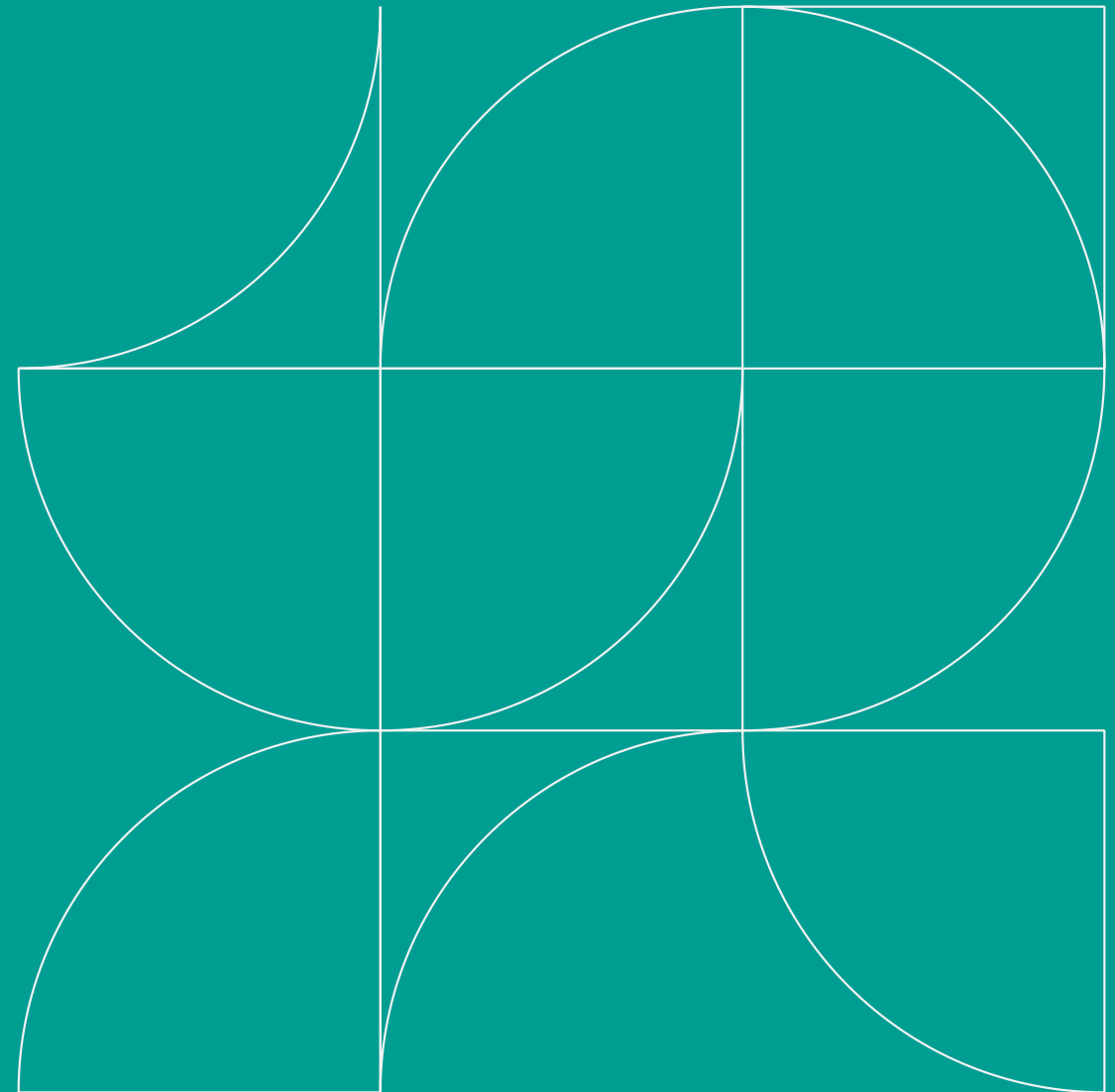


# 17<sup>th</sup> Annual Workplace Class Action Litigation Report Webinar

2021 Edition / February 23, 2021

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# Today's Discussion Leaders

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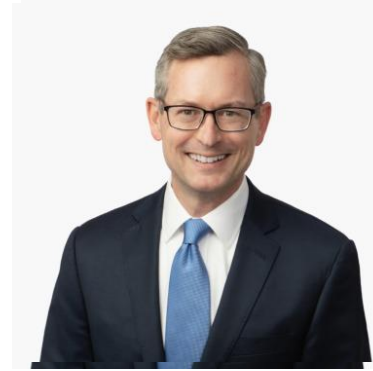


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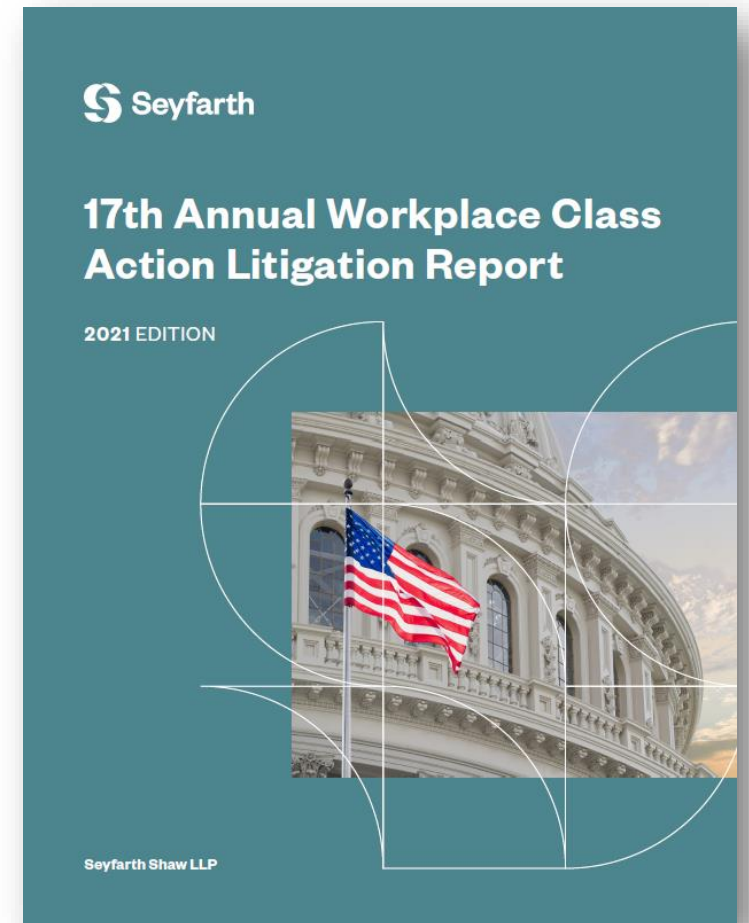


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# Key Trends In Workplace Class Action Litigation In 2020

- 1 The Impact Of The COVID-19 Pandemic
- 2 Change Is The New Normal
- 3 Increase In Class Action Settlement Numbers In 2020
- 4 Slowed Governmental Enforcement Litigation In 2020
- 5 Rise Of Wage & Hour Certification Numbers
- 6 What Is Ahead In 2021



# What Is Hot In The Workplace Class Action World?

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- **COVID-19** –As state and local governments responded to the COVID-19 threat, many employers moved their employees to tele-work or work-from-home arrangements, or laid off or furloughed workers, and many businesses – and courts – shut down or postponed critical operations.
  - Despite the swell of filings, by the end of 2020, few cases raising COVID-related issues had matured to the class certification stage. As a result, few courts had considered whether the pandemic gave rise to concerns that aided plaintiffs in clearing certification hurdles, and the courts that considered such issues reached different conclusions.
- **Change** – With a flip from a “red” to a “blue” White House for the next four years, employers can expect this change to bring shifts to the workplace class action landscape. Employers should anticipate that, while leadership of the EEOC will remain in place through the short-term, the Biden Administration will bring policy changes on other fronts that may take shape through legislative efforts, agency action and regulation, and enforcement litigation.

# What Is Hot In The Workplace Class Action World?

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- **Settlement Amounts** – Although many expected the pandemic to depress the size and pace of settlements even further as businesses sought to conserve cash in the wake of the COVID-19 pandemic, the increase in the value of workplace class action settlements defied expectations.
- **Government Enforcement Actions** –The pace of government enforcement actions slowed to an all-time low, but settlement activity was up. Change is now in the air with the new Biden Administration.
- **Certification Numbers** - The significant volume of FLSA filings over the past several years has caused the issuance of more certification rulings in the FLSA areas than in any other substantive area of complex employment litigation. Despite the pandemic's crippling impact on court operations and personnel, courts issued more rulings on wage & hour certification issues in 2020 than they issued in each of the past five years.

