JacksonLewis

WINTER 2023

CLASS ACTION TRENDS REPORT

Looking back, looking ahead

In this issue of the Class Action Trends Report, *we welcome the New Year and look back at the most significant developments affecting employment class and collective action litigation in 2022. These developments include several significant U.S. Supreme Court decisions, a massive verdict in the first biometric privacy case to go to a jury trial, novel sources of classwide wage and hour liability, and continued procedural quagmires. We also look ahead at potential new challenges in store for employers in 2023.*

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Year in review: Top 10 class action developments

The most significant class action developments of 2022 and their potential impact in the new year and beyond:

1. SCOTUS weighs in on FAA's transportation worker exception

In recent years, the transportation worker exception to the Federal Arbitration Act (FAA) has emerged as a major issue in class action litigation, as plaintiffs seek to invoke the exception to avoid arbitrating wage and hour disputes pursuant to the terms of arbitration agreements. The FAA exception applies to workers who are "engaged in foreign or interstate commerce," but the meaning of this clause has been subject to varied interpretations.

On June 6, 2022, the U.S. Supreme Court held in *Southwest Airlines Co. v. Saxon* that the transportation worker exception applies to individuals employed as ramp workers who frequently handle cargo for an airline. Therefore, they were not required to arbitrate their claims under the FAA. The Court's holding applies to a narrow segment of workers and expressly does not apply to "last mile" delivery drivers. However, the plaintiff's bar is arguing that the Court's decision had broader impact in that it clarifies the parameters of the transportation worker exemption and what it means, for purposes of the exemption, to be "engaged in foreign or interstate commerce." (Read more here.)

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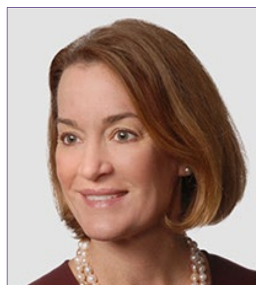
A WORD FROM MIA, DAVID AND ERIC


MIA FARBER

DAVID GOLDER

ERIC MAGNUS

A new calendar year is always a good time to take stock of the past 12 months and to look ahead to what the coming year may bring. We do both in this issue of the *Class Action Trends Report*.

Wage-hour matters continued to make up the lion's share of class action employment litigation in 2022, and courts addressed a number of procedural questions that have a sweeping impact on collective action litigation, including whether out-of-state potential class members can join a class or collective action, the rationale for two-step "conditional" certification, and the role of courts in overseeing collective action settlements.

Privacy-related claims, brought predominantly on a classwide basis, are a growing threat, with a sharp increase in complaints in 2022. The risk to employers has never been more apparent following a $228 million verdict awarded to a class of workers under the Illinois Biometric Information Privacy Act. Continuing developments in technology, a rise in data breach incidents, and the growing patchwork of state privacy and data protection laws may leave organizations increasingly vulnerable to classwide exposure.

Moreover, downstream liability for cyber incidents can be unexpected and significant. In December 2021, a cyber-attack on a payroll software vendor resulted in a deluge of *wage and hour* class litigation against users of the payroll system who scrambled to record employees' work hours and to timely pay them while the system was out of commission. The lesson for employers: always have a timekeeping back-up plan. The larger takeaway: the plaintiff's bar is always on the lookout for new and novel reasons to sue.

The extent to which employers are able to use arbitration to minimize the disruption and expense of class litigation was the subject of litigation and legislation in 2022. The scope of the Federal Arbitration Act's transportation worker exemption, shifting law on arbitration of California Private Attorneys General Act actions, and new statutory impediments to arbitration were in play.

With this 2022 wrap-up issue, we also wrap up our quarterly newsletter. We will continue to cover developments in employment class and collective action litigation on our Employment Class and Collective Action Update blog, with more frequent and timely updates and insights for our readers.

Best wishes for a happy and prosperous new year,

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About the *Class Action Trends Report*

The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Law & Business *Employment Law Daily*, the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

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Courts are called upon with increasing frequency to determine whether the transportation worker exception applies to a given segment of workers in a variety of settings — the transportation industry, gig economy, and other sectors where wage-hour litigation is prevalent and the application of the transportation worker exception remains unclear. In Southwest Airlines*, the justices explained that, when determining whether workers qualify for the exception, what the contracting entity does has no bearing on the question. Rather, the issue turns on the specific duties those workers perform.*

In decisions issued in late 2022, the U.S. Court of Appeals for the First Circuit addressed whether the exception applied to drivers for two app-based food delivery services. In the first decision, the appellate panel cited the Southwest Airlines *holding that "workers must be actively engaged in the interstate transport" for the exception to apply, and it was not enough that the raw ingredients of the meals delivered by drivers from local restaurants to patrons' homes, at some earlier time, had traversed state lines. (Note the Supreme Court, however, has never held that driving across state lines in itself makes someone a transportation worker under the FAA.) A week later, finding its reasoning "fully applicable" in another case involving drivers for a different app-based delivery service, the First Circuit once again affirmed a district court decision ordering the drivers to arbitrate their putative class claims.*

State courts may also be increasingly called upon to interpret the FAA transportation worker exception. For example, in October 2022, the Massachusetts Supreme Judicial Court ruled that food delivery drivers for an online food delivery company were not engaged in interstate commerce and, therefore, were not exempt from application of the FAA. The drivers deliver locally to customers within the state, transporting goods that already completed the interstate journey by the time the goods arrived at the restaurant, delicatessen, or convenience store to which the drivers were sent. Therefore, the state high court reversed a lower court's decision denying the defendant's motion to compel arbitration.

