18th Annual Workplace Class Action Litigation Report

2022 EDITION

Seyfarth Shaw LLP

© 2022 Seyfarth Shaw. All rights reserved.

No part of this book may be reproduced in any written, electronic, recording, or photocopying form without written permission of Seyfarth Shaw.

Library of Congress Control Number: 2017930291

ISBN: 978-0-578-35352-4

Important Disclaimer

The material in this report is of the nature of general commentary only. It is not offered as legal advice on any specific issue or matter and should not be taken as such. The views expressed are exclusively those of the authors. The authors disclaim any and all liability to any person in respect of anything and the consequences of anything done or omitted to be done wholly or partly in reliance upon the contents of this report. Readers should refrain from acting on the basis of any discussion contained in this publication without obtaining specific legal advice on the particular facts and circumstances at issue. Any sort of comprehensive legal advice on any particular situation is beyond the scope of this report. While the authors have made every effort to provide accurate and up-to-date information on laws, cases, and regulations, these matters are continuously subject to change. Furthermore, the application of the laws depends on the particular facts and circumstances of each situation, and therefore readers should consult with an attorney before taking any action. This publication is designed to provide authoritative information relative to the subject matter covered. It is offered with the understanding that the authors are not engaged in rendering legal advice or other professional services.

- From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.

Seyfarth Shaw LLP
233 South Wacker Drive
Suite 8000
Chicago, Illinois 60606-6448
T (312) 460-5000
F (312) 460-7000

pmiller@seyfarth.com
T (312) 460-5513

www.seyfarth.com

January 2022

Dear Clients:

This past year has been like no other. The continuation of the COVID-19 pandemic has impacted everyone and everything, including class action litigation.

The last few years have seen a transformation in class action and collective action litigation involving workplace issues. This came to a head from 2014 to 2021 with numerous 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 2022 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 2021, and analyzes these most significant settlements over the past 12 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 2021 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 1,607 decisions analyzed in the Report.

The cases decided in 2021 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.

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 Lorie Almon, Brian Ashe, David S. Baffa, Raymond C. Baldwin, Patrick Bannon, Brett C. Bartlett, Alnisa Bell, Edward W. Bergmann, Holger Besch, Michael J. Burns, Anthony S. Califano, Ashley K. Cano, Robert J. Carty, Jr., Mark A. Casciari, Ariel Cudkowicz, Justin Curley, Catherine M. Dacre, Joseph R. Damato, Lisa J. Damon, Christopher J. DeGroff, Michael DeMarino, Pamela Devata, Ada Dolph, William J. Dritsas, Alex Drummond, John Drury, Chantelle Egan, Noah A. Finkel, Sarah Fowler, Matt Gagnon, Loren Gesinsky, Mark Grajski, Timothy F. Haley, Ari Hersher, Timothy L. Hix, James Hlawek, Timothy M. Hoppe, David Jacobson, Michael Jacobsen, Eric Janson, Louisa Johnson, David D. Kadue, Lynn Kappelman, Daniel B. Klein, Ronald J. Kramer, Richard B. Lapp, Kristina Launey, Paul J. Leaf, Leo Li, Aaron Lubeley, Laura Maechtlen, Richard P. McArdle, Ryan A. McCoy, Helen M. McFarland, Condon A. McGlothlen, Kristin McGurn, Andrew M. McNaught, Christina F. Meddin, Jon Meer, Katherine Mendez, Chelsea D. Mesa, Barry Miller, Ian H. Morrison, Lorraine O’Hara, Camille A. Olson, Andrew Paley, Gerald Pauling, Katherine E. Perrelli, Dana L. Peterson, Kyle Peterson, Thomas J. Piskorski, Jill A. Porcaro, Jennifer Riley, David J. Rowland, Christian Rowley, Emily Schroeder, Sam Schwartz-Fenwick, Andrew Scroggins, Joshua Seidman, Laura Shelby, Frederick T. Smith, Courtney Stieber, Robert Stevens, Robert Szyba, Diana Tabacopoulos, Coby Turner, Joseph Turner, Annette Tyman, Peter A. Walker, Timothy M. Watson, Geoffrey Westbrook, Shireen Wetmore, Howard Wexler, Daniel Whang, Robert S. Whitman, Tom Wybenga, and Adam Young.

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 2022

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.*, *Howard, et al. v. Cook County Sheriff's Office*, 989 F.3d 587 (7th Cir. 2021)). If a decision is unavailable in bound format, we have utilized a Lexis cite from its electronic database (*e.g.*, *Stiner, et al. v. Brookdale Senior Living Inc.*, 2021 U.S. Dist. LEXIS 116521 (N.D. Cal. June 22, 2021)). If a ruling is not contained in an electronic database, the full docketing information is provided (*e.g.*, *In Re Flint Water Cases*, Case No. 16-CV-10444 (E.D. Mich. Jan. 21, 2021)).

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 *2022 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.
4. Bookmarking is offered for notable pages.
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. Windso*r, 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 2021 1
- C. Significant Trends In Workplace Class Action Litigation In 2021 4
  - (i) Class Action Settlement Trends 4
  - (ii) Class Certification Trends In 2021 8
  - (iii) Government Administrative And Enforcement Trends 16
  - (iv) The Continuing Impact Of COVID-19 19
  - (v) The Continuing Impact Of Arbitration 22
- D. Complex Employment-Related Litigation Trends In 2021 25
- E. Likely Trends For The Future Of Workplace Class Actions In 2022 27
- F. Conclusion 31

II. SIGNIFICANT CLASS ACTION SETTLEMENTS IN 2021 33
- A. Top Ten Private Plaintiff-Initiated Monetary Settlements 33
- B. Top Ten Government-Initiated Monetary Settlements 38
- C. Noteworthy Injunctive Relief Provisions In Class Action Settlements 40

III. SIGNIFICANT FEDERAL EMPLOYMENT DISCRIMINATION CLASS ACTION AND EEOC PATTERN OR PRACTICE RULINGS 43
- A. Cases Certifying Or Refusing To Certify Employment Discrimination Class Actions 43
  - (i) First Circuit 43
  - (ii) Second Circuit 43
  - (iii) Third Circuit 44
  - (iv) Fourth Circuit 45
  - (v) Fifth Circuit 45
  - (vi) Sixth Circuit 45
  - (vii) Seventh Circuit 46
  - (viii) Eighth Circuit 47
  - (ix) Ninth Circuit 48
  - (x) Tenth Circuit 49
  - (xi) Eleventh Circuit 50
  - (xii) District Of Columbia Circuit 50
- B. EEOC Pattern Or Practice Cases 50
  - (i) First Circuit 51
  - (ii) Second Circuit 51
  - (iii) Third Circuit 53
  - (iv) Fourth Circuit 54
  - (v) Fifth Circuit 55
  - (vi) Sixth Circuit 58
  - (vii) Seventh Circuit 60
  - (viii) Eighth Circuit 63
  - (ix) Ninth Circuit 64
  - (x) Tenth Circuit 65
  - (xi) Eleventh Circuit 65
  - (xii) District Of Columbia Circuit 69

IV. SIGNIFICANT COLLECTIVE ACTION RULINGS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT 71
- A. Cases Certifying Or Refusing To Certify ADEA Collective Action Claims 71

(i) First Circuit ... 71
(ii) Second Circuit ... 71
(iii) Third Circuit ... 71
(iv) Fourth Circuit ... 71
(v) Fifth Circuit ... 72
(vi) Sixth Circuit ... 72
(vii) Seventh Circuit ... 72
(viii) Eighth Circuit ... 72
(ix) Ninth Circuit ... 72
(x) Tenth Circuit ... 73
(xi) Eleventh Circuit ... 74
(xii) District Of Columbia Circuit ... 74

B. Other Federal Rulings Affecting The Defense Of ADEA Collective Actions ... 75

(i) Arbitration Issues In ADEA Collective Actions ... 75
(ii) Discovery Issues In ADEA Collective Actions ... 75
(iii) Pay Policies In ADEA Collective Action Litigation ... 76
(iv) Procedural Issues In ADEA Collective Action Litigation ... 77
(v) Settlement Approval Issues In ADEA Collective Action Litigation ... 78
(vi) Venue Issues In ADEA Collective Action Litigation ... 78

V. SIGNIFICANT COLLECTIVE ACTION RULINGS UNDER THE FAIR LABOR STANDARDS ACT ... 81

A. Cases Certifying Or Refusing To Certify FLSA Collective Action Claims ... 82

(i) First Circuit ... 82
(ii) Second Circuit ... 84
(iii) Third Circuit ... 107
(iv) Fourth Circuit ... 115
(v) Fifth Circuit ... 121
(vi) Sixth Circuit ... 131
(vii) Seventh Circuit ... 154
(viii) Eighth Circuit ... 162
(ix) Ninth Circuit ... 171
(x) Tenth Circuit ... 189
(xi) Eleventh Circuit ... 194
(xii) District Of Columbia Circuit ... 200
(xiii) Federal Court Of Claims ... 201

B. Other Federal Rulings Affecting The Defense Of FLSA Collective Actions ... 202

(i) Amendments And Counterclaims In FLSA Collective Actions ... 202
(ii) Arbitration Of Wage & Hour Class And Collective Claims ... 204
(iii) Awards Of Attorneys' Fees And Costs In FLSA Collective Actions ... 223
(iv) Class And Collective Actions Involving Volunteers ... 227
(v) Class Communications In Wage & Hour Class Actions ... 227
(vi) Concurrent State Law Claims In Wage & Hour Class Actions ... 228
(vii) Coverage In FLSA Collective Actions ... 238
(viii) Disqualification In FLSA Collective Actions ... 239
(ix) Discovery In FLSA Collective Actions ... 239
(x) DOL Wage & Hour Enforcement Actions ... 240
(xi) Equitable Tolling In Wage & Hour Class Actions ... 243
(xii) Exemption Issues In FLSA Collective Actions ... 243
(xiii) FLSA Collective Actions For Donning And Doffing ... 250

(xiv) FLSA Collective Actions Involving Government Employees 251
(xv) Foreign Worker Issues In Wage & Hour Class Actions 254
(xvi) Independent Contractor Issues In Wage & Hour Class Actions 255
(xvii) Individual Executive Liability In FLSA Collective Actions..........................259
(xviii) Issues With Opt-In Rights In Wage & Hour Class Actions.......................261
(xix) Joint Employer, Employee Status, And Employer Status Issues In FLSA Collective Actions 262
(xx) Jurisdictional Issues In Wage & Hour Collective And Class Actions........263
(xxi) Migrant And Seasonal Agricultural Worker Protection Act Class Actions 265
(xxii) Motor Carrier Act Issues In FLSA Collective Actions...............................266
(xxiii) Notice Issues In FLSA Collective Actions 267
(xxiv) Pay Policies And Bonuses In FLSA Collective Actions 269
(xxv) Preemption And Immunity Issues In FLSA Collective Actions 279
(xxvi) Preemptive Motion Issues In FLSA Collective Actions 281
(xxvii) Procedural Issues In FLSA Collective Actions...284
(xxviii) Public Employee FLSA Collective Action Litigation 289
(xxix) Retaliation Claims In Wage & Hour Class Actions 290
(xxx) Sanctions In Wage & Hour Class Actions..291
(xxxi) Settlement Approval Issues In Wage & Hour Class Actions And FLSA Collective Actions 292
(xxxii) Settlement Bar And Estoppel Issues In Wage & Hour Class Actions 298
(xxxiii) Sleep-Time Policies In Wage & Hour Class Action Litigation...................299
(xxxiv) Statute Of Limitations Issues In Wage & Hour Class Action Litigation 300
(xxxv) Stay Orders In FLSA Collective Actions 300
(xxxvi) Tip Pooling And Tip Credit Claims Under The FLSA...............................301
(xxxvii) Travel Time Issues In Wage & Hour Class Action Litigation 303
(xxxviii) Trials In Wage & Hour Class And Collective Actions...............................304
(xxxix) Venue Issues In FLSA Collective Actions...305
(xl) Wage & Hour Class And Collective Actions Involving Students And Interns...305

VI. SIGNIFICANT CLASS ACTION RULINGS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 309

A. Cases Certifying Or Refusing To Certify ERISA Class Actions 309

(i) First Circuit 309
(ii) Second Circuit 310
(iii) Third Circuit 311
(iv) Fourth Circuit...311
(v) Fifth Circuit 312
(vi) Sixth Circuit 312
(vii) Seventh Circuit 313
(viii) Eighth Circuit 314
(ix) Ninth Circuit...316
(x) Tenth Circuit 316
(xi) Eleventh Circuit 317
(xii) District Of Columbia Circuit 318

B. Other Federal Rulings Affecting The Defense Of ERISA Class Actions..................318

(i) Administrative Fees In ERISA Class Actions...318
(ii) Administrative Exhaustion In ERISA Class Actions.................................318
(iii) Appeal Issues In ERISA Class Actions..319
(iv) Arbitration Issues In ERISA Class Actions...319

(v) Attorneys' Fees And Costs In ERISA Class Actions ... 323
(vi) Breach Of Fiduciary Duty In ERISA Class Actions ... 324
(vii) Discovery Issues In ERISA Class Actions ... 326
(viii) DOL And PBGC ERISA Enforcement Litigation ... 326
(ix) ERISA 401(k) Class Actions ... 328
(x) ERISA Class Action Litigation Over Retiree/Employee Benefits ... 341
(xi) ERISA Stock Drop Class Actions ... 347
(xii) Excessive Fee Claims In ERISA Class Actions ... 348
(xiii) Fiduciary Duty Issues In ERISA Class Actions ... 350
(xiv) Preemption, Procedural, And Coverage Issues In ERISA Class Actions ... 354
(xv) Preemptive Motions In ERISA Class Actions ... 356
(xvi) Releases Issues In ERISA Class Actions ... 357
(xvii) Selection Of Lead Counsel In ERISA Class Actions ... 357
(xviii) Settlement Approval Issues In ERISA Class Actions ... 358
(xix) Standing Issues In ERISA Class Actions ... 360
(xx) Stays In ERISA Class Actions ... 363
(xxi) Venue Issues In ERISA Class Actions ... 363

VII. SIGNIFICANT STATE LAW CLASS ACTION RULINGS ... 365

A. Employment Discrimination Rulings ... 366

(i) California ... 366

B. Wage & Hour Rulings ... 367

(i) Arizona ... 367
(ii) California ... 368
(iii) District Of Columbia ... 379
(iv) Florida ... 380
(v) Kentucky ... 380
(vi) Maryland ... 381
(vii) Massachusetts ... 381
(viii) Minnesota ... 384
(ix) Nevada ... 384
(x) Pennsylvania ... 385
(xi) West Virginia ... 385

C. Rulings In Breach Of Employment Contract/Miscellaneous Workplace Claims ... 386

(i) Alaska ... 386
(ii) California ... 386
(iii) Illinois ... 388
(iv) Maryland ... 388
(v) New Jersey ... 389
(vi) New York ... 389

D. Other State Law Rulings Affecting The Defense Of Workplace Class Action Litigation ... 391

(i) California ... 391
(ii) Florida ... 412
(iii) Georgia ... 413
(iv) Illinois ... 414
(v) Louisiana ... 420
(vi) Maine ... 421
(vii) Massachusetts ... 421

(viii) Michigan 422
(ix) Minnesota 422
(x) Missouri 423
(xi) New Jersey 423
(xii) New York 426
(xiii) North Carolina 428
(xiv) North Dakota 429
(xv) Ohio 429
(xvi) Oklahoma 430
(xvii) Pennsylvania 431
(xviii) South Carolina 433
(xix) Texas 434
(xx) Washington 435
(xxi) West Virginia 436
(xxii) Wisconsin 437

VIII. RULINGS ON THE CLASS ACTION FAIRNESS ACT 439

(i) First Circuit 440
(ii) Second Circuit 440
(iii) Third Circuit 440
(iv) Fourth Circuit 441
(v) Fifth Circuit 441
(vi) Sixth Circuit 442
(vii) Seventh Circuit 443
(viii) Eighth Circuit 444
(ix) Ninth Circuit 444
(x) Tenth Circuit 449
(xi) Eleventh Circuit 449
(xii) District Of Columbia Circuit 450

IX. OTHER FEDERAL RULINGS AFFECTING THE DEFENSE OF WORKPLACE CLASS ACTION LITIGATION 451

(i) ADA Class Actions 451
(ii) Alien Tort Litigation In Class Actions 457
(iii) Amendments In Class Actions 457
(iv) *American Pipe* Tolling In Class Actions 458
(v) Appeals In Class Action Litigation 460
(vi) Appointment, Selection, And Removal Of Lead Counsel In Class Actions 462
(vii) Ascertainability Issues Under Rule 23 464
(viii) Attorneys’ Fee Awards In Class Actions 465
(ix) Bifurcation Issues In Class Actions 474
(x) Breach Of Contract Class Actions 475
(xi) Choice-Of-Law Issues In Class Actions 476
(xii) Civil Rights Class Actions 476
(xiii) Class Action Litigation Involving Universities 481
(xiv) Class Actions Involving Claims Of Negligence 501
(xv) Class Actions Involving Dress Codes 502
(xvi) Class Actions Involving Unions 502
(xvii) Class Actions Over Workplace Health & Safety Issues 508
(xviii) Class Actions Relative To Sexual Harassment Issues 509
(xix) Class Actions Under 42 U.S.C. Section 1981 510
(xx) Class Communications Issues In Class Actions 512
(xxi) Class Definition Issues In Class Actions 512

(xxii) Class-Wide Proof And Class-Wide Damages In Class Actions 513
(xxiii) COBRA Class Actions 515
(xxiv) Collateral Estoppel, *Res Judicata*, And Settlement Bar Concepts Under Rule 23 517
(xxv) The *Colorado River* Doctrine In Class Actions 518
(xxvi) Commonality Issues In Class Actions 519
(xxvii) Consolidation And Joinder Issues In Class Actions 519
(xxviii) Consumer Fraud Class Actions 520
(xxix) COVID-19 Class Actions 526
(xxx) *Cy Pres* Issues In Class Actions 567
(xxxi) Data Breach Class Actions 568
(xxxii) Decertification Issues Under Rule 23 572
(xxxiii) Default Judgments In Class Actions 574
(xxxiv) Discovery Issues In Class Actions 575
(xxxv) Disparate Treatment Issues In Class Actions 584
(xxxvi) Disqualification Of Counsel In Class Actions 585
(xxxvii) Experts In Class Actions 587
(xxxviii) FACTA And FDCPA Class Actions 590
(xxxix) First Amendment Class Actions 593
(xl) FCRA Class Actions 594
(xli) *Forum Non-Conveniens* In Class Action Litigation 596
(xlii) Government Enforcement Litigation 597
(xliii) Immigration Class Actions 605
(xliv) Immunity Issues In Class Actions 607
(xlv) Indemnification Issues In Class Actions 608
(xlvi) Injunctions In Class Actions 609
(xlvii) Insurance Issues In Class Actions 611
(xlviii) Intervention Issues In Class Actions 613
(xlix) Issues With The Judicial Panel On Multi-District Litigation In Class Actions 616
(l) Jurisdiction Issues In Class Action Litigation 619
(li) Labor Abuse Issues In Class Action Litigation 622
(lii) Litigation Over Class Action Settlement Agreements And Consent Decrees 624
(liii) Media Issues In Class Action Litigation 627
(liv) Multi-Party Litigation Over Modification Of Employee/Retirement Benefits 628
(lv) Non-Workplace Class Action Arbitration Issues 630
(lvi) Objectors And Opt-Out Issues In Class Actions 647
(lvii) Predominance Issues In Class Actions 648
(lviii) Preemption Issues In Class Actions 652
(lix) Preemptive Motions To Strike Or Dismiss Class Allegations 653
(lx) Privacy Class Actions 663
(lxi) Procedural Issues And Proof Requirements In Rule 23 Class Actions 683
(lxii) Recusals In Class Action Litigation 687
(lxiii) Removal And Remand Issues In Class Actions 688
(lxiv) Retaliation Issues In Class Action Litigation 690
(lxv) RICO Class Actions 691
(lxvi) Sanctions, Contempt, And Unethical Misconduct Issues In Class Action Litigation 693
(lxvii) Sealing Issues In Class Actions 701
(lxviii) Service Awards And Costs In Class Actions 702
(lxix) Settlement Administration Issues In Class Actions 703

(lxx) Settlement Approval Issues In Class Actions 705
(lxxi) Standing Issues In Class Actions 712
(lxxii) Statute Of Limitations Issues In Class Actions 716
(lxxiii) Stays In Class Action Litigation 719
(lxxiv) TCPA Class Actions 721
(lxxv) The Adequacy Of Representation Requirement For Class Certification 729
(lxxvi) The Mootness Doctrine In Class Action Litigation 730
(lxxvii) The Numerosity Requirement For Class Certification 731
(lxxviii) The *Rooker-Feldman* Doctrine In Class Actions 732
(lxxix) Trafficking Victims Protection Act In Class Action Litigation 732
(lxxx) Typicality Issues In Class Action Litigation 733
(lxxxi) Venue Issues In Class Actions 733
(lxxxii) Veterans' Class Actions 736
(lxxxiii) WARN Class Actions 738
(lxxxiv) Workplace Antitrust Class Actions 743
(lxxxv) Workplace Class Action Arbitration Issues 746
(lxxxvi) Writs Of Mandamus In Class Actions 749

APPENDIX I – TABLE OF 2021 WORKPLACE CLASS ACTION AND COLLECTIVE ACTION LITIGATION RULINGS 751

I. Overview Of The Year In Workplace Class Action Litigation

A. Executive Summary

Over the past decade, workplace class action litigation has exploded relative to its prevalence and complexity. The class action mechanism provides skilled plaintiffs' lawyers a tool to attempt to inflate the size and risk of litigation exponentially. The plaintiffs' class action bar has seized on and expanded its use of this tool to grow its practice and has adopted an array of tactics to command and build increasing pressure and leverage.

