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# Workplace Class Action Litigation

REPORT



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Seyfarth Shaw LLP

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Dear Clients:

The last few years have seen a transformation in class action and collective action litigation involving workplace issues. This came to a head in 2014 to 2017 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 2018 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 2017, and analyzes the most significant settlements over the past twelve 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 2017 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 1,408 decisions analyzed in the Report.

The cases decided in 2017 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, Mary Kay Klimesh, 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, Tom Wybenga, and Kenwood C. Youmans.

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 2018

# 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., *Monroe, et al. v. FTS USA, LLC*, 860 F.3d 389 (6th Cir. 2017)). If a decision is unavailable in bound format, we have utilized a LEXIS cite from its electronic database (e.g., *Dolemba, et al. v. Kelly Services, Inc.*, 2017 U.S. Dist. LEXIS 13508 (N.D. Ill. Jan. 31, 2017)). 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. 29, 2017)).

## 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.
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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 .....	1
A.	Executive Summary .....	1
B.	Key Trends Of 2017 .....	1
C.	Significant Trends In Workplace Class Action Litigation In 2017 .....	1
(i)	Higher Class Action Settlement Numbers In 2017 .....	3
(ii)	Class Certification Trends In 2017 .....	7
(iii)	Governmental Enforcement Litigation Trends In 2017 .....	15
(iv)	The Impact Of U.S. Supreme Court Rulings.....	18
D.	Complex Employment-Related Litigation Trends In 2017 .....	22
E.	Likely Trends For The Future Of Workplace Class Actions In 2018 .....	24
F.	Conclusion.....	28
II.	SIGNIFICANT CLASS ACTION SETTLEMENTS IN 2017 .....	31
A.	Top Ten Private Plaintiff-Initiated Monetary Settlements .....	31
B.	Top Ten Government-Initiated Monetary Settlements.....	37
C.	Noteworthy Injunctive Relief Provisions In Class Action Settlements .....	38
III.	SIGNIFICANT FEDERAL EMPLOYMENT DISCRIMINATION CLASS ACTION AND EEOC PATTERN OR PRACTICE RULINGS.....	41
A.	Cases Certifying Or Refusing To Certify Employment Discrimination Class Actions Under Title VII Of The Civil Rights Act Of 1964.....	41
B.	EEOC Pattern Or Practice Cases .....	46
IV.	SIGNIFICANT COLLECTIVE ACTION RULINGS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT .....	115
A.	Cases Certifying Or Refusing To Certify ADEA Collective Action Claims.....	115
B.	Other Federal Rulings Affecting The Defense Of ADEA Collective Actions .....	119
(i)	Arbitration Issues In ADEA Collective Actions.....	119
(ii)	Discovery In ADEA Collective Action Litigation .....	120
(iii)	Disparate Impact Issues In ADEA Collective Actions .....	120
(iv)	Disqualification Issues In ADEA Collective Action Litigation .....	123
(v)	Procedural Issues In ADEA Collective Action Litigation .....	124
(vi)	Release And Notice Issues In ADEA/EPA Collective Action Litigation .....	124
V.	SIGNIFICANT COLLECTIVE ACTION RULINGS UNDER THE FAIR LABOR STANDARDS ACT .....	127
A.	Cases Certifying Or Refusing To Certify FLSA Collective Action Claims .....	128
B.	Other Federal Rulings Affecting The Defense Of FLSA Collective Actions .....	270
(i)	All Writs Act Issues In Wage & Hour Class Actions.....	271
(ii)	Amendments And Counterclaims In FLSA Collective Actions.....	272
(iii)	Appeals In Wage & Hour Class Actions.....	273

(iv)	Application Of <i>Twombly</i> Pleading Standards In FLSA Collective Actions .....	277
(v)	Arbitration Of Wage & Hour Class Claims .....	278
(vi)	Awards Of Attorneys' Fees And Costs In FLSA Collective Actions.....	304
(vii)	Communications With Class Members In FLSA Collective Actions .....	307
(viii)	Concurrent State Law Claims In Wage & Hour Class Actions .....	308
(ix)	Discovery In FLSA Collective Actions .....	319
(x)	DOL Wage & Hour Enforcement Actions.....	322
(xi)	Exemption Issues In FLSA Collective Actions .....	328
(xii)	FLSA Collective Actions For Donning And Doffing.....	337
(xiii)	Foreign Worker Issues In Wage & Hour Class Actions .....	337
(xiv)	Independent Contractor Issues In Wage & Hour Class Actions.....	338
(xv)	Individual Executive Liability In FLSA Collective Actions.....	347
(xvi)	Issues With Interns, Volunteers, And Students Under The FLSA .....	349
(xvii)	Issues With Opt-In Rights In Wage & Hour Class Actions.....	350
(xviii)	Joint Employer, Employee Status, And Employer Status Issues In FLSA Collective Actions .....	352
(xix)	Liquidated Damages In FLSA Collective Actions .....	357
(xx)	Mootness In FLSA Collective Actions .....	358
(xxi)	Motor Carrier Act Issues In FLSA Collective Actions.....	358
(xxii)	Pay Policies And Bonuses In FLSA Collective Actions .....	361
(xxiii)	Preemption And Immunity Issues In FLSA Collective Actions .....	371
(xxiv)	Procedural And Notice Issues In FLSA Collective Actions.....	375
(xxv)	Public Employee FLSA Collective Action Litigation .....	386
(xxvi)	Record-Keeping Claims In Wage & Hour Class Actions .....	392
(xxvii)	Sanctions In Wage & Hour Class Actions.....	392
(xxviii)	Settlement Approval Issues In Wage & Hour Class Actions And Collective Actions .....	394
(xxix)	Settlement Bar And Estoppel Issues In Wage & Hour Class Actions .....	407
(xxx)	Statute Of Limitations Issues In Wage & Hour Class Action Litigation .....	410
(xxxi)	Stays In Wage & Hour Class Actions.....	412
(xxxii)	Tip Pooling And Tip Credit Claims Under The FLSA.....	414
(xxxiii)	Tolling Issues In Wage & Hour Class Actions.....	420
(xxxiv)	Training Time Issues In Wage & Hour Class Actions .....	422
(xxxv)	Travel Time Issues In Wage & Hour Class Action Litigation .....	423
(xxxvi)	Trial And Damages Issues In FLSA Collective Actions .....	425
(xxxvii)	Venue Issues In FLSA Collective Actions.....	426

	(xxxviii)	Willfulness In FLSA Collective Actions.....	426
VI.		SIGNIFICANT CLASS ACTION RULINGS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 .....	429
	A.	Cases Certifying Or Refusing To Certify ERISA Class Actions.....	429
	B.	Other Federal Rulings Affecting The Defense Of ERISA Class Actions .....	442
	(i)	Administrative Fee Issues In ERISA Class Actions .....	442
	(ii)	Attorneys' Fees And Costs In ERISA Class Actions.....	442
	(iii)	Breach Of Fiduciary Duty Issues In ERISA Class Actions .....	444
	(iv)	Damages Issues In ERISA Class Actions.....	450
	(v)	Discovery Issues In ERISA Class Actions .....	450
	(vi)	DOL And PBGC ERISA Enforcement Litigation .....	451
	(vii)	ERISA 401(k) Class Actions.....	452
	(viii)	ERISA Class Action Litigation Over Retiree/Employee Benefits .....	457
	(ix)	ERISA Stock Drop Class Actions.....	462
	(x)	ESOP Issues In ERISA Class Actions .....	464
	(xi)	Independent Contractor Issues In ERISA Class Actions .....	465
	(xii)	Judgments In ERISA Class Actions.....	466
	(xiii)	Preemption, Procedural, And Coverage Issues In ERISA Class Actions .....	466
	(xiv)	Tolling, Statute Of Limitations, And Exhaustion Requirements In ERISA Class Actions.....	468
VII.		SIGNIFICANT STATE LAW CLASS ACTION RULINGS .....	473
	A.	Employment Discrimination Rulings .....	474
	B.	Wage & Hour Rulings.....	475
	C.	Rulings In Breach Of Employment Contract/Miscellaneous Workplace Claims.....	497
	D.	Other State Law Rulings Affecting The Defense Of Workplace Class Action Litigation.....	504
VIII.		RULINGS ON THE CLASS ACTION FAIRNESS ACT .....	553
IX.		OTHER FEDERAL RULINGS AFFECTING THE DEFENSE OF WORKPLACE CLASS ACTION LITIGATION .....	587
	(i)	ADA Class Actions .....	587
	(ii)	Alien Tort Statute And Trafficking Victims Class Actions.....	593
	(iii)	Anti-Injunction Act Issues In Class Actions.....	594
	(iv)	Appeals In Class Action Litigation.....	594
	(v)	Application Of Tolling Principles In Class Actions .....	597
	(vi)	Appointment, Selection, And Removal Of Lead Counsel In Class Actions .....	598
	(vii)	Ascertainability Under Rule 23.....	599

(viii)	Attorneys' Fee Awards In Class Actions .....	602
(ix)	Bankruptcy Issues In Class Actions .....	613
(x)	Breach Of Contract Class Actions.....	614
(xi)	Civil Rights Class Actions.....	618
(xii)	Class Actions Involving Unions .....	619
(xiii)	Class Definition Issues .....	622
(xiv)	Class-Wide Proof And Class-Wide Damages In Class Actions.....	623
(xv)	Collateral Estoppel, <i>Res judicata</i> , And Settlement Bar Concepts Under Rule 23 .....	625
(xvi)	Commercial Free Speech Issues In Class Actions.....	629
(xvii)	Consolidation Issues In Class Actions .....	630
(xviii)	Consumer Fraud Class Actions .....	630
(xix)	COBRA Class Actions.....	633
(xx)	Data Breach Class Actions.....	634
(xxi)	Decertification Under Rule 23 .....	640
(xxii)	Default Judgments In Class Actions .....	642
(xxiii)	Discovery Issues In Class Actions .....	642
(xxiv)	Disqualification Of Counsel In Class Actions .....	650
(xxv)	Employee Testing Issues In Class Actions .....	651
(xxvi)	Experts In Class Action Litigation.....	652
(xxvii)	FACTA And FDCPA Class Actions .....	655
(xxviii)	Family & Medical Leave Act Class Actions.....	659
(xxix)	FCRA Class Actions.....	661
(xxx)	Federal Tort Claims Act Class Actions .....	671
(xxxi)	Foreign Worker And Labor Issues Class Actions .....	671
(xxxii)	Government Enforcement Litigation.....	672
(xxxiii)	Immigration Class Actions.....	674
(xxxiv)	Industrial Injury Class Actions .....	677
(xxxv)	Injunctions In Class Actions .....	677
(xxxvi)	Intervention Issues In Class Actions .....	680
(xxxvii)	Issue Certification Under Rule 23 .....	681
(xxxviii)	Issues With The Judicial Panel On Multi-District Litigation In Class Actions .....	684
(xxxix)	Jurisdiction Issues In Class Action Litigation .....	686
(xl)	Litigation Over Class Action Settlement Agreements And Consent Decrees .....	687
(xli)	Medical Monitoring Class Actions .....	689

(xlii)	Mootness Issues In Class Action Litigation.....	689
(xliiii)	Multi-Party Litigation Over Modification Of Employee/Retirement Benefits.....	693
(xliv)	Non-Workplace Class Action Arbitration Issues .....	700
(xlv)	Notice Issues In Class Actions.....	712
(xlvi)	Objectors And Opt-Out Issues In Class Actions .....	713
(xlvii)	OFCCP Enforcement Actions .....	715
(xlviii)	Preemption Issues In Class Actions.....	716
(xlix)	Preemptive Motions To Strike Or Dismiss Class Allegations .....	717
(l)	Privacy Class Actions.....	722
(li)	Procedural Issues And Proof Requirements In Rule 23 Class Actions .....	726
(lii)	Public Employee Class Actions.....	731
(liiii)	Sanctions, Contempt, And Unethical Misconduct In Class Action Litigation .....	732
(liv)	Service Awards And Costs In Class Actions.....	739
(lv)	Settlement Administration Issues In Class Actions.....	741
(lvi)	Settlement Approval Issues In Class Actions .....	743
(lvii)	Settlement Enforcement Issues In Class Actions .....	749
(lviii)	Special Masters In Class Actions.....	751
(lix)	Standing Issues In Class Actions.....	753
(lx)	Statute Of Limitations Issues In Class Actions .....	764
(lxi)	Stays In Class Action Litigation.....	765
(lxii)	TCPA Class Actions .....	766
(lxiii)	The Adequacy Of Representation Requirement For Class Certification.....	774
(lxiv)	The <i>Cy Pres</i> Doctrine In Class Actions .....	775
(lxv)	The Numerosity Requirement For Class Certification .....	776
(lxvi)	The Predominance Requirement For Class Certification .....	777
(lxvii)	The Typicality Requirement For Class Certification.....	779
(lxviii)	Trial And Post-Trial Issues In Class Action Litigation .....	780
(lxix)	Venue Issues In Class Actions.....	780
(lxx)	WARN Class Actions.....	782
(lxxi)	Workplace Antitrust Class Actions .....	788
(lxxii)	Workplace Class Action Arbitration Issues .....	791
APPENDIX I – TABLE OF 2017 WORKPLACE CLASS ACTION AND COLLECTIVE ACTION LITIGATION RULINGS.....		801





# 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 increased exponentially over the past decade. More often than not, class actions pose unique "bet-the-company" risks for employers. 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 adversely impact a corporation's business operations, jeopardize or cut short the careers of senior management, and cost millions of dollars to defend. For these reasons, risks from workplace class actions are at the top of the list of challenges that keep business leaders up late at night.

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. 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 in 2017, governmental enforcement litigation pursued by the U.S. Equal Employment Commission ("EEOC") and the U.S. Department of Labor ("DOL") continued to manifest an aggressive "push-the-envelope" agenda by agencies, with regulatory oversight of workplace issues continuing as a high priority.

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 2018 is the continuing evolution in federal policies based on a new political party occupying the White House for part of 2017. Furthermore, while changes to government priorities started on Inauguration Day and are on-going, others are being carried out by new leadership at the agency level who were appointed in the fourth quarter of 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 2017*

An overview of workplace class action litigation developments in 2017 reveals four key trends.

First, the monetary value of the top workplace class action settlements rose dramatically in 2017. These numbers increased over past years, even after they had reached all-time highs in 2014 to 2016. The plaintiffs' employment class action bar and governmental enforcement litigators were exceedingly successful in monetizing their case filings into large class-wide settlements, and they did so at decidedly higher values than in previous years. The top ten settlements in various employment-related class action categories totaled \$2.72 billion in 2017, an increase of over \$970 million from \$1.75 billion in 2016. Furthermore, settlements of employment discrimination class actions experienced over a three-fold increase in value; statutory workplace class actions saw nearly a five-fold increase; and government enforcement litigation registered nearly a ten-fold increase. Whether this is the beginning of a long-range trend or a short-term aberration remains to be seen as

2018 unfolds, but the determinative markers suggest this upward trend will rise further in 2018, at least insofar as private plaintiff class actions are concerned.

Second, while federal and state courts issued many favorable class certification rulings for the plaintiffs' bar in 2017, evolving case law precedents and new defense approaches resulted in better outcomes for employers in opposing class certification requests. 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 employment discrimination and ERISA class actions, the plaintiffs' bar scored well in securing class certification rulings in federal courts in 2017 (over comparative figures for 2016). Class actions were certified in significant numbers in "magnet" jurisdictions that continued to issue decisions that encourage – or, in effect, force – the resolution of large numbers of claims through class-wide mechanisms. Yet, while the sheer volume of wage & hour certification decisions in 2017 increased as compared to last year, employers actually fared better in litigating those class certification motions in federal court than last year. Of the 257 wage & hour certification decisions in 2017, plaintiffs won 170 of 233 conditional certification rulings (approximately 73%), but lost 15 of 24 decertification rulings (approximately 63%). By way of comparison, there were 224 wage & hour certification decisions in 2016, where plaintiffs won 147 of 195 conditional certification rulings (approximately 76%) and lost 13 of 29 decertification rulings (approximately 45%). In sum, employers beat slightly more first stage conditional certification motions in 2017, and dramatically increased their odds – a jump of 18% – of fracturing cases with successful decertification motions.