When the transportation worker exception applies, such that workers are outside the reach of the FAA, workers with arbitration agreements not covered by the FAA may still be subject to arbitration under the operative state arbitration acts. In one case, for example, a federal court found the FAA's transportation worker exception applied to delivery drivers for an online retailer. As the court observed, however, even though the FAA did not apply, the determinative question remained whether the parties intended to resolve disputes through arbitration. Concluding that the existence of an arbitration provision meant the "parties clearly agreed to arbitrate," the court construed the agreement to effectuate the parties' intent by reading a state arbitration act into the agreement.

Whatever arbitration law applies, as the Supreme Court made clear in Lamps Plus, Inc. v. Varela, *"the task for courts and arbitrators at bottom remains the same: to give effect to the intent of the parties." Because the existence of an arbitration provision shows that the parties intend to arbitrate disputes, courts are to give effect to that intention when interpreting agreements under state arbitration acts, just as under the FAA.*

2. U.S. Supreme Court opens door to arbitration of individual PAGA claims

California's Labor Code Private Attorneys General Act (PAGA) allows an aggrieved employee to bring a "representative" action on behalf of other current or former employees to recover civil penalties for violations of the California Labor Code. In 2014, in *Iskanian v. CLS Transp. Los Angeles, LLC*, the California Supreme Court held that waivers of representative actions under PAGA are not enforceable, because they undermine the state's interest in enforcing the Labor Code. Further, under the "*Iskanian*" rule, a plaintiff's individual claims under PAGA could not be separated from the PAGA claims of the other allegedly aggrieved employees. In other words, employers that wanted to resolve an individual employee's PAGA claims in arbitration would have to arbitrate the PAGA claims of the other allegedly aggrieved employees as well. Plaintiff's attorneys have used PAGA and the *Iskanian* rule ever since as a mechanism for skirting arbitration agreements that require claims to be arbitrated on an individual (rather than classwide) basis.

In a welcome decision to organizations that employ workers in California, however, the U.S. Supreme Court ruled that PAGA can no longer serve as a "get out of

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arbitration free" card. In *Viking River Cruises, Inc. v. Moriana*, issued on June 15, 2022, the Supreme Court overruled *Iskanian* to the extent it effectively required PAGA claims to be adjudicated in court on a representative basis. The Court held that bilateral arbitration agreements governed by the FAA may require litigants bringing PAGA claims to arbitrate on an individual basis only. The Court held the *Iskanian* rule is preempted by the FAA to the extent California precludes division of PAGA actions into individual arbitrable claims and non-individual, non-arbitrable claims. Critically, the Court also held that "the correct course" with respect to the non-individual, non-arbitrable PAGA claims of the other alleged aggrieved employees was to dismiss the claims, since the plaintiff lacked standing to prosecute those claims in court while pursuing their individual PAGA claims in arbitration.

Viking River *was not the final word. On the heels of the U.S. Supreme Court decision, the California Supreme Court agreed to review an unpublished California appellate court opinion affirming a state court's refusal to compel arbitration in a representative PAGA action. The state high court will consider the limited issue of whether an individual who has been compelled to arbitrate claims under PAGA "that are 'premised on Labor Code violations actually sustained by'" the plaintiff has standing "to pursue 'PAGA claims arising out of events involving other employees'" in court or in any other agreed forum. (Read more here.)*

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More PAGA developments

Rule 23 criteria don't apply to PAGA actions. An employee need not meet the requirements for certification under Rule 23, including the "manageability" requirement, to assert a PAGA cause of action, the Ninth Circuit ruled, easing the pursuit of representative actions by employees. "Rule 23 class actions and PAGA actions are so conceptually distinct that class action precepts generally have little salience for PAGA actions," according to the federal appeals court. The Ninth Circuit also held that, because PAGA claims seek civil penalties and not damages, the district court abused its discretion in ruling that the PAGA claims were barred because of the employee's failure to sufficiently disclose estimated damages under Rule 26(a). The Ninth Circuit reversed the district court's dismissal of an employee's PAGA claims alleging wage and hour violations.

Individual settlement did not bar PAGA action. A California appeals court held claim preclusion did not bar a room service waiter from bringing a PAGA action against a hotel company after settling individual claims against the company in a prior action. The causes of action were not the same since the harm in the first action was suffered by the employee "individually and to a putative class of former or current employees" of the company, while the harm in the subsequent PAGA action was suffered by the "state and the general public." Additionally, the parties were not the same. In the employee's first lawsuit, filed in her individual capacity, she was the real party in interest, while in the second action the state was the real party in interest. Lastly, there was no privity between the state and the employee in the first action as the state had no interest in the subject matter of that suit.

Voters to decide PAGA's future. A proposed ballot measure to replace PAGA has qualified for California's November 2024 general election. Under the measure, "aggrieved" employees would no longer be able to file a representative action on behalf of themselves and other "aggrieved" employees for certain California Labor Code violations. The replacement measure would eliminate the Labor Commissioner's authority to contract with private organizations or attorneys to assist with enforcement. It also would require the California legislature to provide an unspecified amount of funding for enforcement, require the Labor Commissioner to provide pre-enforcement advice, and allow employers to correct identified violations without penalties, although increased penalties for willful violations would be authorized.

For more on PAGA, see our PAGA Look Back.

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The enforceability of arbitration agreements in California continues to evolve in other areas as well. California Assembly Bill (AB) 51, which took effect in 2020, purports to prohibit employers from requiring employees, as a condition of employment, to sign arbitration agreements concerning disputes arising under the California Labor Code or California Fair Employment and Housing Act. A federal district court found the measure was preempted by the FAA and enjoined enforcement. A divided panel of the U.S. Court of Appeals for the Ninth Circuit reversed in part, vacating the lower court's preliminary injunction. In August 2022, however, the Ninth Circuit withdrew its panel opinion and granted a panel rehearing. The Ninth Circuit's move may indicate that it will conclude the FAA preempts AB 51 in its entirety, potentially giving employers in California the green light to condition employment or employment-related benefits upon an employee's signing an arbitration agreement.

