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16th Annual Workplace Class Action Litigation Report Webinar

2020 Edition

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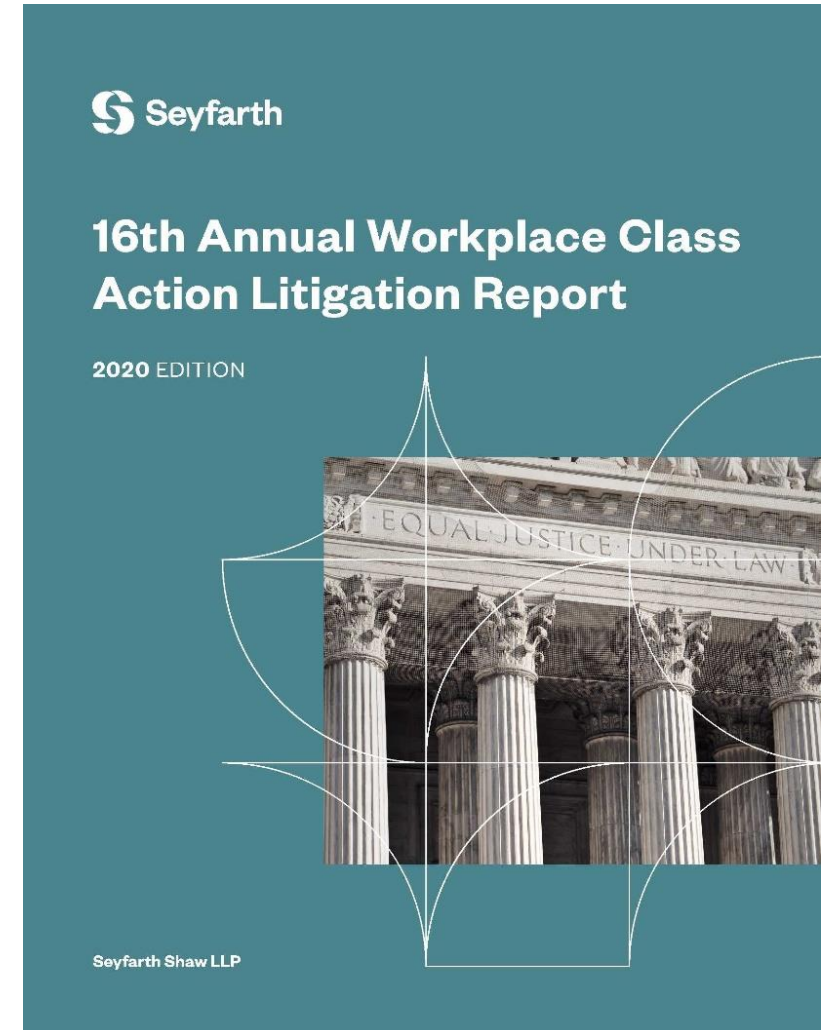
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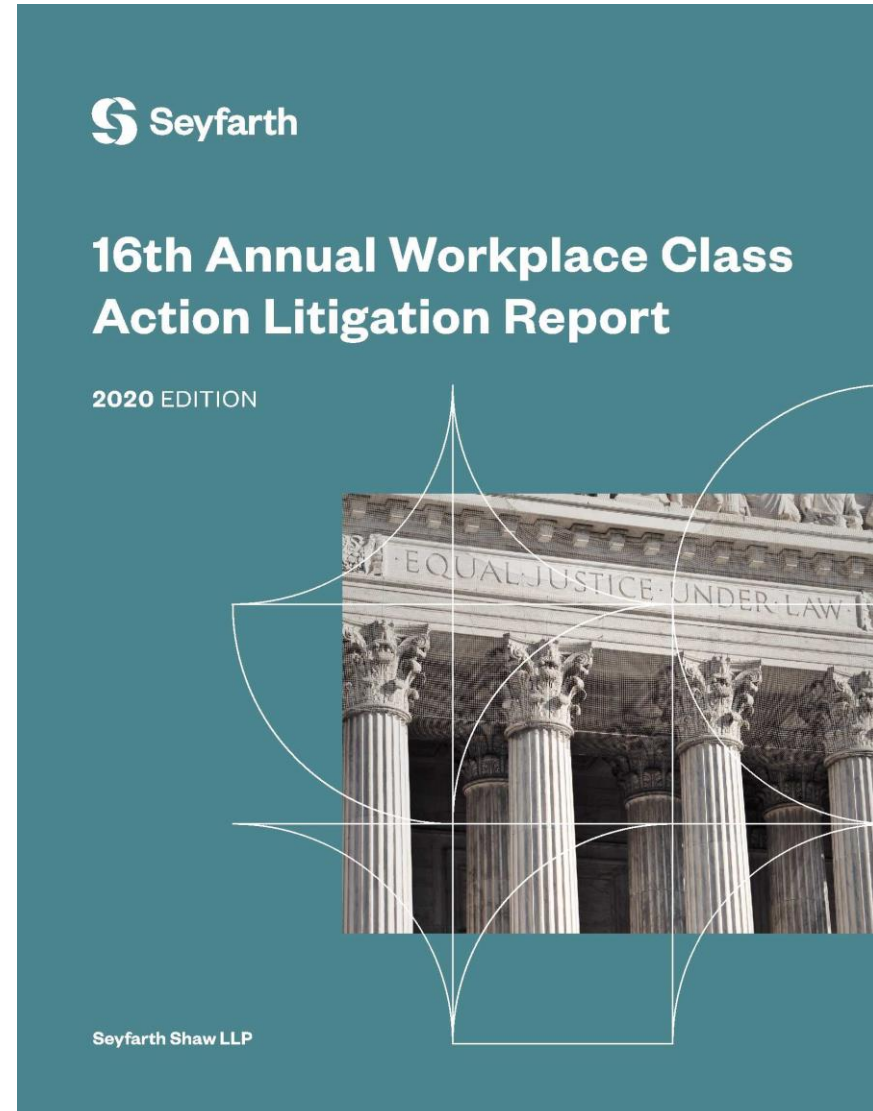
Today's Discussion Points

| | |
|---|--|
| 1 | Certification Trends In 2019 |
| 2 | Impact Of Supreme Court Rulings |
| 3 | Governmental Enforcement Litigation Trends In 2019 |
| 4 | Lower Class Action Settlement Numbers In 2019 |
| 5 | Impact Of The #MeToo Movement |
| 6 | What Should Be In Your Defense Toolkit And Compliance Program? |



Introduction To The Webinar

- The 16th Annual Workplace Class Action Litigation Report (“WCAR”)
- Overview Of 2019 Class Action Developments
- Our Topics Today Relate To Employment Discrimination, Wage & Hour, Government Enforcement & ERISA Class Actions



What Is Hot In The Workplace Class Action World?

