



**Book Launch Event For The 17th
Annual Workplace Class Action
Litigation Report**

**Chicago, Illinois
February 3, 2021**



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Seyfarth Shaw LLP

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Introduction



Laura Maechtlen
Partner
Seyfarth Shaw LLP



Today's Speakers



Gerald L. Maatman, Jr.
Partner
Seyfarth Shaw LLP



Keith E. Sonderling
Commissioner
EEOC



Workplace Class Action Litigation Report Media Coverage

LAW.COM

THE
AM LAW LITIGATION DAILY

 **REUTERS**

WESTLAW NEWS JANUARY 5, 2021 / 5:59 PM / UPDATED 17 DAYS AGO

Why the Cash-Hungry Economy Still Yielded Big Workplace Class Action Settlements

:A lot of people thought that settlements had ground to a halt and that companies would want to have these cash outlays. Well, as the year went on the exact opposite occurred," says Seyfarth Shaw's Gerald Maatman Jr., the general editor of the firm's annual workplace class action report.

Pandemic spurs record number of rulings in workplace class actions- Seyfarth

Bloomberg Law

Class Action Settlements Rose, Covid Backlash Looms: Report (1)

MONEY



COVID-19 sparks more than 1,000 workplace-related lawsuits in 2020 as employees complain about safety, wages

Paul Davidson USA TODAY

Published 10:01 a.m. ET Jan. 5, 2021 | Updated 4:21 p.m. ET Jan. 5, 2021

ABAJOURNAL

After Setting A New Record In 2020, Workplace-Related Litigation Will Remain A Source Of Significant Financial Exposure For Employers

Forbes

COVID-19 spurred more than a thousand workplace lawsuits in 2020, class action report says



U.S. Equal Employment Opportunity Commission – What Employers Ought To Expect In 2021