For more on the *Viking River* decision, listen to our podcast:

Viking River Cruises Drops Anchor on PAGA

3. Federal law limits mandatory arbitration, class waivers of certain claims

On March 3, 2022, President Joe Biden signed into law the "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021." The legislation makes predispute arbitration agreements and class or "joint" action waivers invalid and unenforceable as to sexual assault and sexual harassment claims. The Act defines joint-action waiver as an agreement, whether or not part of an arbitration agreement, that would prohibit or waive the right of a party to the agreement to participate in a joint, class, or collective action in a judicial, arbitral, administrative, or other forum. (Read more here.)

Though the Act applies only to "a case which is filed under Federal, Tribal, or State law and relates to the sexual assault and sexual harassment claims" (which means that otherwise valid arbitration agreements remain valid and enforceable with respect to other types of claims), litigation is likely over the scope of the law, particularly where sex assault or sex harassment claims accompany other claims (such as wage and hour class and collective claims) as plaintiffs' counsel bring novel arguments in an effort to evade arbitration agreements and class waivers. It also remains to be seen whether plaintiffs look to "tack on" unfounded sexual harassment or related claims to complaints in a bid to litigate putative class actions over unrelated allegations in court.

Watch for more legislative efforts to restrict the use of mandatory arbitration to resolve employment-related disputes. Numerous measures introduced at the federal level have stalled. A newly divided Congress likely means any sweeping legislation will make no headway. However, there is always the prospect that more limited or incremental measures will garner bipartisan support.

4. Majority view taking hold that *Bristol-Myers* applies to FLSA cases

In its 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, the U.S. Supreme Court held that a state court could not exercise specific personal jurisdiction over nonresident plaintiffs' claims against a nonresident company. Left unresolved by the Court was whether its decision, handed down in a mass tort action, applied to class actions under Federal Rule of Civil Procedure 23 and, of particular note to employers, whether it applied to collective actions, as authorized by the Fair Labor Standards Act (FLSA) and the Age Discrimination in Employment Act (ADEA). In the intervening years, federal district courts have issued conflicting rulings on this issue.

In 2021, both the U.S. Courts of Appeals for the Sixth and Eighth Circuits ruled that *Bristol-Myers* jurisdictional principles *do* apply to bar out-of-state opt-in plaintiffs in collective actions where general jurisdiction does not attach. (The Sixth Circuit covers federal courts in Kentucky, Michigan, Ohio, and Tennessee; the Eighth Circuit covers Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.)

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However, on January 13, 2022, the U.S. Court of Appeals for the First Circuit (covering Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island) issued what is the minority view. It concluded that *Bristol-Myers* does *not* apply to collective actions; meaning, FLSA collectives may include members from outside the state. The First Circuit decision thus created a circuit split. On July 26, 2022, the U.S. Court of Appeals for the Third Circuit became the fourth federal circuit to squarely address the issue. Joining the Sixth and Eighth Circuits, the Third Circuit (which covers Delaware, New Jersey, and Pennsylvania) held that *Bristol-Myers* applies to FLSA collective actions.

The current circuit split solidly favors employers, with three appellate courts concluding that *Bristol-Myers* applies in the FLSA context, limiting employees' ability to pursue massive nationwide wage suits to the state where the employer is incorporated or has its principal place of business. The Supreme Court has refused to review both the First and Sixth Circuit cases, thus preserving (for now) the circuit split as to the applicability of *Bristol-Myers* principles to collective actions. (Read more here.)

Employers seeking to avoid defending FLSA claims on a nationwide scale, away from their principal place of business or state of incorporation, face an emerging consensus that Bristol-Myers *applies to collective, but not class, actions. Meanwhile, other jurisdictional questions are pending. For one, the U.S. Supreme Court is considering the constitutionality of Pennsylvania's "registration statute," which requires corporations that register to do business in Pennsylvania consent to the "general personal jurisdiction" of Pennsylvania. The justices heard oral argument on November 8, 2022. (Read more here.)*

5. Plaintiffs win big in first-ever BIPA trial

On October 12, 2022, a federal jury in Chicago returned a verdict for the plaintiff class in the first-ever case involving claims under the Illinois Biometric Information Privacy Act (BIPA) to go to trial. The BIPA provides that a prevailing party *may* recover actual damages or statutory liquidated damages of $1,000 for each negligent violation and $5,000 for each reckless or intentional violation, plus attorneys' fees and costs, and injunctive relief. The issue of what constitutes a violation for purposes of assessing statutory liquidated damages has not yet been definitively decided by the courts.

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Third Circuit rules *anticipated* participation in collective action is protected

The FLSA's antiretaliation provision protects individuals from reprisal based on an employer's *anticipation* that those individuals will file a consent to join a collective FLSA action, the Third Circuit has ruled. As a matter of first impression, the appeals court also ruled that an individual "testifies" for purposes of the antiretaliation provision (Section 15(a)(3)) when the individual files a consent to join an FLSA collective action.

The plaintiff applied for a position with a subsidiary of his former employer, which was facing an overtime collective action filed by the plaintiff's former coworker. The plaintiff was a similarly situated individual and thus a putative member of the FLSA collective. He had yet to file a consent to join the suit. However, the former employer and the subsidiary knew that he was an anticipated witness and that he was about to file his own consent.