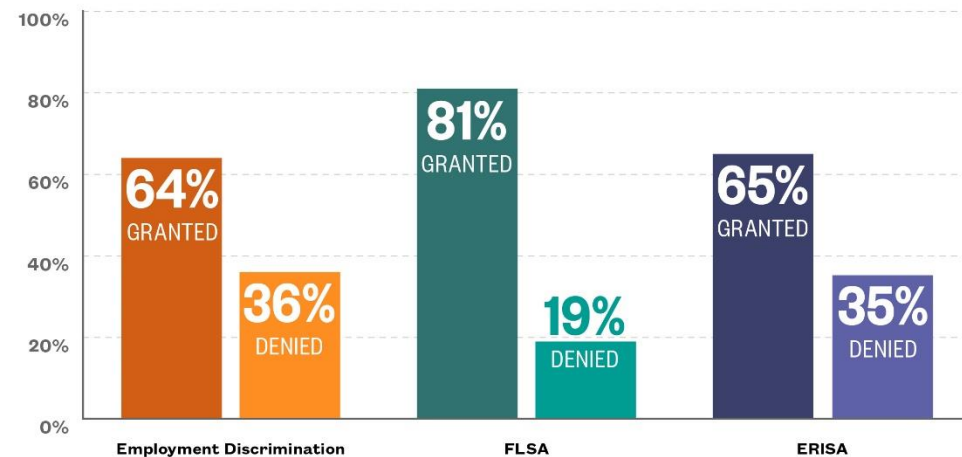
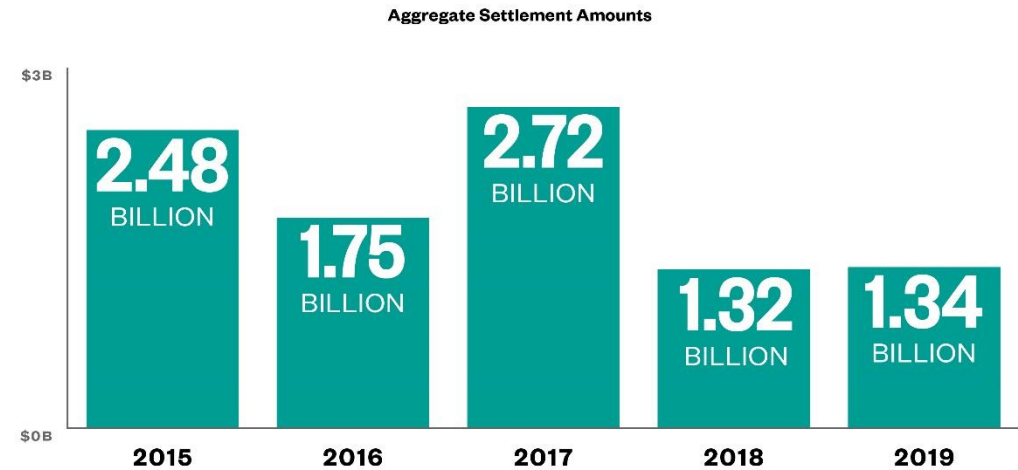
- **Class Certification Rulings** – The plaintiffs’ bar achieved historic success in terms of class certification rulings in 2019, especially in the wage & hour space. On average, Plaintiffs succeeded on slightly over 4 out of every 5 conditional certification motions – a rate of 81%.
- **U.S. Supreme Court Rulings** – The Supreme Court issued a number of key decisions on complex employment litigation and class action issues in 2019, and is set to review additional workplace issues in 2020.
 - Several key decisions on complex employment litigation and class action issues that were arguably more pro-business than decisions in past terms. Specifically, *Lamps Plus v. Varela* and *Nutraceutical Corp. v. Lambert* reflected a conservative, strict constructionist reading of statutes and class action procedures.

What Is Hot In The Workplace Class Action World?

- **Government Enforcement Litigation** – While filings and settlements of government enforcement litigation in 2019 did not reflect a head-snapping pivot from the ideological pro-worker outlook of the Obama Administration to a pro-business, less regulation/litigation viewpoint of the Trump Administration, the numbers began to trend downward, reflecting a departure from the aggressive enforcement litigation agenda of prior government.
- **Settlement Amounts** – The aggregate monetary value of workplace class action settlements increased slightly in 2019, but as compared to the last several years, it was one of the lowest marks for settlements after those values plummeted to their lowest level ever in 2018. For most of the past decade, these settlement numbers had been increasing on an annual basis, and reached all-time highs in 2017.
- **#MeToo Movement** – In response to the #MeToo Movement, workplace harassment cases made their way into the complex litigation space in 2019 and resulted in some of the largest class action settlements of the year.

Key Trends In 2019

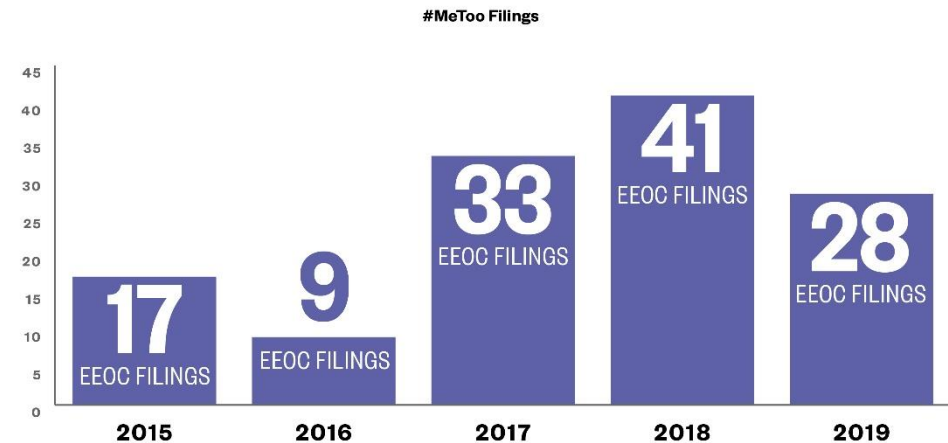
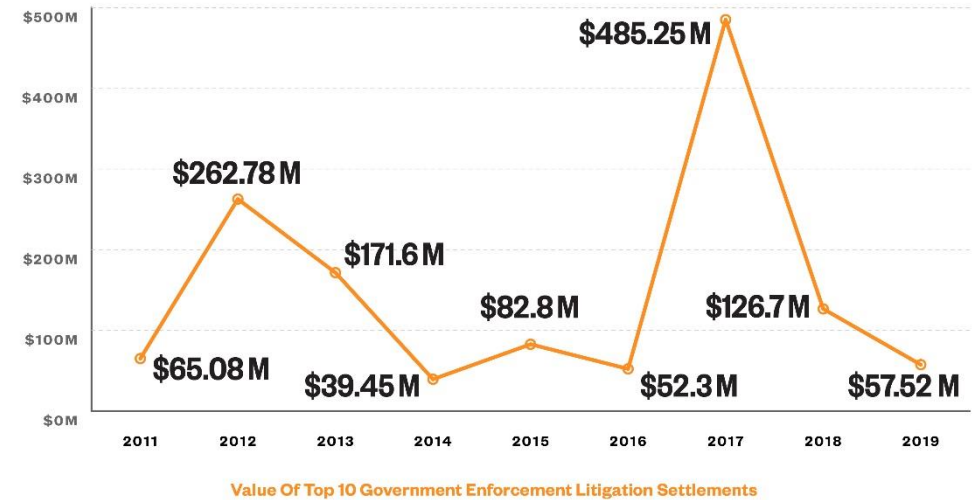
- As measured by the top ten largest case resolutions in various workplace class action categories, recoveries remained low.
- Plaintiffs achieved robust numbers of initial class and collective certification rulings in 2019, especially at the “conditional certification” stage in FLSA collective actions.



2019 Certification Motions For
Employment Discrimination, FLSA, And ERISA

Key Trends In 2019

- EEOC-initiated recoveries continued to fall. Since the 2017 level, the of the top 10 government enforcement litigation settlements dropped by over \$425 million.
- The fifth and newest major class action development of 2019 – the #MeToo Movement – was highlighted by the EEOC filing 28 sexual harassment cases, down from 2018’s all-time high number of 41.



Headlines Of 2019 Important To Employers



•End-Of-Year Statistics

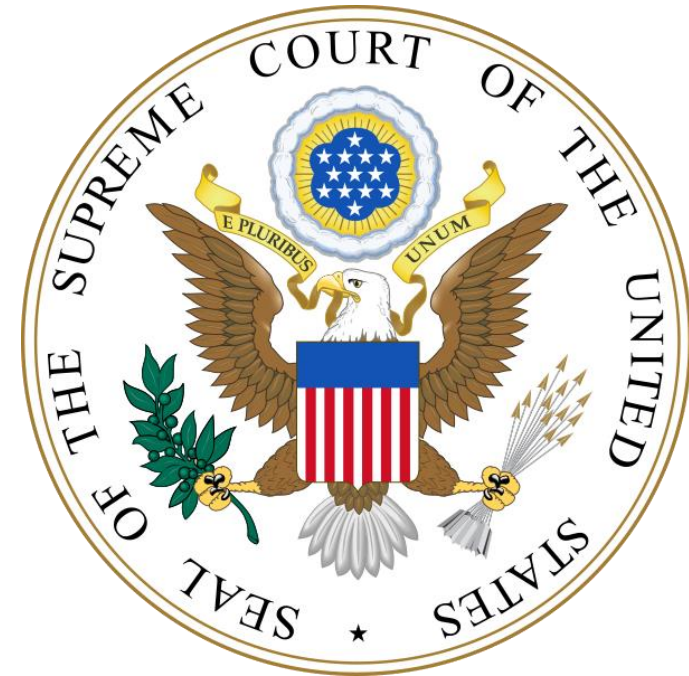
– Workplace litigation by the numbers in 2019:

- ERISA lawsuits totaled 5,732 (down as compared to 6,334 in 2018)
- FLSA lawsuits totaled 6,780 (the fourth consecutive decrease, and the lowest number of FLSA filings since 2011)
- Employment discrimination lawsuits totaled 12,255 (down slightly from 12,488 in 2018)

This was the first time in over a decade that filings were down in all three categories.

