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Dear Clients:

The last few years have seen a transformation in class action and collective action litigation involving workplace issues. This came to a head in 2014 to 2016 with several 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 2017 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 2016, and analyzes the most significant settlements over the past twelve 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 2016 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 1,331 decisions analyzed in the Report.

The cases decided in 2016 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 Richard L. Alfred, Lorie Almon, Raymond C. Baldwin, Brett C. Bartlett, Edward W. Bergmann, Holger Besch, Daniel Blouin, Michael J. Burns, Robert J. Carty, Jr., Mark A. Casciari, John L. Collins, Ariel Cudkowicz, Catherine M. Dacre, Joseph R. Damato, Christopher J. DeGroff, Rebecca DeGroff, Pamela Devata, Ada Dolph, Alex Drummond, William F. Dugan, Noah A. Finkel, Timothy F. Haley, Heather Havette, Eric Janson, David D. Kadue, Lynn Kappelman, Raymond R. Kepner, Daniel B. Klein, Mary Kay Klimesh, Ronald J. Kramer, Richard B. Lapp, Richard P. McArdle, Jon Meer, Ian H. Morrison, Camille A. Olson, Andrew Paley, Katherine E. Perrelli, Kyle Peterson, Thomas J. Piskorski, Jennifer Riley, David Ross, Jeffrey K. Ross, David J. Rowland, Frederick T. Smith, Amanda Sonneborn, Diana Tabacopoulos, Joseph S. Turner, Annette Tyman, Peter A. Walker, Timothy M. Watson, Robert S. Whitman, Tom Wybenga, and Kenwood C. Youmans.

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

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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.*, *Glatt, et al. v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016)). If a decision is unavailable in bound format, we have utilized a LEXIS cite from its electronic database (*e.g.*, *Wyms, et al. v. Staffing Solutions Southeast, Inc.*, 2016 U.S. Dist. LEXIS 90137 (S.D. Ill. July 12, 2016)), and if a LEXIS cite is not available, then to a Westlaw cite from its electronic database (*e.g.*, *Henderson, et al. v. United Student Aid Funds, Inc.*, 2016 WL 5956041 (S.D. Cal. May 3, 2016)). If a ruling is not contained in an electronic database, the full docketing information is provided (*e.g.*, *EEOC v. Zoria Farms, Inc.*, Case No. 13-CV-1544 (E.D. Cal. July 22, 2016)).

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 *2017 Workplace Class Action Litigation Report* is also available as an eBook. The downloaded eBook is accessible via freely available eBook reader apps like iBook, Kobo, Aldiko, etc. The eBook provides a rich and immersive reading experience to the users.

Some of the notable features include:

1. The eBook is completely searchable.
2. Users can increase or decrease the font sizes.
3. Active links are set for the table of contents to their respective sections.
4. Bookmarking is offered for notable pages.
5. Readers can drag to navigate through various pages.

A Note On Class Action And Collective Action Terms And Laws

References are made to Rule 23 of the Federal Rules of Civil Procedure and 29 U.S.C. § 216(b) throughout this Report. These are the two main statutory sources for class action and collective action decisional law. Both are procedural devices used in federal courts for determining the rights and remedies of litigants whose cases involve common questions of law and fact. The following summary provides a brief overview of Rule 23 and § 216(b).

Class Action Terms

The Report uses the term *class action* to mean any civil case in which parties indicated their intent to sue on behalf of themselves as well as others not specifically named in the suit at some point prior to the final resolution of the matter. This definition includes a case in which a class was formally approved by a judge (a *certified* class action), as well as a *putative* class action, in which a judge denied a motion for certification, in which a motion for certification had been made but a decision was still pending at the time of final resolution, or in which no formal motion had been made but other indications were present suggesting that class treatment was a distinct possibility (such as a statement in a complaint that the plaintiffs intended to bring the action on behalf of others similarly-situated).

Although certified class actions may receive considerable attention if they are reported publicly, defendants also must confront putative class actions that contain the potential for class treatment as a result of filing a motion for certification or because of allegations in the original complaint that assert that the named plaintiffs seek to represent others similarly-situated. Even if such cases are never actually certified, the possibility of the litigation expanding into a formal class action raises the stakes significantly, perhaps requiring a more aggressive (and costlier) defense or resulting in a settlement on an individual basis at a premium.

Rule 23

Rule 23 governs class actions in federal courts, and typically involves lawsuits that affect potential class members in different states or that have a nexus with federal law. Rule 23 requires a party seeking class certification to satisfy the four requirements of section (a) of the rule and at least one of three conditions of section (b) of the rule. Under U.S. Supreme Court precedent, a district court must undertake a "rigorous analysis of Rule 23 prerequisites" before certifying a class. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982). More often than not, plaintiffs will support their motion for class certification with deposition testimony, declarations of putative class members, and expert opinions in the form of affidavits of expert witnesses. Courts often observe that the appropriate analysis in reviewing this evidence is not equivalent to an examination of the merits or a battle between the parties' experts. Rather, the salient issue is whether plaintiffs' legal theories and factual materials satisfy the Rule 23 requirements.

The Rule 23(a) requirements include:

- Numerosity – The individuals who would comprise the class must be so numerous that joinder of them all into the lawsuit would be impracticable.
- Commonality – There must be questions of law and fact common to the proposed class.
- Typicality – The claims or defenses of the representative parties must be typical of the claims and defenses of putative class members.

- Adequacy of Representation – The representative plaintiffs and their counsel must be capable of fairly and adequately protecting the interests of the class.

The standards for analyzing the commonality requirement of Rule 23(a)(2) were tightened in 2011 with the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes, et al.*, 564 U.S. 338 (2011). As a result, a "common" issue is one that is "capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Id.* at 2551.

Once a plaintiff establishes the four requirements of Rule 23(a), he or she must satisfy one of the three requirements of Rule 23(b). In practice, a plaintiff typically establishes the propriety of class certification under either Rule 23(b)(2) or Rule 23(b)(3) in an employment-related case.

Because application of each rule depends on the nature of the injuries alleged and the relief sought, and imposes different certification standards on the class, the differences between Rule 23(b)(2) and (b)(3) are critical in employment-related class action litigation. In the words of the rule, a class may be certified under Rule 23(b)(2) if the party opposing the class "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." In other words, plaintiffs seeking to certify class actions under Rule 23(b)(2) are restricted to those cases where the primary relief sought is injunctive or declaratory in nature. Rule 23(b)(2) does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Rule 23(b)(2) provides for a binding litigation order as to all class members without guarantees of personal notice and the opportunity to opt-out of the suit.

Rule 23(b)(3) is designed for circumstances in which class action treatment is not as clearly called for as in Rule 23(b)(1) and Rule 23(b)(2) situations, when a class action may nevertheless be convenient and desirable. A class may be certified under Rule 23(b)(3) if the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Pertinent considerations include the interest of the members of the class in individually controlling the prosecution of separate actions; the extent and nature of any litigation concerning the controversy already commenced by members of the class; the desirability of concentrating the litigation of the claims in one particular forum; and the difficulties likely to be encountered in the management of a class action.

To qualify for certification under Rule 23(b)(3), therefore, a class must meet not only the requirements of Rule 23(a), but also two additional requirements: "(1) common questions must predominate over any questions affecting only individual members; and (2) class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy." *Amchem Products, Inc. v. Windso*r, 521 U.S. 591, 615 (1997). While the common question requirement of Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) overlap, the predominance requirement is more stringent than the common question requirement. Thus, even though a case may present common questions of law or fact, those questions may not always predominate and class certification would be inappropriate.

Rule 23(b)(3) applies to cases where the primary relief sought is money damages. The Supreme Court has determined – in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) – that unlike in Rule 23(b)(2) class actions, each class member in a Rule 23(b)(3) class action for money damages is entitled as a matter of due process to personal notice and an opportunity to opt-out of the class action. Accordingly, Rule 23(c)(2) guarantees those rights for each member of a

class certified under Rule 23(b)(3). There are no comparable procedural guarantees for class members under Rule 23(b)(2).

Finally, two recent decisions of the U.S. Supreme Court have established a gloss on the Rule 23 requirements that play out in class certification proceedings in a significant manner, including: (i) *Wal-Mart Stores, Inc. v. Dukes, et al.*, 564 U.S. 338 (2011), as referenced above, which tightened commonality standards under Rule 23(a)(2); and (ii) *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), which interpreted Rule 23(b)(3) – that requires "questions of law or fact common to class members predominate over any questions affecting only individual members" – to mandate that plaintiffs' proposed damages model show damages on a class-wide basis. In *Wal-Mart* and *Comcast*, the Supreme Court reaffirmed that lower federal courts must undertake a "rigorous analysis" of whether a putative class satisfies the predominance criterion set forth in Rule 23(b)(3), even if that analysis overlaps with the merits of the underlying claims.

29 U.S.C. § 216(b)

This statute governs multi-plaintiff lawsuits under the ADEA and the FLSA. Generally, such lawsuits are known as collective actions (as opposed to class actions).

Under 29 U.S.C. § 216(b), courts generally recognize that plaintiffs and other "non-party" individuals may not proceed collectively until they establish that that they should be permitted to do so as a class. Under § 216(b), courts have held that "similarly-situated" individuals may proceed collectively as a class. The federal circuits have not agreed on the standard according to which such a class should be certified. Two competing standards for certification are recognized.

The first approach adopts the view that the "similarly-situated" inquiry is coextensive with the procedure used in class actions brought pursuant to Rule 23. Using this methodology, the court analyzes the putative class for factors including numerosity, commonality, typicality, and adequacy of representation. This typically occurs after some discovery has taken place. This approach is unusual and is not favored.

The second approach is a two-tiered approach involving a first stage conditioned certification process and a second stage potential decertification process. It is more commonly used and is the prevailing test in federal courts. In practice, it tends to be a "plaintiff-friendly" standard.

In the context of the first stage of conditional certification, plaintiffs typically move for conditional certification and permission to send notices to prospective class members. This generally occurs at an early stage of the case, and often before discovery even commences. Courts have held that a plaintiff's burden at this stage is minimal. A ruling at this stage of the litigation often is based upon allegations in the complaint and any affidavits submitted in favor of or in objection to conditional certification.

Courts have not clearly defined the qualitative or quantitative standards of evidence that should be applied at this stage. Courts are often reluctant to grant or deny certification on the merits of a plaintiff's case. This frustrates defendants with clearly meritorious arguments in defense of the litigation, such as those based on compelling proof that would establish the exempt status of the plaintiffs and other employees alleged to be similarly-situated.

Instead, courts appear to find the most convincing proof that certification is improper based on evidence that putative class members perform different jobs in different locations or facilities, under different supervisors, and potentially pursuant to differing policies and practices. Courts

also have held that certification is inappropriate when individualized inquiries into applicable defenses are required, such as when the employer asserts that the relevant employees are exempt.

Where conditional certification is granted, a defendant has the opportunity to request that the class be decertified after discovery is wholly or partially completed in the subsequent, second stage of decertification. Courts engage in a more rigorous scrutiny of the similarities and differences that exist amongst members of the class at the decertification stage. The scrutiny is based upon a more developed, if not entirely complete, record of evidence. Upon an employer's motion for decertification, a court assesses the issue of similarity more critically and may revisit questions concerning the locations where employees work, the employees' supervisors, their employment histories, the policies and practices according to which they perform work and are paid, and the distinct defenses that may require individualized analyses.

Opt-In/Opt-Out Procedures

Certification procedures are different under Rule 23 and 29 U.S.C. § 216(b). Under Rule 23(b)(2), a court's order binds the class; under Rule 23(b)(3), however, a class member must opt-out of the class action (after receiving a class action notice). If he or she does not do so, they are bound by the judgment. Conversely, under § 216(b), a class member must opt-in to the lawsuit before he or she will be bound. While at or near 100% of class members are effectively bound by a Rule 23 order, opt-in rates in most § 216(b) collective actions typically range from 5% to 40%.