Today, workplace class actions remain at the top of the list of challenges that business leaders face. An adverse judgment in a class action has the potential to bankrupt a company. Adverse publicity from a threatened or ongoing class action has the potential to eviscerate good will and market share. At the same time, negotiated resolutions have the potential to spawn copy-cat class actions and follow-on claims from multiple groups of plaintiffs' lawyers who challenge corporate policies and practices in numerous jurisdictions at the same time or in succession. Compounding these risks, federal and state legislatures and administrative agencies continually add to a patchwork quilt of compliance challenges that shift and change with each administration, thereby bringing increased unpredictability.

Ever-attuned to the challenges facing business leaders, the plaintiffs' class action bar has leveraged these risks into increasingly large pay-outs. Skilled plaintiffs' class action lawyers and governmental enforcement litigators have continued to develop new theories and approaches to the successful prosecution of complex workplace litigation and enforcement lawsuits and have continued to convert the size and uncertainty of such litigation into settlements at increasing rates. This phenomenon was manifest in 2021 as the aggregate value of workplace class action settlements ballooned to an all-time high.

As a result, managing and combating workplace class action threats commands an evolving and strategic approach. The events of the past year demonstrate that the array of problems facing businesses are continuing to change and to become more complex. During 2021, the COVID-19 pandemic continued to inspire new laws and regulations, which led to new types of workplace issues and new class theories that are likely to influence the fabric of complex workplace litigation for years to come. The COVID-19 "return to work" effort, remote and hybrid work arrangements, and vaccination mandates spawned new challenges and new class action risks.

The impact of the pro-worker policies of the Biden Administration also took hold over the past year as the agencies under its charge effectively reversed many of the pro-business rules adopted by the Trump Administration. The Biden Administration rolled out policy changes that are continuing to take shape through executive orders, legislative efforts, agency rulemaking, and enforcement litigation. Contrary to the pro-business approach of the Trump Administration, many of these efforts expanded the rights, remedies, and procedural avenues available to workers and government enforcement agencies, and created an array of litigation and compliance challenges for businesses.

As we move into 2022 and beyond, employers should expect that the changing workplace, coupled with these stark reversals in policy, will expand enforcement efforts and have a cascading impact on private class action litigation. The combination of these factors presents increasing challenges for businesses to integrate their risk mitigation and litigation strategies to navigate these exposures.

While predictions about the future of workplace class action litigation may cover a wide array of potential outcomes, one sure bet is that the plaintiffs' class action bar will continue to evolve and adapt to changes in legislation, agency rulemaking, and case law precedents. As a result, class action litigation will remain fluid and dynamic, and corporate America will continue to face new litigation challenges in the year to come.

B. Key Trends Of 2021

An overview of workplace class action litigation developments in 2021 reveals five key trends.

First, the aggregate monetary value of workplace class action settlements exploded in 2021 to an all-time high, as plaintiffs' lawyers and government enforcement agencies monetarized their claims at the highest values we have ever tracked. Many employers and commentators alike expected the pandemic to depress the size and pace of settlements. Instead, the numbers show that the plaintiffs' bar was successful in converting case filings into significant settlement numbers at higher levels during the pandemic than in any of the preceding years. After settlement numbers reached a high point in 2017, they plummeted to their lowest level ever in 2018 before experiencing a mild recovery in 2019. In 2020, settlement numbers continued their upward trend in several areas, signaling a return to prominence of these bet-the-company cases. This momentum continued in 2021, as class action settlement recoveries reached a new threshold. The top 10 settlements in various employment-related class action categories exceeded $3.62 billion in 2021, compared to $1.58 billion in 2020, $1.34 billion in 2019, and $1.32 billion in 2018. For wage & hour class actions, the monetary value of the top 10 private plaintiff settlements entered into or paid in 2021 reached $641.3 million. This amount represents a monumental increase from the 2020 total of $294.6 million, as well as the 2019 total of $449.05 million. For ERISA class actions, the monetary value of the top 10 private plaintiff settlements entered into or paid in 2021 totaled a whopping $837.3 million, more than double the 2020 total of $380.10 million and the 2019 total of $376.35 million. The only areas of decline were private-plaintiff employment discrimination and government enforcement action settlements. The top 10 employment discrimination settlements garnered $323.45 million in 2021, as compared to settlement figures of $422.68 in 2020 and $137.35 million in 2019, and the top 10 government enforcement action settlements garnered $146.38 million, a sharp decline from the 2020 total of $241 million, but a significant jump from the 2019 total of $57.52 million.

Second, wage & hour litigation remained a sweet spot for the plaintiffs' class action bar as it achieved high rates of success at both the certification and decertification stages. Based on sheer volume and statistical numbers, workers certified more class and collective actions in the wage & hour space in 2021 as compared to any other area of workplace law. While evolving case law precedents and new defense approaches resulted in many good outcomes for employers opposing class and collective action certification requests in 2021, the plaintiffs' bar sustained its high rate of success on first-stage conditional certification motions in 2021 and markedly improved its rate of success on second-stage decertification motions. Perhaps due to the backlog resulting from pandemic-related court closures, the overall number of rulings increased in 2021, and plaintiffs prevailed on those first-stage motions at a rate exceeded only by the rate at which they prevailed in 2020. Of the 298 FLSA wage & hour certification decisions in 2021, plaintiffs won 226 of 279 conditional certification rulings (approximately 81%). As to second-stage decertification motions, plaintiffs prevailed at a similar rate in 2021 than in other years of the past decade. Plaintiffs lost 10 of 19 decertification motions (approximately 53%). By comparison, employers saw 286 wage & hour certification decisions in 2020, and plaintiffs won 231 of 274 conditional certification motions (approximately 84%) and lost six out of 12 decertification rulings (approximately 50%). By further comparison, of the 267 wage & hour certification decisions in 2019, plaintiffs won 198 of 243 conditional certification rulings (approximately 81%), and lost 14 of 24 decertification rulings (approximately 42%). By further comparison, there were 273 wage & hour certification decisions in 2018, where plaintiffs won 196 of 248 conditional certification rulings (approximately 79%) and lost 13 of 25 decertification rulings (approximately 48%). In sum, the plaintiffs' bar successfully secured certification of wage & hour actions at an astounding rate in 2021, while their odds of clearing the decertification hurdle decreased slightly to 47%. We expect these numbers to rise ever further in 2022 with a more employee-friendly U.S. Department of Labor actively working to eliminate pro-business rules and shifting its regulatory focus toward a plaintiff-friendly agenda.

Third, the change of leadership in the White House translated directly to reversals in administrative agendas, as the Biden Administration's enforcement authorities took steps to eliminate pro-business rules of the Trump Administration, thereby fueling skepticism regarding the continued weight of agency determinations. Voters elected to turn the White House from red to blue in November 2020 and, as a result, changes in numerous areas rolled out over 2021 that reversed Trump-era pro-business policies and sought to expand worker rights. The Department of Labor ("DOL"), in particular, withdrew or rescinded Trump-era rules, including the tip credit, joint employer, and independent contractor rules promulgated by the DOL during the Trump Administration. For example, after amending the DOL's Field Operations Handbook in February 2019, the Trump DOL undertook formal rulemaking and, in late 2020, issued a final rule that would have allowed employers to take the tip credit

for duties performed “for a reasonable time immediately before or after” a tipped duty. Before that final rule took effect, the Biden Administration delayed its effective date and then rescinded and replaced it with a more complicated, worker-friendly final rule that limited use of the tip credit effective December 28, 2021. Similarly, effective on March 16, 2020, the Trump DOL established a rule that set forth a four-factor balancing test for determining when a business would be considered the “employer” of a worker who simultaneously performs work for another business. The Biden DOL rescinded the Trump DOL rule, effective September 28, 2021, in favor of the more expansive and less predictable “economic reality” test applied by some courts. While the DOL acted swiftly to reverse course on many fronts with the change of administrations, other agencies continue to operate under Trump-appointed majorities and, as a result, have been slower to pivot. Likewise, the chair of the EEOC shifted with President Biden’s inauguration, and major rule shifts came through other avenues. On June 30, 2021, for example, President Biden signed a joint resolution narrowly passed by Congress to repeal a Trump-era rule that would have increased the EEOC’s information-sharing requirements during the statutorily mandated conciliation process. The agency’s filings over the past year reflect this state of affairs. For instance, after more than doubling its inventory of systemic filings between FY 2016 and FY 2018 (with 18 in FY 2016, 30 in FY 2017, and 37 in FY 2018), the EEOC’s systemic filings dropped to 17 in FY 2019, 13 in FY 2020, and 13 in FY 2021. Total filings followed a similar trajectory, with 136 in FY 2016, 202 in FY 2017, 217 in FY 2018, but only 149 in FY 2019, 101 in FY 2020, and 114 in FY in 2021. When the EEOC’s current leadership shifts away from a majority of Trump-appointed Commissioners in mid-2022, employers should anticipate a stark shift in the EEOC’s litigation enforcement program.

Fourth, COVID-19 class action litigation became more pervasive in reaching across new industries and spawning new challenges on the workplace class action front. The COVID-19 pandemic had a significant, continuing impact on all aspects of life in 2021. Its impact extended to the legal system in general and workplace class actions in particular. As we reported last year, in 2020, as state and local governments responded to the COVID-19 threat, many employers moved their employees to tele-work or work-from-home arrangements, many companies laid off or furloughed workers, and many businesses shut down or postponed critical operations. In 2021, as vaccines became widely available and state and local governments continued to manage the COVID-19 threat, many employers attempted to move their employees to “return to work” or “hybrid” work arrangements. Such developments prompted federal regulators to enact vaccine-or-test mandates and fueled employers to adopt or expand health screenings, temperature check protocols, and mandatory vaccination policies. These steps, in turn, led to waves of controversy as workplace class actions brought by states, employee advocates, unions, and employer groups erupted over regulatory actions and employer policies. Litigants challenged agency rule-making contending that it exceeded executive authority to regulate conditions of employment. These challenges have met mixed results, as courts have granted approximately 41% of requests for temporary restraining orders or preliminary injunctions to date. Other litigants have challenged employer policies on various grounds, including on the bases that they allegedly discriminated against employees by failing to provide disability or religious accommodations, or retaliated against workers who expressed COVID-related concerns or sought such accommodations. Such challenges have met a lower rate of success, as courts have granted approximately 82% of motions to dismiss such class claims in whole or part. In sum, the pandemic has continued to spike class actions (of all varieties) and litigation over all types of workplace issues. Employers are apt to see these workplace class actions continue to expand and morph in 2022 as the pandemic endures.

Fifth, workplace arbitration programs continued to influence the nature of class action litigation and shift the types of claims filed in 2021 as the plaintiffs’ bar continued to find ways to work around such obstacles. As employers clawed for cover from the increasing weight of workplace class action litigation in recent years, workplace arbitration continued to gain steam, aided by the U.S. Supreme Court’s transformative ruling in *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612 (2018). *Epic Systems* reaffirmed that the Federal Arbitration Act requires courts to enforce agreements to arbitrate according to their terms, including mandatory agreements that provide for individual proceedings and include class action waivers. Bolstered by such precedents, more than half of non-union, private-sector employers and more than two-thirds of large employers have adopted mandatory arbitration agreements. Such programs have continued to shift class action litigation dynamics in critical ways as they have led to more front-end attacks on proposed class and collective actions and, as the result of such attacks, to the defense bar dismantling more workplace class and collective actions by fracturing

those proceedings and diverting them into individual arbitrations. Over the past year, plaintiffs' class action lawyers continued to attempt to find ways to end-run such agreements. These efforts took shape on multiple fronts. In 2021, the plaintiffs' bar continued to shift its efforts toward claims more apt to be immune from such programs or toward populations less likely to have entered into agreements with defendants. This trend is illustrated by the spike in filings based on state laws that are not currently subject to arbitration, like the California Private Attorneys' General Act ("PAGA"), which filings have quadrupled over the past decade and continued their upward trajectory during 2021. On a different front, advocates for workers and labor redoubled their efforts to shift this landscape by backing new legislation that would amend federal laws to ban mandatory arbitration agreements, depending on the bill, for employment, consumer, antitrust, civil rights, or sexual harassment disputes. In light of current administrative priorities, the future remains anything but clear as to whether arbitration programs will remain viable tools to counter proposed workplace class actions in the face of these continued attacks on *Epic Systems*.

C. Significant Trends In Workplace Class Action Litigation In 2021

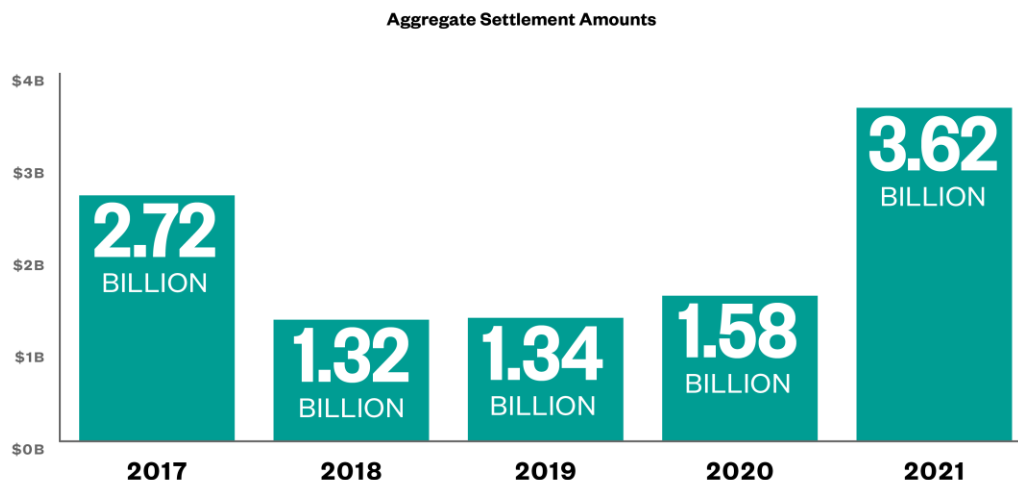
(i) Class Action Settlement Trends

As measured by the top 10 largest case resolutions in various workplace class action categories, overall settlement numbers skyrocketed in 2021 to an all-time high. The plaintiffs' bar and government enforcement attorneys obtained significant settlements in a wide range of areas in 2021, and the overall "top ten" settlement values in 2021 in workplace class actions increased from those in 2020 in every area except for employment discrimination and government-initiated enforcement actions. For the first time ever, aggregate class action settlement recoveries in all categories exceeded the $3.6 billion threshold.

Although many employers and commentators alike expected the continuing impact of the pandemic to depress the size and slow the pace of settlements, workplace class action settlements defied expectations, and the plaintiffs' bar was successful in converting case filings into significant settlement numbers at higher levels during the two years of the pandemic than during the two preceding years. After settlement numbers reached a high point in 2017, those numbers fell dramatically in 2018, and then leveled off in 2019. In 2020, the plaintiffs' bar was successful in monetizing their class action filings at a higher level, signaling the beginning of an upward climb.

The momentum continued in 2021, as class action settlement recoveries reached a new high.

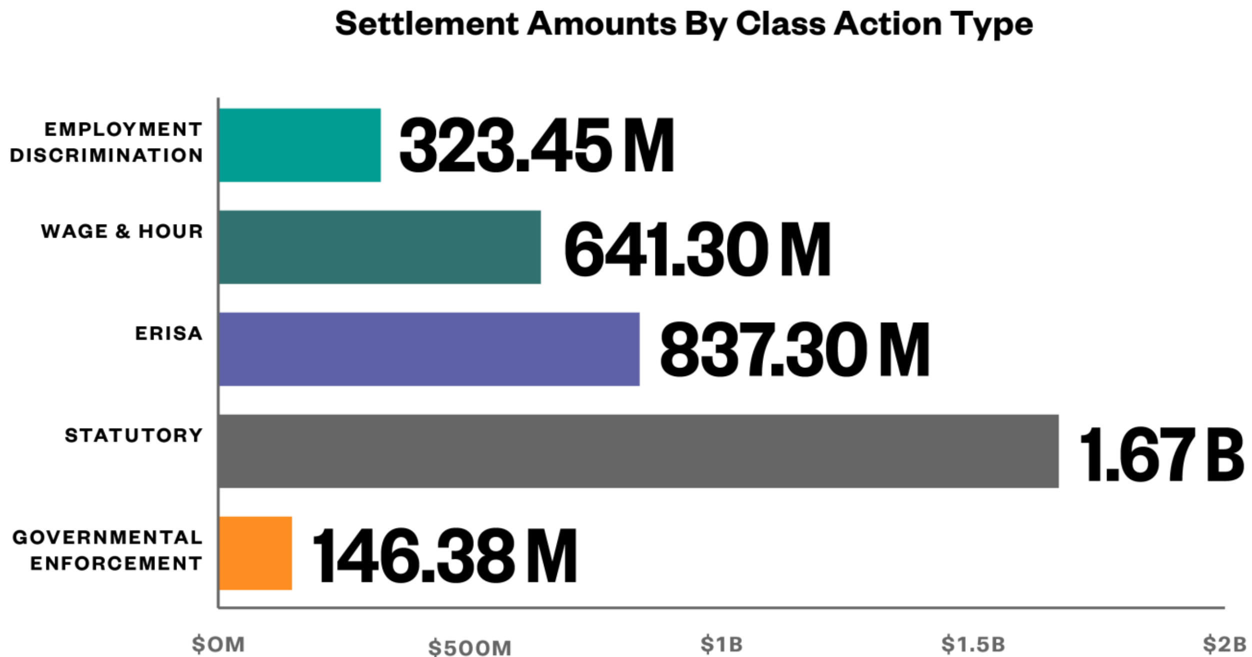
This past year, the plaintiffs' bar drove the settlement of high-value class actions in multiple areas. Considering all types of workplace class actions, settlement numbers in 2021 totaled more than $3.62 billion, an increase compared to 2020, which totaled $1.58 billion, and from 2019, which totaled 1.34 billion. The 2021 totals exceeded the previous high-water mark reached in 2017, when such settlements topped $2.72 billion, setting a new benchmark. The following graphic shows this trend:



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

In 2021, employers saw a monumental upward swing in the settlement values of wage & hour claims, ERISA class actions, and private statutory claims. In contrast, corporate America saw significant decreases across-the-board for resolutions of class actions involving employment discrimination claims and government enforcement litigation.

The following chart illustrates the overall results in these categories for 2021 settlement numbers:



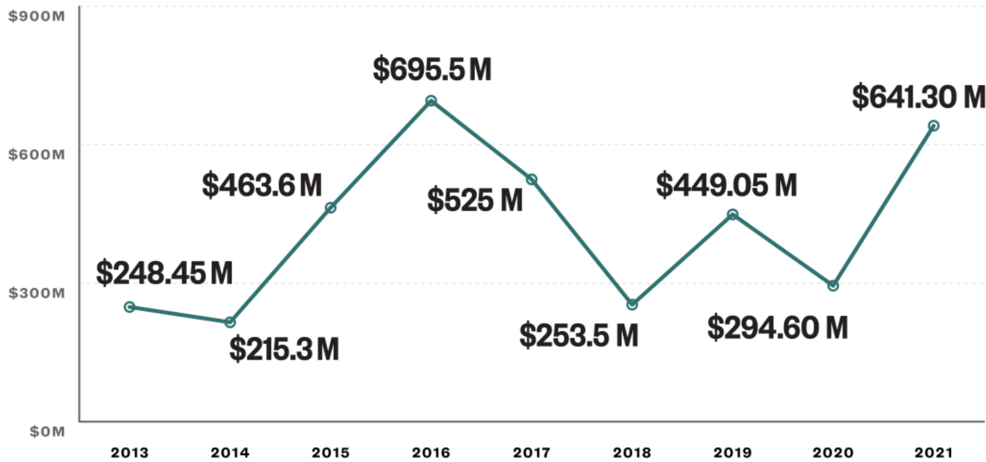
By type of case, settlement values in wage & hour claims, ERISA class actions, and private statutory cases experienced the most significant increases.

On the wage & hour front, the value of the top 10 wage & hour class action settlements ballooned in 2021 to $641.3 million. In 2020, the value of those settlements fell off significantly from the previous year. In 2020, the value of the top 10 wage & hour settlements was $294.60 million, compared with $449.05 million in 2019.

In 2021, the value of the top 10 wage & hours class action settlements made a resurgence to a number higher than the number in any year of the past decade aside from 2016. The 2021 value of $641.3 million held slightly lower than the high water mark reached in 2016 ($695.5 million) but otherwise exceeded every other year of the past decade, including 2020 ($294.6 million), 2019 ($449.05 million), 2018 ($253.5 million), 2017 ($525 million), 2015 ($463.6 million), 2014 ($215.3 million), 2013 ($248.45 million), and 2012 ($292 million).

