Seyfarth

17th Annual Workplace Class Action Litigation Report

2021 EDITION

Seyfarth Shaw LLP

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Dear Clients:

This past year has been like no other. COVID-19 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 2020 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 2021 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 2020, and analyzes the 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 2020 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 1,548 decisions analyzed in the Report.

The cases decided in 2020 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. Employers also can expect that class action and collective action lawsuits increasingly will combine claims under multiple statutes, thereby requiring the defense bar to have a cross-disciplinary understanding of substantive employment law as well as the procedural peculiarities of opt-out classes under Rule 23 of the Federal Rules of Civil Procedure and the opt-in procedures in FLSA and ADEA collective actions.

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 Tom Ahlering, 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, Pamela Devata, Ada Dolph, William J. Dritsas, Alex Drummond, Chantelle Egan, Noah A. Finkel, Matt Gagnon, Loren Gesinsky, Mark Grajski, Timothy F. Haley, Ari Hersher, Timothy L. Hix, Eric Janson, Louisa Johnson, David D. Kadue, Lynn Kappelman, Daniel B. Klein, Ronald J. Kramer, Richard B. Lapp, Kristina Launey, Aaron Lubeley, Laura Maechtlen, Richard P. McArdle, Helen M. McFarland, Condon A. McGlothlen, Kristin McGurn, Andrew M. McNaught, Christina F. Meddin, Jon Meer, Katherine Mendez, Gina Merrill, 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 Ross, David J. Rowland, Christian Rowley, Emily Schroeder, Sam Schwartz-Fenwick, Andrew Scroggins, 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, Howard Wexler, Daniel Whang, Robert S. Whitman, and Tom Wybenga.

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 2021

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.*, *Salter, et al. v. Quality Carriers, Inc.*, 974 F.3d 959 (9th Cir. 2020)). If a decision is unavailable in bound format, we have utilized a Lexis cite from its electronic database (*e.g.*, *Camara, et al. v. Mastro's Restaurants LLC*, 2020 U.S. App. LEXIS 8370 (D.C. Cir. Mar. 17, 2020). If a ruling is not contained in an electronic database, the full docketing information is provided (*e.g.*, *New York v. U.S. Department Of Labor*, Case No. 20-CV-3020 (S.D.N.Y. Aug. 3, 2020)).

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 *2021 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. Windsor*, 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%.

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A. Executive Summary

Over the past decade, the plaintiffs' bar has escalated the prosecution of workplace class action litigation. As the workplace class action litigation landscape has expanded, the risks have grown exponentially, and the defense of class action litigation has transformed. In this unique year of COVID-19, this trend has accelerated.

Today, workplace class actions remain at the top of the list of challenges that keep business leaders up at night. Whereas an adverse judgment has the potential to bankrupt a business, adverse publicity from a threatened or ongoing class action has the potential to eviscerate market share. At the same time, negotiated resolutions bring the potential for "copy-cat" class actions and "follow on" claims, whereby multiple groups of plaintiffs' lawyers create a domino effect of litigation filings that challenge corporate policies and practices in numerous jurisdictions at the same time or in succession. Hence, workplace class actions can impair a corporation's business operations, jeopardize the careers of senior management, and cost millions of dollars to defend.

For these reasons, the plaintiffs' bar has grown in numbers and shifted tactics to attempt to capitalize on such potentialities. Skilled plaintiffs' class action lawyers and governmental enforcement litigators are continuing to develop new theories and approaches to the successful prosecution of complex workplace litigation and government enforcement lawsuits. Rulings by federal and state courts are continually adding to this patchwork quilt of compliance problems and litigation management issues. As a result, managing and combating these risks commands an evolving and strategic approach.

The events of the past year demonstrate that the array of problems facing businesses are continuing to evolve and become more complex. The COVID-19 pandemic created new challenges and new laws, which led to new types of workplace issues, new remote-work challenges, and new class theories that are likely to become part of the fabric of complex workplace litigation for years to come.

As the business-friendly policies of the Trump Administration gave way to a reduced emphasis on governmental enforcement litigation pursued by the U.S. Equal Employment Commission ("EEOC") and other federal agencies, the plaintiffs' class action bar filled the void. They continued aggressively to pursue and to certify class and collective actions in record numbers, particularly in the wage & hour space.

Adding to this mosaic of challenges in 2021 is the coming change as the White House flips from red to blue and the incoming Biden Administration commits to a renewed focus on workers' rights. Employers should anticipate that, while leadership of the EEOC will remain in place through the short-term, the Biden Administration will bring policy changes on other fronts that may take shape through legislative efforts, agency rulemaking, and enforcement litigation.

Contrary to the pro-business approach of the Trump Administration, many of these efforts may be intended to expand the rights, remedies, and procedural avenues available to workers and, as a result, expand workplace class action litigation. As we move into 2021 and beyond, employers should expect changes that will represent stark reversals in policy and have a cascading impact on private class action litigation.

The combination of these factors will challenge businesses to integrate their litigation and risk mitigation 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.

B. Key Trends Of 2020

An overview of workplace class action litigation developments in 2020 reveals five key trends.

First, the COVID-19 pandemic had a significant impact on all aspects of life in 2020. Its impact extended to the legal system in general and workplace class actions in particular. 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 laid off or furloughed workers, and many businesses shut down or postponed critical operations. The pace of court filings, however, did not match this trend as the plaintiffs' bar filed a slew of COVID-19-related class actions. The pandemic spiked class actions (of all varieties) and litigation over all types of workplace issues. As the pandemic took hold, the plaintiffs' bar retooled their class action theories to match. As businesses scrambled to confront the realities of stay-at-home and closure orders, their actions drew claims that, for instance, layoffs caused an unintended disparate impact on protected groups or failed to comply with WARN Act requirements. As businesses rushed to adopt safety requirements, their actions drew claims that they failed to pay minimum wage or overtime for compensable work hours, failed properly to reimburse employee expenses, failed to provide leave required under the patchwork of state and federal laws enacted in response to the pandemic, or failed to go far enough in protecting workers from COVID-19. Employers are apt to see these workplace class actions expand and morph as businesses restart operations in the wake of COVID-19.

Second, 2020 signaled that change is the new normal. As many pro-business precedents continued to roll out and take hold in 2020, voters elected to turn the White House from red to blue and, as a result, likely precipitated changes in numerous areas that will expand worker rights. The U.S. Supreme Court's transformative ruling in *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612 (2018), continued to profoundly impact the prosecution and defense of workplace class actions in 2020. *Epic Systems* reaffirmed that the Federal Arbitration Act requires courts to enforce agreements to arbitrate according to their terms, including mandatory agreements with terms providing for individual proceedings and class action waivers. During 2020, *Epic Systems* continued to shift class action litigation dynamics in critical ways as it led to more front-end attacks on proposed class and collective actions and, as the result of such attacks, led to the defense bar dismantling more workplace class and collective actions by fracturing those proceedings and diverting them into individual arbitrations. The past year demonstrated that change is a constant, however, and, as the Biden Administration takes office, advocates for workers and labor may ramp up their activities and efforts to shift this landscape. If Democrats regain control of the Senate during the Biden Administration, employers may see new legislative efforts to overturn the *Epic Systems* regime and eventually may see those efforts gain traction and succeed in altering the force of the Federal Arbitration Act in the workplace. Along with the arbitration landscape, the shift in Administrations is likely to bring increased regulation of businesses, renewed enforcement efforts, and policy changes at the agency level that will result in efforts to abandon or overturn pro-business rules of the Trump Administration.

Third, somewhat counterintuitively, the aggregate monetary value of workplace class action settlements increased in 2020, as settlement numbers went up and plaintiffs' lawyers and government enforcement actions monetarized their claims at higher rates. Many employers and commentators alike expected the pandemic to depress the size and pace of settlements in the new "cash is king" approach to the business cycle. Instead, workplace class action litigation defied the odds. The numbers show that the plaintiffs' bar was successful in converting case filings into significant settlement numbers at higher rates than the past two years. After settlement numbers reached an all-time high in 2017, they plummeted to their lowest level ever in 2018, before experiencing a mild recovery in 2019. This past year, settlement numbers continued their upward trend in several areas, signaling a return to prominence of these bet-the-company cases. The top ten settlements in various employment-related class action categories totaled $1.58 billion in 2020, compared to $1.34 billion in 2019, and $1.32 billion in 2018. Relative to private plaintiff discrimination class actions, the monetary value of the top ten private plaintiff settlements in 2020 sky-rocketed to $422.68 million, a substantial increase as compared to $137.35 million in 2019 and $216.09 million in 2018. Government enforcement litigation settlements likewise registered a substantial increase to $241 million, compared to $57.52 million in 2019 and $126.70 million in 2018. ERISA class actions saw a slight increase to $380.10 million, as compared to $376.35 million in 2019 and $313.4 million in 2018. The only areas of decline were private-plaintiff wage & hour and statutory class action settlements. The top ten wage & hour settlements garnered $294.60 million in 2020, as compared to the aggregate settlement figures of $449.05 million in 2019 and $253.50 million in 2018, and the top ten statutory settlement garnered $244.55 million in 2020, as compared to the aggregate figures of $319.65 million in 2019 and $411.15 million in 2018.

Fourth, government enforcement litigation slowed considerably. Although the value of government enforcement settlements went up, agencies like the EEOC downsized their litigation enforcement programs and brought fewer lawsuits in 2020 than in any year of the past decade. Most significant for employers, during the past year, the EEOC undertook multiple initiatives that reflected a shift away from systemic litigation as a priority. First, on February 4, 2020, Chair Janel Dhillon announced five priorities for 2020, none of which included a systemic litigation focus, and reiterated that litigation is "truly a last resort" for the Commission. Second, on March 10, 2020, the EEOC released its Resolution Concerning the Commission's Authority to Commence or Intervene in Litigation wherein, in short, it removed authority over EEOC litigation activities from the General Counsel and reassigned the authority to commence or intervene in systemic discrimination litigation solely to the Commissioners. Third, on October 8, 2020, the EEOC released a notice of proposed rulemaking that overhauled the conciliation process with the goal of improving its transparency and, thus, its overall effectiveness. The agency's filings over the past year reflect this trend and a continued shift away from systemic litigation. 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 and 13 in FY 2020. 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 and 101 in FY 2020. Because the EEOC's current leadership of a majority of Trump-appointed Commissioners will remain in place through at least mid-2022, it is likely that the EEOC will remain on its current trajectory into the start of a Biden Presidency.

Fifth, wage & hour litigation remained the sweet spot for the plaintiffs' class action bar. Based on sheer volume and statistical numbers, workers certified more class and collective actions in the wage & hour space in 2020 as compared to any other area of workplace law. Further, while evolving case law precedents and new defense approaches resulted in many good outcomes for employers opposing class and collective action certification requests in 2020, the plaintiffs' bar achieved a higher rate of success on first-stage conditional certification motions in 2020 than in any other year of the past 15 years. Despite the unprecedented pandemic-related court closures, the overall number of rulings increased in 2020, and plaintiffs prevailed on those first-stage motions at an unprecedented rate. Of the 286 wage & hour certification decisions in 2020, plaintiffs won 231 of 274 conditional certification rulings (approximately 84%) and lost six out of 12 decertification rulings (approximately 50%). By comparison, employers saw 267 wage & hour certification decisions in 2019, and 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 increasing rate, while their odds of clearing the decertification hurdle continue to hover around 50/50. This state of affairs is expected to explode in 2021 with a more worker-friendly U.S. Department of Labor apt to make supposed wage theft its enforcement priority and to shift its regulatory focus toward a plaintiff-friendly agenda.

C. Significant Trends In Workplace Class Action Litigation In 2020

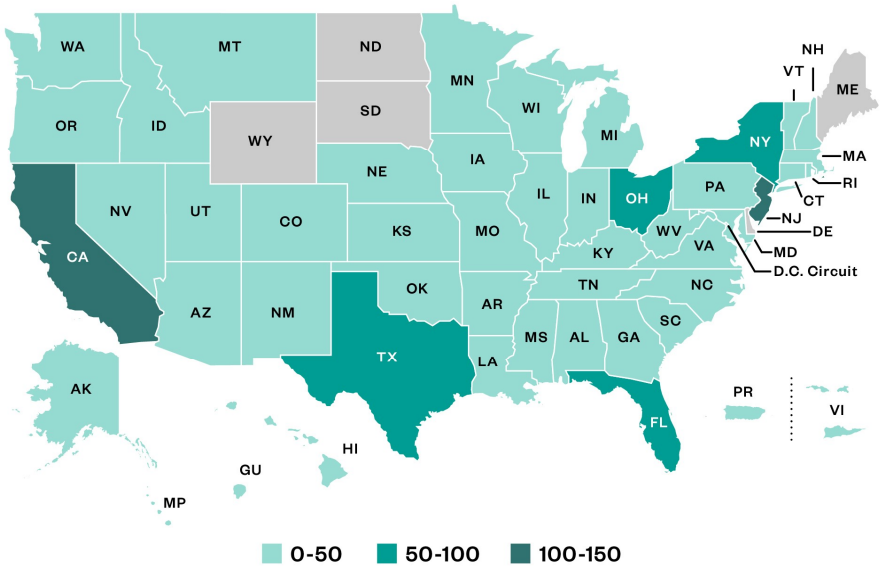
(i) The Impact Of COVID-19

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.

The pace of court filings, however, did not match this trend as the Plaintiffs' bar retooled their theories to match. During 2020, COVID-19 gave rise to at least 1,005 workplace lawsuits, filed across 47 states and 28 industries. As business operations reopen in 2021, even more coronavirus-related lawsuits are expected in 2021.

As the following graphic demonstrates, the plaintiffs' bar focused these lawsuits in traditionally employee-friendly jurisdictions, as they filed 181, or 18%, of these suits in California, followed in numbers by New Jersey (150), Florida (95), New York (68), and Ohio (66).