TABLE OF CONTENTS

I. Overview Of The Year In Workplace Class Action Litigation

A. Executive Summary

Workplace class action litigation has increased geometrically over the past decade. More often than not, It poses unique "bet-the-company" risks for employers. An adverse judgment in a class action has the potential to bankrupt a business or eviscerate its market share. Likewise, the on-going defense of a class action can drain corporate resources long before the case reaches a decision point. Companies that do business in multiple states are also susceptible to "copy-cat" class actions, whereby plaintiffs' lawyers create a domino effect of litigation filings that challenge corporate policies and practices in numerous jurisdictions at the same time. Hence, workplace class actions can adversely impact a corporation's business operations, jeopardize or end the careers of senior management, and cost millions of dollars to defend. For these reasons, workplace class action litigation risks are at the top of the list of problems that keep business leaders from sleeping at night.

Skilled plaintiffs' class action lawyers and governmental enforcement litigators are not making this challenge any easier. They are continuing to develop new theories and approaches to the successful prosecution of complex employment litigation. New rulings by federal and state courts add to this patchwork quilt of compliance problems and risk management issues. In turn, the events of the past year in the workplace class action world demonstrate that the array of litigation issues facing businesses are continuing to accelerate at a rapid pace while also undergoing significant change. Governmental enforcement litigation pursued by the U.S. Equal Employment Commission ("EEOC") and the U.S. Department of Labor ("DOL") has also manifested an aggressive "push-the-envelope" agenda of two activist agencies, with regulatory oversight of workplace issues continuing as a high priority in the Obama Administration. The combination of these factors are challenging businesses to integrate their litigation and risk mitigation strategies to navigate these exposures. These challenges are especially acute for businesses in the context of complex workplace litigation.

Adding to this mosaic of challenges in 2017 is the first change-over of the political party occupying the White House in eight years. One of the initial items both political parties will address is President Trump's nominee to fill the vacant seat on the U.S. Supreme Court. The fragile alliances amongst the conservative and liberal factions will hang in the balance, as future workplace class action rulings will pivot at least in part on the new composition of the Supreme Court once the nominee is confirmed and takes the bench sometime in 2017. Furthermore, changes to government priorities will start on Inauguration Day, and some may well be stark reversals in policy that are sure to have a cascading impact on private class action litigation. While predictions about the future of workplace class action litigation may cover a wide array of potential outcomes, the one sure bet is that change is inevitable and corporate America will encounter new litigation challenges.

B. Key Trends Of 2016

An overview of workplace class action litigation developments in 2016 reveals six key trends.

First, class action dynamics increasingly have been shaped and influenced by recent rulings of the U.S. Supreme Court. Over the past several years, the Supreme Court has accepted more cases for review – and issued more rulings – than ever before that have impacted the prosecution and defense of class actions and government enforcement litigation. The past year continued that trend, with several key decisions on complex employment litigation and class action issues, and more cases accepted for review that are posed for rulings in 2017. The key class action decisions this past year – in the *Tyson Foods* and *Spokeo* cases – were arguably more pro-plaintiff and pro-class action than business-oriented or anti-class action. While the Supreme Court led by Chief Justice John Roberts is often thought to be pro-business, the array of its key rulings impacting class action workplace issues is anything but one-dimensional. Some

decisions may be viewed as hostile to the expansive use of Rule 23, while others are hospitable and strengthen the availability of class actions and/or make proof requirements easier for plaintiffs. Further, the Supreme Court declined several opportunities to impose more restraints on class actions, and by often deciding cases on narrow grounds, it has left many gaps to be filled in by – and thereby has fueled disagreements arising amongst – lower federal courts. Suffice it to say, the range of rulings form a complex tapestry that precludes an overarching generalization that the Supreme Court is either pro-business or pro-worker on class actions.

Second, the monetary value of the top employment-related class action settlements declined significantly in 2016 after they reached all-time highs in 2014 and 2015. The plaintiffs' employment class action bar and governmental enforcement litigators successfully translated their case filings into large class-wide settlements, but they did so at lower values than in the two previous years. The top ten settlements in various employment-related categories totaled $1.75 billion in 2016, which declined from $2.48 billion in 2015 and $1.87 billion in 2014. Whether this is the start of a trend or a short-term aberration remains to be seen as 2017 unfolds.

Third, federal and state courts issued more favorable class certification rulings for the plaintiffs' bar in 2016 than in past years. Plaintiffs' lawyers continued to craft refined and more successful class certification theories to counter the more stringent Rule 23 certification requirements established in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). In the areas of employment discrimination, wage & hour, and ERISA class actions, the plaintiffs' bar scored exceedingly well in securing class certification rulings in 2016. In sum, class actions continue to be certified in significant numbers and certain "magnet" jurisdictions continue to issue decisions that encourage – or, in effect, force – the resolution of large numbers of claims through class action mechanisms.

Fourth, overall complex employment-related litigation filings increased in 2016 insofar as employment discrimination cases were concerned, but decreased in the areas of ERISA class actions, governmental enforcement litigation, and wage & hour collective actions and class actions. For the past decade, wage & hour class actions and collective actions have been the leading type of "high stakes" lawsuits being pursued by the plaintiffs' bar. Each year the number of such case filings increased. However, for the first time in over a decade, case filing statistics for 2016 reflected that wage & hour litigation decreased over the past year. Additional factors set to coalesce in 2017 – including litigation over the new FLSA regulations and the direction of wage & hour enforcement under the Trump Administration – are apt to drive these exposures for Corporate America. To the extent that government enforcement of wage & hour laws is ratcheted down, the private plaintiffs' bar likely will "fill the void" and again increase the number of wage & hour lawsuit filings.

Fifth, wage & hour certification decisions in 2016 increased geometrically as compared to last year. Of the 224 wage & hour certification decisions in 2016, there were 195 conditional certification rulings and 29 decertification rulings. In contrast, in 2015, there were 175 wage & hour certification decisions, including 153 conditional certification rulings and 22 decertification rulings. While plaintiffs' lawyers won more conditional certification motions than compared to prior years, employers also won decertification motions at higher rates than as compared to 2015. At the same time, that led to a more rapid and robust development of case law on conditional certification and decertification issues in the wage & hour context. It also reflects the simple truism that with more wage & hour litigation case filings over the last 36 months, there have been more conditional certification and decertification decisions in that space than in any other area of workplace class action litigation.

Sixth, and finally, government enforcement lawsuits brought by the DOL and EEOC continued the aggressive litigation programs of both agencies, but by sheer numbers of cases, their enforcement activities were arguably limited in their effectiveness, at least when measured by lawsuit filings and recoveries compared to previous years. Settlement numbers for government enforcement litigation in 2016

decreased substantially as compared to 2015, as did the litigation dockets of the DOL and the EEOC. This trend is critical to employers, as both agencies have a focus on "big impact" lawsuits against companies and "lead by example" in terms of areas that the private plaintiffs' bar aims to pursue. The content and scope of enforcement litigation undertaken by the DOL and the EEOC in the Trump Administration remains to be seen; most believe there will be wholesale changes, which may well prompt the private plaintiffs' class action bar to "fill the void" and expand the volume of litigation pursued against employers over the coming year.

C. Significant Trends In Workplace Class Action Litigation In 2016

(i) The Impact Of U.S. Supreme Court Rulings

Over the past decade, the U.S. Supreme Court – led by Chief Justice John Roberts – increasingly has shaped the contours of complex litigation exposures through its rulings on class action and governmental enforcement litigation issues. Many of these decisions have elucidated the requirements for pursuing employment-related class actions.

The 2011 decision in *Wal-Mart Stores, Inc. v. Dukes* and the 2013 decision in *Comcast Corp. v. Behrend* are the two most significant examples. Those rulings are at the core of class certification issues under Rule 23. To that end, federal and state courts cited *Wal-Mart* in 536 rulings in 2016; they cited *Comcast* in 216 cases in 2016.

Rulings In 2016

In terms of direct decisions by the Supreme Court impacting workplace class actions, this past year was no exception. In 2016, the Supreme Court decided seven cases – five employment-related cases and two class action cases – that will influence complex employment-related litigation in the coming years.

These rulings included two wage & hour cases, two statutory violation cases (under the Fair Credit Reporting Act ("FCRA") and the Telephone Consumer Protection Act ("TCPA")), two ERISA cases, and one EEOC case. A rough scorecard of the decisions reflects three distinct plaintiff-side victories, defense-oriented rulings in three cases, and one toss-up.

– ***Tyson Foods, Inc. v. Bouaphakeo, et al.*, 136 S. Ct. 1036 (2016)** –*Tyson Foods* involved review of a ruling where workers pursued class claims under the FLSA and Iowa state law for unpaid work and overtime for time spent putting on and taking off hard hats, work boots, hair nets, aprons, gloves, and earplugs. The employer objected to class certification on a host of grounds, including that the variations in protective gear, the differences in the time to don and doff the gear, and the varying hours worked gave rise to individualized issues precluding class certification. The workers proved their donning and doffing time and their hours over 40 hours per week based on expert testimony via a time and motion study that calculated average times donning and doffing. At trial the jury awarded $2.89 million to 3,344 class members, which the district court increased to $5.8 million with liquidated damages, and the Eight Circuit affirmed. In a 6 to 2 decision, the Supreme Court answered the vexing "trial by formula" problem it touched upon in *Wal-Mart*, and determined that the representative evidence offered via statistics and expert testimony was appropriate in this case, and supported both class certification and the jury verdict for the class. The Supreme Court declined to craft a general rule governing the use of statistical evidence, or so-called representative evidence, in all types of class actions, although in general it elucidated when such evidence would be allowed in a class action and when class members can rely on statistical samples to establish their claims. For these reasons, more so than the other Supreme Court case in 2016, *Tyson Foods* was the Rule 23 workplace class action decision of the year. The ruling opens a door that many thought the Supreme Court closed in *Wal-Mart* and *Comcast*, and provides plaintiffs' counsel with a

new theoretical approach for class certification. Most notably, the dissenters in *Tyson Foods* claimed that the Supreme Court had turned its back on *Comcast* by redefining and diluting the predominance standard for class certification under Rule 23(b)(3).

– ***Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)** – Widely considered the other key class action ruling of the past Supreme Court term, *Spokeo* concerned whether people without an injury can still file class actions. The case involved whether a job applicant had the ability to bring a complaint against credit reporting firms under the FCRA, where the plaintiff alleged that a people search engine violated the FCRA when it reported he was wealthy and had a graduate degree; in reality, he was struggling to find work. The district court had dismissed the lawsuit because plaintiff lacked standing, and the Ninth Circuit reversed. In its 6 to 2 ruling, the Supreme Court held that the wrong analysis of standing had been undertaken, and it remanded the case for further findings. In so doing, the Supreme Court articulated that standing requires a showing of a "concrete injury" that is not necessarily synonymous with a tangible injury. Hence, certain types of intangible harms may be sufficient to satisfy standing requirements. The decision reflects that the Supreme Court's class action jurisprudence has taken a more nuanced and measured approach toward constraints on the ability of representative parties to litigate class actions. By opening the door to more expanded standing principles, *Spokeo* is apt to subject employers to more litigation under statutes like the FCRA.

– ***EEOC v. CRST Van Expedited, Inc.*, 136 S. Ct. 1642 (2016)** – This case concerned the largest fee sanction award – approximately $4.7 million – ever issued against the EEOC. It arose from a systemic sexual harassment lawsuit that the agency lost for failing to meet pre-suit obligations relative to the claims of 67 female employees for whom the EEOC sued, but whose claims the Commission failed to investigate before filing suit. The dispute over legal fees arose when the employer subsequently secured a fee award for its expenditures in fighting the claims. The Eighth Circuit subsequently upended that award on the basis that the district court improperly ruled that it had to determine on an individual basis whether each of the 67 claims in question were frivolous or groundless (and as the employer's victory on procedural grounds was not a victory on the merits). On further appeal to the Supreme Court, it unanimously held that a favorable outcome on the merits is not a prerequisite for an employer to recover fees against the EEOC. As a result, it remanded the case for an examination of the fee issue and resuscitated the employer's quest to recover millions of dollars from the Commission. In so doing, it gave the EEOC a significant bench-slap over its arguments. While the decision dealt specifically with Title VII's attorneys' fee provision, it is likely that the attorneys' fee provisions in many other statutes will be intercepted in a similar fashion.