Major Supreme Court Decisions In 2019

- Over the past decade, the Supreme Court has issued a number of decisions that significantly impacted class action litigation
 - *Wal-Mart Stores, Inc. v. Dukes*
 - *Comcast Corp. v. Behrend*
- 2019 was no exception – the Supreme Court decided six cases – two employment-related cases and four class action cases – that will influence complex employment-related litigation in the coming years



Major Supreme Court Decisions In 2019



- *New Prime, Inc. v. Oliveira, et al.*, 139 S. Ct. 532 (2019)
- *Nutraceutical Corp. v. Lambert, et al.*, 139 S. Ct. 710 (2019)
- *Frank, et al. v. Gaos*, 139 S. Ct. 1041 (2019)
- *Lamps Plus, Inc., et al. v. Varela, et al.*, 139 S. Ct. 1407 (2019)
- *Home Depot U.S.A., Inc. v. Jackson, et al.*, 139 S. Ct. 1743 (2019)
- *Parker Drilling Management Services, Ltd. v. Newton, et al.*, 139 S. Ct. 1881 (2019)

U.S. Supreme Court Rulings That May Impact Employers In 2020



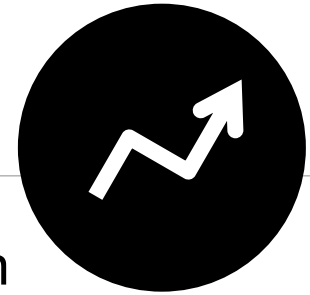
- ***Retirement Plans Committee Of IBM v. Jander, et al., No. 18-1165*** –
 - **Question** → Whether and in what circumstances the “more harm than good” pleading standard from *Fifth Third Bancorp. v. Dudenhoeffer* can be satisfied by general allegations relative to the harm of inevitable disclosure of alleged fraud increases over time.

- ***Intel Corp. Investment Policy Committee v. Sulyma, et al., No. 18-1116*** –
 - **Question** → What quantum of information triggers the date on which an employee has knowledge of the breach or violation ERISA to trigger the three-year “actual knowledge” statute of limitations?

- ***Thole, et al. v. U.S. Bank, N.A., No. 17-1712*** –
 - **Question** → Can defined benefit plan participants or beneficiaries seek relief for alleged imprudent investments without demonstrating actual or imminent financial loss?

- ***Rutledge v. Pharmaceutical Care Management Ass’n, No. 18-540*** –
 - **Question** → Are state laws regulating pharmacy benefit managers preempted by ERISA?

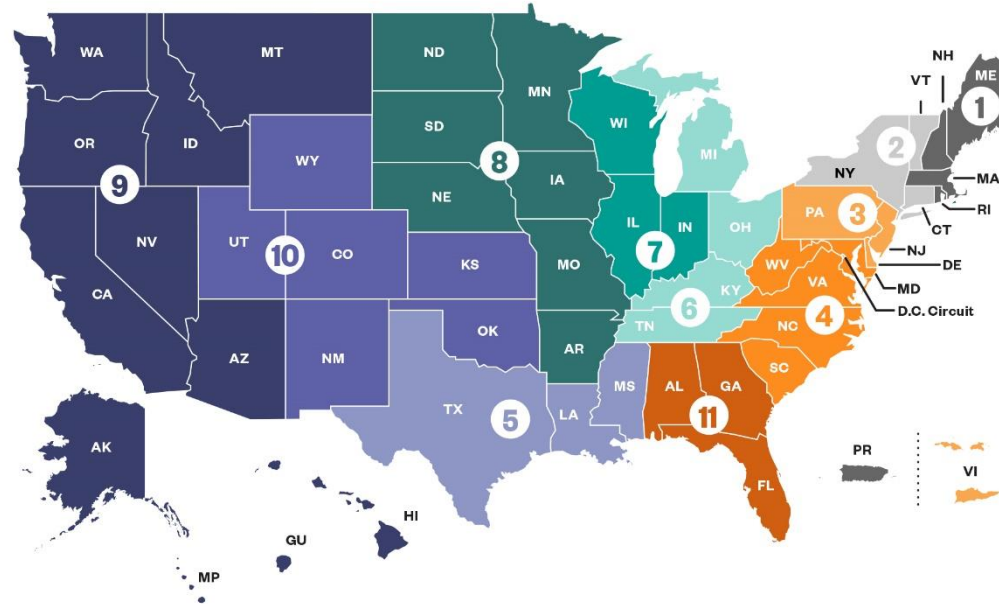
Class & Collective Certification Trends In 2019



- Plaintiffs achieved remarkable results on “first stage” conditional certification motions (199 of 245 rulings, or approximately 81%) in wage & hour cases.
 - *This is the highest conditional certification number that the plaintiffs’ bar has achieved in 15 years.*
- Comparatively, employers prevailed in over half of “second stage” decertification motions (15 of 26 rulings, or approximately 58%) in wage & hour cases, up 6% from 52% in 2018 but lower than the 64% of decertification motions granted in 2017

Class Certification Trends In 2019

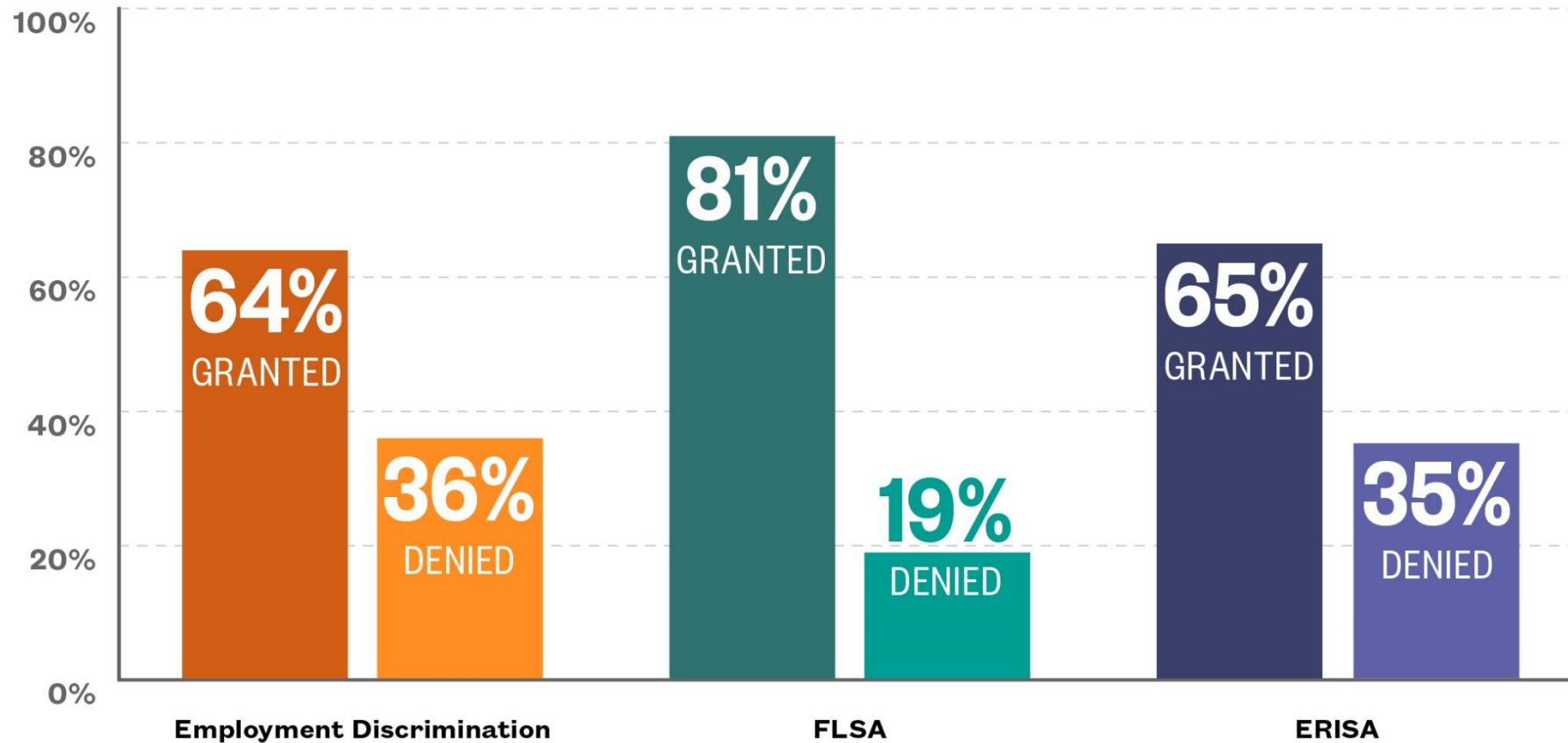
U.S. Courts Of Appeal – Analysis Of FLSA Certification Decisions



| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | D.C. Circuit | Court of Federal Claims |
|---|---|----|----|----|----|----|----|----|----|----|----|--------------|-------------------------|
| Conditional Certification Motions Granted | 5 | 36 | 11 | 10 | 31 | 36 | 10 | 13 | 31 | 7 | 7 | 0 | 2 |
| Conditional Certification Motions Denied | 1 | 9 | 2 | 2 | 8 | 6 | 4 | 5 | 8 | 0 | 1 | 0 | 0 |
| Decertification Motions Granted | 0 | 1 | 0 | 0 | 7 | 0 | 2 | 0 | 4 | 1 | 0 | 0 | 0 |
| Decertification Motions Denied | 2 | 0 | 1 | 1 | 0 | 3 | 1 | 1 | 1 | 0 | 1 | 0 | 0 |