The plaintiff was told that the parent company declined to hire him or any putative members of the collective action "because of that lawsuit." The plaintiff then filed his own collective action alleging that both entities violated Section 15(a)(3) when they refused to hire him and others because they were "about to testify" in the coworker's suit.

The Third Circuit held an individual who *intends* to file a consent to join a collective action is "about to testify" within the meaning of Section 15(a)(3), and that an employer's fair notice of the protected activity could be established by its *anticipation* that the individual would file such a consent or otherwise give relevant testimony.

Read more here.

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In *Rogers v. BNSF Railway*, the jury returned a verdict in favor of a class of truck drivers. The drivers claimed they were fingerprinted when they entered BNSF's railyards to make pickups and deliveries without being provided written notice and without BNSF first obtaining their informed consent. The jury found that the employer recklessly or intentionally violated the BIPA 45,600 times, or one time for each member of the class. The jury was not asked to calculate damages, but instead was asked only for the total number of negligent, reckless, or intentional violations. Shortly after the jury returned its verdict, the trial court entered judgment awarding the class $228 million, which equals $5,000 per class member.

Currently pending before the Illinois Supreme Court are two cases that may significantly impact the scope of potential damages for BIPA violations, particularly as to potential classwide liability.

Both BNSF and the plaintiff have filed post-trial motions, which remain pending at the time of this publication. In part, BNSF has argued that it was entitled to have the jury determine the amount of damages under the statute, if any, particularly given that the statutory language suggests that damages are discretionary, not automatic (something previously noted in dicta by an Illinois appeals court). BNSF has publicly stated that it intends to appeal. (Read more here.)

In other BIPA developments last year, on February 3, 2022, the Illinois Supreme Court ruled that employees' claims for liquidated damages against their employers for violations of the BIPA are not barred by the exclusivity provisions of the Illinois Workers' Compensation Act. (Read more here.) Currently pending before the Illinois Supreme Court are two cases that may significantly impact the scope of potential damages for BIPA violations, particularly as to potential class-wide liability. In one case, which is on consideration by way of a certified question from the U.S. Court of Appeals for the Seventh Circuit, the Illinois Supreme Court will decide when claims under Sections 15(b) and (d) of the BIPA accrue. (Read more here.) Separately, the Illinois Supreme Court will decide whether claims under the BIPA are subject to a one-year or five-year statute of limitations. These decisions could come down at any time.

6. U.S. Soccer Federation settles equal pay claim for $24 million

The U.S. Soccer Federation (USSF) agreed to pay $24 million to resolve allegations of pay discrimination brought by members of the U.S. Senior Women's National Team and, going forward, to compensate members of the women's team equal to their male counterparts. Of the settlement fund, $22 million is allocated to class members and for attorneys' fees and costs. The settlement includes an additional $2 million for a fund to benefit class and collective members in their pursuit of post-playing career goals and charitable efforts related to women's and girls' soccer.

The long-running case began in April 2016, when the players filed a charge with the Equal Employment Opportunity Commission (EEOC). In March 2019, the players filed a class and collective action under the FLSA and state law. The agreement was first announced as a tentative deal in February 2022.

Unfolding within the context of professional sports, the USSF suit was not a typical equal pay case. It presented unique fact questions whether women and men performed "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions," within the meaning of the Equal Pay Act. Moreover, players' total compensation is shaped mostly by external factors, like collective bargaining and the sport's international governing body (which sets the prize money — at a marked gender gap).

An equal pay suit involving a putative class of at least 5,200 current and former corporate employees of Nike, Inc. is perhaps more illustrative of the considerable challenges of resolving equal pay claims on a classwide basis. Employees at Nike world headquarters were paid under four distinct salary bands and held 1,249 different job codes. Nike delegated substantial authority for pay and promotion decisions to managers of the company's many different departments. In late November 2022, a federal magistrate recommended the district court judge deny certification

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to the equal pay class, concluding that the inquiry into alleged pay disparities would be fact-intensive and highly individualized. The aggregated data presented by the plaintiffs "presume commonality, however, it does not present a common mode of proving it," the magistrate said, adding "pursuit of individual claims is the better method to litigate claims of discrimination."

In late December, the Nike plaintiffs filed objections to the magistrate's report and recommendation, which awaits review by the district court. A favorable magistrate ruling, if adopted by the court, will have come after four years of motion practice, exhaustive discovery, and costly expert witnesses. Even when successful, the defense of class certification is an expensive undertaking. And the litigation continues.

The recent wave of pay disclosure laws makes clear that pay equity is a legislative priority at the state and local level. California's Senate Bill 1162, which took effect January 1, 2023, requires companies with at least 15 employees to include pay scales for every job posting. Similar laws have been passed in Colorado, Connecticut, Maryland, and Washington State. Most recently, on December 21, 2022, New York Governor Kathy Hochul signed a pay transparency bill, to take effect in September 2023. These laws also may make it easier for the plaintiff's bar to obtain useful salary information in pursuit of litigation. Therefore, as these measures proliferate, employers in all jurisdictions should make equal pay a compliance priority for 2023.

Follow our Pay Equity Advisor blog for the latest developments in pay equity law and litigation.

7. The ground shifts on scrutiny of FLSA settlements

For 40 years, the great majority of federal courts have followed the U.S. Court of Appeals for the Eleventh Circuit's 1981 decision in *Lynn's Food Stores, Inc. v. U.S.* That decision said FLSA claims may be settled *only* through approval by the U.S. Department of Labor (DOL) or through a lawsuit filed by the individual, in which a court of competent jurisdiction must enter a stipulated judgment after reviewing the proposed settlement for fairness. Just a few years ago, the U.S. Court of Appeals for the Second Circuit agreed with the reasoning of *Lynn's Food*, concluding that parties cannot settle FLSA claims and (in the case of lawsuits) dismiss them — with or without prejudice — without either DOL or court approval. Similarly, the Fourth, Seventh, and Ninth Circuits have noted, either in *dicta* or without substantive discussion, that the FLSA prohibits unsupervised waiver or settlement of claims.