– ***Campbell-Ewald Co. v. Gomez, et al.*, 136 S. Ct. 663 (2016)** – *Campbell-Ewald* concerned whether a company can moot and defeat a class action brought under the TCPA by offering a settlement by way of a Rule 68 offer of judgment, and what happens to potential class actions when such proposals are accepted. In this case, defendant made the Rule 68 offer before plaintiff filed a motion for class certification, and it moved to dismiss the lawsuit as moot after plaintiff declined the offer. In a 6 to 3 ruling, the Supreme Court held that under basic contract principles, an unaccepted offer creates no lasting right or obligation, and plaintiff's claims were not rendered moot. In so ruling, the Supreme Court eliminated a potential defense strategy that employers had used to eviscerate class actions with "pick off" offers to the named plaintiff.

– ***Amgen, Inc. v. Harris, et al.*, 136 S. Ct. 758 (2016)** – In this unanimous ruling, the Supreme Court reversed and remanded a breach of fiduciary duty claim under the ERISA on the grounds that ERISA fiduciaries that manage publically-traded employee stock investments in 401(k) plans need not overcome a presumption of prudence. In so ruling, the Supreme Court reaffirmed its ruling in *Fifth Third Bank v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). The Supreme Court reversed on the

basis that the Ninth Circuit imposed too low of a burden on plaintiffs when attempting to show that the ERISA fiduciaries should have done something to halt the decline in stock values.

– ***Encino Motorcars, LLC v. Navarro, et al.*, 136 S. Ct. 2117 (2016)** – This case involved interpretation of an exemption for service advisors at automobile dealerships who sued for unpaid overtime under the FLSA. The district court had dismissed the claim on the basis of an exemption for salesmen, partsmen, and mechanics under the FLSA, but the Ninth Circuit reversed on the basis of an interpretative regulation of the DOL in 2011 (that reversed the DOL's position on the exemption without explanation). In a 6 to 2 ruling, the Supreme Court reversed the Ninth Circuit's decision, holding that reliance on the DOL's interpretative regulation lacked the force of law because it was arbitrary and capricious. The Supreme Court criticized the DOL's position and instructed the Ninth Circuit to reinterpret the FLSA exemption without giving any deference to the DOL's 2011 regulation.

– ***Gobeille, et al. v. Liberty Mutual Insurance Co.*, 136 S. Ct. 936 (2016)** – In this case, the Supreme Court held in a 6 to 2 ruling that a Vermont state law – that required the disclosure of payments relating to healthcare claims and information about healthcare services – was preempted by the ERISA to the extent the Vermont law applied to ERISA-governed plans. In so ruling, the Supreme Court articulated the contours of how the ERISA preempts state law attempts to regulate healthcare benefit issues.

The decisions in *Spokeo*, *Campbell-Ewalt*, and *Tyson Foods* are sure to shape and influence class action litigation in a profound manner relative to preemptive defense strategies and "pick-off" attempts, standing concepts, and statistical evidence for class certification and proof of class claims for damages. To the extent that extrinsic restrictions on class actions – *i.e.*, limits on the ability of representative plaintiffs to litigate class actions, such as Article III standing concepts and the mootness doctrine – are relaxed or lessened (as in *Spokeo* and *Campbell-Ewalt*), class actions are easier to maintain and litigate. Further, *Tyson Foods* is certainly a setback for employers and reflects an approach to class certification that seems at odds with *Wal-Mart* and *Comcast*. To that end, one indication of their impact is the fact that after the Supreme Court's rulings in these cases, lower federal and state courts cited *Spokeo* in 365 decisions, cited *Campbell-Ewald* in 185 decisions, and cited *Tyson Foods* in 104 decisions during the remainder of 2016.

Amgen, Navarro, Gobeille, and *CRST Van Expedited* are also apt to shape the future of workplace litigation in the contexts of ERISA fiduciary duty claims, deference to DOL regulations in wage & hour litigation, ERISA preemption, and claims for breaches of statutory duty against the EEOC. While arguably defense-oriented rulings, they are not as significant for employers as *Spokeo, Campbell-Ewalt,* and *Tyson Foods* are for plaintiffs.

Rulings Expected In 2017

Equally important for the coming year, the Supreme Court has accepted five additional cases for review in 2016 – that are likely to be decided in 2017 – that also will impact and shape class action litigation and government enforcement lawsuits faced by employers. Those cases include four employment lawsuits and one class action case. The Supreme Court undertook oral arguments on two of these cases in 2016; the other three will have oral arguments in 2017. The corporate defendants in each case have sought rulings seeking to limit the use of class actions or control government enforcement lawsuits.

– ***NLRB v. SW General,* No. 15-1251** – In this case, which was argued on November 7, 2016, the Supreme Court will determine whether an unfair labor practice charge was unauthorized due to the NLRB's acting general counsel serving in violation of a federal statute in terms of NLRB procedure. The Supreme Court is apt to decide the scope of Presidential authority with executive agencies, the

contours of federal labor law, and a blueprint for how future Administrations can exercise power over labor policies.

– ***Microsoft v. Baker, et al.,*** **No. 15-457** – Although not an employment case, this case may well impact the ability of employers to defend class action litigation. It involves a consumer fraud class action where the district court denied class certification, which was reversed on appeal by the Ninth Circuit. The Supreme Court will determine the impact and implications in a class action when the named plaintiffs voluntarily dismiss their claims with prejudice while others in the class wish to proceed with the class litigation. This case is expected to be set for oral argument in 2017.

– ***Czyzewski, et al, v. Jevic Holding,*** **No. 15-649** – Argued on December 7, 2016, this case involves the Worker Adjustment and Retraining Notification ("WARN") Act and the interplay between worker rights under that statute and bankruptcy proceedings after a company allegedly violates the WARN Act. The Supreme Court likely will determine whether priority in distributing assets in bankruptcy may proceed in a manner that allegedly violates the priority scheme in the Bankruptcy Code. The case also may decide rules for priority in reorganizations and liquidations that impact employers and workers in economically challenged industries and organizations.

– ***EEOC v. McLane Co., Inc.,*** **No. 15-1248** – In this case, the Supreme Court will examine whether a district court's decision to quash or enforce a subpoena in an EEOC administrative enforcement proceeding should be reviewed *de novo*, or reviewed deferentially. The process of responding to or challenging an EEOC subpoena may become considerably more expensive if the Supreme Court sides with the Commission's position, especially as the EEOC been exceedingly aggressive in pursuing systemic administrative investigations through liberal use of subpoenas for all sorts of employer data. This case is expected to be set for oral argument in 2017.

– ***Advocate Health Care Network v. Stapleton, et al.,*** **No. 16-74** – In this case (a consolidation of three separate appeals), the Supreme Court will examine whether church-affiliated hospitals are exempt from the ERISA. The hospitals assert that their retirement plans are excluded from the ERISA's coverage and that they should not face class actions over alleged breaches of fiduciary obligations and minimum funding requirements. This case is expected to be set for oral argument in 2017.

The Supreme Court is expected to issue decisions in these five cases in 2017.

Each decision may have significant implications for employers and for the defense of high-stakes workplace litigation.

Filling The Scalia Vacancy On The U.S. Supreme Court

As 2017 opens, the Supreme Court remains shorthanded after the death of Justice Antonin Scalia in February of 2016. The potential exists for 4-to-4 deadlocks on key issues. Given the timing of President Trump's nomination for Justice Scalia's successor, the Supreme Court is apt to be short one member until the late spring or potentially even longer given the politics and logistics of the confirmation process.

In terms of the impact of the successor to Justice Scalia, it is reasonable to assume that he or she will be conservative and cut more in the mold of the types of judges that President Trump described in his campaign in terms of the significance of the judicial process in general and the Supreme Court in particular. While the current ideological alignments on the Supreme Court are fragile, a "conservative" replacement of Justice Scalia would almost certainly preserve the current moderate-conservative approach to class action questions. That being said, Justice Scalia had an outsized influence on class action issues during his tenure on the Supreme Court. As illustrated by his opinions in *Wal-Mart Stores, Inc. v. Dukes* and *Comcast*

Corp. v. Behrend, Justice Scalia advocated putting the spotlight on class action litigation, and the consistent thread of his opinions were to make class actions more difficult to certify and more challenging to win. In sum, skeptics of class actions lost their strongest judicial ally, and his passing likely will weaken the intellectual championing of counter-points to a future rebound of class action jurisprudence at the Supreme Court.

(ii) Lower Class Action Settlement Numbers In 2016

As measured by the top ten largest case resolutions in various workplace class action categories, overall settlement numbers decreased in 2016 as compared to 2015.

This manifested a trend that began with the U.S. Supreme Court's decision in *Wal-Mart* in 2011. By tightening Rule 23 standards and raising the bar for class certification, *Wal-Mart* made it more difficult for plaintiffs to convert their class action filings into substantial settlements.

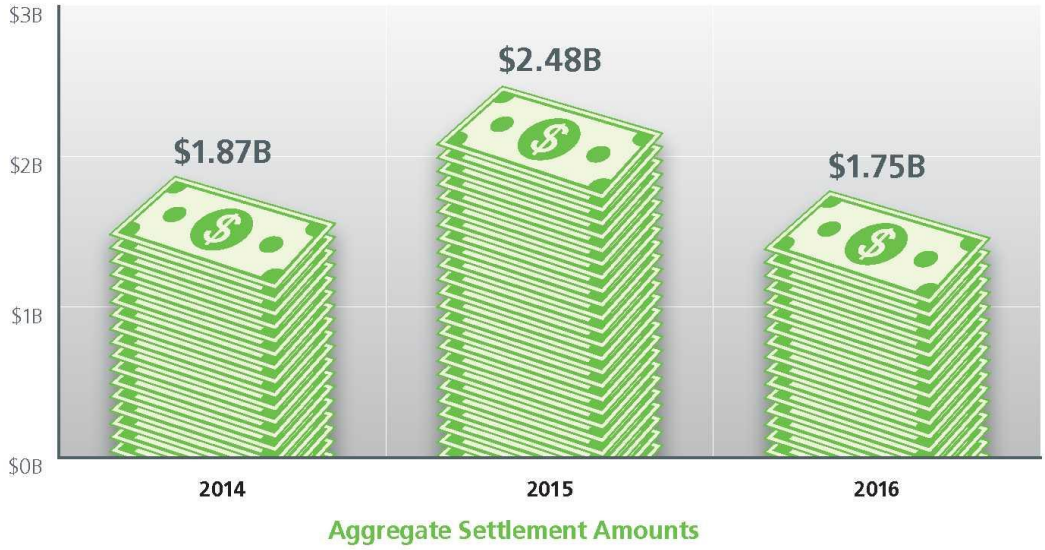
The settlement statistics for 2016 underscore this trend and the impediments to transforming case filings into settlements of cases on a class-wide basis.

This also reflects a process whereby there has been a maturing of case architecture considerations, as plaintiffs' lawyers have "re-booted" their strategic approaches to take account of *Wal-Mart*, and crafted refined class certification theories with better chances of success.

That phenomenon is still being played out, as well as manifesting itself in settlement dynamics.

Considering all types of workplace class actions, settlement numbers in 2016 totaled $1.75 billion, which decreased significantly from 2015 when these settlements were at an all-time high of $2.48 billion.

This also represented a significant decrease over 2014 levels, when the aggregate settlement numbers totaled $1.87 billion.