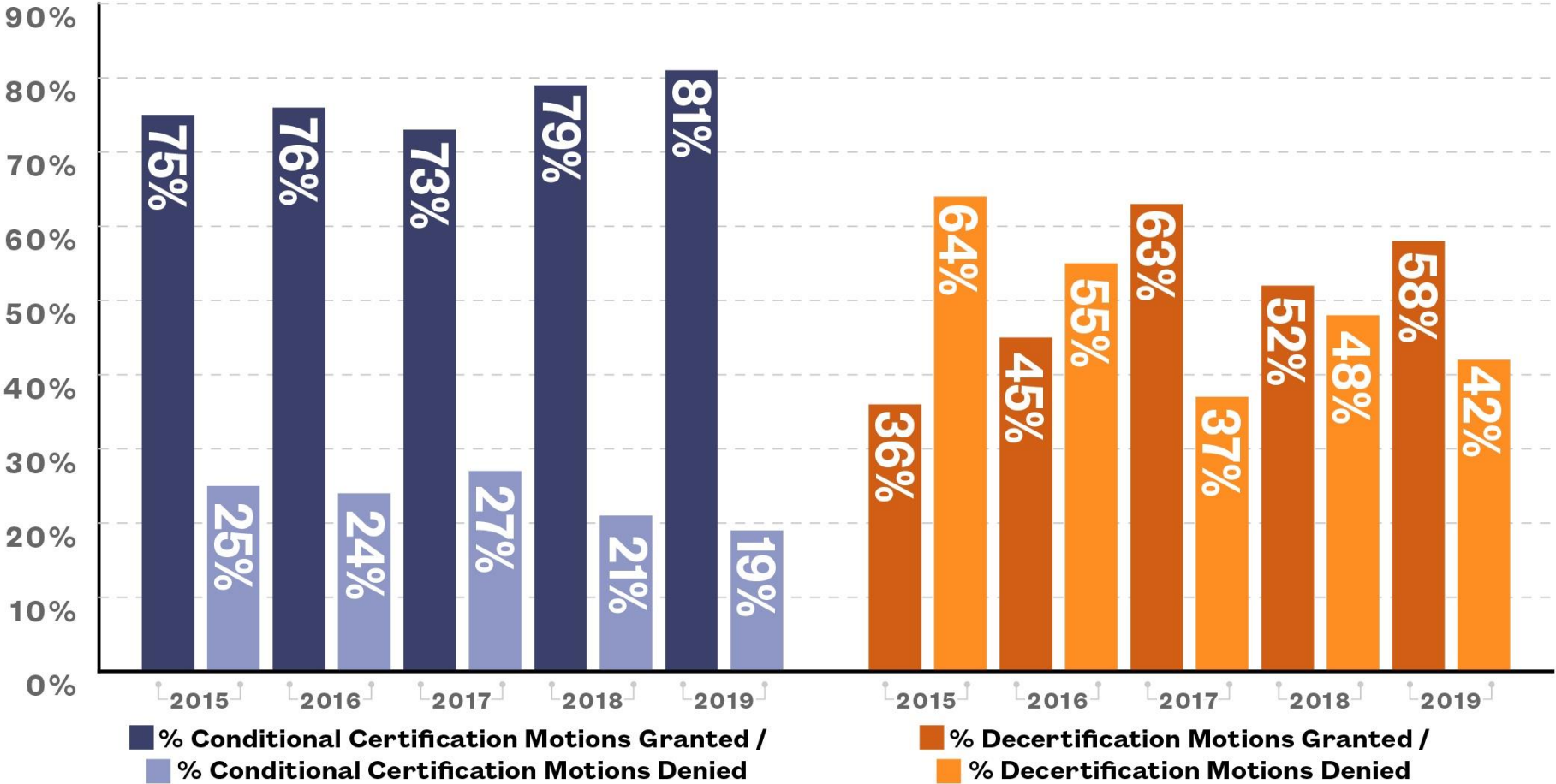
**Total: 199 Conditional Certifications Granted / 46 Conditional Certifications Denied
15 Decertification Motions Granted / 11 Decertification Motions Denied**

Class Certification Trends In 2019



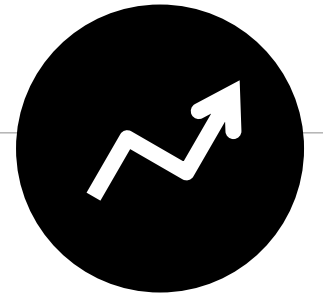
**2019 Certification Motions For
Employment Discrimination, FLSA, And ERISA**

Class Certification Trends In 2019 – Wage & Hour



**2015 - 2019 FLSA Conditional Certification Motions
and Decertification Motions**

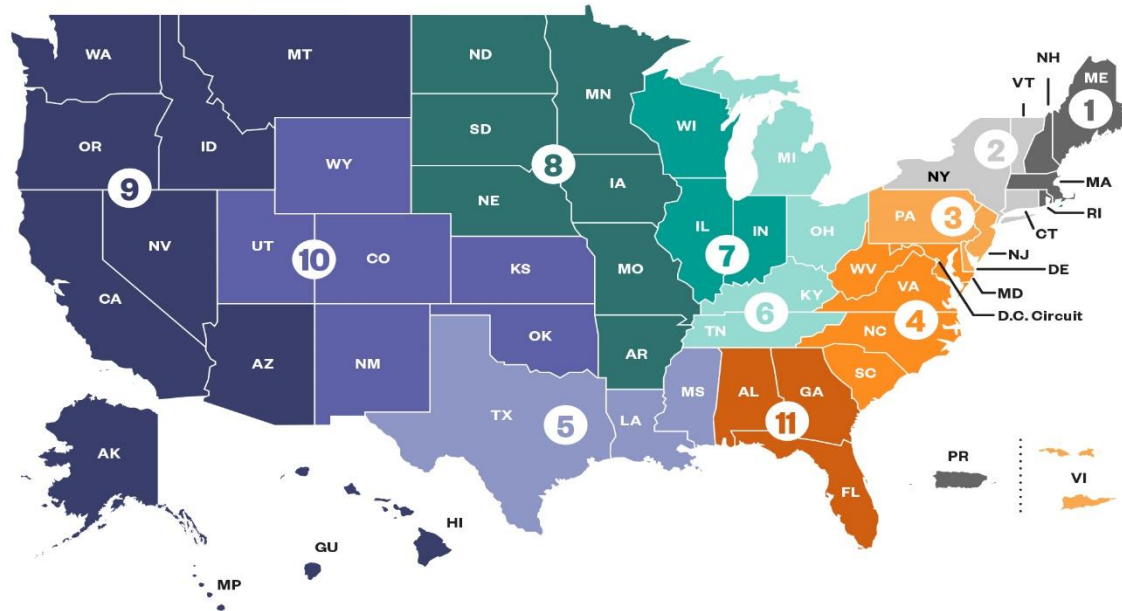
Class Certification Trends In 2019 – Employment Discrimination



- Increase in “smaller”/down-sized employment discrimination class actions to assert local, state-wide, and regional classes instead of mega-classes.
 - Likely fueled by the *Wal-Mart* ruling, which discouraged massive nationwide classes and has subsequently forced the Plaintiffs’ playbook on Rule 23 strategies to change.
- The Plaintiffs’ bar fared well in employment discrimination cases, where 7 out of 11 certification motions were granted in 2019.
 - This compared to 8 out of 11 denied in 2018.
 - The certification rate of 64% was one of the highest on record over the last decade.