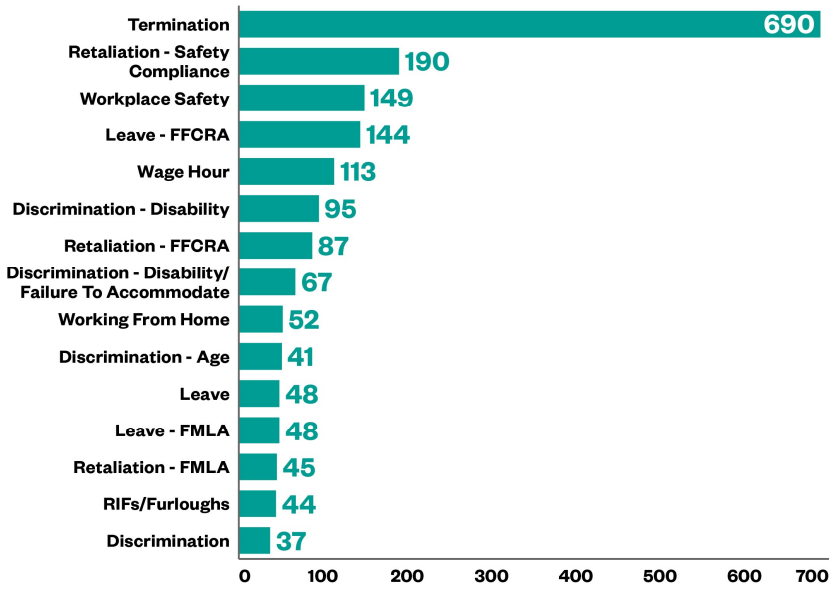
2020 COVID Lawsuits By State



Reflecting the creativity of the plaintiffs' bar, in the lawsuits filed to date, plaintiffs have asserted 46 different issues or theories of liability, with five primary theories as the key drivers of COVID-19 workplace litigation, including: (1) alleged failure to provide a safe working environment; (2) discrimination claims, particularly relating to disability and age; (3) leave claims under the FMLA and the patchwork of federal, state, and local laws enacted in response to the pandemic; (4) retaliation and whistleblower claims, often attached to either a workplace safety or leave issue; and (5) wage & hour lawsuits arising out of the pandemic.[1]

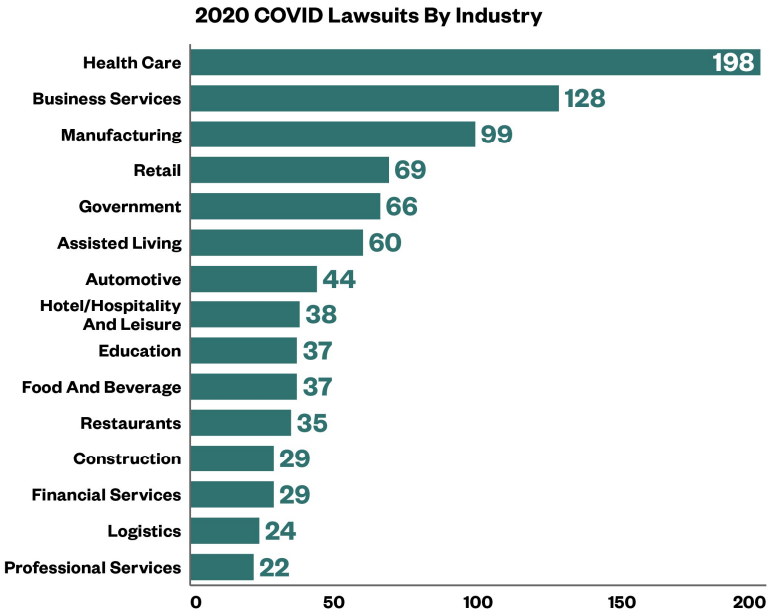
The following graphic illustrates the breakdown by issue.

2020 COVID Lawsuits By Issue



[1] An analysis of certification rulings in COVID-19 class actions in 2020 in state courts is set forth in Chapter VII, Section D, and for federal courts in Chapter IX.

Understandably, in-house legal professionals overwhelmingly cite workplace liability as the biggest legal risk they face related to the global health crisis. The lawsuits were spread across a broad array of industries, with highest numbers targeting healthcare and business services, as illustrated by the following chart. Employers of all industries and sizes, however, are continuing to ready themselves for workplace litigation that they anticipate is still in the pipeline, as the new theories developed in response to the pandemic become part of the fabric of workplace litigation for years to come.



We anticipate that the tide of workplace class action litigation will continue to rise in several key areas such as discrimination and workplace bias, wage & hour, as well as on the health & safety front. Employers are apt to see these workplace class actions expand and morph as businesses restart operations in 2021 in the wake of COVID-19, particularly as courts roll out a patchwork quilt of rulings.

These filings reflect the creativity of the plaintiffs' bar, particularly in the workplace safety arena. The Occupational Safety & Health Act ("OSHA") requires that employers provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." In the context of COVID-19, the OSHA advised employers to follow guidelines from the CDC, such as sanitizing surfaces and ensuring social distancing. Whereas federal administrative guidance does not generally give rise to a private cause of action, members of the plaintiffs' bar attempted to shoehorn failures to comply into claims for public nuisance as well as claims for breach of duty to protect the health and safety of employees.

As lawsuits rolled in from employees who alleged that they were "encouraged" to continue attending work, that they were prevented from adequately washing hands or sanitizing workstations, and that their employers' efforts fell short of providing protection of their workers' health, courts issued a series of rulings as to whether those alleging "failure to protect" can state a viable claim, particularly if they did not contract the disease. A federal court in Missouri in *Rural Community Workers Alliance v. Smithfield Foods, Inc.*, No. 20-CV-6063 (W.D. Mo. May 5, 2020), for instance, granted a motion to dismiss claims that an employer failed to protect employees at a meat processing plant, and declined to hear the case pursuant to the primary jurisdiction doctrine to allow the OSHA to consider the issues. An Illinois state court, in *Massey v. McDonald's Corp.*, No. 2020-CH-04247 (Cir. Ct. Cook County June 3, 2020), by contrast, refused to toss accusations by a proposed class of Chicago-based employees that their employer failed to do enough to protect them during the ongoing pandemic. Further, a California state court in *United Farm Workers of America, et al. v. Foster Poultry Farms*, No. 20-CV-3605 (Cal. Super. Ct. Dec. 23, 2020), entered a tentative ruling approving a temporary restraining order to require an employer to follow CDC guidelines to keep its plant workers safe from COVID-19.

Despite the swell of filings, by the end of 2020, few cases raising COVID-related issues had matured to the class certification stage. As a result, few courts had considered whether the pandemic gave rise to concerns that aided plaintiffs in clearing certification hurdles, and the courts that considered such issues reached different conclusions. On April 10, 2020, for instance, a court in the Northern District of Illinois in *Money v. Pritzker*, No. 20-CV-02093 (N.D. Ill. April 10, 2020), declined to certify a class of state inmates concerned about their risk of COVID-19 infection because it found that each putative class member came with a unique situation and the imperative of individualized determinations rendered the case inappropriate for class treatment. On June 6, 2020, a court in the Southern District of Florida reached a different result in *Gayle v. Meade*, No. 20-CV-21553 (S.D. Fla. June 6, 2020). Focusing on the threat of a heightened risk of severe illness, despite the need for individualized assessment of each detainee's vulnerabilities to COVID-19, the court ruled that plaintiffs satisfied Rule 23's commonality requirement by pointing to common conduct, including failure to implement adequate precautionary measures and protocols, lack of access to hygiene products, and lack of social distancing. Companies should anticipate that, as employers continue to navigate the pandemic and filings work their way through the court system, 2021 will bring additional lawsuits and additional rulings on myriad issues that shape future litigation.

(ii) Change Is The New Normal

With the final election results in, and the White House set to turn "blue" for the next four years, employers can expect this change to bring shifts to the workplace class action landscape. Employers should anticipate that, while leadership of the EEOC will remain in place through the short-term, the Biden Administration will bring policy changes on other fronts that may take shape through legislative efforts, agency action and regulation, and enforcement litigation.

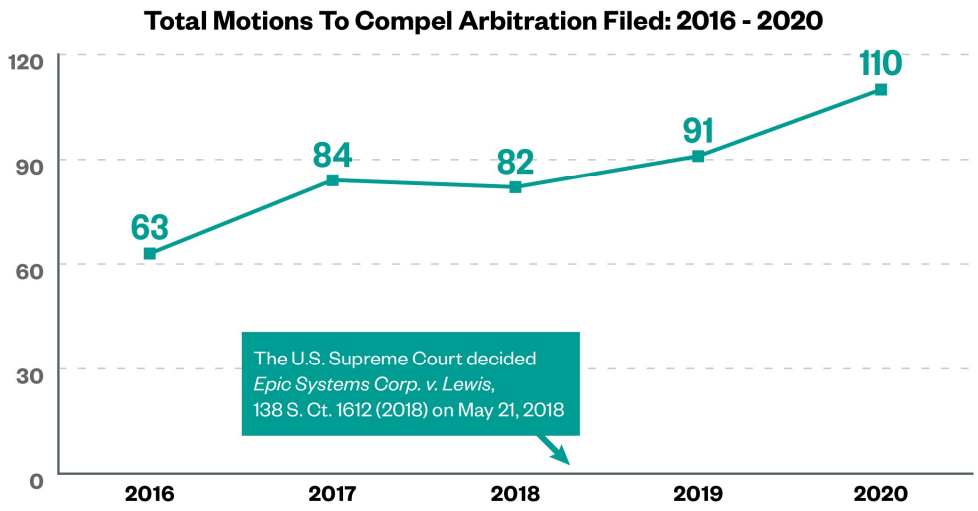
Contrary to the pro-business approach of the Trump Administration, many of these efforts may be intended to expand the rights, remedies, and procedural avenues available to workers and, as a result, have the potential to shake up the workplace class action landscape in several areas.

The U.S. Supreme Court issued one of the most transformative decisions on class action issues – *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612 (2018) – during the Trump Administration. In *Epic Systems*, the Supreme Court reaffirmed that the Federal Arbitration Act requires courts to enforce agreements to arbitrate according to their terms, including mandatory agreements with terms providing for individual proceedings and class action waivers. *Epic Systems* profoundly impacted the prosecution and defense of workplace class actions in 2020 as it led to more front-end attacks by employers on proposed class and collective actions, and the dismantling of more workplace class and collective actions. Clearly, workplace arbitration agreements with class action waivers are one of the most potent tools of employers to manage their risks of class action litigation.

As the Biden Administration takes office, however, advocates for workers and labor may ramp up their activities and efforts to shift this landscape. If Democrats regain control of the Senate during the Biden Administration, employers may see new legislative efforts to overturn the *Epic Systems* regime and eventually may see those efforts gain traction and succeed in altering the force of the Federal Arbitration Act in the workplace.

In the time period since the Supreme Court decided *Epic Systems*, businesses facing class action lawsuits have filed more motions to compel arbitration and with a higher rate of success than in the years before this landmark decision. While this trend was likely fueled by other factors as well – such as the simplicity and cost-effectiveness of arbitration and the Supreme Court's other "pro-business" arbitration rulings in recent years – the latest class action litigation statistics show that motions to compel arbitration have become an increasingly effective defense to class action lawsuits since *Epic Systems*.[2] The following graphic highlights the number of motions to compel arbitration that were filed, granted, and denied from 2016 to 2020:

[2] 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 Chapter IX.



Along with the arbitration landscape, the shift in administrations is likely to bring efforts to roll back pro-business rules promulgated under the Trump Administration. The U.S. Department of Labor (the "DOL"), in particular, is apt to attempt to shift priorities on multiple fronts under the Biden Administration. As a key element of Biden's platform, he decried "wage theft" and claimed that employers "steal" billions each year from working people by paying less than the minimum wage. As a candidate, Biden represented that he would build on efforts by the Obama Administration to drive an effort to dramatically reduce worker misclassification. Such statements, among others, signal that the Biden Administration will take efforts to reverse pro-business measures of the DOL under the Trump Administration that arguably narrowed application of minimum wage and overtime requirements.

On January 12, 2020, the DOL announced a final rule to revise and update its regulations interpreting joint employer status under the Fair Labor Standards Act (the "FLSA"). In the joint employer rule, the DOL provided updated guidance for determining joint employer status when an employee performs work for an employer that simultaneously benefits other individuals or entities, including a four-factor balancing test that considers whether the potential joint employer: (i) hires or fires the employee; (ii) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (iii) determines the employee's rate and method of payment; and (iv) maintains the employee's employment records. Important for employers, the DOL clarified that an employee's "economic dependence" on a potential joint employer does not dictate whether the entity is a joint employer under the FLSA and that a franchise or similar business model does not make joint employer status under the FLSA more or less likely.

After the joint employer rule became effective on March 16, 2020, 17 states and the District of Columbia filed suit alleging that the regulation violated the Administrative Procedures Act. On June 29, 2020, Judge Gregory Wood of the U.S. District Court for the Southern District of New York, in *New York v. Scalia*, No. 20-CV-1689 (S.D.N.Y. June 29, 2020), granted a motion to intervene filed by several business groups and, on September 8, 2020, vacated a portion of the rule. On November 6, 2020, the DOL and business groups appealed to the U.S. Court of Appeals for the Second Circuit. After Biden takes office, the DOL almost certainly will drop its participation in the appeal and, if the business groups fail, aim to issue joint employer regulations more consistent with Obama-era guidance.

On September 22, 2020, the DOL also unveiled a proposed regulation regarding classification of workers as independent contractors. In the proposed regulation, the DOL adopted a shorter, simpler test for classifying workers as independent contractors rather than employees covered by federal minimum wage and overtime law. It adopted an "economic reality" test and clarified that the concept of economic dependence turns on whether a worker is in business for himself or herself (*i.e.*, as an independent contractor) or is economically dependent on a potential employer for work (*i.e.*, as an employee). The proposed rule described five factors that should be

examined as part of the economic reality test, including two "core" factors – (i) the nature and degree of the worker's control over the work; and (ii) the worker's opportunity for profit or loss – that are afforded greater weight in the analysis.

The DOL subsequently fast-tracked the rule-drafting and public-comment process in an effort to solidify the regulation before President Trump left office and thereby provide employers a persuasive tool to fend off class actions accusing them of improperly classifying workers as independent contractors. The DOL under President Biden will have the authority to – and likely will – suspend the rule, along with any other Trump Administration regulation that failed to take effect before the transfer of power on January 20, 2021. Nonetheless, employers can expect business groups to defend the regulation, particularly in light of its favorable impact for the gig economy and other industries.

On November 25, 2020, the DOL also submitted a long-anticipated final rule to the White House Office of Information and Regulatory Affairs that would clarify the tip credit for hospitality industry employers. If adopted as proposed, the rule would allow employers to pay tipped employees a minimum wage of $2.13 per hour regardless of the amount of time they spend on non-tipped duties, such as cleaning their work stations. The new measure would eliminate the so-called 80/20 rule, which first appeared in the DOL's Field Operations Handbook, and required that, when tipped employees spend more than 20% of their workweek performing general preparation work or maintenance, their employers must pay full minimum wage for the time spent in such duties. Even if the DOL completes the rule before January 20, 2021, however, it will face an uncertain future once President Biden takes office. Similar to the joint employer rule, Democratic state attorneys general are likely to challenge the rule under the Administrative Procedure Act, and the Biden DOL is likely to embrace a return to the less-employer-friendly pre-Trump interpretations of the tip credit rules.

In sum, whereas employers saw an array of business-friendly rules promulgated by the Trump Administration, their futures remain uncertain as the Biden Administration takes charge. Employers can expect multiple shifts and realignments of rulemaking and enforcement priorities that may fuel and shape the contours of workplace class action litigation, particularly on the wage & hour front.

(iii) Class Action Settlement Trends

As measured by the top ten largest case resolutions in various workplace class action categories, overall settlement numbers increased in 2020, as compared to the prior two years. After settlement numbers reached an all-time high in 2017, those numbers fell dramatically in 2018, and then leveled off in 2019.

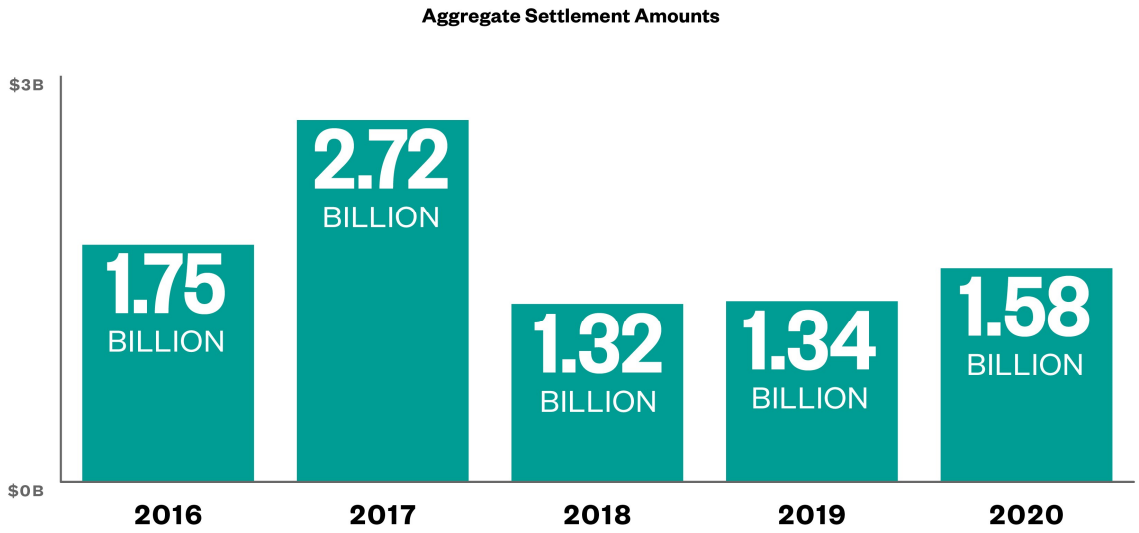
Although many employers and commentators alike expected the pandemic to depress the size and pace of settlements even further as businesses sought to conserve cash in the wake of the COVID-19 pandemic, workplace class action settlements defied expectations.