Keith E. Sonderling
Commissioner, EEOC
February 3, 2021

**thank
you**

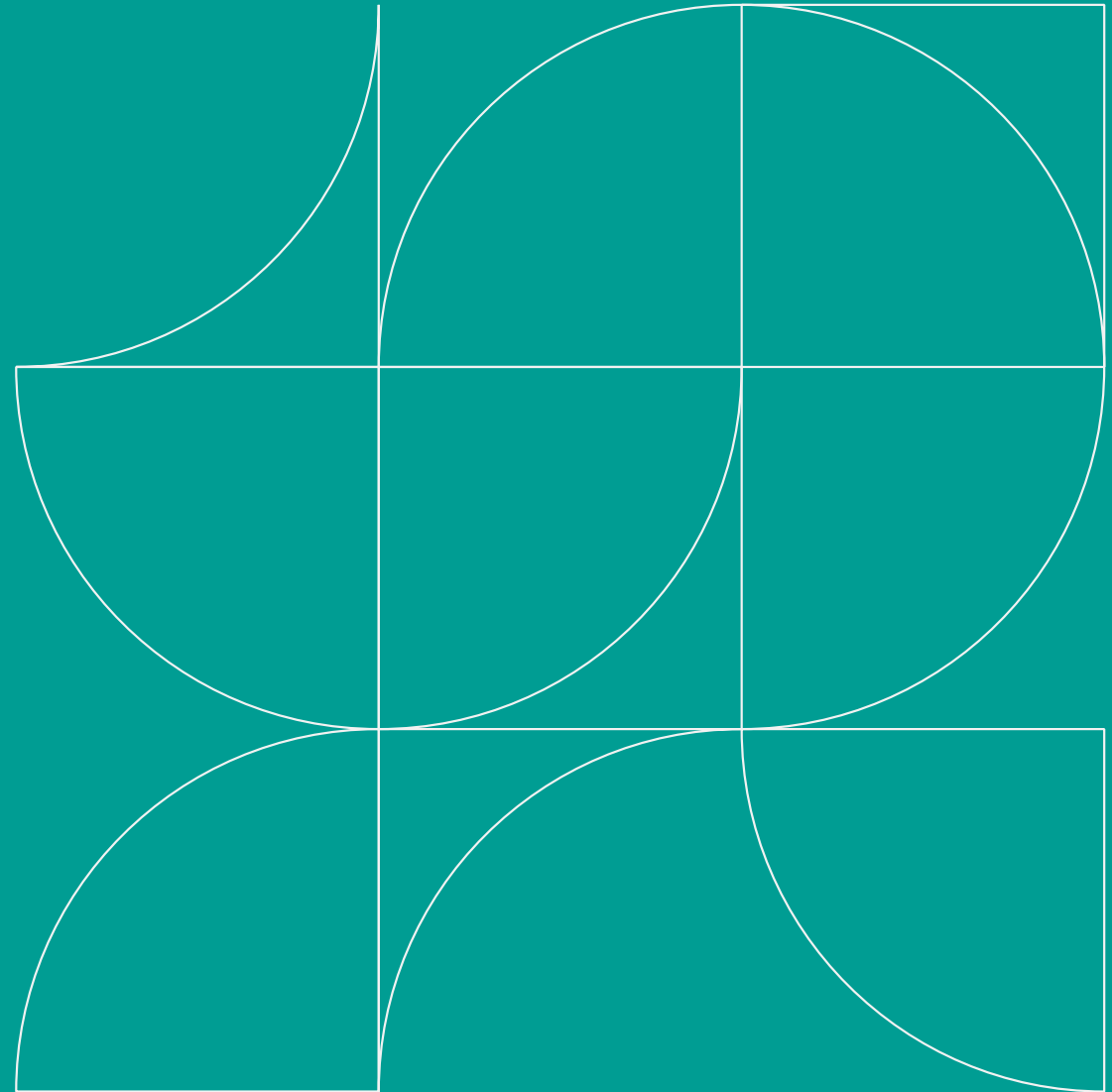
**Keith E. Sonderling
Commissioner**

U.S. Equal Employment Opportunity Commission



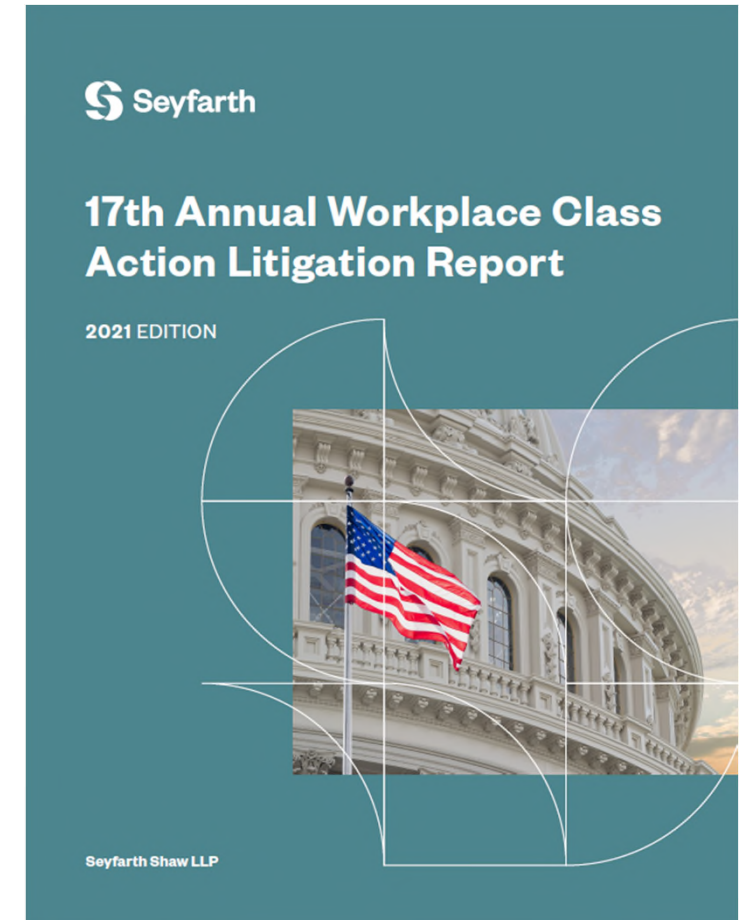
Book Launch For 17th Annual Workplace Class Action Litigation Report

Gerald L. Maatman, Jr.
February 3, 2021



Key Trends In Workplace Class Action Litigation In 2020

- 01** The Impact Of The COVID-19 Pandemic
- 02** Change Is The New Normal
- 03** Increase In Class Action Settlement Numbers In 2020
- 04** Slowed Governmental Enforcement Litigation In 2020
- 05** Rise Of Wage & Hour Certification Numbers