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

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



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

**Total: 7 Conditional Certifications Granted / 4 Conditional Certifications Denied
4 Decertification Motions Granted / 0 Decertification Motions Denied**

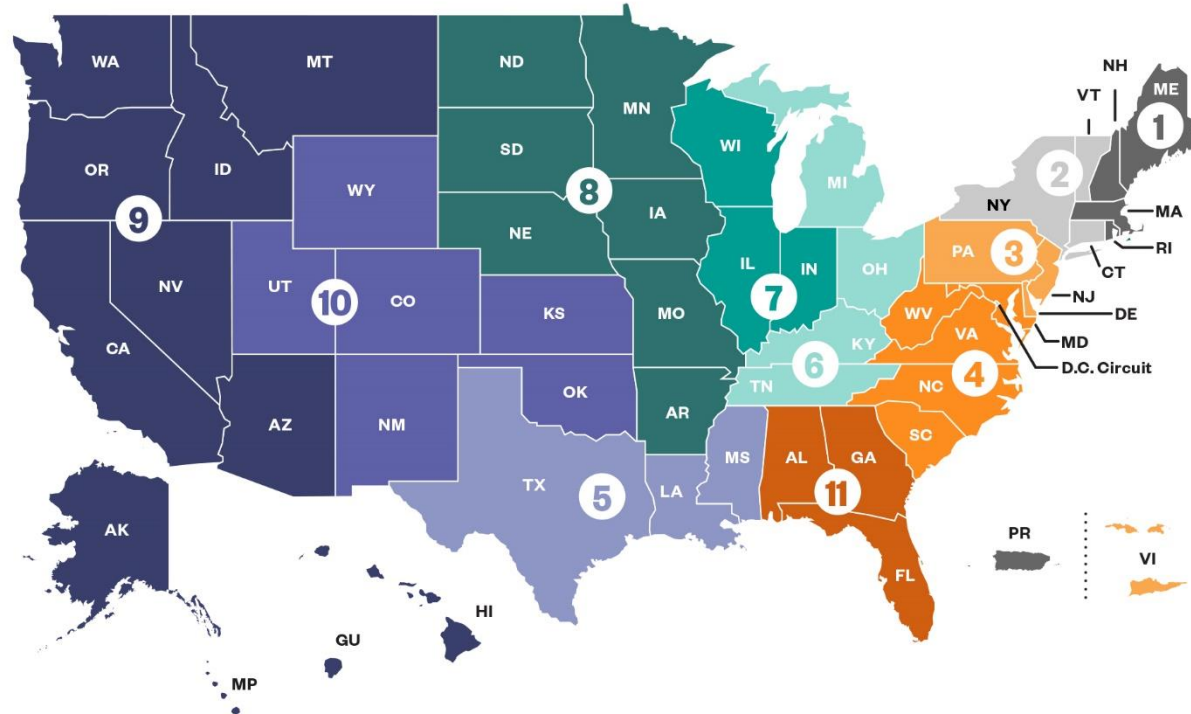
Class Certification Trends In 2019 – ERISA



- ERISA cases continued to focus on application of decisions of the U.S. Supreme Court, which refined the scope of potential liability and defenses.
- Once again, the *Wal-Mart* decision impacted the ERISA certification playing field, *i.e.*, more grounds to oppose class certification.
- Class certification motions have the best chance of denial in the context of ERISA welfare plans and ERISA defined contribution pension plans, where individualized issues of liability and damages are prevalent.
- Plaintiffs succeeded in certifying 11 of 17 certification rulings in 2019, which was aligned with the conversion rate in 2018.

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

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



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

Total: 11 Granted / 6 Denied

Significant Certification Decisions In 2019 – Employment Discrimination



- *Van v. Ford Motor Co.*, 2019 U.S. Dist. LEXIS 143 (N.D. Ill. Aug. 22, 2019) [Page 46]
- *Harris v. Union Pacific*, 2019 U.S. Dist. LEXIS 17917 (D. Ned. Feb. 5, 2019) [Page 46-47]
- *Moussouris v. Microsoft Corp.*, 2019 U.S. App. LEXIS 38320 (9th Cir. Dec. 24, 2019) [Page 48]

Significant Certification Decisions In 2019 – Wage & Hour



- *Seiffart v. Qwest Corp.*, 2019 U.S. Dist. LEXIS 28658 (D. Mont. Feb. 22, 2019) [Page 223]
- *Pettenatov. Beacon Health Options, Inc.*, 2019 U.S. Dist. LEXIS 187691 (S.D.N.Y. Oct. 25, 2019) [Page 117]
- *Qazi v. Stage Stores, Inc.*, 2019 U.S. Dist. LEXIS 102363 (S.D. Tex. June 19, 2019) [Page 146]
- *In Re JPMorgan Chase & Co.*, 916 F.3d 494 (5th Cir. 2019) [Page 314]
- *Dietrich v. C.H. Robinson Worldwide*, 2019 U.S. Dist. LEXIS 48555 (N.D. Ill. Mar. 20, 2019) [Page 173]
- *Pierce v. Wyndham Vacation Resorts, Inc.*, 2019 U.S. App. LEXIS 12806 (6th Cir. April 29, 2019) [Page 164]

Significant Certification Decisions In 2019 – ERISA



- *Cunningham v. Cornell University*, 2019 U.S. Dist. LEXIS 10357 (S.D.N.Y. Jan. 22, 2019) [Page 355]
- *Brown v. Nationwide Life Insurance Co.*, 2019 U.S. Dist. LEXIS 160940 (S.D. Ohio Sept. 19, 2019) [Page 358]
- *Condry v. UnitedHealth Group, Inc.*, 2019 U.S. Dist. LEXIS 106254 (N.D. Cal. May 23, 2019) [Page 358]

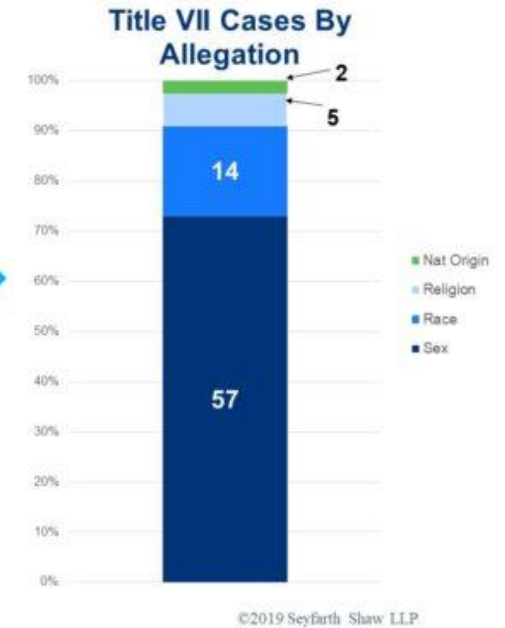
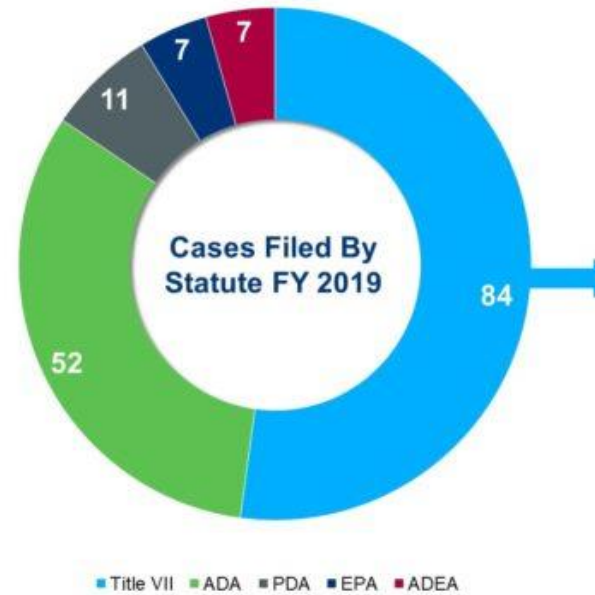
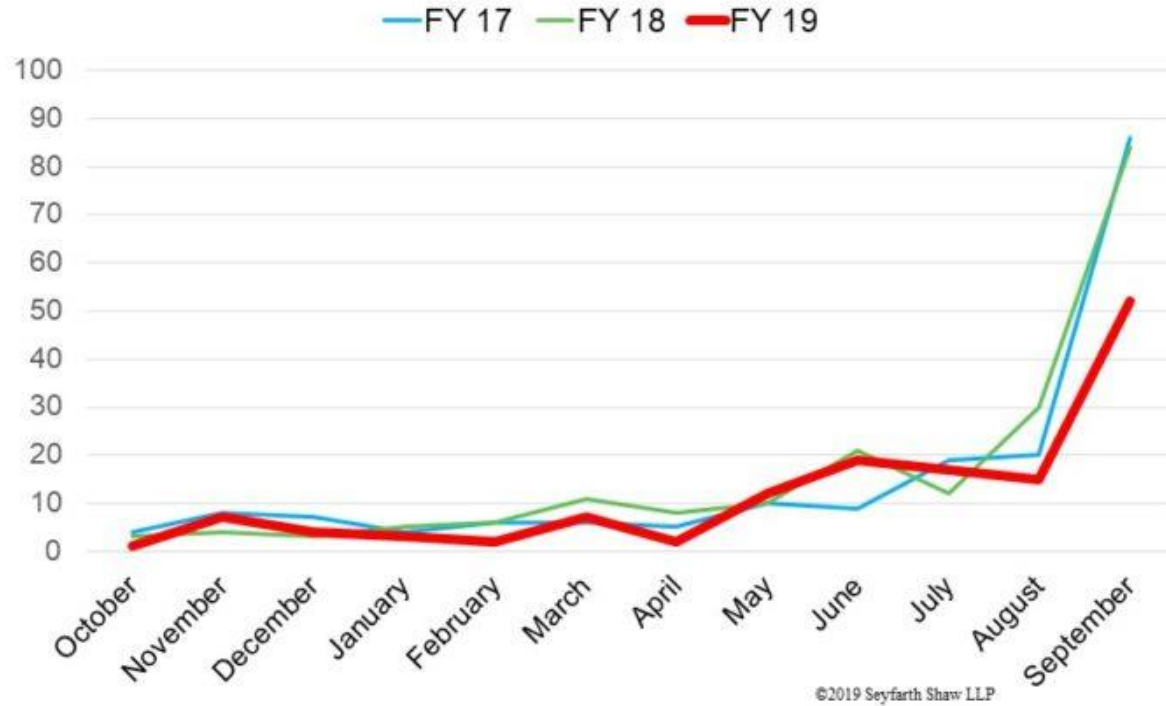
Other Rule 23 Decisions Of Significance In 2019



