jump over prior years, as the EEOC filed 30 such cases in 2017 and 18 such cases in 2016. In terms of monetary relief, in 2018 the EEOC recovered more than $505 million for alleged discrimination victims, a significant jump from $484 million it recovered in 2017 and $482.1 million it recovered in 2016.

For all types of government-initiated enforcement actions, the monetary value of the top ten settlements entered into or paid in 2018 totaled $126.7 million. While this figure represented a sharp decline from the 2017 total of $485.25 million, it still represents a major increase from 2016, when the total was $52.3 million.

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

The majority of the settlements (five) involved DOL enforcement actions, while the remaining settlements involved DOJ enforcement actions and EEOC litigation.

1. **$47 million – *U.S. Department Of Justice v. Credit Suisse Group AG* (DOJ June 6, 2018)** (settlement agreement stemming from the DOJ's investigation of Defendant's hiring practices in Asia).
2. **$20.8 million – *United States v. The City Of New York*, Case No. 18-CV-4100 (E.D.N.Y. July 18, 2018)** (final approval granted for settlement of gender discrimination enforcement action involving city-employed registered nurses and certified midwives claiming the city's sex bias classification of their work had an adverse impact on their retirement age and pensions).
3. **$16 million – *In Re First Farmers Financial Litigation*, Case No. 14-CV-7581 (N.D. Ill. Jan. 26, 2018)** (settlement agreement stemming from the DOL's investigation of Defendant's alleged violation of the ERISA related to misrepresentations about earnings in fictitious investments causing millions in losses to future retirees).
4. **$13.9 million – *U.S. Department Of Labor v. Imperial Pacific International* (DOL Mar. 5, 2018)** (settlement of wage & hour claims brought by the DOL on behalf of 2,400 employees against four China based construction contractors).
5. **$5.5 million – *U.S. Department Of Justice v. Waste Management, Inc.* (DOJ Aug. 29, 2018)** (settlement agreement of claims involving the DOJ's investigation into the Defendant's Texas-based facility's alleged pattern or practice of hiring undocumented workers).

6. **$5 million – *U.S. Department Of Labor v. A.C.E. Restaurant Group, Inc.*, Case No. 15-CV-7149 (D.N.J. May 29, 2018)** (consent judgment entered in the DOL's enforcement action relative to unpaid overtime wages, minimum wage requirements, and damages for retaining portions of employee's tips).

7. **$5 million – *United States v. City Of Jacksonville*, Case No. 12-CV-451 (M.D. Fla. Aug. 22, 2018)** (consent decree approved in the DOJ's pattern or practice lawsuit alleging race discrimination against black firefighters who were promotion candidates).

8. **$4.9 million – *EEOC v. United Parcel Service, Inc.*, Case No. 15-CV-4141 (W.D.N.Y. Dec. 21, 2018)** (consent decree approved in EEOC enforcement action over Defendant's hiring and employment practices relative to job applicants based on alleged religious discrimination).

9. **$4.4 million – *EEOC v. Amsted Rail Co., Inc.*, Case No. 14-CV-1292 (S.D. Ill. June 11, 2018)** (consent decree approved in EEOC enforcement action over Defendant's hiring practices relative to job applicants based on alleged unlawful medical testing).

10. **$4.2 million – *U.S. Department Of Labor v. Southwest Fuel Management, Inc.*, Case No. 16-CV-4547 (C.D. Cal. July 16, 2018)** (consent judgment entered in the DOL's enforcement action relative to alleged minimum wage and overtime wage violations).

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 modification of internal personnel practices and procedures; oversight and monitoring of corporate practices; mandatory training of supervisory personnel and employees; compensation for named plaintiffs and class members; and an award of attorneys' fees and costs for class counsel. In addition to substantial payments for overtime liability, settlements of FLSA collective actions often involve changes to payroll practices and procedures. In ERISA class action settlements, the terms typically include monetary payments along with injunctive orders barring fiduciaries and third-parties from serving as plan fiduciaries.