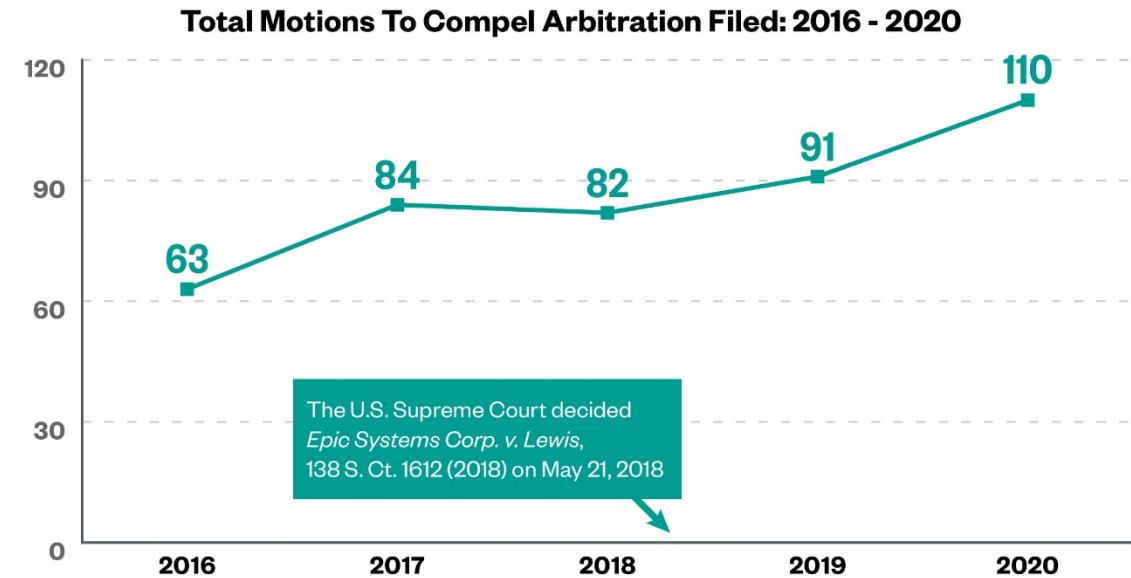


Trend 1: The Impact Of The COVID-19 Pandemic

- Stay-at-home and lockdown orders forced the large-scale transition of employees to telework and work-from-home
- Shutdown of businesses translated to furloughed or laid off workers
 - WARN Act and termination claims proliferated
- 1,005 COVID-specific workplace lawsuits were filed across 47 states during the pandemic
- It is anticipated that workplace class action litigation in areas like workplace bias/discrimination, wage & hour, and health & safety are apt to be filed in the wake of COVID-19 during 2021

Trend 2: Change Is The New Normal

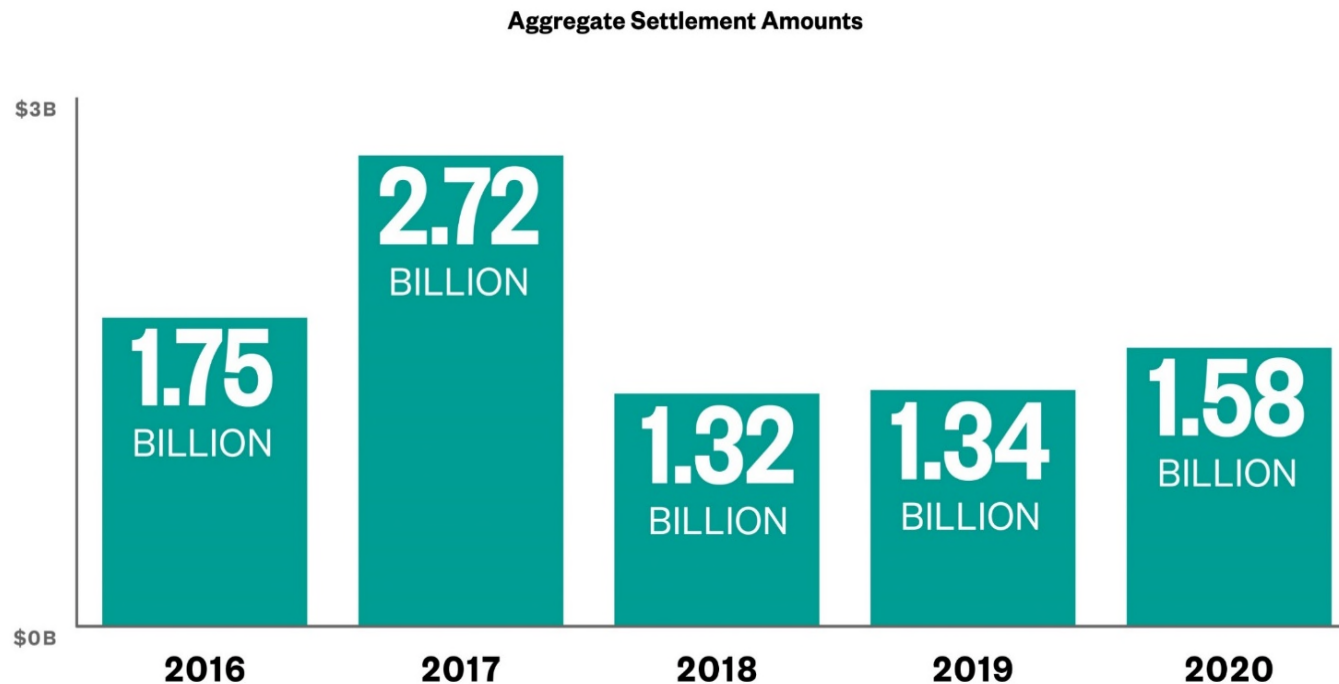
- The Effect Of Pro-Business Policies
 - The impact of prior rulings such as *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) - allowing for the enforcement of workplace arbitration agreements - continued to be felt with courts upholding class action waivers to dismantle class and collective actions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