Third, filings and settlements of government enforcement litigation in 2017 did not reflect a head-snapping pivot from the ideological pro-worker (or anti-big business) outlook of the Obama Administration to a pro-business, less regulation/litigation viewpoint of the Trump Administration. Instead, as compared to 2016, government enforcement litigation actually increased in 2017. As an example, the EEOC alone brought 184 lawsuits in 2017 as compared to 86 lawsuits in 2016. Further, the settlement value of the top ten settlements in government enforcement cases jumped dramatically – from \$52.3 million in 2016 to \$485.25 million in 2017. The explanations for this phenomenon are wide and varied, and include the time-lag between Obama-appointed enforcement personnel vacating their offices and Trump-appointed personnel taking charge of agency decision-making power; the number of lawsuits "in the pipeline" that were filed during the Obama Administration that came to conclusion in the past year; and the "hold-over" effect whereby Obama-appointed policy-makers remained in their positions long enough to continue their enforcement efforts before being replaced in the last half of 2017. This trend is critical to employers, as both the 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 2018 opens, it appears that the content and scope of enforcement litigation undertaken by the DOL and the EEOC in the Trump Administration will tilt away from the pro-employee/anti-big business mindset of the previous Administration. Trump appointees at the DOL and the EEOC are slowly but surely "peeling back" on positions previously advocated under the Obama Administration. As a result, it appears inevitable that the volume of government enforcement litigation and value of settlement numbers from those cases will decrease in 2018. The ultimate effect, however, may well prompt the private plaintiffs' class action bar to "fill the void" and expand the volume of workplace litigation pursued against employers over the coming year as the DOL and the EEOC adjust their litigation enforcement activities.

Fourth and finally, class action litigation increasingly has been shaped and influenced 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 – and issued more rulings – that have impacted the prosecution and defense of class actions and government enforcement litigation. The past year continued that trend, with several key decisions on complex employment litigation and class action issues that were arguably more pro-business than decisions in past years. More cases also were accepted for review in 2017 that are positioned for rulings in 2018, including what may be the most high-stakes issue impacting employers since the *Wal-Mart* ruling in 2011 – the *Epic Systems*, *Murphy Oil*, and *E & Y* trilogy of cases on the legality of workplace arbitration agreements with class action waivers. The ruling expected in the *Epic System*, *Murphy Oil*, and *E & Y* cases in 2018 may well change the class action playing field in profound ways. Coupled with the appointment of Justice Neil Gorsuch in 2017 and potential additional appointments to the Supreme Court by President Trump in 2018 and beyond, litigation dynamics may well be re-shaped in ways that further change the playbook for prosecuting and defending class actions.

## C. Significant Trends In Workplace Class Action Litigation In 2017

### (i) Higher Class Action Settlement Numbers In 2017

As measured by the top ten largest case resolutions in various workplace class action categories, overall settlement numbers increased exponentially in 2017 as compared to 2016.

This continued the reversal of a trend that began with the U.S. Supreme Court's decision in *Wal-Mart* 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.

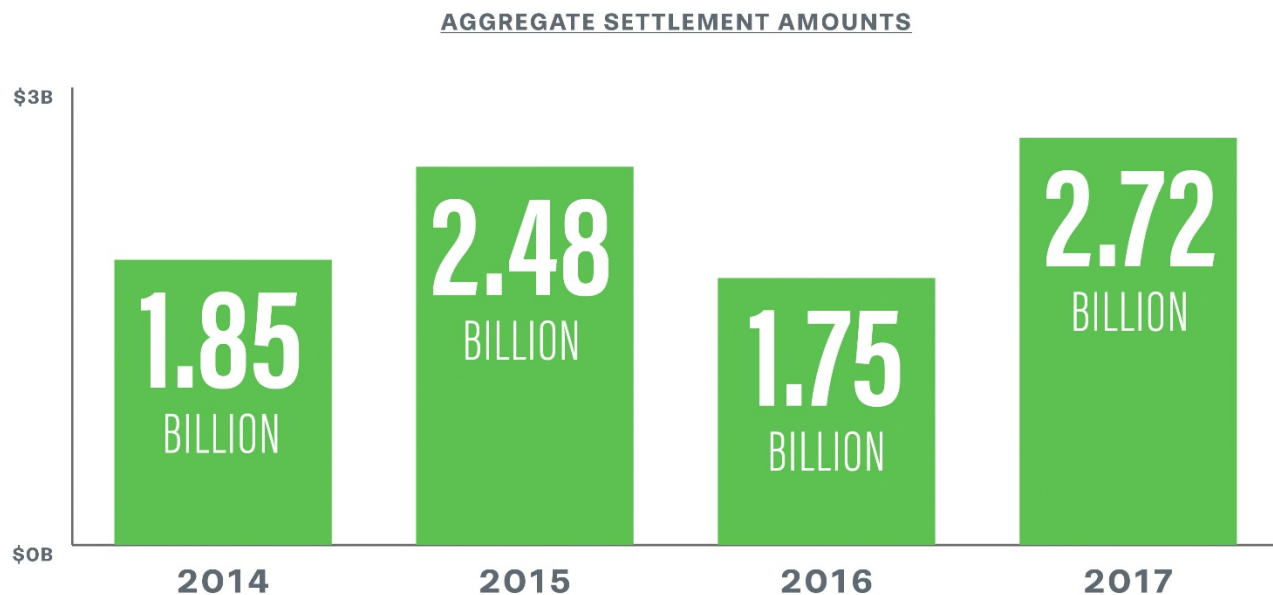
The settlement statistics for 2017 underscore how the plaintiffs' bar has successfully "found a way" around the impediments to transforming their case filings into large settlements on a class-wide basis. This also reflects a process whereby there has been a maturing of case architecture considerations, as plaintiffs' lawyers have "re-booted" their strategic approaches to take account of *Wal-Mart*, and crafted refined class certification theories with better chances of success.

That phenomenon is still being played out, as well as manifesting itself in settlement dynamics.

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

The 2017 figure also eclipsed the settlement numbers of 2015, which were then at the all-time high of \$2.48 billion.

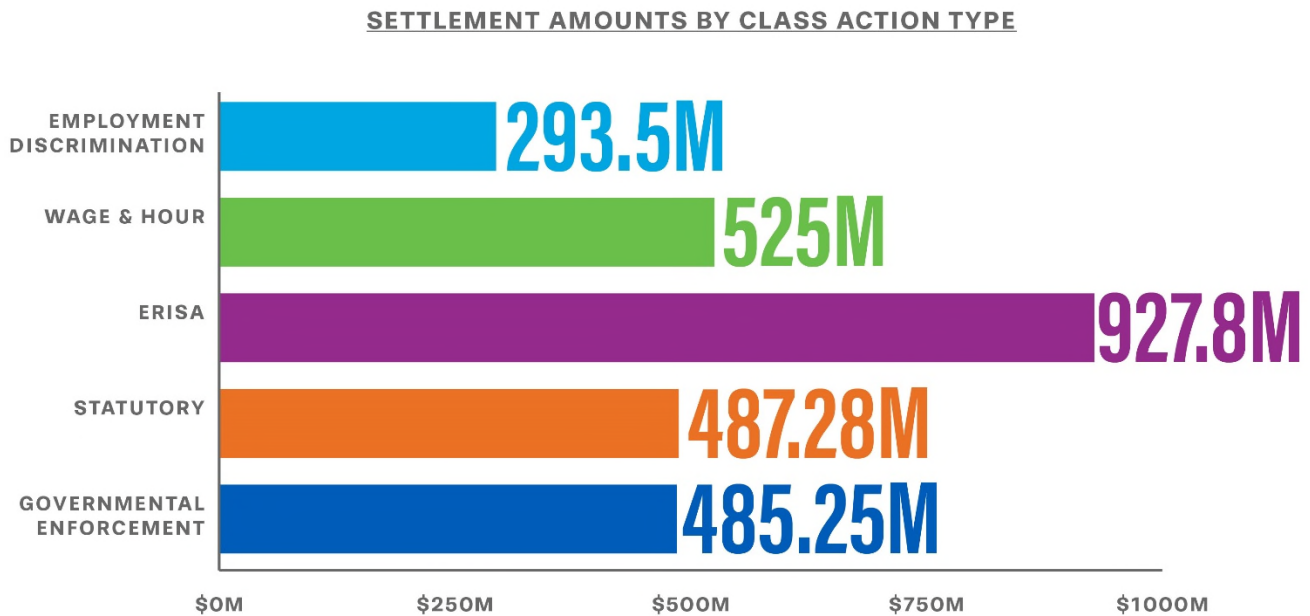
The following graphic shows this trend:



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

In 2017, there was a slight downward trend for the value of wage & hour class action settlements, and significant increases across-the-board for resolutions of class actions involving employment discrimination, statutory workplace laws, and ERISA class actions, as well as governmental enforcement litigation.

This phenomenon is shown by the following chart for 2017 settlement numbers:

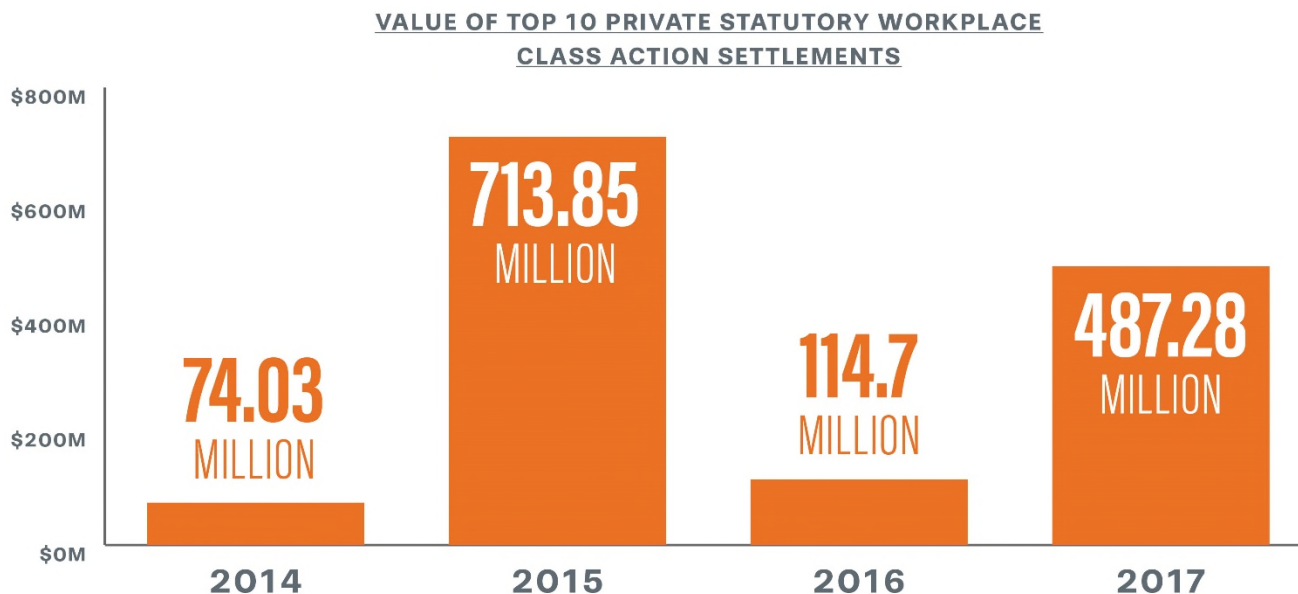


By type of case, settlements values in employment discrimination class actions, private plaintiff statutory workplace class actions, and government enforcement cases experienced the most significant increases.

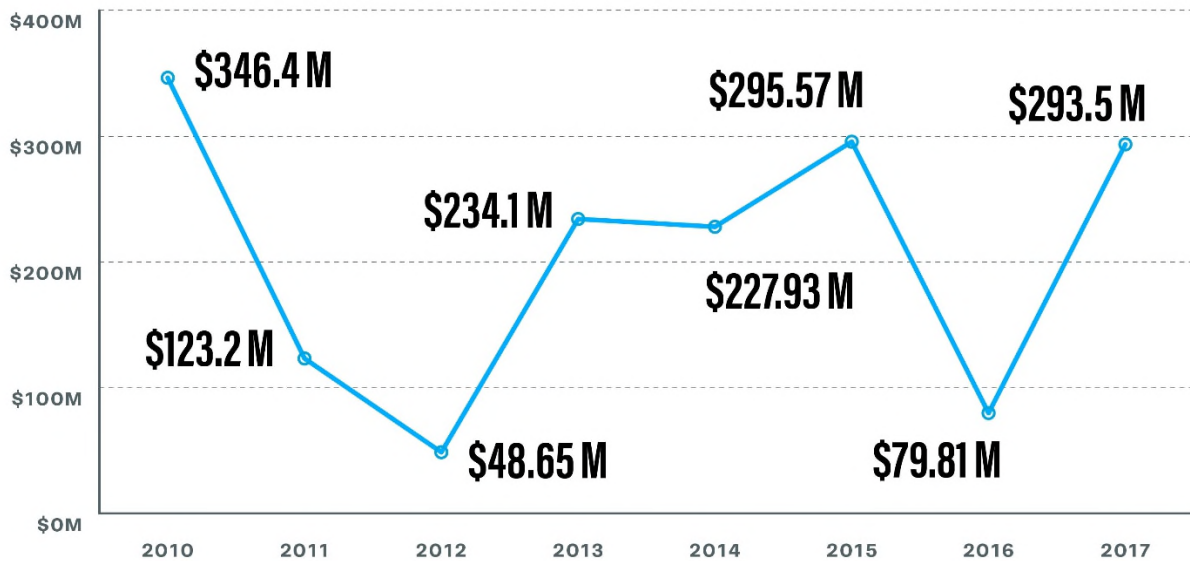
The top ten settlements in the private plaintiff statutory class action category (e.g., cases brought for breach of contract for employee benefits, and workplace antitrust laws and statutes such as the Fair Credit Reporting Act or the Worker Adjustment and Retraining Notification Act) totaled \$487.28 million.

This figure increased from \$114.7 million in 2016.

The following chart shows this nearly five-fold increase:



Most telling, however, the reversal of the “Wal-Mart effect” is shown by the pattern for employment discrimination class action settlements in 2017, as well as a comparison of the settlement figures with previous settlement activity over the last decade. This trend is illustrated in the following chart:



**VALUE OF TOP 10 EMPLOYMENT DISCRIMINATION CLASS ACTION SETTLEMENTS**

In 2017, the value of the top ten largest employment discrimination class action settlements of \$293.5 million was the second highest figure since 2010,<sup>1</sup> and bucked 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. On a comparative basis, the settlement figure for 2017 was the third highest over the past eight years.