However, a growing number of courts have begun to challenge that obligation, and to conclude that settlement of bona fide FLSA disputes does not require a court's review.

"The potential problem with *Lynn's Food* is that nothing in the text of the FLSA expressly requires court review and approval of settlements," one federal magistrate judge observed in a March 15, 2022, decision. In addition to the fact that the FLSA itself contains no provision requiring court approval of FLSA settlements, the magistrate noted, "in judicially creating a requirement for approval of FLSA settlements, courts are impliedly and improperly giving the impression that somehow the policy considerations and rights protected by the FLSA are more important than other federal statutes." These circumstances have compelled more courts to conclude in recent years that settlement of bona fide FLSA disputes do not require court approval. (Read more here.)

At least in some jurisdictions, parties no longer must undertake the expense of a lawsuit, and the court does not have to burden itself with an ever-growing backlog of litigation, to resolve bona fide FLSA disputes. Unless and until the Supreme Court weighs in, however, the conflict likely will remain.

Meanwhile, the Ninth Circuit in 2022 pushed back on another significant impediment to settlement of claims, affirming the authority of state courts to approve class action settlements in the face of a settlement objector. Absent class members in state-court class actions cannot pursue individual claims in federal court when the class has entered into a settlement releasing all such claims and

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a state court has entered final judgment approving the settlement, the appeals court held. (Read more here.)

Also, in September 2022, the Second and Ninth Circuits issued decisions upholding the use of "incentive" or "service" payments to lead plaintiffs in a class litigation. The Eleventh Circuit had set off a minor firestorm in 2020 when, in a suit brought under the Telephone Consumer Protection Act, it held that such awards are unlawful in Federal Rule of Civil Procedure 23 class actions and vacated a proposed $1.43 million settlement in which nearly 10,000 consumers (out of a potential class of 179,642) submitted claims. (Read more here.) Concern arose about the impact of the decision on the resolution of class actions within the Eleventh Circuit, adding further nuance to the negotiation of settlements and the drafting of settlement agreements, as well as speculation that it would result in even greater judicial scrutiny of class action settlements — particularly wage and hour settlements — by federal courts within the circuit. The decision, however, remains an outlier, with both the Second and Ninth Circuits affirming their prior holdings that Rule 23 does not impose a per se bar on such awards.

Meanwhile, a new appeal pending before the Eleventh Circuit is challenging a federal court's decision invalidating a $10,000 payment to three named plaintiffs in exchange for a general release of claims. The payments were part of a stand-alone agreement, negotiated separately from a settlement resolving an overtime suit involving a class of 1,365 employees. The district court found the payments violate the Eleventh Circuit's bar on service awards to lead plaintiffs. The side agreement, the appeals court said, was merely an improper "workaround" of the prohibition on service payments. On appeal, the employees contend that the negotiated payments are not service awards. While not a direct challenge to the Eleventh Circuit bar on service awards, a successful appeal in the case may chip away at the circuit's overreaching oversight and unwarranted intrusion into parties' private right of contract.

8. A new arrow in the quiver when challenging agency rulemaking

On October 13, 2022, the U.S. Department of Labor (DOL) issued a proposed rule that would restore a "totality-of-the-circumstances" analysis for determining independent contractor status under the FLSA, making it more difficult for organizations to enter into independent contractor relationships. The DOL also announced its intent to propose changes to rules defining white-collar exemptions under the FLSA. Both rule changes would breed confusion, make it more difficult to ensure compliance with the FLSA, and increase employers' risk of class action exposure. However, an end-of-term Supreme Court decision may leave these and other federal agency regulations more vulnerable to constitutional challenge.

In *West Virginia v. Environmental Protection Agency*, issued June 30, 2022, the Court invalidated an Environmental Protection Agency regulation aimed at reducing carbon emissions. The Court did so based on the "major questions" doctrine, which provides that Congress cannot defer significant issues of national policy to an administrative agency unless there is a clear expression of such intent. The decision marked the second time the justices had invoked the major questions doctrine in the Court's 2021-22 term. Six months earlier, the same 6-3 majority relied on the doctrine to invalidate the Occupational Safety and Health Administration's (OSHA) COVID-19 vaccine mandate for private employers, a regulation that would have applied to 84 million U.S. workers.

The majority's reasoning may apply to a host of regulatory activity including, for example, the DOL's efforts to redefine independent contractor status. A court may rule Congress never authorized the DOL's attempts to retrofit the FLSA (passed in 1938) to address the contemporary, seismic shift toward contract work and an exploding gig economy. Other agency regulations affecting the workplace may be subject to "major questions" scrutiny. Indeed, within days of the Court's decision, a restaurant industry group challenging the DOL's "80-20-30" dual jobs rule for tipped workers sought to file a notice of supplemental authority in its ongoing case, asserting that in West Virginia, *the Supreme Court "articulated principles of administrative law and separation of powers" that have a bearing on the litigation.*

West Virginia *also was cited in two ongoing lawsuits seeking to overturn President Joe Biden's executive order increasing the minimum wage rate for employees of federal contractors.* "West Virginia *makes plain both*

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that the major questions doctrine (1) very much does exist and (2) is plainly applicable here," the plaintiffs in one suit told a federal court. In the other case, the plaintiffs argued that the Supreme Court did not expressly limit the reach of the major questions doctrine to administrative agencies; meaning, the doctrine applied to the executive branch, generally, including to actions by the president, with potentially far-reaching implications. (Read more here.)