The numbers show that, in 2020, the plaintiffs' bar was successful in monetizing their class action filings at a higher level than the past two years, perhaps signaling the beginning of an upward climb toward the numbers we saw in 2016 and 2017.

These trends harken back to the U.S. Supreme Court's 2011 decision in *Wal-Mart, Inc. v. Dukes*, 564 U.S. 338 (2011). By tightening Rule 23 standards and raising the bar for class certification, *Wal-Mart* made it more difficult for plaintiffs to certify class actions and, as a result, more difficult to convert their class action filings into substantial settlements. These barriers became more formidable in 2018 with the Supreme Court's ruling in *Epic Systems v. Lewis,* which upheld the validity of class action waivers in mandatory workplace arbitration agreements.

The "*Wal-Mart/Epic Systems*" phenomenon provided employers a "one-two punch" relative to their defense strategies that continues to impact the contours of class action litigation in 2020. To that end, federal and state courts cited *Wal-Mart* in 673 rulings in 2020, and they cited *Epic Systems* in 189 decisions by year's end.

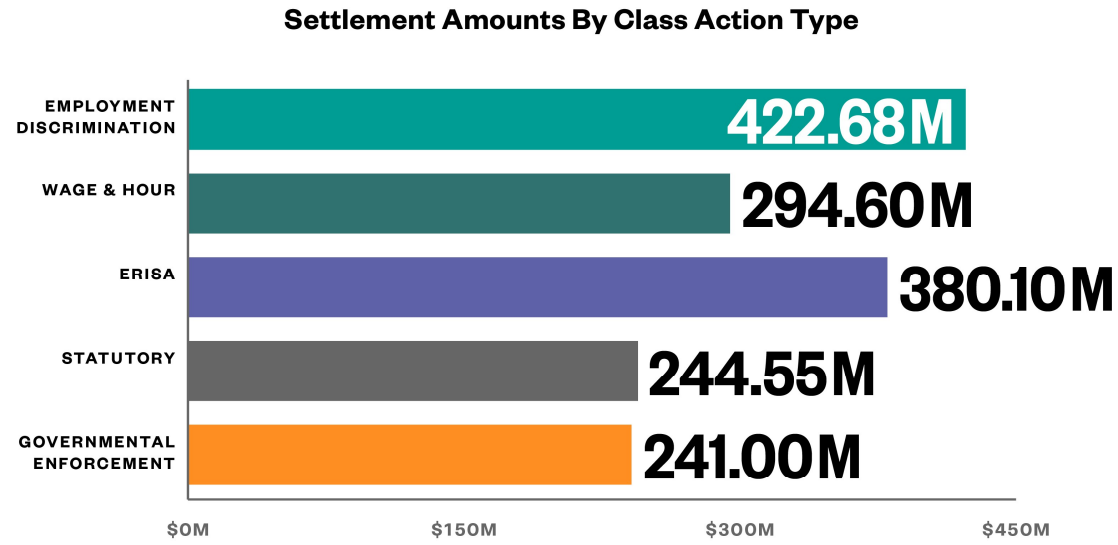
This past year, the plaintiffs' bar continued to identify and develop work-arounds that helped to force the settlement of high-value class actions in multiple areas. Considering all types of workplace class actions, settlement numbers in 2020 totaled $1.58 billion, an increase compared to settlements in 2019, which totaled $1.34 billion, and from 2018, when they totaled $1.32 billion. These totals, however, remain significantly lower than their high-water mark in 2017, when such settlements topped $2.72 billion, and slightly lower than 2016, when such settlements totaled $1.75 billion. The following graphic shows this trend:



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

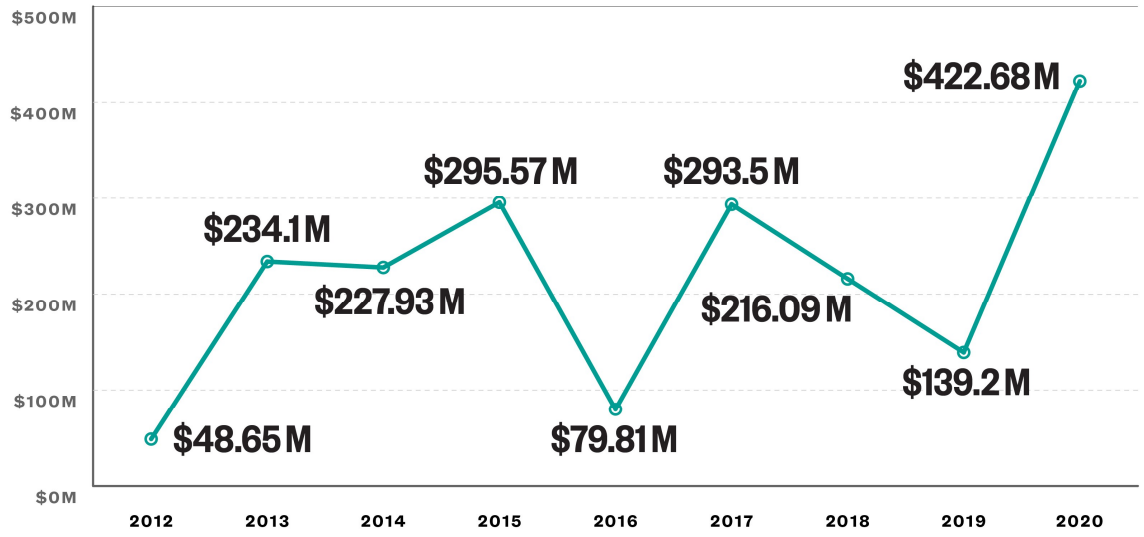
In 2020, we saw a significant upward trend regarding the settlement values of employment discrimination claims, government enforcement litigation, and a slight upward trend regarding ERISA class actions. In contrast, we saw significant decreases across-the-board for resolutions of class actions involving wage & hour claims and private statutory claims.

The results in these categories are illustrated by the following chart for 2020 settlement numbers:



By type of case, settlement values in employment discrimination class actions and government enforcement cases experienced the most significant increases.

Employment discrimination class action settlements showed a significant increase in 2020. The top ten settlements totaled $422.68 million, as compared to $139.2 million in 2019, $216.09 million in 2018, and $293.5 million in 2017. 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

In 2020, the value of the top ten largest employment discrimination class action settlements of $422.68 million was the highest figure reached since we began tracking numbers,[3] and $76.28 million higher than the next highest year recorded (2010).

As such, 2020 represents the reversal of a trend that started in 2011 (after *Wal-Mart* was decided) that kept the value of the top ten settlements under $300 million in each of the subsequent nine years.

Relatedly, the top ten settlements in government enforcement litigation experienced a sharp upward turn in 2020, as it increased to $241.0 million, a significant jump from the $57.52 million we saw in 2019 and from the $126.7 million recorded in 2018. Although the numbers did not approach the 2017 high-water mark of $485.25 million, they outpaced the numbers lodged in every other year since 2012.[4]

This trend is illustrated by the following chart of settlements from 2012 to 2020:

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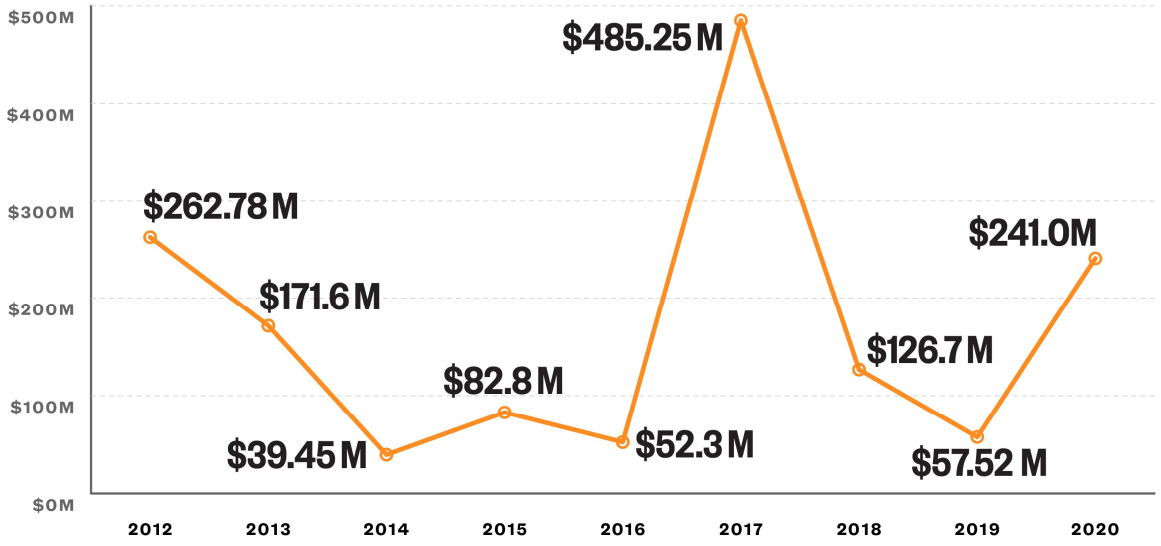
[3] An analysis of class action settlement activity is discussed in Chapter II of this Report. The total of $422.68 million in 2020 was the highest total recorded since we started tracking numbers. By comparison, the $139.2 million in 2019 was the fourth lowest total since the *Wal-Mart* ruling in 2011.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

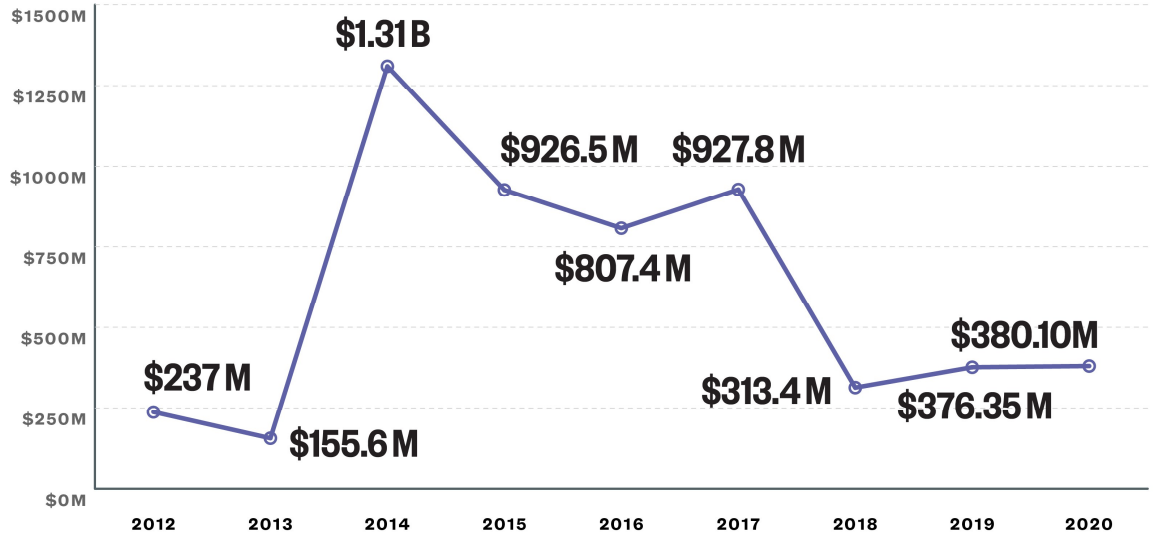
[4] The total for the top ten government enforcement litigation settlements in 2012 was $262.78 million. Aside from 2017, when such settlements totaled $485.25 million, the top ten government enforcement settlements remained under $200 million every year from 2013 through 2019.



Value Of Top 10 Government Enforcement Litigation Settlements

ERISA class action settlements rose slightly in 2020. The top ten settlements totaled $380.10 million, which topped the 2019 total of $376.35 million, as well as the 2018 total of $313.4 million. ERISA settlements in 2020, however, remained well below prior years, including the $1.31 billion we saw in 2014, the $926.5 million we recorded in 2015, the $807 million we saw in 2016, and the $927.8 million we logged in 2017. Given that ERISA class action settlements over the four-year period from 2014 through 2017 averaged $992.93 million, 2020 continues a trend toward a lower conversion rate for the plaintiffs' bar.[5]

This trend is illustrated by the following chart of settlements from 2012 to 2020:



Value Of Top 10 ERISA Class Action Settlements

[5] 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.

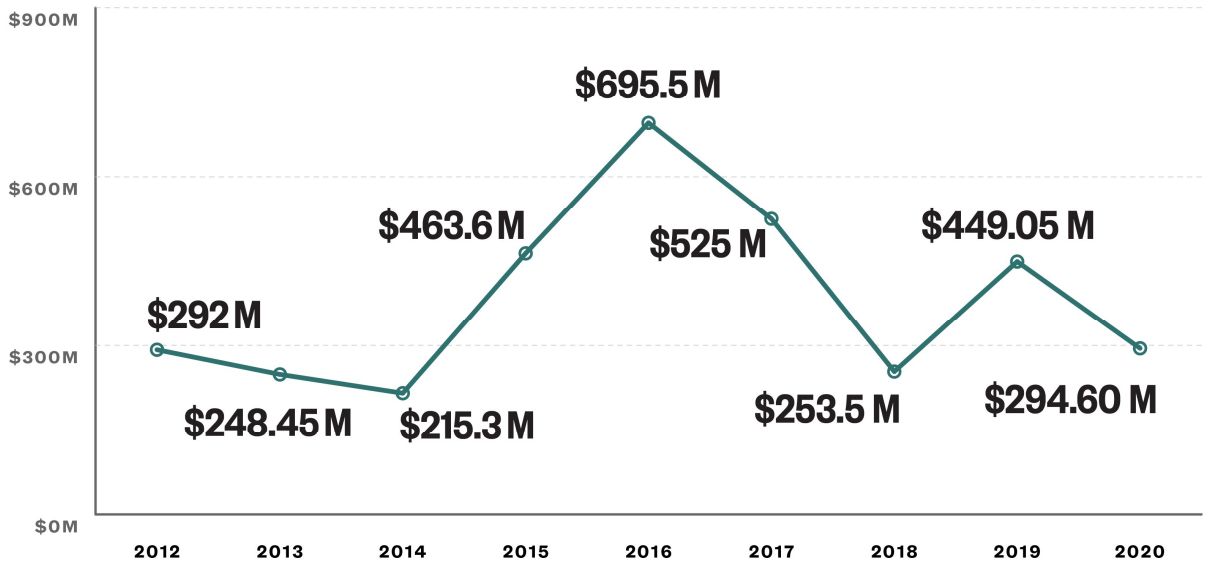
The upward year-over-year trend did not hold for wage & hour class action settlements. The value of those settlements in 2020 fell off significantly from the previous year. In 2020, the value of the top ten wage & hour settlements was $294.60 million, compared with $449.05 million in 2019.