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

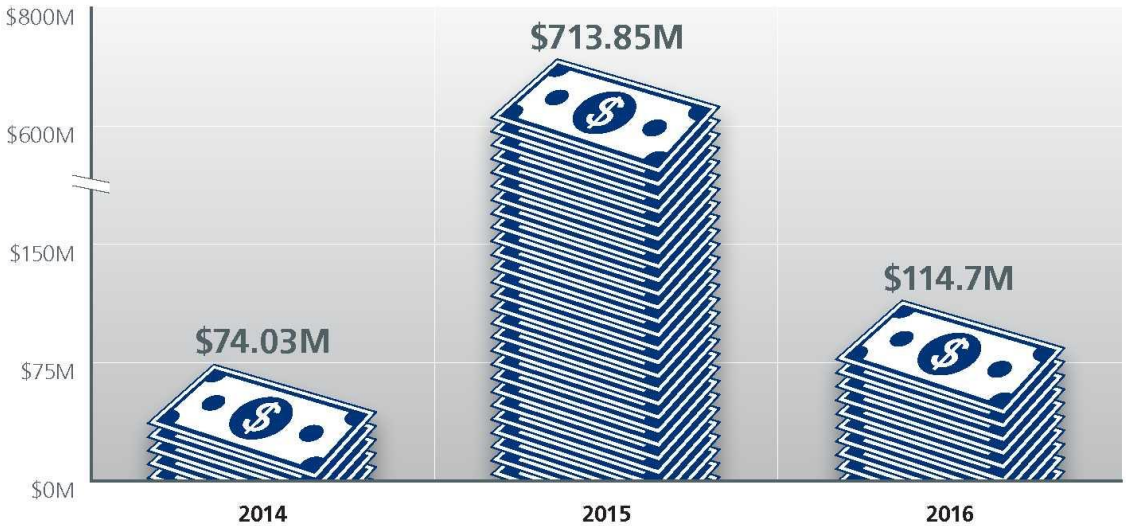
There was an upward trend for wage & hour class action settlements, and a significant downward trend for resolutions of employment discrimination and ERISA class actions, as well as governmental enforcement litigation.

This is shown by the following chart for 2016 settlement numbers:

Settlement Amounts By Class Action Type

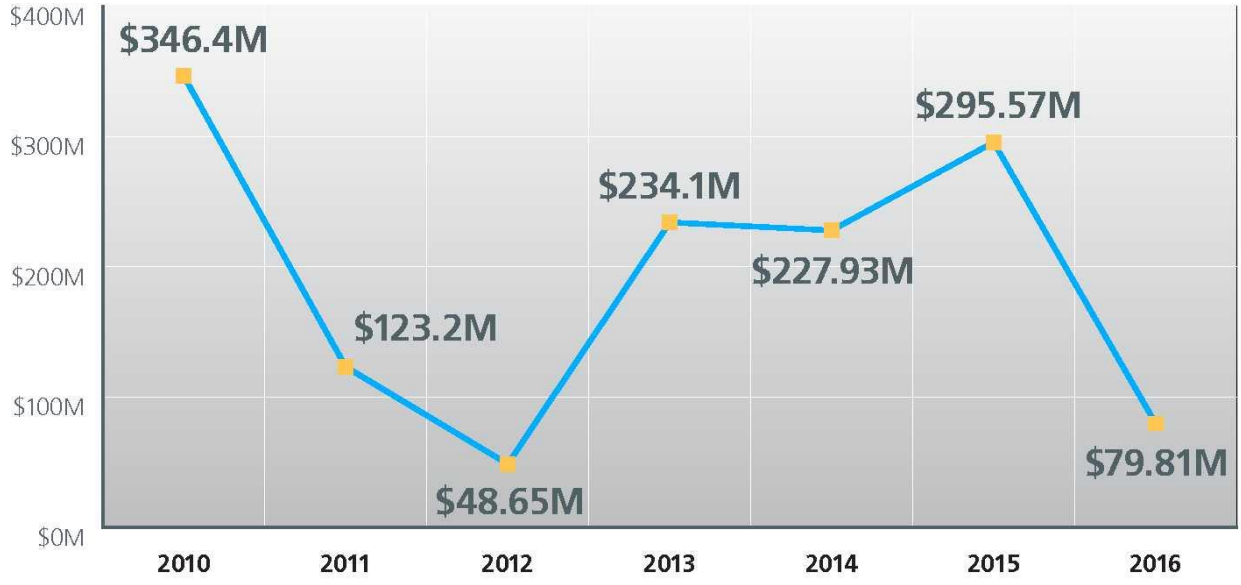
By type of case, settlements in private plaintiff statutory workplace class actions experienced the most significant decrease.

The top ten settlements in this category decreased to $114.7 million, which was a significant decline from $713.85 million in 2015, but an increase from $74.03 million in 2014. The following chart shows this nearly seven-fold decrease:



Value of Top 10 Private Statutory Workplace Class Action Settlements

Most telling, however, the "*Wal-Mart* effect" is shown by the pattern for employment discrimination class action settlements in 2016, as well as a comparison of the settlement figures with previous settlement activity over the last decade. This trend is illustrated in the following chart:



Value Of Top 10 Employment Discrimination Class Action Settlements

In 2016, the value of the top ten largest employment discrimination class action settlements of $79.81 million was the second lowest figure since 2010,[1] and followed the trend that started in 2011 (after *Wal-Mart* was decided) that showed decreases in settlement amounts over three years of that 4-year period. On a comparative basis, the settlement figure for 2016 was the second lowest over the past six years.

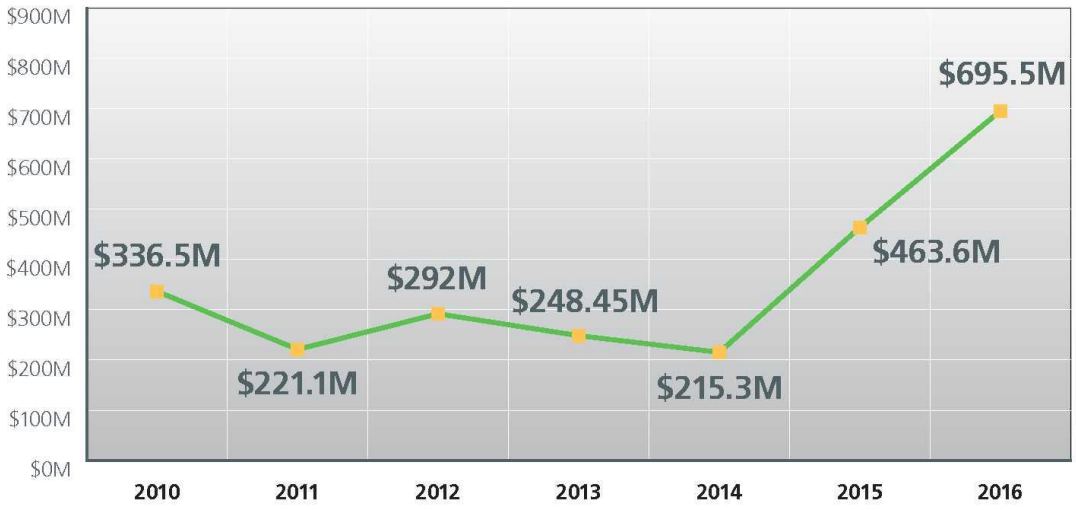
This trend, however, did not hold for wage & hour class action settlements. In 2016, the value of the top ten wage & hour settlements was $695.5 million, a significant increase over 2015. This is most telling in examining the last four years, for 2016 represented almost a quadrupaling (after two years of declining numbers in 2013 and 2014) in the value of the top wage & hour settlements as compared to 2014.[2] This reflects that *Wal-Mart* has had far less of an impact in this substantive legal area, as FLSA settlements are

[1] An analysis of class action settlement activity is set forth in Chapter II of this Report. The total of $79.81 million for the top ten largest employment discrimination class action settlements in 2016 is the second lowest total since 2006; the figures for each year were as follows: 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. With the issuance of the *Wal-Mart* decision in June of 2011, settlements were decidedly lower in 2012, and relatively depressed in 2013 and 2014.

[2] By comparison, the top ten wage & hour class action settlements in 2015 totaled $463.6 million, compared to $215.3 million in 2014 and $248.45 million in 2013. The figure of $695.5 million in 2016 is the highest amount over the last decade.

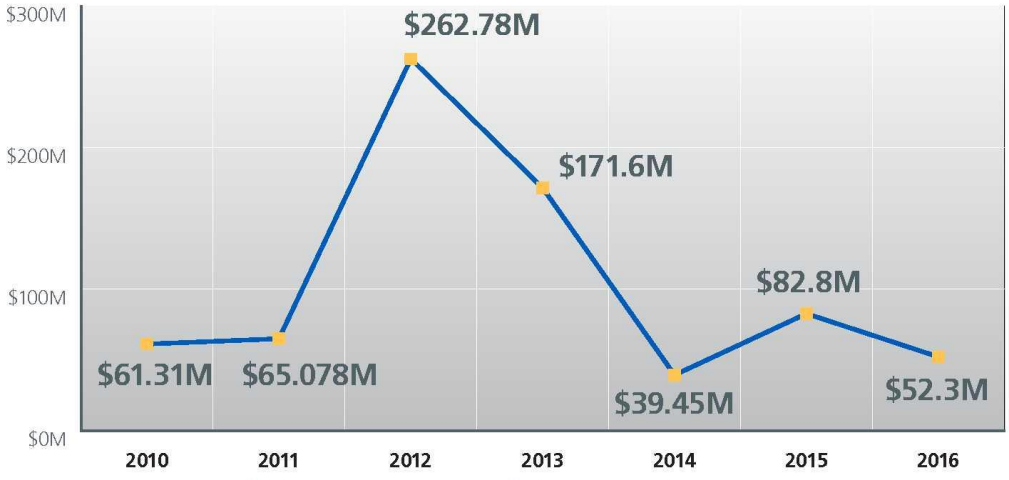
not explicitly tied to the concepts on class certification addressed in *Wal-Mart* (and instead, are based on the standards under 29 U.S.C.§ 216(b)).

This trend is illustrated by the following chart:



Value Of Top 10 Wage & Hour Class Action Settlements

Relatedly, settlements in government enforcement litigation experienced a significant downward trend. The top ten settlements in 2016 totaled $52.3 million, a substantial decrease even from 2015, when settlements hit one of their lowest points in the past eight years.[3] This trend is illustrated by the following chart of 2016 settlements:



Value Of Top 10 Government Enforcement Litigation Settlements

[3] The total for the top ten government enforcement litigation settlements was $82.8 million in 2015, compared to $39.45 million in 2014, $171.6 million in 2013 and $262.78 million in 2012. Other than 2014 (when governmental settlements hit their lowest point in the last decade at $39.45 million), the value of the top ten settlements in 2016 was the second lowest figure for the past decade.

ERISA class action settlements also were down, as the top ten settlements totaled $807.4 million in 2016.

This figure represented a decline from $926.5 million in 2015.

While the 2016 aggregate settlement number was nearly six times greater than in 2013,[4] it entailed a significant decrease from 2014 (when settlements were $1.31 billion). Nonetheless, ERISA class action settlements this past year were fueled by several mega-settlements.

This trend is illustrated by the following chart:

Settlement trends in workplace class action litigation have been influenced by many factors.

In the coming year, settlement activity is apt to be influenced developing case law interpreting the Supreme Court's decision in *Tyson Foods*, the impact of the Trump Administration's labor and employment enforcement policies, and case filing trends of the plaintiffs' class action bar.

(iii) Class Certification Trends In 2016

Anecdotally, surveys of corporate counsel confirm that complex workplace litigation – and especially class action and multi-plaintiff lawsuits – remains one of the chief exposures driving corporate legal budgetary expenditures, as well as the type of legal dispute that causes the most concern for their companies.

The prime concern in that array of risks is now indisputably wage & hour litigation.

The circuit-by-circuit analysis of 244 class certification decisions in all varieties of workplace class action litigation is detailed in the following map.

