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The EEOC Year In Review – Strategies For Employers

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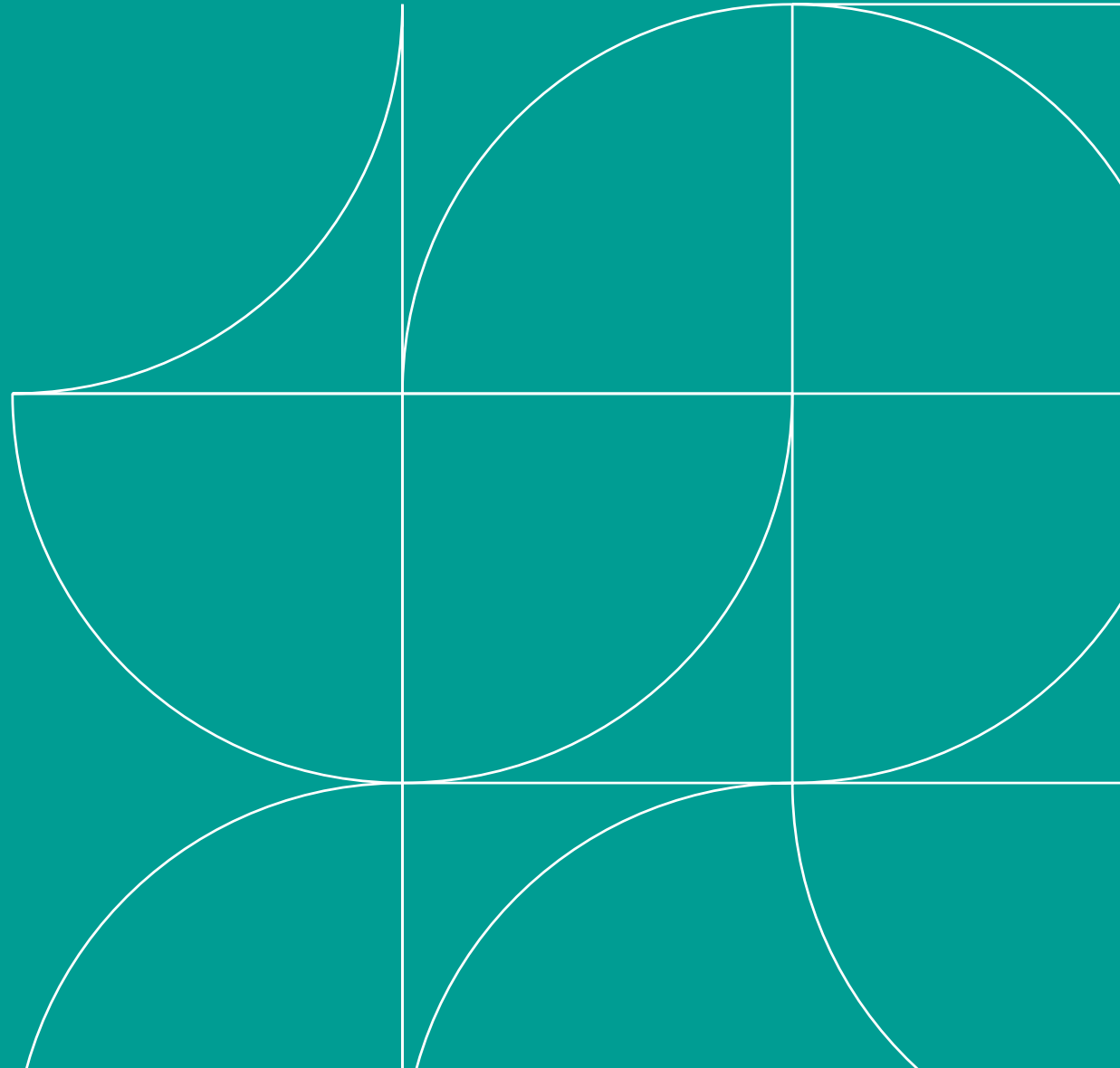
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About The EEOC Book



- Analyzes new lawsuits filed and other enforcement activities initiated in the EEOC's 2019 fiscal year from October 1, 2018 through September 30, 2019
- Analyzes recent court decisions impacting substantive and procedural developments in EEOC-initiated litigation
- Distributed to thousands of companies, corporate counsel, and journalists
- Referenced in the Wall Street Journal, Bloomberg BNA, HR Dive, HR.com, and Law360

What We Will Cover In Today's Session

- 01 Trends In EEOC Litigation In FY 2019
- 02 Recent Developments According To The EEOC's Strategic Enforcement Priorities
- 03 Guide to EEOC Litigation For Employers
- 04 What Is On The Horizon For EEOC Litigation?