Considering the trend starting in 2015, aside from dips in 2018 and 2020, the value of the top 10 wage & hour settlements exceeded $400 million in every year, for an adjusted five-year average of $537.43 million, or an overall seven-year average of $462.18 million. Adding the numbers, corporate America saw over $3.235 billion devoted to settling the top 10 wage & hour settlements over that seven-year period.

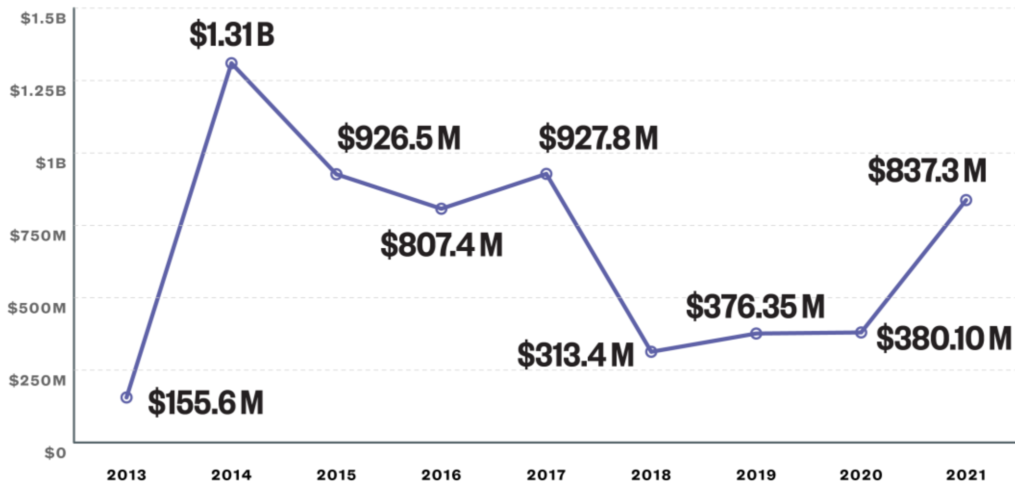
As the plaintiffs' class action bar continues to find avenues to avoid the impact of the 2018 ruling in *Epic Systems* on businesses inclined to adopt mandatory workplace arbitration programs with class action waivers, and as cases subject to that precedent continue to work their way out of the pipeline, we anticipate that settlement numbers will continue to climb in 2022.



Value Of Top 10 Wage & Hour Class Action Settlements

The settlement value of the top 10 ERISA class actions climbed sharply in 2021. The top 10 settlements totaled $837.30 million, a substantial increase over the 2020 total of $380.10 million as well as the 2019 total of $376.35 million and the 2018 total of $313.40 million. ERISA settlements in 2021 climbed back closer to the levels employers saw from 2014 to 2017, during which period settlements totaled $1.31 billion (2014), $926.5 million (2015), $807.4 million (2016), and $927.8 million (2017), for an average over the four-year period from 2014 through 2017 of $992.93 million.[1]

This trend is illustrated by the following chart of settlements from 2013 to 2021:

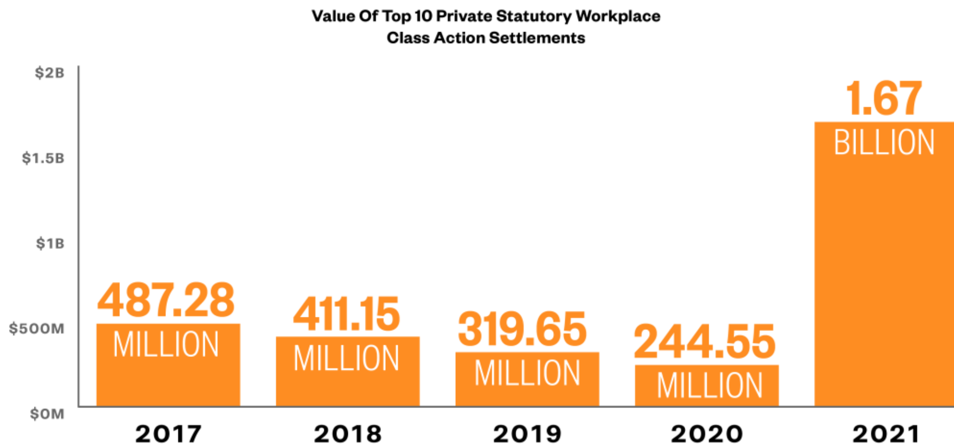


Value Of Top 10 ERISA Class Action Settlements

The top 10 settlements in the private plaintiff statutory class action category (*e.g.*, cases brought for breach of contract for employee benefits, workplace antitrust laws, or statutes such as the Fair Credit Reporting Act or the Worker Adjustment and Retraining Notification Act) skyrocketed in 2021 to a new high. The settlements totaled $1.671 billion, which represents a significant increase over every year from 2016 forward and a reversal of a downward year-over-year trend that began in 2018. The previous high water mark, set in 2017, was $487.28 million. In 2018, settlements tapered to $411.15 million, followed by $319.65 million in 2019, and $244.55 in 2020.

[1] The total for the top ten ERISA class action settlements was $1.31 billion in 2014, $926.5 million in 2015, $807.4 in 2016, and $927.8 in 2017.

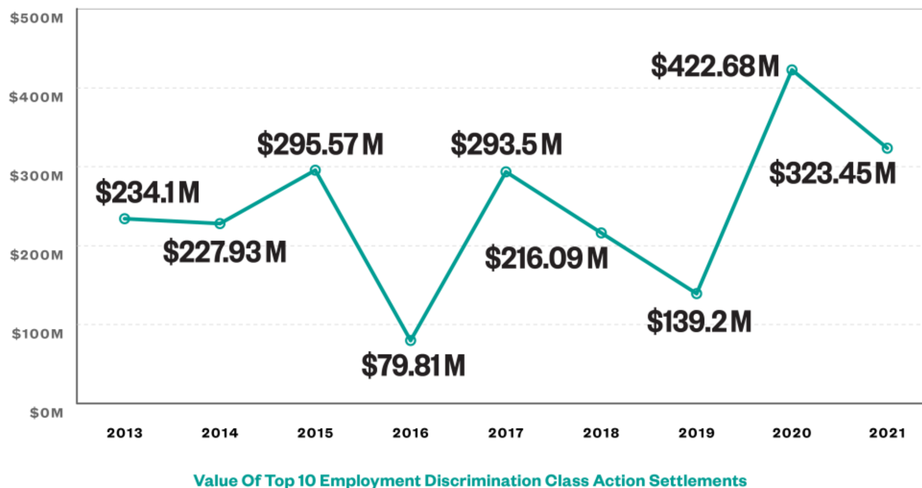
The following chart tracks these figures:



Employment discrimination class action settlements, on the other hand, showed a decrease in 2021, as compared to 2020. In 2021, the top 10 settlements totaled $323.45 million, as compared to $422.68 million in 2020. In 2020, the value of the top 10 largest employment discrimination class action settlements of $422.68 million was the highest figure reached since we began tracking numbers,[2] and $76.28 million higher than the next highest year recorded (2010).

While lower than the levels employers saw in 2020, the 2021 settlement numbers were significantly higher than previous years, including 2015 ($295.57 million) and 2017 ($293.5 million), and greatly exceeded those in 2012 ($48.65 million), 2013 ($234.1 million), 2014 ($227.93 million), 2016 ($79.81 million), 2018 ($216.09 million), and 2019 ($139.2 million). In fact, the top 10 settlements in 2021 of $323.45 million were higher than the average year-over-year value of the top 10 settlements from 2012 to 2020 of $217.5 million.

The comparison of the settlement figures with previous settlement activity over the last decade is illustrated in the following chart:



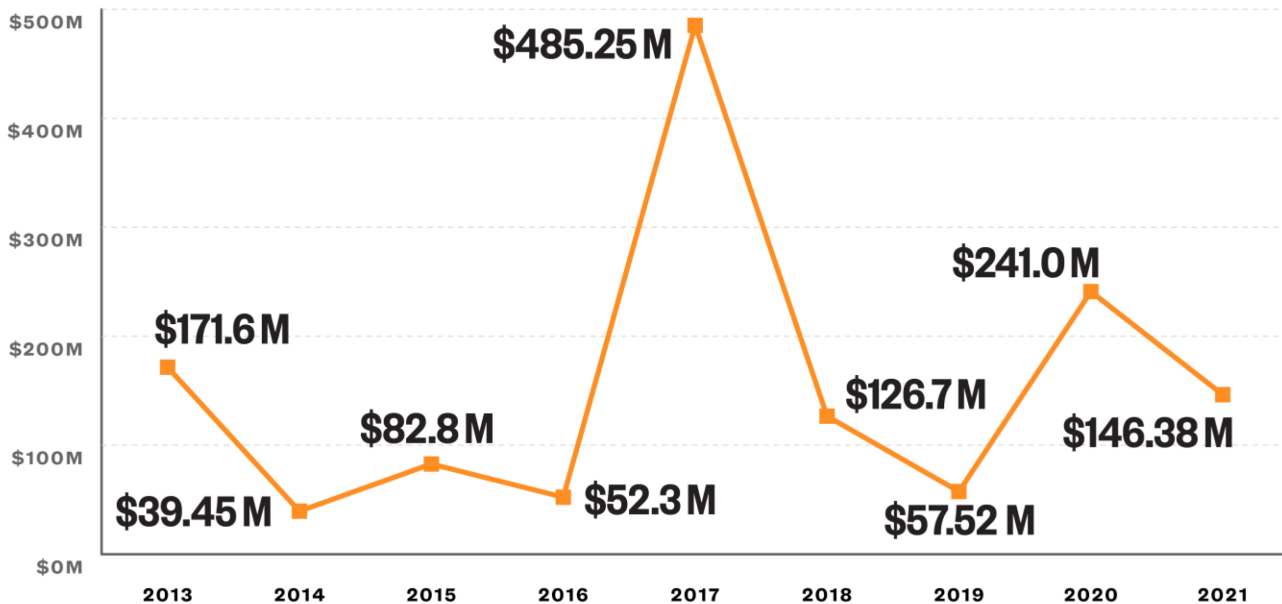
Value Of Top 10 Employment Discrimination Class Action Settlements

[2] An analysis of class action settlement activity is discussed in Chapter II of this Report. The total of $422.68 million in 2020 was the highest total recorded since we started tracking numbers. By comparison, the $139.2 million in 2019 was the fourth lowest total since the *Wal-Mart* ruling in 2011. The figures for each of the preceding years are as follows: $216.09 million (2018); $293.5 million (2017); $79.81 million (2016); $295.57 million (2015); $227.93 million (2014); $234.1 million (2013); $48.6 million (2012); $123.2 million (2011); $346.4 million (2010); $86.2 million (2009); $118.36 million (2008); $282.1 million (2007); and $91 million (2006). The issuance of the *Wal-Mart* decision in June 2011, depressed numbers under $300 million for each year thereafter until 2020.

Relatedly, the top 10 settlements in government enforcement litigation experienced a downward turn in 2021, as they decreased to a total of $146.38 million.

In 2020, those settlements totaled $241.0 million, a significant jump from the $57.52 million employers saw in 2019 and from the $126.7 million recorded in 2018. Thus, although the numbers decreased in 2021, they outpaced the numbers lodged in 2014, 2015, 2016, and 2019 and fell closer to the average year-over-year value of the top 10 settlements from 2012 to 2020 of $168.82 million.[3]

This trend is illustrated by the following chart of settlements from 2013 to 2021:



Value Of Top 10 Government Enforcement Litigation 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, case filing trends of the plaintiffs' class action bar, the Biden Administration's labor and employment enforcement policies, and class certification rulings.

(ii) Class Certification Trends In 2021

Complex workplace litigation remains one of the chief exposures driving corporate legal budgetary expenditures. Class actions and multi-plaintiff lawsuits, in particular, continue to provide a source of concern for companies. A prime component in that array of risks indisputably continues to include complex wage & hour litigation.

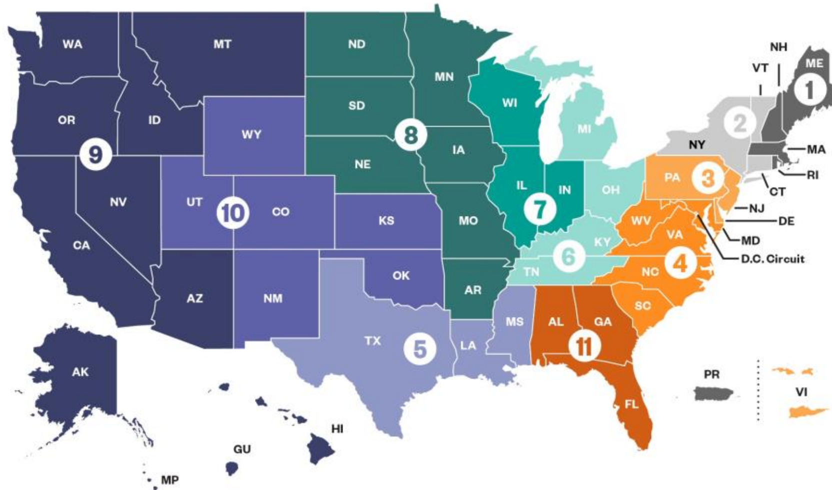
The following map sets forth a circuit-by-circuit analysis of this year's 332 class certification decisions in all varieties of workplace class action litigation, including wage & hour, employment discrimination, and ERISA.

As the map reflects, in 2021, complex wage & hour litigation under the FLSA drove more certification briefings and a greater number of certification decisions than other areas combined.

---

[3] The total for the top ten government enforcement litigation settlements in 2012 was $262.78 million. Aside from 2017, when such settlements totaled $485.25 million, the top ten government enforcement settlements remained under $200 million every year from 2013 through 2019.

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	Court of Federal Claims
Employment Discrimination Decisions													
Certification Motions Granted	0	0	2	1	0	2	0	1	4	2	1	0	0
Certification Motions Denied	0	1	0	0	0	0	2	0	1	0	1	0	0
Sub-Total:	**13 Certifications Granted / 5 Certifications Denied**												
ERISA Decisions													
Certification Motions Granted	0	0	1	0	1	0	3	1	1	0	1	0	0
Certification Motions Denied	0	1	0	0	0	0	0	3	0	1	1	0	0
Decertification Motions Granted	0	0	0	0	0	0	0	0	0	0	0	0	0
Decertification Motions Denied	0	2	0	0	0	0	0	0	0	0	0	0	0
Sub-Total:	**8 Certifications Granted / 6 Certifications Denied** **0 Decertification Motions Granted / 2 Decertification Motions Denied**												
FLSA Certification Decisions													
Conditional Certification Motions Granted	5	47	15	13	13	50	17	17	31	10	5	1	2
Conditional Certification Motions Denied	1	9	5	2	9	7	1	3	8	1	7	0	0
Decertification Motions Granted	0	1	0	0	1	1	1	2	1	0	3	0	0
Decertification Motions Denied	0	1	1	0	2	0	0	1	2	1	0	1	0
Sub-Total:	**226 Conditional Certifications Granted / 53 Conditional Certifications Denied** **10 Decertification Motions Granted / 9 Decertification Motions Denied**												
Total:	**247 Total Certification Motions Granted / 64 Total Certifications Denied** **10 Decertification Motions Granted / 11 Decertification Motions Denied**												

Wage & Hour Certification Trends

The ease with which plaintiffs have achieved first-stage certification in the FLSA wage & hour context surely has contributed to the number of filings in that area, and plaintiffs achieved a higher rate of success on initial certification motions in 2021 than in any other year of the past decade, indicating that wage & hour remains a sweet spot for the plaintiffs' bar.

In 2021, wage & hour lawsuit filings in federal courts decreased for the sixth year in a row. That said, more FLSA lawsuits were filed during each of the preceding nine years – during 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, and 2020 – than were filed in any year of the preceding several decades. Many of these cases remain in the pipeline within federal courts, and the result is a burgeoning case load of wage & hour issues.

To be sure, the significant volume of FLSA filings over the past several years has caused the issuance of more certification rulings in the FLSA area than in any other substantive area of complex employment litigation.

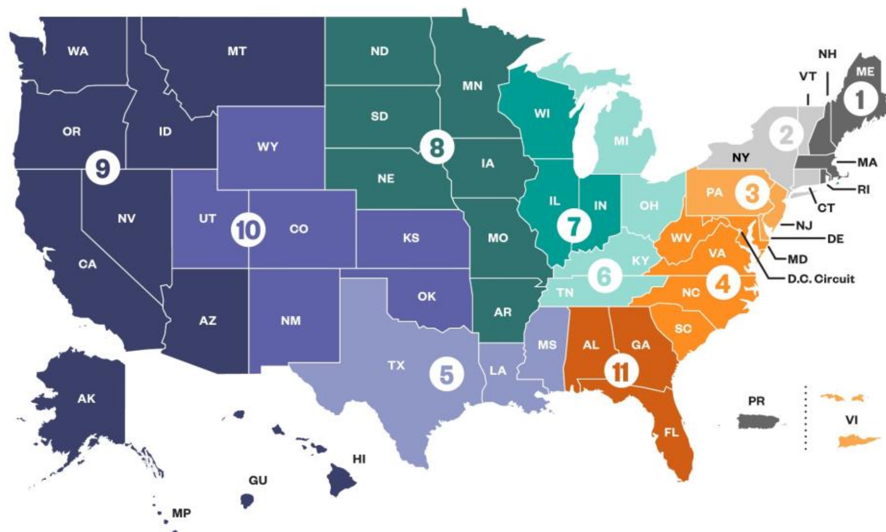
Despite the pandemic's continued impact on court operations and personnel, courts issued more rulings on wage & hour certification issues in 2021 than they issued in each of the past five years. In particular, federal courts issued 298 decisions on FLSA certification and decertification issues in 2021, an increase from the 286 certification rulings issued in 2020, the 267 certification rulings issued in 2019, the 273 certification rulings in 2018, and the 257 certification rulings in 2017.

Of these rulings, 279 addressed first-stage motions for conditional certification of wage & hour collective actions under 29 U.S.C. § 216(b), whereas 19 addressed second-stage motions for decertification. Plaintiffs historically have secured a higher rate of success on the former, while employers have secured a higher rate of success on the latter. In 2021, as noted above, plaintiffs achieved an exceptionally high rate of success on first stage conditional certification motions, equal to or higher than the rate they achieved in any year of the past decade aside from 2020. In 2021, Plaintiffs saw their rate of success at 81%, down slightly from their 2020 success rate of 84%, and the same as their 2019 success rate of 81%. Employers, on the other hand, saw their rate of success on decertification motions rise to 53% in 2021, up from 50% in 2020 and 58% in 2019.

The analysis of these rulings – discussed in Chapter V of this Report – shows that plaintiffs filed a high predominance of cases against employers in "plaintiff-friendly" jurisdictions such as the judicial districts within the Second and Ninth Circuits. For the second time in a decade, however, rulings were equally or more voluminous out of the Sixth Circuit, which also tended to favor workers over employers in conditional certification rulings.

The following map illustrates this trend:

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



Analysis Of FLSA Certification Decisions

CIRCUIT COURT	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit	Court of Federal Claims
Conditional Certification Motions Granted	5	47	15	13	13	50	17	17	31	10	5	1	2
Conditional Certification Motions Denied	1	9	5	2	9	7	1	3	8	1	7	0	0
Decertification Motions Granted	0	1	0	0	1	1	1	2	1	0	3	0	0
Decertification Motions Denied	0	1	1	0	2	0	0	1	2	1	0	1	0

Sub-Total: **226 Conditional Certifications Granted / 53 Conditional Certifications Denied**
10 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.

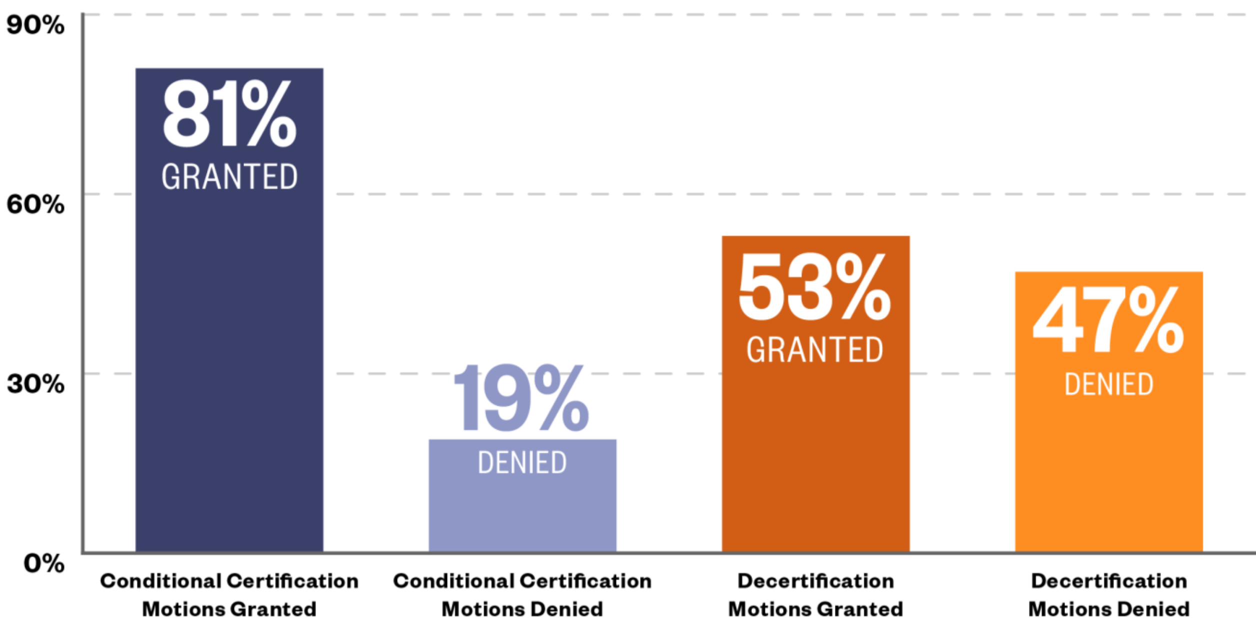
First, it substantiates that the district courts within the Second, Sixth, and Ninth Circuits are the epi-centers of wage & hour class actions and collective actions. More cases were prosecuted and conditionally certified – 47 certification orders in the Second Circuit, 31 certification orders in the Ninth Circuit, and 50 certification orders in the Sixth Circuit – in the district courts in those circuits than in any other areas of the country. For the second time in two years, the Sixth Circuit – which encompass the states of Michigan, Ohio, Kentucky, and Tennessee – had more rulings and certifications than either the Second or Ninth Circuits.