Trend 2: Change Is The New Normal

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

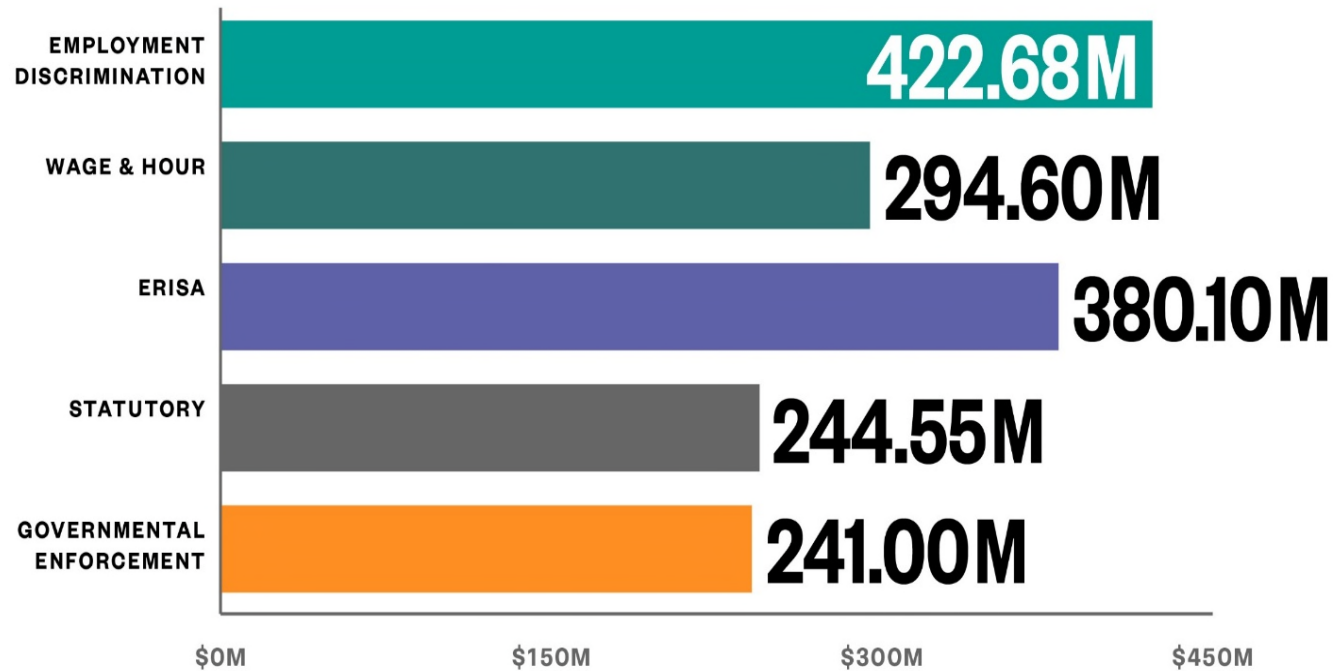
Trend 3: Increase In Class Action Settlement Numbers In 2020