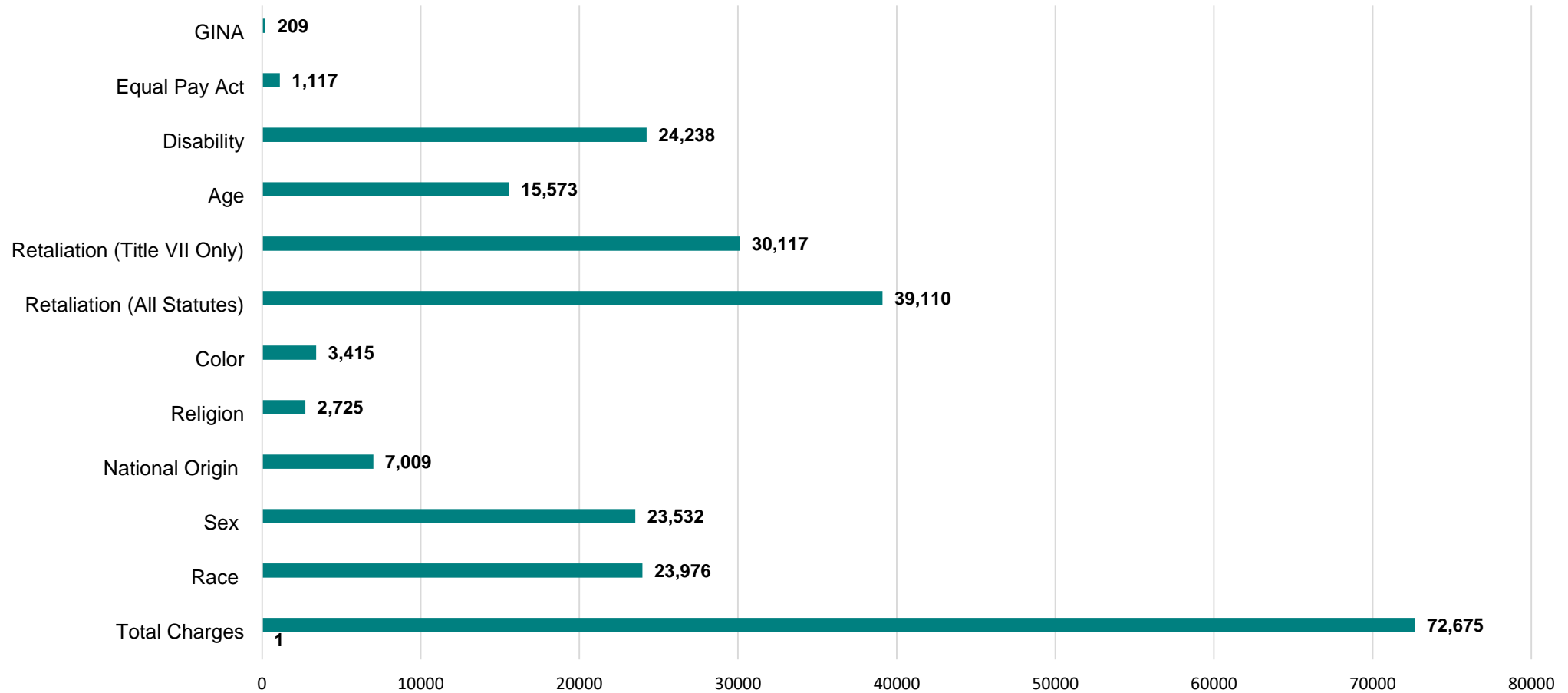
FY 2019 – A “Transition” Year

- FY 2019 was a “transition” year for the EEOC
- Overall, there was a drop in the number of merits suits and subpoena enforcement actions in FY 2019. There was also a drop in the number of charges filed in FY 2019.
- Janet Dhillon, the current EEOC Chair, started in her role on May 15, 2019.
- Between the expiration of the prior Chair Feldblum’s term in January and Dhillon’s appointment nearly four months later, the Commission lacked a quorum, which hindered its ability to act.
- The shutdown also lasted from December 22, 2018 to January 25, 2019, playing a part in the decrease.