9. Payroll software cyber-hack spawns wage-hour litigation

On December 11, 2021, timekeeping and payroll software vendor Ultimate Kronos Group suffered a disruption in service following a ransomware attack. The company did not fully restore its software services until January 22, 2022. In the interim, thousands of employers, through no fault of their own, were unable to use the Kronos system to track hours accurately and to timely pay employees. The fallout was a wave of class and collective actions against employers under the FLSA and state wage and hour laws. Healthcare entities, large manufacturers, retailers, and municipal employers were especially hard-hit.

For example, a suit against an automaker alleged that, because the company failed to implement an alternative timekeeping and payroll system following the system outage, nonexempt employees who worked overtime during this period were not paid for all hours worked. Some employees alleged they were not paid at all during certain workweeks following the outage. Ultimately, according to the complaint, thousands of employees were affected. In other Kronos litigation, a group of class actions against a food conglomerate that were consolidated in New York, a federal judge on December 2, 2022, granted preliminary approval to a $12.75 million settlement resolving the wage claims brought on behalf of a combined 70,000 employees.

The Kronos litigations raised disputed questions about what constitutes timely wage payment under the FLSA, plaintiffs' burden to show they were underpaid during the period in question, and the extent of liability for liquidated damages when employers endeavor in good faith to promptly cure inadvertent violations — in many cases, by compensating affected employees more than they ostensibly were owed immediately upon regaining access to the Kronos system.

These cases serve as an important reminder that accurate timekeeping is an inescapable obligation under federal and state wage and hour laws. The cases also caution employers that the use of third-party software in meeting this obligation does not absolve them of potential liability. Moreover, particularly with the concerning rise in cyberattacks, it is imperative for employers to have a backup plan. With counsel, engage in a risk analysis to determine what actions should be taken to prepare for possible outages or other disruptions in an employer's timekeeping system.

10. New York "manual workers" paid biweekly bring deluge of suits

New York Labor Law (NYLL) §191 provides that "manual workers" must be paid on a weekly basis. Hundreds of class actions were filed against New York employers in 2022 by employees who claim they meet the definition of "manual worker" and are entitled to damages for having been paid on a biweekly, rather than weekly basis.

Under New York law, a manual worker is defined as a "mechanic, workingman or laborer." That definition includes employees who spend more than 25 percent of their time engaged in physical tasks, according to the interpretation of the New York Department of Labor. Retail store cashiers, customer service representatives, and clerks at check-cashing establishments have claimed to fall within the definition, asserting that "tending the cash register," unloading and stocking inventory, and setting up floor displays amount to manual labor and that these tasks amount to at least 25 percent of their work.

Employers large and small, across a wide swath of industries, have been targeted for alleged violations of the NYLL's pay frequency requirement. The claims seek penalties in the form of liquidated damages of one-half of an employer's entire payroll for a six-year

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period (New York's statute of limitation), resulting in potentially hundreds of millions of dollars in damages for a single employer.

Much of the litigation stems from *Vega v. CM & Assoc. Constr. Mgt., LLC,* a 2019 decision by the First Department of the New York Appellate Division. The court held a private right of action exists for violations of Section 191. Previously, the overwhelming majority of courts to address the issue had concluded that employees had no right to sue and that the statute was enforced solely by the New York Department of Labor, with maximum fines of $3,000.

Whether Section 191 provides a private right of action remains unsettled. On December 12, 2022, a federal court in New York, in an unpublished decision, rejected an auto parts manufacturer's argument that there is no private right of action and denied its motion to dismiss. Rebutting the employer's contention that the *Vega* case was wrongly decided, the court observed that "since *Vega*, every court in this Circuit to consider that decision has followed its construction of the New York Labor Law." The court also held the employer offered no "persuasive evidence that the state's highest court would reach a different conclusion." In another litigation, a national retailer has filed a motion for interlocutory appeal of a federal court's order denying a motion to dismiss a Section 191 class action. The aim is to secure Second Circuit review, and it petitioned the federal appeals court to ask the state high court to do just that.

A potential split among state appellate courts may prompt the high court to take up the question as well: The Second Department has been asked to consider a state court decision tossing a Section 191 case after concluding that employees *cannot* sue for violations of the pay frequency

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COVID-19 litigation drags on…

As the third calendar year of the COVID-19 pandemic drew to a close, the outbreak of COVID-19-related litigation showed no signs of slowing. Indeed, the second half of 2022 marked a sharp increase in new complaint filings, both single-plaintiff and class actions, challenging employer vaccine mandates.

The most common COVID-19-related class action filings, however, are wage and hour claims, particularly complaints seeking pay for pre-shift time undergoing COVID-19 screening. These claims were asserted in approximately 47 percent of class action suits *not* related to vaccine mandate litigation. Many of these suits are filed in California and allege claims under the California Labor Code or PAGA.

Numerous employers in 2022 were hit with putative class actions seeking reimbursement for expenses incurred while working from home during quarantine (brought mostly in California). Less common were claims that employees were denied a promised "COVID-19" or "responsibility" bonus or that the employer failed to factor those bonuses into the regular rate of pay for purposes of calculating overtime.

About 20 percent of the approximately 120 new class actions we tracked in 2022 related to COVID-19 allege violations of the Worker Adjustment and Retraining Notification Act (WARN) or its state-law counterparts. These lawsuits involved layoffs that arguably were directly attributable to the pandemic or were the result of economic conditions worsened by the lingering pandemic.

See the Fall 2022 issue of the *Class Action Trends Report* for a detailed discussion of the state of COVID-19 litigation in 2022 and beyond.

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provision, putting the Second Department at odds with the First Department's outlier decision in *Vega*.

