



18th Annual Workplace Class Action Litigation Report Webinar

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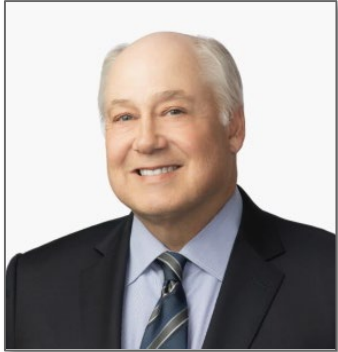
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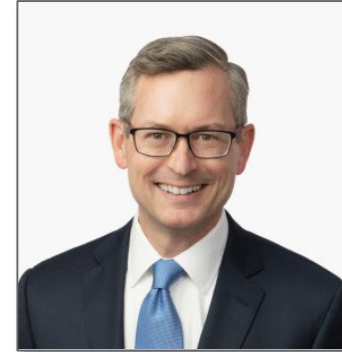
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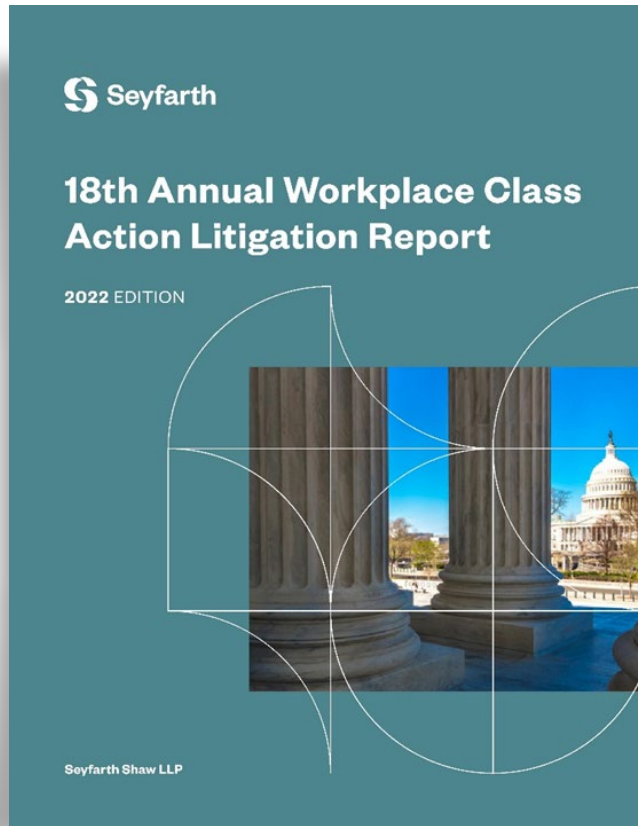
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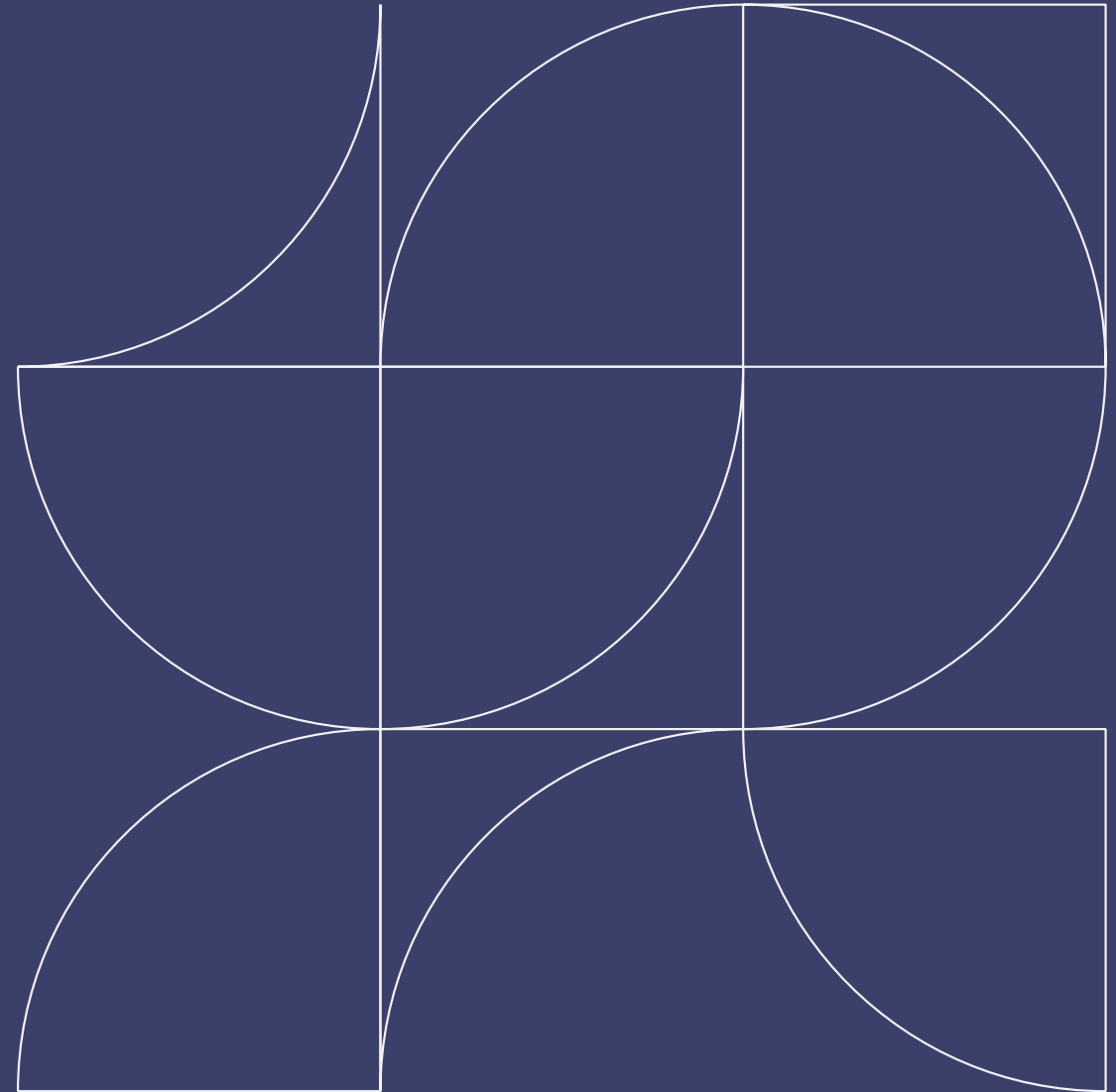
Agenda



- 1 | Class Action Settlement Trends**
- 2 | Class Certification Trends**
- 3 | Government Administrative And Enforcement Trends**
- 4 | The Continuing Impact Of COVID-19**
- 5 | The Continuing Impact Of Arbitration**
- 6 | Key Class Action Rulings**

1.

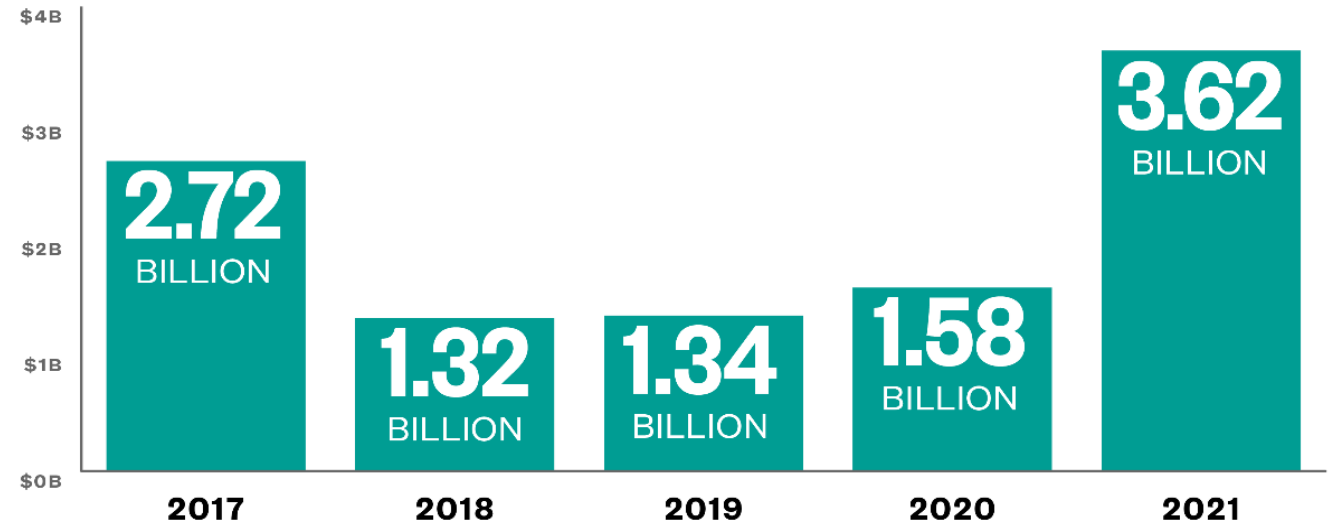
Class Action Settlement Trends



Trend 1: Class Action Settlement Trends

- The settlement numbers in 2021 were off the chart
- What does this mean for employers in practical terms?