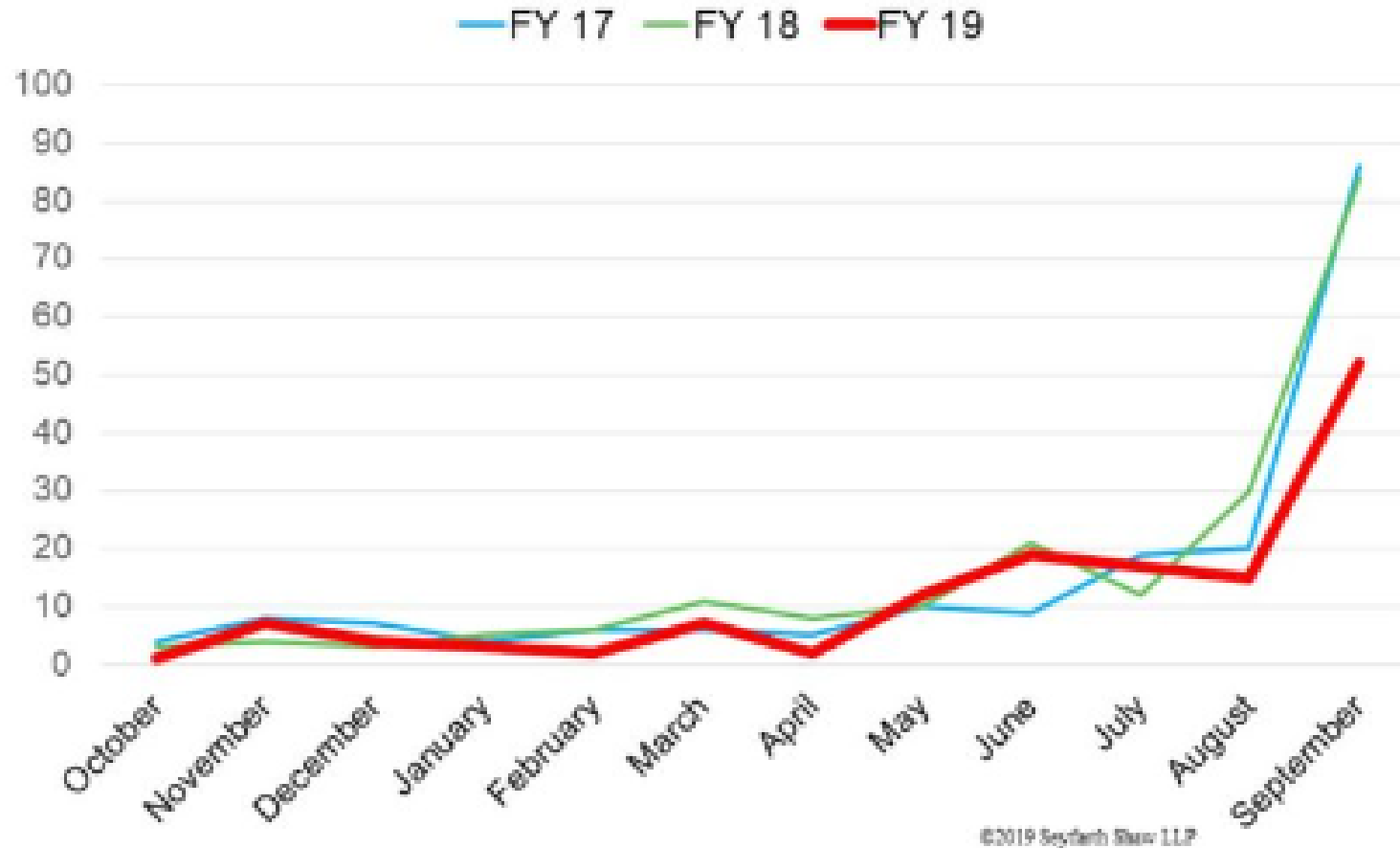
FY 2019 – A “Transition” Year

Total EEOC Charges Filed By Category In FY 2019



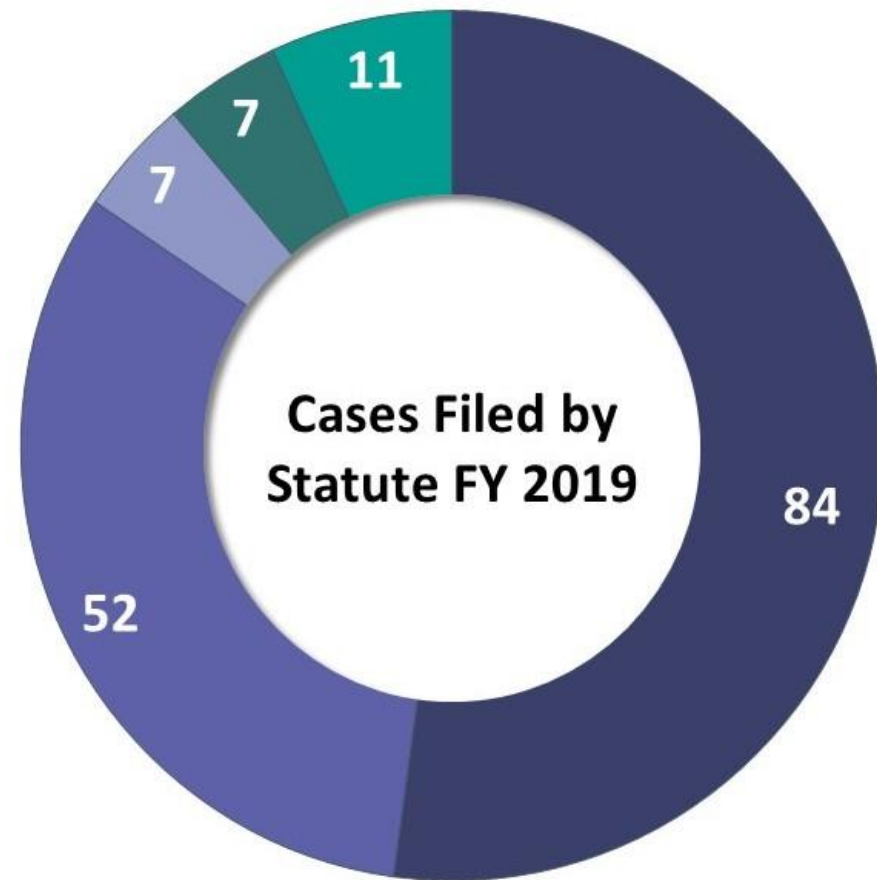
FY 2019 – A “Transition” Year

Cases Filed By Month FY 2017-2019



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Trends In Case Filings In FY 2019