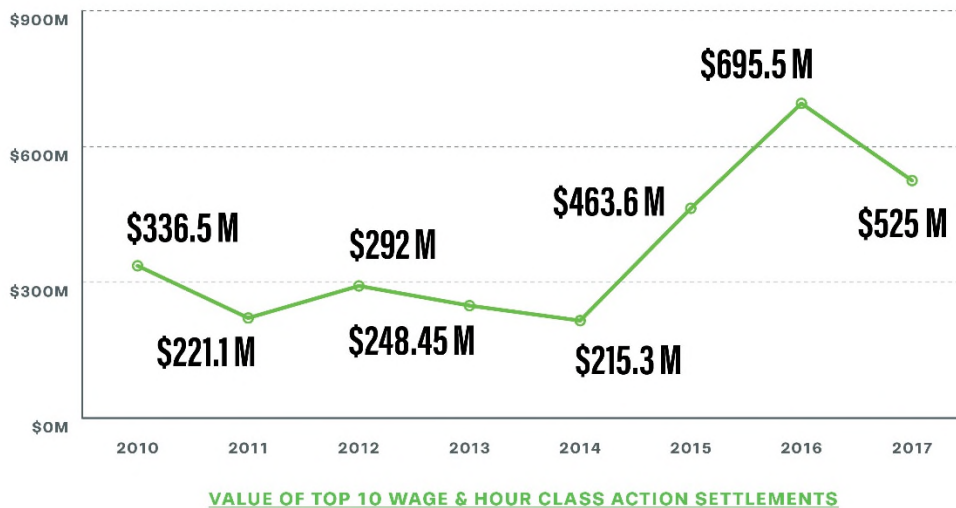
This trend, however, did not hold for wage & hour class action settlements. In 2017, the value of the top ten wage & hour settlements was \$525 million, a decrease of over \$170 million from 2016. However, when analyzed over the past eight years, the figure of \$525 million actually was the second highest annual total in that time period.

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.<sup>2</sup>

<sup>1</sup> An analysis of class action settlement activity is discussed in Chapter II of this Report. The total of \$293.5 million in 2017 was the second highest 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: 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 second lowest total in 2017 since the *Wal-Mart* ruling.

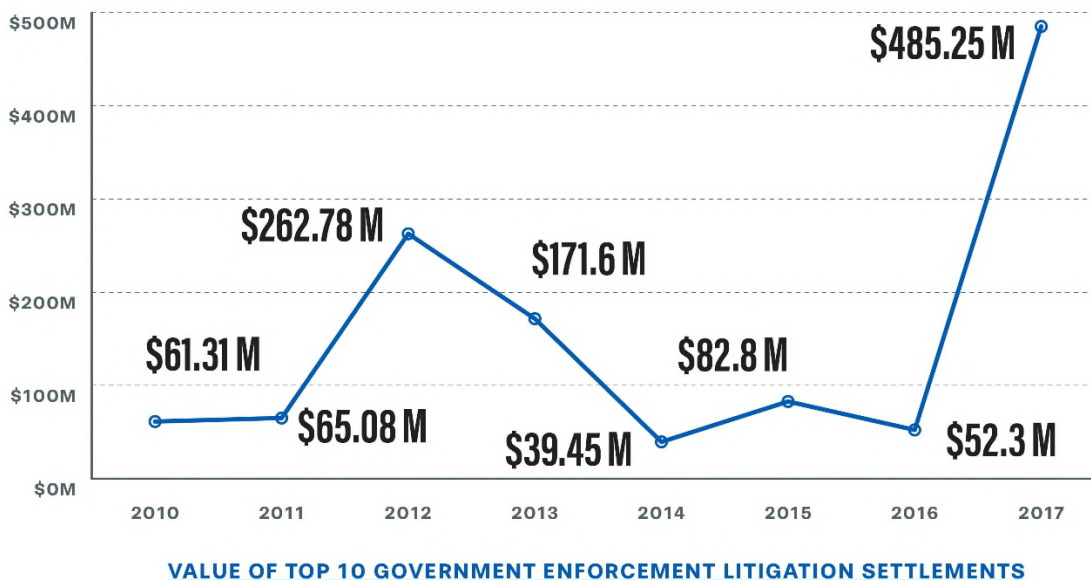
<sup>2</sup> By comparison, the top ten wage & hour class action settlements in 2015 totaled \$463.6 million, compared to \$215.3 million in 2014 and \$248.45 million in 2013. The figure of \$695.5 million in 2016 is the highest amount over the last decade.

This trend is illustrated by the following chart:



These settlement numbers reflect that *Wal-Mart* has had far less of an impact in this substantive legal area, as FLSA settlements are not explicitly tied to the concepts on class certification addressed in *Wal-Mart* (and instead, are based on the standards under 29 U.S.C. § 216(b)).

Relatedly, the top ten settlements in government enforcement litigation experienced a booming upward arc, as they increased nearly ten-fold from \$52.3 million in 2016 to \$485.25 million in 2017. By comparison, the top ten settlements in 2016 represented a slight decrease even from 2015, when settlements hit one of their lowest points in the past eight years.<sup>3</sup> This trend is illustrated by the following chart of settlements from 2010 to 2017:



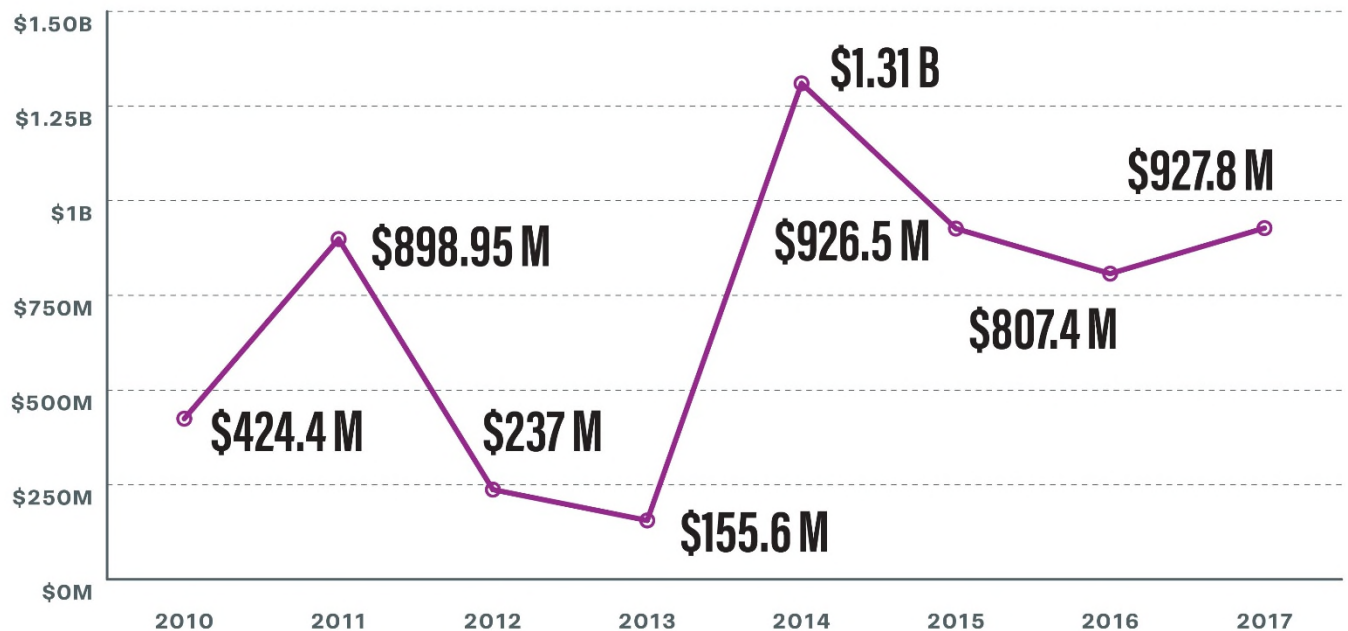
<sup>3</sup> The total for the top ten government enforcement litigation settlements was \$82.8 million in 2015, compared to \$39.45 million in 2014, \$171.6 million in 2013, and \$262.78 million in 2012. Other than in 2014 (when governmental settlements hit their lowest point in the last decade at \$39.45 million), the value of the top ten settlements in 2016 was the second lowest figure for the past decade.

ERISA class action settlements also were up in 2017, as the top ten settlements totaled \$927.8 million. This figure represented an increase from \$807.4 million in 2016.

Further, ERISA settlements for the two-year period of 2016 and 2017 were a combined \$1.73 billion.

While the 2016 aggregate settlement number was nearly six times greater than in 2013,<sup>4</sup> it entailed a significant decrease from 2014 (when settlements were \$1.31 billion).

This trend is illustrated by the following chart of settlements from 2010 to 2017:



**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, the impact of the Trump Administration's labor and employment enforcement policies, case filing trends of the plaintiffs' class action bar, and class certification rulings

## (ii) Class Certification Trends In 2017

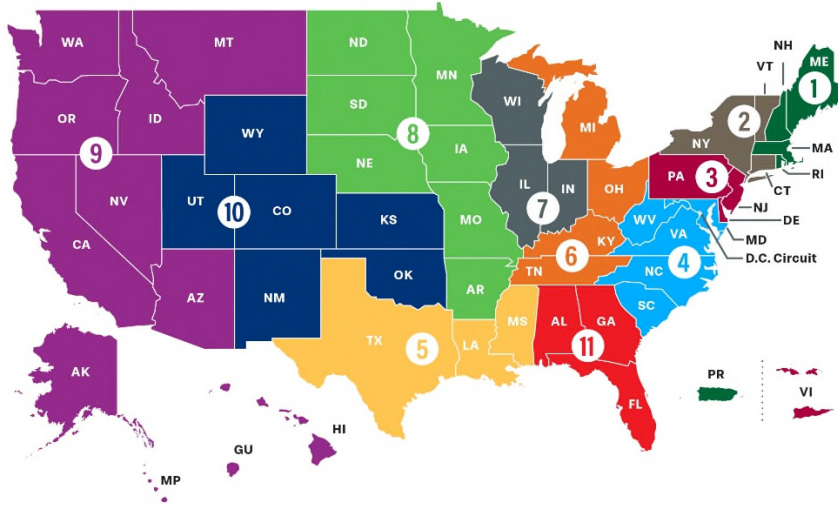
Anecdotally, surveys of corporate counsel confirm that complex workplace litigation – and especially class action and multi-plaintiff lawsuits – remains one of the chief exposures driving corporate legal budgetary expenditures, as well as the type of legal dispute that causes the most concern for companies.

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

The circuit-by-circuit analysis of 290 class certification decisions in all varieties of workplace class action litigation is detailed in the following map:

<sup>4</sup> 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.

### U.S. Circuit Courts Of Appeal



### Analysis Of Decisions By Circuit Court

CIRCUIT COURT	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit
<b>Employment Discrimination Decisions</b>												
Certification Motions Granted	0	1	1	0	0	0	1	1	1	0	1	1
Certification Motions Denied	0	1	0	0	0	0	0	0	0	0	3	0
<b>Sub-Total: 7 Granted / 4 Denied</b>												
<b>ERISA Decisions</b>												
Certification Motions Granted	0	6	0	2	0	1	0	1	5	0	2	0
Certification Motions Denied	0	1	0	1	1	0	0	1	0	0	1	0
<b>Sub-Total: 17 Granted / 5 Denied</b>												
<b>FLSA Certification Decisions</b>												
Conditional Certification Motions Granted	6	33	4	12	25	21	17	8	25	10	8	1
Conditional Certification Motions Denied	2	6	2	1	5	5	7	4	23	1	7	0
Decertification Motions Granted	0	3	1	0	1	1	3	1	5	0	0	0
Decertification Motions Denied	0	3	0	0	2	0	1	1	2	0	0	0
<b>Sub-Total: 170 Conditional Certifications Granted / 63 Conditional Certifications Denied 15 Decertification Motions Granted / 9 Decertification Motions Denied</b>												
<b>Total: 194 Total Certification Motions Granted / 72 Total Certification Motions Denied 15 Decertification Motions Granted / 9 Decertification Motions Denied</b>												

## Wage & Hour Certification Trends

While plaintiffs continued to achieve robust numbers of initial conditional certification rulings of wage & hour collective actions in 2017, employers also secured significant victories in defeating conditional certification motions and obtaining decertification of § 216(b) collective actions.<sup>5</sup> The percentage of successful motions for decertification brought by employers rose by nearly 18% in 2017. This was the highest success rate over the past decade.

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 – is the greatest in the last several decades.

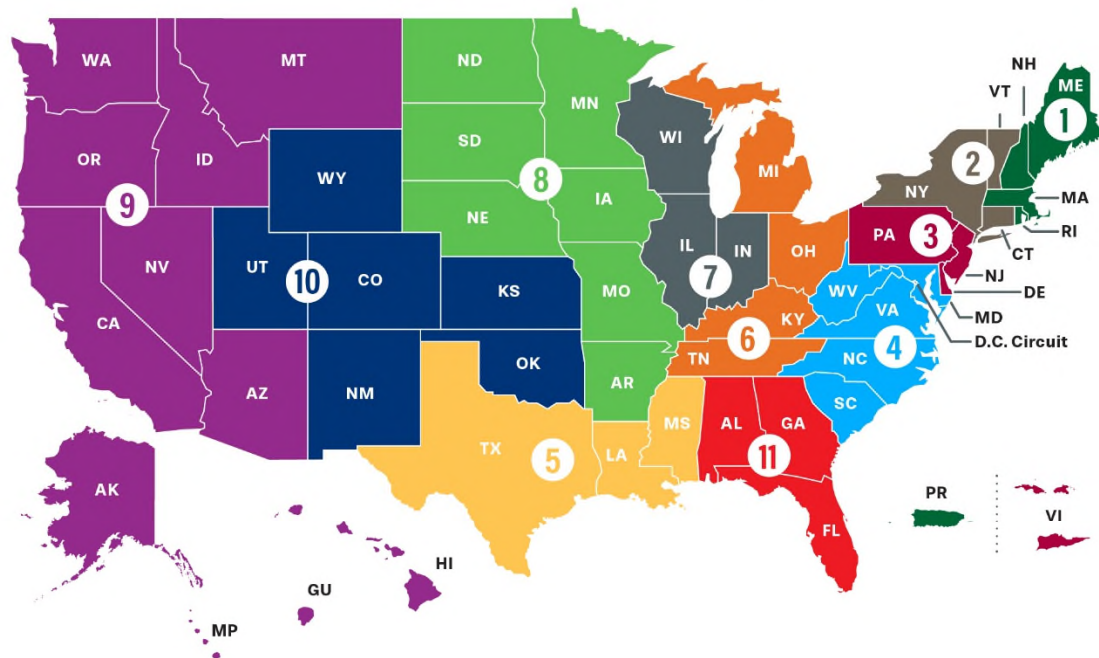
<sup>5</sup> An analysis of rulings in FLSA collective actions in 2017 is set forth in Chapter V, and analysis of rulings in state law wage & hour class action in 2017 is set forth in Chapter VII, Section B.



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 – 257 certification rulings in 2017, as compared to the 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 more cases are brought against employers in “plaintiff-friendly” jurisdictions such as the judicial districts within the Second and Ninth Circuits. 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
Conditional Certification Motions Granted	6	33	4	12	25	21	17	8	25	10	8	1
Conditional Certification Motions Denied	2	6	2	1	5	5	7	4	23	1	7	0
Decertification Motions Granted	0	3	1	0	1	1	3	1	5	0	0	0
Decertification Motions Denied	0	3	0	0	2	0	1	2	2	0	0	0

**Total: 170 Conditional Certifications Granted / 63 Conditional Certifications Denied  
15 Decertification Motions Granted / 9 Decertification Motions Denied**

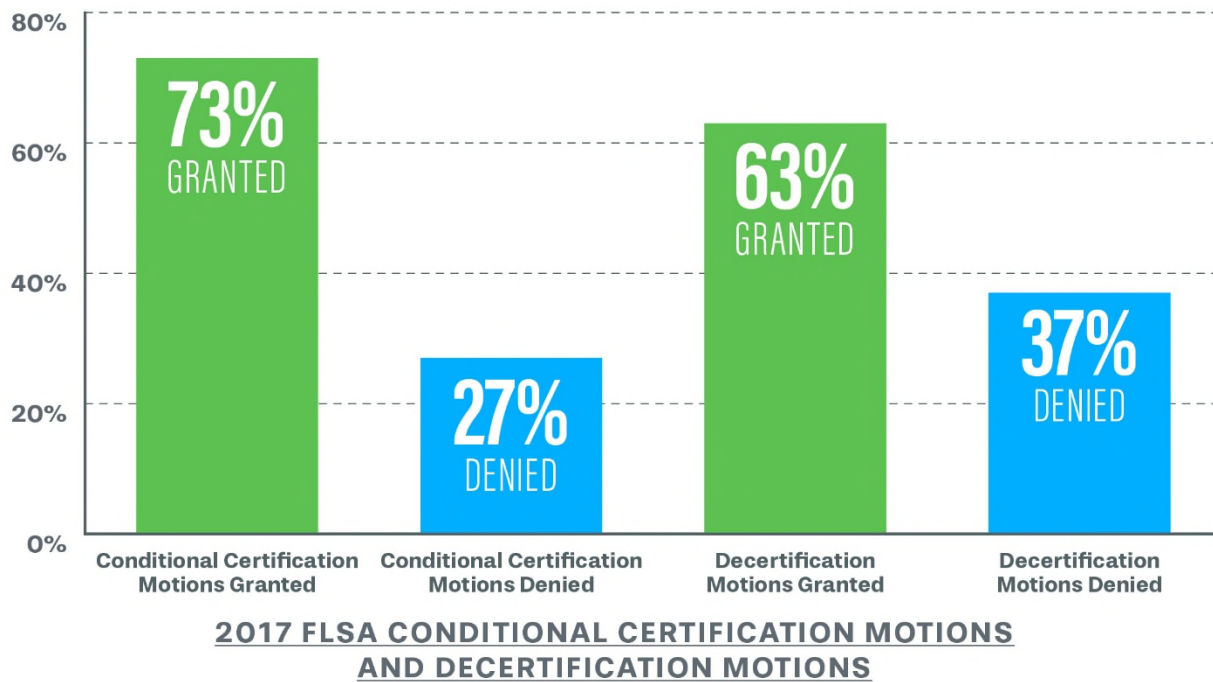
The statistical underpinnings of this circuit-by-circuit analysis of FLSA certification rulings is telling in several respects.