Although a significant decrease from 2019, the value held slightly above the lowest levels of the past decade, including above four of the past eight years with values of $292 million (2012), $248.45 million (2013), $215.3 million (2014), and $253.5 million (2018).

On a comparative basis, the top 10 settlements in 2020 likewise fell well short of the spikes we saw in the other four of the previous eight years, with values of $463.6 million (2015), $695.5 million (2016), $525 million (2017), and $449.05 million (2019).

When combined, however, the top 10 wage & hour settlements for the three-year period of 2015, 2016, and 2017 totaled over $1.68 billion. Adding 2018 and 2019 settlements, corporate America saw over $2.386 billion devoted to settling the top 10 wage & hour settlements over that five-year period.[6]

As the impact of the 2018 ruling in *Epic Systems* continues to provide defenses for businesses inclined to adopt mandatory workplace arbitration programs with class action waivers, and cases filed prior to such adoption continue to work their way out of the pipeline, we could see settlement numbers continue to follow a downward trajectory in 2021.

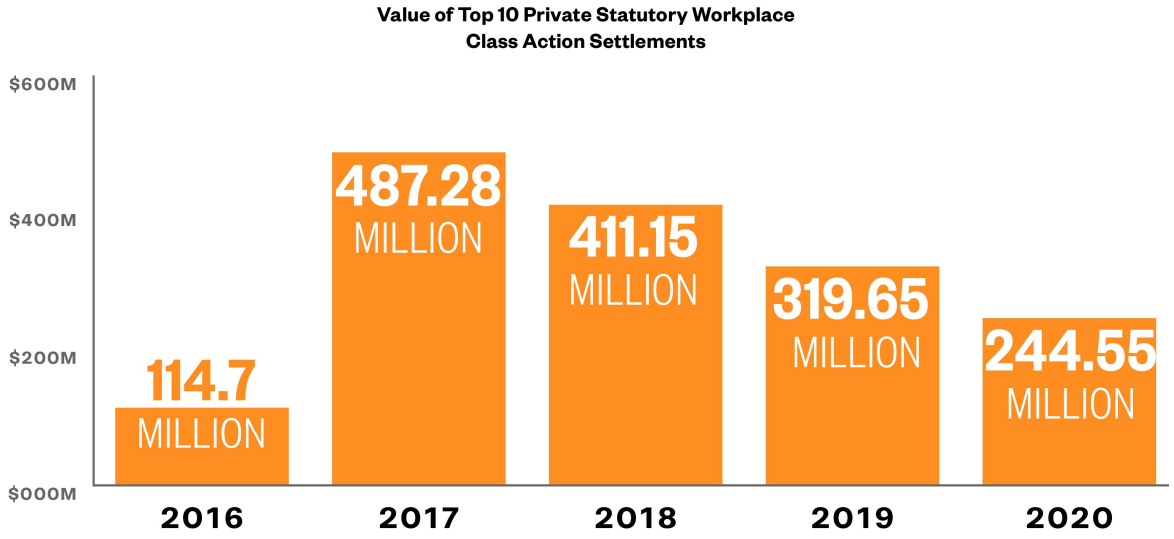


Value Of Top 10 Wage & Hour Class Action Settlements

The top ten 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) likewise fell off in 2020. The settlements totaled $244.55 million, which represented a significant decrease from 2019 and the continuation of a downward year-over-year trend that began in 2018. In 2017, such settlements totaled $487.28 million; in 2018, they totaled $411.15 million; and in 2019, they totaled $319.65 million.

[6] By comparison, the top ten wage & hour class action settlements totaled $215.3 million in 2014 and $248.45 million in 2013. The 2016 figure of $695.5 million is the highest amount over the past decade. The 2019 figure of $449.05 million was the fourth highest total over the past decade.

The following chart tracks these figures:



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 interpreting U.S. Supreme Court rulings such as *Epic Systems*, the Biden Administration's labor and employment enforcement policies, case filing trends of the plaintiffs' class action bar, and class certification rulings.

(iv) Government Enforcement Trends

On the governmental enforcement front, 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. These shifts likely resulted from the pro-business stance of the Trump Administration. The EEOC saw considerable leadership turnover at the top as Trump's nominees for Commissioner slots were finally confirmed on May 3, 2019 (Janet Dhillon, Chair) and September 22, 2020 (Keith Sonderling, Vice Chair, and Andrea Lucas, Commissioner).

Prior to September 2020, the EEOC's leadership consisted of only three of five Commissioners, including Janet Dhillon, Chair (Republican), Vicki Lipnic (Republican), and Charlotte Burrows (Democrat). Commissioner Lipnic's term technically expired in July 2020, but she was allowed to stay on through September 2020 so that the Commission would have a quorum and could operate. On September 22, 2020, the Senate confirmed three new Commissioners, two Republicans and one Democrat, for the two vacant seats and the seat formerly held by Lipnic. The Commission must remain bipartisan by law, but these new additions solidified a Republican majority at least until July 2022 when Dhillon's term expires, despite the result of the 2020 election in flipping the White House from red to blue.

The total number of new lawsuits filed by the EEOC decreased significantly during 2020. The EEOC filed 94 merits lawsuits and seven subpoena enforcement actions, a stark decline compared to the 144 merits lawsuits and eight subpoena enforcement actions filed during 2019. This represented a 35% reduction in total actions commenced by the Commission year over year. Despite the shift in administrations, employers can expect that the EEOC's majority-Republican leadership will continue to curtail litigation efforts in 2021.

Although the numbers declined, when considered on a percentage basis, the distribution of cases filed in terms of their theories of liability remained largely consistent compared to 2019. Title VII and ADA cases once again comprised the majority of cases filed by the Commission, suggesting that enforcement priorities did not shift dramatically and remained fairly consistent under the Trump Administration. This past year marked the fourth

year of the EEOC's 2017-2021 Strategic Enforcement Plan ("SEP"), which guides enforcement activity. The six enforcement priorities set forth in the SEP include: (1) the elimination of systemic barriers in recruitment and hiring; (2) protection of immigrant, migrant, and other vulnerable workers; (3) addressing emerging and developing issues; (4) enforcing equal pay laws; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach.[7]

The Commission maintains discretion to interpret and pursue these priorities as it deems appropriate. Although the SEP defined priorities, they are broad and apply to an expansive landscape of issues. For example, the EEOC consistently has focused on the protection of lesbian, gay, bisexual, and transgender individuals over the past several years as an emerging and developing issue in the workplace.

The EEOC's efforts in this area resulted in a body of case law across jurisdictions, culminating in the U.S. Supreme Court's landmark decision in *R.G. & G.R. Funeral Homes, Inc. v. EEOC & Bostock v. Clayton County, Georgia*, which held that Title VII prohibits discrimination against gay or transgender employees as a form of sex discrimination.[8] The 6-3 decision authored by Justice Gorsuch represented a significant victory for the EEOC during 2020.

Additionally, during 2020, employers saw a flurry of activity at the EEOC relative to its internal practices and procedures, with the Commission pushing to meet objectives prior to the change in administrations on January 20, 2021. Notably, the EEOC made strides to shift its internal decision-making authority, update its conciliation and mediation procedures, and voluntarily scale back some of its authority.

First, on March 10, 2020, the EEOC released information about a significant internal resolution that reassigned authority for certain high-stakes litigation decisions within the Commission. The resolution reined in many of the powers previously held by the EEOC's General Counsel and, in turn, the Commission's various Regional Attorneys, who historically have wielded considerable discretion over the types of lawsuits that they file and the legal positions that they advance. Under the new resolution, the Commissioners – and not the General Counsel (or Regional Attorneys) – will make key litigation decisions concerning systemic litigation and various other matters. According to the resolution, the Commissioners now have exclusive authority over the following:

- Cases involving an allegation of systemic discrimination or a pattern or practice of discrimination;
- Cases expected to involve a major expenditure of agency resources, including staffing and staff time, or expenses associated with extensive discovery or expert witnesses;
- Cases presenting issues on which the Commission has taken a position contrary to precedent in the Circuit in which the case will be filed;
- Cases presenting issues on which the General Counsel proposes to take a position contrary to precedent in the Circuit in which the case will be filed;
- Other cases reasonably believed to be appropriate for Commission approval in the judgment of the General Counsel. This category includes, but is not limited to, cases that implicate areas of the law that are not settled and cases that are likely to generate public controversy;
- All recommendations in favor of Commission participation as *amicus curiae*; and

[7] U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 – 2021, *available at* https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[8] *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC & Bostock, et al. v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020).

- A minimum of one litigation recommendation from each District Office each fiscal year, including litigation recommendations based on the above criteria.

Even with respect to those cases that do not raise the issues enumerated above, the General Counsel is now obligated to communicate about more garden variety cases with the Chair and, at the Chair's request, shall consult with the Chair to decide whether those cases should be brought before the Commissioners for a vote. If the Chair does not advise the General Counsel within five business days as to whether a particular case must be submitted to the Commissioners for a vote, the General Counsel retains authority to proceed with a lawsuit on her own initiative.

These changes represent a stunning reduction in the General Counsel's discretion. For many years, the General Counsel and attorneys in the field appeared to exercise broad control over the types of cases the EEOC would file, the theories of law that it would pursue, and the litigation tactics that it would employ. Because the General Counsel was encouraged to delegate that authority to Regional Attorneys across the country, the result was a sometimes fragmented, district-by-district approach to EEOC enforcement litigation.

Second, on July 7, 2020, the EEOC issued a press release announcing two new six-month pilot programs aimed at increasing voluntary resolutions of discrimination charges via changes to its conciliation and mediation programs. Then, on October 8, 2020, the EEOC released the specifics of a Notice of Proposed Rulemaking ("NPRM") seeking to make additional changes to the conciliation process. In its NPRM, 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."[9] Although the Commission's NPRM makes clear that the Commission still believes that it is important to maintain a flexible approach to conciliation, it also acknowledged that, over the last several years, its conciliation efforts resolved less than half of the charges where a reasonable cause finding was made. Specifically, between fiscal years 2016 and 2019, only 41.23% of the EEOC's conciliations with employers were successful.[10]

Third, on September 3, 2020, the EEOC issued a rare opinion letter regarding the Commission's interpretation and enforcement of § 707(a) of Title VII, which authorizes the EEOC to sue employers engaged in a "pattern or practice" of discrimination. The opinion letter addressed two seemingly technical questions, including: (1) whether a pattern or practice claim under § 707(a) requires allegations of violations of § 703 or § 704 of Title VII; and (2) whether the EEOC must satisfy pre-suit requirements such as conciliation before it can bring a § 707 case. In a lengthy discussion, the EEOC ultimately concluded that the answer to both questions is "yes." Notably, the Commission's letter first acknowledged that "[t]he Commission, like all agencies, is a 'creature of statute' that only has the authority that Congress has given it . . . Therefore, in performing its duties, the Commission must follow the statutory language that Congress has provided." This language signals a new approach from the Commission that voluntarily limits the EEOC's authority, particularly relative to claims in pattern or practice suits to only concrete allegations of discrimination.

Fourth, on November 2, 2020, the EEOC held its first public meeting of FY 2021 to consider a proposed memorandum of understanding ("MOU") between the EEOC, the Department of Labor ("DOL"), and the Department of Justice ("DOJ") aimed at recommitting to collaboration between the agencies and coordinating efforts to protect civil rights in the workplace.[11] Key provisions of the MOU included strengthening procedures for coordination between the three agencies at the field and headquarters levels, including discussions on enforcement priorities and coordinating on issues like religious liberty, conscious protections, and novel or unique issues and bringing greater efficiencies to the investigation process.

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[9] 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).

[10] *Id.*

[11] The EEOC's fiscal year ("FY") runs from October 1 to September 30. FY 2021 began on October 1, 2020.

Collectively, these changes represent a significant shift in the EEOC's philosophy and practice toward a curtailment of its own powers and a shift away from using litigation as the blunt-force instrument of choice. These changes are apt to influence the Commission's approach into 2021 and beyond.

Although the EEOC's total litigation filings for 2020 reflected a marked decline, the Commission's "Agency Financial Report" ("AFR"), which was released in November 2020, touted a surge in recoveries on behalf of employees. The AFR provided a snapshot of FY 2020 performance highlights, including the following:

- During FY 2020, the EEOC recovered a record amount of $535.4 million on behalf of alleged discrimination victims. By comparison, the EEOC recovered approximately $486 million in FY 2019; approximately $505 million in FY 2018; and approximately $484 million in FY 2017.

- The amount recovered through mediation, conciliation, and settlement dropped from $354 million in FY 2019 to $333.2 million in FY 2020.

- Conversely, litigation recoveries increased from $39.1 million in FY 2019 to $106 million in FY 2020, the highest in 16 years. The EEOC credits this surge in litigation recovery to its resolution of 165 lawsuits in FY 2020 and stated that it achieved "favorable results" in approximately 96% of its court resolutions.

- The Commission reported a reduction of the inventory of pending private sector charges by 3.7% – to 41,951 charges – that now represents the lowest inventory of charges in 14 years.

Further, national origin discrimination has continued to become an increasingly large part of the EEOC's enforcement agenda. 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. Historically, those concerns have been focused on how global terrorism and unrest in the Middle East could lead to discrimination against Muslim or Sikh employees or those of Middle Eastern or South Asian descent, or how illegal immigration issues could give rise to discrimination against Mexican or South and Central American workers. The COVID-19 pandemic could change this focus somewhat moving forward, as the outbreak of a deadly pandemic that had its origin in China has given rise to increased concerns about national origin discrimination against Asian Americans, as cautioned by EEOC Chair Dhillon in a statement issued early during the COVID-19 pandemic.

On the DOL front, like many agencies, its agenda this year was occupied with issues relating to the COVID-19 pandemic. The DOL was busy enforcing and issuing guidance on implementation of the Families First Coronavirus Response Act, with the Wage & Hour Division consistently updating FAQ guidance on the Act. The DOL also issued final "temporary" regulations interpreting the FCRA. Despite the COVID-19 detour, the DOL accomplished many of its other objectives prior to the 2020 election. The agency announced new joint employer and independent contractor rules, discussed above; issued a final rule that allows employers to pay bonuses or other incentive-based pay to salaried, non-exempt employees whose hours vary from week to week; issued joint guidance with the IRS providing that insurers can allow the newly jobless to sign up for a coverage extension known as the COBRA, at any time up to 60 days after the national emergency declaration for COVID-19 is lifted; and announced it would no longer seek "double damages" in FLSA actions where there is no clear evidence of bad faith and willfulness or where the employer has no prior history of violations.

Finally, the National Labor Relations Board ("NLRB") continued its trend toward more conservative views of labor laws in 2020. It ruled that an employer may discipline workers for making profane, abusive, or offensive statements, so long as the employer's action is not based on specific anti-union animus, reinstating the previously-reversed *Wright Line* analysis, and it issued a final rule providing that an entity may be considered a joint employer of a separate employer's employees only if the two share or co-determine employees' essential terms and conditions of employment, which are exclusively defined as wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction. Employers can anticipate, however, that 2021 will look markedly different, as the Biden Administration has reiterated that supporting organized labor will sit atop of the agenda. The Board is currently operating with a vacant seat with a term running through August 2023, and the

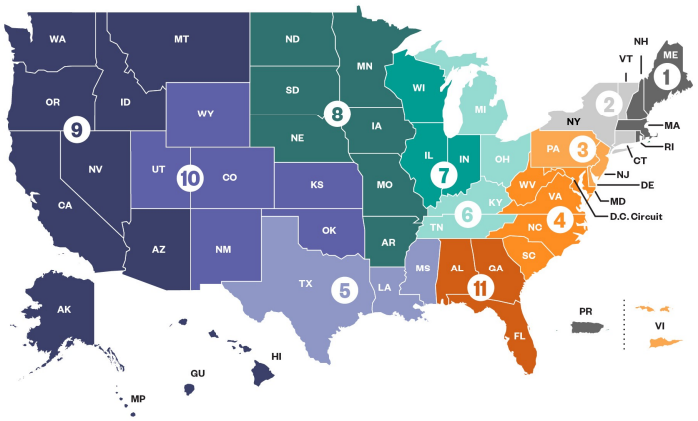
General Counsel's term expires in one year. Before any significant change can happen at the NLRB, the Biden Administration will need to fill the two open seats, necessitating additional changes in leadership.