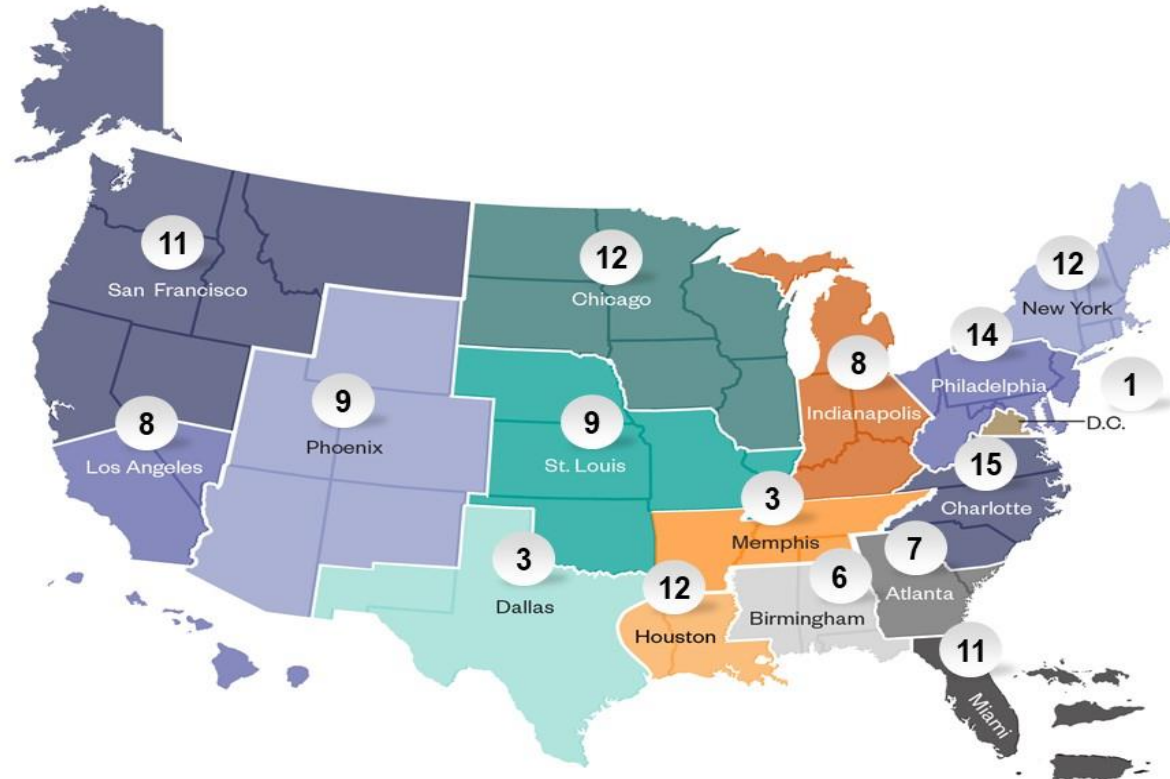


Title VII Breakdown

Sex	57
Race	14
Religion	5
Nat. Origin	2

■ Title VII ■ ADA ■ ADEA ■ EPA ■ PDA

Filings By EEOC District In FY 2019



Atlanta 7	Birmingham 6	Charlotte 15	Chicago 12
Dallas 3	Houston 12	Indianapolis 8	Los Angeles 8
Memphis 3	Miami 11	New York 12	Philadelphia 14
Phoenix 9	San Francisco 11	St Louis 9	Washington, D.C. 1

Developments In Subpoena Enforcement Action And Investigations

- In FY 2019, the EEOC initiated 8 subpoena enforcement actions.
- That is considerably lower than the 18 and 17 enforcement actions that were filed in FY 2018 and FY 2017, respectively.
- In 2017, the Supreme Court clarified the standard of review regarding enforcement of EEOC subpoenas in *McLane Co. v. EEOC*.
- A number of court decisions in FY 2019 also addressed how the EEOC is permitted to conduct an investigation itself, and how employers may be able to fight back.

EEOC's Strategic Enforcement Priorities

- 01** Eliminating Barriers In Recruitment And Hiring
- 02** Protecting Vulnerable Workers
- 03** Addressing Selected Emerging And Developing Issues
- 04** Ensuring Equal Pay Protections For All Workers
- 05** Preserving Access To The Legal System
- 06** Preventing Systemic Harassment

EEOC's Strategic Enforcement Priorities

- **A Renewed Effort Toward Conciliation and Mediation?**

- On February 4, 2020, Chair Dhillon released the Commission's Priority List for 2020.
- The List included many of the same strategic objectives included in previous strategic priority lists.
- However, the list also asserts that "litigation is truly a last resort and not an appropriate substitute for rule-making or legislation."
- This statement could be a glimmer of hope for employers that the EEOC will take a step back from what some have called a "shoot first and aim later" litigation strategy.
- It is unclear how the 2020 priorities will work in tandem with the FY 2017-2021 SEPs.

Priority #1 – Eliminating Barriers In Recruitment And Hiring

- Focus on class-based recruitment and hiring practices that discriminate against racial, ethnic, religious groups, older workers, women, and people with disabilities.
- Major developments in FY 2019 related to digital bias hiring, particularly related to Facebook and other social media advertising



Priority #1 – Eliminating Barriers In Recruitment And Hiring

- **The EEOC Probes Employers In The Digital Age**

- After referring to this issue for years, the EEOC has made good on challenging employers' use of artificial intelligence, algorithms, and “big data” to recruit, screen, and select candidates and employees.
- The Communications Workers of America (CWA) recently filed discrimination charges against sixty-six employers for allegedly engaging in discriminatory advertising on Facebook that excluded women and older workers from receiving the job ads.
 - “Evidence gathered during the investigation established that . . . Respondent advertised on Facebook, with national exposure, and when doing so it used language to limit the age of individuals who were able to view the advertisement.”

Priority #1 – Eliminating Barriers In Recruitment And Hiring

- **Other Developments In The Law Of Age Discrimination**

- On February 14, 2019, a bipartisan group Senators and members of the House of Representatives introduced bills to establish the Protecting Older Workers Against Discrimination Act, which would amend the ADEA and other federal statutes to make it easier for employees to prove age discrimination.
- Age discrimination continues to be a top priority for the EEOC. This focus continues to result in substantial litigation wins for the Commission.
 - For example, the U.S. District Court for the District of Maryland held that the EEOC need not follow the procedural requirements of collective actions required of private litigants under the Fair Labor Standards Act when litigating ADEA actions.