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 2018 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 2018 were the following:

- Allow class counsel to monitor religious accommodation process and determine if it is working and sufficiently meets the employees' Constitutional rights;
- Offer new jobs to 150 females who were not hired for warehouse positions;
- Administer parental leave and related return-to-work benefits in a manner that ensures equal benefits for male and female employees;
- Provide all employees with FLSA training;
- Send letters of regret and provide employment references to aggrieved individuals;
- Designate certain alleged harassers as ineligible for rehire;
- Designate two company board members to receive future complaints of harassment, discrimination, or retaliation;
- Provide an employee with an interpreter;

- Only require employees to report prescription medications if the employer has a "reasonable suspicion" that the medication may affect performance;
- Not requesting or soliciting an applicant's year of birth before referring the applicant to a prospective employer; and
- Provide quicker vesting on matching contributions and a guarantee that the vesting schedule won't change to a less generous one for a period of at least three years.

The top ten settlements in 2018 involving significant injunctive relief provisions include:

1. ***Syed, et al. v. City Of New York*, Case No. 16-CV-4789 (S.D.N.Y. Jan. 2, 2018).** A Muslim police officer brought a class action lawsuit alleging that the New York Police Department ("NYPD") violated Title VII of the Civil Rights Act of 1964, the U.S. Constitution, and laws of the State of New York, as well as for violations of the New York City Human Rights Law by enforcing an unconstitutional "no beard" policy. The NYPD suspended the police officer from duty when he refused to shave his beard due to his religious beliefs. As part of the settlement agreement, the NYPD will train its employees who process requests for religious accommodations. The settlement also establishes an 18 months review period during which class counsel will monitor the religious accommodation process and determine if it is working and sufficiently meets the employees' Constitutional rights.

2. ***EEOC v. Sherwood Food Distributors LLC*, Case No. 16-CV-2386 (N.D. Ohio Oct. 16, 2018).** The EEOC brought an action alleging that as far back as 2009, Sherwood discriminated against a group of female applicants at its warehouses in Cleveland, Ohio and Detroit, Michigan by refusing to hire them for entry-level positions because of gender. Under the terms of the consent decree entered by the Court, in addition to monetary relief, the employer must offer jobs to at least 150 women identified by the agency during the claims process, establish hiring goals designed to increase the percentage of females hired for entry-level warehouse positions and maintain a higher representation of females in those positions over a period of years; create and produce to the EEOC electronic data such as applicant flow logs; and disclose the number of female and male applicants who seek entry-level warehouse positions, the number of females and males hired for such positions, and the company's progress in meeting hiring goals.

3. ***EEOC v. Estée Lauder Cos., Inc.*, Case No. 17-CV-3897 (E.D. Pa. July 17, 2018).** The EEOC alleged that Estée Lauder discriminated against a group of 210 male employees by providing them, as new fathers, with less paid leave to bond with a newborn, or with a newly adopted or fostered child, than it provided new mothers. Under the terms of the consent decree entered by the Court, in addition to monetary relief, the company must administer parental leave and related return-to-work benefits in a manner that ensures equal benefits for male and female employees and utilizes sex-neutral criteria, requirements, and processes. For biological mothers, the parental paid leave benefits begin after any period of medical leave occasioned by childbirth. The benefits apply retroactively to all employees who experienced a qualifying event (*e.g.*, birth, adoption, foster placement, etc.) since January 1, 2018. The consent decree also requires that Estée Lauder provide training on unlawful sex discrimination and allow monitoring by the EEOC.

4. ***U.S. Department Of Labor v. El Charro Casita, Inc.* (DOL Jan. 19, 2018).** The DOL reached an agreement with three Santa Rosa, California area restaurants to resolve its investigation regarding the employer paying employees straight-time rates, in cash, for overtime hours worked, rather than time-and-one-half of their regular rates for hours they worked beyond 40 in a workweek. As part of the agreement, in addition to monetary relief, the employer agreed to modernize its payroll and scheduling system, provide all employees with FLSA training, and designate a third-party monitor to conduct a review of the company's compliance with the FLSA every six months for at least two years. The employer also acknowledged that retaliating against or threatening any employee for cooperating with or participating in a DOL investigation is strictly prohibited, and may subject it to further action.