(v) Class Certification Trends In 2020

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. Layered on top of those problems are the spike in workplace litigation caused by the COVID-19 pandemic.

A prime component in that array of risks is indisputably complex wage & hour litigation. The following map sets forth a circuit-by-circuit analysis of 314 class certification decisions in all varieties of workplace class action litigation, including wage & hour, employment discrimination, and ERISA. As the map reflects, in 2020, complex wage & hour litigation under the FLSA drove more certification briefing and a greater number of certification decisions than other areas combined.

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	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	1	0	1	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 Certifications Denied 6 Decertification Motions Granted / 6 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 2020 than in any other year of the past decade, indicating that wage & hour remains a sweet spot for the plaintiffs' bar.

For only the fifth time in over a decade, and for the fifth year in a row, wage & hour lawsuit filings in federal courts decreased. That being said, more FLSA lawsuits were filed during each of the preceding eight years – during 2012, 2013, 2014, 2015, 2016, 2017, 2018, and 2019 – than were filed in any year of the past 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.

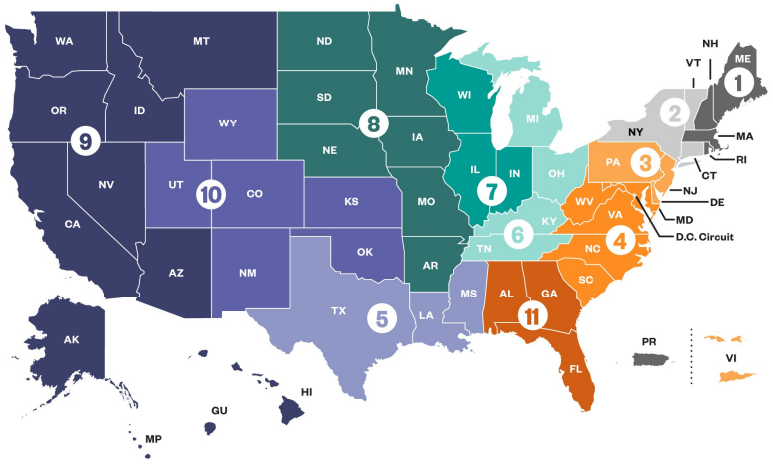
To be sure, the significant volume of FLSA filings over the past several years has caused the issuance of more certification rulings in the FLSA areas than in any other substantive area of complex employment litigation. Despite the pandemic's crippling impact on court operations and personnel, courts issued more rulings on wage & hour certification issues in 2020 than they issued in each of the past five years. In particular, federal courts issued 286 decisions on FLSA certification and decertification issues in 2020, an increase from the 267 certification rulings issued in 2019, the 273 certification rulings in 2018, and the 257 certification rulings in 2017.

Of these rulings, 274 addressed first-stage motions for conditional certification of wage & hour collective actions under 29 U.S.C. § 216(b), whereas 12 addressed second-stage motions for decertification. Plaintiffs secured a higher rate of success on the former in 2020, while employers secured a lower rate of success on the latter. In fact, as noted above, plaintiffs achieved a higher rate of success on first stage conditional certification motions in 2020 than they achieved in any year of the past decade. Plaintiffs saw an increase in their rate of success to 84%, up from 81% in 2019 and 79% in 2018, whereas employers saw their rate of success on decertification motions dip to 50% in 2020, down from 58% in 2019 and 52% in 2018.

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 voluminous out of the Fifth and Sixth Circuits, 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



CIRCUIT COURT	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
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

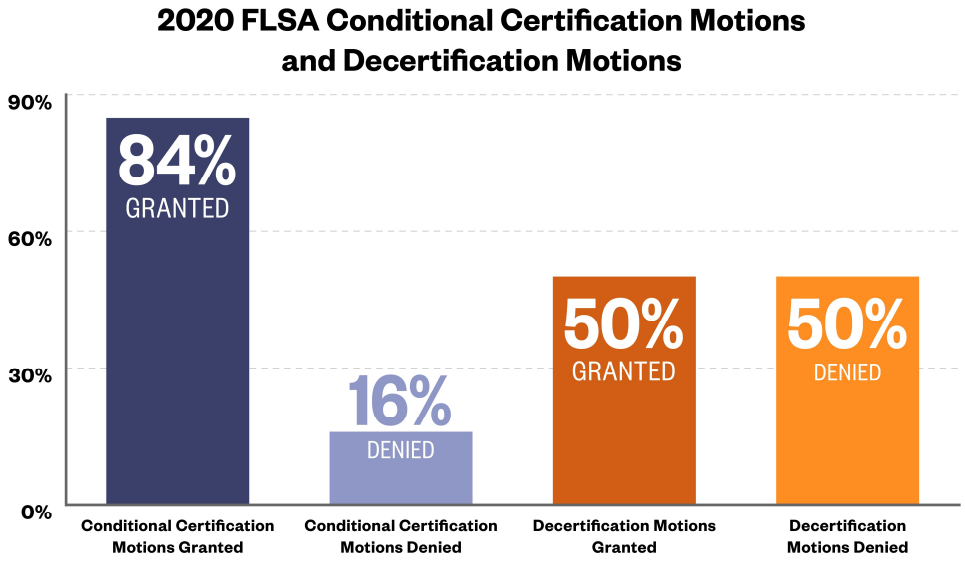
The statistical underpinnings of this circuit-by-circuit analysis of FLSA certification rulings is telling in several respects.

First, it substantiates that the district courts within the Second, Fifth, Sixth, and Ninth Circuits are the epi-centers of wage & hour class actions and collective actions. More cases were prosecuted and conditionally certified – 40 certification orders in the Second Circuit, 30 certification orders in the Fifth Circuit, 29 certification orders in the Ninth Circuit, and 28 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 Fifth and Sixth Circuits – which encompass the states of Texas, Louisiana, Mississippi, Michigan, Ohio, Kentucky, and Tennessee – had nearly as many (or more) 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 (231 of 274 rulings, or approximately 84%) in 2020, which was even higher than 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 wins recorded in the last decade. Further, in terms of "second stage" decertification motions, employers won 50% of those rulings (6 of 12 rulings) in 2020, which represented a dip from the 2019 numbers (14 of 24 rulings, or approximately 58%) and the lowest percentage since 2016.

Overall, these statistics show robust numbers for the plaintiffs' bar, as plaintiffs prevailed on "first stage" conditional certification motions at a higher rate in 2020 and lost "second stage" decertification motions at a lower rate. The "first stage" conditional certification statistics for plaintiffs at 84% in 2020 were even more favorable to workers than in 2019, when plaintiffs won 81% of "first stage" conditional certification motions, and 2018, when plaintiffs won 79% of "first stage" conditional certification motions. The "second stage" decertification statistics for employers at 50% in 2020 were less favorable to employers than in 2019, when employers won 58% of "second stage" decertification motions, and 2018, when employers won 52% of decertification rulings, and 2017, when employers won 63% of decertification rulings.

The following chart illustrates this trend for 2020:



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 typically secure better results. Securing initial "first stage" conditional certification – and foisting settlement pressure on an employer – can be done quickly (almost right after the case is filed), with a minimal monetary investment in the case (*e.g.*, no expert support is needed, unlike a motion for class certification in an employment discrimination class action or an

ERISA class action), and without significant discovery in accordance with the case law that has developed under 29 U.S.C. § 216(b).

As a result, to the extent litigation of class actions and collective 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 shorter periods of time.

The certification statistics for 2020 confirm these factors. Despite the on-set of the COVID-19 pandemic by March of 2020 (and the slowdown in business and closures of courthouses due to safety concerns), the plaintiffs' bar secured more certification victories than at any time over the past 15 years.

The extent to which *Epic Systems* will continue to impact wage & hour certification trends remains uncertain. As 2020 reflected, the number of FLSA lawsuits filed in 2020 fell as compared to 2019, along with settlement values, but not to rates altogether different than the filing numbers we saw in 2019 or settlement numbers we saw in 2018, suggesting that the plaintiff's class action is not losing interest in these suits. To the contrary, the number of rulings issued by federal courts, in spite of the COVID-19 pandemic, suggests that plaintiffs' counsel are not exiting these cases from the court system either voluntarily or via motions to compel arbitration, before courts have passed on motions for conditional certification. Further, the rate at which courts granted conditional certification in 2020 suggests that arbitration provisions 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 are seeking to represent.

As mentioned above, as the Biden Administration takes office, and particularly if Democrats regain control of the Senate during his term, employers may see new legislative efforts to overturn *Epic Systems* and eventually may see those efforts gain traction. Their success, however, in altering the force of the Federal Arbitration Act in the workplace, may depend upon future ideological and political dynamics. As a result, we expect that *Epic Systems* will continue to impact case filing numbers in the near term.

Employment Discrimination & ERISA Certification Trends

Against the backdrop of wage & hour litigation, the rulings in *Wal-Mart* and *Epic Systems* fueled more critical thinking and crafting of case theories in employment discrimination and ERISA class action filings in 2020. The Supreme Court's Rule 23 decisions have had the effect of forcing the plaintiffs' bar to "re-boot" the architecture of their class action theories.[12] At least one result was the decision in *Tyson Foods v. Bouaphakeo,* 136 S. Ct. 1036 (2016), in which the U.S. Supreme Court accepted the plaintiffs' arguments that, in effect, appeared to soften the requirements previously imposed in *Wal-Mart* for maintaining and proving class claims, at least in wage & hour litigation.

Hence, it is clear that the playbook on Rule 23 strategies is undergoing a continuous process of evolution. The plaintiffs' class action bar is continually testing ways to navigate around and to wear away the force of these precedents. One work-around is the filing of "smaller" employment discrimination class actions. We have seen statewide or regional-type classes asserted more often than the type of nationwide mega-case that *Wal-Mart*

[12] An analysis of certification rulings in Title VII employment discrimination class actions in 2020 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.

discouraged. Plaintiffs' counsel are being more selective, strategic, and savvy relative to calibrating the focus of their cases and aligning the size of the proposed class to the limits of Rule 23 certification theories.

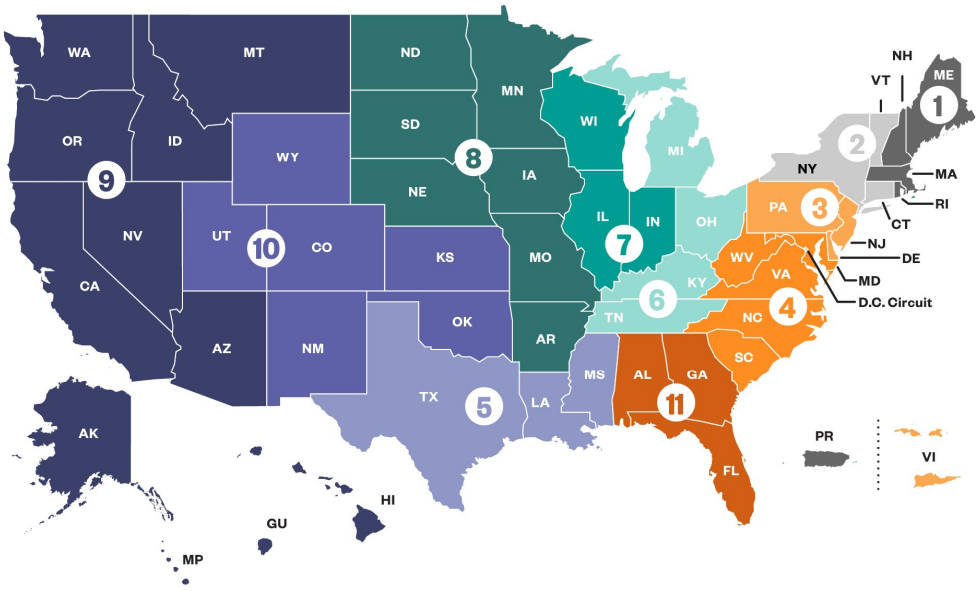
In essence, at least in the employment discrimination area, the plaintiffs' litigation playbook is more akin to a strategy of "aim small to secure certification, and if unsuccessful, then miss small." Plaintiffs seem apt to file these scaled-down class actions in order to test the prevalence of arbitration agreements among putative class members and, depending on the result, to move forward with a limited class 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 2020, settlement numbers in employment discrimination class actions skyrocketed, as mentioned above, whereas the number of rulings on motions for class certification dwindled. In 2020, courts issued only 12 rulings on motions for class certification in employment discrimination actions, compared with 15 rulings in 2019. Plaintiffs prevailed in 5 of the 12 rulings, or 42%, in 2020, with 4 of those rulings emanating from the Ninth Circuit.

The rate of success of the plaintiffs' bar in 2020 on such motions was not appreciably different from 2019. 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%, but, in 2017, plaintiffs won 7 of 11 rulings on such motions.

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



CIRCUIT COURT	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	0	0	0	0	1	0	4	0	0	0	0	0
Conditional Certification Motions Denied	0	1	0	0	0	1	2	1	1	0	1	0	0	0

Sub-Total: 5 Conditional Certifications Granted / 7 Conditional Certifications Denied

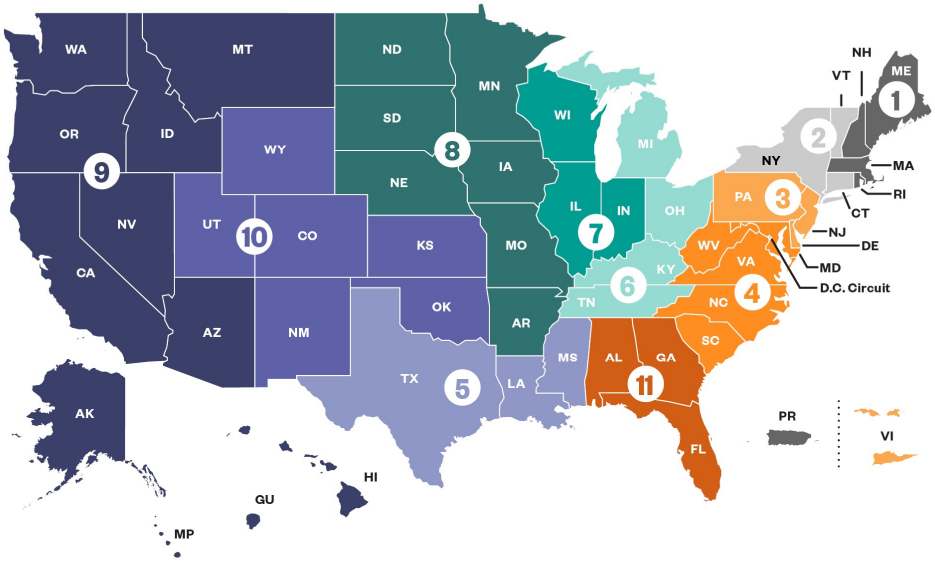
In terms of the ERISA class action litigation scene in 2020,[13] the focus continued to rest on precedents of the U.S. Supreme Court as it shaped and refined the scope of potential liability and defenses in ERISA class actions.