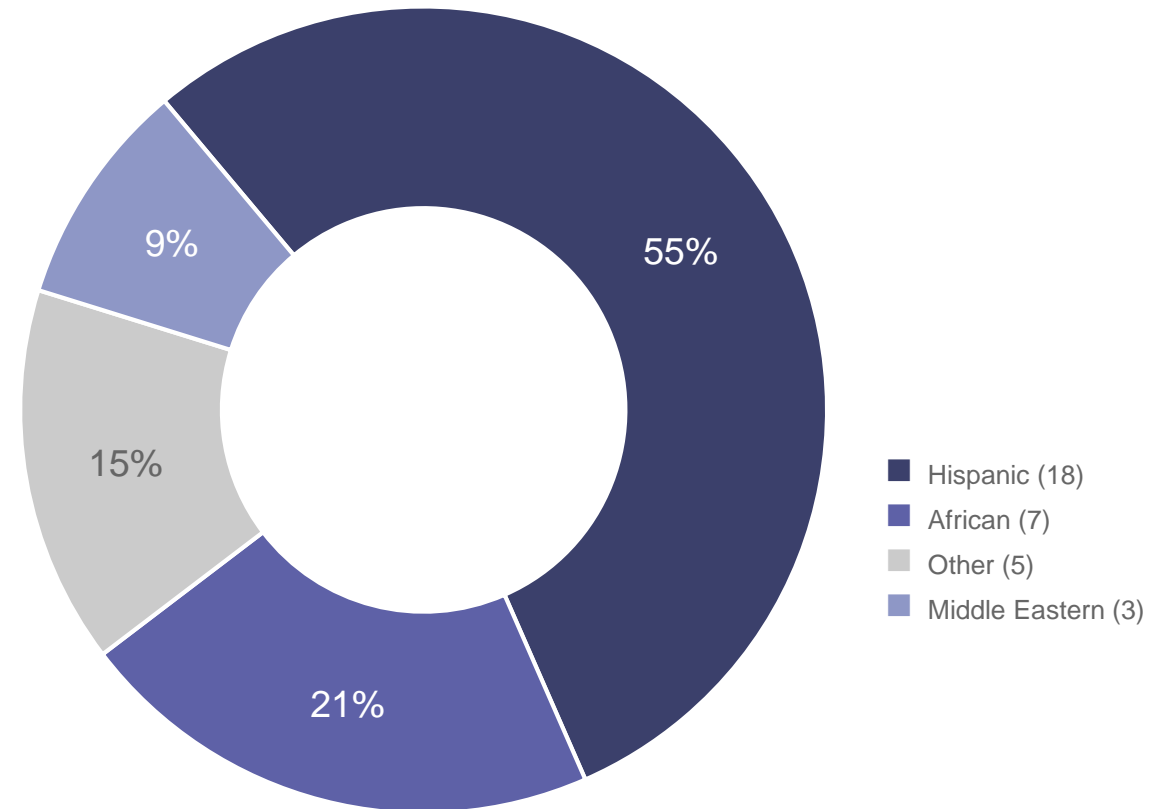
Priority #1 – Eliminating Barriers In Recruitment And Hiring

- **The EEOC's Ongoing Focus On Employers' Use Of Criminal And Credit History Background Checks**
 - The EEOC also continues to attack employers' use of criminal and credit history background checks.
 - However, after years of litigation in this area, the key legal issue that continues to make national headlines is the State of Texas's challenge of the EEOC's authority to set national guidelines in this area.
 - The EEOC has actively monitored how employers use algorithms, big data, “data scraping” of the internet, and other sophisticated tools to evaluate applicants. Those tools are increasingly capable of providing the same types of information about applicants and employees contained in criminal and credit history reports.

Priority #2 – Protecting Vulnerable Workers

- The EEOC will focus on job segregation, harassment, trafficking, pay, retaliation and other policies and practices against vulnerable workers including immigrant and migrant workers, and against members of underserved communities.

EEOC National Origin Filings FY 2015 - FY 2019



Priority #2 – Protecting Vulnerable Workers

- **Protection Of Immigrants’ Rights To Combat Discrimination In The Courts**
 - A key issue for the EEOC involves the potential “chilling” effect if employers are able to use litigation to learn the immigration status of their accusers.
 - Courts have often sided with the EEOC on this issue.
 - *EEOC v. Sol Mexican Grill LLC*
 - Courts have also consistently held that immigrants – even if they are in the country illegally – are protected by the federal workplace discrimination statutes.
 - *EEOC v. Phase 2 Investments, Inc.*

Priority #2 – Protecting Vulnerable Workers

- **Developments In Combatting Religious Discrimination: A Focus On Anti-Muslim Bias**
 - For several years now, the Strategic Enforcement Priorities has emphasized the protection of Muslim employees against discrimination.
 - One hotbed of interest to the EEOC is discrimination based on religious attire or grooming.
 - According to the EEOC, even if an employer does not know that an employee's or applicant's garb or grooming practice is religious in nature, the employer may still be liable if it believes or should have known that it is – even if the employee did not ask for an accommodation.

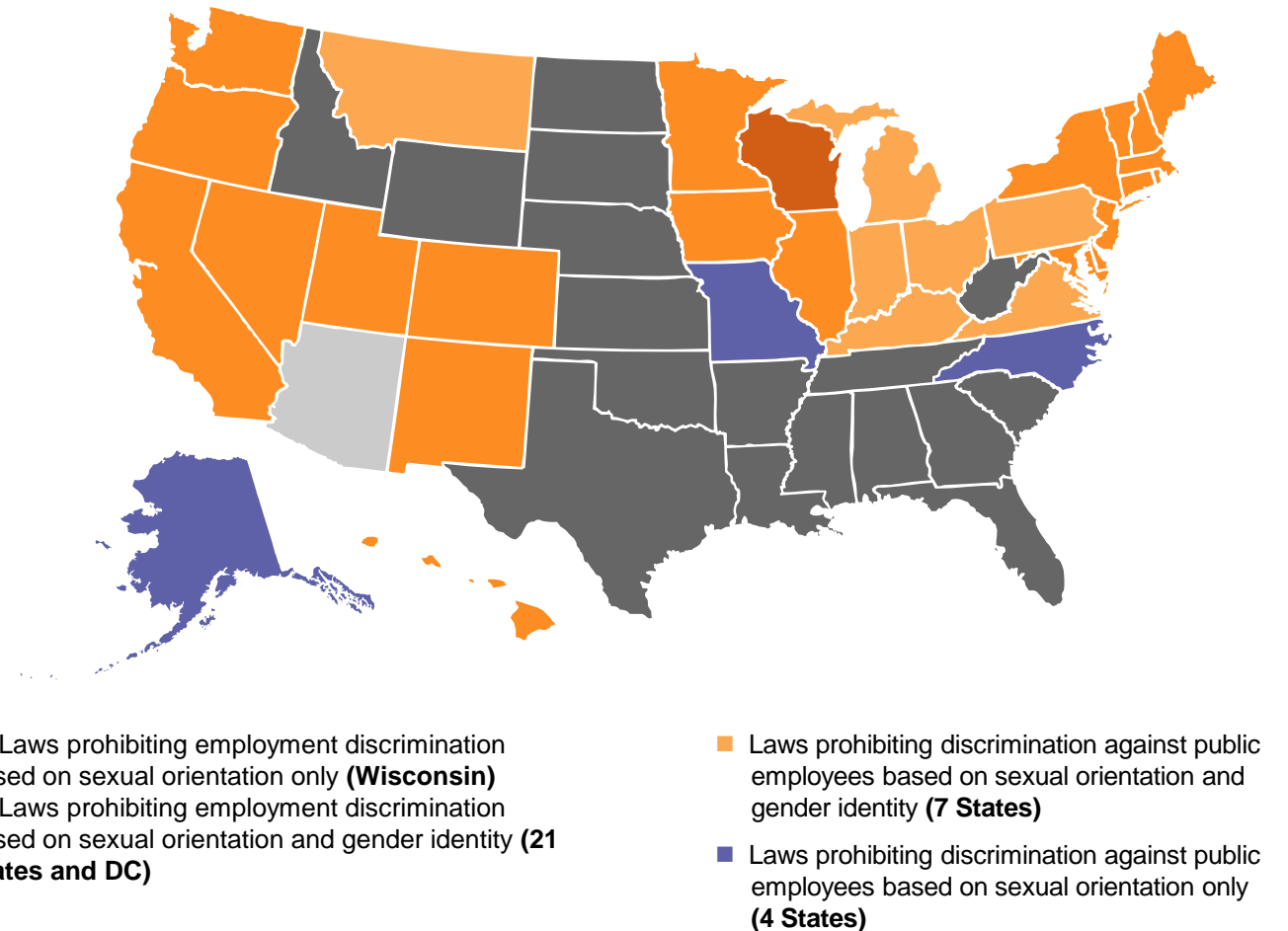
Priority #2 – Protecting Vulnerable Workers