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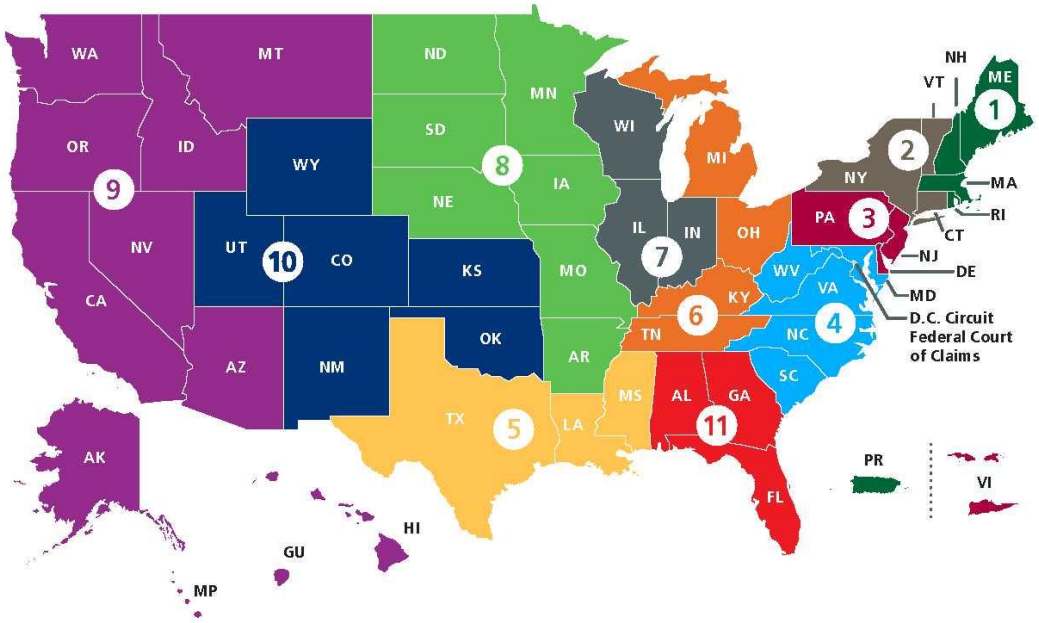
[4] The total for the top ten ERISA class action settlements in 2015 was $926.5 million compared to $1.31 billion in 2014 and $155.6 million in 2013.

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
Employment Discrimination Decisions												
Certification Motions Granted	0	0	1	1	0	0	0	0	2	0	0	0
Certification Motions Denied	0	1	0	0	0	0	0	0	1	1	1	0
Sub-Total:	**4 Granted / 4 Denied**											
ERISA Decisions												
Certification Motions Granted	0	1	1	0	0	1	1	0	2	1	1	0
Certification Motions Denied	0	0	1	1	1	0	0	0	1	0	0	0
Sub-Total:	**8 Granted / 4 Denied**											
FLSA Certification Decisions												
Conditional Certification Motions Granted	6	29	6	7	22	11	9	8	33	2	12	2
Conditional Certification Motions Denied	3	8	2	0	5	0	6	1	18	1	4	0
Decertification Motions Granted	0	3	3	0	1	0	1	1	4	0	0	0
Decertification Motions Denied	0	4	3	0	1	1	3	0	3	1	0	0
Sub-Total:	**147 Conditional Certifications Granted / 48 Conditional Certifications Denied** **13 Decertification Motions Granted / 16 Decertification Motions Denied**											
Total:	**159 Total Certification Motions Granted / 56 Total Certification Motions Denied** **13 Decertification Motions Granted / 16 Decertification Motions Denied**											

Wage & Hour Certification Trends

While plaintiffs continued to achieve initial conditional certification of wage & hour collective actions in 2016, employers also secured significant victories in defeating conditional certification motions and

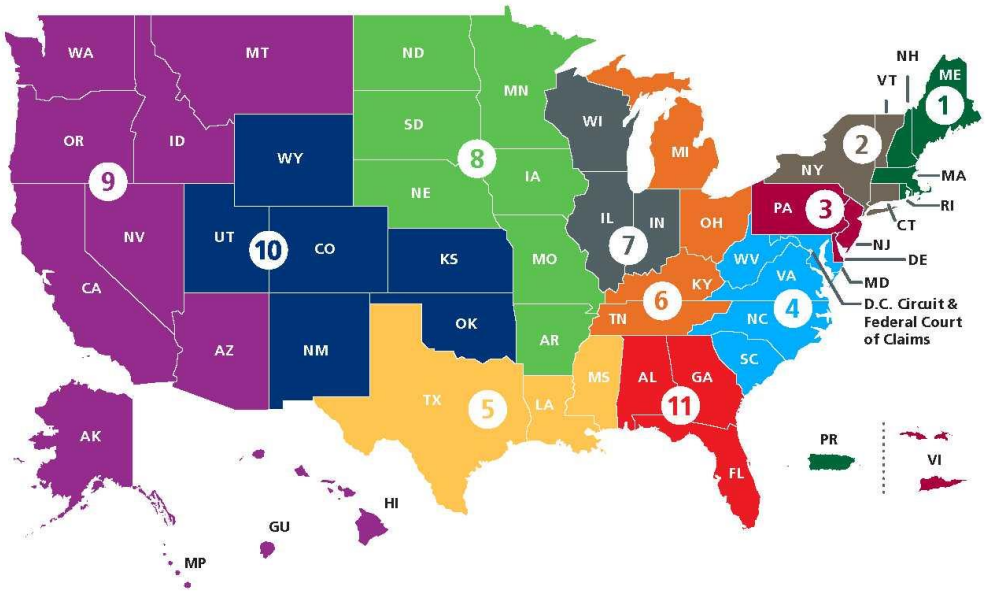
obtaining decertification of § 216(b) collective actions.[5] The percentage of successful motions for decertification brought by employers rose by nearly 10% in 2016.

Most significantly, for the first time in over a decade, wage & hour lawsuit filings in federal courts decreased.

An increase in FLSA filings over the past several years, however, caused the issuance of more FLSA certification rulings than in any other substantive area of complex employment litigation, *i.e.*, 224 certification rulings in 2016, as compared to the 175 certification rulings in 2015.

The analysis of these rulings – discussed in Chapter V of this Report – shows that more cases are brought against employers in more "plaintiff-friendly" jurisdictions such as the judicial districts within the Second and Ninth Circuits. This trend is shown in the following map:

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



	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit
Conditional Certification Motions Granted	6	29	6	7	22	11	9	8	33	2	12	2
Conditional Certification Motions Denied	3	8	2	0	5	0	6	1	18	1	4	0
Decertification Motions Granted	0	3	3	0	1	0	1	1	4	0	0	0
Decertification Motions Denied	0	4	3	0	1	1	3	0	3	1	0	0

Total: 147 Conditional Certifications Granted / 48 Conditional Certifications Denied
13 Decertification Motions Granted / 16 Decertification Motions Denied

The map of FLSA certification rulings is telling.

[5] An analysis of FLSA collective actions in 2016 is set forth in Chapter V, and analysis of state law wage & hour class action rulings in 2016 is set forth in Chapter VII, Section B.

First, it substantiates that the district courts within the Ninth Circuit and the Second Circuit are the epicenters of wage & hour class actions and collective actions.

More cases were prosecuted and conditionally certified – 33 certification orders in the Ninth Circuit and 29 certification orders in the Second Circuit – in the district courts in those circuits than in any other areas of the country. The district courts in the Fifth, Eleventh, and Sixth Circuits were not far behind, with 22, 12, and 11 certification orders respectively in those jurisdictions.

Second, as the burdens of proof reflect under 29 U.S.C. § 216(b), plaintiffs won the overwhelming majority of "first stage" conditional certification motions (147 of 195 rulings, or approximately 76%); in terms of "second stage" decertification motions, plaintiffs also prevailed in a slight majority of those cases (16 of 29 rulings, or approximately 55% of the time).

The "first stage" conditional certification statistics for 2016 are aligned to the numbers in 2015, when plaintiffs won 75% of "first stage" conditional certification motions. However, employers fared much better in 2016 on "second stage" decertification motions. Employers won decertification at a rate of 45%, which was up from 36% in 2015.

The following chart illustrates this trend for 2016:

2016 FLSA Conditional Certification Motions And Decertification Motions

Third, this reflects that there has been an on-going migration of skilled plaintiffs' class action lawyers into the wage & hour litigation space. 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 is needed, unlike the situation when certification is sought in an employment discrimination class action or ERISA class action), and without having to conduct significant discovery (per 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, 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. Finally, as success in litigation often begets copy-cat filings, the increase in top wage &

hour settlements in 2016 to $695.5 million as compared to $463.6 million in 2015 is likely to prompt more litigation too.

Employment Discrimination & ERISA Certification Trends

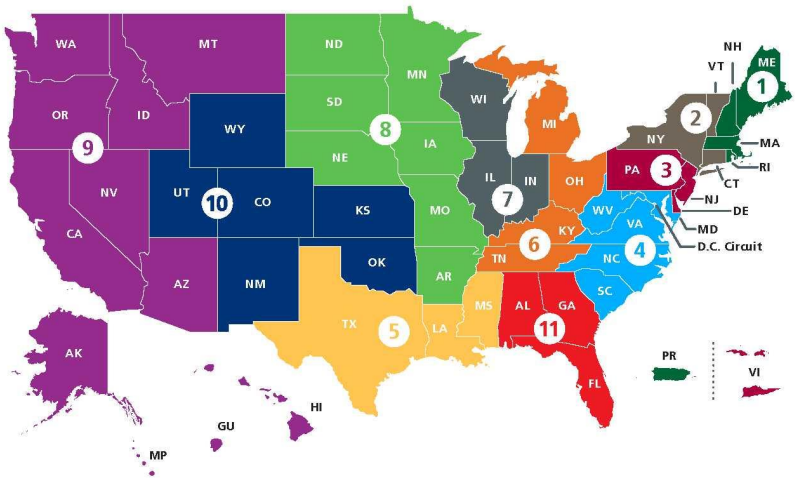
At the same time, the rulings in *Wal-Mart* and *Comcast* also fueled more critical thinking and crafting of case theories in employment discrimination and ERISA class action filings in 2016. The Supreme Court's two Rule 23 decisions have had the effect of forcing the plaintiffs' bar to "re-boot" the architecture of their class action theories.[6] At least one result was the decision this past year in *Tyson Foods*, in which the Supreme Court accepted plaintiffs' arguments that, in effect, appeared to soften the requirements previously imposed in *Wal-Mart* and *Comcast* for maintaining and proving class claims.

Hence, it is clear that the playbook on Rule 23 strategies is undergoing a continuous process of evolution. Filings of "smaller" employment discrimination class actions have increased due to a strategy whereby state or regional-type classes are asserted rather than nationwide mega-cases that *Wal-Mart* discouraged. In essence, at least in the employment discrimination area, the plaintiffs' litigation playbook is more akin to a strategy of "aim small, miss small."

In turn, employment-related class certification motions outside of the wage & hour area were a mixed bag or tantamount to a "jump ball" in 2016, as 4 of the 8 were granted and 4 were denied.

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

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



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

Total: 4 Granted / 4 Denied

[6] An analysis of class certification rulings in Title VII employment discrimination class actions in 2016 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.

In terms of the ERISA class action litigation scene in 2016,[7] 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.