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

Trend 3: Increase In Class Action Settlement Numbers In 2020

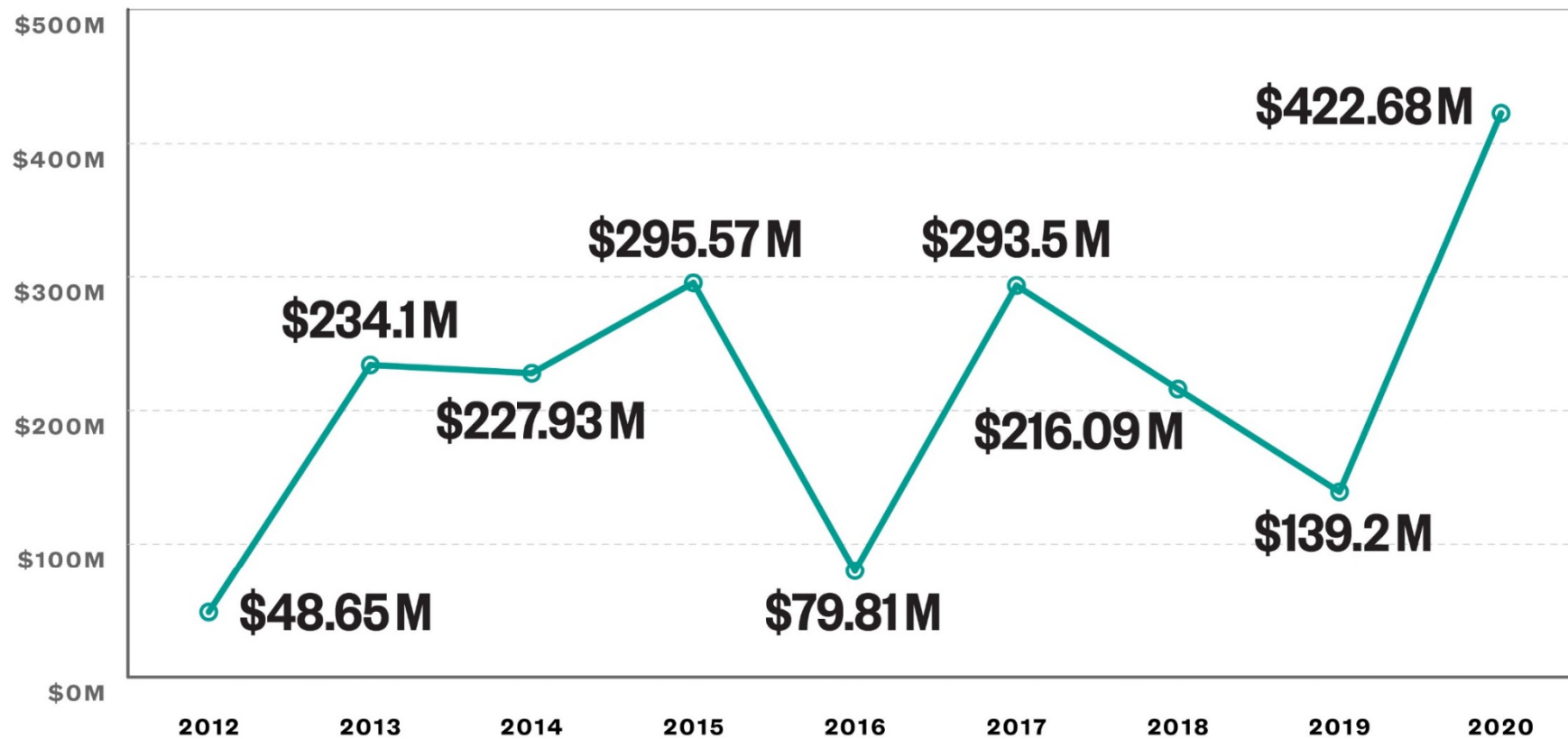
Settlement Amounts By Class Action Type



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

Trend 3: Increase In Class Action Settlement Numbers In 2020

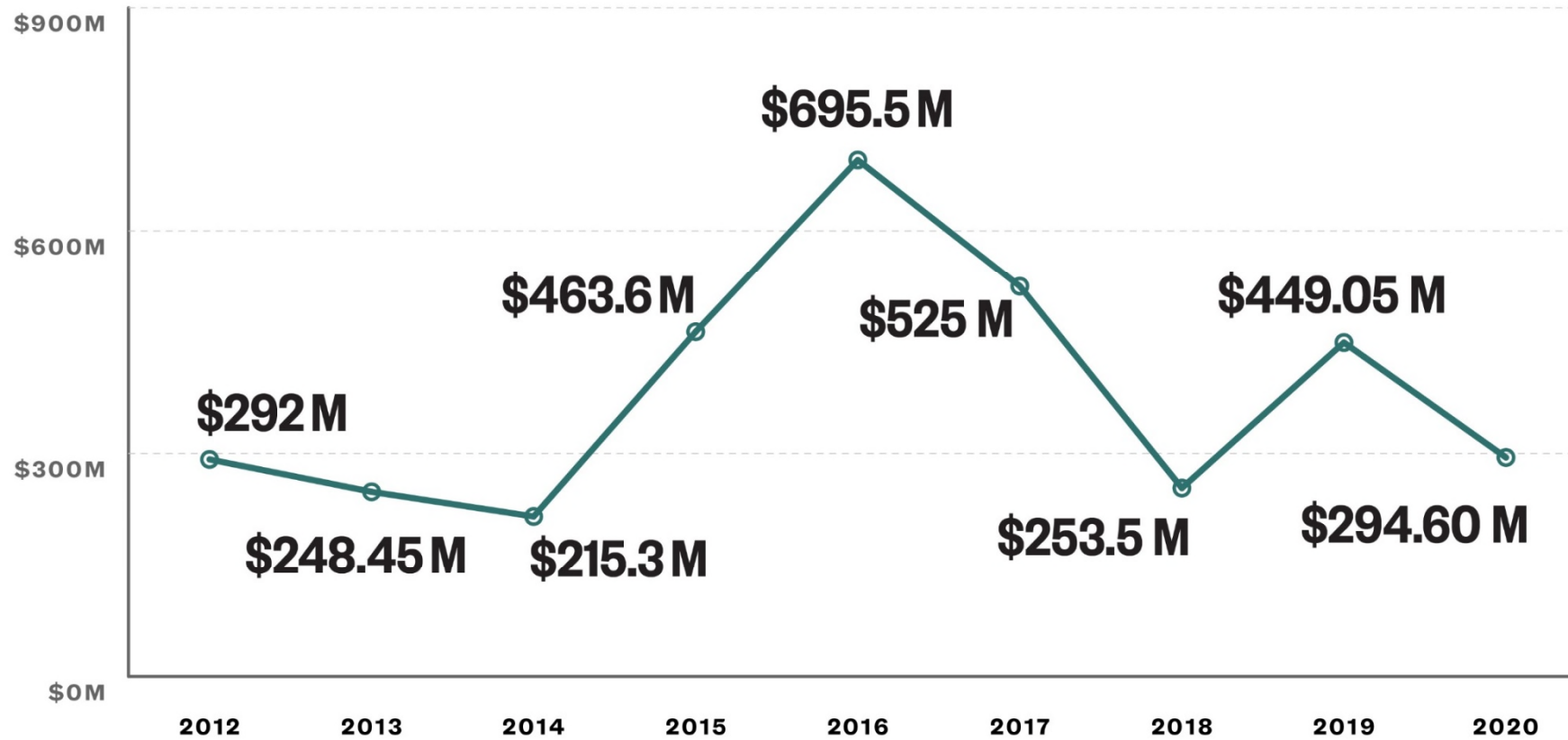
- Employment discrimination cases saw the highest increase in 2020, totaling \$422.68 million