Second, as the burdens of proof under 29 U.S.C. § 216(b) suggest, plaintiffs won the overwhelming majority of "first stage" conditional certification motions (226 of 279 rulings or approximately 81%) in 2021, which was similar to the 2020 numbers (231 of 274 rulings or approximately 84%), the 2019 numbers (198 of 243 or approximately 81%), and the 2018 numbers (196 of 248 rulings or approximately 79%), which were themselves the highest percentages of plaintiff-side wins recorded in the last decade. Further, in terms of "second stage" decertification motions, employers won 53% (10 of 19 rulings) in 2021, which represented a slight rise from the 2020 numbers (6 of 12 rulings or approximately 50%) and the 2019 numbers (14 of 24 rulings or approximately 58%).

Overall, these statistics show robust numbers for the plaintiffs' bar, as plaintiffs prevailed on "first stage" conditional certification motions at a high rate in 2021 and lost "second stage" decertification motions at a lower rate. The "first stage" conditional certification statistics for plaintiffs at 81% were nearly as favorable as the rate of success that workers obtained in 2020 (84%), as favorable as the rate of success that workers obtained in 2019, when plaintiffs won 81% of "first stage" conditional certification motions, and more favorable as the rate of success that workers obtained in 2018, when plaintiffs won 79% of "first stage" conditional certification motions.

The "second stage" decertification statistics for employers at 53% in 2021 was more favorable to employers than the decertification statistics in 2020, when employers prevailed on 50% of such motions, in 2019, when employers prevailed on 58% of "second stage" decertification motions, in 2018, when employers won 52% of decertification rulings, and in 2017, when employers won 63% of decertification rulings.

The following chart illustrates this trend for 2021:



Third, these numbers reflect the ongoing migration of skilled plaintiffs' class action lawyers into the wage & hour litigation space. Experienced and able plaintiffs' class action counsel are apt to secure better results, and the case law that has developed under 29 U.S.C. § 216(b) serves to attract such individuals. In light of the "lenient" standard that many courts apply at the initial conditional certification phase of a case, plaintiffs often can secure "first stage" conditional certification – and foist settlement pressure on an employer – fairly quickly (shortly after filing a case), with minimal monetary investment (*e.g.*, without support from an expert), as compared to class certification in an employment discrimination class action or an ERISA class action, for instance, which typically requires additional discovery, evidentiary submissions, and expert testimony.

As a result, to the extent that litigation of collective actions and class 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. Hence, as compared to employment discrimination and ERISA 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 the short term.

The certification statistics for 2021 confirm these factors. Despite the continued impact of the COVID-19 pandemic and the lower rate of case filings, courts issued more certification rulings in 2021 and the plaintiffs' bar secured more certification victories in 2021 than in any other year of the past decade.

The extent to which *Epic Systems* will continue to impact wage & hour certification trends remains uncertain. As 2021 reflected, the number of FLSA lawsuits filed in 2021 continued to fall as compared to prior years. Coupled with the settlements and the number of rulings discussed above, these statistics suggest that the plaintiffs' class action bar is not losing interest in these suits. To the contrary, the number of rulings issued by federal courts, despite the COVID-19 pandemic, suggests that plaintiffs' counsel are succeeding in obtaining rulings on motions for conditional certification at a higher rate than ever. These factors also indicate that arbitration agreements are not getting in the way of these motions and that, instead, plaintiffs are being more selective in filing their cases or in narrowing the groups of employees that they seek to represent.

As discussed below, given the pro-worker policies of the Biden Administration, employers are seeing legislative efforts to overturn *Epic Systems* gain traction. Particularly if Democrats are able to retain control of the House and Senate during the remainder of President Biden's term, employers may see these legislative efforts to overturn *Epic Systems* succeed. As a result, employers could see substantial expansion of case filing numbers in the next few years.

Employment Discrimination & ERISA Certification Trends

Against the backdrop of wage & hour litigation, the rulings in *Wal-Mart* and *Epic Systems* continued to fuel more critical thinking and crafting of case theories in employment discrimination and ERISA class action filings in 2021. The Supreme Court's Rule 23 decisions forced the plaintiffs' bar to "re-boot" the architecture of their class action theories.[4] Hence, the playbook on Rule 23 strategies is undergoing a continuous process of evolution, and the plaintiffs' class action bar is continually testing ways to navigate around and to wear away the force of these precedents.

As to *Wal-Mart*, one work-around has been the filing of "smaller" employment discrimination class actions. In the past 10 years, employers have seen more statewide or regional-type classes asserted than the type of nationwide mega-case that *Wal-Mart* discouraged. Plaintiffs' counsel have been more selective, strategic, and

---

[4] An analysis of certification rulings in Title VII employment discrimination class actions in 2021 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.

savvy relative to calibrating the focus of their cases and aligning the size of their proposed classes to the limits of Rule 23 certification theories.

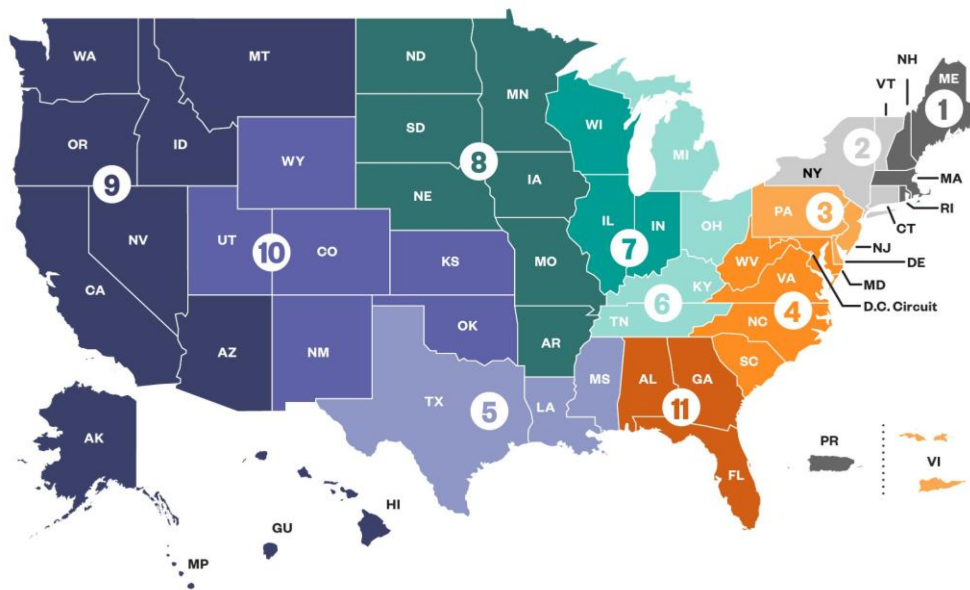
As to *Epic Systems*, at least in the employment discrimination area, Plaintiffs have seemed apt to file scaled-down class actions to test the prevalence of arbitration agreements among putative class members and, depending on the result, to move forward with one or more limited classes of non-signers or to use the threat of undermining the enforceability of the arbitration program to attempt to leverage a settlement prior to obtaining a ruling on the propriety or scope of certification.

In 2021, the number of rulings on motions for class certification expanded as compared to 2020. In 2021, courts issued 18 rulings on motions for class certification in employment discrimination actions, compared with 12 rulings in 2020 and 15 rulings in 2019. Plaintiffs, however, prevailed on these motions at a higher rate. Plaintiffs prevailed in 13 of the 18 rulings, or 72%, in 2021, with four of those rulings emanating from the Ninth Circuit, compared to 5 of the 12 rulings, or 42%, in 2020, again with four of those rulings emanating from the Ninth Circuit.

The rate of success of the plaintiffs' bar in 2021 on such motions was materially higher than its rate of success in recent years. In 2019, plaintiffs won 7 of the 11 rulings, or 63%, on motions for initial certification of class actions in employment discrimination cases, but plaintiffs lost 4 of 4 motions for decertification, for an overall success rate of 46.7%. By comparison, in 2018, plaintiffs won 3 of the 11 rulings on motions for class certification, or 27%, and, in 2017, plaintiffs won 7 of 11 rulings on such motions, or 64%.

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

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



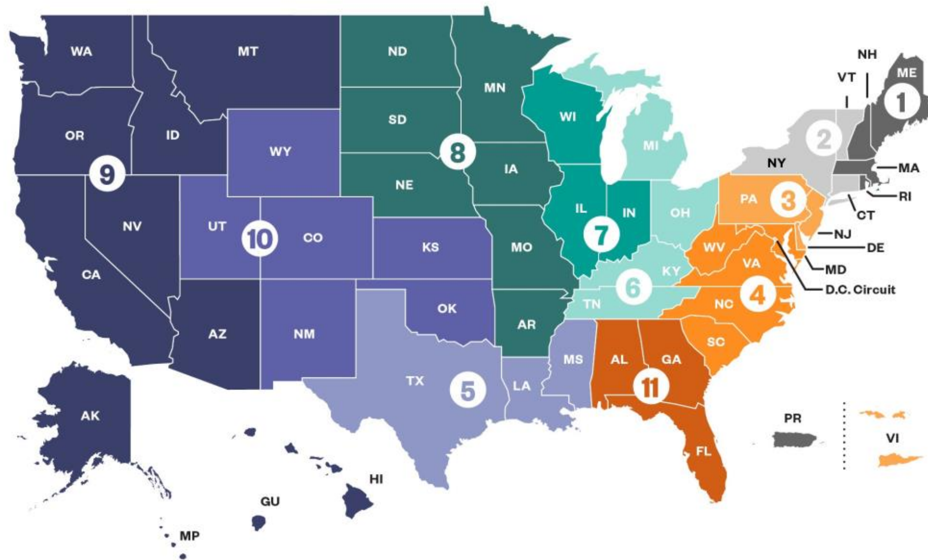
Analysis Of Employment Discrimination Decisions

CIRCUIT COURT	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit
Conditional Certification Motions Granted	0	0	2	1	0	2	0	1	4	2	1	0
Conditional Certification Motions Denied	0	1	0	0	0	0	2	0	1	0	1	0
Sub-Total:	**13 Certifications Granted / 5 Certifications Denied**											

In terms of the ERISA class action litigation in 2021,[5] the decisions show that employers had the best chance of defeating class certification in the context of ERISA class actions. Courts issued 16 rulings on class certification in 2021, with plaintiffs prevailing in 8 of 14 decisions, or 57%. As a result, 2021 marks plaintiffs' lowest rate of success in terms on certifying ERISA class action in recent years by a fair margin. In 2020, plaintiffs won 11 of 16 certification rulings, a success rate of 69%. In 2019, plaintiffs won 11 of 17 certification rulings, a success rate of 65%. By comparison, in 2018 plaintiffs won 11 of 17 certification rulings for a similar success rate of 65%, and, in 2017, plaintiffs prevailed in 17 of 22 certification rulings, for a success rate of 77%.

A map illustrating these trends is shown below:

U.S. Courts Of Appeal – Analysis Of ERISA Decisions



Analysis Of ERISA Decisions

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

Sub-Total: **8 Certification Motions Granted / 6 Certifications Motions Denied**
0 Decertification Motions Granted / 2 Decertification Motions Denied

Overall Trends

So what conclusions overall can be drawn on class certification trends in 2021?

In the areas of wage & hour and employment discrimination claims, in particular, 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.

While class certification rates in ERISA class actions took a nose dive in 2021 compared to prior years (8 motions granted and 6 motions denied in 2021, for a success rate of 57%), class certification for employment

[5] An analysis of rulings in ERISA class actions in 2021 is set forth in Chapter VI, Section A.

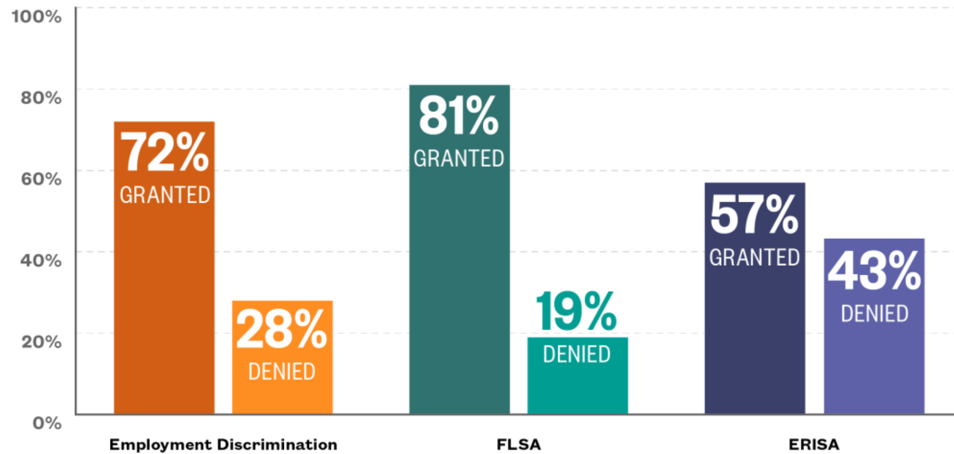
discrimination cases (13 motions granted and 5 motions denied in 2021) and conditional certification in wage & hour cases (226 motions granted and 53 motions denied in 2021) remained pronounced, with a success rate ranging from 71% to 81%.

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

– a success rate of 57% for certification of ERISA class actions;

– a success rate of 72% for certification of employment discrimination class actions (both Title VII and age discrimination cases); and

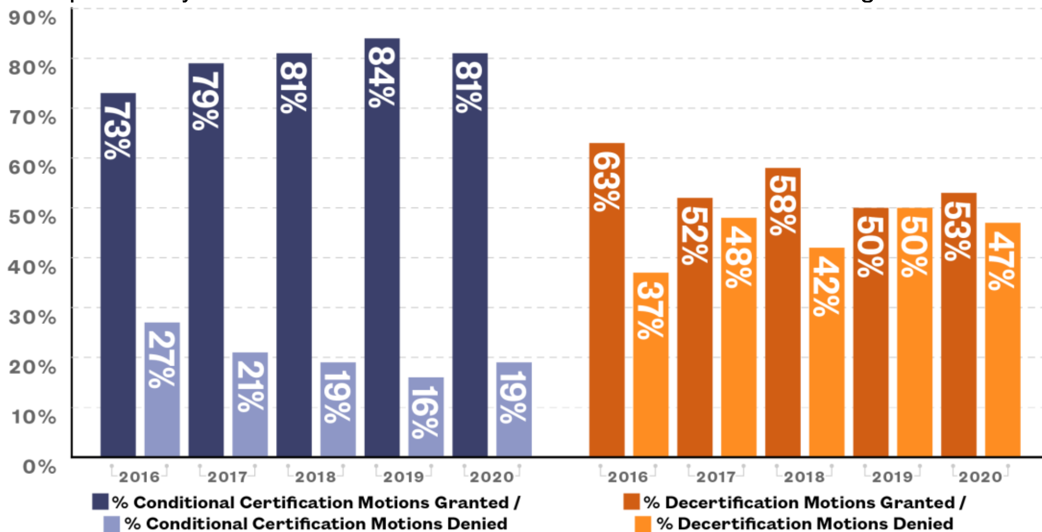
– a success rate of 81% for conditional certification of wage & hour collective and class actions.



2021 Certification Motions For Employment Discrimination, FLSA, And ERISA

The most certification activity in workplace class action litigation took place in the wage & hour space. The trend over the past five years in the wage & hour space reflects a steady success rate that ranged from a low of 73% to a high of 84% for the plaintiffs' bar. The positive results are more concentrated in plaintiff-friendly "magnet" jurisdictions where the case law favors workers and presents challenges to employers seeking to block certification.

The trend over the past five years for certification orders is illustrated in the following chart:



2017 - 2021 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 past several years. Although case law precedents and defense approaches continue to evolve and generate many good outcomes for employers, courts continue to grant conditional certification motions at high rates.

Whereas overall case filing numbers were down, the numbers of rulings issued in 2021 and the rate of success of the plaintiffs' bar in gaining conditional certification suggest that the plaintiffs' bar is exercising more selectivity and restraint when it comes to filing and seeking certification of narrower or more defined groups, thereby contributing to a higher success rate.

The key bright spots in 2021 for employers were an increase in the odds of defeating certification in ERISA class actions, where employers succeeded in defeating class certification in nearly 43% of the rulings issued during 2021, and in the odds of prevailing on decertification of FLSA collective actions, where employers succeeded in obtaining decertification in 53% of the rulings issued during 2021.

(iii) Government Administrative And Enforcement Trends

With the installation of a new administration in 2021, employers saw almost immediate shifts in administrative priorities. Over the past year, the Biden Administration rolled out changes on several fronts that took shape through executive orders, legislative efforts, and agency actions. Contrary to the pro-business approach of the Trump Administration, the Biden Administration aimed for many of these changes to expand the rights, remedies, and procedural avenues available to workers. As a result, many of these changes are likely to have a cascading impact on the workplace class action landscape in several areas, as they encourage entry into the area and render potential recoveries more lucrative.

The Biden DOL, in particular, withdrew or rescinded multiple Trump-era rules often implicated in workplace class actions, including the tip credit, joint employer, and independent contractor rules promulgated by the Trump DOL. In passing the rules, the Trump DOL sought to clarify and narrow legal standards in these areas and, as a result, to bring predictability to companies struggling to comply with arguably imprecise rules open to inconsistent interpretation and application by courts. In undoing these rules, the Biden Administration has rescinded them and, in some instances, has taken steps to replace them with broader, more demanding standards that are more likely to inspire class-wide challenges.

As to the tip credit, for instance, Section 3(m) of the FLSA permits an employer to take a tip credit toward its minimum wage obligation for tipped employees. The so-called "80/20 Rule," however, which first appeared in a DOL Field Operations Handbook in 1988, purported to require employers to pay the full minimum wage for any time spent performing non-tip-producing tasks that exceeded 20% of the workweek. Courts applied this guidance, forcing employers to separate tasks into buckets of "tip-producing" duties, "related" duties, and "unrelated" duties, with little direction as which activities fell into which bucket. This uncertainty led to waves of litigation that plagued the restaurant industry, in particular, over the past decade.

In November 2018, the Trump DOL issued an opinion letter wherein it withdrew the 80/20 Rule and, in February 2019, it amended the DOL Field Operations Handbook to replace the 20% limitation with a "reasonable time" standard, noting that "an employer of an employee who has significant non-tip related duties which are inextricably intertwined with their tipped duties should not be forced to account for the time that employee spends doing those intertwined duties." In December 2020, the Trump DOL issued the Tip Regulations Final Rule.

In early 2021, however, the Biden DOL twice delayed the effective date of the Final Rule. Then, on October 23, 2021, the Biden DOL withdrew the Trump-era rule and introduced its own rule. In addition to resurrecting the 80/20 Rule, the Biden DOL limited the tip credit to non-tip-producing work that directly supports tip-producing work and does not exceed "a continuous period" of 30 minutes. The new DOL tipped-employee rule, which went into effect on December 31, 2021, is apt to refuel workplace litigation in this area, particularly as the hospitality industry struggles with challenges posed by tracking activities and task times.

The Trump-era joint employer and independent contractor rules met a similar fate. Effective March 16, 2020, the Trump DOL issued a new rule for determining when two or more distinct employers could be deemed to jointly employ a worker. The rule set forth a four-factor balancing test that considered whether the business: (1) hires or fires the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records. 29 C.F.R. § 791.2(a)(1). The rule provided employers more clarity and arguably narrowed the circumstances under which they could be deemed joint employers for wage & hour purposes. Following the effective date, the U.S. District Court for the Southern District of New York, however, opined that portions of the rule violated the Administrative Procedure Act ("APA"). The appeal from that opinion remained pending when, on July 29, 2021, the Biden DOL announced that it would rescind the Trump DOL rule effective September 28, 2021, leaving courts to revert to their pre-Trump-Rule frameworks, which implement a variety of multi-factor tests in interpreting joint employer status.