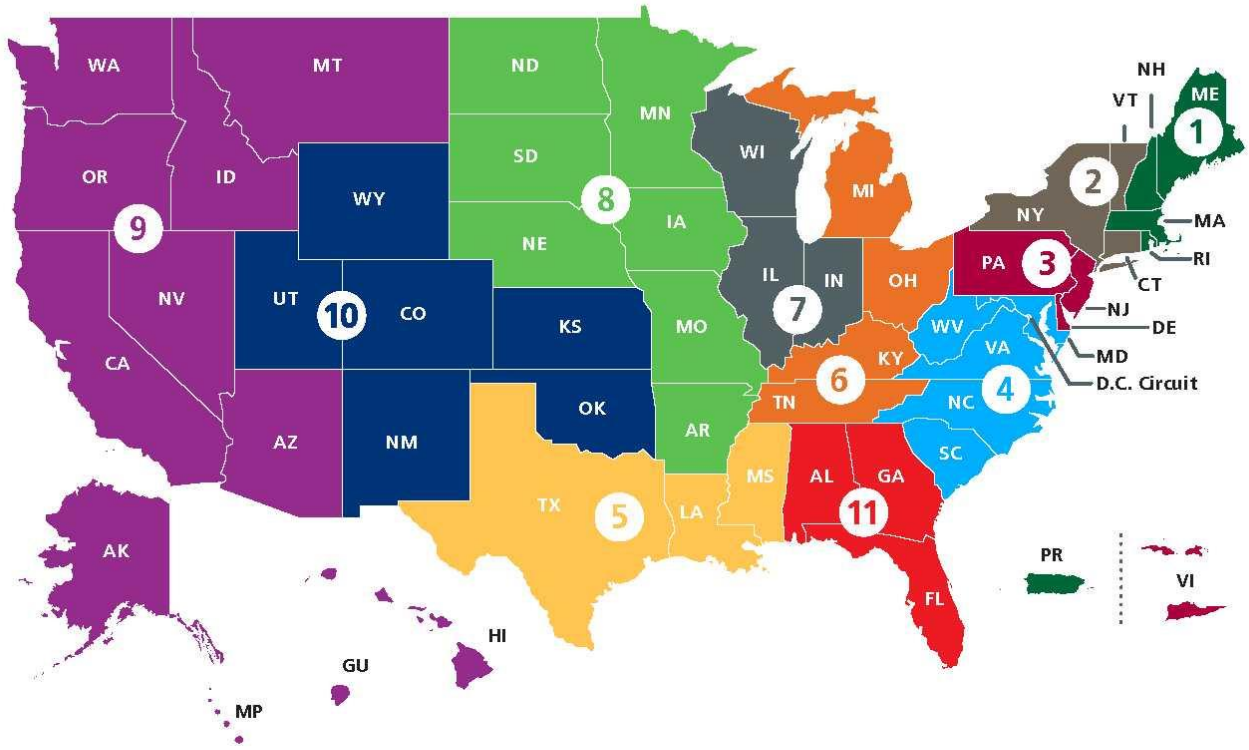
The *Wal-Mart* decision also has changed the ERISA certification playing field by giving employers more grounds to oppose class certification.

The decisions in 2016 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.

Nonetheless, plaintiffs were more successful than defendants in ERISA class actions, as plaintiffs won 8 of 12 certification rulings in 2016.

A map illustrating these trends is shown below:

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



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

Total: 8 Granted / 4 Denied

[7] An analysis of rulings in ERISA class actions in 2016 is set forth in Chapter VI, Section A.

Overall Trends

So what conclusions overall can be drawn on class certification trends in 2016?

In the areas of employment discrimination, wage & hour, and ERISA, the plaintiffs' bar is converting their case filings into certification of classes at a high rate.

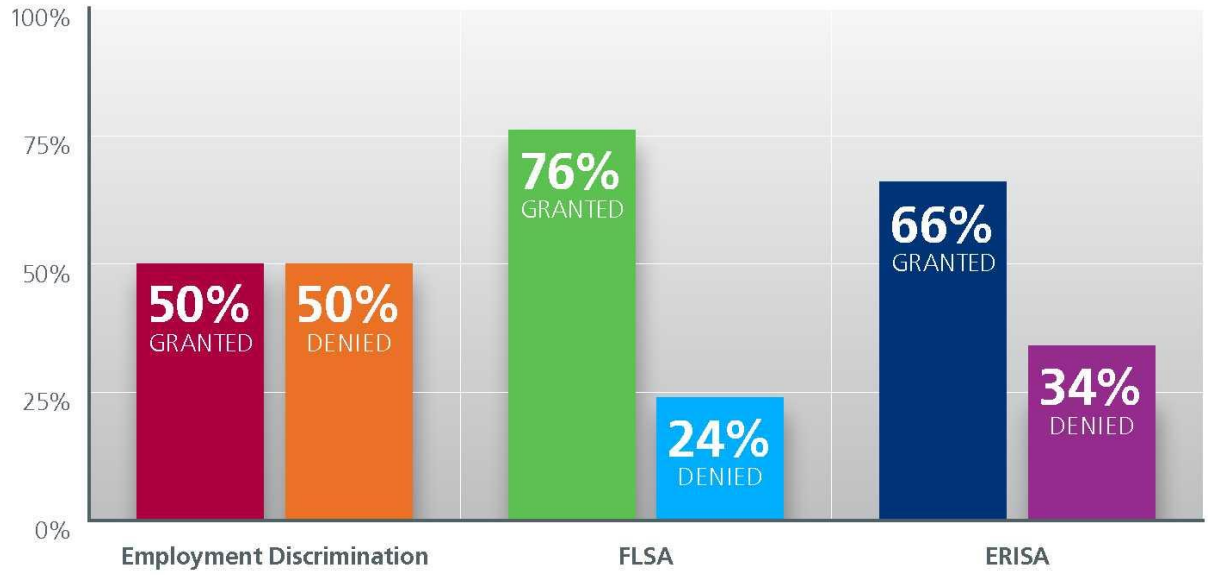
Whereas class certification was a coin toss for employment discrimination cases (4 granted and 4 denied in 2016), class certification is relatively easier in ERISA cases (8 granted and 4 denied in 2016), but most prevalent in wage & hour litigation (with 147 conditional certification orders granted and 48 denied, as well as 13 decertification motions granted and 16 denied).

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

– a 50% success rate for certification of employment discrimination class actions (both Title VII and age discrimination cases);

– a 66% success rate for certification of ERISA class actions; and,

– a 76% success rate for conditional certification of wage & hour collective actions.



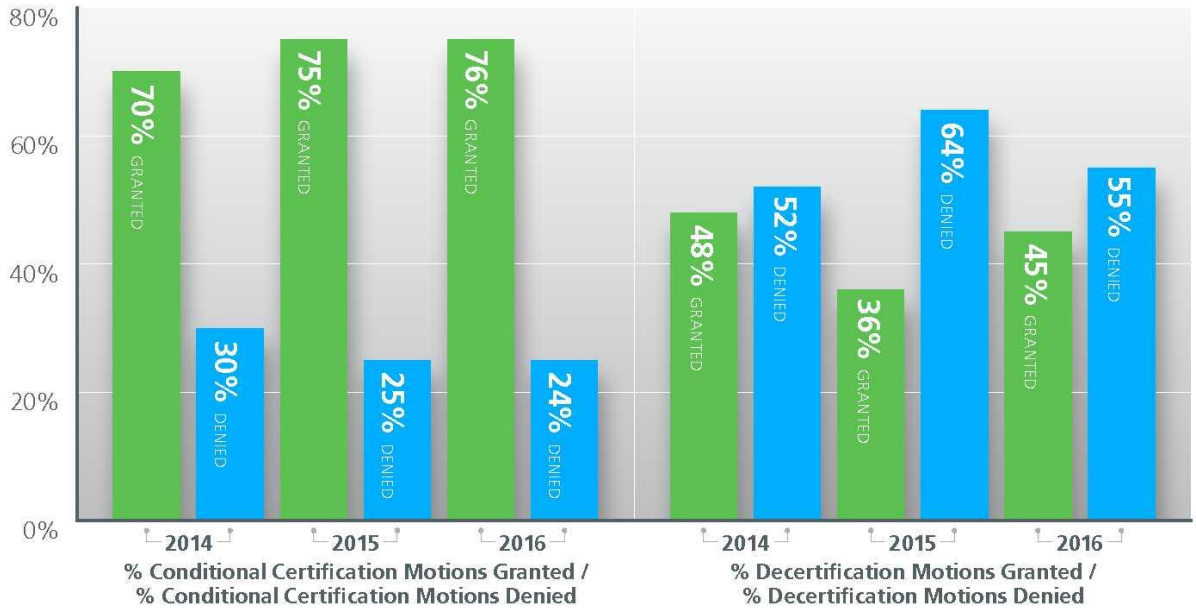
2016 Certification Motions For Employment Discrimination, FLSA, And ERISA

Obviously, the most certification activity in workplace class action litigation is in the wage & hour space.

The trend over the last three years reflects a steady success rate of 70% to 76% for the plaintiffs' bar that is tilted toward plaintiff-friendly "magnet" jurisdictions were the case law favors workers and presents challenges to employers seeking to block certification.

Yet, in 2016, employers increased their odds of decertifying wage & hour cases to 45% as compared to 36% in 2015.

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



2014 - 2016 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. The new wrinkle to influence these factors in 2017 is the Supreme Court's recent ruling in *Tyson Foods*. To the extent it assists plaintiffs in their certification theories, future certification decisions may well trend further upward for workers.

Lessons From 2016

There are multiple lessons to be drawn from these trends in 2016.

First, while *Wal-Mart* undoubtedly heightened commonality standards under Rule 23(a)(2) starting in 2011, and *Comcast* tightened the predominance factors at least for damages under Rule 23(b) in 2013, the plaintiffs' bar has crafted theories and "work arounds" to maintain or increase their chances of successfully securing certification orders. In 2016, their certification numbers were up to the highest levels in the last three years.

Second, the defense-minded decisions in *Wal-Mart* and *Comcast* have 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* and the predominance analysis from *Comcast* have not impacted the ability of the plaintiffs' bar to secure certification orders under 29 U.S.C. § 216(b).

Third, there are "cracks in the defense wall" appearing in the case law relative to efforts by employers to create sustained barriers to class certification. The Supreme Court's decision in 2016 in *Tyson Foods* is the most prominent example of how "work arounds" are taking place to enable plaintiffs' lawyers to achieve class certification.

Fourth, while monetary relief in a Rule 23(b)(2) context is severely limited, certification is the "holy grail" in class actions, and certification of any type of class – even a non-monetary injunctive relief class claim –

often drives settlement decisions. This is especially true for employment discrimination, ERISA, and wage & hour class actions, as plaintiffs' lawyers can recover awards of attorneys' fees under fee-shifting statutes in an employment litigation context. In this respect, the plaintiffs' bar is nothing if not ingenuous, and targeted, strategic certification theories (*e.g.*, issue certification on a limited discrete aspect of a case) are the new norm in federal and state courthouses.

Fifth, during the certification stage, courts are more willing than ever before to assess facts that overlap 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.

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* and *Comcast* era, but also thriving.

(iv) Complex Employment-Related Litigation Trends In 2016

While shareholder and securities class action filings witnessed an increase in 2016, employment-related class action filings remained relatively flat.

By the numbers, filings for employment discrimination and ERISA claims were basically flat over the past year, while the volume of wage & hour cases decreased for the first time in over a decade.

By the close of the year, ERISA lawsuits totaled 6,530 filings (down slightly as compared to 6,925 in 2015 and 7,163 in 2014), FLSA lawsuits totaled 8,308 filings (down as compared to 8,954 in 2015 and up from 8,066 in 2014), and employment discrimination lawsuits totaled 11,593 filings (an increase from 11,550 in 2015 and a decrease from 11,867 in 2014).

In terms of employment discrimination cases, however, the potential exists for a significant jump in case filings in the coming year, as the charge number totals at the EEOC in 2015 and 2016 reached record levels in the 52-year history of the Commission; due to the time-lag in the period from the filing of a charge to the filing of a subsequent lawsuit, the charges in the EEOC's inventory will become ripe for the initiation of lawsuits in 2017.

By the numbers, FLSA collective action litigation filings in 2016 far outpaced other types of employment-related class action filings; virtually all FLSA lawsuits are filed and litigated as collective actions. Up until 2015, lawsuit filings reflected year-after-year increases in the volume of wage & hour litigation pursued in federal courts since 2000; statistically, wage & hour filings have increased by over 450% in the last 15 years.