# Headlines Of 2020 Important To Employers

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## •End-Of-Year Statistics

– Workplace litigation by the numbers in 2020:

- ERISA lawsuits totaled 5,042 (down as compared to 5,732 in 2019)
- FLSA lawsuits totaled 6,396 (the sixth consecutive annual decrease, and the lowest number of filings since 2011)
- Employment discrimination lawsuits totaled 10,801 (down significantly from 12,255 in 2019)

**This was the second year in a row that filings were down in all three categories.**

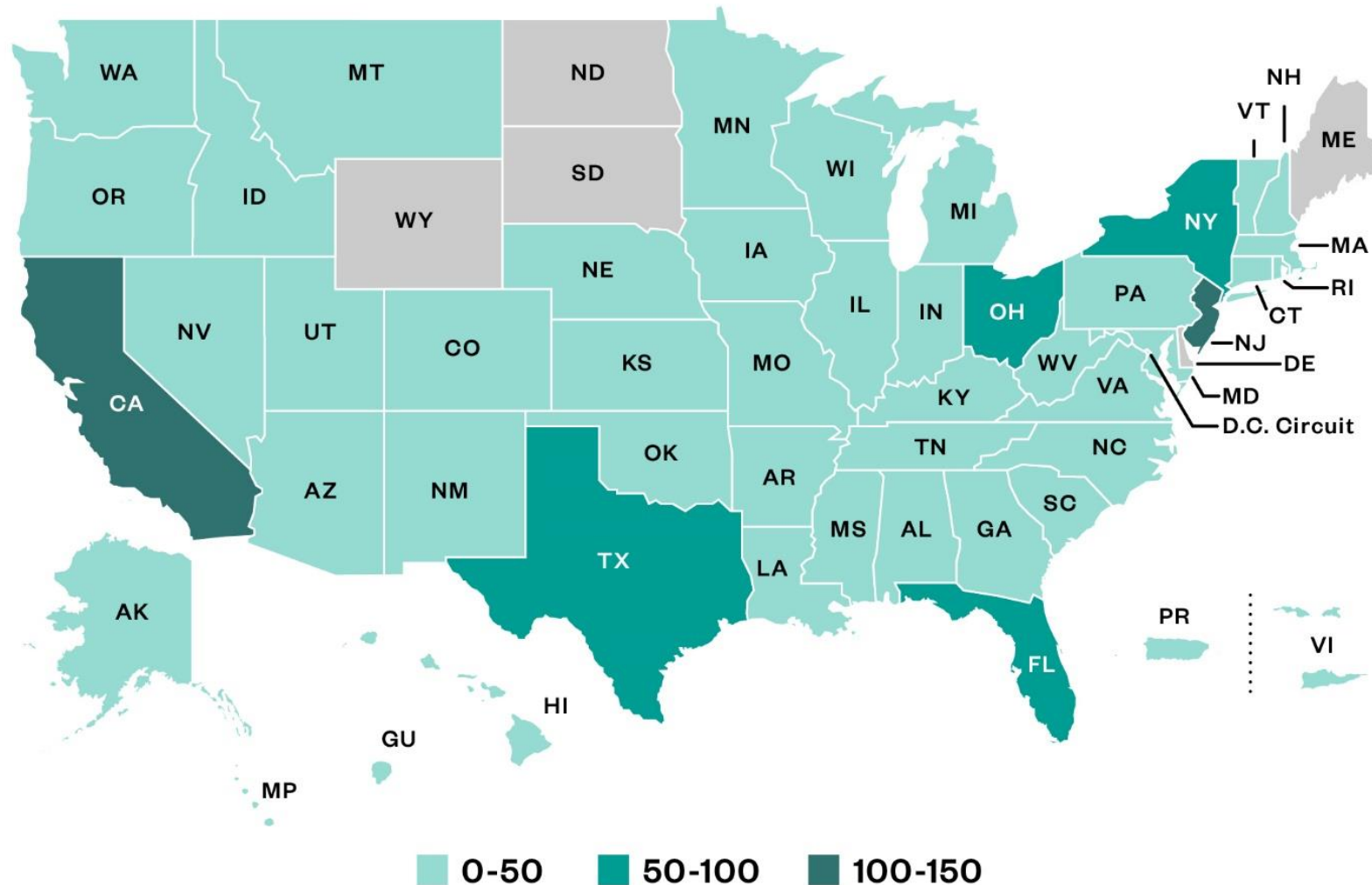
# Trend 1: The Impact Of The COVID-19 Pandemic

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- Stay-at-home and lockdown orders forced the large-scale transition of employees to telework and work-from-home
- Shutdown of businesses translated to furloughed or laid off workers
  - WARN Act and termination claims proliferated
- More than 1,000 COVID-specific workplace lawsuits were filed across 47 states during the pandemic – likely the “tip of the iceberg....”
- It is anticipated that workplace class action litigation in areas like workplace bias/discrimination, wage & hour, and health & safety are apt to be filed in the wake of COVID-19 during 2021

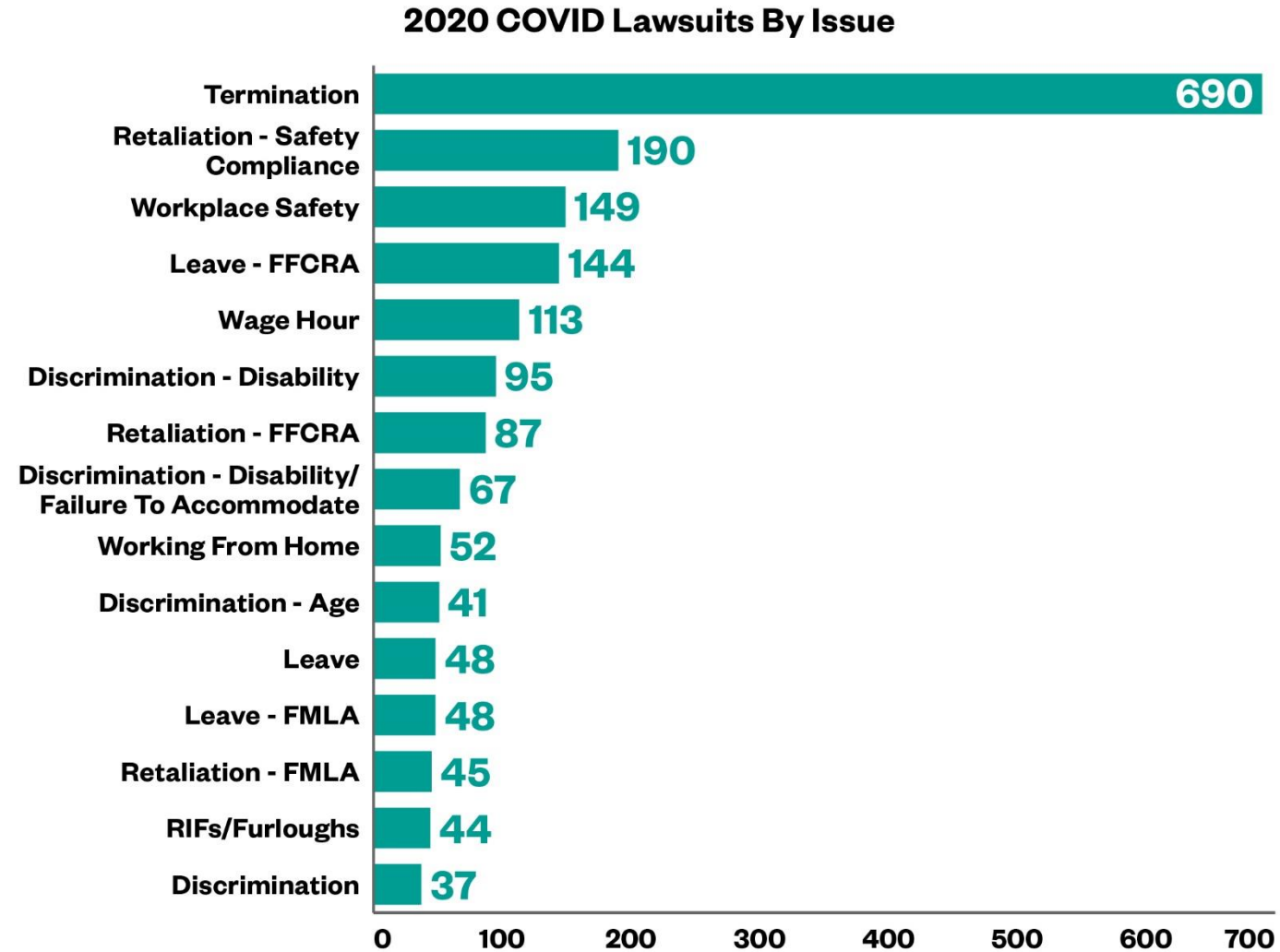
# Trend 1: The Impact Of The COVID-19 Pandemic