First, it substantiates that the district courts within the Ninth Circuit and the Second Circuit are the epi-centers of wage & hour class actions and collective actions. More cases were prosecuted and conditionally certified – 48 certification orders in the Ninth Circuit and 39 certification orders in the Second Circuit – in the district courts in those circuits than in any other areas of the country. The district courts in the Fifth, Sixth, and Seventh Circuits were not far behind, with 30, 26, and 24 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 (170 of 233 rulings, or approximately 73%). However, in terms of “second stage” decertification motions, employers prevailed in a majority of those cases (15 of 24 rulings, or approximately 63% of the time).

The “first stage” conditional certification statistics for plaintiffs at 73% for 2017 are aligned to the numbers in 2016, when plaintiffs won 75% of “first stage” conditional certification motions. However, employers fared much better in 2017 on “second stage” decertification motions. Employers won decertification at a rate of 63%, which was up from 45% in 2016 and 36% in 2015.

The following chart illustrates this trend for 2017:



Third, this reflects that there has been an on-going migration of skilled plaintiffs’ class action lawyers into the wage & hour litigation space. 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. Finally, as success in litigation often begets copy-cat filings, that the value of top wage & hour settlements in 2017 topped \$525 million – and over \$1.2 billion in the last two years – is likely to prompt more litigation in 2018.

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 2017 confirm these factors.

## Employment Discrimination & ERISA Certification Trends

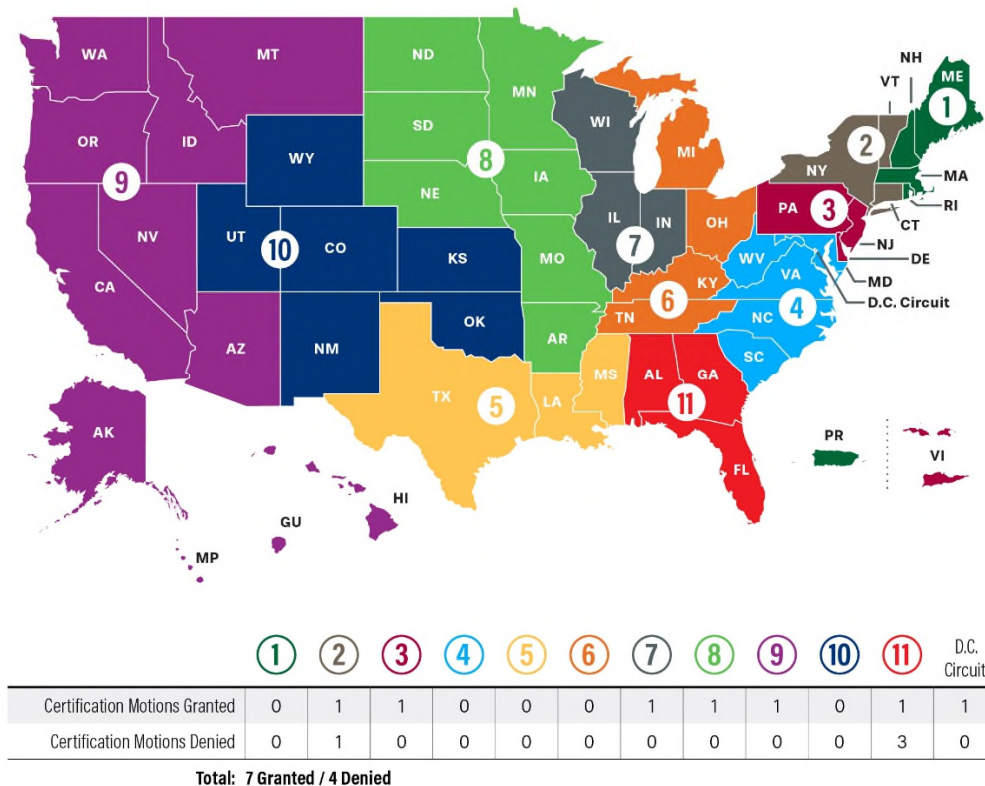
At the same time, the rulings in *Wal-Mart* and *Comcast* also fueled more critical thinking and crafting of case theories in employment discrimination and ERISA class action filings in 2017. The Supreme Court's two Rule 23 decisions have had the effect of forcing the plaintiffs' bar to "re-boot" the architecture of their class action theories.<sup>6</sup> 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* and *Comcast* 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, employment-related class certification motions outside of the wage & hour area were a mixed bag or tantamount to a "jump ball" in 2017, as 7 of the 11 were granted and 4 of the 11 were denied.

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

**U.S. Courts Of Appeal - Analysis Of Employment Discrimination Decisions**



<sup>6</sup> An analysis of certification rulings in Title VII employment discrimination class actions in 2017 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.

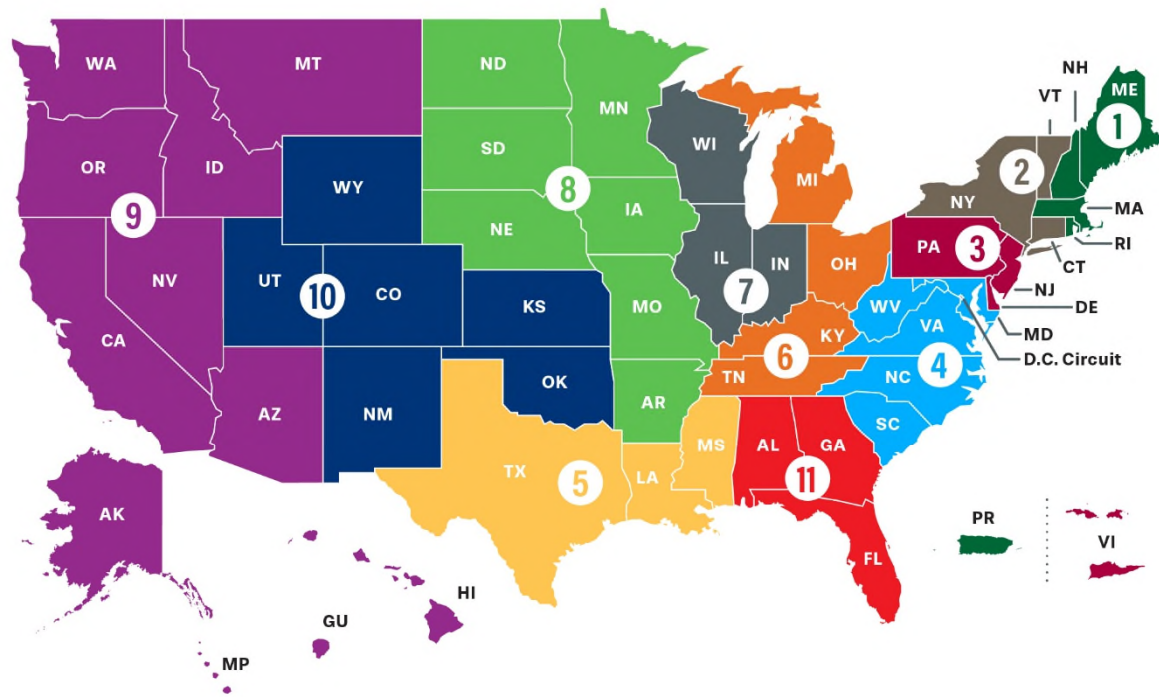
In terms of the ERISA class action litigation scene in 2017,<sup>7</sup> the focus continued to rest on precedents of the U.S. Supreme Court as it shaped and refined the scope of potential liability and defenses in ERISA class actions.

The *Wal-Mart* decision also has changed the ERISA certification playing field by giving employers more grounds to oppose class certification. The decisions in 2017 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.

Nonetheless, plaintiffs were more successful than defendants in litigating certification motions in ERISA class actions, as plaintiffs won 17 of 22 certification rulings in 2017.

A map illustrating these trends is shown below:

### U.S. Courts Of Appeal - Analysis Of ERISA Decisions



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

**Total: 17 Granted / 5 Denied**

### **Overall Trends**

So what conclusions overall can be drawn on class certification trends in 2017?

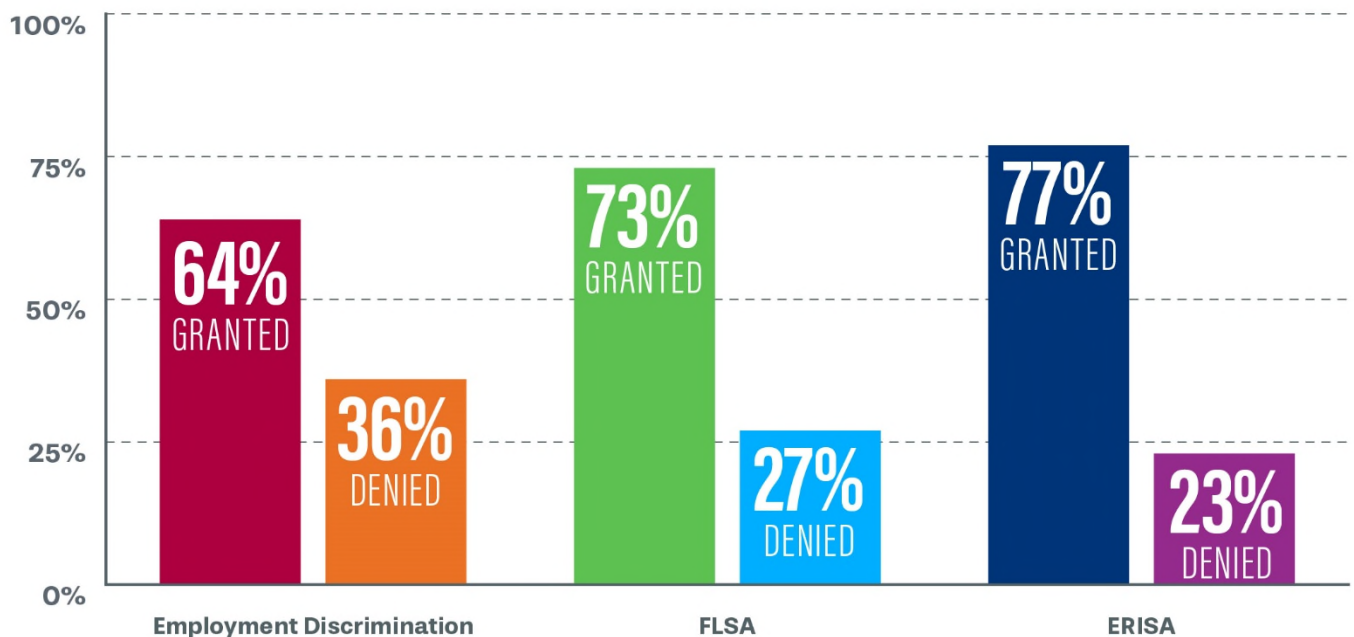
<sup>7</sup> An analysis of rulings in ERISA class actions in 2017 is set forth in Chapter VI, Section A.

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

Whereas class certification was somewhat of a coin toss for employment discrimination cases (7 motions granted and 4 motions denied in 2017), class certification is relatively easier in ERISA cases (17 motions granted and 5 motions denied in 2017), but most prevalent in wage & hour litigation (with 170 conditional certification motions granted and 63 motions denied, as well as 15 decertification motions granted and 9 motions denied).

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

- a 64% success rate for certification of employment discrimination class actions (both Title VII and age discrimination cases);
- a 77% success rate for certification of ERISA class actions; and,
- a 73% success rate for conditional certification of wage & hour collective actions.



### 2017 CERTIFICATION MOTIONS FOR EMPLOYMENT DISCRIMINATION, FLSA, AND ERISA

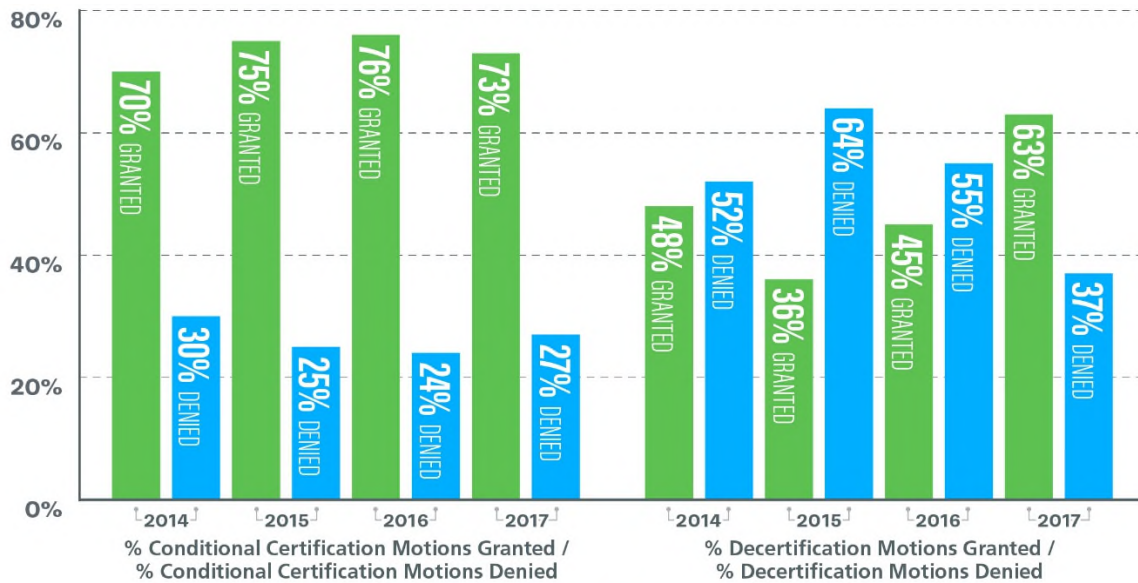
Obviously, the most certification activity in workplace class action litigation is in the wage & hour space.

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 76% (with 2017 right in the middle at 73%) for the plaintiffs' bar, which is tilted toward plaintiff-friendly "magnet" jurisdictions where the case law favors workers and presents challenges to employers seeking to block certification.

Yet, the key statistic in 2017 for employers was an increase in the odds of successful decertification of wage & hour cases to 63%, as compared to 45% in 2016, 36% in 2015, and 52% in 2014.