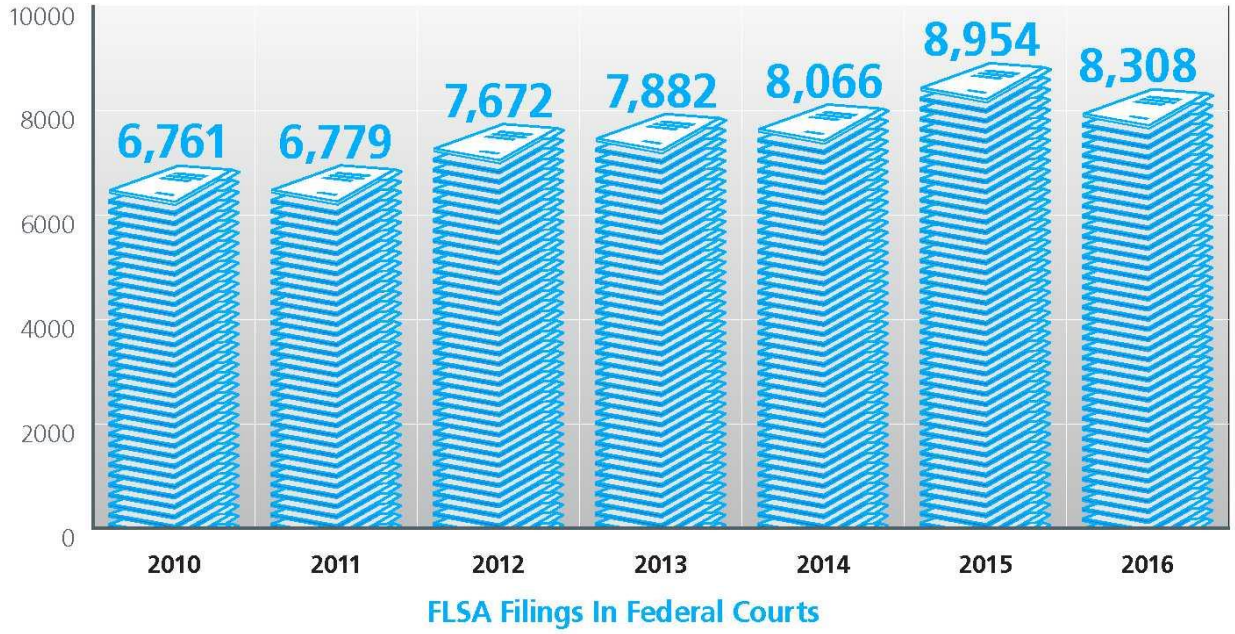
The fact of the first decrease in FLSA lawsuit filings in 15 years is noteworthy in and of itself. However, a peek behind these numbers confirms that with 8,308 lawsuit filings, 2016 was the second highest year ever in the filing of such cases (only eclipsed by 2015, when 8,954 lawsuits were commenced).

Given this trend, employers may well see record-breaking numbers of FLSA filings in 2017. Various factors are contributing to the fueling of these lawsuits, including: (i) new FLSA regulations on overtime exemptions in 2016, which have been delayed in terms of their implementation due to legal challenges by 13 states; (ii) minimum wage hikes in 21 states and 22 major cities set to take effect in 2017; and (iii) the intense focus on independent contractor classification and joint employer status, especially in the franchisor-franchisee context. Layered on top of those issues is the difficulty of applying 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 meant that ambiguities, omitted terms, and unanswered questions abound under the FLSA (something as basic as the definition of the word "work" does not exist in the statute), and the plaintiffs' bar is suing over those issues at a record pace.

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. By industry, retail and hospitality companies experienced a deluge of wage & hour class actions in 2016.

This trend is illustrated by the following chart:



The story behind these numbers is indicative of how the plaintiffs' class action bar chooses cases to litigate. It has a diminished appetite to invest in long-term cases that are fought for years, and where the chance of a plaintiffs' victory is fraught with challenges either as to certification or on the merits. Hence, this reflects the various differences in success factors in bringing employment discrimination and ERISA class actions, as compared to FLSA collective actions.

Obtaining a "first stage" conditional certification order is possible without a "front end" investment in the case (*e.g.*, no expert is needed unlike the situation when certification is sought in an ERISA or employment discrimination class action) and without conducting significant discovery due to the certification standards under 29 U.S.C. § 216(b). Certification can be achieved in a shorter period of time (in 2 to 6 months after the filing of the lawsuit) and with little expenditure of attorneys' efforts on time-consuming discovery or with the costs of an expert. As a result, to the extent that litigation of class actions by plaintiffs' lawyers are viewed as an investment, prosecution of wage & hour lawsuits is a relatively low cost investment without significant barriers to entry relative to other types of workplace class action litigation. As compared to ERISA and employment discrimination class actions, FLSA litigation is less difficult or protracted, 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 2016 confirm these factors.

An increasing phenomenon in the growth of wage & hour litigation is worker awareness. Wage & hour laws are usually the domain of specialists, but in 2016 wage & hour issues made front-page news. The widespread public attention to how employees are paid almost certainly contributed to the sheer number of suits. Big verdicts and record settlements also played a part, as success typically begets copy-cats and litigation is no exception. 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. Technology allows for the virtual commercialization of wage & hour cases through the Internet and social media.

Against this backdrop, wage & hour class actions filed in state court also represented 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. In particular, California continued its status in 2016 as a breeding ground for wage & hour class action litigation due to laxer class certification standards under state law, exceedingly generous damages remedies for workers, and more plaintiff-friendly approaches to class certification as well as wage & hour issues under the California Labor Code. For the fourth year out of the last five, 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.[8] Calling California one of the worst of the worst jurisdictions, the ATRA described the Golden State as indeed that for plaintiffs' lawyers "seeking riches and the expense of employers …" and where "lawmakers, prosecutors, and judges have long aided and abetted this massive redistribution of wealth." [9]

(v) Governmental Enforcement Litigation Trends In 2016

On the governmental enforcement front, both the EEOC and the DOL intensified the focus of their administrative enforcement activities and litigation filings in 2016. At the same time, the number of lawsuits filed and the resulting recoveries by settlement – measured by aggregate litigation filings and the top 10 settlements in government enforcement litigation – were less than half of what the EEOC and DOL achieved in 2015.

The EEOC's lawsuit count dropped precipitously. By continuing to follow through on the systemic enforcement and litigation strategy plan it announced in April of 2006 (that centers on the government bringing more systemic discrimination cases affecting large numbers of workers), the EEOC filed less cases overall but more systemic lawsuits. This manifested the notion that the Commission's limited budget and bandwidth are best deployed to matters where a systemic focus is most needed and the largest numbers of alleged victims are at issue. As 2016 demonstrated, the EEOC's prosecution of pattern or practice lawsuits is now an agency-wide priority backed up by the numbers. Many of the high-level investigations started in the last three years mushroomed into the institution of EEOC pattern or practice lawsuits in 2016.

The Commission's 2016 Annual Report[10] also announced that it expects to continue the dramatic shift in the composition of its litigation docket from small individual cases to systemic pattern or practice lawsuits

[8] The ATR Foundation's 2016 Report is available at http://www.judicialhellholes.org/wp-content/uploads/2015/12/JudicialHellholes-2016.pdf

[9] *Id.* at 1. The "nine worst" jurisdictions in 2016 according to the ATRA report are: (1) Missouri, (2) California, (3) New York, (4) Florida, (5) New Jersey, (6) Illinois, (7) Louisiana, (8) Virginia, and (9) Texas.

[10] The EEOC's 2016 Annual Report is published at http://www.eeoc.gov/eeoc/plan/upload/2016par.pdf.

on behalf of larger groups of workers. The EEOC's FY 2016 Annual Report detailed the EEOC's activities from October 1, 2015 to September 30, 2016. The EEOC's Report indicated that:

- The Commission completed work on 273 systemic investigations in FY 2016, which resulted in 21 settlements or conciliation agreements that yielded a total recovery of $20.5 million for systemic claims; six of the settlements involved 50 alleged victims or more, and 13 settlements included 20 or more alleged victims. The FY 2016 recoveries represent a decrease of systemic recoveries in FY 2015 when the Commission netted $33 million based on resolution of systemic investigations.
- The EEOC recovered $347.9 million for alleged victims of employment discrimination in FY 2016 through mediation, conciliation, and settlements. This represented a decrease of $10.4 million as compared to FY 2015, when the Commission garnered $356.6 million for its enforcement efforts.
- For its lawsuits, the EEOC secured $58.3 million in recoveries in FY 2016. This figure was down $7 million as compared to the FY 2015 recoveries of $65.3 million. However, the EEOC resolved fewer lawsuits than it did last year, and recovered less money from those cases. Specifically, the EEOC resolved 139 lawsuits during FY 2016 for a total recovery of $52.2 million; by comparison, the EEOC resolved 155 lawsuits in FY 2015 for a total recovery of $65.3 million.
- The EEOC filed only 86 lawsuits in 2016 (down significantly from the 139 lawsuits it filed in 2015), of which 31 were "multiple victim" lawsuits, with 18 cases involved claims of systemic discrimination on behalf of 20 or more workers, and 13 cases involved multiple alleged discrimination victims of up to 20 individuals. The EEOC had 165 cases on its active lawsuit docket by year end (down from FY 2015, when it had 218 cases on its docket, of which 48% involved multiple aggrieved parties and 28.5% involved challenges to alleged systemic discrimination). Overall, this represented increases in these categories in terms of the make-up of the Commission's litigation being tilted more heavily toward systemic cases.
- The EEOC also received 91,503 administrative charges of discrimination, which was slightly up from the FY 2015 total of 89,385 charges and the FY 2014 total of 88,778 charges. Thus, charge activity was one of the heaviest in the 52 year history of the Commission.
- The EEOC also encountered significant criticism in the manner in which it enforced anti-discrimination laws. This criticism took various forms in terms of judicial sanctions, suits against the Commission by private litigants and States, and questioning by Congress over the EEOC's alleged lack of transparency.

Against this back-drop, 2016 saw modest recovery numbers as compared to recent years on the part of the EEOC.

While the inevitable by-product of these governmental enforcement efforts is that employers are likely to face bigger lawsuits on behalf of larger groups of workers in 2017, the EEOC's systemic litigation program is not without its detractors. Several federal judges entered significant sanctions against the EEOC – some in excess of seven figures – for its pursuit of pattern or practice cases that were deemed to be without a good faith basis in fact or law.[11] The U.S. Supreme Court in *EEOC v. CRST Van Expedited, Inc.,* 136 S. Ct. 1642 (2016), examined the propriety of the $4.7 million fee sanction, the largest fee sanction ever leveled against the Commission; while the EEOC had been successful in its initial appeal in reversing the sanction before the Eighth Circuit, the Supreme Court unanimously rejected the EEOC's position,

[11] An analysis of rulings in EEOC cases in 2016 is set forth in Chapter III, Section B.

remanded the fee sanction issue for review, and gave new life to the employer's efforts to recoup millions of dollars against the Commission.

Fiscal year 2016 also marked another year in the EEOC's 2012-2016 Strategic Enforcement Plan ("SEP"). The SEP was created in 2012 as a blueprint to guide the EEOC's enforcement activity. Its most controversial and perhaps most far-reaching effect on the agency's activity is the priority it gives to systemic cases: those pattern or practice, policy, or class-like cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area. Systemic cases have been the main driver of EEOC litigation over the past few years, and likely will be well into the future. The EEOC is now fighting challenges to its power to bring those cases on a number of fronts. Among other things, it is aggressively challenging any court's ability to review how it conducts certain statutorily-mandated procedures before bringing suit, including how it investigates its cases and tries to conciliate those cases with employers. If successful in those efforts, the EEOC will have greatly eased its path to pursuing systemic cases.