Certain large employers (with at least 1,000 employees in the state) may be entitled to an exemption from the weekly pay requirement. Employers should confer with counsel about seeking a waiver with the New York Department of Labor to avert future liability. The waiver option is unavailable to smaller employers, however — for whom these lawsuits pose an existential risk. Nor does it help employers that already have been sued and had not obtained a waiver. A waiver has no retroactive effect.

The flood of Section 191 class actions is a reminder of the potential exposure employers can face when a novel interpretation of a state wage and hour law creates an unanticipated cause of action. Employers that violate state laws may unknowingly be at risk of far greater exposure than an enforcement agency fine. A periodic audit of wage and hour practices is essential to ensure compliance with federal, state, and local laws. ■

What to watch for in 2023...

Wage and hour litigation

Highly compensated employees and the salary basis test. Is a supervisor making over $200,000 each year entitled to overtime pay if his compensation is computed on a daily basis (rather than a weekly rate)? The answer depends on whether the FLSA's "highly compensated employee" exemption from overtime requires that employees also be paid on a "salary basis" in order for the exemption to apply. The U.S. Supreme Court is expected to resolve the question in an overtime case brought by an employee of an offshore oil and gas rig. The Court heard oral argument in the case in October 2022 and is expected to issue a decision by June 2023. If the Supreme Court agrees with the Fifth Circuit that daily rate pay is not equivalent to a salary, regardless of how highly compensated the employee is, employers will face increased liability — potentially classwide — for failure to pay overtime. (Read more here.)

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Will "conditional" certification face further demise? In its 2021 decision in *Swales v. KLLM Transport Services, LLC*, the Fifth Circuit rejected the two-stage, "conditional" certification standard commonly applied by courts in collective actions under the FLSA. The decision marked a significant change in how collective actions are litigated in federal courts in Louisiana, Mississippi, and Texas. So far, district courts outside the Fifth Circuit have resisted adopting the *Swales* approach. Will *Swales* make inroads elsewhere in 2023, or will the Fifth Circuit remain an outlier? In December 2022, a Sixth Circuit panel heard oral argument in a case that urges the appeals court to follow the Fifth Circuit's lead. If it does so, we may see other circuits follow in 2023.

Training-related claims. Trending in 2022 were class actions alleging that employees who are otherwise exempt should have been classified as nonexempt during the time they spent training for their positions. The employees reason that they were not engaged in exempt duties in the period in which they were learning how to perform those duties and, thus, should have been paid overtime during that period. Nonexempt employees also are filing suit seeking pay for time spent in *voluntary* training from home to acquire new skills.

Employers also have been sued over attempts to enforce "clawback" agreements against departed employees

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who had agreed to repay the employer for the costs of training if they quit prior to a contractually defined period of time. Such training repayment agreements initially emerged in the financial industry, with high-level employees. More recently, employers have begun to adopt these clawback agreements with lower-paid employees, given the rising costs of employee training and commensurate rise in turnover. Consequently, more such class action lawsuits, brought under a variety of legal theories, may surface.

Compensability of boot-up time. Two federal circuits now have held that the time spent by call center employees turning on employer-provided computers prior to the start of their work shifts is compensable under the FLSA. The Ninth Circuit concluded, in an October 2022 decision, that because the employees' principal duties require the use of a functional computer, turning on their computers at the beginning of their shifts is compensable under the FLSA as an integral and indispensable part of those duties (*unless* the time spent is *de minimis*). In 2021, the Tenth Circuit similarly had found that call center representatives were entitled to be paid for time they spent booting up their work computers and launching software programs prior to clocking into a timekeeping system.

Employees will try to expand these holdings to other circuits, where no contrary decisions have been issued as of yet. The success of the plaintiffs in the Ninth and Tenth Circuits, coupled with the rapid rise of telecommuting across many sectors of the economy, makes it likely employers will be contending with a growing number of boot-up suits.

Employee misclassification. Independent contractor misclassification lawsuits are a perennial litigation target. Organizations will continue to face class actions claims by workers contending they should have been classified as employees and paid accordingly. The law defining independent contractors is continually in flux, and court decisions addressing independent contractor status, and whether misclassification claims can be pursued on a class basis, can be difficult to predict or reconcile.

The good news: defendants scored a major win in the Ninth Circuit last year when the appeals court reversed a district court's decision certifying a Rule 23 class in a misclassification suit under California independent contractor law. Among other findings, the appeals court concluded the plaintiffs could not meet the predominance requirement because individualized inquiries would be needed to determine whether, if the independent contractors were in fact statutory employees, they had worked enough hours to be entitled to overtime. The bad news: the U.S. Department of Labor's anticipated issuance of a revised independent contractor rule in 2023 will further muddy the waters.

The arbitration front

The extent to which employers are able to resolve employment disputes through binding individual arbitration was the subject of much litigation and legislation in 2022. The ongoing push and pull of employers seeking to use arbitration agreements to minimize the disruption and expense of class or otherwise aggregated litigation and plaintiffs' lawyers looking to evade arbitration agreements to bring class, collective, or representative actions in court will persist well into 2023. Two developments in particular are worth noting:

Bellwether arbitration. When thwarted in their efforts to evade arbitration, plaintiffs' attorneys have sought to undermine the efficiencies of arbitration by adopting a strategy of filing hundreds, or even thousands, of individual arbitration demands against an employer. This results in considerable cost to employers, who typically foot the bill. (See "Mass arbitration monkey wrench" in the June 2022 issue of the *Class Action Trends Report.*) However, the Ninth Circuit is set to rule in a consumer case involving a company's efforts to head them off at the pass.