2020 COVID Lawsuits By State

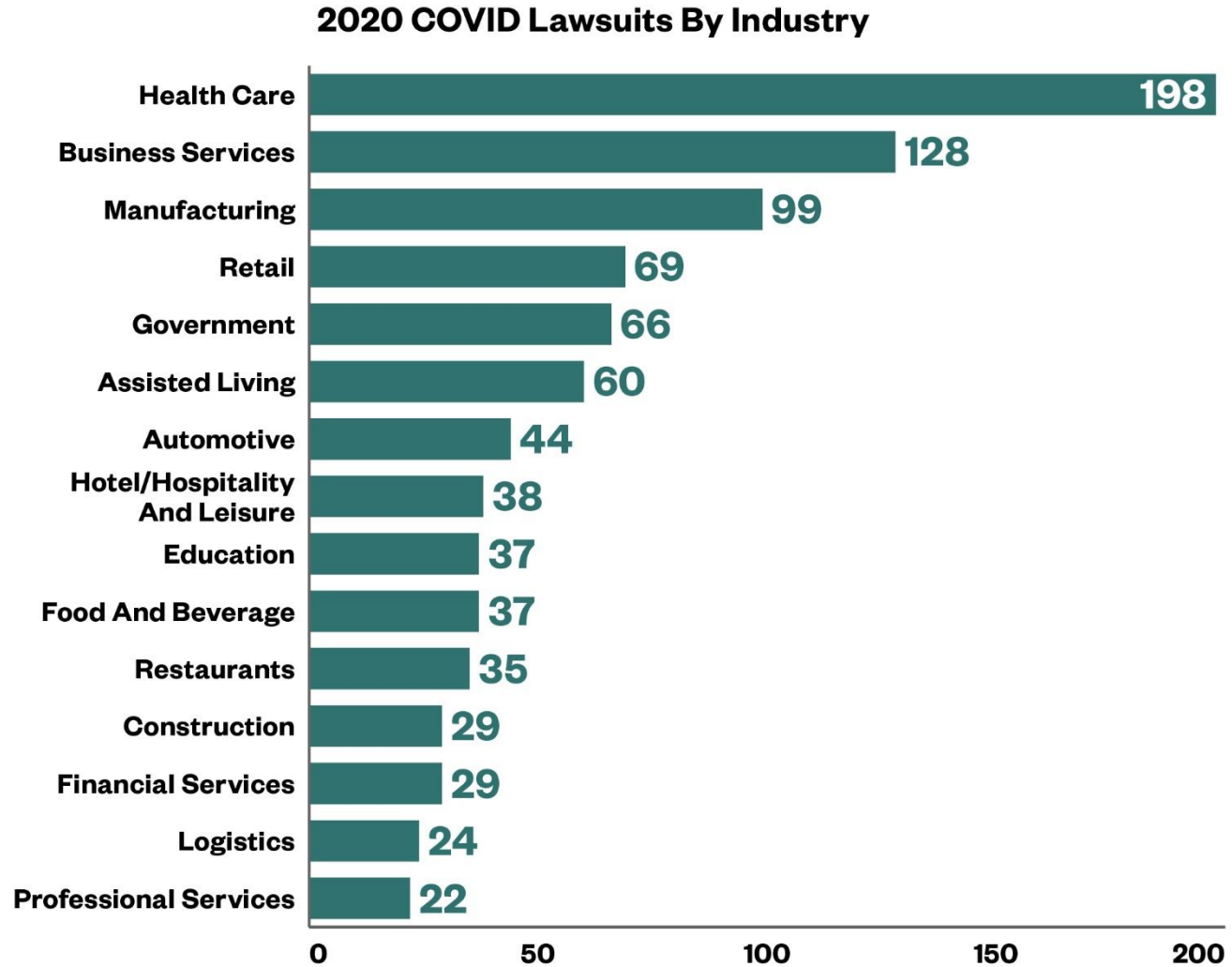




# Trend 1: The Impact Of The COVID-19 Pandemic

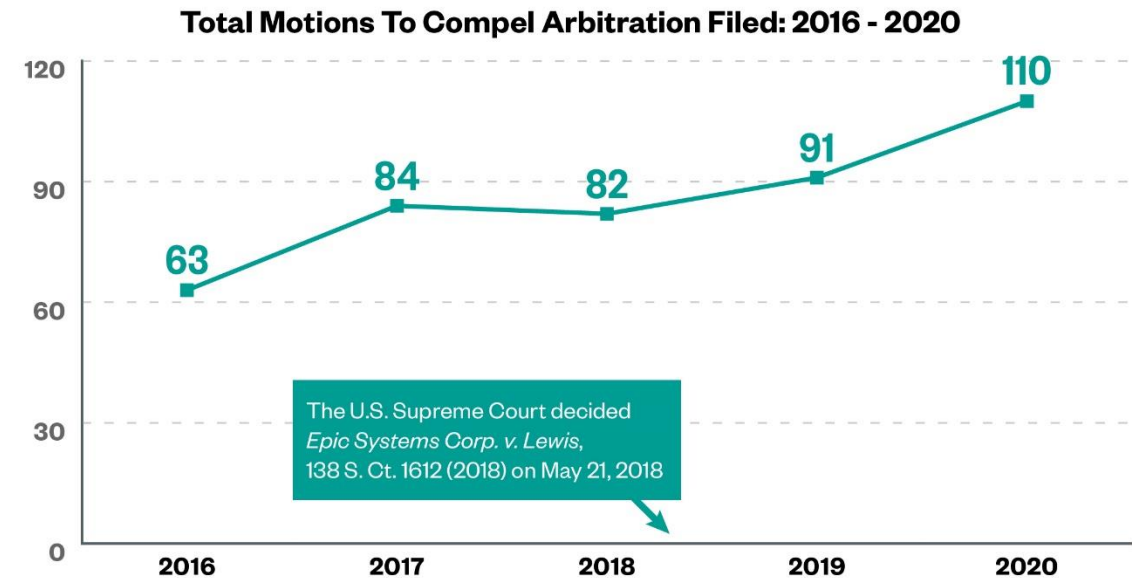


# Trend 1: The Impact Of The COVID-19 Pandemic



# Trend 2: Change Is The New Normal

- The Effect Of Pro-Business Policies
  - The impact of prior rulings such as *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) - allowing for the enforcement of workplace arbitration agreements - continued to be felt with courts upholding class action waivers to dismantle class and collective actions
    - Motions to compel arbitration in class action lawsuits increased, aided by the *Epic* ruling along with other recent Supreme Court decisions favoring arbitration
    - The latest data shows motions to compel arbitration have proven to be a cost-saving and effective defense to class action lawsuits

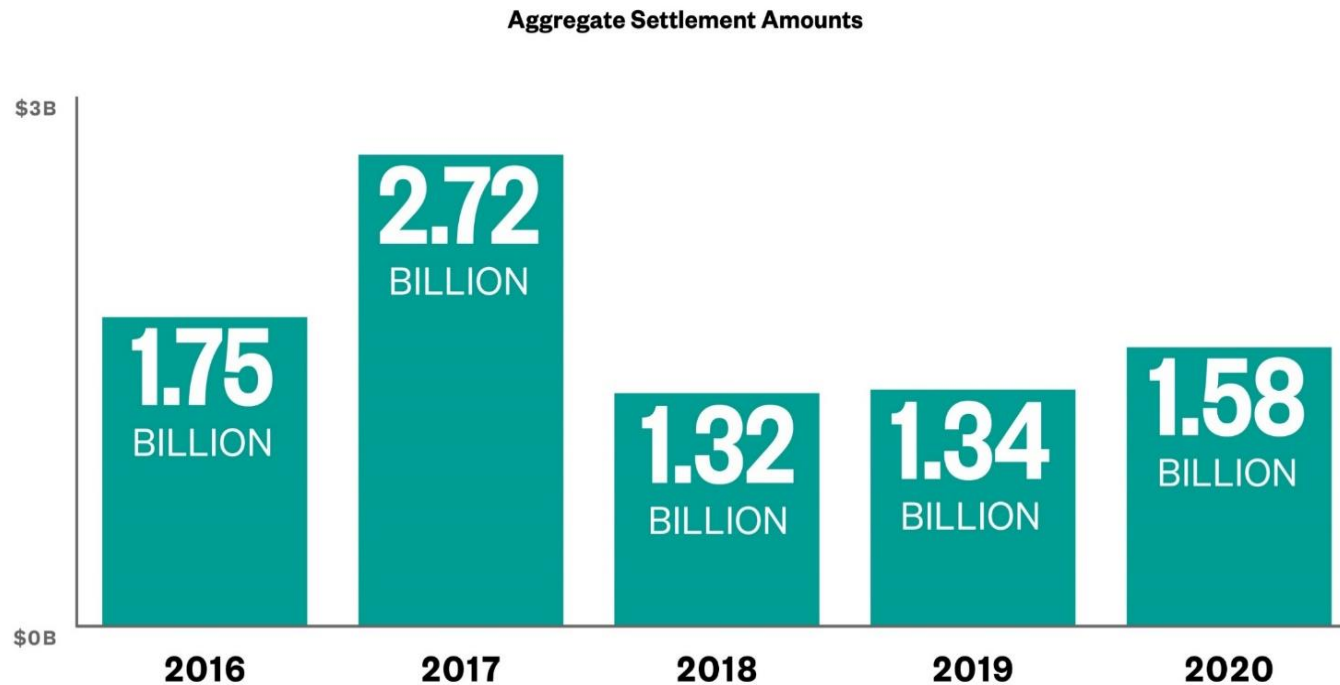


## Trend 2: Change Is The New Normal

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- Employer-friendly EEOC leadership will remain in place for now in the short-run
- A shift to a “blue” White House could lead to more worker-friendly regulations, pro-employee agency enforcement, and proposed legislation to change the Federal Arbitration Act and overturn *Epic Systems*
- Changes at the U.S. Department of Labor (“DOL”) will shift towards worker-friendly policies, reversing pro-business measures of the Trump Administration
  - Fair Labor Standards Act (“FLSA”) interpretations
  - Increase in minimum wage
  - Narrower application of overtime exemptions
  - Worker classification