Value Of Top 10 Employment Discrimination Class Action Settlements

Trend 3: Increase In Class Action Settlement Numbers In 2020

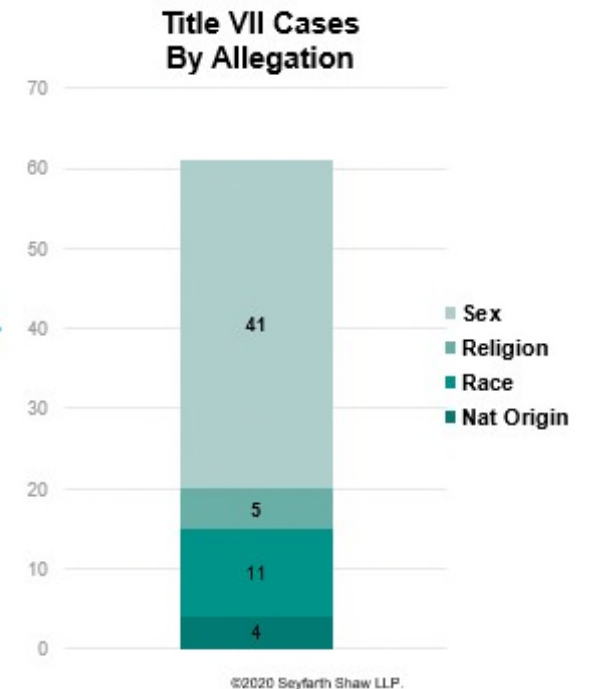
- The top 10 wage & hour settlement total declined from last year to \$294.60 million



Value Of Top 10 Wage & Hour Class Action Settlements

Trend 4: Slowed Governmental Enforcement Litigation In 2020

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

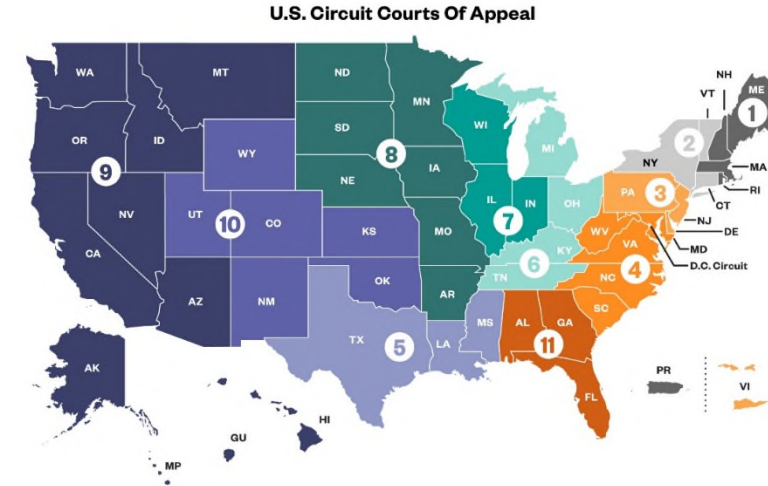


Trend 4: Slowed Governmental Enforcement Litigation In 2020

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

Trend 5: Rise Of Wage & Hour Certification Numbers

- More class and collective actions were certified in 2020 than any other of workplace law space
- Employers saw the higher rate of success by workers on first-stage conditional certification motions than at any time in the previous 15 years
 - Of 286 wage & hour certification decisions in 2020, plaintiffs won 84%
- This trend is expected to increase in 2021