The arbitration agreement at issue in the case provided that, if a plaintiff's attorney files 25 or more individual arbitration demands asserting similar legal claims, the arbitration would unfold in a staged bellwether proceeding. Each party will select five cases to start. If the parties cannot resolve the remaining cases following

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the first round of 10 arbitrations, then they would choose 10 more cases, and so on, until all of the claims are fully resolved (either through an arbitration or a settlement). A district court in California found this provision unconscionable. It reasoned that bellwether arbitration could delay the resolution of consumers' claims and that the provision presented potential statute of limitations concerns. Moreover, the agreement lacked mutuality, according to the court. While the company was free to use a single law firm of its choice for any number of arbitrations, consumers represented by a single firm were subjected to the mass arbitration clause.

A ruling for the appellants in the Ninth Circuit could validate the use of bellwether provisions in arbitration agreements[.]

On appeal, the company argued that bellwether arbitration is more efficient, can guide the parties to a global resolution of the claims, and can reduce the settlement pressure on defendants lest they are forced "to pay millions of dollars in arbitration fees without regard to the merits of the claims." A decision is expected in 2023. A ruling for the appellants in the Ninth Circuit could validate the use of bellwether provisions in arbitration agreements, a useful safeguard to ensure arbitration agreements meet their objective of facilitating individual resolution of disputes.

SCOTUS to consider automatic stays. The U.S. Supreme Court will decide whether a case in federal district court should be stayed automatically when one of the parties has appealed the court's order denying a motion to compel arbitration of the dispute. The U.S. Courts of Appeals for the Third, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits have ruled that district courts must halt the proceedings when a party has filed a "non-frivolous" appeal challenging a decision denying a motion to compel arbitration. They reasoned that a court no longer has jurisdiction over the matter once such an appeal is filed. However, the Second, Fifth, and Ninth Circuits have held that district courts have the discretion to decide on a case-by-case basis whether to put the proceedings on hold or continue with the litigation — potentially moving forward with costly discovery and motions — while the appeal is pending. The justices will resolve this 6-3 circuit court split in a consumer class action case filed in a federal district court in California. (Read more here.)

Data privacy and security

In light of the massive BIPA verdict in *Rogers v. BNSF Railway* (noted above), BIPA litigation is not likely to go away anytime soon. In addition, novel uses of biometrics are likely to further fuel litigation — particularly as plaintiffs' counsel continue to push the boundaries regarding the types of technologies they target. Such uses also have sparked a rapidly changing legal landscape, expanding well beyond the Illinois epicenter. (Our Biometric Law Map shows the state-by-state spread of laws related to biometric information.)

The sharp increase in data-privacy-related class action lawsuits in 2022, however, was not solely BIPA-driven. Actions arising from data breach incidents and a wave of suits under the federal Video Privacy Protection Act drove much of the new litigation. Between February and October 2022, at least 47 proposed class actions were filed alleging transfers of "personal video consumption data from online platforms to Facebook without their consent." In addition, healthcare entities were hard-hit by lawsuits challenging the use of online tracking technologies on their websites or mobile apps. The lawsuits allege that patient data is being shared from patient portals and other websites, in violation of the Health Insurance Portability and Accountability Act. (Read more here.)

With rapidly advancing technologies, new laws, an increasingly rigorous regulatory environment, and an ongoing crime wave of cyberattacks, the surge in class

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Follow the Jackson Lewis Workplace Privacy, Data Management & Security Report blog to stay on top of new developments impacting workplace privacy legislation, regulation, and litigation.

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litigation related to data privacy and security will show no sign of receding in 2023.

ERISA litigation

Recent years have seen an avalanche of class actions challenging retirement plan investments and the management of and fees associated with defined contribution plans. The number and pace at which these complaints are filed continue to accelerate.

ERISA class actions can pack a particularly harsh punch. They seek damages in the range of hundreds of millions of dollars and typically settle for multi-millions of dollars, with settlements often reaching eight figures. According to Lex Machina data through mid-December 2022, the top 10 ERISA settlements last year amounted to a combined $118.5 million.

As the filing of these cases accelerates, the legal landscape shifts. In January 2022, the U.S. Supreme Court issued an ERISA decision offering some guidance as to pleading standards, but not enough to avoid conflicting interpretations by circuit courts in 401(k) fee cases since. (Read more here.) Meanwhile, plaintiffs' counsel are taking aim at plan fiduciary conduct, placing all fiduciaries and plan sponsors at risk of becoming defendants in this type of litigation, with no clear roadmap from the courts. ■

Emerging issues, new classwide threats

The workplace is undergoing rapid change. Moreover, profound social changes outside the workplace directly impact employers. Consider these recent developments:

- A surge in religious accommodation claims, largely attributable to lawsuits opposing mandatory COVID-19 vaccination, but certain to be asserted with respect to myriad other religious accommodation requests;
- A slew of new wage and hour and data breach suits arising from the unprecedented expansion of remote work — and an uptick in disability accommodation claims where work-from-home requests are denied;
- The backlash against diversity, equity, and inclusion initiatives, as reflected in "anti-woke" legislation and a rise in "reverse" discrimination claims;
- Expanded legal protections for pregnant and breastfeeding employees; and
- Growing opposition to noncompete agreements.

All of these changes have the potential to spark a wave of litigation. Moreover, to the extent these changes, and employers' policies and practices in response to these changes, can affect employees on a wider scale, they can fuel class litigation. To minimize the risk, it is essential for employers to stay continually apprised and to have an effective compliance strategy in place. ■

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February 21, 2023	Workplace Law Symposium: The Year Ahead (Raleigh, NC)
March 16, 2023	A Day in the Life of a Pension and Employee Benefits Attorney: Long Island Workplace Law Breakfast Series

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