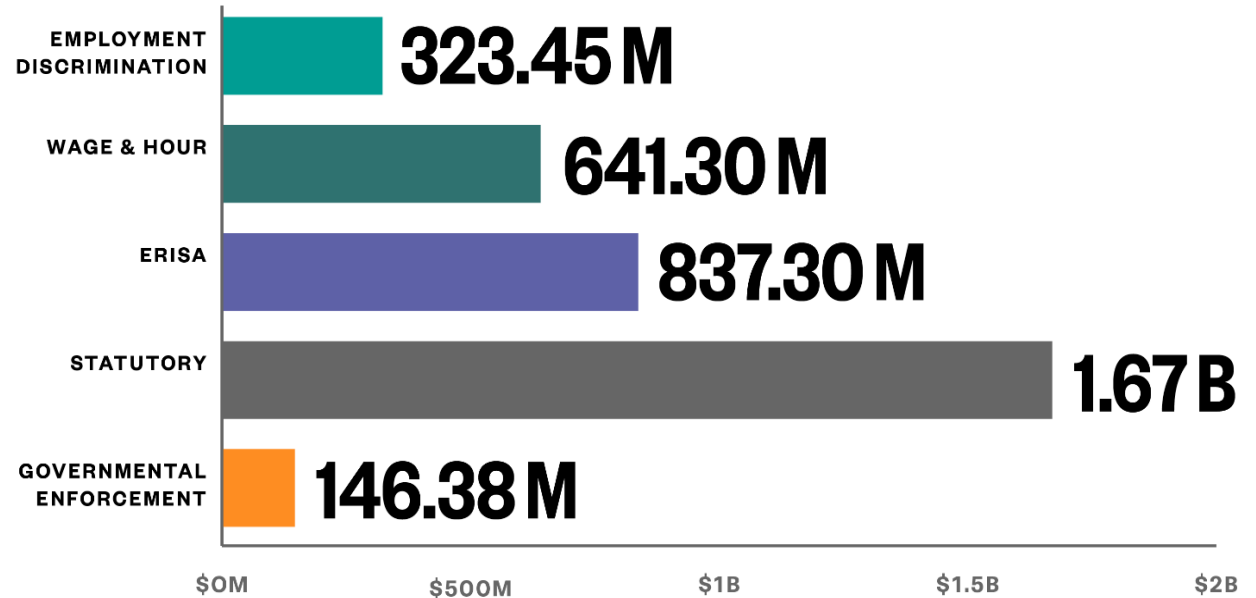
Aggregate Settlement Amounts



Trend 1: Class Action Settlement Trends

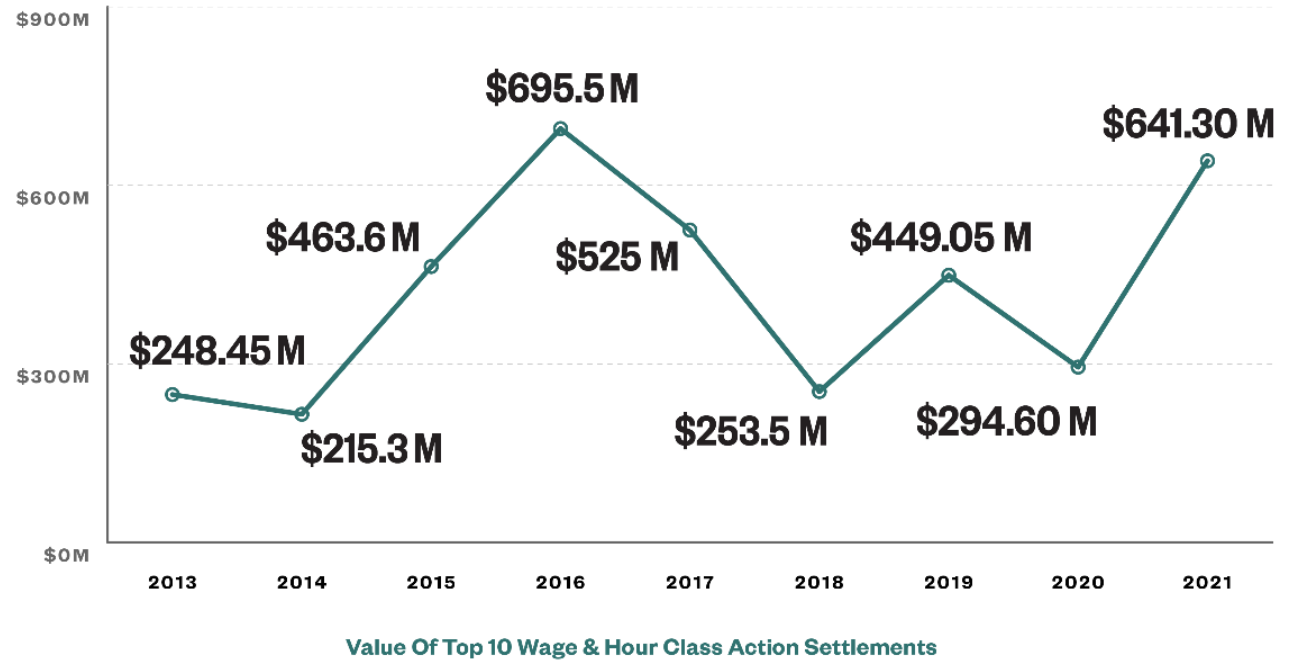
- The top ten settlements per area
- Wage & hour and ERISA class action settlements more than doubled from the year before
- Settlements for statutory claims increased ten-fold
- Employment discrimination and government enforcement claims were slightly down

Settlement Amounts By Class Action Type



Trend 1: Class Action Settlement Trends

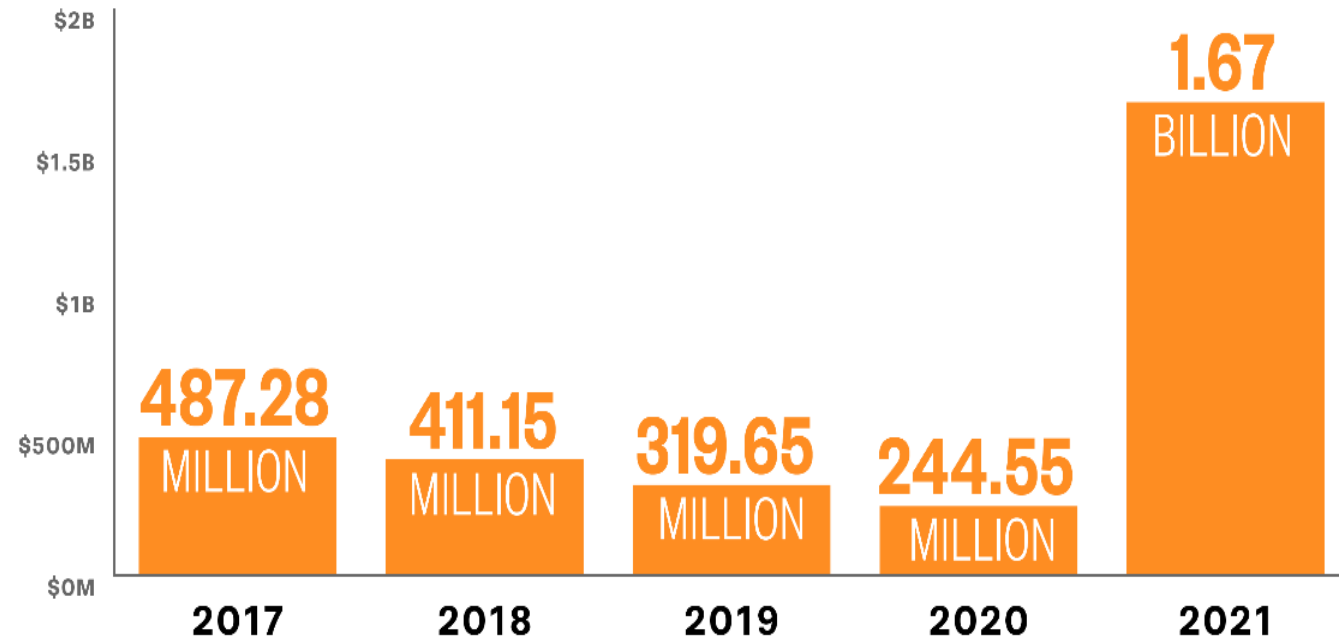
- Wage & hour class and collective actions remain the #1 threat for employers
- Over the past 5 years, the average for the top 10 payouts has been \$537.43 million per year
- Over the past 7 years, the total amount paid for the top 10 settlements has topped \$3.25 billion