Effective January 6, 2021, the Trump DOL adopted an Independent Contractor Rule that addressed the circumstances under which a worker qualified as an independent contractor. The Rule consisted of two main factors – the level of control the individual has over his or her own work and the opportunity for profit or loss due to his or her own personal investment – and provided that, if the analysis of the two main factors proved indeterminate regarding independent contractor status, companies should weigh three guiding factors, including the level of skill of the role involved, the permanence of the working relationship, and how the role in question relates to the company's overall business operation. Overall, the Independent Contractor Rule arguably ran counter to the trend discouraging the use of independent contractors and made it easier for companies, including gig economy businesses, to utilize such arrangements. After staying enforcement of the Rule, on May 5, 2021, the Biden DOL withdrew the Independent Contractor Rule, again leaving courts to revert to their varying pre-Trump-Rule frameworks for deciding independent contractor status.

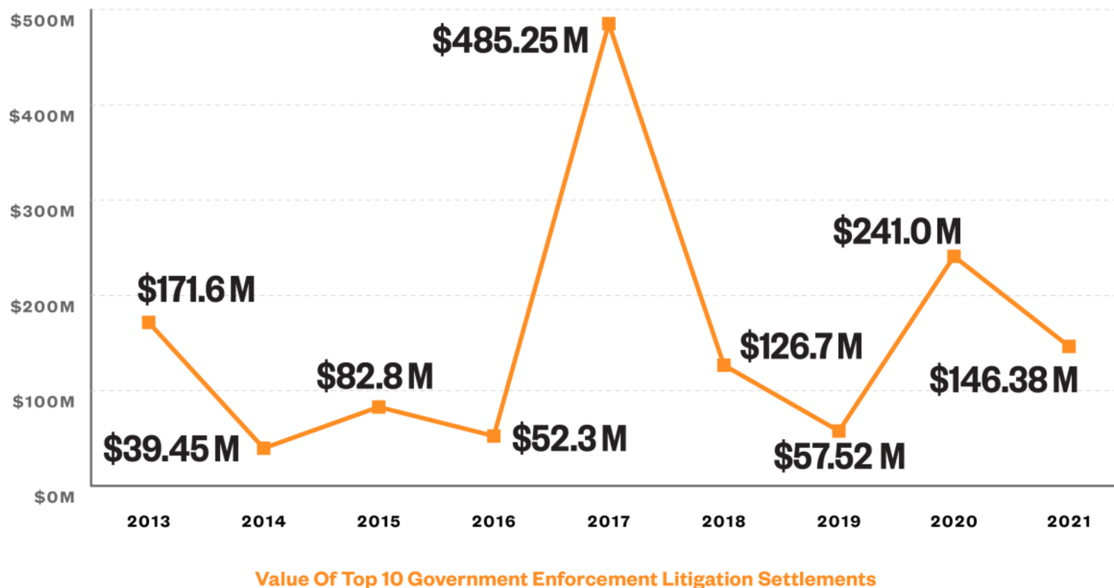
The changing tide brought by the Biden Administration reached outside the wage & hour space and into other areas likely to impact workplace class action litigation. While the DOL acted swiftly to reverse course on many fronts with the change of administrations, the EEOC continued to operate over parts of the past year with a Trump-appointed majority and, as a result, had limited latitude to pivot. President Biden quickly named two Democrats for the five-member Commission, Charlotte E. Burrows and Jocelyn Samuels, as Chair and Vice Chair, respectively. Although the Chair positions shifted with President Biden's inauguration, however, the Commission retained a Republican-appointed majority. As a result, the major policy changes that many expected to materialize with the Biden Administration may have to wait through July 1, 2022, when former chair Janel Dhillon's term expires, opening the door to a Democratic-appointed majority.

Major policy shifts on the employment discrimination front manifested in large part through other avenues. Upon taking office, President Biden issued Executive Order 13988, "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation," the fourth Executive Order he signed on January 20, 2021. The order directed all federal agencies to review all policies that implement non-discrimination protections on the basis of sex ordered by Title VII and similar laws and to extend those protections to the categories of sexual orientation and gender identity. President Biden likewise promptly entered Executive Order 13985, "Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government" – that revoked President Trump's Executive Order 13950, "Combating Race and Sex Stereotyping" that directed the head of each agency to ensure that agency employees did not teach, advocate, or promote in training a series of "divisive concepts" such as that one race or sex is inherently superior to another or that the United States is fundamentally racist or sexist – and replaced the directive with one requiring each agency to assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups.

Despite these shifting policy pronouncements from the White House, the EEOC stayed largely on track as compared to the preceding year. During 2020 employers saw significant shifts in the EEOC's enforcement agenda, including a notable shift away from litigation as a one-size-fits-all tool for combatting workplace discrimination. As the EEOC's enforcement agenda shifted, employers experienced a marked decrease in federal complaints and a marked increase in settlements as the EEOC sought to wind down its litigation docket.

The EEOC filed a similar number of lawsuits in FY 2021 as compared to FY 2020. The EEOC filed 114 total cases in FY 2021, which included 111 merits lawsuits and 3 subpoena enforcement actions. This total number of filings landed only slightly higher than the FY 2020 total of 101 lawsuits. These totals remain substantially lower than the preceding years, where employers saw 149 filings in FY 2019, 217 filings in FY 2018, 202 filings in FY 2017, and 136 filings in FY 2016. The agency's systemic filings over the past year followed a similar trajectory. For instance, after more than doubling its inventory of systemic filings between FY 2016 and FY 2018 (with 18 in FY 2016, 30 in FY 2017, and 37 in FY 2018), the EEOC's systemic filings dropped to 17 in FY 2019, 13 in FY 2020, and 13 in FY 2021.

The following graphic reflects this trend.



Value Of Top 10 Government Enforcement Litigation Settlements

In terms of the types of cases filed, when considered on a percentage basis, the types of cases filed in 2021 did not reflect any dramatic shift in strategic priorities. When considered on a percentage basis, the distribution of cases filed by statute remained roughly consistent compared to FY 2020 and FY 2019. Title VII cases once again made up the majority of cases filed, making up 62% of all filings (on par with the 60% in FY 2020 and 60% in FY 2019). ADA cases made up a significant percentage of the EEOC's filings, totaling 36% in FY 2021, a moderate uptick from 30% in FY 2020. The EEOC filed only one age discrimination case in FY 2021, down seven from FY 2020.

On November 16, 2021, the EEOC released its Agency Financial Report ("AFR") for Fiscal Year 2021. The AFR is a data compilation regarding the EEOC's financial health, initiatives, and guiding principles. The FY 2021 edition marked the third version of the publication, following the release of the inaugural AFR in FY 2019. As outlined in the AFR, while lawsuit filings increased slightly in 2021, especially toward the end of the fiscal year in September, the EEOC's overall monetary recoveries dropped by $51 million, from a record-setting $534.4 million in FY 2020 to approximately $484 million in FY 2021. The FY 2021 number more closely resembled the $486 million recovered in FY 2019, as compared to $505 million in FY 2018 and $484 million in FY 2017.

The amount that the EEOC recovered through mediations, conciliations, and settlements increased from $333.2 million in FY 2020 to approximately $350.7 million in FY 2021, nearly reaching the $354 million recovered in FY 2019. The EEOC announced that it recovered the $350.7 million in FY 2021 on behalf of 11,067 alleged victims of employment discrimination in the private sector and state and local governments. The EEOC also announced that it recovered more than $100 million on behalf of 2,169 federal employees and applicants. On the litigation front, the EEOC reported recovering $34 million for 1,920 individuals as a direct result of litigation resolutions, a sharp decline from the $106 million total in FY 2020 and $39.1 million in FY 2019.

With the pandemic lingering into FY 2021, the EEOC reported a commitment to Alternative Dispute Resolution ("ADR") programs, including virtual mediation and conciliation proceedings. According to the AFR, in FY 2021, the EEOC successfully resolved 41.1% of its conciliations (51.7% of those included claims that implicated one or more of the EEOC's Strategic Enforcement Plan priority areas). The EEOC conducted 6,644 private sector mediations, resulting in $176.6 million in benefits to charging parties. This represents a material increase from the $156.6 million recovered in mediations during FY 2020.

Despite the reported commitment to effective conciliation proceedings, and the increase in recoveries from mediations, conciliations, and settlements in FY 2021, on June 30, 2021, President Biden signed a joint resolution narrowly passed by Congress to repeal a Trump-era rule that increased the EEOC's information sharing during the conciliation process. On October 9, 2020, the Commission published a Notice of Proposed Rulemaking outlining proposed revisions designed to update its conciliation procedures, which it had not changed significantly since 1977. In its announcement, the EEOC acknowledged that, historically, it elected not to adopt detailed regulations relative to its conciliation efforts based on its belief that retaining flexibility over the conciliation process would "more effectively accomplish its goal of preventing and remediating employment discrimination."[6] Although the Commission stressed the importance of maintaining a flexible approach to conciliation, it acknowledged that, over the preceding several years, its conciliation efforts resolved less than half of the charges where it had made a reasonable cause finding. Specifically, between fiscal years 2016 and 2019, only 41.23% of the EEOC's conciliations with employers were successful.[7] (As noted above, in FY 2021, the EEOC successfully resolved 41.1% of its conciliations.)

On January 14, 2021, the EEOC published a final rule that, among other things, would have required the EEOC to provide an employer with a written summary of the known facts that formed the basis of the allegations, to identify known aggrieved individuals or known groups of aggrieved individuals for whom it sought relief unless such individuals requested anonymity, and to supply the calculations underlying any initial conciliation proposal for monetary relief. The White House criticized the procedures as "onerous and rigid," and, on July 1, 2021, President Biden signed a joint resolution passed by Congress to repeal the EEOC's final rule that would have overhauled the agency's prelitigation settlement process.

In sum, whereas employers saw an array of business-friendly rules promulgated by the Trump Administration, the Biden Administration brought changes to these rules that are likely to continue through 2022. Employers can expect continuing shifts and realignments of rulemaking and enforcement priorities that are likely to fuel and shape the contours of workplace class action litigation in the coming year.

(iv) The Continuing Impact Of COVID-19

During 2021, COVID-19 class action litigation became more pervasive in reaching across new industries and spawning new challenges on the workplace class action front.

The COVID-19 pandemic had a significant impact on all aspects of life in 2021 and a profound impact on the workplace, in particular. In 2020, 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. In 2021, as state and local governments continued to manage the COVID-19 threat, vaccines became widely available, and many employers attempted to move their employees to "return to work" or "hybrid" work arrangements.

Such developments prompted federal regulators to enact vaccine-or-test mandates and fueled employers to adopt or expand health screenings, temperature check protocols, and mandatory vaccination policies. These

[6] Update of Commission's Conciliation Procedures, 85 Fed. Reg. 64079 (proposed Oct. 9, 2020) (to be codified at 29 C.F.R. pt. 1601 and 1626).

[7] *Id.*

steps, in turn, led to waves of controversy as workplace class actions brought by states, employee advocates, unions, and employer groups erupted over regulatory actions and employer policies.

Challenges to federal actions, to date, have produced mixed results. On September 9, 2021, President Biden signed Executive Order 14042. Through its terms, the EO required entities that contract with the federal government to agree to require vaccinations for their employees. The EO proclaimed that it "promoted economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument." On November 30, 2021, in *State of Louisiana v. Becerra*, No. 3:21-CV-03970 (W.D. La. Nov. 30, 2021), however, the district court entered a preliminary injunction enjoining enforcement of the rule.

On a similar front, on November 4, 2021, the U.S. Occupational Safety and Health Administration (OSHA) announced its long-awaited Emergency Temporary Standard (ETS) that required employers with 100 or more employees, among other things, to develop, implement, and enforce policies requiring most employees to get vaccinated or to undergo weekly testing for COVID-19. The ETS became effective upon publication in the Federal Register on November 5, 2021, and set January 4, 2022, as the deadline for employees to receive their final vaccine dose or to begin testing. The ETS covered all employees of covered employers, whether full-time, part-time or temporary, except for employees (a) working alone (in a location where other individuals are not present); (b) working from home; or (c) working exclusively outdoors.

Litigants filed at least 27 lawsuits in 12 different federal circuit courts of appeals challenging such agency rule-making on the grounds that, among other things, it exceeded executive authority to regulate employment conditions. On November 12, 2021, in *BST Holdings, LLC v. OSHA*, No. 21-60845 (5th Cir. Nov. 12, 2021), the Fifth Circuit stayed the ETS and ordered OSHA to refrain from taking steps to implement or enforce the mandate until further court order, reasoning that the petitioners' challenges to the mandate were likely to succeed on the merits because, even if the mandate passed constitutional muster, it was the "rare government pronouncement" that was both under-inclusive and over-inclusive. Despite such pronouncement, on December 17, 2021, a Sixth Circuit panel designated to rule on the consolidated challenges lifted the stay, reasoning that the harm caused by keeping the emergency temporary standard frozen outweighed any damage that would stem from letting it go into effect.[8]

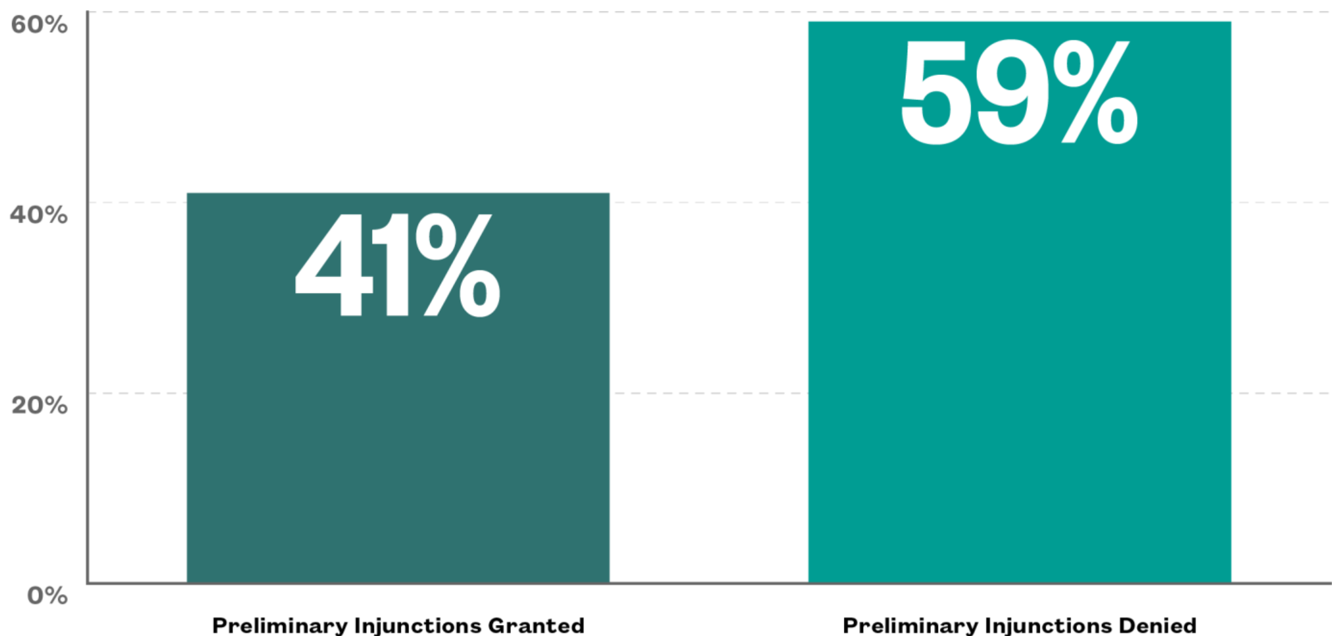
The Sixth Circuit's ruling was quickly appealed on an emergency basis to the U.S. Supreme Court. On December 22, 2021, the U.S. Supreme Court agreed to hear arguments on an expedited basis at a special session on January 7, 2022, and to consider whether it should allow the ETS and another rule, issued by the Centers for Medicare & Medicaid Services requiring vaccinations for employees at facilities that participate in the Medicare and Medicaid healthcare programs, to go into effect. Both cases challenge the authority of administrative agencies and the federal government to issue such sweeping mandates in the context of the pandemic. A ruling is anticipated in the first quarter of 2022.

Challenges to state government actions have proven less successful. For instance, healthcare workers sued to block COVID-19 vaccine mandates in both Maine and New York and sought preliminary injunctions contending that such mandates violated their constitutional rights because they did not include religious exemptions. In both cases, the reviewing courts, respectively, refused to grant injunctive relief, and the U.S. Supreme Court declined requests to intervene in both actions. In total, of the 41 motions for preliminary injunctive relief filed in 2021 to prevent enforcement of vaccination rules, only 15, or 41% were granted.

---

[8] *In Re MCP No. 165, Occupational Safety & Health Administrative Rule On COVID-19 Vaccination & Testing, 86 Fed. Reg. 61402,* No. 21-7000 (6th Cir. Dec. 17, 2021).

This trend is illustrated by the following graphic.



2021 COVID-19 Class Action Rulings On Preliminary Injunctions

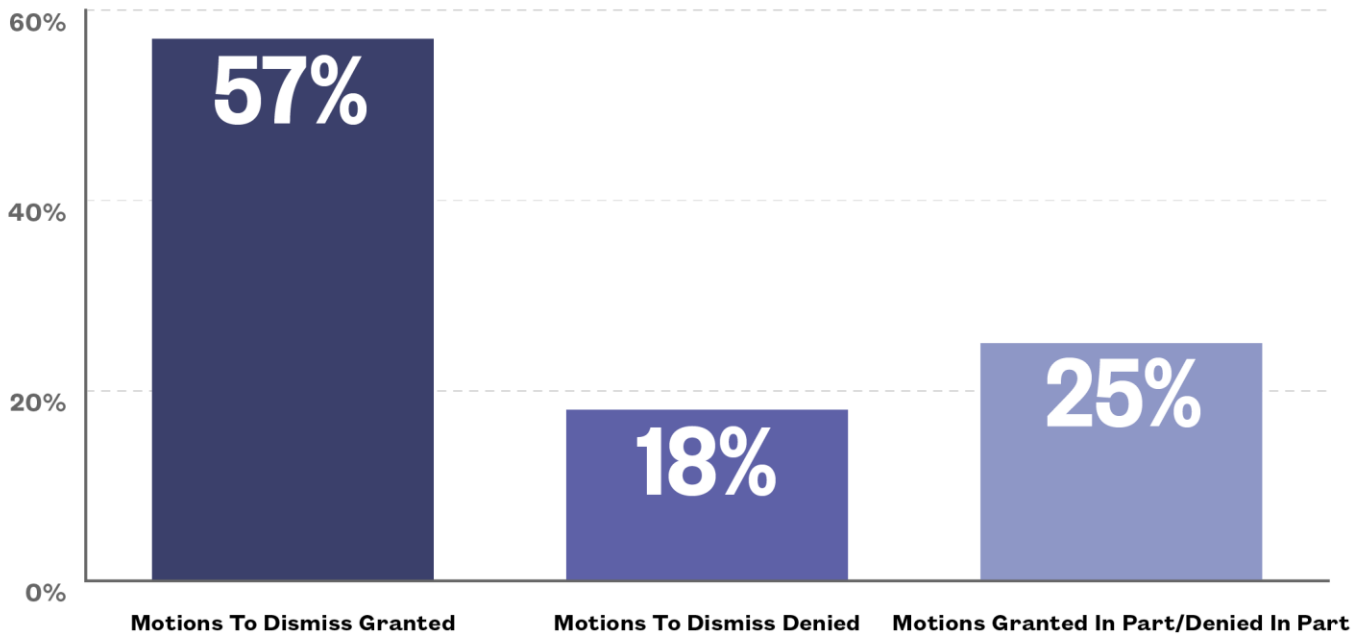
Challenges to policies adopted by private employers faced worse odds in 2021. In 2021, litigants challenged employer policies on various grounds, including on the grounds that they supposedly discriminated against employees because they failed to provide disability or religious accommodations or retaliated against workers who expressed COVID-related concerns or sought such accommodations.

In *Sambrano v. United Airlines, Inc.*, No. 21-CV-1074 (N.D. Tex. Nov. 8, 2021), for instance, a group of employees filed a putative class action alleging that United violated Title VII by refusing to engage in an interactive process, by failing to provide reasonable religious accommodations, and by retaliating against them for engaging in protected activity. After granting in part defendant's motion to dismiss in part on personal jurisdiction grounds, the court denied plaintiffs' motion for preliminary injunction on the basis that plaintiffs failed to meet their burden to show that, without such an order, they would suffer imminent, irreparable harm.

On December 13, 2021, the Fifth Circuit denied an emergency motion for an injunction pending appeal of the order in *Sambrano v. United Airline, Inc.*, No. 21-11159 (5th Cir. Dec. 13, 2021).

By contrast, in *Fraternal Order Of Police Chicago Lodge No. 7 v. City of Chicago*, No. 2021 CH 5376 (Ill. Cir. Ct. Nov. 1, 2021), a group of police officers filed an action seeking a temporary restraining order to enjoin the implementation of defendant's COVID-19 vaccination policy until the parties could arbitrate their grievances pursuant to their collective bargaining agreements. The court granted the motion in part. The court reasoned that, if all employees complied with the vaccine requirements, as of the end of the year, there would be no grievances to adjudicate and no remedy that an arbitrator could award. The court, therefore, ruled that plaintiffs demonstrated irreparable injury, stayed compliance with the vaccination requirement until the parties completed their arbitrations, and granted in part plaintiffs' motion for a preliminary injunction.