- *In Re Payment Card Exchange Litigation*, 2019 U.S. Dist. LEXIS 216796 (E.D.N.Y. Dec. 16, 2019) (award of \$523 million in attorneys' fees) [Page 512]
- *Bell v. Brockett*, 2019 U.S. App. LEXIS 12411 (4th Cir. April 25, 2019) (no “defendant only” class certification) [Page 549]
- *In Re National Prescription Opiate Litigation*, Case No. 17-MD-2804 (N.D. Ohio Aug. 18, 2019) (class certified for “negotiation of possible settlement” only) [Page 630]

Government-Initiated Litigation

Cases Filed By Month FY 2017-2019

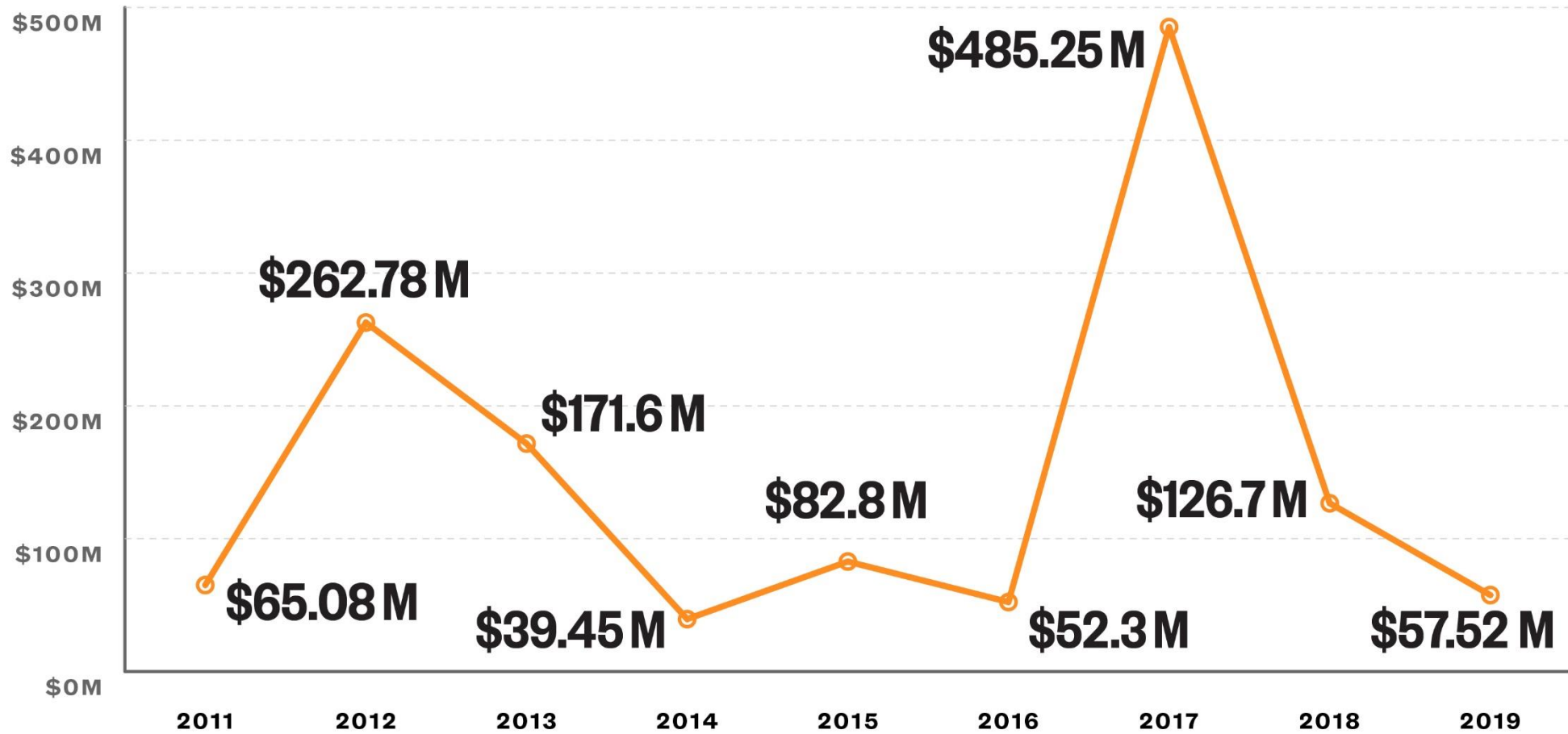




Government-Initiated Litigation

- The EEOC filed 145 lawsuits in FY 2019, 52 of which were filed in September, compared to the just 12 filed in the first quarter of 2019.
- The Commission continued to file a significant number of lawsuits under Title VII and the ADA.
 - Notably, the EEOC displayed a clear priority for gender-based discrimination and harassment, with 57 filings including such allegations.
- The top 10 settlements totaled \$57.52 million, an enormous drop as compared to \$126.7 million in 2018.

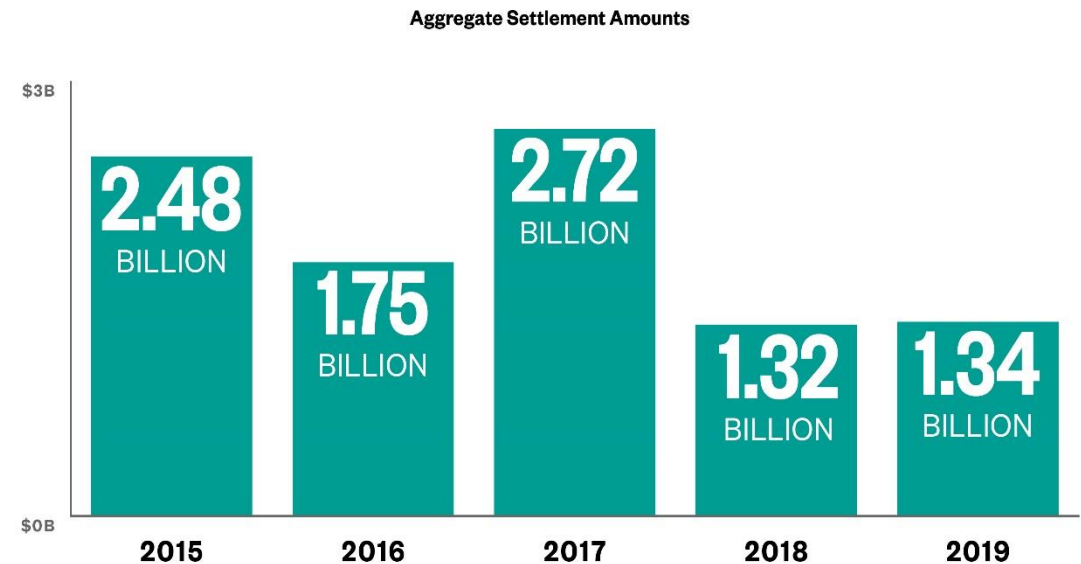
Dynamics Behind A Busy Year Of Government-Initiated Litigation