Trend 1: Class Action Settlement Trends

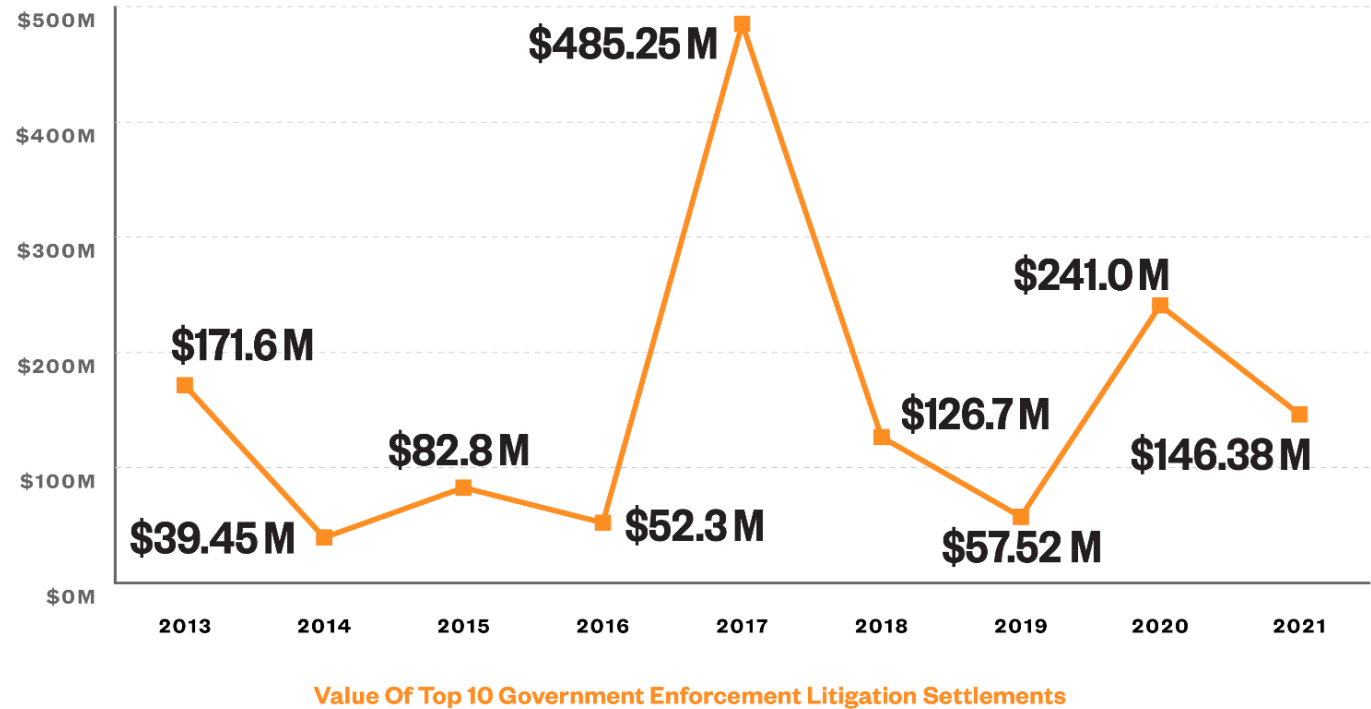
- Statutory class action claims have exploded
- The impact of the migration of skilled plaintiffs class action lawyers expanding into additional areas
- Massive powder-keg of exposure

Value of Top 10 Private Statutory Workplace Class Action Settlements



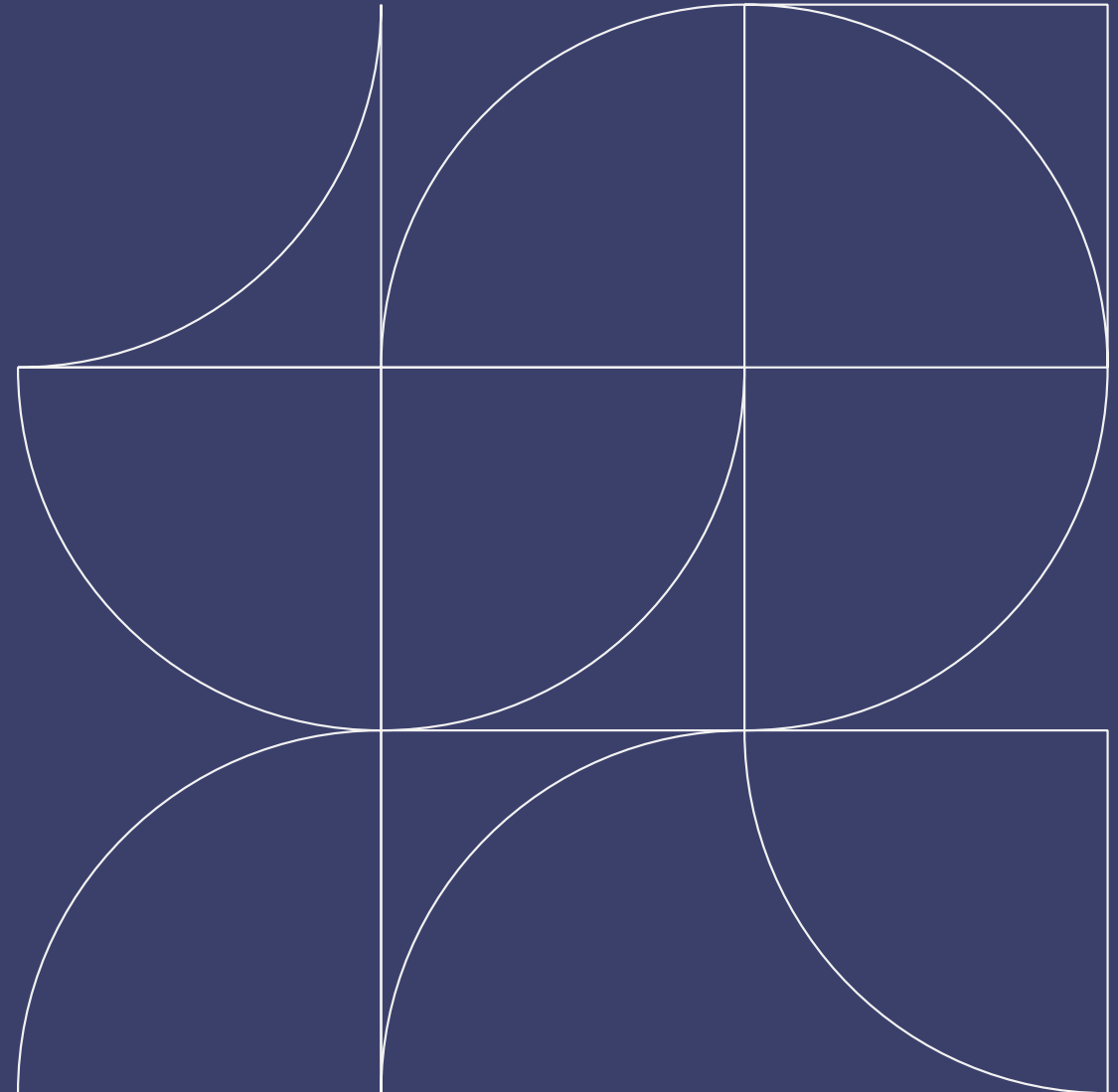
Trend 1: Class Action Settlement Trends

- Government enforcement settlements follow a more nuanced pattern
- The “blue-to-red and red-to-blue” phenomenon
- Look for increases in 2022