5. ***EEOC v. Geo Group Inc.*, Case No. 10-CV-2088 (D. Ariz. Jan. 8, 2018).** The EEOC entered a consent decree with the Geo Group, Inc., which operates two correctional facilities in Arizona, to resolve claims of sexual harassment and retaliation occurring from 2006 to 2012. Under the terms of the consent decree, in addition to providing monetary relief to 16 women, GEO must designate certain alleged harassers as ineligible for rehire, review its EEO policies, include EEO compliance when evaluating its managers, ensure that all complaints of sexual harassment and retaliation are immediately and thoroughly investigated by a neutral employee, ensure that the complainant is informed of the results of the investigation, post notices of the consent decree in its Florence facilities, and conduct anti-discrimination training.

6. ***EEOC v. Coral Gables Trust Co.*, Case No. 18-CV-21148 (S.D. Fla. April 4, 2018).** The EEOC entered into a consent decree with Coral Gables Trust Co., a South Florida-based privately held trust company that provides wealth investment management and trust services, to resolve allegations of a hostile work environment based on gender and retaliation. Under the terms of the consent decree entered by the Court, in addition to providing monetary relief, the employer must retain an independent equal employment opportunity consultant to investigate all complaints of sex-based harassment, designate two board members to receive future complaints of harassment, discrimination, or retaliation, distribute a revised policy against sex discrimination, post a notice informing employees about the resolution of the lawsuit, provide anti-discrimination training to all managers and employees, and provide individual training to the company's chief wealth advisor.

7. ***EEOC v. AT&T Pacific Bell Telephone Co.*, Case No. 17-CV-1059 (E.D. Cal. July 12, 2018).** The EEOC entered into a consent decree with Pacific Bell Telephone Co. to resolve a lawsuit alleging it did not effectively accommodate a deaf employee at its location in Fresno, California. Under the terms of the consent decree entered by the Court, in addition to providing monetary relief, the employer is required to provide the employee with an interpreter, ensure a work environment free from disability discrimination, especially as it pertains to reasonable accommodation of hard-of-hearing and deaf employees, provide training to the employee's immediate supervisor, subsequent supervisors, and human resources personnel, and ensure appropriate record-keeping, reporting, and monitoring of disability complaints.

8. ***EEOC v. M.G. Oil Co.*, Case No. 16-CV-4131 (D.S.D. May 18, 2018).** The EEOC brought claims that M.G. Oil Co. withdrew an offer of employment to an applicant for a cashier position at the casino based on a drug test showing the lawful presence of a prescribed medication. Under the terms of the consent decree entered by the Court, in addition to providing monetary relief, the employer must adopt company-wide policies to prevent future hiring issues under the ADA and will require employees to report prescription medications only if the employer has a "reasonable suspicion" that the medication may affect performance.

9. ***EEOC v. Diverse Lynx, LLC*, Case No. 17-CV-3220 (D.N.J. Mar. 8, 2018).** The EEOC brought claims against Diverse Lynx, LLC, a Princeton, New Jersey-based IT staffing firm, alleging it violated the Age Discrimination in Employment Act when, after learning an applicant's date of birth, the company sent the applicant an email stating that he would no longer be considered for the position because he was "born in 1945" and "age will matter." Under the terms of the consent decree entered by the Court, in addition to providing monetary relief, the employer agreed that it may not request or solicit an applicant's year of birth before referring the applicant to a prospective employer. The employer further agreed that it will provide its employees, including its managers and supervisors, with live in-person training that addresses federal anti-discrimination laws, and complaint and reporting procedures, and that it will not retaliate against persons who complain of discriminatory conduct or practices.

10. ***Fuller, et al. v. SunTrust Banks, Inc.*, Case No. 11-CV-784 (N.D. Ga. June 27, 2018).** Plaintiffs claimed that Defendants, who were fiduciaries of the ERISA plan, breached their fiduciary duties in administering the plan and the plan's assets. Specifically, Plaintiffs alleged that SunTrust continued to offer its stock as a plan investment when it was imprudent to do so, and that it failed to provide complete and accurate information to plan participants regarding the company's financial condition. In a settlement

agreement approved by the Court, in addition to monetary relief, the Court ordered Defendants to provide quicker vesting on matching contributions and a guarantee that the vesting schedule would not change to a less generous one for a period of at least three years. The Court also ordered Defendants to fund matching contributions in cash and enhance training for its fiduciary committee.

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