- **A Potential New Enforcement Trend: Heightened Awareness Of National Origin Discrimination**
 - National origin discrimination based on one's *perception* of national origin has been in the news lately thanks to the recent comments President Trump directed towards a new crop of House Representatives.
 - The EEOC has long argued that discrimination on the basis of *perceived* national origin is just as actionable as any other kind of national origin discrimination.
 - *EEOC v. MVM, Inc.*

Priority #3 – Emerging Issues

- The EEOC is responsible for monitoring trends and developments in the law, workplace practices, and labor force demographics.

State-Level Sexual Orientation And Gender Identity Protections Across The U.S.



Priority #3 – Emerging Issues

- **Supreme Court Set To Decide Whether LGBT Discrimination Is Prohibited By Title VII**
 - The EEOC has campaigned to have LGBT discrimination recognized as a prohibited form of sex discrimination under Title VII.
 - The U.S. Supreme Court is set to decide this issue in a trio of landmark cases arising out of the Second, Sixth, and Eleventh Circuits
 - The case will likely come down according to political ideology, though with Justice Gorsuch a possible swing vote.

Priority #3 – Emerging Issues

- The 2017 Strategic Enforcement Plan identifies five emerging and developing issues as strategic priorities:
 - Qualification standards and inflexible leave policies;
 - Accommodating pregnancy-related limitations;
 - Protecting lesbian, gay, bisexual, and transgender (LGBT) individuals from discrimination;
 - Clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships; and
 - Addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent