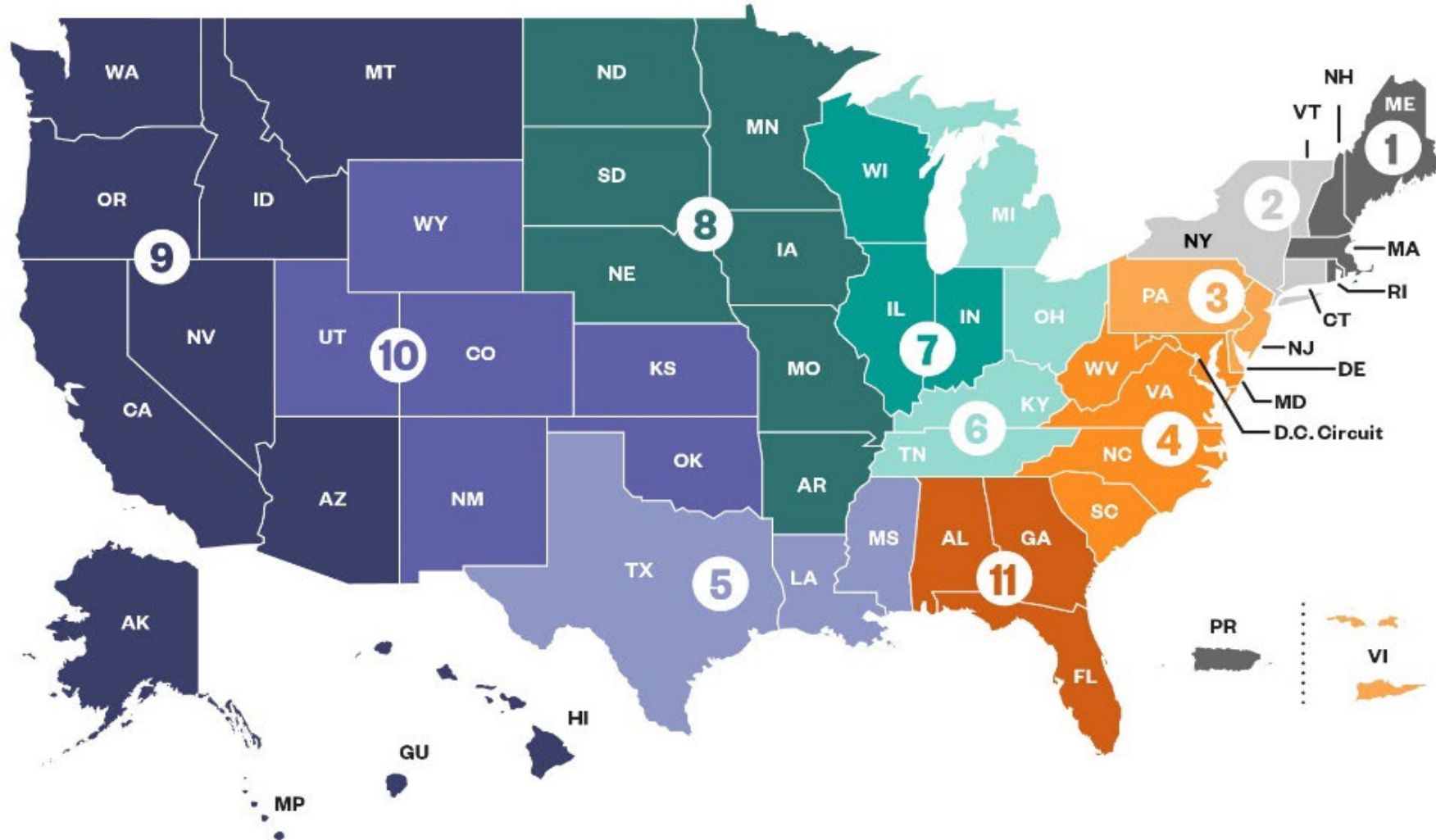
2.

Class Certification Trends



Trend 2: Class Certification Trends

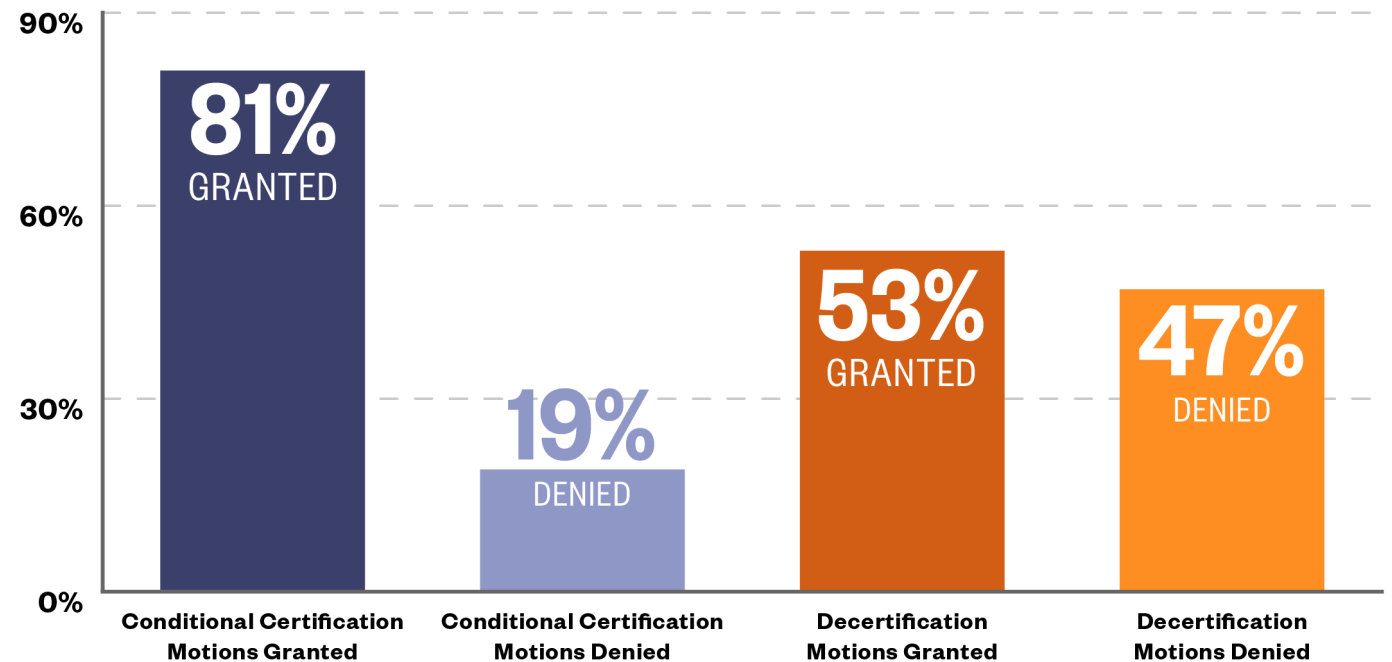
U.S. Circuit Courts Of Appeal



Trend 2: Class Certification Trends

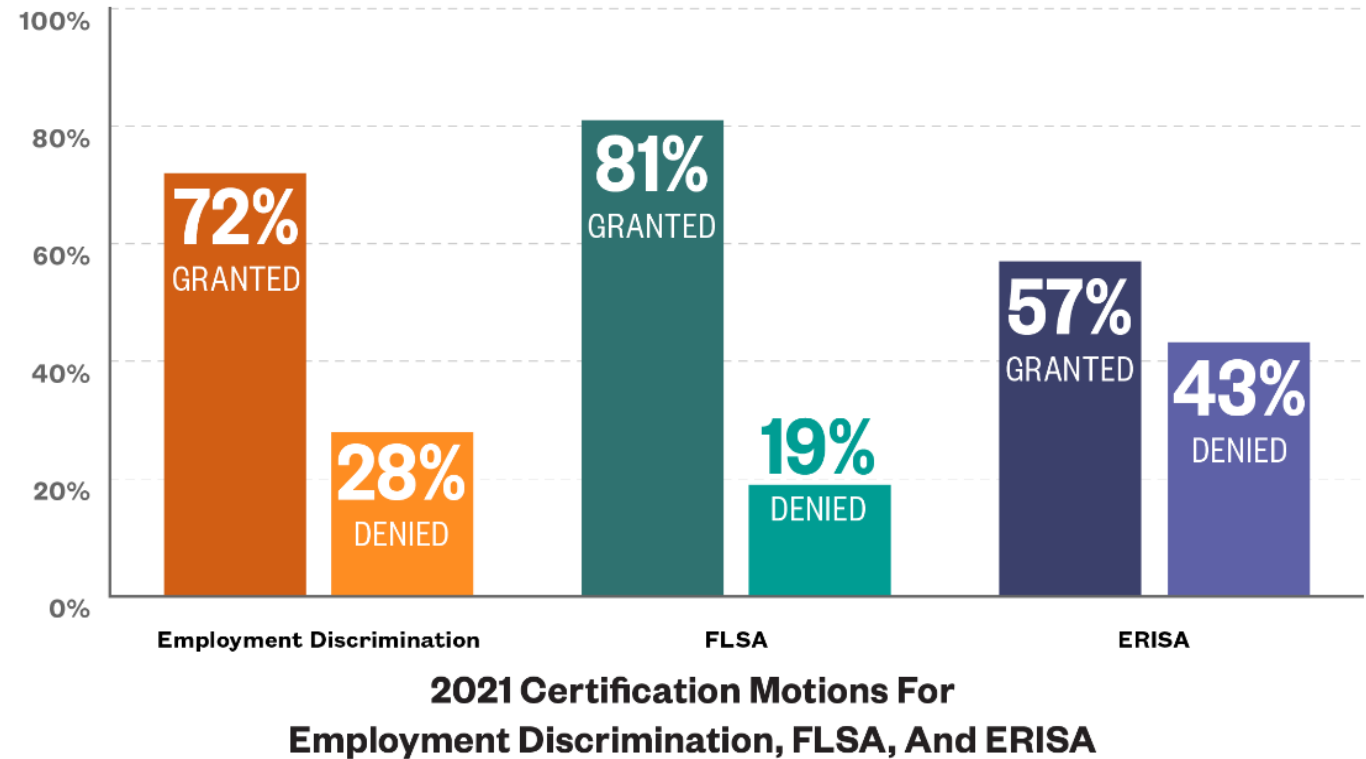
- The state of the union insofar as wage & hour class and collective actions are concerned
- At 81%, the plaintiffs' bar garnered success at the initial certification phase at the highest levels in 2 decades
- Venue, circuit precedents, and individual judicial assignments remain highly determinative on outcomes