The on-going defense of litigation and participation in discovery following conditional certification is often an expensive proposition for employers, and many choose to settle to avoid that scenario. However, for employers that face the costs of discovery and then litigate decertification motions, the pay-off in 2017 was a fracturing of cases at the highest success rate in over a decade – a decertification percentage of 63%.

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



**2014 - 2017 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 2017 was the Supreme Court’s ruling 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 2017**

There are multiple lessons to be drawn from these trends in 2017.

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 2017, their certification numbers were consistent with levels in the last several years.

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.

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 ingenious, 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.

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.

### **(iii) Governmental Enforcement Litigation Trends In 2017**

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 2017. Both the EEOC and the DOL intensified the focus of their administrative enforcement activities and litigation filings in 2017. At the same time, the number of lawsuits filed and the resulting recoveries by settlement – measured by aggregate litigation filings and the top 10 settlements in government enforcement litigation – constituted a ten-fold increase as compared to what the EEOC and DOL achieved in 2016.

To the extent the Trump Administration aims to change those dynamics, its agency appointees either were not nominated in time to influence their respective agencies or were not put into place until mid to late 2017. The result was a delay in charges 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 2018.

As a result, the EEOC's lawsuit count increased geometrically in 2017. 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 2017 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 2017.

By comparison to previous years, 2017 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 2017 than it did in all of the months of 2016 combined.

This past year also marked the first 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 2018 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 2018 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.

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 2017. 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 2017. 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 2017 Performance Accountability Report<sup>8</sup> 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 2017 report<sup>8</sup> outlined the EEOC's activity from October 2, 2016 to September 30, 2017. It showed the following:

- The EEOC's field offices resolved 329 systemic investigations and collected \$38.4 million in remedies (compared to 273 systemic investigations and \$20.5 million in 2016). The figures for 2017 constitute significant increases over the previous year, and are near record amounts for monetary relief for systemic cases.
- The EEOC also issued cause determinations finding discrimination in 167 systemic investigations (compared to 113 in 2016). Consequently, not only did the EEOC resolve more systemic investigations compared to 2016, but also it made considerably more cause determinations that it converted into beefed-up recoveries for claimants compared to last year.
- The EEOC secured approximately \$484 million in total relief in 2017 in litigation, mediations, and pre-litigation investigations. This tracks closely to last year's total relief figure of \$482.1 million. It also includes \$355.6 million obtained through mediation, conciliation, and settlement for victims of discrimination in private, state and local government, and federal workplaces. That number is marginally up from last year, which saw \$347.9 million in such recoveries.

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<sup>8</sup> The EEOC's 2017 Performance Accountability Report is at <https://www.eeoc.gov/eeoc/plan/2017par.cfm>.



- Litigation recoveries, on the other hand, have been steadily declining over the past few years, hitting only \$42.4 million in 2017. This is markedly lower than 2016 and 2015, which saw the EEOC obtain \$52.2 million and \$65.3 million in litigation recoveries respectively.
- The EEOC filed 184 merits lawsuits in 2017. This is more than double the 86 merits lawsuits that were filed in 2016. Of the lawsuits, 124 were on behalf of individuals, 30 were non-systemic suits with multiple victims, and the other 30 were systemic claims. The EEOC also filed 18 subpoena enforcement actions in 2017. Hence, the EEOC in the first year of the Trump Administration was far more active in filing lawsuits than in the final year of the Obama Administration.
- In FY 2017, the EEOC resolved 99,109 charges, a marked increase over the past two years. As a result, the EEOC decreased its charge inventory by 16.2%, to 61,621 charges. This is the lowest level of charge inventory in 10 years and represents a significant reduction compared to FY 2016, when the EEOC only reduced its outstanding charges by 3.8%.

By comparison, the DOL's enforcement recoveries dwarfed those of the EEOC in 2017, as the DOL undertook aggressive enforcement activities over the past year and scored increases in settlements both in court actions and in the administrative investigation process. Without a full leadership team in place at the DOL's Wage & Hour Division ("WHD"), the enforcement program continued on the same track as it had been under the Obama Administration. In FY 2017, the WHD recovered more than \$270 million in back pay wages for more than 240,000 workers, which represented a solid increase from the back wages recovered in the previous year. Given the Trump Administration's focus on policy changes, employers can expect that many of these enforcement strategies will get a closer look as the new DOL leadership team falls into place in 2018.

Over the past several years, the WHD fundamentally changed the way in which it pursues its investigations. Suffice to say, the investigations have been more searching and extensive, and often result in higher monetary penalties for employers. According to the DOL, since early 2009, the WHD has closed 200,000 cases nationwide, resulting in more than \$2.2 billion in back wages for over 2.24 million workers. In FY 2017, the WHD collected more than \$270 million in back wages. For much of the year, the DOL kept up its aggressive enforcement program, particularly in the hotel, restaurant, and retail industries. Much of the WHD's enforcement and other activities took place under the umbrella of "fissured industries" initiatives, which focus on industries with high usage of franchising, sub-contracting, and independent contractors. At the conclusion of those enforcement actions, the WHD continued to increase its use of civil money penalties, liquidated damages, and enhanced compliance agreements. As the Trump Administration reviews and considers the prior Administration's enforcement policies, we expect that 2018 is apt to bring a stark change in enforcement priorities and strategies.

The new year brought a new Administration and high expectations by employers for change at the WHD. Political reality and the Senate calendar, however, combined to limit the WHD's ability to implement that change. For most of 2017, only Secretary of Labor Alex Acosta and a single Assistant Secretary had been confirmed by the Senate. By year's end, the DOL Solicitor and several Assistant Secretaries had been confirmed; the critical position of the WHD Administrator remained vacant, as well as another dozen or so senior positions at the DOL. With the senior leadership team in place at the DOL by 2018, the agency is likely to make significant headway on the Trump Administration's policy objectives in the coming year.

Nevertheless, 2017 provided an opportunity for the new WHD to address some of its most pressing issues. The DOL was immediately tasked with defending the prior Administration's revisions to the Part 541 overtime exemption regulations, which had been enjoined in federal court in advance of their effective date in late 2016. Those revisions, which would have doubled the existing salary level required for the white-collar exemptions, substantially increased the minimum level required for the highly-compensated-employee exemption, and automatically increased the salary level on a periodic basis. These were the first changes to Part 541 in more than 10 years. However, those changes were ruled invalid on the basis that the salary level established in the regulation exceeded the Department's authority.

The Trump Administration managed to position itself well for future developments regarding the overtime regulations, defending the DOL's authority to set a salary level generally (which some believed had been called

into question by the order declaring the Obama overtime rule invalid), while electing not to defend the specific salary level established in the 2016 regulation. It is likely that DOL will propose yet another change to the regulations in 2018.

The DOL also took the first steps in rolling back the prior Administration's view of what it means to be "employed" under the FLSA. In June of 2017, the DOL announced the withdrawal of the WHD Administrator's Interpretation 2015-1 ("AI"), which contained the WHD's analysis of the employee vs. independent contractor issue, and AI 2016-1, which contained the WHD's analysis of the joint employment issue. Both AIs were regarded as having an incredibly broad interpretation of what it means to have an employment relationship. Although no replacement guidance has yet been issued, the withdrawal of the AIs is seen as a signal that the current Administration does not take such an expansive view of what it means to be "employed" under the FLSA.

Around the same time as its withdrawal of the AIs, the DOL also announced the return to the use of opinion letters. After decades of use, these regulatory tools had been abandoned by the Obama Administration. The DOL's decision to restart its issuance of opinion letters allows employers and employees alike to seek formal guidance from the WHD on some of the most challenging wage & hour issues. No opinion letters have yet been issued, but it is clear that compliance assistance will once again be a valuable tool in the arsenal of the WHD, alongside its enforcement activities.

Not to be outdone, the National Labor Relations Board ("NLRB") also undertook an ambitious agenda in 2017. 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, eliminating protections for obscene, vulgar, and highly inappropriate activity under the NLRA.

#### **(iv) 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.

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. To that end, federal and state courts cited *Wal-Mart* in 586 rulings in 2017; they cited *Comcast* in 238 cases in 2017.

The past year also saw a change in the composition of the Supreme Court in April of 2017, with Justice Neil Gorsuch assuming the seat of Antonin Scalia after his passing in 2016. 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 2018 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 2017***

In terms of direct decisions by the Supreme Court impacting workplace class actions, this past year was no exception. In 2017, the Supreme Court decided seven cases – three employment-related cases and four class action cases – that will influence complex employment-related litigation in the coming years.

The employment-related rulings included one case brought under the Worker Adjustment and Retraining Notification Act, one ERISA case, and one EEOC case. A rough scorecard of the decisions reflects two distinct plaintiff/worker-side victories, and defense-oriented rulings in five cases.

- ***EEOC v. McLane Co.*, 137 S. Ct. 1159 (2017)** – Decided on February 21, 2017, the case involved the applicable standard of appellate review of district court decisions to quash or enforce EEOC subpoenas. The Supreme Court held that the standard must be based on an abuse of discretion, and contrary lower court decisions – which called for *de novo* review – were rejected. The EEOC has broad statutory authority to issue subpoenas in the course of investigating charges of employment discrimination, and it may seek enforcement of its subpoenas in federal court when employers refuse to comply with them. In that event, the applicable test favors enforcement of the subpoena. The Supreme Court determined that if the charge is proper and the material requested is relevant, the subpoena should be enforced unless the employer can establish that the subpoena is too indefinite, has been issued for an illegitimate purpose, or is unduly burdensome. In sum, the Supreme Court underscored the breadth of the agency’s authority to subpoena information from employers in the course of investigating discrimination charges.
- ***Expressions Hair Design, et al. v. Schneiderman*, 137 S. Ct. 1144 (2017)** – Decided on March 29, 2017, this case involved a class action by a group of New York merchants, arguing that a New York statute that prohibits merchants from charging a surcharge to customers who use credit cards violated the First Amendment because it regulates what they say about their prices. The lower courts had dismissed the suit out of hand, concluding that price regulations regulated conduct alone and thus are immune from scrutiny under the First Amendment. The Supreme Court held that because the statute goes beyond the pure regulation of price sufficiently into the realm of regulating speech, it is subject to scrutiny under the First Amendment. As a result, the case was remanded for further consideration of the validity of the statute under the First Amendment. The ruling is a narrow one, but ensures the continuation of class action litigation over the New York statute.
- ***Advocate Health Care Network, et al. v. Stapleton*, 137 S. Ct. 1652 (2017)** – Decided on June 5, 2017, this ruling determined that pension plans that otherwise meet the definition of a church plan definition under the ERISA can qualify for the exemption without being established by a church. The decision is the culmination of a wave of ERISA class actions brought by employees of religiously affiliated non-profit hospitals who asserted that the employers improperly claimed that their pension plans were ERISA-exempt “church plans.”
- ***Microsoft Corp. v. Baker, et al.*, 137 S. Ct. 1702 (2017)** – Decided on June 12, 2017, this ruling determined that the voluntary dismissal of individual claims by class representatives after denial of class certification deprives appellate courts of jurisdiction over review of the underlying class certification decision. The case involved consideration of a strategy for appealing denials of class certification whereby plaintiffs responded to a denial of class certification with a voluntary agreement to dismiss their claims. With that dismissal in hand, they would claim they have a final order that they can appeal, planning to revive their claims if the appeal reversed the certification order. The Supreme Court unanimously rejected this practice. It held that plaintiffs in putative class actions cannot transform a tentative interlocutory order into a final judgment simply by dismissing their claims with prejudice – subject, no less, to the right to revive those claims if the denial of class certification was reversed on appeal. The ruling should help corporate defendants in defeating piecemeal attacks on favorable class certification orders.
- ***Bristol-Myers Squibb Co., et al. v. Superior Court Of California*, 137 S. Ct. 1773 (2017)** – Decided on June 19, 2017, this opinion established limitations on personal jurisdiction over non-resident plaintiffs in “mass actions,” a litigation strategy often utilized by plaintiffs’ class action lawyers to sue corporations in plaintiff-friendly jurisdictions that have little to no connection with the dispute. The Supreme Court determined that the requisite connection between the corporate defendant and the litigation forum must be based on more than a combination of the company’s

connections with the state and the similarity of the claims of the resident plaintiffs and the non-resident claimants. The ruling reversed a lower court decision that hundreds of plaintiffs who sued a corporation in California state court over alleged injuries associated with a corporation's product could not sue in that state because they were not residents. In effect, it reversed a decision of the California Supreme Court and directed the dismissal of 592 non-California claims from 33 other states. The ruling has significant implications for the location and scope of class action litigation. As a result, the ruling supports the view that plaintiffs cannot simply "forum shop" in large class actions, and instead must sue where the corporate defendant has significant contacts for purposes of general jurisdiction or limit the class definition to residents of the state where the lawsuit is filed. It should provide some measure of protection to corporations that often are hauled into plaintiff-friendly jurisdictions across the country to which they have nor the plaintiffs suing them had any connection.

- ***CalPERS, et al. v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017)** – Decided on June 26, 2017, this decision involved a relatively technical question regarding the right to opt-out of a class action – when plaintiffs file a class action, are members of the class entitled to opt-out and represent themselves, and how statutes of limitations work in that situation. Federal securities laws include two different kinds of filing deadlines for claims about misrepresentations in connection with the issuance of securities, including a one-year deadline running from the discovery of the untrue statement and an outside three-year deadline running from the date on which the statement was made. The Supreme Court held that tolling under *American Pipe* applies only to the one-year deadline, not the three-year deadline. Applying that rule, it barred the action brought in this case by CalPERS, which had opted-out of a large class action brought against Lehman Brothers; the original action was brought in a timely manner, but CalPERS did not opt-out of that action until more than three years after the challenged statements. The ruling closes off a tactic of successive class claims by barring the traditional power of lower federal courts to modify statutory time limits in the name of equity despite any practical obstacles this creates in class actions.
- ***Czyzewski, et al. v. Jevic Holding Co.*, 137 S. Ct. 973 (2017)** – Decided on March 22, 2017, this case involved the Worker Adjustment and Retraining Notification ("WARN") Act and the interplay between worker rights under that statute and the rights of creditors in bankruptcy proceedings after a company allegedly violates the WARN Act. In considering whether priority in distributing assets in bankruptcy may proceed in a manner that allegedly violates the priority scheme in the Bankruptcy Code, the Supreme Court held that such a distribution is improper and priority rules may not be evaded in Chapter 11 structured dismissals. The Supreme Court's ruling protects workers with WARN claims and bars priority deviations in bankruptcies implemented through non-consensual structured dismissals.

The decisions in *Advocate Health Care Network*, *Baker*, *Bristol-Myers*, *CalPERS*, *Expressions Hair Designs*, *Jevic*, and *McLane Co.* are sure to shape and influence workplace class action litigation and government enforcement litigation in a profound manner. These rulings will impact standing concepts and jurisdictional challenges, liability under the WARN and the ERISA, appeals of class certification decisions, challenges to EEOC administrative subpoenas, and rules on *American Pipe* tolling and application of statute of limitations in class actions. To the extent that extrinsic restrictions on class actions – *i.e.*, limits on the ability of representative plaintiffs to appeal certification orders (as in *Baker*), and jurisdictional restrictions on bringing cases in "plaintiff-friendly" jurisdictions (as in *Bristol-Myers*) – were tightened, class actions will become harder to maintain and litigate. On the other hand, *McLane Co.* is certainly a setback for employers and strengthens the EEOC's ability to conduct wide-ranging administrative investigations through its subpoena power.

### ***Rulings Expected In 2018***

Equally important for the coming year, the Supreme Court accepted five additional cases for review in 2017 – that will be decided in 2018 – that also will impact and shape class action litigation and government enforcement lawsuits faced by employers.

Those cases include three employment lawsuits and two class action cases. The Supreme Court undertook oral arguments on two of these cases in 2017; the other three will have oral arguments in 2018.