The *Wal-Mart* decision also has changed the ERISA certification playing field by giving employers more grounds to oppose class certification. The decisions in 2020 show that class certification motions have the best chance of denial in the context of ERISA welfare plans, and ERISA defined contribution pension plans, where individualized notions of liability and damages are prevalent.

While plaintiffs were more successful than employers in litigating certification motions in ERISA class actions, their success rate was on par with previous years. 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 similarly 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



CIRCUIT COURT	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit	Court of Federal Claims	EEOC
Certification Motions Granted	1	3	0	0	0	0	2	1	2	0	2	0	0	0
Certification Motions Denied	0	0	0	0	2	0	0	1	0	1	0	1	0	0
Sub-Total:	**11 Granted / 5 Denied**													

Overall Trends

So what conclusions overall can be drawn on class certification trends in 2020?

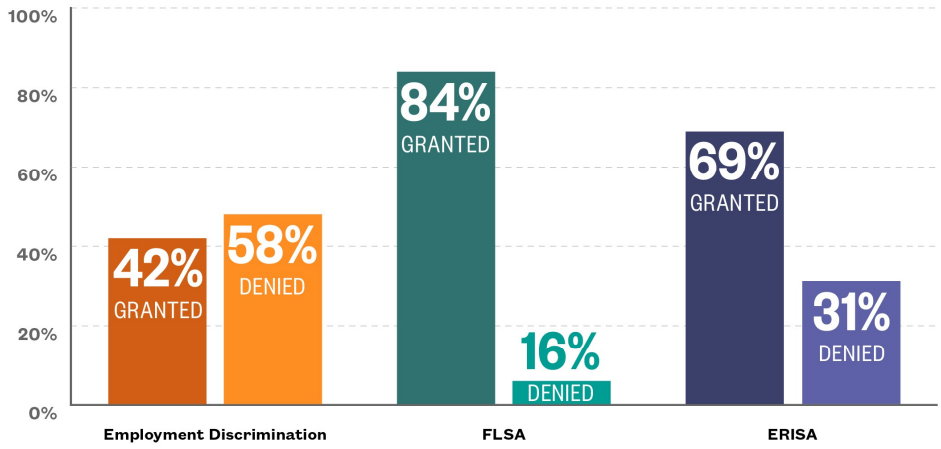
In the areas of wage & hour and ERISA claims, in particular, the plaintiffs' bar is converting their case filings into certification of classes at a high rate. To the extent class certification aids the plaintiffs' bar in monetizing their lawsuit filings and converting them into class action settlements, the conversion rate is robust.

[13] An analysis of rulings in ERISA class actions in 2019 is set forth in Chapter VI, Section A.

Whereas class certification for employment discrimination cases (5 motions granted and 7 motions denied in 2020) and in ERISA cases (11 motions granted and 5 motions denied in 2020) showed an approximate 42% to 69% success rate for plaintiffs, the plaintiffs' success rate factor in wage & hour litigation (with 231 conditional certification motions granted and 43 motions denied) is pronounced.

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

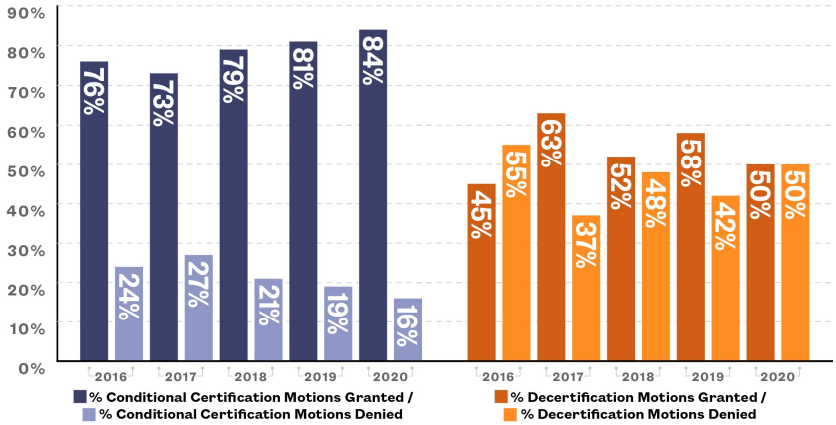
- a success rate of 42% for certification of employment discrimination class actions (both Title VII and age discrimination cases);
- a success rate of 69% for certification of ERISA class actions; and,
- a success rate of 84% for conditional certification of wage & hour collective actions.



2020 Certification Motions For Employment Discrimination, FLSA, And ERISA

The most certification activity in workplace class action litigation is 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% (with 2020 representing the highest success rate ever) 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.

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



2016 - 2020 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 last 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, these figures 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 the success rate of the plaintiffs' bar.

The key statistic and bright spot in 2020 for employers was an increase in the odds of defeating certification in employment discrimination class actions, where plaintiffs succeeded in certifying classes in less than half of the rulings issued during 2020.

Lessons From 2020

There are multiple lessons to be drawn from these trends in 2020.

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 2020, their certification conversion rate for ERISA and employment discrimination cases was 69% and 42%, respectively, while wage & hour cases showed an 84% 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, the ruling four years ago in *Tyson Foods* has made certification prospects even easier for plaintiffs in the wage & hour space, insofar as conditional certification motions are concerned. The conversion rate of successful certification motions hit an all-time high of 84% in 2020, which confirms the evolution of the case law in this space.

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. In this respect, the plaintiffs' bar is nothing if not ingenuous, and targeted certification theories (*e.g.*, issue certification, certification of a regional class, or certification of a class of non-signatories to arbitration agreements) are the new norm in federal and state courthouses as plaintiffs seek to leverage the threat of certification to monetize their claims.

Fourth, during the certification stage, courts are more willing than ever before to assess facts that overlap with both certification and merits issues, and to apply a more practical assessment of the Rule 23(b) requirement of predominance, which focuses on the utility and superiority of a preclusive class-wide trial of common issues. Courts are also more willing to apply a heightened degree of scrutiny to expert opinions offered to establish proof of the Rule 23 requirements.

Finally, employers now have an effective weapon to short-circuit the decision points for class action exposure through use of mandatory workplace arbitration agreements. Based on the *Epic Systems* ruling, a class waiver in an arbitration agreement is now an effective first-line defense to class-based litigation. Throughout 2020, employers used arbitration defenses to fracture class actions and convert them into individual, bi-lateral arbitration proceedings. 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 through 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 look for work-arounds on the judicial as well as the legislative front.

D. Complex Employment-Related Litigation Trends In 2020

While class action filings in some areas witnessed an increase in 2020, employment-related class action filings remained relatively stable and aligned with case filing numbers of previous years.

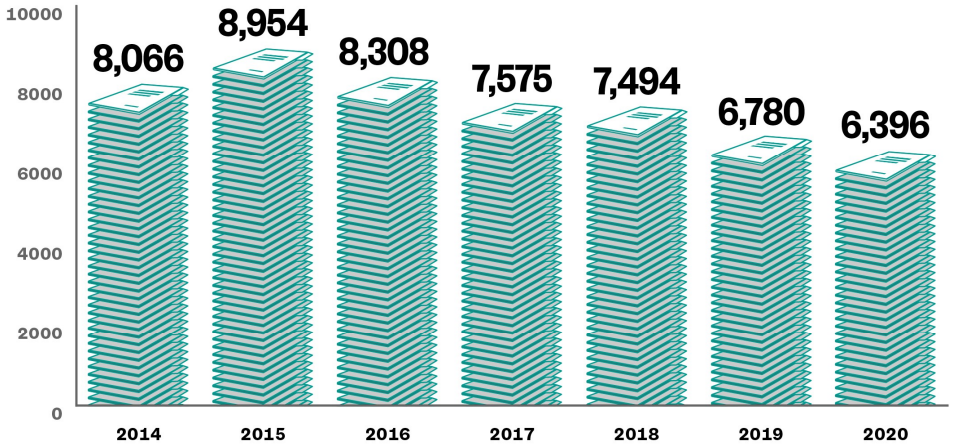
By the numbers, filings for employment discrimination, FLSA, and ERISA claims were slightly lower over the past year. Filing patterns in 2020 reflected only the second time in a decade when the number of lawsuit filings decreased across the board in all three categories. The lower numbers likely reflected 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 5,042 filings (as compared to 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 6,396 filings (as compared to 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 10,801 filings (as compared to 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 2020, 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 adopt diversity and inclusion programs, and to avoid the ire of social media. Inevitably, litigation filings are apt to increase over the next year as a result of this focus.

By the numbers, FLSA collective action litigation filings in 2020 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 2020, FLSA filings decreased for only the fifth time in over two decades.

This trend is illustrated by the following chart:



FLSA Filings In Federal Courts

The fifth 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 6,396 lawsuit filings, 2020 was the 9th highest year ever in the filing of such cases (only eclipsed by levels in 2012, 2013, 2014, 2015, 2016, 2017, 2018, and 2019). When viewed on a continuum, 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 2021. Various factors are contributing to the fueling of these lawsuits, including: (i) minimum wage hikes that took effect in 2020 and will take effect in 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 which is likely to generate pro-employee shifts in rulemaking that expand eligibility for minimum wage and overtime compensation and, in turn, 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 2020 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 play 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. Coupled with layoffs and furloughs due to the COVID-19 pandemic, 2021 lawsuit filings may spike to higher levels than seen in the last few years.

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 2020 as a breeding ground for wage & hour class

action litigation under the California Labor Code. For the seventh year out of the last nine, 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.[14] The ATRA described the Golden State as "a perennial Judicial Hellhole."[15]

E. Likely Trends For The Future Of Workplace Class Actions In 2021

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 2021?

The COVID-19 pandemic is likely to continue to define the workplace in 2021, 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 states begin distribution of a vaccine, and employers start reopening 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 2021. 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 2021 may become whether the change in administration will lead to a renewal 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 2021. States like Illinois have continued to see an onslaught of class actions against employers for breaches of privacy rights, as well as mistreatment of personal information and biometric data. State laws regarding data breaches and individual privacy are apt to fueling the growth of these types of class actions in 2021.

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

ERISA Litigation –

In the midst of the pandemic, 2020 saw a veritable explosion of litigation regarding defined contribution plans' (401(k) and 403(b) plan) fees and investments. More than 80 of these class actions were filed around the country, including many by plaintiff firms that are new in the area. It appears that any plan is a potential target for these claims, even plans with relatively low fees and robust investment lineups.

Courts continue to grapple with whether these complaints state claims upon which relief can be granted. Although the federal circuits apply facially uniform standards, in practice it is more likely for these cases to get past the pleading stage in the Second and Third Circuits than in the Seventh and (surprisingly) the Ninth

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[14] The ATRA Foundation's 2020 Report, *available at* http://www.judicialhellholes.org/wp-content/uploads/2020/12/ATRA_JH20_layout_08.pdf

[15] *Id.* at 1. According to the ATRA report, the "nine worst" jurisdictions for employers to be sued in 2020 were: (1) Pennsylvania (including Philadelphia), (2) New York City, (3) California, (4) South Carolina, (5) Louisiana, (6) Georgia, (7) City of St. Louis, Missouri, (8) Illinois (in particular, Cook, Madison, and St. Clair Counties), (9) Minnesota. *Id.* at 1-2.

Circuits. That being said, 2021 is certain to see more court decisions and possible action from the U.S. Supreme Court, which is considering a petition for *certiorari* from the Seventh Circuit ruling in *Hughes v. Northwestern University* that could establish a pleading standard for 401(k)/403(b) plan fees cases.

In addition, 2020 was also a remarkable year in that it saw four U.S. Supreme Court rulings in ERISA cases that will shape litigation for years to come. Somewhat surprising given the conservative leaning of the Supreme Court, the cases were a mixed bag for employers.

In *Retirement Plans Committee of IBM v. Jander*, 140 S. Ct. 592 (2020), the Supreme Court remanded an ERISA "stock drop" case for further consideration of whether fiduciary actions to divest or limit investments in stock of the plan sponsor are at odds with federal securities regulations. On remand, the lower courts have allowed the case to proceed, leading some to believe the Supreme Court breathed new life into this previously defunct type of litigation.

In *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 (2020), the Supreme Court resolved a longstanding debate over what a defendant must show to prove "actual knowledge" in order to trigger the ERISA's three-year statute of limitations for breach of fiduciary duty claims. The Supreme Court held that the statue requires proof that the plaintiff was "in fact aware" of the facts giving rise to the claim and in so doing precluded reliance on mere notice of the facts contained in plan disclosures.

In *Thole v. US Bank, N.A.*, 140 S. Ct. 1615 (2020), in contrast, the Supreme Court largely eviscerated challenges to defined benefit plan investments, holding that the plaintiffs had no standing because the allegedly imprudent investments did not diminish their retirement benefits. Many lower courts are now considering defense arguments that the same logic precludes claims by defined contribution plan participants who challenge the propriety of funds they never invested in.

Finally, in *Rutledge v. Pharmaceutical Care Management Association*, 2020 U.S. LEXIS 5988 (U.S. Dec. 10, 2020), the Supreme Court issued yet another decision concerning the ERISA's sweeping preemption provision. It held that the ERISA does not preempt state laws that regulate pharmacy benefit managers, which act as intermediaries between health plans and pharmacies.

What can we expect in 2021 in the ERISA space?

First, given the volume of ERISA class action filings in 2020, corporate counsel can expect to see further litigation regarding claims as to the reasonableness of 401(k) and 403(b) plan fees and expenses, inappropriate plan investments, and misleading financial disclosures.

Second, after finally abating toward the end of the Trump Presidency, we expect that DOL enforcement activity, litigation, and regulation will start to pick up again under the Biden Administration.

Finally, the *Rutledge* decision will surely embolden state legislatures and regulators to step up regulation of ancillary providers to benefit plans in an effort to protect local businesses and consumers. The decision may also prompt a resurgence of state law causes of action against plan providers.

Overall, we can expect 2021 to turn up the heat in the ERISA litigation arena.

Employment Discrimination Class Action Litigation –

In terms of private plaintiff employment discrimination class action litigation, employers can expect this area to remain an intense focus in 2021 by the private plaintiffs' bar. Publicity from the Black Lives Matter movement likely will continue to be a driver of litigation and settlements on this front.

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* 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.
- Given the Supreme Court's plaintiff-friendly ruling in 2016 in *Tyson Foods*, employers can expect more aggressive positions being advocated by plaintiffs' class action lawyers to try to "end run" *Wal-Mart*, especially on damages theories under Rule 23(b)(3).
- In terms of certification theories, the plaintiffs' bar is apt to pursue hybrid or parallel class certification theories where injunctive relief is sought under Rule 23(b)(2) and monetary relief is sought under Rule 23(b)(3), as well as a range of partial "issues 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, while deferring damages issues and determinations, and pressuring employers to settle due to the transaction costs of individualized mini-trials on damages. In effect, this tactic is another end-run around the limitations on Rule 23(b)(3) articulated in *Comcast*.

Government Enforcement Litigation –

The incoming Biden Administration likely has its eye on some changes it would like to make to agency priorities once it is in a position to do so. Until then, however, the EEOC and NLRB will continue to operate under Republican leadership into 2021. The critical priority shifts that have been advanced by the Republican Commission include the following:

A New Focus On Religious Discrimination: For several years, the EEOC's SEP identified as one of its top strategic enforcement priorities as addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad. According to the SEP, the EEOC continues to see an increase in charges involving religious discrimination against Muslims and those with a Middle Eastern background. However, in more recent years, the EEOC has demonstrated a willingness to pursue religious discrimination claims on behalf of other religious groups as well.