Analysis Of Decisions By Circuit Court

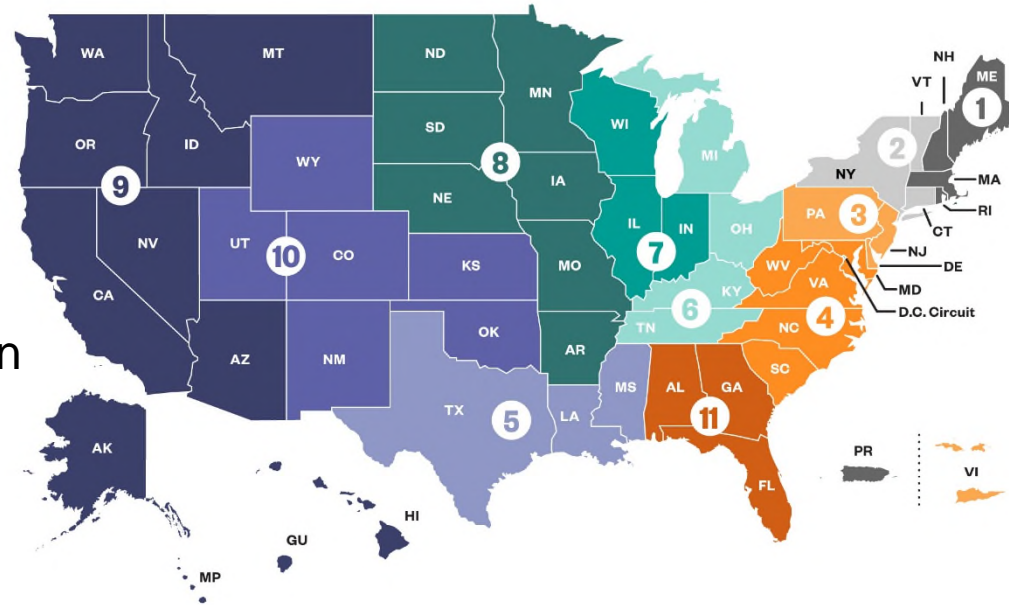
CIRCUIT COURT ① ② ③ ④ ⑤ ⑥ ⑦ ⑧ ⑨ ⑩ ⑪ D.C. Circuit Federal Claims

| | ① | ② | ③ | ④ | ⑤ | ⑥ | ⑦ | ⑧ | ⑨ | ⑩ | ⑪ | D.C. Circuit | Federal Claims |
|--|---|----|----|----|----|----|----|----|----|----|----|--------------|----------------|
| Employment Discrimination Decisions | | | | | | | | | | | | | |
| Certification Motions Granted | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 4 | 0 | 0 | 0 | 0 |
| Certification Motions Denied | 0 | 1 | 0 | 0 | 0 | 1 | 2 | 1 | 1 | 0 | 1 | 0 | 0 |
| Sub-Total: 5 Conditional Certifications Granted / 7 Conditional Certifications Denied | | | | | | | | | | | | | |
| ERISA Decisions | | | | | | | | | | | | | |
| Certification Motions Granted | 1 | 3 | 0 | 0 | 0 | 0 | 2 | 1 | 2 | 0 | 2 | 0 | 0 |
| Certification Motions Denied | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 |
| Sub-Total: 11 Granted / 5 Denied | | | | | | | | | | | | | |
| FLSA Certification Decisions | | | | | | | | | | | | | |
| Conditional Certification Motions Granted | 1 | 40 | 15 | 20 | 30 | 28 | 17 | 22 | 29 | 16 | 10 | 1 | 2 |
| Conditional Certification Motions Denied | 1 | 3 | 8 | 3 | 5 | 3 | 4 | 3 | 7 | 1 | 4 | 1 | 0 |
| Decertification Motions Granted | 1 | 1 | 0 | 0 | 0 | 0 | 3 | 0 | 1 | 0 | 0 | 0 | 0 |
| Decertification Motions Denied | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 1 | 3 | 0 | 0 | 0 | 0 |
| Sub-Total: 231 Conditional Certifications Granted / 43 Conditional Certifications Denied 6 Decertification Motions Granted / 6 Decertification Motions Denied | | | | | | | | | | | | | |
| Total: 247 Total Certification Motions Granted / 55 Total Certification Motions Denied 6 Decertification Motions Granted / 6 Decertification Motions Denied | | | | | | | | | | | | | |

Trend 5: Rise Of Wage & Hour Class Certification Numbers

- 286 FLSA certification rulings were issued in federal courts, an increase from 267 rulings in 2019
- 274 of these were first-stage motions for conditional certification of wage & hour collective actions, with Plaintiffs succeeding at a rate of 84%
- 12 were second-stage motions for decertification, with employers succeeding at 58%, a lower rate than prior years
- Plaintiffs filed more cases in the Second and Ninth Circuits than anywhere else, as both tended to be friendlier jurisdictions to employees
- The Fifth and Sixth Circuits also continued a trend with high volume rulings that favored workers in conditional certifications