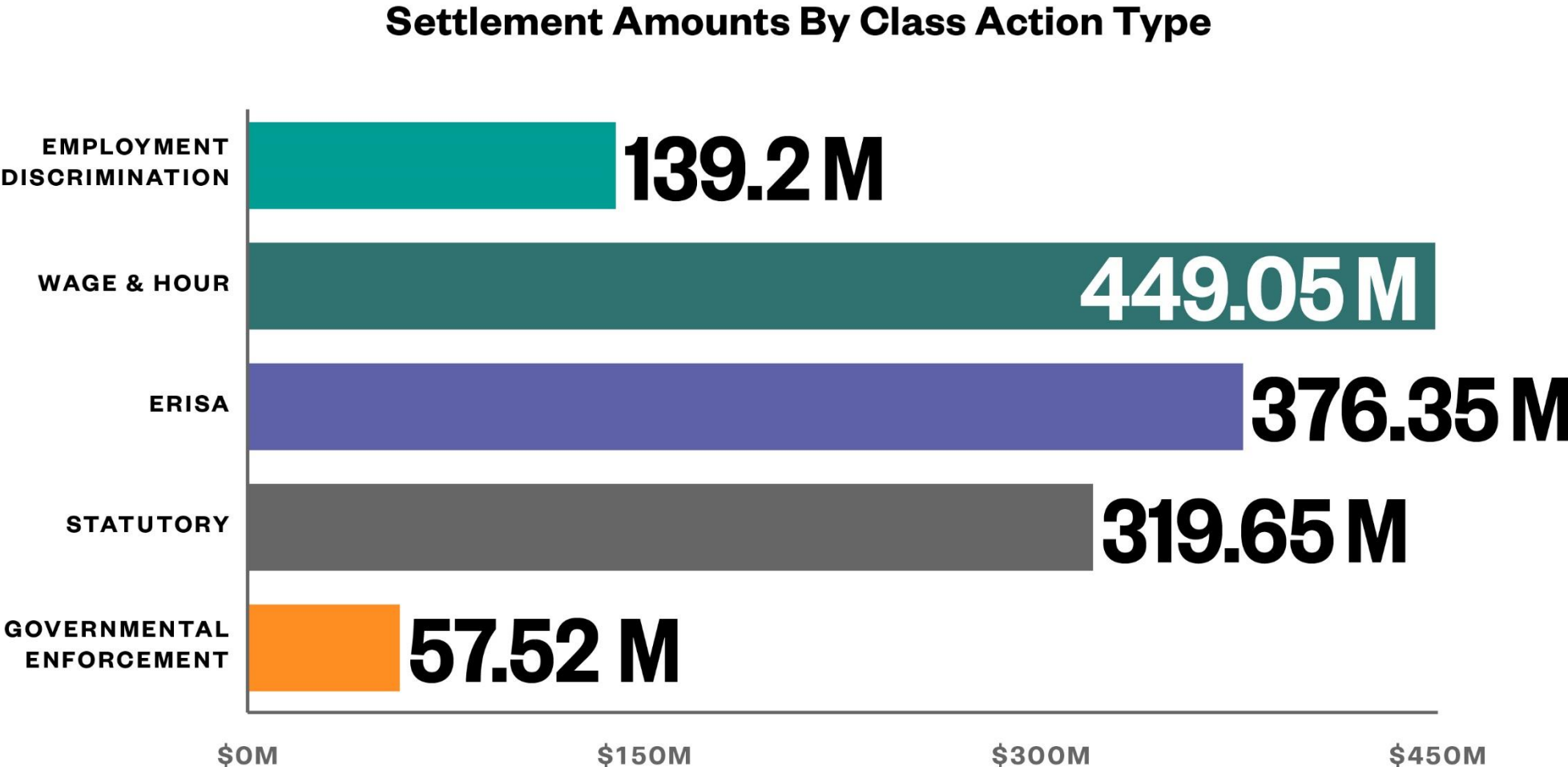
Value Of Top 10 Government Enforcement Litigation Settlements

Noteworthy Settlements & Their Workplace Implications Going Forward

- Based on all five categories, the top ten aggregate settlement numbers in 2019 totaled \$1.34 billion, a slight increase from \$1.32 billion in 2018, but a substantial decrease from \$2.72 billion in 2017.
- It was the second lowest total for aggregate settlements over the decade of 2010 to 2019, with only 2018 having a lower aggregate total.
- Possible factors driving this reduction:
 - The Supreme Court’s decision in *Wal-Mart, Inc. v. Dukes* in 2011, which tightened Rule 23 standards and raised the bar for class certification.
 - The Supreme Court’s decision in *Epic Systems* in May 2018, which upheld the validity of class waivers in mandatory workplace arbitration agreements.



Settlement Amounts By Class Action Type



Leading Settlements – Employment Discrimination [Pg. 33-34 of the WCAR]



- Top 10 settlements totaled \$139.20 million, which was a decrease from 2018 (\$216.09 million), but still significantly higher than 2016 (\$79.81 million)
- Breakdown of the top 10 employment discrimination class action settlements:
 - Seven of the top ten alleged gender discrimination (based on sexual harassment, pay practices, pregnancy, and sexual misconduct)
 - Spread across the country
 - 2 of top 10 in California

Leading Settlements – Wage & Hour [Pages 34-36 of the WCAR]



- Top 10 settlements totaled \$449.05 million, nearly double the amount in 2018 when the total was \$253.5 million.
- Most robust increase in 2019.
- Primarily involved nationwide claims with only two state-specific claims.
- 6 of the top 10 wage & hour settlements involved lawsuits pending in either state or federal courts in California.

Leading Settlements – ERISA

[Pages 36-37 of the WCAR]



- Top 10 settlements totaled \$376.35 million, an increase from 2018, when the total was \$313.4 million, but far below the 2017 total of \$927.8 million.
- The largest ERISA settlement in 2019 was *Owens, et al. v. Metropolitan Life Insurance Co.*, which concerned the use of company accounts as a vehicle to distribute ERISA plan life insurance benefits and settled for \$80 million.
- Second largest was a \$75 million settlement of a claim involving JP Morgan Chase and affiliates' investment in allegedly risky securities within stable value funds.
- Half of the top ten settlements involved 401(k) and 403(b) plan fee claims, with settlements totaling \$100 million for these cases.