In total, courts have issued 65 opinions on motions to dismiss class action claims related to COVID-19 in 2021, and have granted 82% of those motions in whole or in part. The following graphic shows this trend:



2021 COVID-19 Class Action Rulings On Motions To Dismiss

In sum, the pandemic has continued to spike class actions (of all varieties) and litigation over all types of workplace issues. To date, however, defendants have achieved high rates of success in defeating these claims by overcoming motions for preliminary injunction and by prevailing on motions to dismiss in whole or part. Employers are apt to see these workplace class actions continue to expand and morph in 2022 as the pandemic endures.

(v) The Continuing Impact Of Arbitration

Workplace arbitration programs continued to have a profound impact on workplace class action litigation in 2021. Such programs influenced the nature of class action litigation filed and shifted the types of claims asserted as the plaintiffs' bar continued to find ways to pivot around such obstacles.

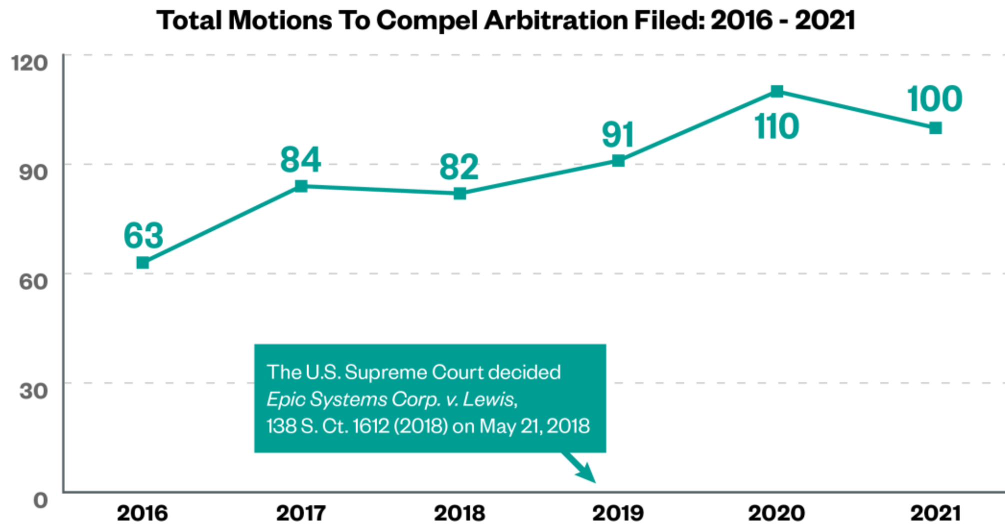
As employers clawed for cover from the increasing weight of workplace class action litigation in recent years, workplace arbitration has continued to gain traction, aided by the U.S. Supreme Court's transformative ruling in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). *Epic Systems* reaffirmed that the Federal Arbitration Act (FAA) requires courts to enforce agreements to arbitrate according to their terms, including mandatory agreements that provide for individual proceedings and include class action waivers.

Bolstered by such precedents, more than half of non-union, private-sector employers and more than two-thirds of large employers have adopted mandatory arbitration agreements. Such programs have continued to shift class action litigation dynamics in critical ways as they have led to more front-end attacks on proposed class and collective actions and, as the result of such attacks, to the defense bar dismantling more workplace class and collective actions by fracturing those proceedings and diverting them into individual arbitrations.

Workplace arbitration agreements with class action waivers were one of the most potent tools of employers to manage their risk of class action litigation in 2021. In the time period since the Supreme Court decided *Epic Systems*, businesses facing class action lawsuits have filed more motions to compel arbitration with a higher rate of success than in the years before this landmark decision.

The latest class action litigation statistics show that, over the past five years, motions to compel arbitration have become an increasingly effective defense to class action lawsuits, particularly since *Epic Systems*.[9]

The following graphic illustrates the number of motions to compel arbitration that were filed from 2016 to 2021:



Over the past year, plaintiffs' class action lawyers continued to attempt to find ways to end-run such agreements. These efforts took shape on multiple fronts. In 2021, the plaintiffs' bar continued to shift its efforts toward claims more apt to be immune from such programs or toward populations less likely to have entered into agreements with the defendants. This trend is illustrated by the spike in filings asserting violations of the California Private Attorneys' General Act ("PAGA"), which claims, according to current California precedent, are not subject to arbitration based on *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014). Such filings have quadrupled over the past decade and, in 2021, continued their upward trajectory. The following graphic illustrates this trend.

In a major turn of events for employers, on December 15, 2021, the U.S. Supreme Court granted a petition for *certiorari* filed in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573 (Dec. 15, 2021), to review whether courts can exclude claims brought under the PAGA from federal arbitration requirements, paving the way for a potentially transformative ruling. The Supreme Court's ruling could dictate the future of the PAGA as a workaround to workplace arbitration, especially as states outside California have considered similar legislation.

On a different front, advocates for workers and labor expanded their efforts to shift this landscape by backing new legislation that would amend federal law to ban mandatory arbitration agreements, depending on the bill, for employment, consumer, antitrust, civil rights, or sexual harassment disputes.

Arbitration agreements have come under increasing scrutiny in recent years, especially with regard to claims for sexual harassment and assault arising during employment. A number of states have attempted to limit employers' ability to require arbitration of such claims, including states such as California, Maryland, New Jersey, New York, Vermont, and Washington, which have passed statutes in recent years limiting employers' ability to require arbitration. Most of these efforts, however, have conflicted with the FAA. As a result, worker advocates have targeted their efforts toward amending the FAA or passing laws that limit or prohibit arbitration of workplace disputes.

---

[9] Rulings on motions to compel arbitration in wage & hour class and collective actions are analyzed in Chapter V, Section B. Rulings on motions to compel arbitration from state courts in other areas of workplace class actions and non-workplace class actions are analyzed in Chapter VII, Section D and from federal courts in Chapter IX.

Multiple proposals have made their way to Congress. In 2021, Senators Kirsten Gillibrand (D-NY) and Lindsey Graham (R-SC) co-sponsored the "Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act of 2021" (S. 2342). The bill has 17 other sponsors, including 10 Democrats and 7 Republicans, and a companion bill introduced in the House (H.R. 4445) has 14 Democratic and 5 Republican sponsors. The Act would amend the FAA to prohibit predispute arbitration agreements, including agreements with class or collective action waivers, for claims involving sexual assault or sexual harassment.

The Resolving Sexual Assault and Harassment Disputes Act of 2021 (S. 3143) was introduced by Senator Joni Ernst (R-IA). The bill would amend the FAA to prohibit arbitration of sexual assault claims and allow for arbitration of sexual harassment claims under limited circumstances. Finally, the Build Back Better Act (H.R. 5376) contains, among many other provisions, language that would overrule the Supreme Court's decision in *Epic Systems* by banning collective action waivers in arbitration agreements. This bill passed the House but currently faces unanimous Republican opposition in the Senate. Thus, its prospects are uncertain.

In light of current administrative priorities, the future remains anything but clear as to whether arbitration programs will remain viable tools to counter proposed workplace class actions in the face of continued attacks on *Epic Systems*. These federal developments suggest that some version of an arbitration bill, particularly if tailored to sexual assault and harassment claims, has a good chance of becoming law.

Lessons From 2021

There are multiple lessons to be drawn from these trends in 2021.

First, while the *Wal-Mart* ruling undoubtedly heightened commonality standards under Rule 23(a)(2) starting in 2011, the plaintiffs' bar has crafted theories and "work-arounds" to maintain or increase their chances of successfully securing certification orders in ERISA, wage & hour, and employment discrimination lawsuits. In 2021, their certification conversion rate for ERISA and employment discrimination cases was 57% and 72%, respectively, while wage & hour cases showed an 81% conversion rate.

Second, the defense-minded decision in *Wal-Mart* has 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* has not impacted the ability of the plaintiffs' bar to secure first-stage conditional certification orders under 29 U.S.C. § 216(b). If anything, certification prospects have become greater for plaintiffs in the wage & hour space insofar as conditional certification motions are concerned. The conversion rate of certification motions hit 81% in 2021, close to its all-time high of 84% in 2020.

Third, certification is the "holy grail" in class action litigation, and certification of any type of class – even a narrowed or non-monetary injunctive relief class – 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 the employment litigation context. This reality has driven the plaintiffs' bar toward narrowed groups and targeted certification theories (*e.g.*, issue certification, certification of a regional class, or certification of a class of non-signatories to arbitration agreements) as plaintiffs seek to leverage the threat of certification to monetize their claims.

Fourth, employers currently have an effective weapon to short-circuit the decision points for class action exposure through use of mandatory workplace arbitration agreements. Based on the ruling in *Epic Systems*, a class waiver in an arbitration agreement remains an effective first-line defense to class-based litigation. Throughout 2021, employers used arbitration defenses to fracture class actions and convert them into individual, bi-lateral arbitration proceedings. Unless halted through legislation, this defense is apt to spread, as more companies adopt mandatory workplace arbitration programs, putative class members who worked prior to their implementation dwindle, and lawsuits filed before their adoption work their way out of the judicial pipeline.

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* era, but

also thriving. The battle ground is likely to shift in the coming years, as employers create a bulwark against such class-based claims based on *Epic Systems,* and plaintiffs continue to look for and pursue work-arounds on the judicial as well as the legislative front.

D. Complex Employment-Related Litigation Trends In 2021

While class action filings in some areas witnessed an increase in 2021, employment-related class action filings decreased in 2021 as compared to case filing numbers of previous years.

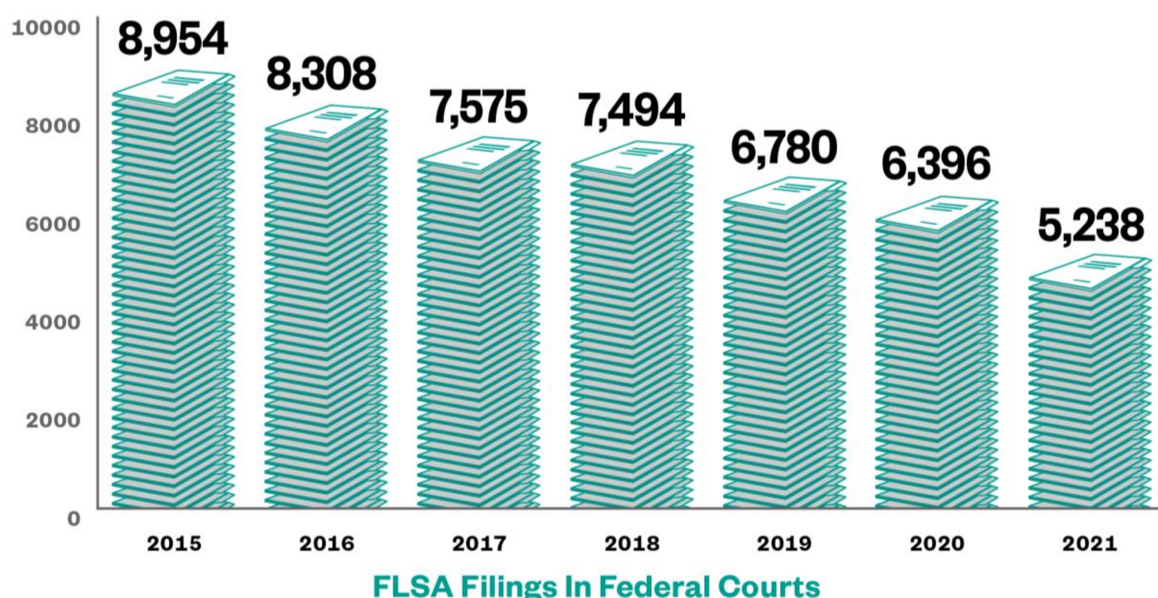
By the numbers, filings for employment discrimination, FLSA, and ERISA claims were lower over 2021 as compared to the past five years. Filing patterns in 2021 reflected only the third time in a decade when the number of lawsuit filings decreased across the board in all three categories. The lower numbers likely reflected the impact of the COVID-19 pandemic, as well as the growing prevalence of workplace arbitration agreements by employers, which led the plaintiffs' bar to assert their claims in arbitration as opposed to file lawsuits.

By the close of the year, ERISA lawsuits totaled 4,471 filings (as compared to 5,042 filings in 2020, 5,732 filings in 2019, 6,334 in 2018, 6,695 in 2017, 6,530 in 2016, and 6,925 in 2015), FLSA lawsuits totaled 5,238 filings (as compared to 6,396 filings in 2020, 6,780 filings in 2019, 7,494 in 2018, 7,514 in 2017, 8,308 in 2016, and 8,954 in 2015), and employment discrimination lawsuits totaled 10,350 filings (as compared to 10,801 filings in 2020, 12,255 filings in 2019, 12,488 in 2018, 11,981 in 2017, 11,593 in 2016, and 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. Racial discrimination issues dominated the news cycles throughout 2021, as the Black Lives Matter movement squarely placed race relations in the national spotlight, and companies moved quickly to roll out politically-tied messaging, to promote diversity and inclusion programs, and to avoid the ire of social media. Inevitably, litigation filings are apt to increase as a result of this focus.

By the numbers, FLSA collective action litigation filings in 2021 far outpaced other types of employment-related class action filings because virtually all FLSA lawsuits are filed on a collective basis. From 2000 through 2015, lawsuit filings reflected year-after-year increases in the volume of wage & hour litigation pursued in federal courts. Statistically, wage & hour filings have increased by over 450% in the last 15 years. In 2021, FLSA filings decreased for only the sixth time in two decades.

This trend is illustrated by the following chart:



The sixth year-over-year decrease in FLSA lawsuit filings in 20 years is noteworthy in and of itself, but it likely reflects the impact of the COVID-19 pandemic, as well as the growing prevalence of workplace arbitration programs in the wake of *Epic Systems.* Such programs are leading the plaintiffs' bar to forego filing various lawsuits in court in favor of proceeding directly to arbitration.

However, a peek behind these numbers confirms that with 5,238 lawsuit filings, 2021 was the tenth highest year ever in the filing of such cases (only eclipsed by levels from 2012 through 2020). When viewed on a continuum, as the numbers of certification rulings confirms, the current volume of wage & hour cases within the "pipeline" in the federal courts is as large and vast as ever.

Employers may well see an increase in the number of FLSA filings in 2022. Various factors are contributing to the fueling of these lawsuits, including: (i) minimum wage hikes that took effect in 2020 and 2021, which increase the value of claims for unpaid wages; (ii) the intense focus on independent contractor classification and joint employer status, especially in the gig economy and franchisor-franchisee contexts; and (iii) a change in priorities at the DOL that has generated pro-employee shifts in rulemaking that expand eligibility for minimum wage and overtime compensation and, in turn, likely will fuel filings by the private plaintiffs' bar.

Layered on top of those issues is a host of uncertainties that arise from attempting to apply 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 resulted in ambiguities, omitted terms, and unanswered questions (*e.g.*, the statute does not define "work"). These uncertainties abound under the FLSA, and the plaintiffs' bar is capitalizing on the lack of clarity. 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.

The nature of the certification mechanism under the FLSA contributes to the statute's popularity among members of the plaintiff's bar. Although conditional certification merely gives rise to a notice and opportunity to join or opt-in, the investment of time and expense required to achieve that end can be relatively minimal. Often plaintiffs file a motion for conditional certification at the outset of a matter with little to no evidence aside from a few declarations from current or former employees. By contrast, although certification of a Rule 23 class leads to broader participation, the front-end investment required to meet the requisite criteria is much higher.

The plaintiffs' bar has a diminished appetite to invest in long-term cases that are fought for years and that bring a higher rate of risk relative to the chances of a plaintiff's victory. Hence, the numbers reflect 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 2021 wage & hour issues continued to make 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-cat actions. 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 represent 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. These states have longer statutes of limitation for state law claims, exceedingly generous damages remedies for workers, and more plaintiff-friendly approaches to class certification, which in combination serve to make each state a "plaintiff-friendly" venue for workplace class actions. In particular, California continued its status in 2021 as a breeding ground for wage & hour class action litigation under the California Labor Code. For the eighth year out of the last ten, 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.[10] The ATRA described the Golden State as the "No. 1 Judicial Hellhole thanks to its relentless pursuit of liability-expanding principles."[11]

E. Likely Trends For The Future Of Workplace Class Actions In 2022

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 reorder their compliance strategies to stay ahead of and mitigate these risks and exposures.

So, what can corporate counsel expect in 2022?

The COVID-19 pandemic is likely to continue to define the workplace in 2022, as businesses start the year under the shadow of a healthcare crisis that has changed the nature, location, and manner of work for many individuals. The pandemic likely will continue to inspire class actions of myriad varieties and litigation over various types of workplace issues. As employers continue to reopen their businesses, employers are apt to see workplace class action theories expand and morph in the wake of COVID-19.

The ruling of the Supreme Court in *Epic Systems* in 2018 is also apt to continue to cast a long shadow in 2022. In authorizing class action waivers in mandatory workplace arbitration agreements, the ruling provides employers with a powerful litigation tool to ameliorate the risks of costly class and collective action litigation. Given the power of such defense, the debate for 2022 is likely to become the scope of legislative action aimed at reversing this precedent.

The growing legislative trend to protect individual privacy and personal data in the employment context is likely to generate more class action litigation in 2022. States like Illinois have continued to see an onslaught of class actions against employers for breaches of privacy rights, as well as mishandling of personal information and biometric data. State laws regarding data breaches and individual privacy are apt to fuel the growth of these types of class actions in 2022.

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

ERISA Litigation –

As in 2020, the pandemic did little to slow the tide of ERISA class action filings challenging defined contribution plan (401(k) and 403(b) plan) fees and investments in 2021. While the number of filings dipped slightly from 2020, the filed lawsuits continue to target plans of all sizes. Plaintiffs continue to refine their legal theories and pleading strategies to keep cases alive past motions to dismiss. Repeated waves of 401(k) fee litigation have brought more than just litigation headaches for employers; the significant exposure presented by these cases has caused many fiduciary liability insurers to make significant policy changes that make coverage more expensive and more difficult to obtain.

Employers should anticipate a watershed moment in 2022 for defined contribution fee and investment litigation. The Supreme Court is expected to issue its decision in *Hughes v. Northwestern University*, 141 S. Ct. 2882 (2021), in which it likely will clarify the pleading burdens that plaintiffs face in maintaining these cases. A defense

---

[10] The ATRA Foundation's 2021 Report, *available at* https://www.judicialhellholes.org/wp-content/uploads/2021/12/ATRA_JH21_layout_FINAL.pdf

[11] *Id.* at 1. According to the ATRA report, the "eight worst" jurisdictions for employers to be sued in 2021 were, in order: (1) California; (2) New York; (3) Georgia; (4) Pennsylvania; (5) Illinois; (6) Louisiana; (7) Missouri; and (8) South Carolina. *Id.* at 1-2.

win would make it even harder for plaintiffs to plead viable fee and investment litigation claims, while a plaintiff win might open the courthouse door even wider.

In contrast to four Supreme Court rulings in 2020 in this space, 2021 saw none. Lower federal courts, however, have continued to grapple with the Supreme Court's recent rulings, most notably in the area of standing. In *Thole v. US Bank, N.A.*, 140 S. Ct. 1615 (2020), the Supreme Court largely eviscerated the ability of a plaintiff to challenge defined benefit plan investments. Following the ruling in *Thole*, lower federal courts have evaluated whether the decision has any application in the context of defined contribution plans and have applied the decision in challenges to medical plan administration where the participants face no risk of out-of-pocket expense.

Finally, arbitration was a continued subject of ERISA litigation, with the Seventh Circuit issuing a significant decision in *Smith v. Board of Directors of Triad Manufacturing, Inc.*, No. 20-2708, 2021 WL 4129456 (7th Cir. Sept. 10, 2021). In *Smith*, the Seventh Circuit refused to enforce a plan's arbitration provision that would have deprived the plaintiff of the ability to pursue plan-wide relief. If adopted by other circuits, the ruling has the potential to foreclose employers' attempts to avoid arbitration of plan-wide claims.

What can we expect in 2022 in the ERISA litigation arena?

First, as noted, the Supreme Court may clarify pleading standards for ERISA class actions, with the potential to shut down a significant number of cases or to further embolden plaintiffs. Either way, 2022 will be sure to bring more attention to the reasonableness of 401(k) and 403(b) plan fees and expenses, plan investments, and financial disclosures.

Second, employers can expect to see continued litigation about the effectiveness of arbitration agreements in ERISA plans and the ability of employers to effectively preclude not just class actions, but actions seeking other forms of plan-wide relief. Depending on whether the Seventh Circuit's view prevails, employers will have to evaluate whether the potential class-stopping benefits of arbitration are worth the risks associated with arbitral decisions affording class-wide remedies.

Third, companies can expect to see more litigation about the scope of ERISA preemption. The Supreme Court is considering a petition for review of *Howard Jarvis Taxpayers Association v. California Secure Choice Retirement Savings Program*, 2021 WL 1805758 (9th Cir. May 6, 2021), in which the plaintiffs made an ERISA preemption challenge to California's mandate that employers facilitate payroll deduction contribution to a retirement savings program for employees not covered by an employer's retirement plan. Similar litigation has been filed in Oregon challenging the states' creation of a mandatory long-term care program funded by payroll deductions. These cases are likely to decide the extent to which states (and local governments) can skirt ERISA preemption in creating mandatory benefit regimes.