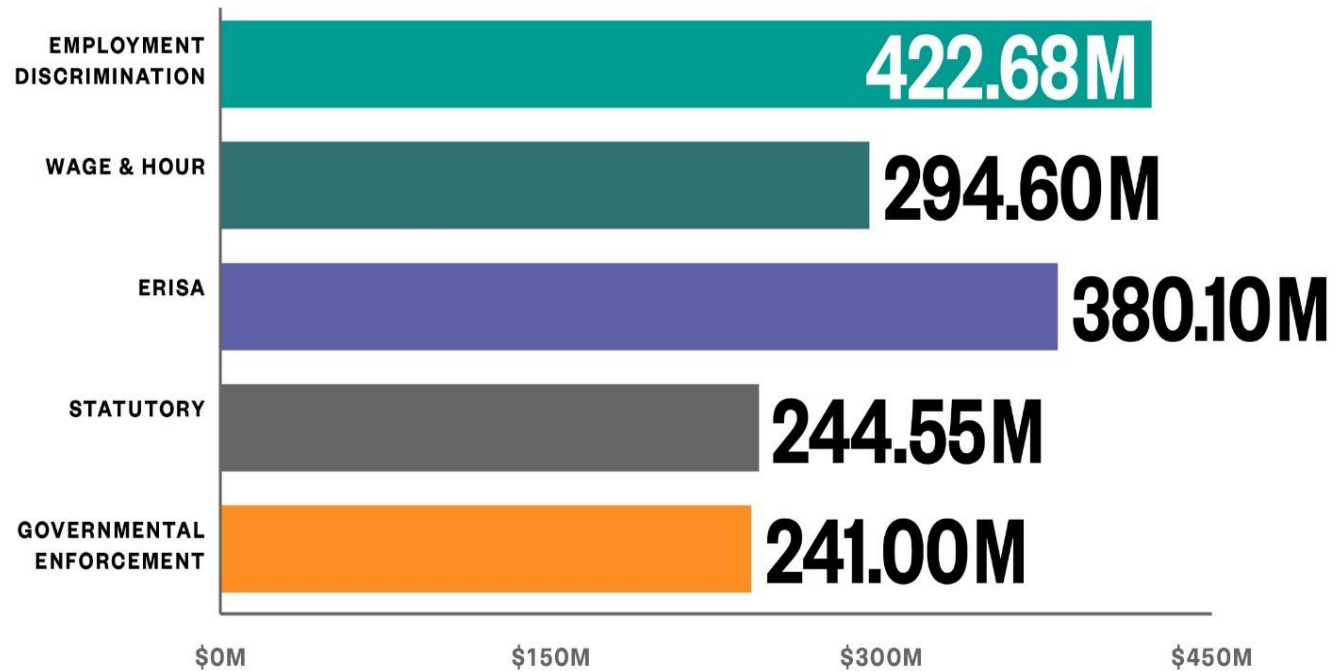
# Trend 3: Increase In Class Action Settlement Numbers In 2020



- The last 12 months saw a rise in the aggregate monetary value of workplace class action settlements, continuing an upward increase from 2019, and defying expectations
  - \$1.58 billion in total settlements in 2020, an increase over the last two years
- Government enforcement litigation and ERISA class actions both saw an increase
- Private-Plaintiff wage & hour and statutory class action settlements decreased

# Trend 3: Increase In Class Action Settlement Numbers In 2020

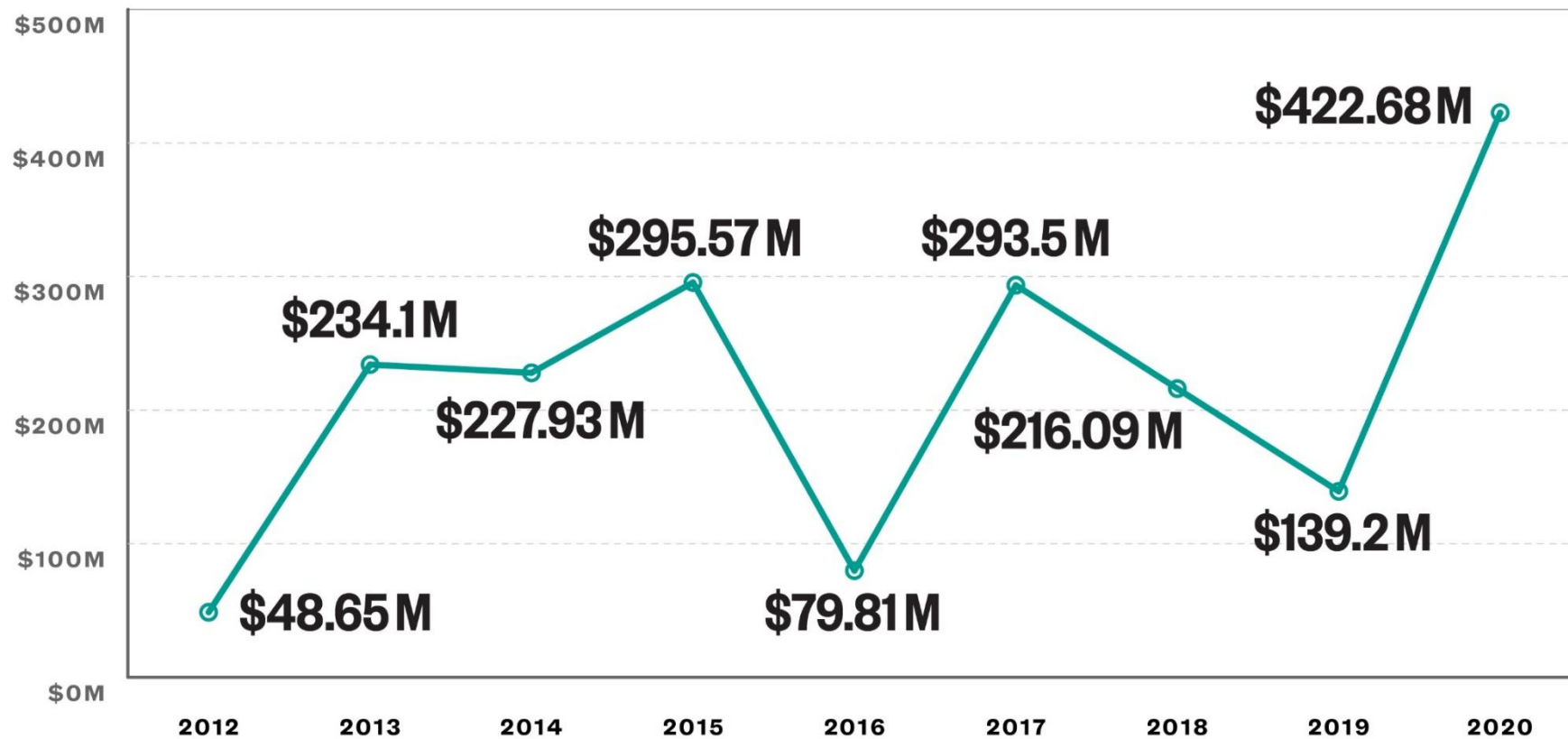
Settlement Amounts By Class Action Type



- Government enforcement litigation and ERISA class actions both saw an increase
- Private-Plaintiff wage & hour and statutory class action settlements decreased
- Employment class actions and government enforcement cases had the most significant increases

# Trend 3: Increase In Class Action Settlement Numbers In 2020

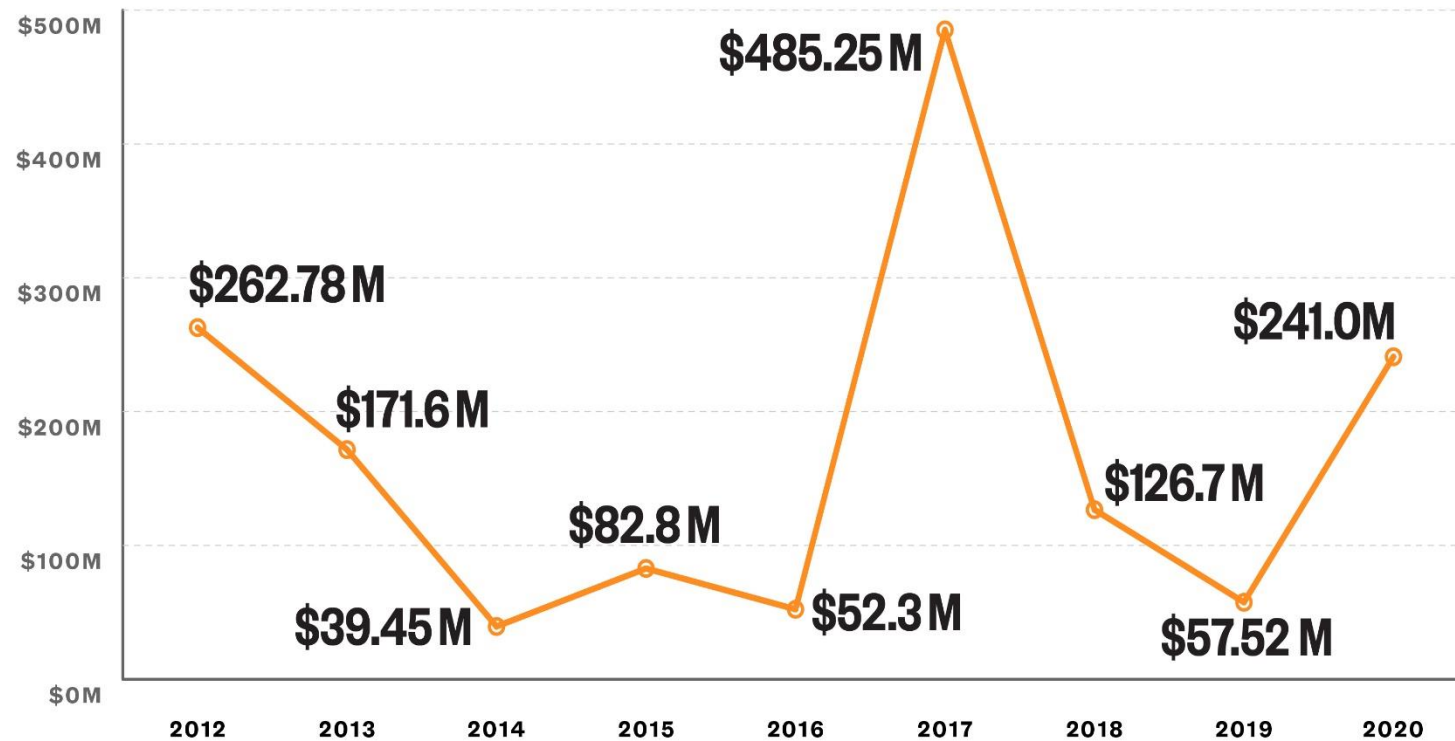
- Employment discrimination cases saw the highest increase in 2020, totaling \$422.68 million