Priority #3 – Emerging Issues

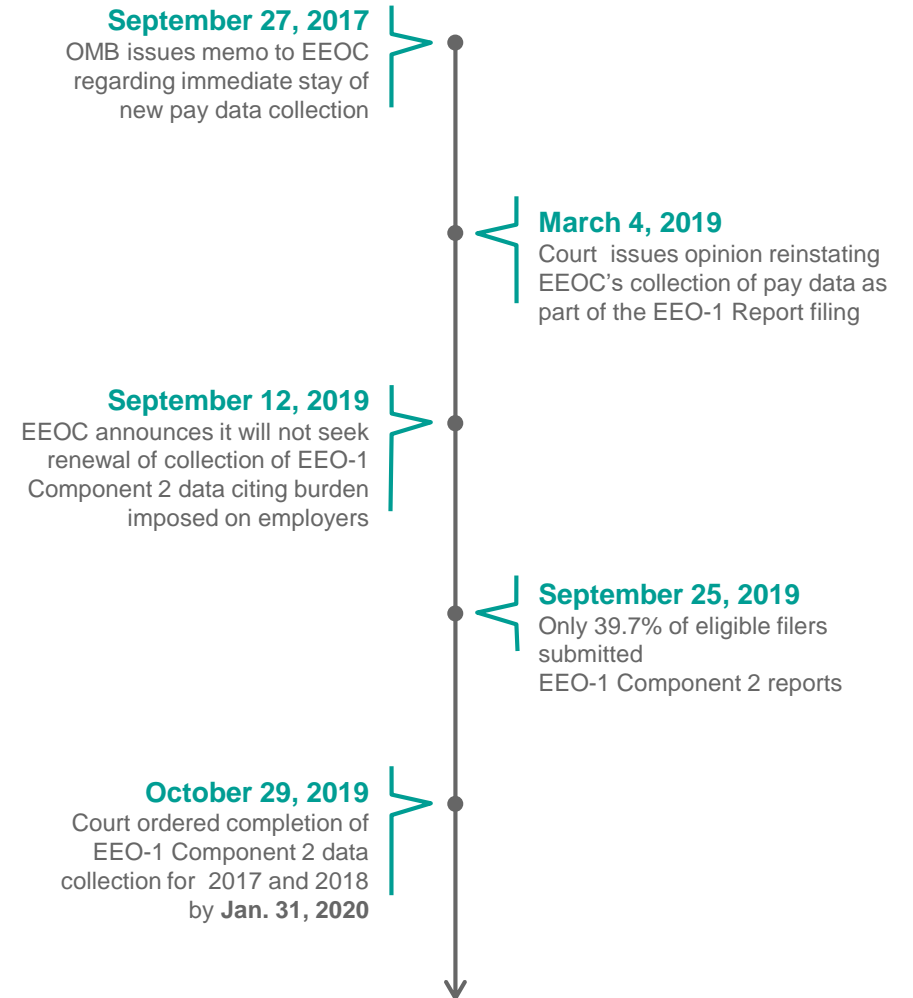
- **Complex Employment Relationships**

- The EEOC's most recent SEP added a new issue under the Emerging and Developing Issues priority: focusing on complex employment relationships and structures in the 21st century workplace
- Since the EEOC added the complex employment relationship priority to its SEP in 2017, there have been few significant case law developments in this area, but that may be changing.
- The Ninth Circuit recently revived claims against fruit growers in the state of Washington who had contracted with a labor contractor to obtain temporary workers from Thailand, finding that the EEOC had plausibly alleged a joint employment relationship for all work performed by the workers.

Priority #4 – Ensuring Equal Pay

- The EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups.

Tracking Recent Developments In Pay Data Collection



Priority #4 – Ensuring Equal Pay

- **Recent Developments In Equal Pay Act Litigation**

- Lawsuits brought under the Equal Pay Act tend to be highly fact-driven and therefore notoriously difficult for employers to dispense with through motion practice prior to trial.
- In 2019, courts denied several motions to dismiss and motions for summary judgment filed by employers on EPA claims. For example:
 - *EEOC v. The George Washington University*
 - *EEOC v. Enoch Pratt Free Library*

Priority #5 – Preserving Access To The Legal System

- The EEOC will focus on policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede EEOC’s investigative or enforcement efforts.

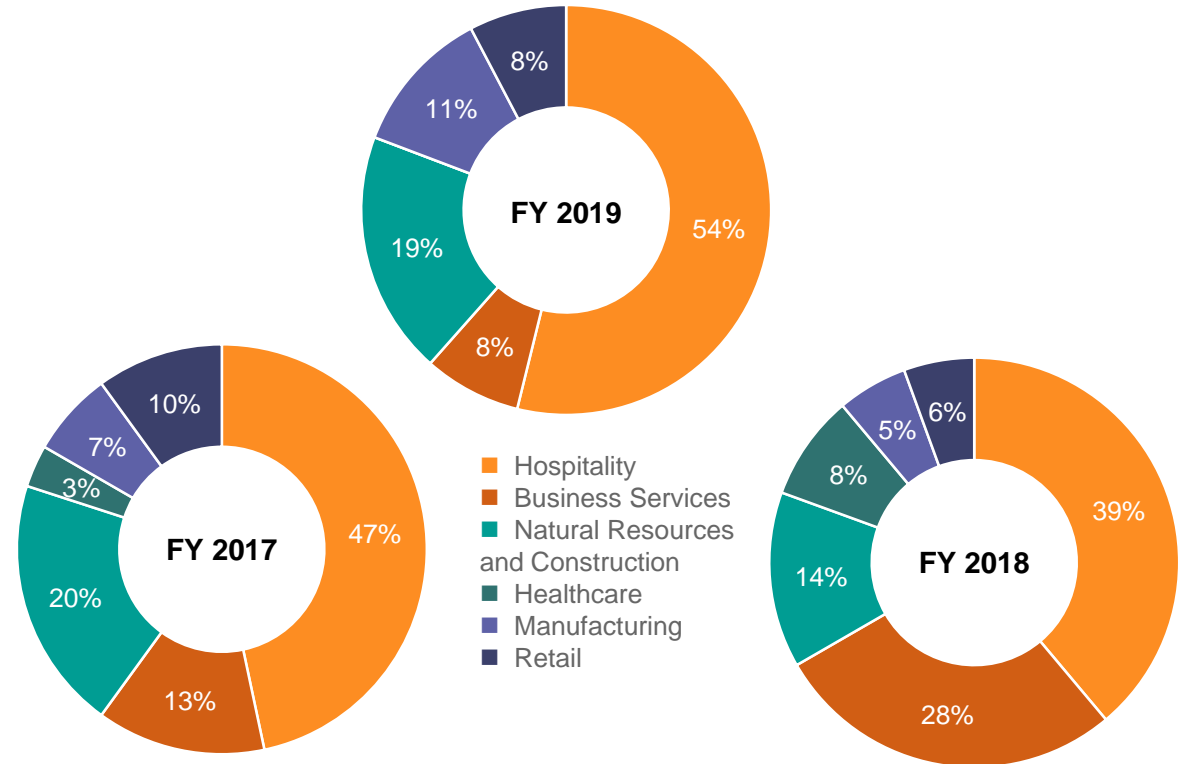
EEOC Public Outreach Events FY 2017 – FY 2019



Priority #6 – Preventing Systemic Harassment

- Harassment continues to be one of the most frequent complaints raised in the workplace. The most frequent bases of harassment alleged are sex, race, disability, age, national origin, and religion.

#MeToo Lawsuits by Industry FY 2017 – FY 2019



Priority #6 – Preventing Systemic Harassment

- **The EEOC Operating In The #MeToo Era**

- On March 20, 2019, the EEOC held an Industry Leaders Roundtable discussion on harassment prevention.
- In its FY 2019 Congressional Budget Justification, the EEOC highlighted the ongoing implications of the #MeToo movement for employers.
- In 2017, the EEOC issued its Proposed Guidance on Unlawful Harassment, offering important clues as to what the EEOC considers best practices for preventing and responding to harassment in the workplace. On September 19, 2019, Chair Dhillon indicated to Congress that the approval process for the Guidance was still stalled.