Finally, employers may see some summary judgment or trial rulings regarding the ability of participants to challenge the mortality assumptions embedded into retirement plans. A number of cases have been filed on this question, but to date no court has reached the merits in those lawsuits. Depending on the outcome of this first wave of cases, corporate America may see significant future litigation in this area.

Employment Discrimination Class Action Litigation –

In terms of private plaintiff employment discrimination class action litigation, employers can expect this area to remain an area of focus by the private plaintiffs' bar in 2022. Publicity from the Black Lives Matter movement likely will continue to drive litigation, as well as settlements on this front as companies strive to avoid publicity associated with allegations of discrimination and to avoid incurring the ire of social media.

On the employment discrimination class action front, corporate counsel can expect to see the following:

- 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 v. Dukes* era. Their focus is likely to be on smaller class cases (*e.g.*, confined to a single corporate facility or operations in one state) with "small and tight" certification requests 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.

- In terms of certification theories, the plaintiffs' bar is apt to pursue hybrid or parallel class certification theories where they seek injunctive relief under Rule 23(b)(2) and monetary relief under Rule 23(b)(3), as well as a range of partial "issue 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 under Rule 23(c)(4), while deferring damages issues and determinations, and pressuring employers to settle due to the transaction costs of individualized mini-trials on damages.

- If legislative efforts to amend or eliminate the impact of workplace arbitration agreements succeed in 2022 with respect to harassment claims, employers could see a renewed focus by the plaintiffs' bar on employment discrimination class actions. While the barriers to certifying such cases generally may be higher in the employment discrimination arena than, for instance, the wage & hour space, and such cases often require more front-end investment by the plaintiffs' bar to create favorable conditions for settlement, we expect that the elimination of workplace arbitration would remove a significant barrier and, thus, generate a renewed interest in this area.

Government Enforcement Litigation –

The Biden Administration has announced several priorities that are likely to manifest in significant employee-friendly policy shifts in 2022. Although the EEOC will continue to operate under a Republican majority of Commissioners into 2022, employers should expect the EEOC to pivot as soon as it is in a position to do so prompting activity on various fronts.

First, according to President Biden's campaign website, he wants to increase the Commission's budget and "empower the EEOC to initiate investigations for all areas of discrimination under its purview." Employers should expect the EEOC to expand in terms of its aggressiveness and the number of investigations and lawsuits that it pursues, particularly regarding LGBT, pregnancy, and disability rights.

Second, in line with the Executive Orders that President Biden signed upon taking office, employers should expect the agency to focus on lesbian, gay, bisexual, and transgender (LGBT) rights, particularly in light of the U.S. Supreme Court's ruling in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that Title VII protects workers from discrimination based on sexual orientation and gender identity. In light of the *Bostock* decision, the EEOC may continue to vigorously pursue claims related to the discrimination or harassment of individuals on the basis of sexual orientation or gender identity.

Third, the EEOC may finally turn greater attention to pay equity issues, along with renewing efforts to revive pay-data collection and reporting requirements through the EEO-1 survey. Due to protracted litigation in the U.S. District Court for the District of Columbia regarding EEO-1 pay data collection, the EEOC was forced in 2019 to collect extensive pay data for a two-year period under an Obama-era rule that it has since repudiated. This pre-Trump Administration data collection initiative required employers with at least 100 employees to report W-2 wage information and total hours worked for their workforce broken down by race, ethnicity, and sex within twelve EEOC created pay bands. Ultimately, the district court held that the EEOC had to take all requisite steps to complete the data collection for 2017 and 2018 by no later than January 31, 2020. Once this collection was

complete, the efforts on this front stalled at the Commission. The EEOC may dust off this effort for 2022 and examine the most efficient means to begin the collection of this data.

Fourth, the EEOC may continue its focus on national origin discrimination. Such discrimination has become an increasing target of EEOC enforcement activity, and the EEOC has expressed in a number of places that it is concerned about the impact that global phenomena can have on worker relations in the United States. The COVID-19 pandemic could lead to increased concerns about national origin discrimination against Asian-Americans, as cautioned by former Chair Dhillon in a statement issued early in the COVID-19 pandemic. The EEOC's announced interest in monitoring this issue may precede a rise in enforcement and litigation on this basis.

Wage & Hour Class Action Litigation –

As with all other areas of employment litigation, COVID-19 affected parties embroiled in litigation under the FLSA and its state law analogues and likely will continue to influence wage & hour litigation trends in 2022.

Following what many experienced as a brief hiatus in 2020 in class and collective action litigation as courts closed and judges adapted to remote proceedings, most began to see proceedings ramp back up in 2021. Courts that had slowed hearings and rulings on pending motions picked up their pace. Parties that had held off on settlement discussions and mediations came together, many finding that virtual mediations could be effective. Anecdotal evidence suggests that plaintiffs' lawyers were fast to seek deals after the pandemic-fueled settlement drought of the year prior.

Those same lawyers recommenced their prolific filing of cases across the country. A handful of well-heeled plaintiffs' firms filed hundreds of suits against employers in the oil, gas, and energy sectors of the U.S. economy, after the Fifth Circuit ruled in *Hewitt v. Helix Energy Solutions, Inc.*, 983 F.3d 789 (5th Cir. 2020), that highly compensated employees paid on a day-rate basis do not satisfy the FLSA's minimum wage and overtime exemptions (a petition for Supreme Court review, however, is likely).

Other plaintiffs' firms began filing lawsuits under state and federal pay laws seeking recovery for wages underpaid or unpaid because of pandemic-related practices. For example, a handful of lawsuits claimed that employees working remotely because of the pandemic were forced in one way or another to work off-the-clock. Others claimed that bonuses and other incentive payments made to employees because of the risks associated with working during the pandemic were improperly excluded from regular rate and overtime premium calculations.

These and similar lawsuits are consistent, too, with what appeared to be a loosely formed trend of experienced wage & hour lawyers focusing on uniform pay, timekeeping, meal periods, rest breaks, and similar practices where damages for an individual plaintiff might be low, but a collective-wide or class-based recovery might justify substantial attorneys' fees. We expect these trends to continue in 2022, with a focus on companies who do not pay employees for time spent on COVID testing or reimburse them for the actual costs of testing.

The plaintiffs' bar also strived in 2021 to prove again that they are willing to litigate (or arbitrate) their cases when class or collective action certification is either limited or not available. Plaintiffs compelled to arbitration, for example, before or as a consequence of motions seeking conditional certification, filed thousands of arbitration claims against national employers, prompting commentators and advocates to coin the term "mass arbitration."

Employers fractured collective actions by arguing that the decision in *Bristol Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), wherein the U.S. Supreme Court declined to find specific personal jurisdiction over a defendant for purposes of adjudicating mass-action claims that arose outside of the forum, foreclosed the inclusion of out-of-forum party plaintiffs. This resulted in firms seeking to transfer potential collective actions to a defendant's home jurisdiction or filing rafts of "me-too lawsuits" in other forums on behalf of the excluded plaintiffs.

Following the Fifth Circuit's landmark decision this past year in *Swales v. KLLM Transport Services, LLC*, 985 F.3d 430 (5th Cir. 2021) – holding that courts in the Fifth Circuit must consider all probative evidence, even merits evidence, at the early stage of collective action litigation before authorizing the distribution of notice to potential members advising them of their rights to opt-in – plaintiffs' lawyers who wished to avoid that heightened evidentiary standard chose to file their own actions in jurisdictions outside the Fifth Circuit. At the same time Swales failed to gain traction outside of the Fifth Circuit.

Regulatory activity in 2021 also promises to spur litigation in 2022. The DOL withdrew Trump-era regulations defining independent contractors and the circumstances under which companies may be considered joint employers and, effective December 28, 2021, reinstituted the so-called 80/20 rule on non-tipped work in determining whether employees qualify for payment of the tip credit wage.

All of this harkens an active and sophisticated plaintiffs' bar that is prepared to continue pursuing wage & hour claims nationally, whether on an individual, class, or collective action, or in arbitration, on a large scale. We expect these trends from 2021 to continue in 2022 and for wage & hour litigation to be as massive as ever.

F. Conclusion

In the ever-changing economy and patchwork quilt of laws and regulations, corporations face new, unique, and challenging litigation risks and legal compliance problems.

Adding to this challenge, the one constant in workplace class action litigation is change. Continuing a trend from 2020, 2021 was a year of great change, inside and outside of the workplace. As these issues play out in 2022, additional chapters in the class action playbook will be written.

The private plaintiffs' bar are apt to be equally, if not more, aggressive in 2022 in bringing class action and collective action litigation against employers. They are likely to be aided by new worker-friendly rulemaking emanating from agencies within the executive branch.

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 2022.

II. Significant Class Action Settlements In 2021

On the heels of two "down years" in 2019 and 2018 for class action settlement recoveries, 2020 marked a return to prominence for these "bet the company" cases, which was a remarkable feat given the impact of the COVID-19 pandemic on society and the legal system.

Despite the lingering pandemic, this momentum continued into 2021. The level of money over the past year – measured by the "top ten" settlements in the various categories of workplace class action litigation – constituted a record-setting "blockbuster" year for recoveries. The plaintiffs' bar and government enforcement attorneys obtained many significant settlements in a wide range of areas, and the overall "top ten" settlement values in 2021 in workplace class actions increased from those in 2020 in every area except for employment discrimination and government-initiated enforcement actions. For the first time ever, class action settlement recoveries in all categories exceeded the $3.6 billion threshold.

This Chapter analyzes the "top ten" private plaintiff-initiated monetary settlements, government-initiated monetary settlements, and noteworthy injunctive relief provisions in class action litigation in 2021.

A. Top Ten Private Plaintiff-Initiated Monetary Settlements

Plaintiffs' lawyers and governmental enforcement attorneys secured many large settlements this past year for employment discrimination, wage & hour, and ERISA class actions, as well as governmental enforcement lawsuits. In 2021, class action recoveries outpaced settlements in every other previous year. Based on all categories, the top 10 aggregate settlement numbers in 2021 totaled a jaw-dropping record of $3.62 billion, over $2 billion greater than the total amount of $1.56 billion in 2020 and nearly triple the total of $1.34 billion in 2019.

To place this development in context, the top 10 settlements from these categories totaled $1.95 billion in 2021. This represented a major uptick as compared to 2020, when the top 10 settlements from these categories totaled $1.338 billion, and from 2019, when the top 10 settlements from these categories totaled $1.036 billion.

As the plaintiffs' bar has aggressively pursued various statutory workplace class actions over the past several years, the Workplace Class Action Report recently expanded Chapter 2 to include this category, which encompasses workplace personal injuries, the Fair Credit Reporting Act, biometric privacy class actions, and other various workplace-related statutory laws. The top 10 settlements in this category, which totaled $1.67 billion, exponentially increased from 2020, when it totaled $222.05 million.

Settlements In Private Plaintiff Employment Discrimination Class Action Lawsuits

For employment discrimination class actions, the monetary value of the top 10 private plaintiff settlements entered into or paid in 2021 totaled $323.45 million. This represented a decrease from 2020, when the total was $422.68 million, but remains a significant increase from the 2019 total of $139.2 million.

1. $100 million – Riot Games, Inc.
2. $90 million – Wexner
3. $44 million – Federal Aviation Administration
4. $34 million – Edward D. Jones & Co.
5. $14 million – Wal-Mart, Inc.
6. $12 million – PricewaterhouseCoopers LLP
7. $10 million – KPMG LLP
8. $8 million – Prince George's County

9. $7.75 million – Western Digital Corp.

10. $3.7 million – Syracuse University

The top 10 settlements were spread out across the country, with California leading the way with two settlements in federal court and one in state court, and Massachusetts with two in federal court. Five of the top 10 settlements involved gender discrimination allegations, including three that involved allegations of pay disparity.

1. **$100 million – *McCracken, et al. v. Riot Games, Inc.*, Case No. 18STCV03957 (Cal. Super. Ct. Dec. 27, 2021)** (settlement agreement reached in class action involving allegations of gender discrimination and sexual harassment).

2. **$90 million – *Rudi, et al. v. Wexner*, Case No. 20-CV-3068 (S.D. Ohio Aug. 25, 2021)** (preliminary approval granted for a class action settlement of shareholder lawsuits alleging a toxic culture of sexual harassment and misogyny).

3. **$44 million – *Breen, et al. v. Buttigieg*, Case No. 05-CV-654 (D.D.C. Aug. 13, 2021)** (settlement agreement reached in class action involving allegations that the Federal Aviation Administration discriminated against nearly 700 older flight service specialists).

4. **$34 million – *Bland, et al. v. Edward D. Jones & Co.*, Case No. 18-CV-3673 (N.D. Ill. July 12, 2021)** (final approval granted for class action settlement involving allegations of race discrimination brought by Black financial advisers).

5. **$14 million – *Tsui, et al. v. Wal-Mart, Inc.*, Case No. 20-CV-12309 (D. Mass. Oct. 15, 2021)** (final approval granted for a class action settlement involving allegations relative to military-related leaves of absence).

6. **$12 million – *Rabin, et al. v. PricewaterhouseCoopers LLP*, Case No. 16-CV-2276 (N.D. Cal. Feb. 3, 2021)** (final approval granted for settlement of a class action involving allegations that older job applicants were denied employment on the basis of their age).

7. **$10 million – *Kassman, et al. v. KPMG LLP*, Case No. 11-CV-3743 (S.D.N.Y. April 12, 2021)** (final approval granted for an Equal Pay Act class and collective action brought by female employees against their employer).

8. **$8 million – *Hispanic National Law Enforcement Association NCR, et al. v. Prince George's County*, Case No. 18-CV-3821 (D. Md. July 20, 2021)** (settlement agreement reached in class action involving allegations that a police department's promotional system discriminated against Black and Hispanic officers).

9. **$7.75 million – *Chen, et al. v. Western Digital Corp.*, Case No. 19-CV-909 (C.D. Cal. Jan. 5, 2021)** (final settlement approval granted for settlement of an Equal Pay Act class and collective action brought by females against their employer).

10. **$3.7 million – *Chew, et al. v. Syracuse University*, Case No. 525007/2021 (N.Y. Oct. 1, 2021)** (settlement agreement reached for a class action alleging gender pay disparities between female and male professors at a university).

Settlements In Private Plaintiff Wage & Hour Class Actions

For wage & hour class actions, the monetary value of the top 10 private plaintiff settlements entered into or paid in 2021 totaled $641.3 million. This amount represents a near doubling in the amount from the 2020 total of $294.6 million, as well as the 2019 total of $449.05 million.

1. $160 million – United States
2. $140 million – ABM Industries
3. $100 million – DoorDash
4. $95 million – Wells Fargo Bank, N.A.
5. $31.5 million – The TJX Co., Inc.
6. $30 million – XPO Logistics Cartage, LLP
7. $30 million – Apple Inc.
8. $22 million – JCK Legacy CO.
9. $17 million – Humana, Inc.
10. $15.8 million – Matco Tools Corp.

The top 10 settlements primarily involved nationwide claims, while only one involved state-specific claims. California led the way with five lawsuits on the list, including three in federal court and two in state court, while the Federal Court of Claims had two resolutions on the top 10 list.

1. **$160 million – *Mercier, et al. v. United States*, Case No. 12-CV-920 (Fed. Cl. Nov. 3, 2021)** (final approval granted for a class action settlement of wage & hour claims alleging that nurses were denied overtime pay).

2. **$140 million – *ABM Industries Overtime Cases*, Case No. CJC-07-004502 (Cal. Super. Ct. July 9, 2021)** (preliminary approval sought for a class action settlement of wage & hour claims alleging the company failed to keep accurate time records, which led to underpayment of wages).

3. **$100 million – *Marko, et al. v. DoorDash*, Case No. BC659841 (Cal. Super. Ct. Dec. 22, 2021)** (preliminary approval granted for class action of wage & hour claims alleging drivers were misclassified as contractors instead of employees).

4. **$95 million – *Kang, et al. v. Wells Fargo Bank, N.A.*, Case No. 17-CV-6220 (N.D. Cal. Dec. 8, 2021)** (final approval granted for a class action settlement of wage & hour claims alleging the company did not properly compensate hourly wages, vacation time, and earned sales commissions).

5. **$31.5 million – *Roberts, et al. v. The TJX Co., Inc.*, Case No. 13-CV-13142 (D. Mass. Jan. 5, 2021)** (final approval granted for a class action settlement of wage & hour claims involving allegations of misclassifying assistant managers, which resulted in overtime pay violations).

6. **$30 million – *Alvarez, et al. v. XPO Logistics Cartage, LLC*, Case No. 18-CV-3736 (N.D. Cal. Oct. 8, 2021)** (preliminary approval granted for two class action settlements of wage & hour claims alleging drivers were misclassified as independent contractors instead of employees).

7. **$30 million – *Frelkein, et al. v. Apple Inc.*, Case No. 13-CV-3451 (N.D. Cal. Dec. 17, 2021)** (preliminary approval granted for a class action settlement of wage & hour claims alleging employees were not compensated for time spent waiting during bag checks after shifts).

8. **$22 million – *In Re JCK Legacy Co.*, Bankr. Case No. 20-BK-10418 (S.D.N.Y. April 7, 2021)** (preliminary approval granted for a class action settlement of wage & hour claims alleging newspaper couriers were misclassified as independent contractors instead of employees).

9. **$17 million – *Kinkead, et al. v. Humana, Inc.*, Case No. 15-CV-1637 (D. Conn. March 26, 2021)** (final approval granted for a class action settlement of wage & hour claims alleging home healthcare workers were not properly compensated for overtime hours worked).

10. **$15.8 million – *Fleming, et al. v. Matco Tools Corp.*, Case No. 19-CV-463 (N.D. Cal. Dec. 13, 2021)** (settlement approval sought for wage & hour class actions over misclassification of independent contractors).

Settlements In Private Plaintiff ERISA Class Actions

For ERISA class actions, the monetary value of the top 10 private plaintiff settlements entered into or paid in 2021 totaled $837.3 million. This amounts to over double the 2020 total of $380.10 million and the 2019 total of $376.35 million.

1. $300 million – Walgreen Co.
2. $154 million – Exela Enterprise Solutions, Inc.
3. $100 million – Dignity Health
4. $79 million – Ruane, Cunniff & Goldfarb, Inc.
5. $60 million – Raytheon Co.
6. $39.2 million – Reliance Trust Co.
7. $30 million – Prospect Chartercare, LLC
8. $28.5 million – FMR LLC
9. $25 million – OSF HealthCare System
10. $21.6 million – WAWA, Inc.

The largest ERISA settlements primarily involved disputes over breaches of fiduciary duty and various theories of mismanagement.

1. **$300 million – *Allegretti, et al. v. Walgreen Co.*, Case No. 19-CV-5392 (N.D. Ill. Feb. 11, 2021)** (preliminary approval granted for settlement of an ERISA class action alleging mismanagement of workers' 401(k) retirement fund).

2. **$154 million – *Sandoval, et al. v. Exela Enterprise Solutions, Inc.*, Case No. 17-CV-1573 (D. Conn. Sept. 17, 2021)** (final approval granted for a settlement of an ERISA class action alleging breach of fiduciary duties over payments of excessive 401(k) administration fees).

3. **$100 million – *Rollins, et al. v. Dignity Health*, Case No. 13-CV-1450 (N.D. Cal. Oct. 19, 2021)** (preliminary approval granted for a settlement of an ERISA class action alleging the health system improperly claimed the "church plan" exemption under the ERISA leading to the underfunding of workers' pension plans).

4. **$79 million – *Ferguson, et al. v. Ruane, Cunniff & Goldfarb, Inc.*, Case No. 17-CV-6685 (S.D.N.Y. Jan. 8, 2021)** (preliminary approval sought for a settlement of an ERISA class action alleging mismanagement of workers' 401(k) retirement fund).

5. **$60 million – *Cruz, et al. v. Raytheon Co.*, Case 19-CV-11425 (D. Mass. Feb. 23, 2021)** (preliminary approval granted for settlement of an ERISA class action filed by retirees accusing the company of using out-of-date pension data to calculate benefits).

6. **$39.2 million – *Pledger, et al. v. Reliance Trust Co.*, Case No. 15-CV-4444 (N.D. Ga. March 8, 2021)** (final approval granted for settlement of an ERISA class alleging mismanagement of retirement funds and breaches of duties with respect of 401(k) plans).

7. **$30 million – *Del Sesto, et al. v. Prospect Chartercare, LLC*, Case No. 18-CV-328 (D.R.I. July 29, 2021)** (final approval granted for settlement of ERISA class action alleging a false classification of the plan as a church plan in order to under-fund the plan and to avoid disclosure obligations).

8. **$28.5 million – *Moitoso, et al. v. FMR LLC*, Case No. 18-CV-12122 (D. Mass. Jan. 22, 2021)** (final approval granted for settlement of an ERISA class action alleging that the Defendants breached their fiduciary duties owed to plan participants).