2021 FLSA Conditional Certification Motions And Decertification Motions



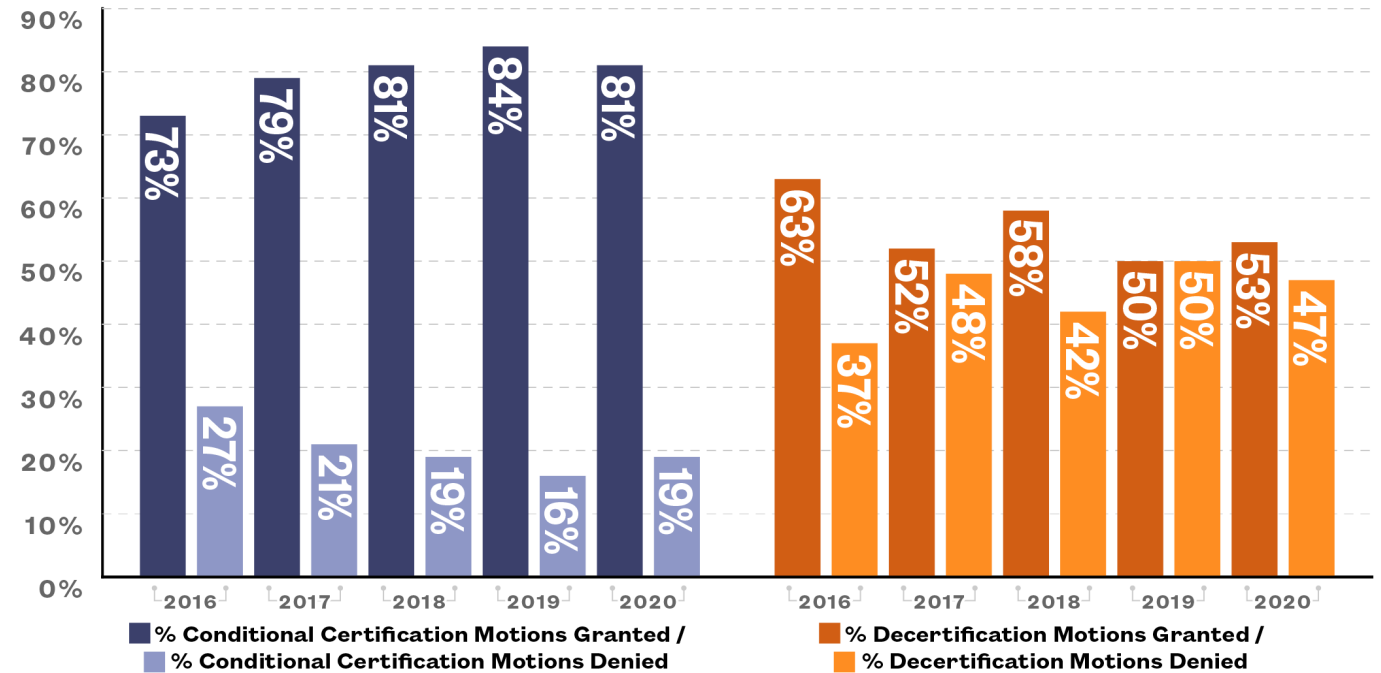
Trend 2: Class Certification Trends

- Employment discrimination class actions – at 72% – were at the highest levels since 2011 (The “*Wal-Mart* effect”)
- ERISA class actions – at 57% – were flat as compared to the previous year



Trend 2: Class Certification Trends

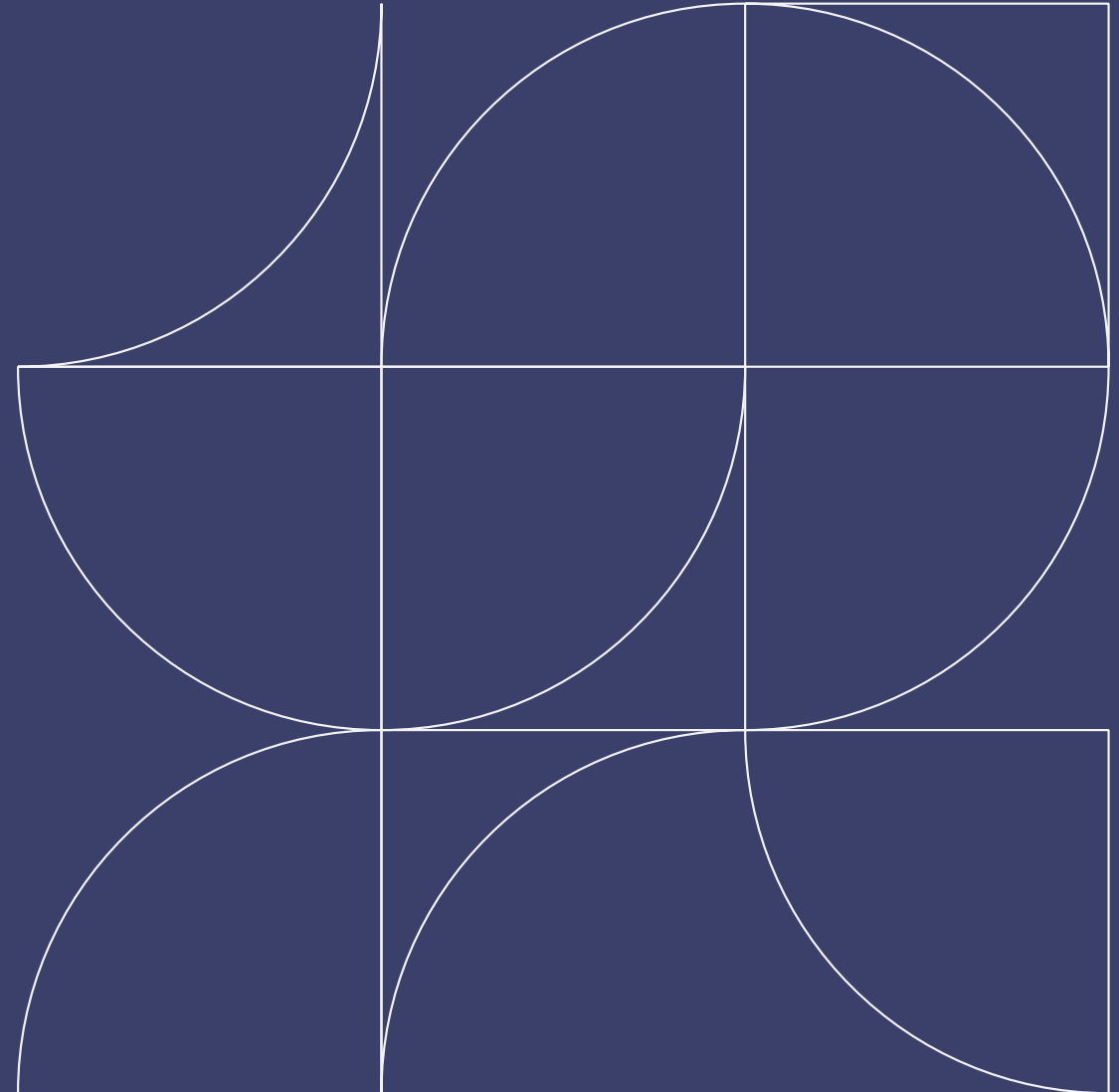
- The 5 year average in the wage & hour space
- Uptick in decertification success levels for employers (at 53% as compared to the previous year)
- The cost of moving for and securing decertification



2017 – 2021 FLSA Conditional Certification Motions and Decertification Motions

3.