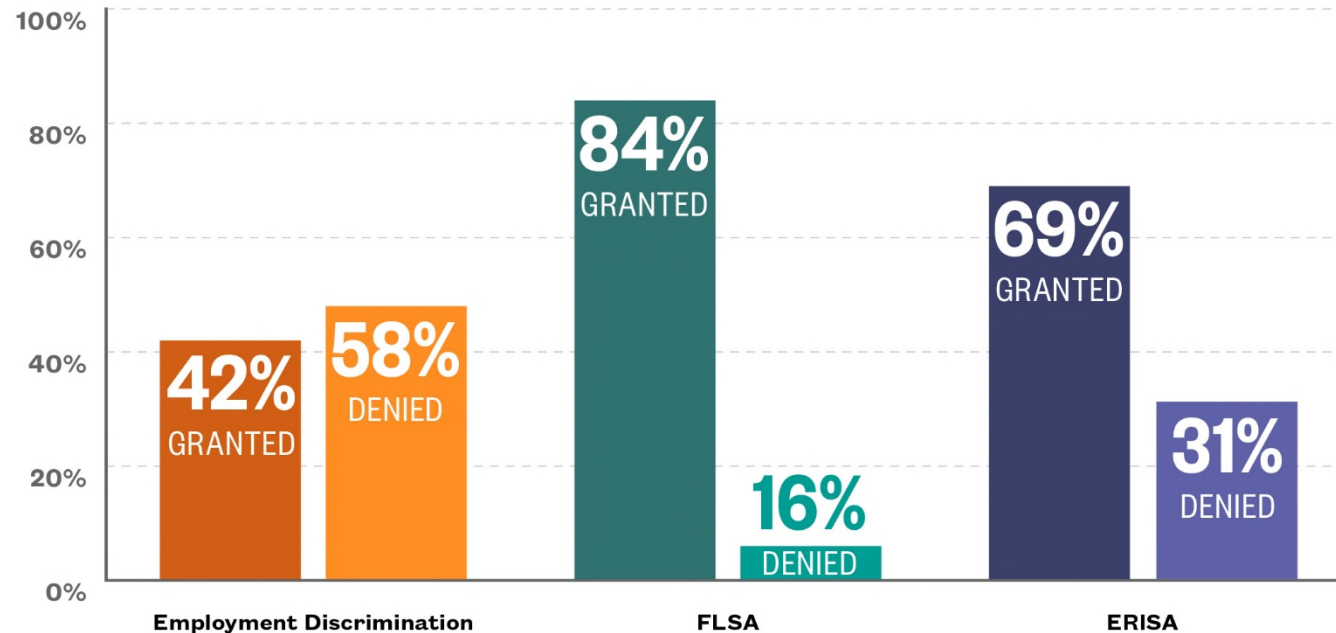
U.S. Courts Of Appeal – Analysis Of FLSA Certification Decisions



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

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

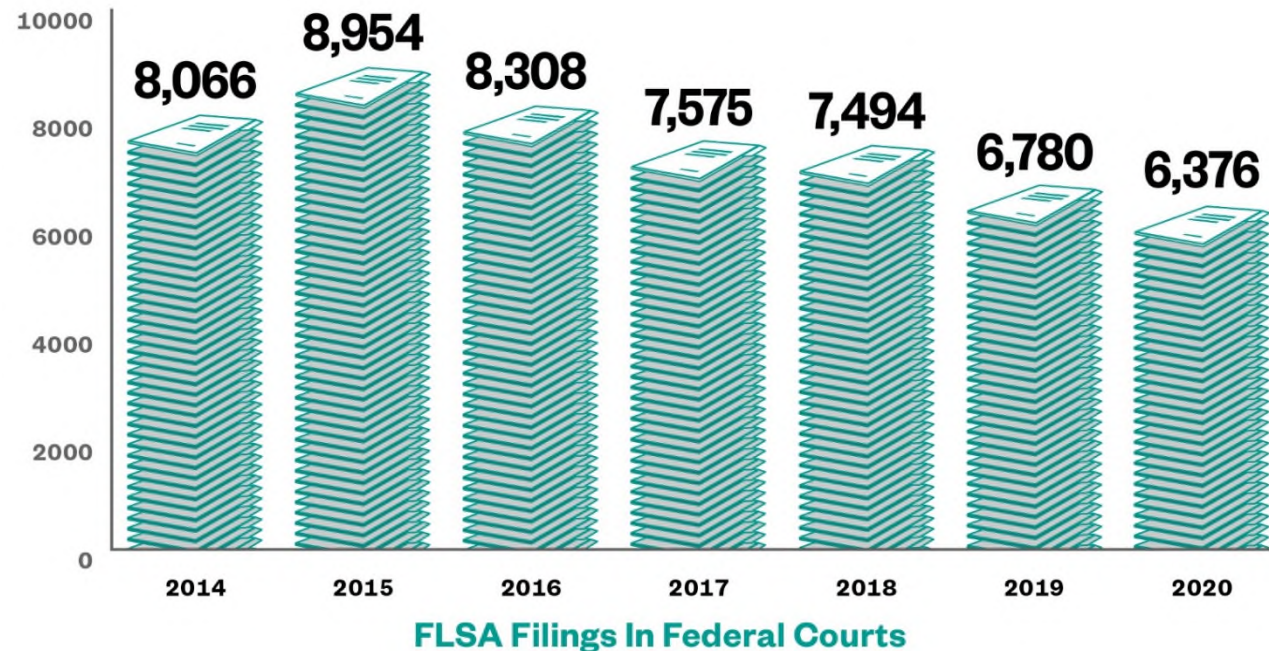
Trend 5: Class Certification Numbers In 2020



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

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

Trend 5: Wage & Hour Litigation Risks



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

What Do The Developments Of 2020 Mean For 2021?

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

What Can Employers Do?

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

thank you

contact information

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