Value Of Top 10 Employment Discrimination Class Action Settlements

# Trend 3: Increase In Class Action Settlement Numbers In 2020

- Government Enforcement settlement numbers were also up in 2020

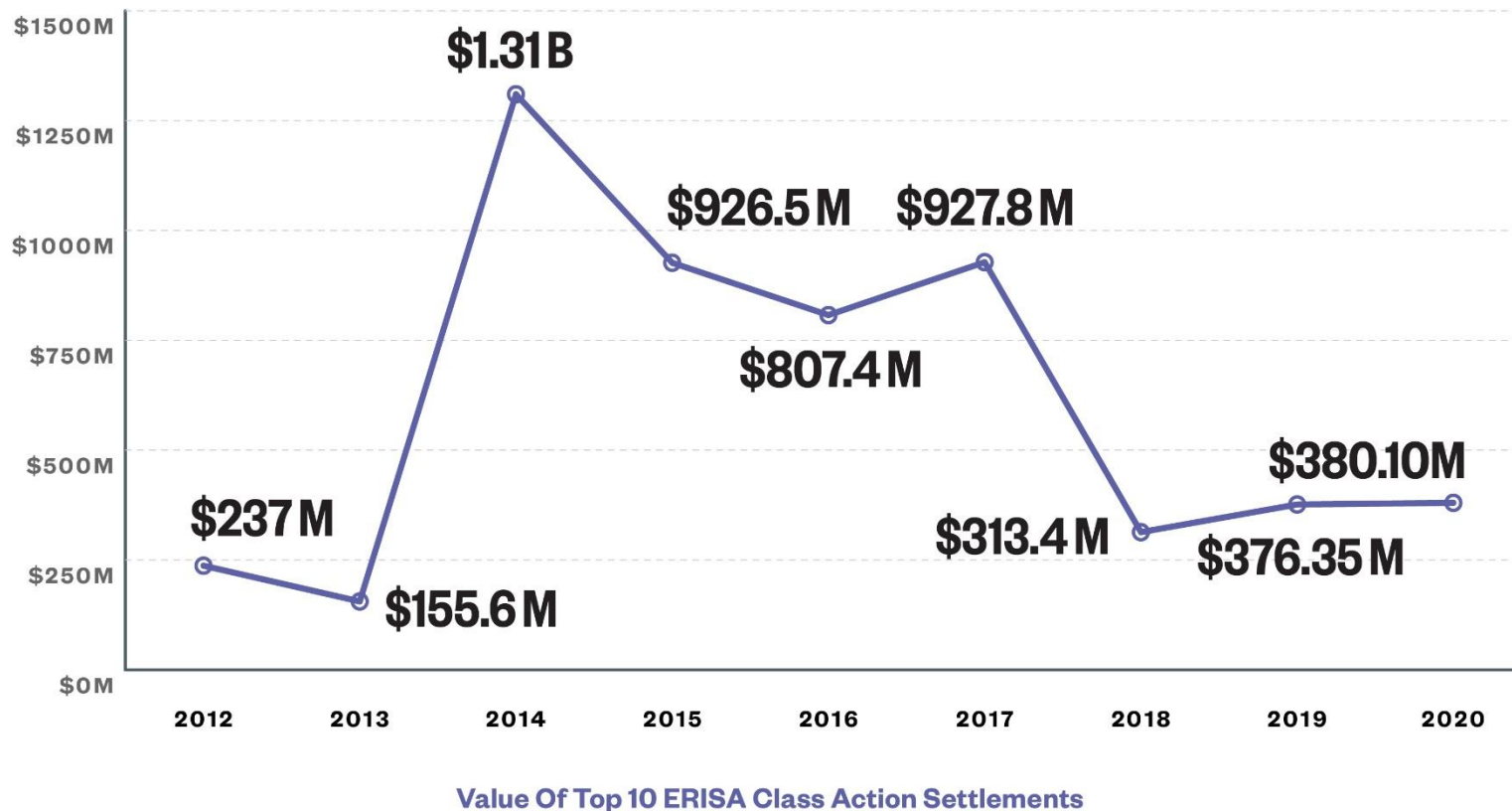


Value Of Top 10 Government Enforcement Litigation Settlements



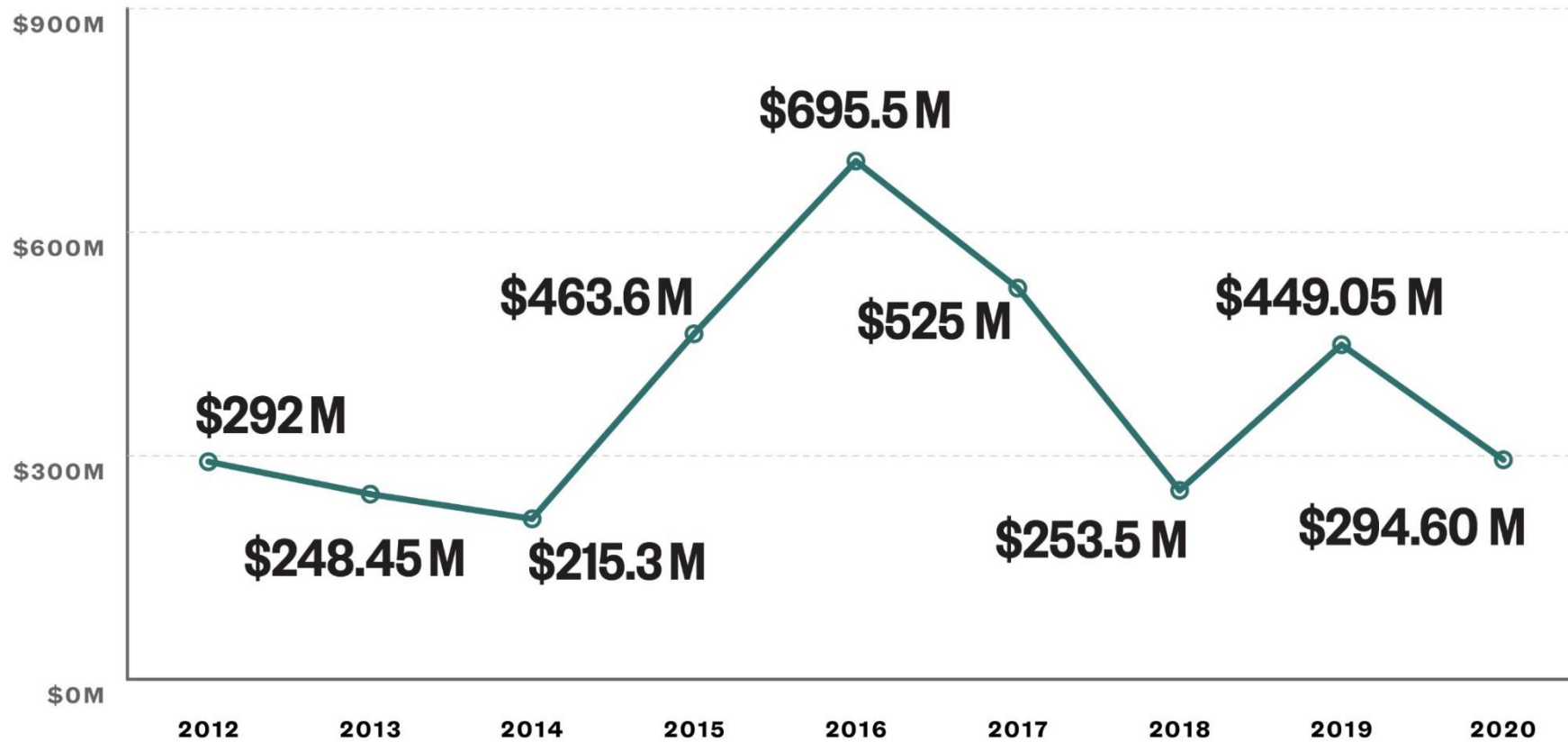
# Trend 3: Increase In Class Action Settlement Numbers In 2020

- ERISA settlement amount of \$380.1 million was similar to 2019's \$376.35 million



# Trend 3: Increase In Class Action Settlement Numbers In 2020

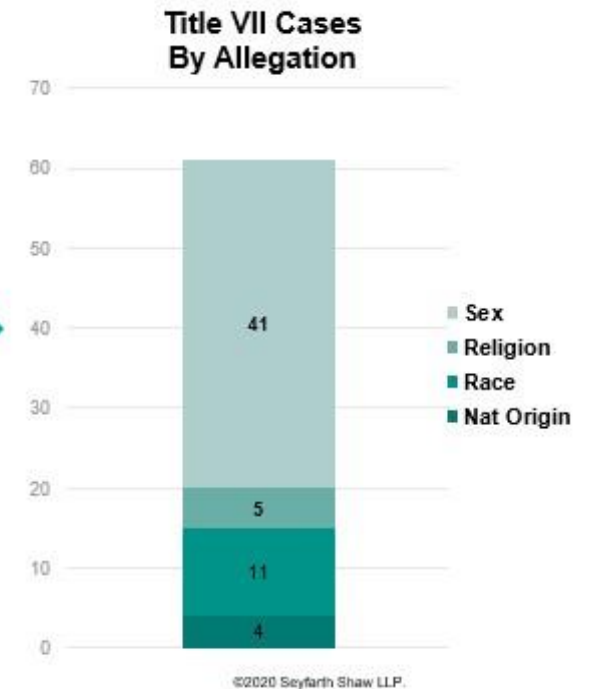
- The top 10 wage & hour settlement total declined from last year to \$294.60 million



Value Of Top 10 Wage & Hour Class Action Settlements

# Trend 4: Slowed Governmental Enforcement Litigation In 2020

- Despite an increase in the value of government enforcement settlements, litigation enforcement efforts declined
  - 94 merits lawsuits (compared to 144 in 2019)
  - 7 subpoena enforcement actions
- Title VII and ADA cases were the majority of the Commission's filings



# Trend 4: Slowed Governmental Enforcement Litigation In 2020

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- EEOC, under Chair Janet Dhillon, shifted away from prioritizing systemic litigation, making it a “last resort” option for the Commission and is likely to continue doing so in 2021
- A March 2020 Resolution removed litigation authority from the General Counsel, shifting it to the Commissioners’ discretion
- Overhauled the conciliation process to improve its transparency and effectiveness
- EEOC recovered \$535.4 million on behalf of alleged discrimination victims, a record amount

# Trend 4: Slowed Governmental Enforcement Litigation In 2020

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- On September 3, 2020, the EEOC issued a rare opinion letter regarding the Commission’s interpretation and enforcement of § 707(a) of Title VII which addressed: (i) whether a pattern or practice claim under § 707(a) requires allegations of violations of § 703 or § 704 of Title VII; and (ii) whether the EEOC must satisfy pre-suit requirements such as conciliation before it can bring a § 707 case. The EEOC ultimately concluded that the answer to both questions is “yes.”
- On November 2, 2020, the EEOC considered a proposed memorandum of understanding (“MOU”) between the EEOC, the Department of Labor (“DOL”), and the Department of Justice (“DOJ”) aimed at recommitting to collaboration between the agencies and coordinating efforts to protect civil rights in the workplace.
  - Key provisions included ways to strengthen procedures for coordination between the three agencies.