Government Administrative And Enforcement Trends



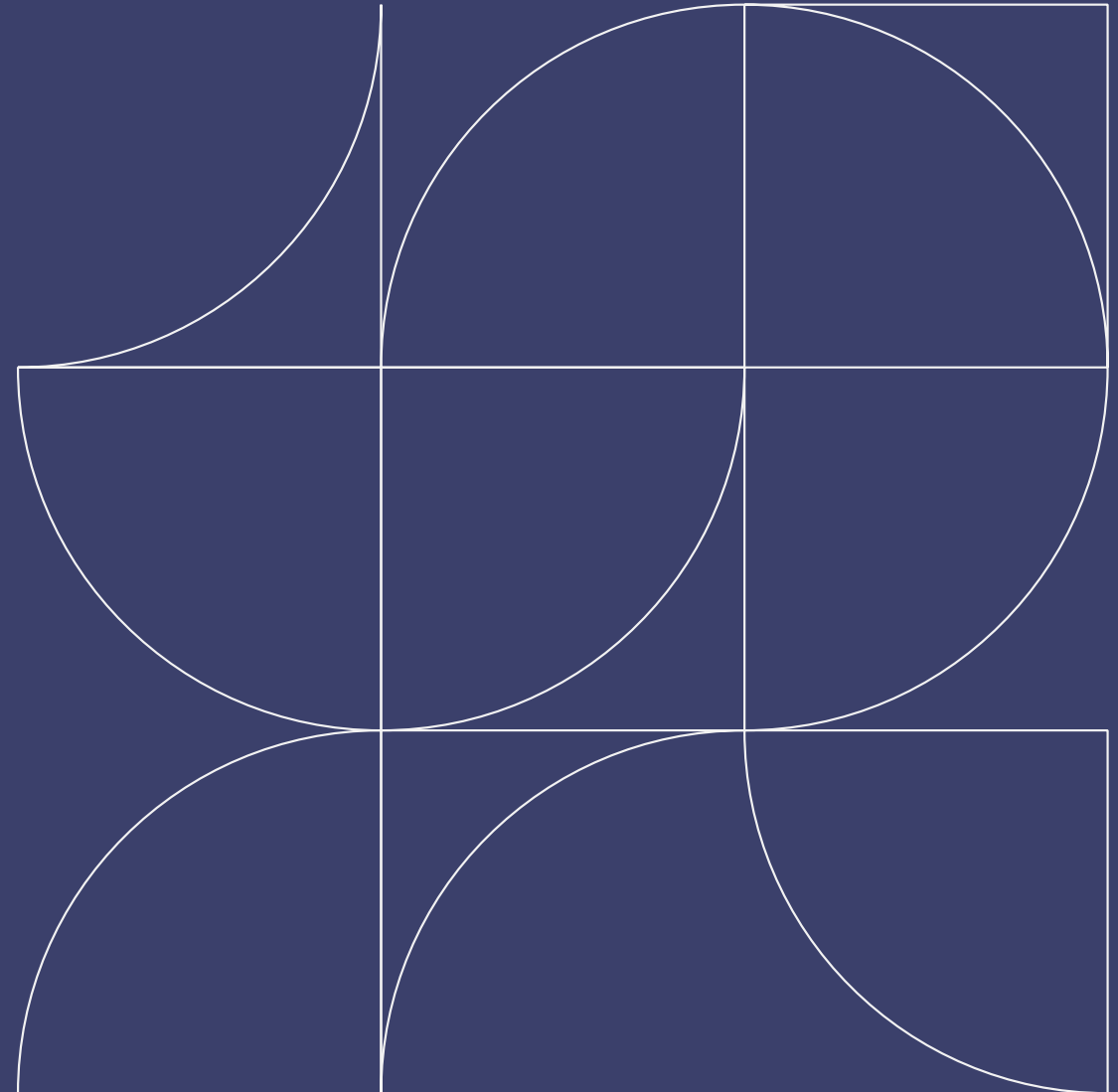


Trend 3: Government Administrative And Enforcement Trends

- New agency personnel are now fully in place and championing the pro-worker, pro-labor policies of the Biden Administration
- Expect more regulation and more enforcement actions
- Inevitably, government enforcement litigation is posed to enter a ramp-up period

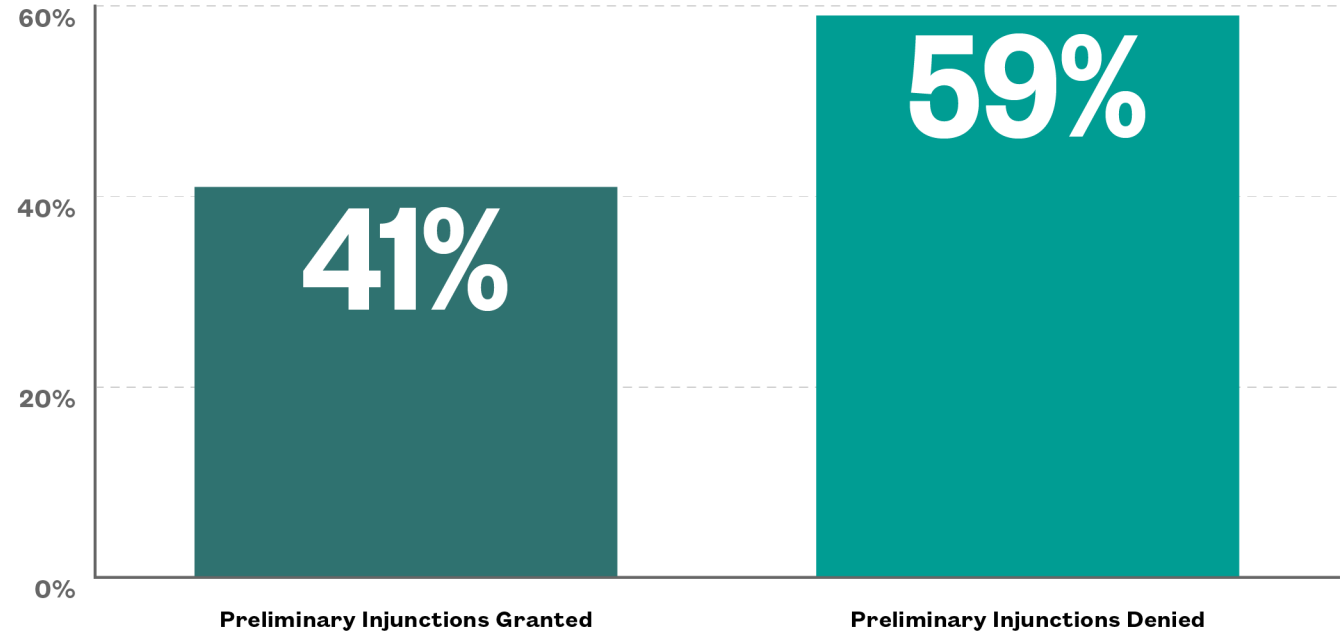
4.