The corporate defendants in each case have sought rulings seeking to limit the use of class actions or raise substantive defenses to class actions or employment-related claims. Further complicating several of these cases, government agencies have either taken opposing stances with each other or reversed positions they held in previous Supreme Court terms or in the lower court proceedings in these cases.

- ***Epic Systems Corp. v. Lewis, NLRB v. Murphy Oil USA & Ernst & Young LLP v. Morris, Nos. 16-285, 16-300 & 16-307*** – Argued on October 2, 2017, these three consolidated appeals in employment cases deal with the interpretation of 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 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. The Supreme Court’s ultimate decision is likely to have far-reaching implications for litigation of class actions and collective actions. The issue started when the NLRB under the Obama Administration began challenging employers’ use of arbitration agreements with class action waivers. During briefing of the issue before the Supreme Court, The Department of Justice under President Trump opposed the NLRB’s position, and has sided with employers and argued that the Federal Arbitration Act favors the validity and enforcement of arbitration agreements that include class waivers.
- ***Cyan, Inc., et al. v. Beaver County Employees Retirement Fund, No. 15-1439*** – Argued on November 28, 2017, this class action case poses the issue of whether federal law bars state courts from hearing certain securities class actions. The case turns on interpretation of the Private Securities Litigation Reform Act of 1995 – which imposes tougher standards on securities class actions brought in federal courts – and if it mandates that state courts can no longer hear class actions based on the Securities Act of 1933. The ultimate ruling by the Supreme Court will impact what many view 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., No. 16-1362*** – In this case, the Supreme Court will examine 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. The future ruling in the case may have far-reaching implications on the legal tests for interpretation of statutory exemptions under the FLSA. A broader reading of the exemption potentially could reduce the number of workers allowed to assert wage & hour claims against their employers. The case is set for argument on January 17, 2018.
- ***Janus, et al. v. AFSCME, No. 16-1466*** – In this employment case, the Supreme Court will consider 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 deciding the constitutionality of “fair share fees” being imposed on public-sector employees as a condition of employment, the Supreme Court’s future ruling likely will impact millions of workers in 22 states that do not have right-to-work laws. Since many workers are apt to cease paying union dues if the fair share fee payments requirement is abolished, the future ruling will have a significant impact on the ability of public-sector unions to conduct their business. The case is set for oral argument on February 26, 2018.
- ***Resh, et al. v. China Agritech, Inc., No. 17-432*** – In this class action case, the Supreme Court will examine whether the tolling rule for class actions established in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), tolls the statute of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period. In *American Pipe*, the Supreme Court 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. In essence, a future ruling in this case will limit or expand the

tolling rule in *American Pipe* to apply only to subsequent individual claims or if it is expanded broadly to successive class actions where plaintiffs were unnamed class members in failed class actions. The case has yet to be set for oral argument.

The Supreme Court is expected to issue decisions in these five cases in 2018.

Each decision may have significant implications for employers and for the defense of high-stakes class action litigation. Further, the decision in *Epic Systems / E & Y / Murphy Oil* may well end up being one of the most significant rulings for employers since *Wal-Mart Stores, Inc. v. Dukes* in 2011.

#### ***D. Complex Employment-Related Litigation Trends In 2017***

While shareholder and securities class action filings witnessed an increase in 2017, employment-related class action filings remained relatively stable and aligned with case filing numbers of previous years.

By the numbers, filings for employment discrimination and ERISA claims were slightly higher over the past year, while the volume of wage & hour lawsuits decreased for only the second time in over two decades.

By the close of the year, ERISA lawsuits totaled 6,727 filings (up slightly as compared to 6,530 in 2016 and down slightly as compared to 6,925 in 2015), FLSA lawsuits totaled 7,575 filings (down considerably as compared to 8,308 in 2016 and 8,954 in 2015), and employment discrimination lawsuits totaled 12,040 filings (an increase from 11,593 in 2016 and an increase from 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 2017, as the #MeToo movement squarely place sex harassment litigation in the national debate. Inevitably, litigation filings will increase over the next year as a result of this focus.

By the numbers, FLSA collective action litigation filings in 2017 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 7,575 lawsuit filings, 2017 was the sixth highest year ever in the filing of such cases (only eclipsed by levels in 2012, 2013, 2014, 2015, and 2016). 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.

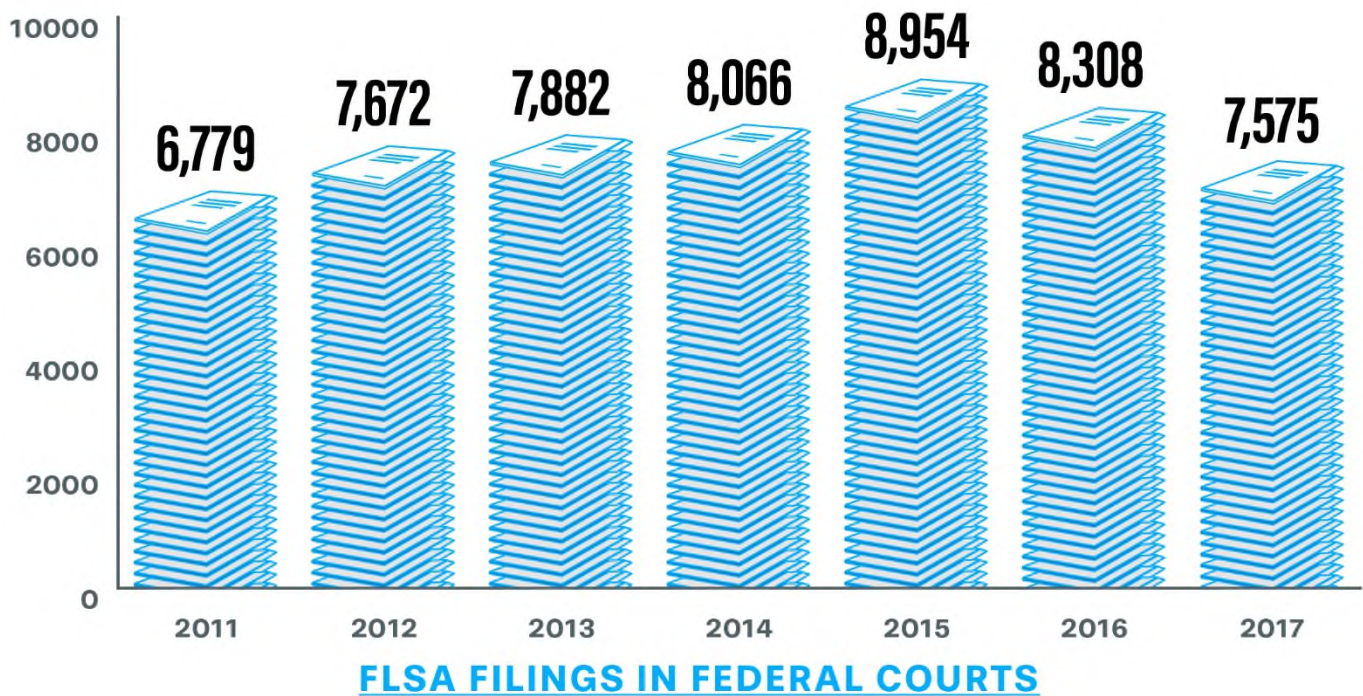
Given this trend, employers may well see a record-breaking increase in the number of FLSA filings in 2018. Various factors are contributing to the fueling of these lawsuits, including: (i) minimum wage hikes in 21 states and 22 major cities that took effect in 2017; (ii) the intense focus on independent contractor classification and joint employer status, especially in the franchisor-franchisee context; and (iii) a decrease in expected filings by the DOL in 2018, 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 2017.

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 2017 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. In particular, California continued its status in 2017 as a breeding ground for wage & hour class action litigation due to laxer class certification standards under state law, exceedingly generous damages remedies for workers, and more plaintiff-friendly approaches to class certification as well as wage & hour issues under the California Labor Code. For the fourth year out of the last five, the American Tort Reform Association ("ATRA") selected California as one of the nation's worst "judicial hellholes" as measured by the systematic application of laws and court procedures in an unfair and unbalanced manner.<sup>9</sup> Calling California one of the worst of the worst jurisdictions, the ATRA described the Golden State as

<sup>9</sup> The ATR Foundation's 2017 Report is available at <http://www.judicialhellholes.org/wp-content/uploads/2017/12/judicial-hellholes-report-2017-2018.pdf>

indeed that for plaintiffs' lawyers seeking riches and the expense of employers and where "lawmakers, prosecutors, and judges have long aided and abetted this massive redistribution of wealth."<sup>10</sup>

### ***E. Likely Trends For The Future Of Workplace Class Actions In 2018***

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 2018?

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

#### ***ERISA Litigation –***

This year's ERISA class action litigation space saw two primary trends. First, the U.S. Supreme Court issued a significant decision relating to the parameters of what is known as the "church plan" exemption to the ERISA, and unanimously held in *Advocate Health Network v. Stapleton*, 137 S. Ct. 1652 (2017), that a pension benefits plan need not be established by a church to qualify as a church plan exempt from the ERISA's funding and other rules. Although the decision settled one of the major questions in church plan litigation, a second wave of these cases may be starting as the plaintiffs' action bar attempts to challenge the religious *bona fides* of these principal purpose organizations.

Second, the plaintiffs' class action bar filed an influx of new 401(k) and 403(b) fee and investment lawsuits against various employers, with a particular concentration on institutions of higher education. In particular, the university ERISA lawsuits challenge the design model of their 403 (b) retirement plans, and the payment of allegedly excessive fees for record-keeping and administrative services. Many of the cases remain active and rulings are expected throughout 2018 on these issues.

The last 12 months also saw an uptick in ERISA class action filings, and while there were relatively few class certification rulings this year, we expect their number to increase next year as the cases work through the system. However, that trend may be mitigated to some extent by a trend among defendants to stipulate to class certification – 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.

Given the volume of ERISA class action filings in 2017, 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).

In addition, corporate counsel can expect to see the following developments:

- In the health and welfare space, plan sponsors can expect some potential additional confusion if Congress and the Trump Administration take up the repeal of the Affordable Care Act. As many plan

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<sup>10</sup> *Id.* at 1. The "eight worst" jurisdictions in 2017 according to the ATRA report were: (1) Florida, (2) California, (3) Missouri (and, in particular, St. Louis), (4) New York (and, in particular, New York City), (5) Pennsylvania (and, in particular, Philadelphia), (6) New Jersey, (7) Illinois (and, in particular, Cook and Madison Counties), and (8) Louisiana.



sponsors know, employers have spent the last few years preparing for and then implementing the Affordable Care Act. The potential changes again to health coverage may cause some confusion amongst plan participants, which in turn could lead to an increase in class action litigation if the participants remain unsure about their applicable coverage for various benefits. In this same vein, 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.

- Further, a fight in the courts is expected regarding the DOL's recently issued final regulations on disability plan administration. These regulations dramatically change the landscape for the handling of disability claims through the frequently offered long-term disability benefits. These regulations are apt to be challenged in the courts given their sweeping and onerous changes. As a result, it is possible that these regulations will never see the light of day. Insurers and plan sponsors need to watch the litigation and its potential results closely. However, if the regulations do go into effect in 2018, as currently contemplated, plan administrators will need to closely examine them to ensure compliance. Additionally, the implementation of these regulations could spur class action lawsuits and DOL enforcement actions if they are not handled appropriately on a plan basis.

### ***Employment Discrimination Class Action Litigation –***

Both in terms of private plaintiff employment discrimination class action litigation, employers can expect this area to remain an intense focus in 2018 by the private plaintiffs' bar.

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) 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 "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 2018, employers can expect changes based on the Trump Administration's business-friendly priorities. Employers also can anticipate less aggressive enforcement of employment-related laws and regulations by the EEOC, the DOL, and the NLRB.

**The EEOC's FY 2017-2021 Strategic Enforcement Plan:** In FY 2017, the EEOC created and announced a new Strategic Enforcement Plan ("SEP") to guide its enforcement mission through fiscal years 2017 through 2021. The new SEP establishes the same six enforcement priorities as the previous version of the SEP, including: (i) elimination of systemic barriers in recruitment and hiring; (ii) protection of immigrant, migrant, and other vulnerable workers; (iii) addressing emerging and developing issues; (iv) enforcing equal pay laws; (v) preserving access to the legal system; and (vi) preventing harassment through systemic enforcement and targeted outreach. Those enforcement priorities have proved to be a reliable guide to how the EEOC pursues its enforcement agenda.

The new SEP added two substantive areas of focus to its "developing and emerging issues" priority list. During the next four years, the EEOC has said that it will focus on "complex" employment relationships, including clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy. The EEOC has also identified "backlash discrimination" as a new area of focus, meaning discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern, or South Asian descent, as well as persons perceived to be members of these groups, that might arise against them as a result of current events affecting the Muslim world. Given the EEOC's track record of making good on its word, employers would be well advised to pay attention to these issues.

**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 discrimination is a form of sex discrimination because it is tantamount to discrimination on the basis of a perceived failure to adhere to stereotypical gender norms. The EEOC is now using the same tactics to try to establish that Title VII prohibits discrimination on the basis of sexual orientation. The key issue for the future is whether the new leadership of the EEOC appointed by President Trump will view these LGBT issues as part of the EEOC's enforcement agenda.

**Potential Changes Brought By The Trump Administration:** The biggest political development that will shape the EEOC's agenda in the coming years is the agenda of the Trump Administration. While there is considerable administrative "inertia" behind the EEOC's current agenda, these political changes are likely to have a profound impact on how the EEOC pursues its mission. In particular, the EEOC's increased focus on the strategic use of large, high-impact "systemic" cases to push forward its strategic goals has come under withering criticism by Republican members of Congress. These types of cases can have a significant impact because they tend to affect a larger number of employees and employers, but also they have often come with overly aggressive litigation positions with respect to the EEOC's "latest and greatest" theories of discrimination. Given the intense focus on this area, this may be one aspect of the EEOC's enforcement agenda that becomes an early target of the Trump Administration.

- Had candidate Hillary Clinton won the White House in the November 2016 elections, most believe that the EEOC, the DOL, and the NLRB would have continued to "push the legal envelope" on joint employer, franchisor/franchisee, and the propriety of arbitration/class waiver issues. With the election of President Trump, the future direction of these initiatives is less clear. The new Administration may well pivot on these positions, which in turn will cause a change in the landscape of workplace class action and governmental enforcement litigation.
- While the WHD is posed to continue its focus on what it calls "fissured" industries, including restaurants, hotels, construction, janitorial services, healthcare, home healthcare, grocery, and retail, the DOL is likely to change course on those policies. In its investigations, an increasing number of which appear to have been coordinated at higher levels of the agency, the WHD had been using its full assortment of enforcement tools, including the assessment of liquidated damages and civil money penalties, investigations spanning the three-year period for willful violations, and the use of media to influence the behavior of employers. Maintenance or a lessening of these litigation strategies remains to be seen in 2018.

- With the pro-business priorities of the Trump Administration, federal workplace agencies are certainly expected to be more employer-friendly. Efforts are likely to shift away from punitive enforcement measures and aggressive enforcement litigation toward a more comprehensive strategy of achieving compliance, including employer outreach, education, and other cooperative opportunities.
- Finally, should government enforcement litigation decrease substantially at the federal level due to changes directed by the Trump Administration, employers should brace for the private plaintiffs' bar and States' Attorney General offices to "fill the void" to champion employment discrimination litigation.

### **Wage & Hour Class Action Litigation –**

Despite the slight decrease of FLSA lawsuit filings in the last 12 months, it is expected that the number of wage & hour claims will continue to rise. We expect the needle to point upwards on that issue in 2018.