Priority #6 – Preventing Systemic Harassment

- **The EEOC’s Proposed Enforcement Guidance On Unlawful Harassment**
 - The Proposed Guidance specifically sets forth the EEOC’s position that as a protected basis “sex” includes sex stereotyping, gender identity, sexual orientation, and pregnancy, childbirth, or related medical issues.
 - The EEOC announced that it will entertain harassment claims based on:
 - (1) “perceived” membership in a protected class (even if the perception is incorrect);
 - (2) “associational harassment”;
 - (3) alleged harassment that was not directed at the employee; and
 - (4) alleged harassment that occurred outside of the workplace.

What Is On The Horizon For EEOC Litigation?

- **More EEOC Nominees In The Pipeline**

- On February 20, 2020, the White House announced that Gibson Dunn attorney Andrea Lucas will be nominated to Republican EEOC seat currently occupied by Victoria Lipnic, who is expected to leave when her term expires in July 2020.
- The nominations package may also include Democratic EEOC nominee Jocelyn Samuels and Labor Department official Keith Sonderling for an open Republican seat.
- If confirmed, these nominations would ensure a continuing quorum at the EEOC. However, confirmation is not guaranteed, as there are Republican concerns about Democratic nominee Samuels.

What Is On The Horizon For EEOC Litigation?

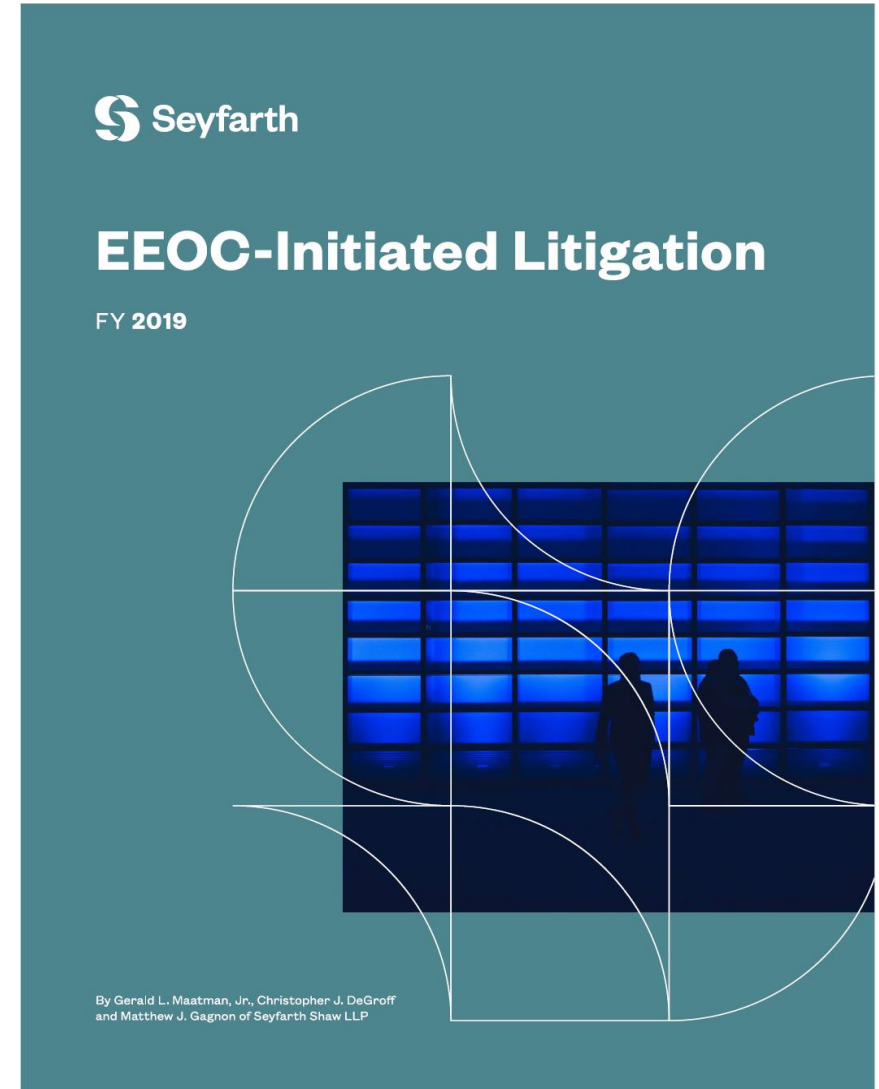
- **White House Announces Plan To Cut The EEOC's Workforce**
 - On February 27, 2020, the White House announced a proposed budget that would trim the workforce at the EEOC by approximately 14%.
 - The White House requested \$362 million to fund the EEOC next year, which would mean a \$27 million drop in the agency's discretionary funding.
 - While Congress still needs to approve the budget, if it goes through, the EEOC will likely continue to struggle to make progress on the backlog of charges and would likely pursue fewer litigation matters due to resources.

What Is On The Horizon For EEOC Litigation?

- **Continued Focus On Sexual Harassment**
 - There is no indication that the EEOC’s interest in #MeToo-related issues will wane any time soon, particularly regarding young women targeted by sexual harassment, especially in the hospitality industry.
- **Ongoing Interest In ADA Issues**
 - February 20, 2020 press release
- **More Attention On National Origin Discrimination**
 - As part of the Commission’s efforts to reach vulnerable workers, the EEOC may have a new and heightened awareness of national origin discrimination claims.

How To Order EEOC-Initiated Litigation: FY 2019

- The book is available to clients of the firm and interested corporate counsel. To request a FREE copy, please e-mail your request to EEOCBook@seyfarth.com.
- To Download the eBook version of the book, Click [HERE](#)
- For Updates And Analysis On Issues Impacting The Workplace Visit www.workplaceclassaction.com



**thank
you**

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