Impact Of The #MeToo Movement

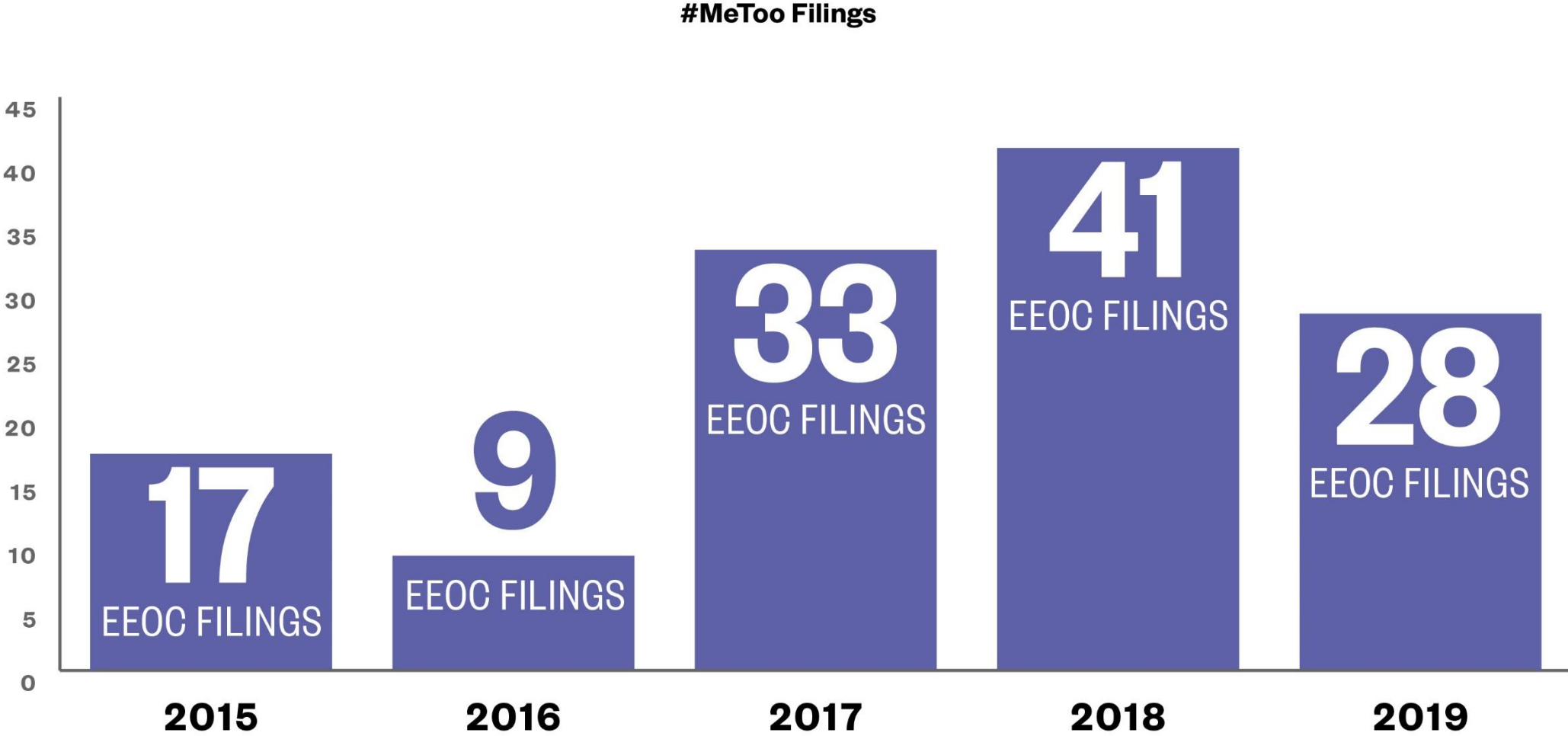
- The newest WCAR trend is the #MeToo Movement, which has had significant implications on the workplace and class action litigation.
- Due to the immediate impact of the #MeToo Movement, numerous states revised their laws to incorporate additional protections, required employee training, or bar mandatory non-disclosure agreements.



Impact Of The #MeToo Movement

- California has been in the forefront of introducing “#MeToo laws,” including banning mandatory arbitration clauses in contracts, which require workers to waive the right to take an employer to court in the event of a dispute. In sum, these legislative changes led to an uptick in #MeToo litigation in these states in 2019, with more case filings expected in 2020.
- The increasing number of sexual harassment claims in the corporate world as part of the #MeToo movement also has led to a number of high-profile employment-related claims.
- Growing number of shareholder derivative and securities class actions. In 2017, 21st Century Fox reached a \$90 million settlement with shareholders over losses related to two harassment scandals. Additional class actions were filed against other organizations in 2019, including a lawsuit that resulted in a \$41 million settlement with Wynn.

Impact Of The #MeToo Movement



How Can You Minimize Your eDiscovery Risks In The Class Action Context?

- Know what data your company has
- Know who “owns” your company’s data
- Get a handle on your key custodians early in litigation
- Preserve liberally; collect and produce judiciously
- Be proactive and drive e-discovery – don’t wait for plaintiffs or the government to drive it for you
- Remember that plaintiffs and third-parties own data too



What Should Be In Your ERISA Compliance Tool Kit?

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



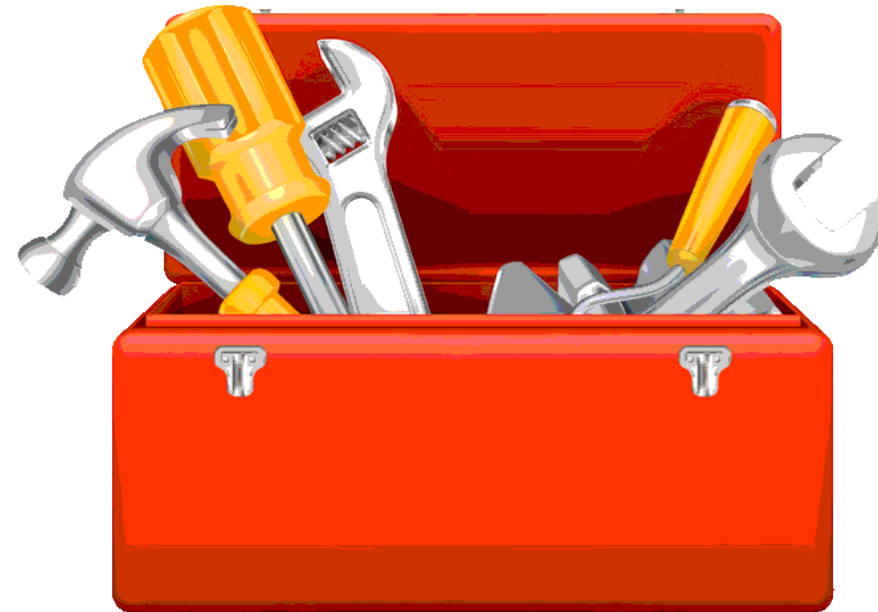
What Should Be In Your Wage & Hour Compliance Tool Kit?

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



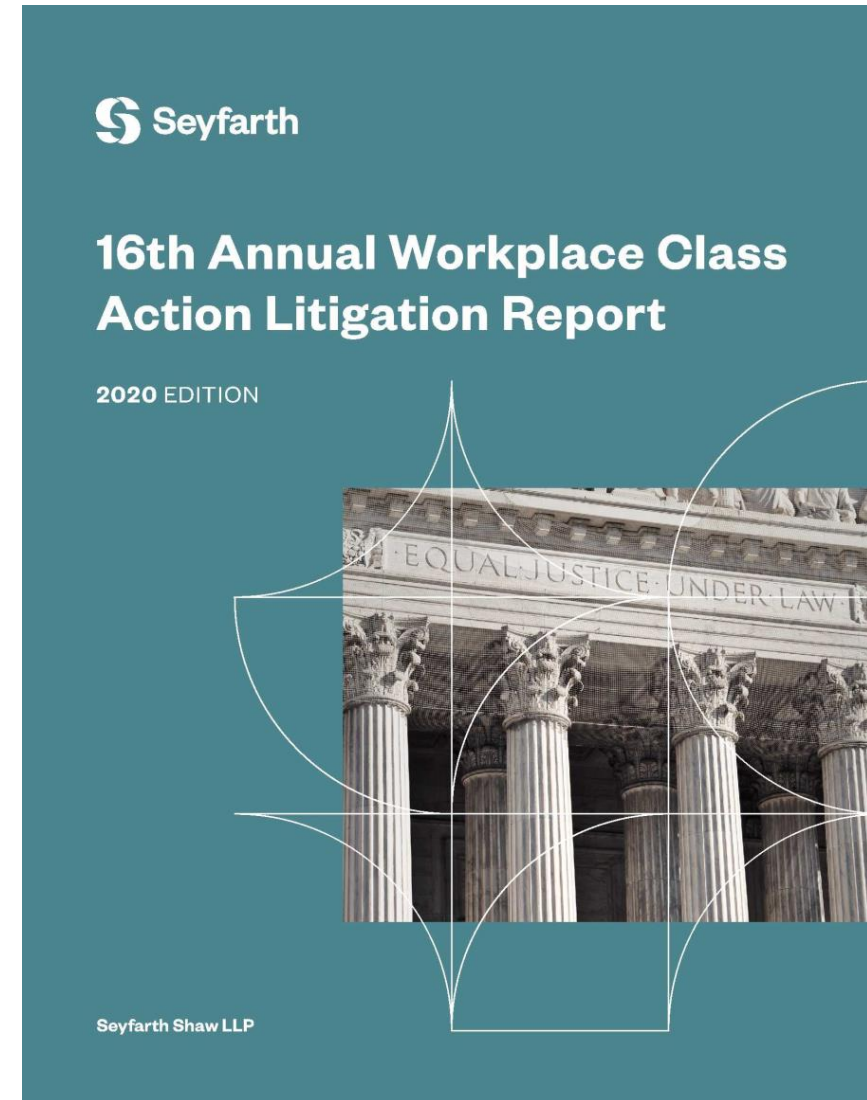
Corporate Tool Kit Issues For Employment Discrimination

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



How To Order The 16th Annual Workplace Class Action Report

- Check out the Workplace Class Action Report website available at www.workplaceclassactionreport.com
- The Report is available to clients of the firm and interested corporate counsel. To request a FREE copy of the report, please e-mail your request to ClassActionReport@seyfarth.com.
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- For Updates And Analysis On Issues Impacting The Workplace Visit www.workplaceclassaction.com



thank
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