The Continuing Impact Of COVID-19



Trend 4: The Continuing Impact Of COVID-19

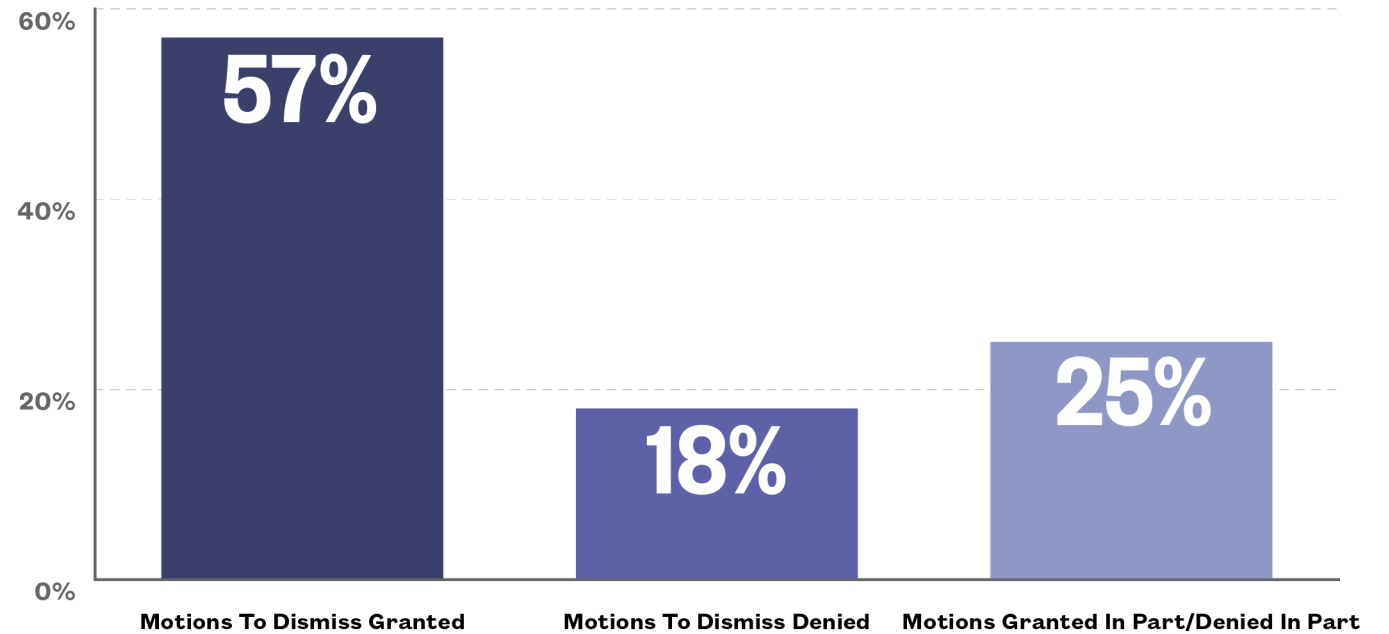
- Success rates on seeking injunctive relief against COVID-19 policies is south of 50/50
- But these rates reflect flux and change, and a difficult legal terrain



2021 COVID-19 Class Action Rulings On Preliminary Injunctions

Trend 4: The Continuing Impact Of COVID-19

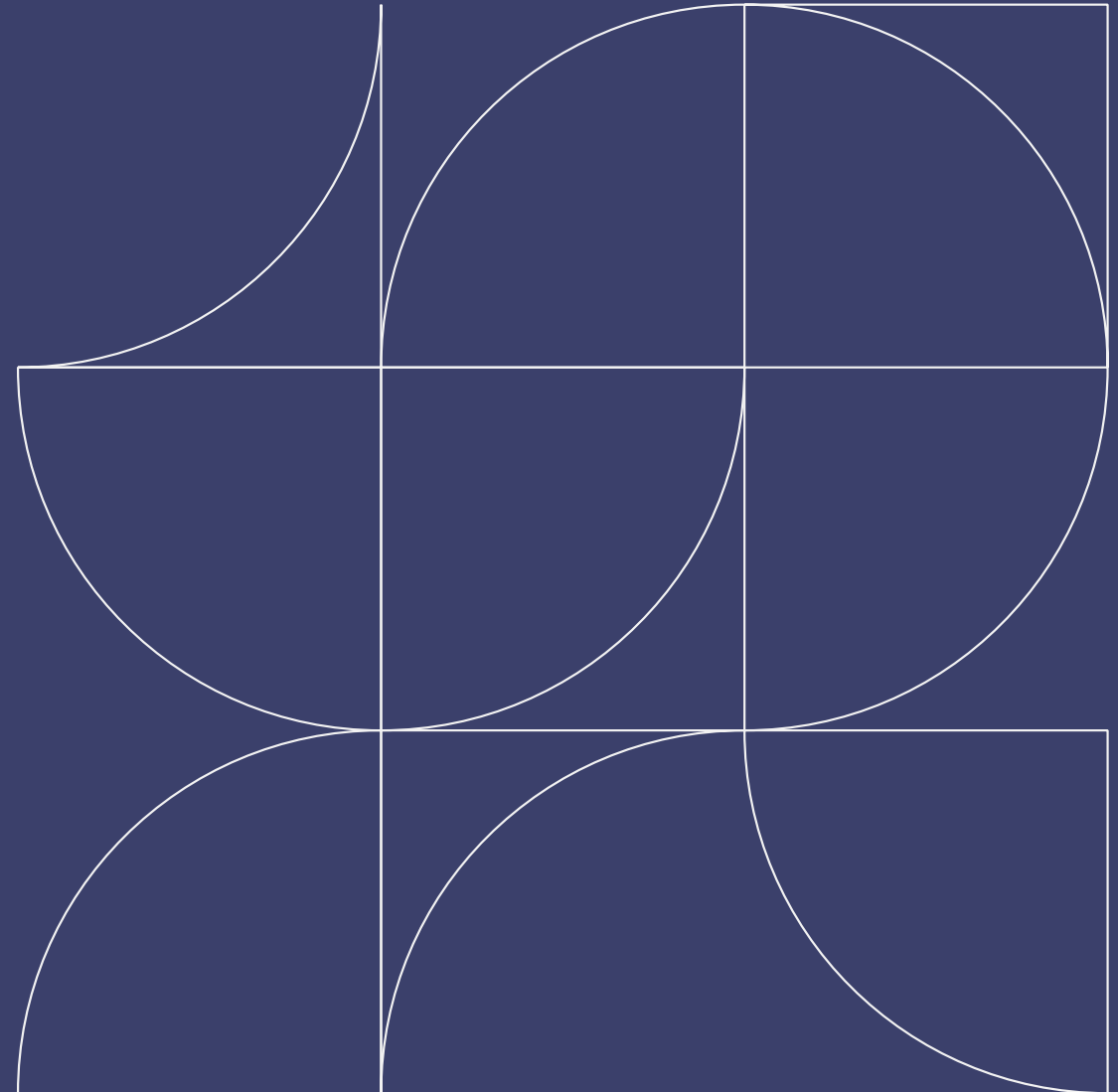
Successful challenges by employees and unions against private employers have been limited



2021 COVID-19 Class Action Rulings On Motions To Dismiss

5.