More recently, on November 17, 2020, the Commission requested public comment regarding updates to its religious discrimination guidance. In addition to direction on religious discrimination and accommodation, the guidance also includes sections addressing religious organizations, the ministerial exception to Title VII, First Amendment protections to employers, and protections under the federal Religious Freedom Restoration Act. The Commission's focus on such areas appears in part to be a reaction to the U.S. Supreme Court's *Bostock* decision, as the introduction to the updated guidance specifically refers to the Court's language in the opinion on religious liberty.

A Shifted Focus On National Origin Discrimination: National origin 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. Historically, those concerns have been focused on how global terrorism and unrest in the Middle East could lead to discrimination against Muslim or Sikh employees or those of Middle Eastern or South Asian descent, or how illegal immigration issues could give rise to discrimination against Mexican or South and Central American workers. The legal issues around this form of national origin discrimination have often focused on the perception of membership in a racial or ethnic group, as it is often the case that different nationalities or races are lumped together with this type of discrimination. The EEOC has long argued that discrimination on the basis of perceived national origin is just as actionable as any other kind of national origin discrimination.

The COVID-19 pandemic could change this focus somewhat. An outbreak of a deadly pandemic that had its origin in China has given rise to increased concerns about national origin discrimination against Asian-Americans, as cautioned by 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.

Dusting Off Equal Pay Data Collection & Implications: 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.[16] Once this collection was completed, the efforts on this front stalled at the Commission. However, Chair Dhillon has opined that the Commission may dust off this effort for 2021 and examine the most efficient means to begin the collection of this data; in the meantime, the analysis of data collected in 2019 is set to be completed in 2021 as well.

LGBT Employee Protections: Like the previous several years, and 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. However, as noted above, the impact of the *Bostock* decision on religiously-affiliated employers is yet to be seen, and the EEOC appears to have taken a particular interest in this issue.

Wage & Hour Class Action Litigation –

For the fifth year in a row, federal courts saw a decrease in FLSA filings. Whether employers will continue to see that trend in 2021, particularly at the federal level, remains to be seen. On the state level, 25 states raised their minimum wages levels in 2020, which typically drives the value of state-based wage & hour claims higher.

Employers nationwide remained on guard in 2020 against risks giving rise to litigation under the Fair Labor Standards Act and state law analogues. The COVID-19 environment spawned harbingers of litigation to come in the wage & hour space arising from "work from home" arrangements. As this state of work continues into 2021, employers are apt to see more claims for expense reimbursement and off-the-clock work from employees who left their traditional offices for remote work arrangements.

Well known plaintiffs' class action firms continued to pursue sophisticated claims in 2020, looking to exploit legal technicalities. Several firms attacked employers' payment of "additional compensation" to salaried exempt employees, claiming that the additional compensation established a "straight-time-overtime" scheme that destroys the employees' exempt classification for various reasons. Other firms challenged the exempt classification of jobs that did not fit squarely into archaic exemptions. Suits challenging non-clinical nurses, recruiters, project managers, financial advisors, and the like have proved fodder for these avaricious attorneys.

The DOL actively pushed its agenda relative to employee status in 2020, as it rolled out a final rule regarding joint employer status and scheduled a final rule regarding independent contractor status to take effect in early 2021. Although one court invalidated a large portion of the former, such ruling is not binding on other courts and remains on appeal. In 2021, employers are apt to see litigation over joint employer and independent contractor issues under the FLSA heat up and to see the extent to which courts will defer to these new precedents.

In addition to an evident push by many employers to ensure compliance with relevant wage & hour laws, arbitration programs containing class and collective action waivers remained a central risk mitigation option for

[16] *National Women's Law Center v. Office of Management & Budget,* No. 17-CV-2458 (D.D.C. Oct. 29, 2019) (ECF No. 91).

wage & hour claims following *Epic Systems.* In 2020, employers saw the plaintiffs' class action bar push the edges of this defense as they attempted to develop work-arounds on the judicial and legislative fronts.

Federal circuit courts reached conflicting results regarding whether the Federal Arbitration Act's exemption for transportation workers engaged in interstate commerce applies to local or "last mile" drivers. Plaintiffs' lawyers with resources and motivation pursued serial arbitrations on behalf of hundreds of claimants. Claims filed in California under the Private Attorneys' General Act exploded as an end-run around defense tools such as arbitration agreements with class action waivers. We can expect to see these and other options tested as we move into 2021.

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. More than any other year in recent memory, 2020 was a year of great change, inside and outside of the workplace. As these issues play out in 2021, additional chapters in the class action playbook will be written.

The private plaintiffs' bar are apt to be equally, if not more, aggressive in 2021 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 2021.

II. Significant Class Action Settlements In 2020

While 2019 and 2018 were not "blockbuster years" for class action settlement recoveries, as overall aggregate settlement figures dropped in both years, the major increase in class action settlement values in 2020 represent a return to prominence for these "bet the company" cases. This was all the more remarkable given that the COVID-19 pandemic had its grip on society and the legal system for nearly 10 months of the year. 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 2020 in workplace class actions increased from those in 2019 in every area except for wage & hour claims.

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

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. The top ten settlements from these categories totaled $1.338 billion in 2020. This represented a major uptick as compared to 2019, when the top ten settlements from these categories totaled $1.036 billion, and from 2018, when the top ten settlements from these categories totaled $909.69 million.

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, and other various workplace-related statutory laws. The top ten settlements in this category, which totaled $244.55 million, substantially decreased from 2019, when it totaled $319.65 million.

In sum, based on all categories, the top ten aggregate settlement numbers in 2020 totaled $1.58 billion, a significant increase from $1.34 billion in 2019 and $1.32 billion in 2018.

Settlements In Private Plaintiff Employment Discrimination Class Action Lawsuits

For employment discrimination class actions, the monetary value of the top ten private plaintiff settlements entered into or paid in 2020 totaled $422.68 million. This represented a substantial increase from 2019, when the total was $139.2 million, and 2018, when the total was $216.09 million.

1. $310 million – Alphabet Inc.
2. $41 million – Wynn Resorts Ltd.
3. $15.5 million – State Of Florida, Department Of Education
4. $14 million – Wal-Mart, Inc.
5. $14 million – Cook County, Illinois
6. $11.63 million – PricewaterhouseCoopers
7. $7.75 million – Western Digital Corp.
8. $3 million – Los Angeles Times Communications
9. $3 million – Pipefitters Association Local Union 597
10. $2.8 million – Raley's Family of Fine Stores

The top ten settlement were spread out across the country, with California leading the way with two settlements in federal court and two in state court. Eight of the top ten settlements involved gender discrimination allegations in areas such as pay, pregnancy and sexual misconduct.

1. **$310 million – *In Re Alphabet Inc. Shareholder Derivative Litigation*, Case No. 19-CV-341522 (Cal. Super. Ct. Nov. 30, 2020)** (final approval granted for a shareholder class action lawsuit over allegations of sexual misconduct involving executives).

2. **$41 million – *In Re Wynn Resorts, Ltd. Derivative Litigation*, Case No. A-18-769630 (Nev. Cty. Ct. Mar. 10, 2020)** (final approval granted for a shareholder class action alleging sexual misconduct by senior company officials).

3. **$15.5 million – *Florida Education Association, et al. v. State Of Florida, Department Of Education*, Case No. 17-CV-414 (N.D. Fla. Mar. 31, 2020)** (final approval granted for a class action settlement of race discrimination claims involving teachers who alleged that a state program paid them unequal bonuses based on race).

4. **$14 million – *Borders, et al. v. Wal-Mart Stores, Inc.*, Case No. 17-CV-506 (S.D. Ill. April 29, 2020)** (final approval granted for a class action settlement of pregnancy discrimination claims involving pregnant workers who claimed they were denied the benefits offered to other workers similar-situated in their ability or inability to work).

5. **$14 million – *Brown, et al. v. Cook County, Illinois*, Case No. 17-CV-8085 (N.D. Ill. Sept. 18, 2020)** (final approval granted for settlement of a class action brought by female public defenders and law clerks alleging the county did not protect them from regularly wrongful sexual harassment inflicted by detainees and other men in the county lockup).

6. **$11.63 million – *Rabin, et al. v. PricewaterhouseCoopers, LLP*, Case No. 16-CV-2276 (N.D. Cal. Aug. 19, 2020)** (preliminary approval granted for an employment discrimination class action involving older job applicants alleging they were denied employment because of their age).

7. **$7.75 million – *Chen, et al. v. Western Digital Corp.*, Case No. 19-CV-909 (C.D. Cal. April 3, 2020)** (preliminary approval granted for a class action brought by 1,370 females employees against their employer alleging violations of the California Equal Pay Act).

8. **$3 million – *Bokall, et al. v. Los Angeles Times Communications, LLC*, Case No. 10-CV-0984 (Cal. Super. Ct. Oct. 25, 2020)** (preliminary approval granted for settlement of a class action lawsuit brought by employees alleging violations of the California Equal Pay Act).

9. **$3 million – *Porter, et al. v. Pipefitters Association Local Union 597*, Case No. 12-CV-9844 (N.D. Ill. Nov. 24, 2020)** (final approval granted for settlement of a race discrimination class action where 350 African-American workers alleged they were provided fewer job opportunities by a union.).

10. **$2.8 million – *Borrego, et al. v. Raley's Family Of Fine Stores*, Case No. 34-2015-177687 (Cal. Super. Ct. Jan. 17, 2020)** (final approval granted for settlement of an employment discrimination class action involving grocery store workers who claimed the company discriminated against them based on pregnancy).

Settlements In Private Plaintiff Wage & Hour Class Actions

For wage & hour class actions, the monetary value of the top ten private plaintiff settlements entered into or paid in 2020 totaled $294.6 million. This amount represents a sharp decline from the 2019 total of $449.05 million, and is more on par with the 2018 total of $253.5 million.

1. $78 million – Air Methods Corp.

2. $35 million – Wells Fargo & Co
3. $31.5 million – The TJX Companies Inc.
4. $28 million – New Prime Inc.
5. $28 million – City of New York
6. $21 million – Aramark Corp.
7. $20 million – Burlington Coat Factory Warehouse Corp.
8. $18.6 million – C.R. England, Inc.
9. $18 million – Conagra Foods
10. $16.5 million – PAM Transportation Inc.

The top ten settlement primarily involved nationwide claims, while only one involved state-specific claims. Furthermore, no state had more than two lawsuits on the list, with California, New Jersey, and Massachusetts.

1. **$78 million – *Helmick, et al. v. Air Methods Corp.*, Case No. RG-13665373 (Cal. Super. Ct. July 1, 2020)** (preliminary approval granted for a class action settlement of wage & hour claims involving 450 medical flight crew workers alleging the company failed to provide overtime pay and meal breaks).
2. **$35 million – *Merino, et al. v. Wells Fargo & Co.*, Case No. 16-CV-7840 (D.N.J. Jan. 15, 2020)** (final approval granted for settlement of a class action brought by 38,000 bank employees claiming the company failed to pay overtime compensation).
3. **$31.5 million – *Roberts, et al. v. The TJX Companies Inc.*, Case No. 13-CV-13142 (D. Mass. July 27, 2020)** (preliminary approval granted for a class action settlement of wage & hour claims involving 1,911 current and former assistant store managers alleging that their employer failed to pay overtime compensation).
4. **$28 million – *Oliveira, et al. v. New Prime Inc.*, Case No. 15-CV-10603 (D. Mass. July 23, 2020)** (preliminary approval granted for a class action settlement of wage & hour claims brought by thousands of drivers alleging a failure to pay wages for all hours worked).
5. **$28 million – *Worley, et al. v. City Of New York*, Case No. 17-CV-4337 (S.D.N.Y. June 8, 2020)** (final approval granted for a class action settlement of wage & hour claims alleging safety agents were not properly compensated for wages and overtime).
6. **$21 million – *Lacher, et al. v. Aramark Corp.*, Case No. 19-CV-687 (E.D. Pa. June 10, 2020)** (final approval granted for class action settlement involving workers who claim the company defaulted on its guarantee to pay bonuses to managers).
7. **$20 million – *Goodman, et al. v. Burlington Coat Factory Warehouse Corp.*, Case No. 11-CV-4395 (D.N.J. Aug. 26, 2020)** (preliminary approval granted for a class action settlement of wage & hour claims involving allegations of failing to pay overtime to assistant store managers).
8. **$18.6 million – *Gradie, et al. v. C.R. England, Inc.*, Case No. 16-CV-0768 (D. Utah Nov. 20, 2020)** (final approval granted for a class action settlement involving drivers who alleged the company withdrew loan payments for driving school at an interest rate that was too high and that they were not paid for meal and rest breaks).

9. **$18 million – *Negrete, et al. v. Conagra Foods, Inc.*, Case No. 16-CV-631 (C.D. Cal. Nov. 16, 2020)** (preliminary approval granted for a class action settlement of wage & hour claims brought by current and former employees alleging they were deprived of meal breaks, rest breaks, and overtime pay).

10. **$16.5 million – *Browne, et al. v. PAM Transport Inc.*, Case No. 16-CV-5366 (W.D. Ark. July 31, 2020)** (final approval granted in wage & hour class action settlement involving thousands of truck drivers alleging a failure to pay proper wages for hours worked).

Settlements In Private Plaintiff ERISA Class Actions

For ERISA class actions, the monetary value of the top ten private plaintiff settlements entered into or paid in 2020 totaled $380.10 million. This was nearly identical to the 2019 total of $376.35 million, and an increase from 2018, when the total was $313.4 million.

1. $79 million – Wells Fargo & Co.
2. $60.5 million – Raydon Corp.
3. $40 million – Reliance Trust Co.
4. $39.5 million – McKinsey & Co.
5. $30 million – Kelsy-Hayes Co.
6. $29 million – SunTrust Bank, Inc.
7. $28.5 million – FMR LLC
8. $27 million – The Board Of Trustees Of the American Operation Of Musicians And Employers' Pension Fund
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. **$79 million – *Berry, et al. v. Wells Fargo & Co.*, Case No. 17-CV-304 (D.S.C. July 29, 2020)** (final approval granted for settlement of an ERISA class action alleging that the company failed to provide retired bank employees deferred compensation they were owed under a retirement benefits plan).

2. **$60.5 million – *Woznicki, et al. v. Raydon Corp.*, Case No. 18-CV-2090 (M.D. Fla. Aug. 26, 2020)** (preliminary settlement approval granted for an ERISA class action alleging that the top executive and plan trustee for the ESOP sold shares of an ineffectively performing stock at an inflated value).

3. **$40 million – *Pledger, et al. v. Reliance Trust Co.*, Case No. 15-CV-4444 (N.D. Ga. Oct. 14, 2020)** (preliminary approval granted for settlement of an ERISA class alleging mismanagement of retirement funds and breaches of fiduciary duties with respect of 401(k) plans).

4. **$39.5 million – *Bhatia, et al. v. McKinsey & Co., Inc.*, Case No. 19-CV-1466 (S.D.N.Y. Sept. 18, 2020)** (preliminary approval granted for settlement of an ERISA class action filed by 401(k) plan participants alleging fiduciary breach violations).

5. **$30 million – *International Union, United Automobile, Aerospace And Agricultural Implement Workers Of America, et al. v. Kelsy-Hayes Co.*, Case No. 11-CV-14434 (E.D. Mich. Aug. 17, 2020)** (preliminary approval granted for an ERISA class action settlement involving 240 retirees accusing the union pension fund of failing to notify them of plan changes that affected their benefits).

6. **$29 million – *In Re SunTrust Bank, Inc. 401(k) Plan Affiliated ERISA Litigation*, Case No. 11-CV-784 (N.D. Ga. July 20, 2020)** (final approval granted for settlement of an ERISA class action alleging mismanagement of workers' pension plans).