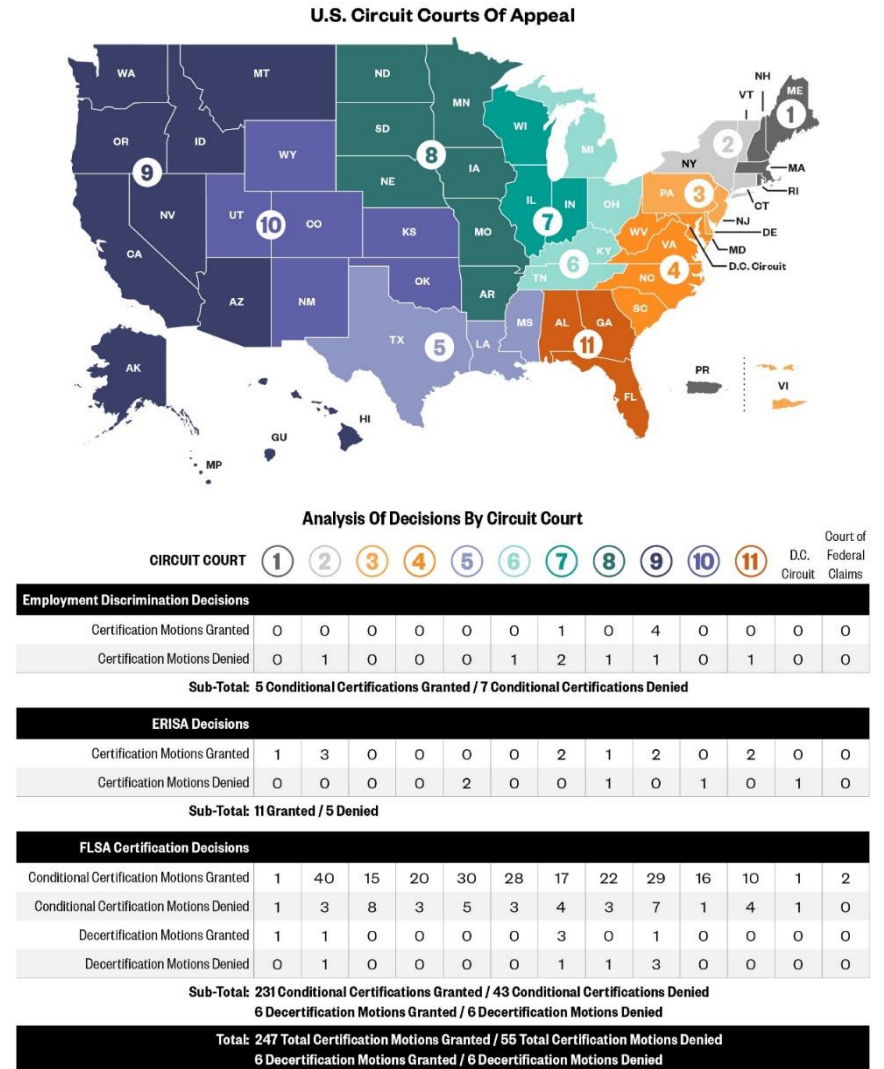
# Trend 4: Slowed Governmental Enforcement Litigation In 2020

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- The DOL was busy enforcing and issuing guidance on implementation of the Families First Coronavirus Response Act, with the Wage & Hour Division consistently updating FAQ guidance on the Act.
- The DOL also issued final “temporary” regulations interpreting the FCRA.
- The National Labor Relations Board (“NLRB”) ruled that an employer may discipline workers for making profane, abusive, or offensive statements, so long as the employer’s action is not based on specific anti-union animus, reinstating the previously-reversed *Wright Line* analysis.
- NLRB also issued a final rule providing that an entity may be considered a joint employer of a separate employer’s employees only if the two share or co-determine employees’ essential terms and conditions of employment.

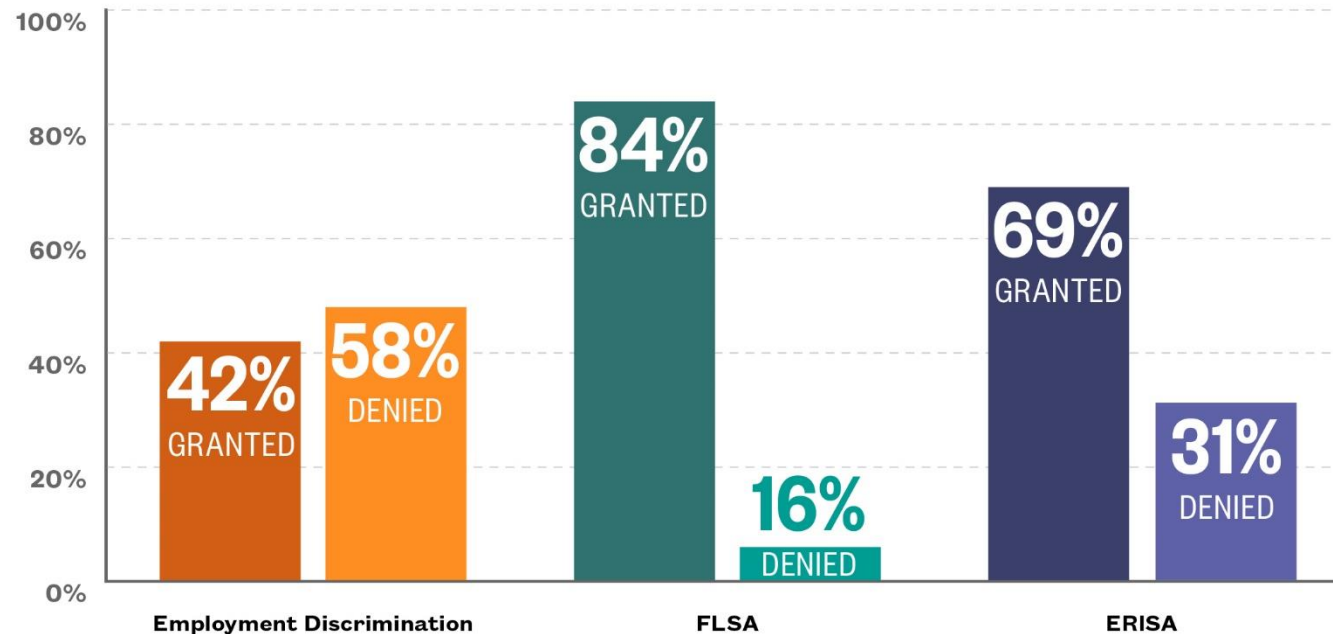
# Trend 5: Rise Of Wage & Hour Certification Numbers

- Total of 314 class certification decisions in all varieties of workplace class action litigation, including wage & hour, employment discrimination, and ERISA
- More class and collective actions were certified in 2020 than any other of workplace law space
- Employers saw the higher rate of success by workers on first-stage conditional certification motions than at any time in the previous 16 years
  - Of 286 wage & hour certification decisions in 2020, plaintiffs won 84%
- This trend is expected to increase in 2021





# Trend 5: Class Certification Numbers In 2020



**2020 Certification Motions For  
Employment Discrimination, FLSA, And ERISA**

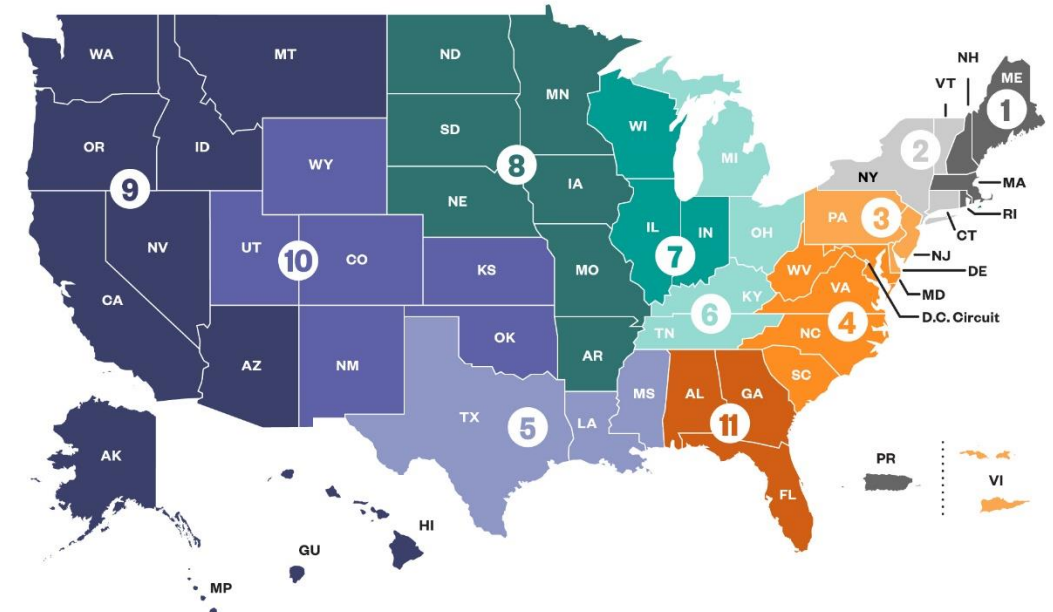
- 42% certification success rate for employment discrimination (Title VII and age discrimination cases)
- 69% certification success rate for ERISA class actions
- 84% conditional certification for wage & hour collective actions