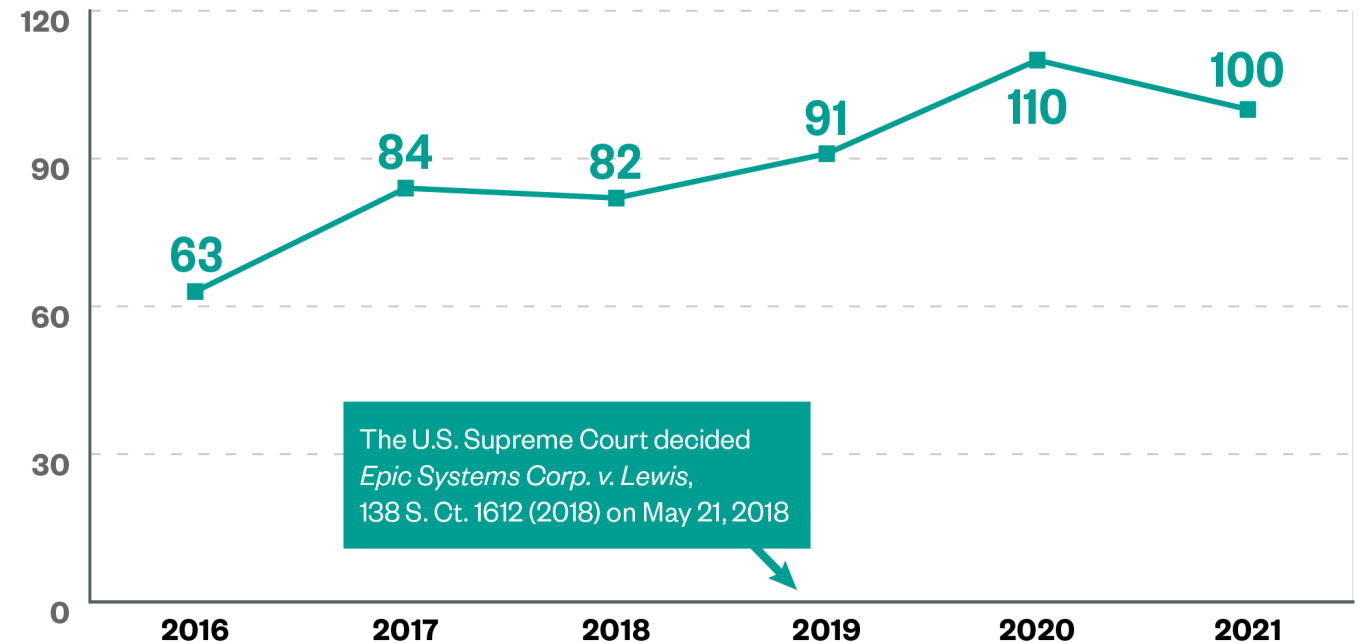
The Continuing Impact Of Arbitration



Trend 5: The Continuing Impact Of Arbitration

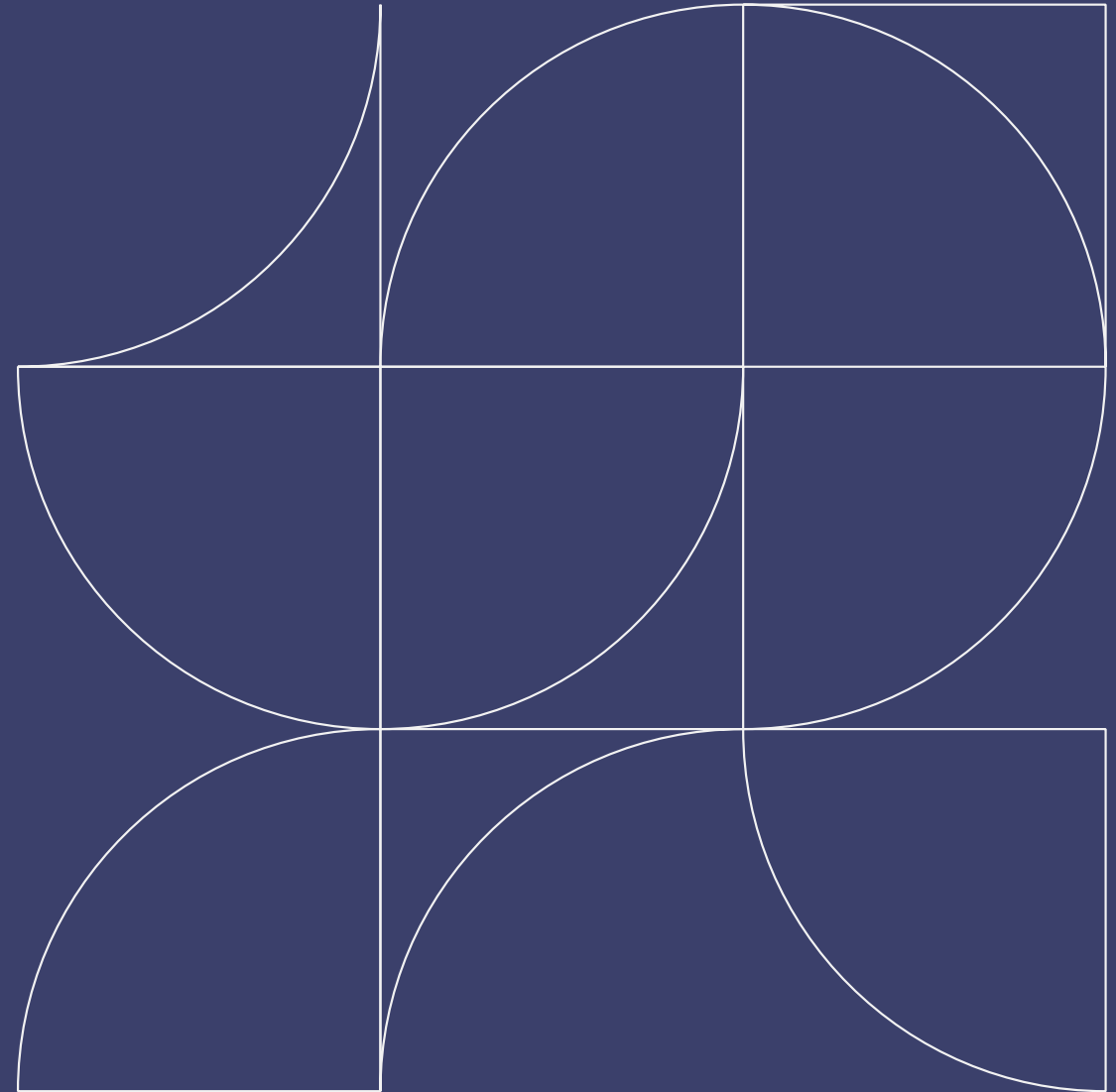
- In the post *Epic Systems* world, estimates are that 60% to 70% of private employers have adopted workplace arbitration programs
- The best risk mitigation approach to eliminating or mitigating workplace class actions is to snuff them out before they start
- Legislation overturning *Epic Systems* is becoming increasingly unlikely

Total Motions To Compel Arbitration Filed: 2016 - 2021



6.

Key Class Action Rulings



Key Employment Discrimination Certification Rulings



- *Ries, et al. v. McDonald's*, 2021 U.S. Dist. LEXIS 247572 (W.D. Mich. Dec. 29, 2021) (certification of workplace harassment claims granted) [Page 45]
- *Howard, et al. v. Cook County*, 989 F.3d 587 (7th Cir. 2021) (certification of workplace harassment overturned on appeal) [Page 46]
- *Riley, et al. v. SK United*, 2021 U.S. Dist. LEXIS 45183 (N.D. Cal. Mar. 9, 2021) (certification of claims of alleged discriminatory hiring practices denied) [Page 49]

Key Wage & Hour Certification Rulings

- *Curry, et al. v. P&G Auditors*, 2021 U.S. Dist. LEXIS 111137 (S.D.N.Y. June 14, 2021) (claims certified of a group of auditors allegedly misclassified as independent contractors) [Page 89]
- *Swales, et al. v. KLLM Transport Services*, 2021 U.S. App. LEXIS 827 (5th Cir. Jan. 12, 2021) (certification order vacated relative to claims of unpaid overtime for truck drivers) [Page 129]
- *Ferra, et al. v. Loews Hollywood Hotel, LLC*, 2021 Cal. LEXIS 4877 (Cal. July 15, 2021) (California Supreme Court order establishing rate of pay for meal and rest period penalty payments) [Page 369]
- *Donohue, et al. v. AMN Services, LLC*, Case No. D071865 (Cal. Feb. 25, 2021) (California Supreme Court order addressing burden of proof on meal period claims) [Page 386]





Key ERISA Certification Rulings

- *Condry, et al. v. UnitedHealth Group*, 2021 U.S. App. LEXIS 27839 (9th Cir. Sept. 12, 2021) (affirming denial of certification due to individual issues inherent in claims) [Page 316]
- *Thorne, et al. v. U.S. Bancorp*, 2021 U.S. Dist. LEXIS 94575 (D. Minn. May 18, 2021) (certification of ERISA claims denied due to lack of commonality and, in many cases, lack of injury) [Page 315]
- *Smith, et al. v. Board of Directors of Triad Manufacturing*, 13 F.4th 613 (7th Cir. 2021) (refusing to enforce arbitration bar against claim for class wide relief) [Page 322]



Other Key Rule 23 Decisions

- *Gilbert, et al. v. Land's End*, 2021 U.S. Dist. LEXIS 156964 (W.D. Wis. Aug. 18, 2021) (claims for health problems caused by workplace uniforms denied certification) [Page 508]
- *Broecker, et al. v. New York City*, 2021 U.S. Dist. LEXIS 226848 (E.D.N.Y. Nov. 24, 2021) (Class claims dismissed relative to challenge to COVID-19 mandate for employees) [Page 531]
- *In Re Facebook Biometric Information Privacy Litigation*, 2021 U.S. Dist. LEXIS 36901 (N.D. Cal. Feb. 26, 2021) (class-wide settlement of \$650 million approved for privacy violations, as well as an award of \$97.5 million in attorneys' fees to class counsel) [Page 671]



What Do The Developments Of 2021 Mean For Employers In 2022?

- Success begets copy-cats and social media publicity – and more class actions
- Wage & hour cases – how workers are paid – remains as the key inflection point for workplace class actions
- Government enforcement litigation is apt to increase in intensity
- The tail of COVID-19 class action claims will continue
- Arbitration defenses remain viable and may even expand, but are under assault



What Can Employers Do?

- Solid HR fundamentals have never been more important
- Early warning systems (HR hotlines, etc.) are critical
- Every claim has the potential to expand, so every claim is important
- Arbitration remains the best defense

How To Order

The 18th Annual Workplace Class Action Report

- Check Out The Workplace Class Action Report Website At:
www.workplaceclassactionreport.com
- Firm Clients Can Request a FREE Copy By Contacting:
ClassActionReport@seyfarth.com



**thank
you**

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