7. **$28.5 million – *Moitoso, et al. v. FMR LLC*, Case No. 18-CV-12122 (D. Mass. July 9, 2020)** (preliminary approval granted for settlement of an ERISA class action alleging mismanagement of employees' 401(k) retirement fund).

8. **$27 million – *Snitzer, et al. v. The Board Of Trustees Of the American Operation Of Musicians And Employers' Pension Fund*, Case No. 17-CV-5361 (S.D.N.Y. Oct. 6, 2020)** (final approval granted for settlement of an ERISA class action filed by 401(k) plan participants alleging fiduciary breach violations).

9. **$25 million – *Smith, et al. v. OSF HealthCare System*, Case No. 16-CV-467 (S.D. Ill. Oct. 7, 2020)** (preliminary approval granted for settlement of an ERISA class action alleging that the Defendant improperly claimed its plan was exempt as a "church plan" to avoid funding requirements).

10. **$21.6 million – *Cunningham, et al. v. WAWA, Inc.*, Case No. 18-CV-3355 (E. D. Pa. July 16, 2020)** (preliminary approval granted for settlement of an ERISA class action filed by former employees accusing the convenience store chain of violating ERISA by forcing workers to leave the employee stock ownership plan).

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 Uniformed Services Employment and Reemployment Rights Act ("USERRA"), the Worker Adjustment and Retraining Notification Act ("WARN"), and other federal and state statutory law violations. The top ten settlements in this category substantially decreased in 2020, as they totaled $244.55 million; by contrast, the total in 2019 was $319.65 million, and $411.15 in 2018.

1. $73 million – University Of California

2. $52 million – Facebook, Inc.

3. $41 million – The Ohio State University

4. $25 million – ADP, LLC

5. $18 million – C.R. England, Inc.

6. $14 million – Dartmouth College

7. $9.25 million – University Of Michigan

8. $5 million – Gruma Corp.

9. $4.1 million – Novatime Technology, Inc.

10. $3.2 million – CBC Restaurant Corp.

The biggest settlements involved allegations of sexual misconduct, workplace injuries, and Title IX claims.

1. **$73 million – *A.B., et al. v. University Of California*, Case No. 20-CV-9555 (C.D. Cal. Nov. 16, 2020)** (preliminary settlement approval sought in a class action brought by 6,600 victims alleging they were sexually abused by a part-time gynecologist at UCLA).

2. **$52 million – *Scola, et al. v. Facebook, Inc.*, Case No. 18-CV-5135 (Cal. Super. Ct. Aug. 7, 2020)** (preliminary approval granted in a class action against Facebook alleging that the tech giant did not protect the content moderators from significant psychological trauma that resulted from graphic images they saw as part of their job duties).

3. **$41 million – *Garrett, et al. v. The Ohio State University*, Case No. 18-CV-692 (S.D. Ohio May 11, 2020)** (approval of settlement fund granted for settlement of claims by former students and alumni accusing the university of failing to hold accountable a staff physician for sexually assaulting male patients).

4. **$25 million – *Kusinski, et al. v. ADP, LLC*, Case No. 2107-CH-12364 (Ill. Cir. Ct. Nov. 6, 2020)** (preliminary approval granted for a class action settlement involving claims that the company violated the Illinois Biometric Information Privacy Act by illegally collecting, possessing, and disclosing the biometric data of employees without written disclosure or proper consent).

5. **$18 million – *Gradie, et al. v. C.R. England, Inc.*, Case No. 16-CV-768 (D. Utah Oct. 26, 2020)** (final approval granted in a class action involving a group of drivers claiming the trucking company coerced prospective employees to enroll in a for-profit training with a misleading promise of possible employment).

6. **$14 million – *Rapuano, et al. v. Dartmouth College*, Case No. 18-CV-1070 (D.N.H. July 10, 2020)** (final approval granted in a class action involving claims of the university not complying with its Title IX obligations when students were subjected to harassment and a hostile environment created by three professors).

7. **$9.25 million – *Doe, et al. v. University Of Michigan* (Nov. 18, 2020)** (prelitigation settlement of class claims where women accused a former university provost of sexually harassing female employees and graduate students).

8. **$5 million – *Citywide Consultants & Food Management LLC, et al. v. Gruma Corp.*, Case No. 19-CV-4724 (C.D. Cal. July 1, 2020)** (final approval granted for a class action settlement involving allegations that Defendant violated state antitrust and labor laws when misclassifying distributors and delivery drivers as independent contractors).

9. **$4.1 million – *Thome, et al. v. Novatime Technology, Inc.*, Case No. 19-CV-6256 (N.D. Ill. Oct. 20, 2020)** (preliminary approval granted for a class action settlement involving claims that the company violated the Illinois Biometric Information Privacy Act by illegally collecting, possessing, and disclosing the biometric data of employees without written disclosure or proper consent).

10. **$3.2 million – *Jones, et al. v. CBC Restaurant Corp.*, Case No. 19-CV-6736 (N.D. Ill. June 12, 2020)** (final approval granted for a class action settlement involving claims that the company violated the Illinois Biometric Information Privacy Act by illegally collecting, possessing and disclosing employees biometric data without written disclosure or proper consent).

B. Top Ten Government-Initiated Monetary Settlements

In 2020, 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 2020 fiscal year, the EEOC filed 94 new merits lawsuits and collected a record amount of $535.4 million on behalf of alleged discrimination victims. By comparison, the EEOC recovered approximately $486 million in FY 2019; approximately $505 million in FY 2018; and approximately $484 million in FY 2017. Of the total amount collected, litigation recoveries increased from $39.1 million in FY 2019 to $106 million, the highest in 16 years.

The DOL conducted a record number of wage compliance audits in 2020 but saw a sharp drop in the amount of back wages collected. It collected a total of $258 million in backpay in 2020, far less than the $322 million obtained in 2019. Moreover, the number of employees who received back wages also dropped from about 314,000 in 2019 to about 230,000 in 2020, while the number of complaints received by the DOL Wage & Hour Division rose from just under 19,000 in 019 to more than 21,500 in 2020.

For all types of government-initiated enforcement actions, the monetary value of the top ten settlements entered into or paid in 2020 totaled $241.0 million. This represented a major jump from the 2019 total of $57.52 million and the 2018 total of $126.7 million.

1. $80 million – Wilmington Trust, N.A.
2. $76 million – CNN America, Inc.
3. $20.5 million – Jackson National Life Insurance Co.
4. $20 million – Wal-Mart, Inc.
5. $10 million – Jet Propulsion Laboratory
6. $9.8 million – JPMorgan Chase & Co.
7. $7.8 million – Wells Fargo Bank N.A.
8. $6.5 million – United Transportation Union
9. $5.4 million – Baltimore County
10. $5 million – Performance Foods

The majority of the settlements, four in total, involved EEOC pattern or practice litigation, while others included enforcement actions and investigations led by the OFCCP and the DOL.

1. **$80 million –** ***U.S. Department Of Labor v. Wilmington Trust, N.A.*** **(DOL April 30, 2020)** (settlement agreement stemming from the DOL's investigation of Defendant's alleged violation of the ERISA related to misrepresentation of the company's fair market value, which caused monetary losses to plan participants of their retirement accounts).

2. **$76 million –** ***National Labor Relations Board v. CNN America, Inc.*** **(NLRB Jan. 10, 2020)** (settlement agreement resulting from claims of the NLRB on behalf of camera operators and technicians who accused the cable news channel of firing them because they were part of a union).

3. **$20.5 million –** ***EEOC v. Jackson National Life Insurance Co.*****, Case No. 16-CV-2472 (D. Colo. Jan. 9, 2020)** (consent decree approved in a race discrimination and retaliation lawsuit brought by the EEOC).

4. **$20 million – *EEOC v. Wal-Mart, Inc.*, Case No. 20-CV-163 (E.D. Ky. Sept. 9, 2020)** (consent decree approved in an EEOC's pattern or practice lawsuit alleging gender discrimination against female job applicants).

5. **$10 million – *EEOC v. Jet Propulsion Laboratory*, Case No. 20-CV-3131 (C.D. Cal. June 11, 2020)** (consent decree approved in an EEOC pattern or practice lawsuit alleging age discrimination against older employees).

6. **$9.8 million – *Office Of Federal Contract Compliance Programs v. JPMorgan Chase & Co.*, (OFCCP Nov. 3, 2020)** (conciliation agreement approved stemming from an investigation of gender-based discrimination in wages).

7. **$7.8 million – *Office Of Federal Contract Compliance Programs v. Wells Fargo Bank N.A.*, (OFCCP Aug. 24, 2020)** (conciliation agreement approved stemming from an investigation involving hiring practices relative to African-American applicants).

8. **$6.5 million – *U.S. Department Of Labor v. United Transportation Union*, Case No. 17-CV-923 (N.D. Ohio Oct. 2, 2020)** (consent judgment entered in the DOL enforcement action alleging Defendants' engaged in violations of Title I of the ERISA).

9. **$5.4 million – *EEOC v. Baltimore County*, Case No. 07-CV-2500 (D. Md. April 23, 2020)** (consent decree approved in EEOC pattern or practice lawsuit alleging that the County engaged in unlawful employment practices by requiring a class of aggrieved individuals within an age group to pay higher contributions than younger individuals to Defendant's pension plan).

10. **$5 million – *EEOC v. Performance Food Group, Inc.*, No. 13-CV-1712 (D. Md. Dec. 9, 2020)** (settlement approval sought in an EEOC pattern or practice lawsuit alleging Defendant failed to hire female applicants at its facilities).

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 nonmonetary relief, but rarely contain all of them. Attorneys representing the U.S. government in enforcement litigation actions also secured several settlements in 2020 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 2020 were the following:

- Reach out to historically black colleges and universities to recruit African-American students into company programs;
- Hire consultant to determine how to prevent racist graffiti at worksites;
- Issue letters of apology to affected employees;

- Transfer more than 1.5 million shares of stock as relief to affected employees;
- Hire an EEO monitor, a diversity director, and a layoff coordinator to ensure compliance with federal law;
- Provide personal notification devices to alert deaf employees of emergencies;
- Provide employment to 580 affected applicants;

The top ten settlements in 2020 involving significant injunctive relief provisions include:

1. ***EEOC v. Dillard's Inc.*, Case No. 20-CV-1152 (E.D. Ark. Oct. 8, 2020).** The EEOC brought an action alleging that the retailer discriminated against African-American employees by denying them promotions into management/supervisory positions because of their race. As part of the consent decree ordered by the Court, the Defendant agreed to consider employees for promotion based on qualifications. The company also agreed reach out to historically black colleges and universities to recruit African-American students into its Little Rock Buyer's Program.

2. ***EEOC v. Chalfont & Associates Group, Inc.*, Case No. 19-CV-1304 (M.D. Fla. Aug. 18, 2020).** The EEOC entered a consent decree with a Florida McDonald's franchise, to resolve a lawsuit alleging unlawful employment practices against a Hasidic Jew when refusing him employment because he would not shave his beard due to religious beliefs. In addition to monetary relief, the company agreed to add anti-discrimination provisions to its grooming polices; institute a vast "zero religious discrimination employment policy," which will include reasonable religious accommodations for all its locations; and conduct workplace behavior training for it managers and human resources personnel.

3. ***Halley, et al. v. Waitr Holdings, Inc.*, Case No. 19-CV-1800 (E.D. La. April 16, 2020).** Current and former delivery drivers brought a class action lawsuit alleging that Defendant violated the Fair Labor Standards Act ("FLSA"), for unpaid minimum wages when failing to compensate its drivers for work-related travel expenses of their personal vehicles. The effects of unreimbursed expenses caused their wages to fall below the federal minimum wage. Additionally, Waitr misclassified some of its delivery drivers as independent contractors and failed to pay them minimum wage for hours worked and overtime. In the settlement agreement approved by the Court, Defendant agreed to transfer more than 1.5 million shares of the platform's stock for monetary relief.

4. ***In Re Afni, Inc.*, Case No. 20-BCFP-0021 (BCFP Nov. 12, 2020).** The Bureau of Consumer Financial Protection entered a consent decree with a debt collection company to resolve claims brought under the Fair Credit Reporting Act ("FCRA"). In addition to monetary penalties, the company agreed to review on a monthly basis samples of account information provided by creditors to ensure the accuracy and integrity of the information; review on a monthly basis samples of consumer disputes and the company's responses to such disputes; retain at least one independent consultant with experience in FCRA compliance to conduct an independent review of the company's policies; and work with the Bureau's Regional Director to implement any changes necessary as a result of the consultant's review.

5. ***EEOC v. Air Systems, Inc.*, Case No. 19-CV-7574 (N.D. Cal. Aug. 20, 2020).** The EEOC entered a consent decree with the manufacturer to resolve a lawsuit alleging unlawful harassment on the basis of race. In addition to monetary relief, the company agreed to review company policies and train all employees on preventing and reporting racial harassment, and to work with a consultant to develop policies and procedures to facilitate discussions with potential subcontractors, general contractors and unions about how to best monitor, prevent, and remedy harassment and racist graffiti at worksites, and develop proposals to incorporate such terms into contracts.

6. ***In Re Twitter Inc. Shareholder Derivative Litigation*, Case No. 18-CV-0062 (D. Del. Nov. 3, 2020).** A settlement was reached by the parties to resolve multiple suits brought against Twitter Inc. by its shareholders, who claimed that the social media company was inflating its user metrics regarding engagement and growth. In addition to a $47 million monetary payment, the agreement also provided

that the company will adopt a number of reforms, including considering underrepresented populations when seeking candidates for nomination to the board of directors and enhancing the board's independence criteria and continuing education.

7. ***EEOC v. Jet Propulsion Laboratory*, Case No. 20-CV-3131 (C.D. Cal. June 9, 2020).** The EEOC resolved a lawsuit against a national research facility alleging claims that the organization laid off older workers in order to hire younger employees. In addition to monetary relief, the consent decree required that the organization retain an EEO monitor, a diversity director, and a layoff coordinator to monitor compliance with the ADEA and ensure that the organization does not take any additional action that has a disparate impact on employees in the protected age group.

8. ***Intravaia, et al. v. National Rural Electric Cooperative Association*, Case No. 19-CV-973 (E.D. Va. Aug. 6, 2020).** Employees of members of a national service organization brought class claims under the ERISA alleging the service association and plan fiduciaries engaged in prohibited transactions and that the plan's administrative costs were overly excessive. In the settlement agreement, in addition to $10 million in monetary relief, Defendant agreed have an independent fiduciary and consultant conduct fee reviews and analyses on a triannual basis and will have a formal request for proposals process for recordkeeping services once every six years.

9. ***EEOC v. Fedex Ground Package System, Inc.*, Case No. 15-CV-0256 (W.D. Pa. May 18, 2020).** The EEOC resolved a lawsuit against the national shipping service alleging claims of discrimination and failure to accommodate deaf and hard-of-hearing employees. In addition to monetary relief, the consent decree required that the company take steps to protect the safety of deaf and hard-of-hearing employees, including ensuring that all tuggers, forklifts and similar motorized equipment have visual warning lights and providing personal notification devices to alert deaf package handlers of an emergency.

10. ***Office Of Federal Contract Compliance Programs v. Wells Fargo Bank N.A.*, (OFCCP Aug. 24, 2020).** The OFCCP entered into a conciliation agreement with the national lender to resolve alleged issues of hiring discrimination on the basis of race. In addition to monetary relief, the conciliation agreement required the bank to provide 580 affected applicants with job opportunities as tellers, personal bankers, customer sales and service representatives, and administrative support positions.

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