# Trend 5: Class Certification Numbers In 2020

- The Second, Fifth, Sixth, and Ninth Circuits are the epi-centers of wage & hour class actions and collective actions. As in 2019, the Fifth and Sixth Circuits had nearly as many (or more) certifications than either the Second or Ninth Circuits.
- These statistics show robust numbers for the Plaintiffs’ bar, as plaintiffs prevailed on “first stage” conditional certification motions at a higher rate in 2020 and lost “second stage” decertification motions at a lower rate.
  - “First stage” certification rate of 84% in 2020, 81% in 2019, and 79% in 2018.
  - “Second stage” decertification rate of 50% in 2020, 58% in 2019, and 52% in 2018.

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



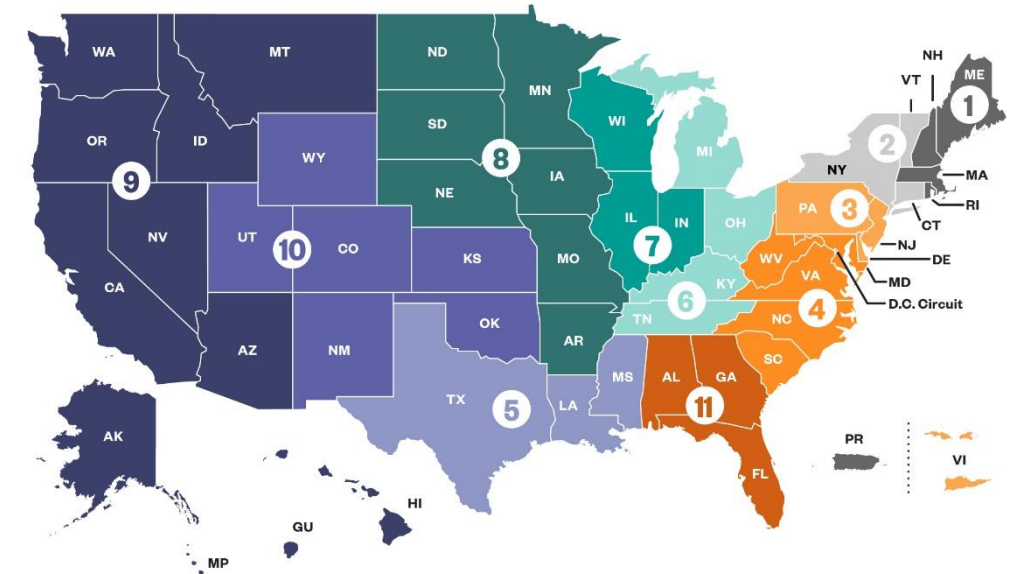
|   | 1 | 2  | 3  | 4  | 5  | 6  | 7  | 8  | 9  | 10 | 11 | D.C. Circuit | Court of Federal Claims |
|---|---|----|----|----|----|----|----|----|----|----|----|--------------|-------------------------|
| Conditional Certification Motions Granted | 1 | 40 | 15 | 20 | 30 | 28 | 17 | 22 | 29 | 16 | 10 | 1            | 2                       |
| Conditional Certification Motions Denied  | 1 | 3  | 8  | 3  | 5  | 3  | 4  | 3  | 7  | 1  | 4  | 1            | 0                       |
| Decertification Motions Granted           | 1 | 1  | 0  | 0  | 0  | 0  | 3  | 0  | 1  | 0  | 0  | 0            | 0                       |
| Decertification Motions Denied            | 0 | 1  | 0  | 0  | 0  | 0  | 1  | 1  | 3  | 0  | 0  | 0            | 0                       |

Total: 231 Conditional Certifications Granted / 43 Conditional Certifications Denied  
6 Decertification Motions Granted / 6 Decertification Motions Denied

# Trend 5: Class Certification Numbers In 2020

- Increase in “smaller”/down-sized employment discrimination class actions to assert local, state-wide, and regional classes instead of mega-classes.
  - Likely fueled by the *Wal-Mart* ruling, which discouraged massive nationwide classes and has subsequently forced the Plaintiffs’ playbook on Rule 23 strategies to change.
- The Plaintiffs’ bar was less successful in securing Rule 23 certifications in the employment discrimination arena and only 5 out of 12 certification motions were granted in 2020.
  - This compared to 7 out of 11 granted in 2019.
  - The certification rate of 42% was one of the lowest on record over the last decade.

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

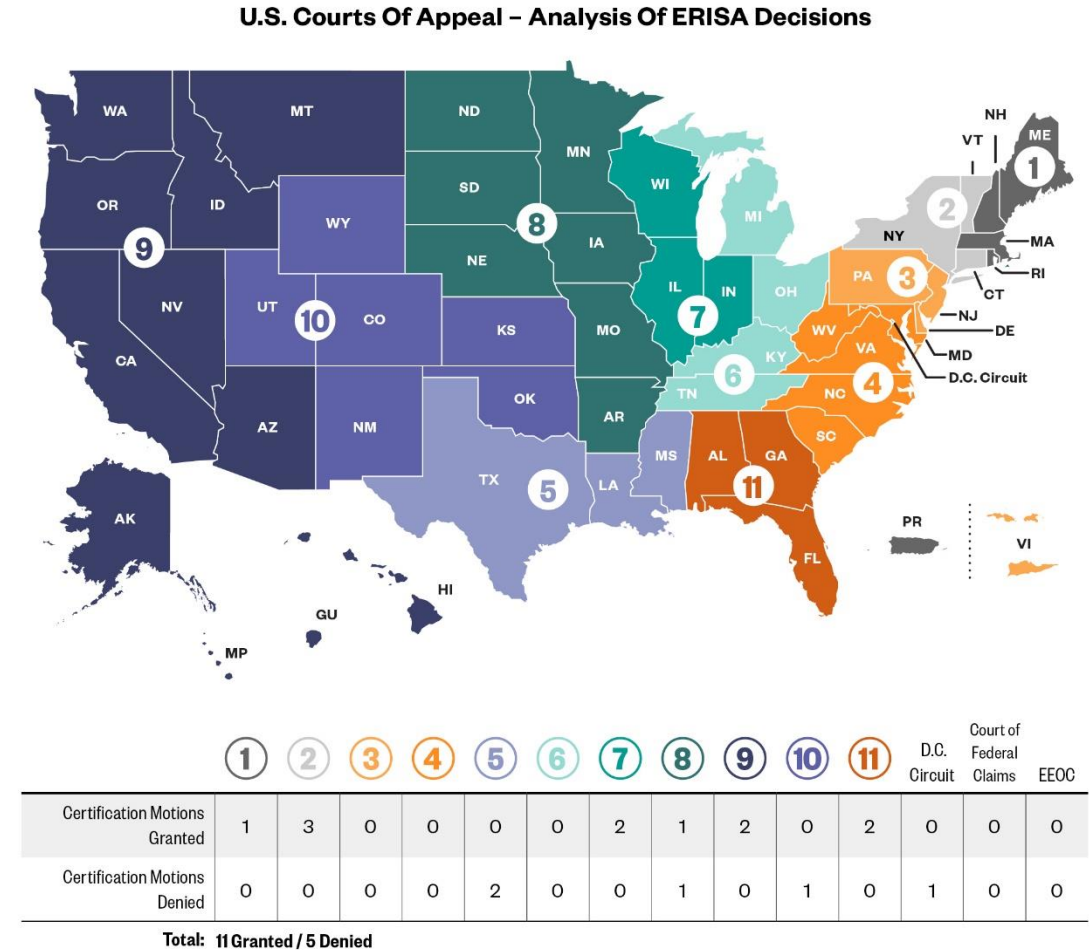


|   | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | D.C. Circuit | Court of Federal Claims | EEOC |
|---|---|---|---|---|---|---|---|---|---|----|----|--------------|-------------------------|------|
| Conditional Certification Motions Granted | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 4 | 0  | 0  | 0       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

Total: 5 Conditional Certifications Granted / 7 Conditional Certifications Denied