9. **$25 million – *Smith, et al. v. OSF HealthCare System*, Case No. 16-CV-467 (S.D. Ill. Jan. 15, 2021)** (final approval granted for settlement of ERISA class action alleging an inaccurate classification of the plan as a "church plan" in order to underfund the plan and to avoid disclosure requirements of ERISA).

10. **$21.6 million – *Cunnington, et al. v. Wawa, Inc.*, Case No. 18-CV-3355 (E.D. Penn. April 21, 2021)** (final approval granted for settlement of ERISA class action alleging breach of fiduciary duties in calculating retirement benefits).

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 class claims for breach of contract and workplace personal injuries, the Fair Credit Reporting Act ("FCRA"), workplace antitrust claims, the Worker Adjustment and Retraining Notification Act ("WARN"), and other federal and state statutory law violations. The top 10 settlements in this category increased exponentially in 2021 as they totaled $1.67 billion; by contrast, the total in 2020 was $219.93 million and the total in 2019 was $319.65 million.

1. $852 million – University Of Southern California

2. $575 million – Sutter Health

3. $71.4 million – Columbia University

4. $52 million – Facebook, Inc.

5. $50 million – McDonald's USA, LLC

6. $29 million – Perdue Farms Inc.

7. $19 million – Duke University

8. $10 million – Wal-Mart Inc.

9. $6.8 million – Compass Group

10. $5.85 million – WAM Holdings d/b/a All-Star Management, Inc.

The biggest settlements involved biometric privacy lawsuits and allegations of sexual misconduct.

1. **$852 million – *Chi, et al. v. University Of Southern California, et al.*, Case No. 18-CV-4258 (C.D. Cal. March 25, 2021)** (final approval granted for settlement of a class action brought by 702 victims claiming they were sexually abused by the university staff gynecologist).

2. **$575 million – *UFCW & Employee Benefits Trust, et al. v. Sutter Health*, Case No. CGC-14-538451 (Cal. Super. Ct. Aug. 27, 2021)** (final approval granted for settlement of a class action alleging the California-based health system leveraged its market power to raise prices and force health plans to use their providers).

3. **$71.5 million – *Doe 16, et al. v. Columbia University*, Case No. 20-CV-1791 (S.D.N.Y. Dec. 1, 2021)** (settlement agreement reached in a class action alleging patients were sexually abused by a former obstetrician-gynecologist on staff).

4. **$52 million – *Scola, et al. v. Facebook, Inc.*, Case No. 18-CV-5135 (Cal. Super. Ct. July 14, 2021)** (final approval granted in a class action against Facebook alleging that the company did not protect the content moderators from significant psychological trauma that resulted from graphic images they saw as part of their job duties).

5. **$50 million – *Lark, et al. v. McDonald's USA, LLC*, Case No. 17-L-559 (Ill. Cir. Ct. Nov. 29, 2021)** (preliminary approval granted for settlement of a class action involving claims that the company violated the Illinois Biometric Information Privacy Act by collecting fingerprint data without the consent of their workers).

6. **$29 million – *Jien, et al. v. Perdue Farms Inc.*, Case No. 19-CV-2521 (D. Md. Oct. 5, 2021)** (preliminary approval granted for settlement of a class action alleging conspiracy by poultry companies to artificially keep workers' wages low).

7. **$19 million – *Binotti, et al. v. Duke University*, Case No. 20-CV-470 (M.D.N.C. Aug. 30, 2021)** (final approval granted for settlement of a class action alleging Sherman Act antitrust claims stemming from the school's no-poach agreement with other institutions).

8. **$10 million – *Roach, et al. v. Walmart Inc.*, Case No. 2019-CH-01107 (Ill. Cir. Ct. June 14, 2021)** (final approval granted for settlement of a class action involving claims that the company violated the Illinois Biometric Information Privacy Act by requiring workers to scan handprints without obtaining their consent).

9. **$6.8 million – *Bryant, et al. v. Compass Group*, Case No. 19-CV-6622 (N.D. Ill. Nov. 2, 2021)** (preliminary settlement approval sought for a class action involving claims that the company violated the Illinois Biometric Information Privacy Act by collecting fingerprint data without the consent of their workers).

10. **$5.85 million – *O'Sullivan, et al. v. WAM Holdings, d/b/a All-Star Management Inc.*, Case No. 19-CH-11575 (Ill. Cir. Ct. Sept. 2, 2021)** (final approval granted for settlement of a class action involving claims that the company violated the Illinois Biometric Information Privacy Act by collecting workers' fingerprint data in order to track their work).

B. Top Ten Government-Initiated Monetary Settlements

In 2021, 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 2021 fiscal year, the EEOC filed 111 new merits lawsuits and collected $484 million on behalf of alleged

discrimination victims. By comparison, the EEOC recovered approximately $535.4 million in FY 2020; approximately $486 million in FY 2019; and approximately $505 million in FY 2018. Of the total amount collected, litigation recoveries decreased from $106 million to $34 million in 2021. By comparison, the DOL's Employee Benefits Security Administration recovered more than $2.4 billion in direct payments to plans, participants, and beneficiaries FY 2021. This represented a decrease from the past two years. The $2.4 billion recovery was down 23% from $3.1 billion in 2020, which saw a record-breaking year for the DOL.

Settlements In Government-Initiated Enforcement Actions And Pattern Or Practice Actions

For all types of government-initiated enforcement actions, the monetary value of the top 10 settlements entered into or paid in 2021 totaled $146.38 million. This represented a sharp decline from the 2020 total of $241 million, but a significant jump from the 2019 total of $57.52 million.

1. $61.7 million – Amazon.com
2. $20 million – Glenn O. Hawbaker Inc.
3. $18 million – Activision Blizzard
4. $14 million – Facebook, Inc.
5. $8.5 million – Adat Shalom Board & Care Inc.
6. $6 million – United States
7. $5.5 million – JBS USA LLC
8. $5.3 million – DoorDash
9. $3.85 million – FIS Holdings Inc.
10. $3.525 million – Aerotek

The majority of the settlements, involved EEOC pattern or practice litigation, while others included enforcement actions and investigations led by the U.S. Department of Labor ("DOL") and the U.S. Federal Trade Commission ("FTC").

1. **$61.7 million – *In The Matter Of Amazon.com. Inc.*, Case No. 1923123 (FTC Feb. 2, 2021)** (consent decree approved in the FTC's enforcement action relative to damages for retaining portions of driver's tips).

2. **$20 million – *Commonwealth Of Pennsylvania v. Glenn O. Hawbaker Inc.*, Case No. CP-14-CR-461-2021 (Penn. Com. Pleas Aug. 3, 2021)** (settlement agreement reached following an investigation by the Pennsylvania Attorney General, where the company agreed to pay back wages it diverted from workers' retirement accounts).

3. **$18 million – *EEOC v. Activision Blizzard*, Case No. 21-CV-7682 (C.D. Cal. Sept. 27, 2021)** (settlement agreement reached relative to claims alleging gender-based harassment and discrimination).

4. **$14 million – *U.S. Department Of Labor v. Facebook, Inc.* (DOL Oct. 19, 2021)** (following a U.S. Department of Labor investigation, the company agreed to settle claims alleging that it unlawfully favored temporary visa holders over U.S. workers in violation of the Immigration and Nationality Act's anti-discrimination clause).

5. **$8.5 million – *California Labor Commissioner v. Adat Shalom Board & Care Inc.*, Case No. 19-STCV-21698 (Cal. Super. Ct. Oct. 20, 2021)** (following an investigation by the California Labor Commissioner, the company settled claims related to live-in caregivers for unpaid wages, overtime, missed meal-period pay, liquidated damages, and interest).

6. **$6 million – *Austin, et al. v. United States*, Case No. 13-CV-00446 (Ct. Fed. Cl. May 28, 2021)** (final approval granted for settlement of a class action filed by a group of healthcare workers that they were denied additional pay when working on federal holidays).

7. **$5.5 million – *EEOC v. JBS USA LLC*, Case No. 10-CV-2103 (D. Colo. June 8, 2021)** (consent decree approved in EEOC lawsuit alleging discrimination against Somali Muslim employees).

8. **$5.3 million – *San Francisco Office Of Labor Standards Enforcement v. DoorDash*, Case No. MWO-917 (SFOLSE Nov. 16, 2021)** (settlement agreement stemming from investigation by the San Francisco Labor Standards Office that food delivery company misclassified workers as independent contractors and used tips to subsidize their base pay).

9. **$3.85 million – *U.S. Department Of Labor v. FIS Holdings Inc.* (DOL April 28, 2021)** (settlement agreement stemming from the DOL's investigation of unpaid overtime compensation for 1,000 pipeline workers in 40 states).

10. **$3.525 million – *EEOC v. Aerotek* (EEOC Oct. 1, 2021)** (settlement agreement following federal systemic investigation of alleged failure to recruit and denial of assignments/placements to individuals based on age, sex, and race).

C. Noteworthy Injunctive Relief Provisions In Class Action Settlements

Generally, the types of relief obtained in settlements of employment discrimination actions can be grouped into five categories, including: (i) modification of internal personnel practices and procedures; (ii) oversight and monitoring of corporate practices; (iii) mandatory training of supervisory personnel and employees; (iv) compensation for named plaintiffs and class members; and (v) 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.

Class action settlements often involving private plaintiffs generally contain one or more of these items of non-monetary relief, but rarely contain all of them. Attorneys representing the U.S. government in enforcement litigation actions also secured several settlements in 2021 that included noteworthy injunctive 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 2021 were the following;

- Provide workers with transparent masks to better assist hearing-impaired customers;
- Conduct a "lessons learned" presentation for all business unit managers that focuses on the anti-discrimination laws;
- Refrain from entering into or enforcing no-poach agreements with competitors;
- Provide retroactive seniority and benefits to aggrieved individuals;
- Use a new candidate selection device, developed by a third-party test developer, that has no statistically significant adverse impact on the basis of race;

- Barring the employment of or contracting with two supervisors who allegedly harassed Black employees.
- Prohibit the business owner's spouse from having direct contact with employees; and
- Hire previously rejected Black applicants who still wanted jobs at the company.

The top 10 settlements in 2021 involving significant injunctive relief provisions include:

1. ***Morgan, et al. v. United States Soccer Federation, Inc.*, Case No. 19-CV-1717 (C.D. Cal. April 12, 2021).** The Court granted final settlement approval of a class action lawsuit brought by current and former female soccer players against the United States Soccer Federation, Inc. ("USSF") alleging gender discrimination. Plaintiffs alleged that the USSF discriminated against them by paying them less; denying them equal playing, training, and travel conditions; denying equal promotion of their games; and denying equal support and development of their games as compared to their male counterparts. In addition to providing monetary relief, the USSF agreed to policy changes that will provide female players with equal travel accommodations, facilities, and professional support.

2. ***Caldwell, et al. v. UnitedHealthcare Insurance Co.*, Case No. 19-CV-2861 (N.D. Cal. July 7, 2021).** In an ERISA class action alleging that UnitedHealthcare improperly denied coverage for lipedema – which is a chronic buildup of fat tissue that affects mainly women and causes pain, mobility problems, and joint disorders – the settlement provides that UnitedHealthcare will expand its coverage of liposuction to treat lipedema and reprocess claims that were previously denied. The coverage will further provide that liposuction is medically necessary in the event certain criteria are met. UnitedHealthcare further agreed to allow resubmission of claims that were previously denied and to review new claims under the updated coverage guidelines.

3. ***Hernandez, et al. v. VES McDonald's*, Case No. RG 20064825 (Cal. Super. Ct. Aug. 12, 2021).** The Court granted a preliminary injunction in a class action alleging that McDonald's failed to provide proper safety measures to employees during the COVID-19 pandemic. The McDonald's franchise owner and managers also agreed to participate in meeting with crew members on a worker safety committee to discuss solutions for maintaining a safe and healthy workplace, including providing sick leave and safety equipment, and conducting contact tracing.

4. ***EEOC v. Danny's Restaurant, LLC*, Case No. 16-CV-769 (S.D. Miss. Aug. 16, 2021).** After the Court previously awarded back wages and approved a consent decree in a lawsuit alleging that Black adult club dancers who were subjected to race discrimination, the Court subsequently ordered that the employer failed to show that reoccurring violations were unlikely. The Court granted the EEOC's motion for injunctive relief, requiring the employer to appoint an outside human resources consultant as an injunctive relief manager, revise and post-anti-discrimination policies in locker rooms, establish a toll-free confidential hotline for reporting job bias, provide further EEO training to employees, and bind all injunctive relief on any purchaser of the business.

5. ***EEOC v. CCC Group*, Case No. 20-CV-610 (N.D.N.Y. Aug. 10, 2021).** The Court approved a consent decree in a lawsuit alleging that CCC Group subjected Black employees to racial discrimination. The consent decree required CCC Group to conduct company-wide training for employees and managers regarding harassment and discrimination issues in the construction industry; conduct a "lessons learned" presentation for all CCC Group business unit managers that focused on the lawsuit's allegations, the consent decree, and anti-harassment training; appoint an EEO Manager; and provide periodic reporting to the EEOC regarding any future allegations of racial harassment. Finally, the consent decree bars CCC Group from employing or contracting with two White supervisors who served as foremen for CCC Group and whom the EEOC alleged harassed Black employees.

6. ***James, et al. v. Old Republic National Title Insurance Co.*, Assurance No. 21-057 (N.Y. Antitrust Bureau Sept. 3, 2021).** Following an investigation by the Attorney General of the State of New York, an assurance of discontinuance was entered to cease any no-poach agreements in the title insurance

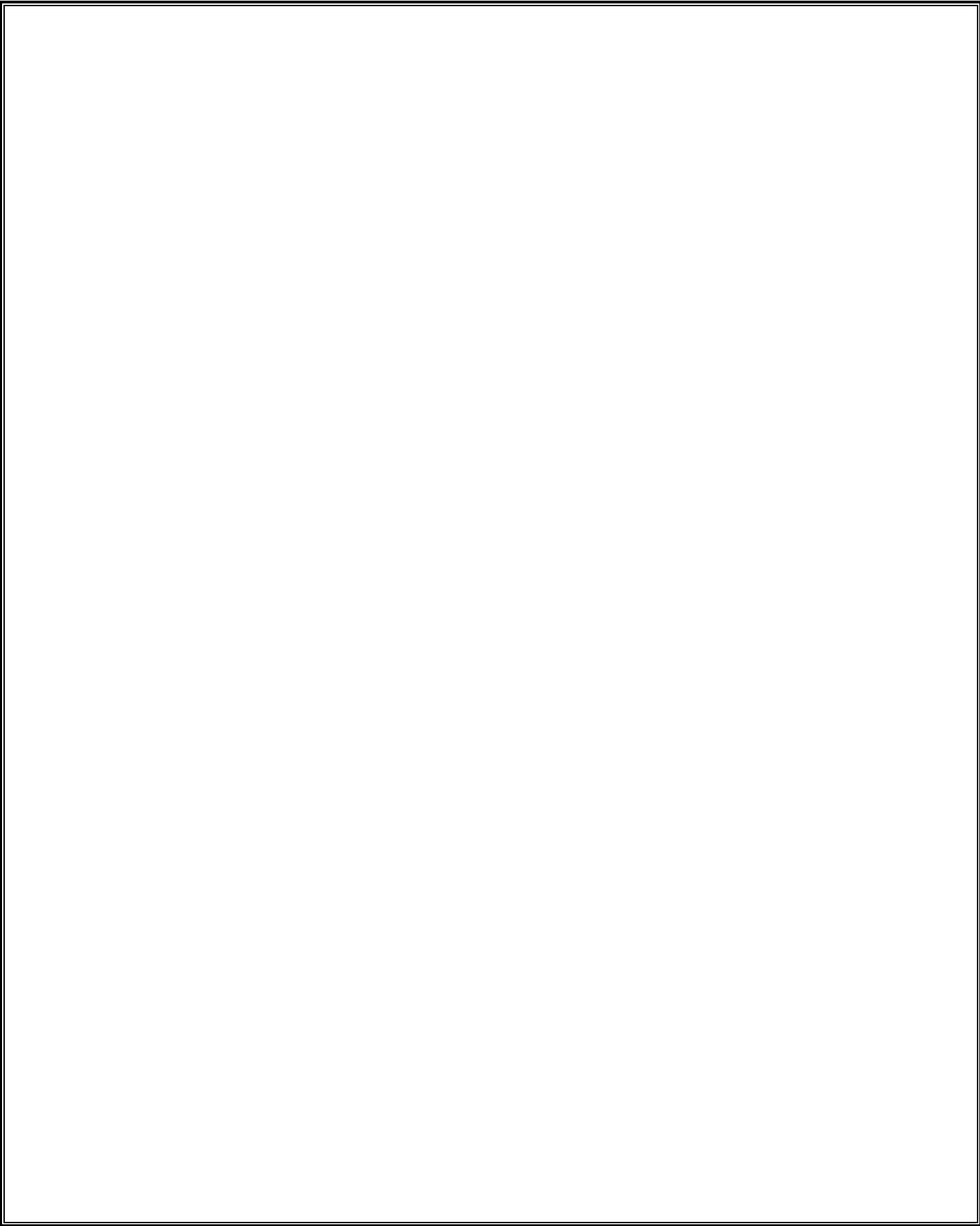
industry. The company agreed to refrain from entering or enforcing no-poach agreements with competitors and will not agree with any competitor to in any way refrain from, request that any competitor refrain from, or pressure any competitor in any way to refrain from soliciting, recruiting, or otherwise competing for employees.

7. ***United States, et al. v. Baltimore County*, Maryland, No. 19-CV-2465 (D. Md. May 19, 2021).** The Court granted settlement approval in a class action alleging that Baltimore County's written examinations for selecting entry-level police officers and cadets had a disparate impact on African-American applicants and were not job-related and consistent with business necessity. Under the terms of the settlement, Baltimore County was enjoined from using the challenged exams and the results any written exam as part of the selection process for entry-level police officers or cadets in any manner that resulted in a disparate impact upon African-American applicants and was not shown to be job-related and consistent with business necessity. Baltimore County also agreed to adopt and use a new selection device, developed by a third-party test developer, that had no statistically significant adverse impact on the basis of race, or, if it had such impact, it must demonstrate it to be job-related for the police officer and cadet position and consistent with business necessity. Additionally, the settlement provided that 20 priority hires would receive: (i) an award of retroactive seniority; (ii) a hiring bonus in lieu of retroactive pension benefits; and (iii) vacation days granted upon graduation.

8. ***EEOC v. Route 22 Sports Bar, Inc.*, Case No. 21-CV-7 (N.D. W.Va. Oct. 20, 2021).** The Court granted the entry of a consent decree in an EEOC lawsuit alleging that the male spouse of an owner of two restaurants subjected a female bartender and other employees to severe, unwanted, and offensive sexual harassment, including luring female employees to his secluded office, propositioning certain female workers for sex, and subjecting them to unwanted sexual touching and comments. In addition to monetary relief, the restaurants will provide significant equitable relief, including prohibiting the owner's male spouse from holding any supervisory position and having any direct contact with employees while acting on behalf of either restaurant; adopting robust sexual harassment and anti-retaliation policies; establishing a complaint procedure for employees to report harassment or retaliation; providing specialized training on conducting sexual harassment investigations; and consenting to EEOC compliance monitoring and reporting requirements.

9. ***EEOC v. Chicago Meat Authority*, Case No. 18-CV-01357 (N.D. Ill. Oct. 11, 2021).** The Court approved a consent decree in an EEOC lawsuit against a meat processor who allegedly favored hiring Hispanic employees over African-American employees, even though the company is located in a largely Black neighborhood on Chicago's South Side. In addition to monetary relief, the consent decree mandated the hiring of rejected applicants who still want jobs at the company, required the company to make good faith efforts to reach hiring goals for Black employees, and mandated the implementation of anti-harassment training and policies.

10. ***State Of California v. Amazon.com Services LLC*, Case No. 34-2021-00311063 (Cal. Super. Ct. Nov. 16, 2021).** Following an investigation by the California Attorney General into Amazon's pandemic safety policies, the parties entered into a stipulation for entry of final judgment that includes an array of injunctive relief provisions relative to workplace safety. In addition to monetary relief of $500,000, Amazon agreed to inform warehouse workers in California about safety protocols and COVID-19 outbreaks in its facilities within 48 hours. Further, it requires Amazon to allow the Attorney General to monitor communications relative to COVID-19 notifications.



Web Page
Visit our page: **www.workplaceclassactionreport.com**

Workplace Class Action Blog
Visit our blog: **www.workplaceclassaction.com**

Twitter
Follow us **@sswcab**

"Seyfarth" and "Seyfarth Shaw" refer to Seyfarth Shaw LLP, an Illinois limited liability partnership. Our London office operates as Seyfarth Shaw (UK) LLP, an affiliate of Seyfarth Shaw LLP. Seyfarth Shaw (UK) LLP is a limited liability partnership established under the laws of the State of Delaware, USA, and is authorised and regulated by the Solicitors Regulation Authority with registered number 556927. Legal services provided by our Australian practice are provided by the Australian legal practitioner partners and employees of Seyfarth Shaw Australia, an Australian partnership. Seyfarth Shaw (賽法思律師事務所) is a separate partnership operating from Hong Kong as a firm of solicitors.

©2022 Seyfarth Shaw LLP. Attorney Advertising. Prior results do not guarantee a similar outcome.

www.seyfarth.com

#21-8055 M1