- News and other commentary regarding the proposed revision to the FLSA overtime exemption regulations that were to become effective on December 1, 2016, attracted the attention of employees and lawyers who represent them. Historically, when the FLSA and related wage & hour laws have received active media attention, the number of lawsuits filed under those laws has spiked.
- Legislatures and government agencies in various states also have revised or are actively planning to revise laws and rules governing how businesses pay employees, including minimum wage hikes. A focus on enacting or strengthening "wage theft" laws is in vogue at the state and local level.
- Regardless of the increased activity that could be linked to the new regulations and their demise, workers' lawyers have continued to focus on cases challenging the classification status of employees in "gray area" jobs that are more likely to call into question amounts of time spent on exempt and non-exempt activities.
- They have also focused on more sophisticated claims involving questions of whether overtime rates were properly determined, bonus calculations, and amounts of time allegedly spent off-the-clock before and after shifts and during meal breaks.
- Likewise, developments in litigation challenging co-defendants – whether franchisees and franchisors or parents and subsidiaries – as joint employers will continue to inspire litigation motivated in part by the view that many business relationships create joint liability for the wage & hour violations of affecting employees of only one party to that relationship.

Plaintiffs' wage & hour lawyers increasingly share the WHD's past focus on challenging the use of independent contractors. This trend may be intensified by several large settlements in 2017 involving this issue, including FedEx's class action settlement of \$227 million to delivery drivers who claimed that their classification as independent contractors was improper. As success by the plaintiffs' class action bar often serves to encourage "copy-cat" lawsuits, employers are apt to see an increase in private party class actions in this context, especially given that the top wage & hour settlements over the past two years were in excess of \$1.2 billion.

**Workplace Arbitration** – Perhaps the most important workplace class action development for 2018 – which could affect all different kinds of class and collective actions – will be one that could allow employers to prevent workplace class actions from being asserted in the first place. Early in 2018, the U.S. Supreme Court is expected to issue a ruling in three cases that were consolidated for hearing – *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris*, and *NLRB v. Murphy Oil* – arising out the Seventh, Ninth, and Fifth Circuits, respectively. The issue in the three cases is whether an agreement that requires an employer and employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act ("FAA"), notwithstanding the provisions of the National Labor Relations Act ("NLRA"). The case was heard by the Supreme Court in the first argument of the first day of the 2017/2018 year's term and should resolve a circuit split on whether filing a purported class or collective action asserting a violation of an employment statute constitutes protected concerted activity within the meaning of § 7

of the NLRA, whether agreeing with employees to waive their ability to bring such class or collective actions violates § 8 of the NLRA, and, even if so, whether the FAA mandates enforcement of an arbitration agreement containing a class waiver.

Given the breadth of the NLRA – it covers most employees, with the most significant exclusions being for independent contractors and supervisors – a ruling in favor of the employees would render unenforceable the vast majority of arbitration agreements containing class waivers, thus causing corporate counsel for those companies currently using class waivers to prepare for a substantive defense of purported class and collective action and to reconsider whether to maintain an arbitration program.

Yet, at the same time, a ruling by the Supreme Court in favor of the employers could radically reshape the landscape of workplace class actions because the argument that the NLRA precludes enforcement of a class waiver is seemingly the last remaining impediment against enforcement of arbitration agreements containing class waivers. If that argument is rejected, the vast majority of employers would be able to implement arbitration programs to resolve disputes bilaterally and without resort to class or collective proceedings (other than as to certain transportation employees, who are excluded from the FAA's coverage), so long as the arbitration program is properly drafted and implemented. The extent to which employers would enact arbitration programs remains to be seen, but at a minimum, all employers would have to at least consider in 2018 whether to adopt arbitration agreements with class waivers and weigh the pros and cons of them as applied to their company's circumstances.

Considering the Supreme Court's current composition, the history of the rulings in other FAA cases, and the course of questioning from the oral argument on October 2, 2017, employers have reason to be cautiously optimistic that they will be have the option to agree to resolve employment disputes on a bilateral basis, and without resort to class or collective actions.

**Certification Standards & Developments** – The standards for certifying a class action under Rule 23, and for permitting employees to opt-in to would-be collective actions, remain important battlegrounds. Employers have enjoyed increasing success in preventing certification or moving for decertification, but plaintiffs' counsel have responded by seeking certification of class actions as to specific issues, and by attempting – sometimes successfully – to expand the applicability of Rule 23(c)(4). When a class action or collective action has been decertified, some plaintiffs' counsel – hoping to replicate the settlement pressure of a class or collective action – have filed individual wage & hour suits by many of the employees who were class or collective action members. The strategy appears to be to “win” a single plaintiff case and then seek multiple settlements on behalf of other individual plaintiffs. Some plaintiffs' counsel have stated that their initial class action was filed primarily to obtain discovery and a class list of contact information, so that they can locate multiple individual plaintiffs for multiple individual lawsuits. Employer strategies to counter these efforts were sometimes successful in 2017, but plaintiffs' counsel are likely to continue to modify this tactic going forward, especially if arbitration defenses become more widespread in the wake of the future Supreme Court ruling in *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris*, and *NLRB v. Murphy Oil*.

## **F. Conclusion**

The one constant in workplace class action litigation is change. More than any other year in recent memory, 2017 was a year of great change in the landscape of Rule 23. As these issues play out in 2018, additional chapters in the class action playbook will be written.

The lesson to draw from 2017 is that the private plaintiffs' bar and government enforcement attorneys at the state level are apt to be equally, if not more, aggressive in 2018 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 2018.



## II. Significant Class Action Settlements In 2017

While 2016 was a blockbuster year for class action settlement recoveries, overall settlement figures sharply increased in nearly all categories in 2017. The plaintiffs' bar and government enforcement attorneys obtained many significant settlements in a wide range of areas. The "top ten" settlement values in 2017 in workplace class actions were significantly higher than those from 2016. Other than wage & hour class action settlements, which saw a slight drop-off in settlement amounts in 2017, areas such as employment discrimination class actions, ERISA class actions, governmental enforcement lawsuits, and other workplace statutory class actions saw bigger 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 in 2017 for employment discrimination, wage & hour, and ERISA class actions, as well as governmental enforcement lawsuits. The top ten settlements from these categories totaled \$2.23 billion in 2017. This represented a significant jump as compared to both 2016 and 2015, when the top ten settlements from these categories totaled \$1.67 billion and \$1.58 billion, respectively.

As the plaintiffs' bar has aggressively pursued various statutory workplace class actions, the Workplace Class Action Report has recently expanded Chapter 2 to include this category, which encompasses workplace antitrust laws, the Fair Credit Reporting Act, and other various workplace-related statutory laws. The top ten settlements in this category saw a sharp four-fold increase over the past year, totaling \$487.28 million in 2017 as opposed to \$114.7 million in 2016.

In sum, based on all categories, the top ten aggregate settlement numbers in 2017 increased to \$2.72 billion, a significant climb when compared with \$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 2017 totaled \$293.5 million. This represents nearly a four-fold increase from 2016, where the total was \$79.81 million.

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

The biggest settlements in 2017 involved pay and promotions class actions. By category, there were five gender discrimination class actions, four race discrimination class actions, and one veterans discrimination class action.

1. **\$90 million – *City Of Monroe Employees' Retirement System, et al. v. Twenty-First Century Fox Inc., Case No. 2017-833 (Del. Ch. Nov. 20, 2017)*** (request for settlement approval of claims stemming from workplace sexual harassment incidents and gender discrimination allegations at Fox News).
2. **\$45 million – *Scott, et al. v. Family Dollar Stores, Inc., Case No. 08-CV-540 (W.D.N.C. Nov. 14, 2017)*** (preliminary approval granted for a class action settlement of gender discrimination claims involving female store managers who alleged discrimination with respect to their pay).
3. **\$35.5 million – *Slaughter, et al. v. Wells Fargo Advisors, LLC, Case No. 13-CV-6368 (N.D. Ill. May 4, 2017)*** (final approval granted for a class action settlement of race discrimination claims involving a group of financial advisers and trainees who alleged the bank limited pay and advancement opportunities for African-American employees).
4. **\$32.5 million – *Creighton, et al. v. Metropolitan Life Insurance Co., Case No. 15-CV-8321 (S.D.N.Y. June 27, 2017)*** (final approval granted for a class action settlement for race discrimination claims involving African-American financial services representatives alleging that the company provided very few chances to work with colleagues, which restricted their training opportunities and precluded them from getting favorable accounts).
5. **\$24 million – *Moore, et al. v. U.S. Department Of Homeland Security, Case No. 00-CV-953 (D.D.C. May 3, 2017)*** (final approval granted for a race discrimination class action brought by a group of African-American Secret Service agents who alleged they were denied promotions for the highest ranks in the agency).
6. **\$20 million – *White, et al. v. Department Of Justice, Case No. 510-2012-77 (EEOC Jan. 17, 2017)*** (preliminary approval granted for a class action settlement involving current and former female prison workers who alleged they were assigned to work in areas of the prison where they were forced to experience sexual harassment from inmates).
7. **\$19.5 million – *Pan, et al. v. Qualcomm Inc., Case No. 16-CV-1885 (S.D. Cal. July 31, 2017)*** (final approval granted for a gender discrimination class action settlement involving 3,300 current and former female employees who claimed they were not paid and promoted on the same scale as men).
8. **\$13 million – *Martin, et al. v. State Of Washington, Case No. 14-2-00016-7 (Wash. Super. Ct. May 5, 2017)*** (preliminary approval granted for a class action settlement involving state patrol troopers claiming that Defendant engaged in discrimination in violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA") by depriving Washington State Patrol employees and applicants of various benefits of employment while they were away on military duty).
9. **\$7.5 million – *Cote, et al. v. Wal-Mart Stores, Inc., Case No. 15-CV-12945 (D. Mass. May 16, 2017)*** (final approval granted for a gender discrimination class action settlement where Wal-Mart was accused of failing to provide spousal health benefits to employees who had lawful marriages to same-sex spouses).
10. **\$6.5 million – *Little, et al. v. Washington Metropolitan Area Transit Authority, Case No. 14-CV-1289 (D.D.C. Dec. 7, 2017)*** (preliminary approval granted for a race discrimination class action involving railroad workers who asserted that the employer's criminal background check policy disproportionately discriminated against African-Americans).



## ***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 2017 totaled \$574.49 million. This represented a decrease from the value of the top ten settlements in 2016, which totaled \$695.5 million. At the same time, the overall value of the top ten wage & hour settlements had higher values than in the two preceding years, which totaled \$463.6 million in 2015 and \$215 million in 2014.

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

The top ten settlements primarily involved nationwide claims, while three involved state-specific claims (both in California). Furthermore, six of the top ten wage & hour settlements involved lawsuits pending in either state or federal courts in California or New York.

1. **\$227 million – *In Re FedEx Ground Package System, Inc. Employment Practices Litigation, Case No. 05-MD-527 (N.D. Ind. April 28, 2017)*** (final approval granted for a class action settlement of wage & hour claims involving drivers from terminals in 19 states claiming that FedEx misclassified them as independent contractors and deprived them of overtime wages, reimbursement for expenses, and employee benefits).
2. **\$110 million – *Augustus, et al. v. American Commercial Security, Case No. BC336416 (Cal. Super. Ct. April 6, 2017)*** (preliminary approval granted for a class action settlement of wage & hour claims involving 15,000 current and former guards who alleged the company violated California labor laws by requiring them to carry radios so they could be "on-call" while on break and meal periods).
3. **\$61.69 million – *Albert, et al. v. The City Of Dallas, Texas, Case No. 199-00697-94 (Tex. Dist. Ct. Nov. 14, 2017)*** (request for approval of class action settlement stemming from state law breach of contract claims relative to the city failing to pay police, fire, and rescue officers a 15% raise according to a 1979 ordinance).
4. **\$27 million – *Cotter, et al. v. Lyft, Inc., Case No. 13-CV-4065 (N.D. Cal. Mar. 16, 2017)*** (final approval granted for a class action settlement of wage & hour claims of current and former drivers accusing the company of misclassifying them as independent contractors and skimming 20% off their tips as an "administrative fee").
5. **\$21 million – *Abdullah, et al. v. U.S. Security Associates, Inc., Case No. 09-CV-9554 (C.D. Cal. Aug. 14, 2017)*** (preliminary approval granted for a class action settlement of wage & hour claims involving a class of 17,000 security guards accusing the company of failing to give meal breaks).

6. **\$19.1 million – *Zorrilla, et al. v. Carlson Restaurants, Inc.*, Case No. 14-CV-2740 (S.D.N.Y. Oct. 26, 2017)** (preliminary 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).
7. **\$16.7 million – *Taylor, et al. v. JP Morgan Chase & Co.*, Case No. 15-CV-3023 (S.D.N.Y. Nov. 3, 2017)** (request for settlement approval for a putative class action involving thousands of bank employees' allegations that the banking giant violated the FLSA by failing to pay proper overtime compensation).
8. **\$16 million – *Bland, et al. v. PNC Bank, N.A.*, Case No. 15-CV-1042 (W.D. Pa. April 11, 2017)** (final approval granted for a class action settlement relative to FLSA claims brought by current and former mortgage loan officers who accused the company of failing to pay overtime and a proper commission).
9. **\$13.5 million – *Jacob, et al. v. Duane Reade, Inc.*, Case No. 11-CV-160 (S.D.N.Y. May 5, 2017)** (final approval granted for a class action settlement of wage & hour claims involving current and former assistant store managers alleging the company failed to pay overtime wages).
10. **\$13 million – *In Re Wells Fargo Wage & Hour Cases*, Case No. JCCP4702 (Cal. Super. Ct. Dec. 19, 2017)** (preliminary approval granted for a class action settlement of wage & hour claims for missed meal and rest breaks and off-the-clock claims).

### ***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 2017 totaled \$927.8 million. This represents a noteworthy increase from the value of the top ten settlements in 2016, which totaled \$807.4 million.

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

The largest ERISA class action settlements 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. **\$352 million – *Griffith, et al. v. Providence Health & Services*, Case No. 14-CV-1720 (W.D. Wash. Mar. 21, 2016)** (final approval granted for settlement of an ERISA class action alleging a non-profit hospital chain under-funded its pension plan by improperly treating it as a "church plan" exempted from federal funding requirements).

2. **\$125 million – *Nicholson, et al. v. Franciscan Missionaries Of Our Lady Health Systems, Case No. 16-CV-258 (M.D. La. Oct. 24, 2017)*** (preliminary approval granted for settlement of a proposed class action alleging that the hospital and the Plans' administrators and fiduciaries had violated the ERISA by improperly classifying the Plans as "church plans" to exempt them from funding requirements).
3. **\$98.3 million – *Hodges, et al. v. Bon Secours Health System, Inc., Case No. 16-CV-1079 (D. Md. July 10, 2017)*** (preliminary approval granted for settlement of a putative class action accusing the hospital of violations of the ERISA by erroneously claiming its Plans were exempt because they are "church plans").
4. **\$75 million – *Lann, et al. v. Trinity Health Corp., Case No. 17-CV-2237 (D. Md. May 31, 2017)*** (final approval granted for settlement of an ERISA class action alleging that Trinity Health improperly claimed its plan qualified as a "church plan" under ERISA).
5. **\$75 million – *In Re Peabody Energy Corp., Case No. 16-BK-42529 (Bankr. E.D. Mo. Mar. 16, 2017)*** (request for settlement approval for an ERISA class action alleging mismanagement of workers' pension plan).
6. **\$75 million – *In Re JP Morgan Stable Value Fund ERISA Litigation, Case No. 12-CV-2548 (S.D.N.Y. Nov. 3, 2017)*** (request for settlement approval for an ERISA class action alleging mismanagement of retirement funds and breaches of fiduciary duties with respect to 401(k) plans).
7. **\$42 million – *Garbaccio, et al. v. St. Joseph's Hospital & Medical Center, Case No. 16-CV-2740 (D.N.J. Oct. 5, 2017)*** (preliminary approval granted for settlement of a putative consolidated class action alleging the hospital violated the ERISA by under-funding an employee pension plan by claiming its Plan was a "church plan").
8. **\$31 million – *Butler, et al. v. Holy Cross Hospital, Case No. 16-CV-5907 (N.D. Ill. June 29, 2017)*** (final approval granted for settlement of an ERISA class action claim filed by former employees accusing the hospital of under-funding its pension plan).
9. **\$29.5 million – *In Re Wheaton Franciscan ERISA Litigation, Case No. 16-CV-4232 (N.D. Ill. Sept. 13, 2017)*** (preliminary approval granted for settlement of a class action alleging a non-profit healthcare system denied ERISA protections to the participants and beneficiaries of the Plan by claiming that the Plan qualified as an exempt "church plan").
10. **\$25 million – *Fernandez, et al. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Case No. 15-CV-22782 (S.D. Fla. Dec. 21, 2017)*** (final approval granted for settlement of an ERISA class action accusing the broker-dealer firm of profiting from unreasonable fees charged to 401(k) plans).