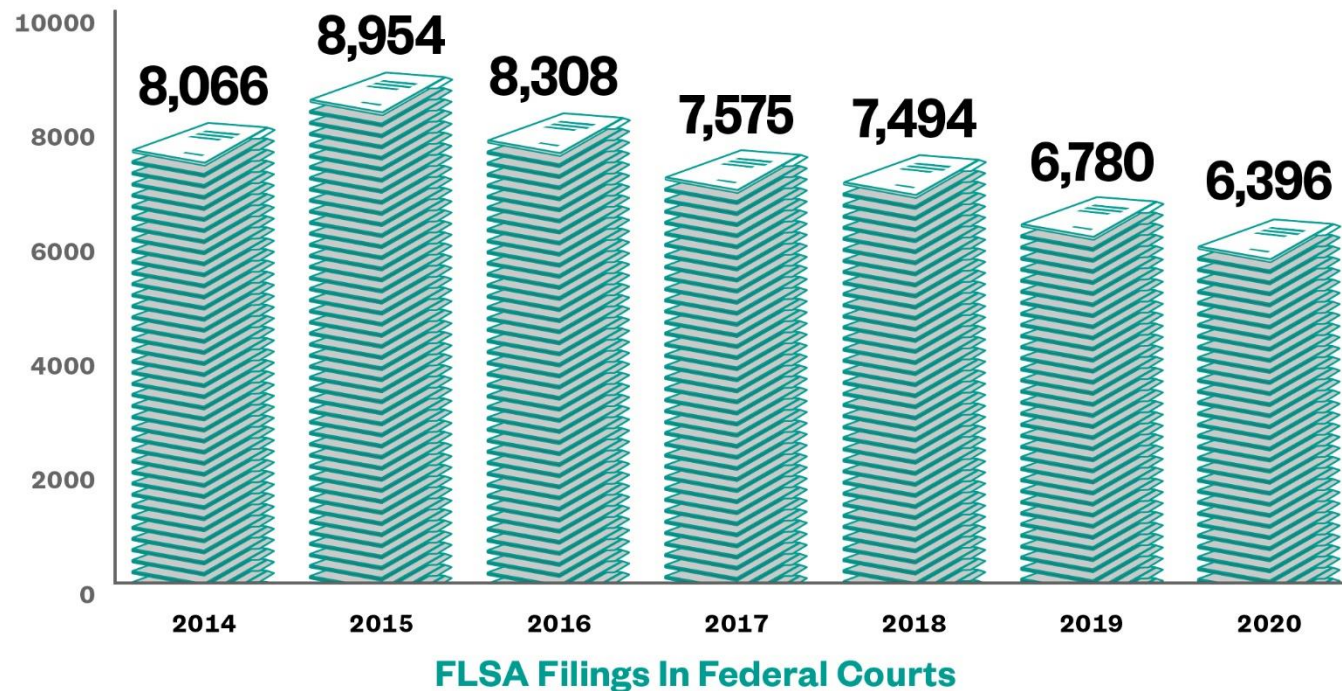
# Trend 5: Class Certification Numbers In 2020

- In ERISA class action litigation, 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.
- Plaintiffs' success rate was on par with previous years. In 2020, plaintiffs won 11 of 16 certification rulings, a success rate of 69%.
  - In 2019 and 2018, plaintiffs won 11 of 17 certification rulings, a success rate of 65% and in 2017, plaintiffs prevailed in 17 of 22 certification rulings, for a success rate of 77%.





# Trend 5: Wage & Hour Litigation Risks



- FLSA collective action cases outnumbered all other types of employment class action because nearly all FLSA lawsuits are filed on a collective action basis
- In 2020, FLSA filings decreased, likely impacted by the COVID-19 pandemic in addition to arbitration programs
- But 2021 may see an increase in FLSA filings due to minimum wage hikes, independent contractor and joint employer status issues, and a shift in DOL priorities

# Significant Certification Decisions In 2020 – Employment Discrimination

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- *Nelson v. Pace Suburban Bus Co.*, 2020 U.S. Dist. LEXIS 208760 (N.D. Ill. Nov. 9, 2020) [Page 44]
- *Harris v. Union Pacific Railroad Co.*, 953 F.3d 1030 (8th Cir. 2020) [Page 45]
- *Case v. Judd*, 2020 U.S. Dist. LEXIS 13281 (M.D. Fla. Jan. 28, 2020) [Page 48]

# Significant Certification Decisions In 2020 – Wage & Hour



- *Thrower v. UniversalPegasus, International Inc.*, 2020 U.S. Dist. LEXIS 161132 (S.D. Tex. Sept. 3, 2020) (misclassification case granting conditional certification despite notable variations among certified positions) [Page 134]
- *Whittenberg v. Centene Co. of Texas, L.P.*, 2020 U.S. Dist. LEXIS 115851 (W.D. Tex. July 1, 2020) (denying certification where self-serving declarations failed to connect alleged far-reaching policy and claimed underpayments of wages due under FLSA) [Page 135]
- *Canaday v. The Anthem Cos., Inc.*, 2020 U.S. Dist. LEXIS 18831 (W.D. Tenn. Feb. 3, 2020) (limiting conditionally certified collective to employees within Tennessee’s borders because *Bristol Myers Squibb* foreclosed court from exercising jurisdiction over defendant as to out-of-state employees) [Page 138]
- *In Re Schlumberger Technology Corp.*, 2020 U.S. App. LEXIS 17776 (5th Cir. June 4, 2020) (reversing lower court order that disclosure of attorney-led job assessment waived attorney-client protections, where defendant did not rely on privileged communications to support its defense) [Page 234]

# Significant Certification Decisions In 2020 – Wage & Hour (California)



- *Castillo v. Bank of America, N.A.*, 2020 U.S. Dist. LEXIS 36182 (9th Cir. Nov. 18, 2020) (affirming denial of class certification where defendant demonstrated that individualized issues regarding whether class members suffered injury from the challenged policy predominated over common questions) [Page 169]
- *Davidson v. O'Reilly Auto Enterprises, LLC*, 2020 U.S. App. LEXIS 24343 (9th Cir. Aug. 3, 2020) (affirming denial of class certification, finding that the district court did not abuse its discretion in enforcing class certification deadline, and that plaintiff failed to show common injury in support of rest period claim) [Page 660]
- *Santos, et al. v. United Parcel Service*, 2020 U.S. Dist. LEXIS 165956 (N.D. Cal. Nov. 18, 2020) (denying certification of meal and rest break claims due to plaintiff's failure to present proof of uniform policies) [Page 184]
- *Barriga v. 99 Cents Only Stores LLC*, 2020 Cal. App. LEXIS 586 (Cal. App. 4th Dist. June 26, 2020) (trial court has duty to scrutinize declarations submitted in opposition to class certification for abuse or coercion) [Page 361]

# Significant Certification Decisions In 2020 – ERISA

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- *Torres et al. v. American Airlines*, 2020 U.S. Dist. LEXIS 109895 (N.D. Tex. May 22, 2020) (class certification denied in mortality table litigation) [Page 313]
- *Thole, et al. v. U.S. Bank, N.A.*, 140 S.Ct. 1615 (2020) (limiting standing to challenge defined benefit plan investment decisions) [Page 353]
- *Intel Corp Investment Policy Committee v. Sulyma, et al.*, 140 S.Ct. 768 (2020) (what is required to show “actual knowledge” for purposes of statute of limitations) [Page 354]
- *Ramos, et al. v. Banner Health*, 261 F.Supp.3d 1067 (D. Colo. 2020) (trial of 401(k) fee case) [Page 355]



# Other Rule 23 Decisions Of Significance In 2020

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- *In Re Xarelto*, 2020 U.S. Dist. LEXIS 50440 (E.D. La. Mar, 24, 2020) (largest fee award of 2020 - \$93 million) [Page 489]
- *Massey v. McDonald's*, 2020 Ill. Cir. LEXIS 465 (Cir. Ct. Ill.) (injunction granted for COVID safety protocols) [Page 411]
- *Waithake v. Amazon.com*, 2020 U.S. App. LEXIS 22313 (1st Cir. JULY 17, 2020) (workplace arbitration issues) [Page 749]

# What Do The Developments Of 2020 Mean For 2021?

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- A COVID-19 litigation time bomb is ticking – when things get back to normal, expect more lawsuits
- Plaintiffs lawyers are upbeat due to their results in 2020, and when coupled with the increasing tilt of state and federal workplace agencies toward pro-worker positions, 2021 is posed to embolden the class action bar further

# What Can Employers Do?

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- Commit to solid HR fundamentals – sound HR practices, fair administration of policies, rigorous training, and investment in legal compliance
- If you have not considered or previously passed on using workplace arbitration agreements with class action waivers, resolve to reconsider the pros/cons of using them
- Own your data, as it contains risks or defenses that bear upon the potential claims of protected category employees
- Invest in – and don't skimp on - legal compliance in terms of the # 1 workplace litigation risk: how you pay and compensate workers

# What Should Be In Your ERISA Compliance Tool Kit?

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- Robust, ongoing fiduciary oversight and review of defined contribution plan investment menu
- Review and understanding of how providers are compensated and how they use participant data
- Implement a limitations and venue provision
- Fiduciary education and training
- Disclosure, disclosure, and more disclosure (and read receipts)

# What Should Be In Your Wage & Hour Compliance Tool Kit?

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- Train managers of non-exempt employees on wage & hour compliance
- Audit for "off the clock" issues through timekeeping systems (e.g., Kronos) and payroll reports
- Review closely any independent contractor and potential joint employer relationships, document them properly, strengthen risk-mitigating provisions (e.g., indemnities & representations of non-employee status)
- Pay extra attention to litigation trends with respect to particular job classifications and industries

# Corporate Tool Kit Issues For Employment Discrimination

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- Ensure robust policies to ban discrimination
- Ensure objective elements in pay-setting, performance evaluations, and promotions
- Preemptively, in a privileged way, analyze adverse impact
- Recruit diverse candidate pools
- Encourage diversity in leadership and succession planning
- Avoid quotas

# How To Order The 17th Annual Workplace Class Action Report

- Check out the Workplace Class Action Report website available at [www.workplaceclassactionreport.com](http://www.workplaceclassactionreport.com)
- The Report is available to clients of the firm and interested corporate counsel. To request a FREE copy of the report, please e-mail your request to [ClassActionReport@seyfarth.com](mailto:ClassActionReport@seyfarth.com).
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