### ***Settlements In Private Plaintiff Statutory Workplace Class Actions***

Plaintiffs' lawyers also pursued a myriad of statutory claims in workplace class actions brought against employers (outside of the areas of employment discrimination, wage & hour, and ERISA class actions). These cases involved workplace antitrust laws, the Fair Credit Reporting Act ("FCRA"), and other federal and state statutory law violations. The top ten settlements in this category increased significantly in 2017, as they totaled \$487.28 million; by contrast, the total was \$114.7 million in 2016.

1. \$209 million – National Collegiate Athletic Association
2. \$150 million – Dreamworks Animation SKG, Inc.
3. \$44.4 million – New York State Department Of Taxation & Finance
4. \$41.4 million – Bank Of America, N.A.

5. \$8 million – Trans Union, LLC
6. \$7.5 million – Uber
7. \$7.33 million – Carey Salt Co.
8. \$6.749 million – Kelly Services, Inc.
9. \$6.7 million – Act II Jewelry, LLC
10. \$6.2 million – American Airlines, Inc.

The biggest settlements involved class actions under workplace antitrust laws, the FCRA, and breaches of contracts and denials of employee benefits. Others included class actions over benefit denials, discriminatory taxes, and unfair competition.

1. **\$209 million – *In Re NCAA Grant-In-Aid Antitrust Litigation*, Case No. 14-MD-2541 (N.D. Cal. Nov. 20, 2017)** (final approval granted for a settlement of a class action alleging violations of antitrust laws relative to anti-competitive caps on student scholarships).
2. **\$150 million – *In Re Animation Workers Antitrust Litigation*, Case No. 14-CV-4062 (N.D. Cal. June 5, 2017)** (final approval granted for a settlement of a workplace class action involving animation and visual effects workers alleging violations of antitrust laws by conspiring to suppress wages via non-poaching agreements).
3. **\$44.4 million – *Owner-Operator Independent Drivers Association, et al. v. New York State Department Of Taxation & Finance*, Case No. 5551-13 (N.Y. Sup. Ct. April 19, 2017)** (final approval granted for a class action settlement involving allegations relative to an illegitimate highway use tax that discriminated against out-of-state truck drivers).
4. **\$41.4 million – *Childress, et al. v. Bank Of America, N.A.*, Case No. 15-CV-231 (E.D.N.C. Sept. 13, 2017)** (preliminary approval granted for a class action settlement involving 125,000 military members claiming the Defendant violated the Servicemembers Civil Relief Act ("SCRA") when charging illegal high interest charges on principle balances).
5. **\$8 million – *Patel, et al. v. Trans Union, LLC*, Case No. 14-CV-522 (N.D. Cal. Oct. 26, 2017)** (preliminary approval granted for a class action settlement regarding allegations that Defendant violated the FCRA by wrongfully describing applicants as terrorists and criminals).
6. **\$7.5 million – *In Re Uber FCRA Litigation*, Case No. 14-CV-5200 (N.D. Cal. Aug. 15, 2017)** (preliminary approval granted for a class action settlement regarding allegations that Uber violated the FCRA by using applicants' background checks to make adverse employment decisions).
7. **\$7.33 million – *In Re Carey Salt Co.*, Case No. 15-CA-19704 (NLRB Mar. 2, 2017)** (settlement agreement stemming from an employer's unfair labor practices against unionized employees).
8. **\$6.749 million – *Hillson, et al. v. Kelly Services, Inc.*, Case No. 15-CV-10803 (E.D. Mich. Aug. 11, 2017)** (final approval granted for a class action settlement relative to a lawsuit brought by job applicants and employees who claimed the company violated the FCRA by conducting background checks without disclosures that were required by law).
9. **\$6.7 million – *West, et al. v. Act II Jewelry, LLC*, Case No. 15-CV-5569 (N.D. Ill. Nov. 21, 2017)** (preliminary approval granted for a class action settlement of claims for breach of contract and denial of benefits to workers when the company shut down its direct sales operations).

10. **\$6.2 million – *Allman, et al. v. American Airlines, Inc. Pilot Retirement Benefits Program Variable Income Plan, Case No. 14-CV-10138 (D. Mass. Feb. 15, 2017)*** (final approval granted for a class action settlement involving a class of 1,270 American Airlines pilots alleging the airline violated its benefit plans by denying full pension contribution to pilots who were on long-term military leave).

## ***B. Top Ten Government-Initiated Monetary Settlements***

In 2017, 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 2017 fiscal year, the EEOC filed 184 new merits lawsuits, including 30 non-systemic multi-party suits and 30 systemic lawsuits. The 30 systemic lawsuits represented a sizeable jump over prior years, as the EEOC filed 18 such cases in 2016 and 16 such cases in 2015. In 2017, the EEOC increased the number of charges resolved to 99,109 charges, up slightly from the 97,443 in 2016. Furthermore, the EEOC reported that it recovered approximately \$38.4 million in relief for victims of systemic discrimination, up from \$20.5 million in 2016. In addition, the EEOC obtained \$484 million in total recoveries through mediation, conciliation, and settlements, a slight increase from the \$482 million it collected in 2016.

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

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

Four of the settlements involved EEOC litigation, three involved DOL enforcement actions, and three involved NLRB, OFCCP, and DOJ enforcement actions.

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

1. **\$300 million – *In Re Avaya, Inc., Case No. 17-BK-10089 (S.D.N.Y. Aug. 7, 2017)*** (settlement agreement stemming from enforcement action for the termination and under-funding of the company’s pension plans for hourly and salaried workers).
2. **\$95 million – *U.S. Department Of Justice v. Asplundh Tree Expert Co., Case No. 17-CR-492 (E.D. Pa. Sept. 28, 2017)*** (final approval granted for settlement of an enforcement action brought by the DOJ alleging supervisors misclassified undocumented workers who were in the country illegally).

3. **\$21.6 million – *NLRB v. VIUSA, Inc.* (NLRB Oct. 30, 2017)** (settlement agreement stemming from an investigation involving claims from 257 former employees alleging that their employer violated federal labor laws by refusing to hire, recognize, and bargain with the union that represented these individuals because it was a minority-based union).
4. **\$15.75 million – *U.S. Department Of Labor v. First Bankers Trust Services, Inc.*, Case No. 12-CV-8648 (S.D.N.Y. Sept. 25, 2017)** (consent judgment entered in a DOL investigation relative to the defendants' alleged violations of ERISA by failing to ensure its stock was bought at a fair price).
5. **\$12 million – *EEOC v. Texas Roadhouse, Inc.*, Case No. 11-CV-11732 (D. Mass. Mar. 31, 2017)** (consent decree approved in an EEOC pattern or practice lawsuit alleging age discrimination relative to servers).
6. **\$10.5 million – *EEOC v. Bass Pro Outdoor World, LLC*, Case No. 11-CV-3425 (S.D. Tex. July 25, 2017)** (approval of a consent decree stemming from an EEOC pattern or practice lawsuit involving Defendant's hiring practices against qualified African-American and Hispanic applicants).
7. **\$10.1 million – *EEOC v. Ford Motor Co.* (EEOC Aug. 15, 2017)** (settlement agreement stemming from an EEOC investigation of sexual and racial harassment allegations by workers at two of the company's Chicago-area plants).
8. **\$9.8 million – *EEOC v. American Airlines, Inc.*, Case No. 17-CV-4059 (D. Ariz. Nov. 3, 2017)** (consent decree approved in an EEOC pattern or practice lawsuit alleging violations against disabled workers).
9. **\$5.5 million – *U.S. Department Of Labor v. Ginsberg*, Case No. 15-CV-985 (S.D.N.Y. July 25, 2017)** (consent judgment entered relative to a DOL investigation of Defendants' alleged breach of their duties under ERISA while acting as fiduciaries of the plan).
10. **\$5 million – *Office Of Federal Contract Compliance Programs v. State Street Corp.*, Case No. R00174213 (OFCCP Sept. 29, 2017)** (entry of conciliation agreement stemming from an investigation of the employer's discrimination against African-American and female executives in the senior vice president, managing director, and vice president positions by paying them less than their white and male colleagues).

### ***C. Noteworthy Injunctive Relief Provisions In Class Action Settlements***

Generally, the types of relief obtained in settlements of employment discrimination class 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 or managers.

Class action settlements involving private plaintiffs generally contain one or more of these items of non-monetary injunctive relief, but rarely contain all of them. Attorneys representing the U.S. Government in enforcement litigation actions also secured several settlements in 2017 that included noteworthy injunctive relief 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 2017 were the following:

- Institute a new policy making same-sex spouses eligible for employer-sponsored benefits;
- Provide a report to the EEOC regarding any employees requesting employer-sponsored benefits for same sex spouses, and whether or not such requests were granted;
- Install a computerized time-keeping system;
- Hire formerly disqualified candidates or upgrade the seniority of current employees;
- Train human resources staff on the anti-discrimination provisions of the Immigration & Nationality Act;
- Cease and desist from requiring applicants to be subjected to pre-offer medical examinations or make any pre-offer medical inquiries;
- Dismiss an allegedly retaliatory lawsuit against an employee who previously filed an EEOC complaint; and,
- Expunge any poor evaluations or discipline of employees from employment records.

The top ten settlements in 2017 involving significant injunctive relief provisions include:

1. ***EEOC v. Prince George's County, Case No. 15-CV-2942 (D. Md. June 1, 2017)***. The EEOC brought an EPA action against Prince George's County's Department of Environment alleging it rebuffed a female engineer's efforts to negotiate a higher starting salary that would match her experience and education. Under the terms of the consent decree entered by the Court, in addition to paying her lost wages and liquidated damages, the county employer agreed to increase her salary by nearly \$25,000 to ensure parity with her male comparators. The employer also agreed to hire a consultant to ensure that its compensation policies and procedures and individual salary determinations comply with the Equal Pay Act, and further agreed to provide training on federal anti-discrimination laws to the county's position review board members, managers, and supervisors.
2. ***EEOC v. S&B Industry Inc., Case No. 15-CV-641 (N.D. Tex. Feb. 15, 2017)***. The EEOC brought an action against a cellphone repair facility alleging it violated the ADA by refusing to hire two deaf applicants. Under the terms of the consent decree, the employer agreed to have managers, supervisors, and human resource professionals attend a training session presented by the Deaf Action Center, a Dallas organization that provides advocacy services for individuals with hearing impairments, covering topics such as the use of sign language interpreters in employment and interview settings. The company also agreed to post a notice about the settlement, provide training for employees on the ADA, keep a written log of all complaints of disability discrimination, and report to the EEOC on a semi-annual basis.
3. ***Salazar, et al. v. McDonald's Corp., Case No. 14-CV-02096 (N.D. Cal. Sept. 15, 2017)***. The Court approved a consent decree relative to a wage & hour class action lawsuit brought on behalf of current and former employees at eight franchisee restaurants. The McDonald's employees accused the franchisee restaurants of violating wage and overtime provisions required under California law. In addition to monetary relief, the consent decree requires the employer to pay overtime premiums to current and future hourly employees who work more than eight hours, review all time and payroll records at least once a day, and provide detailed wage statements to employees.
4. ***EEOC v. Downhole Technology, LLC, Case No. 17-CV-574 (S.D. Tex. April 26, 2017)***. The EEOC alleged that a manufacturer of equipment retaliated against an employee who complained that he was racially harassed when co-workers displayed a white hood to intimidate, ridicule, and insult him. In a consent decree entered by the Court, in addition to monetary relief, the company agreed to educate its employees about the history of hate groups, their symbols, and the harm they cause to others. The employer also agreed to revamp its anti-discrimination policy and establish a toll-free telephone number through which employees would be able to report discrimination and harassment.

5. ***EEOC v. Allsup's Convenience Stores, Inc., Case No. 15-CV-863 (D.N.Mex. Sept. 25, 2017).*** The EEOC brought an action under the ADA alleging that a convenience store employer subjected pregnant employees to different working conditions by making negative comments to them and giving them less favorable tasks and shifts. The three-year consent decree settling the suit required Allsup's to pay \$950,000 to 28 women who were discriminated against based on pregnancy or a pregnancy-related disability, provide offers of re-employment to the 28 women, and provide them with letters of reference.
6. ***Seaman v. Duke University Health System, Case No. 15-CV-462 (M.D.N.C. Aug. 25, 2017).*** The Court approved a settlement agreement stemming from allegations of an illegal conspiracy involving University of North Carolina and others in a no-poaching agreement for medical faculty. The employer's senior administrators and deans had entered into agreements that eliminated or reduced competition among them for skilled medical labor. Under the terms of the consent decree, the medical school and the UNC Health Care System are enjoined and prohibited from making agreements to refrain from recruiting, hiring, or competing for employees.
7. ***EEOC v. Orion Energy Systems, Inc., Case No. 14-CV-1019 (E.D. Wis. April 5, 2017).*** The EEOC brought a lawsuit alleging that a lighting company employer's wellness program violated the ADA by unlawfully requiring medical examinations and making disability-related inquiries. In addition to paying \$100,000 in monetary relief, the employer agreed that it will not maintain any wellness program in the future that poses disability-related inquiries or seeks a medical examination that is not voluntary within the meaning of the ADA and its regulations. The company also agreed to conduct an additional training meeting with its chief executive officer and other high ranking executives, which includes an explanation of the provisions of the consent decree and the requirements of the ADA and its regulations as they pertain to wellness programs.
8. ***People Of The State Of Illinois, et al. v. Xing Ying Employment Agency, Case No. 15-CV-10235 (N.D. Ill. Sept. 5, 2017).*** The Court approved a consent decree stemming from allegations of discrimination involving two restaurants and an employment agency that under-paid and mistreated immigrant workers, many of whom were undocumented workers. In addition to paying \$212,500 in monetary relief, the businesses are required to change their employment practices, keep records of employees' hours and wages, provide training on employment discrimination laws, develop and implement an anti-discrimination policy, and provide training. The employers also must not compel workers to pay for food as a condition of their employment.
9. ***EEOC v. IDEX Corp., Case No. 15-CV-22777 (S.D. Fla. April 19, 2017).*** The EEOC alleged that the company violated the ADA when its supervisors repeatedly asked a regional manager invasive questions about his cancer treatments and questioned his ability to perform job tasks. In addition to providing \$380,000 in monetary relief to the terminated employee, the consent decree also requires the employer to train all human resources managers on the ADA's prohibition against disability discrimination, and review hypothetical accommodation request scenarios with managers. The company also agreed to post and distribute notices concerning the decree through email, its company website, and at locations nationwide.
10. ***EEOC v. Chemtrusion, Inc., Case No. 16-CV-180 (S.D. Ind. July 20, 2017).*** In an ADA action, the EEOC alleged that a manufacturing services company refused to hire or provide reasonable accommodations to a class of job applicants because of medical information it obtained during pre-employment medical examinations. In addition to monetary relief, the consent decree requires that Chemtrusion: (i) instruct its hiring personnel and medical providers not to conduct medical inquiries until after a conditional offer is made; (ii) conduct individualized analyses before withdrawing job offers; (iii) train its hiring personnel on what the ADA requires with respect to medical examinations and hiring; (iv) submit decisions to rescind job offers to legal counsel for review; and (v) track rescinded offers.







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