The EEOC is not only expanding its reach in procedural terms, but also it is attempting to broaden the scope of its authority through an expansion of the scope of anti-discrimination laws themselves. In a number of recent cases, the EEOC has advanced novel legal theories that would, among other things, expand anti-discrimination protections to cover transgender employees and require employers to reasonably accommodate pregnant employees, even those who are experiencing normal pregnancies. The EEOC continued to push the edge of the legal envelope in 2016, viewing itself as an agency that not only enforces the law, but also one that expands the scope of those laws as it deems appropriate.

For this and other reasons, the agency has come under increasing scrutiny and criticism by Republican members of Congress, business groups, and critics of an allegedly activist agency wasting the taxpayers' dollars. Such criticism is unlikely to stem the tide of systemic cases or deter the EEOC from continuing to try to expand its enforcement powers. Subject to policy-directed changes mandated by the Trump Administration, employers can expect the EEOC will use the next year to continue to push for expansion of its procedural and substantive limits.

The DOL also undertook aggressive enforcement activities in 2016.

The Wage & Hour Division ("WHD") kept up its aggressive enforcement actions in 2016, particularly in the hotel, restaurant, and retail industries. Much of WHD's enforcement and other activities took place under the umbrella of "fissured industries" initiatives, which focus on industries with high usage of franchising, sub-contracting, and independent contractors. At the conclusion of those enforcement actions, WHD continued to increase its use of civil money penalties, liquidated damages, and enhanced compliance agreements.

Legislatures and government agencies in various states and municipalities also increased their activities on the wage & hour front. Whether increasing the minimum or living wage, enacting scheduling laws and ordinances, implementing wage theft prohibitions, or increasing the minimum salary level required for exemption, many have already revised or are actively planning to revise laws and rules governing how businesses pay employees in 2017.

With the approaching ten-year anniversary of the last time Congress enacted a minimum wage increase (2007), advocates of a minimum wage increase are likely to turn up the volume on their requests for an increase to the federal minimum wage in 2017. This may well depend on the politics of the debate, for the incoming Republican Administration appears opposed to such an increase.

Finally, if history is a guide, the incoming Administration is likely to return to the decades-old practice of issuing opinion letters in response to specific requests, which had been abandoned by the Obama Administration's decision-makers at the DOL.

Over the past several years, the DOL's Wage & Hour Division ("WHD") fundamentally changed the way in which it pursues its investigations. Suffice to say, the investigations are more searching and extensive, and often result in higher monetary penalties for employers. According to the DOL, since early 2009, the WHD has closed 200,000 cases nationwide, resulting in more than $1.8 billion in back wages for over 2 million workers. In FY 2016, the WHD collected more than $266.5 million in back pay wages, an increase of $20.5 million over the past year. Hence, in 2016, employers finally saw the impact of these changes on the WHD's enforcement priorities, and 2017 is apt to bring much of the same absent a stark change in priorities under the Trump Administration.

The DOL also focused its activities in 2016 on wage & hour enforcement on what it terms "24/7." The WHD's Administrator, Dr. David Weil, was an architect of the WHD's fissured industry initiative. This initiative focuses on several priority industries, including food services (both limited service/full service establishments), hotel/motel, residential construction, janitorial services, moving companies/logistics providers, agricultural products, landscaping/horticultural services, healthcare services, home healthcare services, grocery stores, and retail trade. In FY 2016, the WHD reported recoveries of $143,274,845 for nearly 19,000 workers within these fissured industries.

Not to be outdone, the National Labor Relations Board ("NLRB") undertook an ambitious agenda in 2016 too. It reconsidered well-settled NLRB principles on joint employer rules and representative elections, entertained the possibility of extending the protections of the National Labor Relations Act ("NLRA") to college athletes, and litigated novel claims seeking to hold franchisors liable for the personnel decisions of franchisees. More than any other area impacting workplace litigation, the NLRB also remained steadfast in its view that workplace arbitration agreements limiting class or collective claims are void under § 7 of the NLRA. It pursued a myriad of unfair labor practice charges against employers for alleged violation of the NLRA for use of arbitration agreements with class action and collective action waivers.

D. Trends For The Future Of Workplace Class Actions

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 re-order their compliance strategies to stay ahead of and mitigate these risks and exposures.

So, what can corporate counsel expect in 2017?

Based on the developing trends, we anticipate significant developments in the coming year relative to certification rulings in employment discrimination and ERISA class actions; aggressive governmental enforcement litigation prosecutions; continuing growth in wage & hour litigation (fueled by new overtime regulations, local minimum wage legislation, challenges to independent contractor status, and litigation seeking to expand joint employer concepts); and more litigation over class action waivers in arbitration agreements.

ERISA Litigation –

The coming year the Supreme Court will answer a long debated issue in ERISA litigation regarding the nature and scope of the "church plan" exemption, which impacts many medical centers, educational institutions, and other religiously-affiliated organizations.

Given the volume of ERISA class action filings in 2016, corporate counsel can also expect to see further heated litigation regarding the reasonableness of 401(k) and 403(b) plan fees and expenses in the numerous class action lawsuits pending around the country on these issues. Further, courts are likely to continue to grapple with the complicated and intertwined issues relating to who has standing to bring claims under the ERISA and when those claims accrue, following the Supreme Court's decision in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016).

In addition, corporate counsel can except to see the following developments:

- In the health and welfare space, plan sponsors can expect some potential additional confusion if Congress and the Trump Administration take up the repeal of the Affordable Care Act. As many plan sponsors know, employers have spent the last few years preparing for and then implementing the Affordable Care Act. The potential changes again to health coverage may cause some confusion amongst plan participants, which in turn could lead to an increase in class action litigation if the participants remain unsure about their applicable coverage for various benefits. In this same vein, one can expect that the surge in class actions regarding coverage by out-of-network providers will continue. As many plan sponsors experienced last year, various of network providers have challenged the reimbursement rates from insurers and plans, thus dragging both administrators and plans into numerous litigation matters. Given the uncertainty in the future of the Affordable Care Act and the continuing disputes between insurers and out-of-network providers, it is anticipated that this variety of class action litigation will increase in the coming year.
- Further, a fight in the courts is expected regarding the DOL's recently issued final regulations on disability plan administration. These regulations dramatically change the landscape for the handling of disability claims through the frequently offered long-term disability benefits. These regulations are apt to be challenged in the courts given their sweeping and onerous changes. As a result, it is possible that these regulations will never see the light of day. Insurers and plan sponsors need to watch the litigation and its potential results closely. However, if the regulations do go into effect in 2017-2018, as currently contemplated, plan administrators will need to closely examine them to ensure compliance. Additionally, the implementation of these regulations could spur class action suits and DOL enforcement actions if they are not handled appropriately on a plan basis.

Employment Discrimination Class Action Litigation –

Both in terms of private plaintiff cases and government enforcement litigation brought by the EEOC, employers can expect this area to remain an intense focus in 2017 by the private plaintiffs' bar and government enforcement litigators.

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

- 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* and *Comcast* era. Their focus is likely to be on smaller class cases (*e.g.*, confined to a single corporate facility or operations in one state) 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 "end run" *Wal-Mart* and *Comcast*.

- 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.*
- Finally, should government enforcement litigation decrease substantially due to changes directed by the Trump Administration, employers should brace for the private plaintiffs’ bar and States’ Attorney General offices to “fill the void” to champion employment discrimination litigation.

Government Enforcement Litigation –

At least until there are explicit changes to policies based on the new Administration’s control of the White House, employers can anticipate aggressive enforcement of employment-related laws and regulations by the EEOC, the DOL, and the NLRB.

- **The EEOC’s FY 2017-2021 Strategic Enforcement Plan:** In FY 2016, the EEOC created and announced a new Strategic Enforcement Plan (“SEP”) to guide its enforcement mission through fiscal years 2017 through 2021. The new SEP establishes the same six enforcement priorities as the previous version of the SEP, including: (i) elimination of systemic barriers in recruitment and hiring; (ii) protection of immigrant, migrant, and other vulnerable workers; (iii) addressing emerging and developing issues; (iv) enforcing equal pay laws; (v) preserving access to the legal system; and (vi) preventing harassment through systemic enforcement and targeted outreach. Those enforcement priorities have proved to be a reliable guide to how the EEOC pursues its enforcement agenda.
- The new SEP added two substantive areas of focus to its “developing and emerging issues” priority list. During the next four years, the EEOC has said that it will focus on “complex” employment relationships, including clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy. The EEOC has also identified “backlash discrimination” as a new area of focus, meaning discrimination 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, that might arise against them as a result of current events affecting the Muslim world. Given the EEOC’s track record of making good on its word, employers would be well advised to pay attention to these issues.
- **Continuing Impact Of *Mach Mining* In The Courts:** On April 29, 2015, the U.S. Supreme Court decided *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), which unanimously rejected the EEOC’s view that its statutorily-required conciliation activities are beyond judicial review. The Supreme Court acknowledged that conciliation is a crucial step in realizing Title VII’s legislative goals of making cooperation and voluntary compliance the preferred means of resolving employment discrimination disputes. At the same time, however, the Supreme Court strictly limited the scope of that review, holding that an affidavit from the EEOC stating that it had performed its conciliation activities would usually suffice to establish that the requirement had been met. It was only if an employer countered with a

credible affidavit of its own that a judge would get involved to conduct the limited fact-finding necessary to resolve that dispute.

- The Supreme Court left it to the lower courts to harmonize its unequivocal ruling regarding the necessity of judicial review with the narrow scope of review that was adumbrated by the *Mach Mining* decision. Despite some initial victories for employers relating to this issue, courts deciding cases in FY 2016 tended to find that the EEOC had met its obligation, even when the evidence had amounted to little more than the EEOC's say-so. In light of trends, it remains to be seen what avenues employers may still have open to them to contest the EEOC's "take it or leave it" approach to the conciliation process.

- **The EEOC's Continued Focus On LGBT Discrimination:** Over the past few years, the EEOC has expended significant litigation resources advocating for the protection of LGBT rights under the existing anti-discrimination laws. It has done this through multiple avenues, including using its own administrative rule-making and quasi-judicial powers to decree that transgender discrimination is a form of sex discrimination because it is tantamount to discrimination on the basis of a perceived failure to adhere to stereotypical gender norms. The EEOC is now using the same tactics to try to establish that Title VII prohibits discrimination on the basis of sexual orientation. Employers should expect that these LGBT issues will remain a centerpiece of the EEOC's enforcement agenda under the new FY 2017-2021 SEP.

- **The New EEO-1 Reporting Requirements:** The EEO-1 Report requires employers with more than 100 employees (and federal contractors or subcontractors with more than 50 employees) to collect and provide to the EEOC demographic information (*e.g.*, gender, race, and ethnicity) in each of ten job categories (*e.g.*, Executive & Senior-Level Officials and Managers, First/Mid-Level Officials & Managers, Professionals, Technicians, Sales Workers, Administrative Support Workers, Craft Workers, Operatives, Labors and Helpers, and Service Workers). On February 1, 2016, the EEOC proposed changes to the EEO-1 report, which would require employers to submit employee compensation data; specifically, the W-2 earnings and hours worked for all employees by gender, race, and ethnicity. Unless recent political developments derail the implementation of these reporting requirements, employers will have to start filing the new reports on March 31, 2018. Many employers expect and fear that the EEOC will use this new data to bring more lawsuits under the EPA and Title VII alleging wage discrimination.

- **The EEOC's Failed Attempt To Expand The Definition Of "Race":** In *EEOC v. Catastrophe Management Solutions*,[12] the EEOC argued that an employer discriminated against a black woman by refusing to hire her after she refused to cut her dreadlocks. At issue was whether Title VII protects only immutable characteristics of race, or whether it also protects mutable characteristics such as the manner of wearing one's hair. According to the EEOC, dreadlocks are a manner of wearing hair that is common for black people and suitable for black hair texture and therefore, although some non-black persons have a hair texture that would allow the hair to lock, they are a racial characteristic just as much as skin color. The Eleventh Circuit disagreed, noting that neither Title VII nor the EEOC's regulations define "race." Relying on its earlier precedent, the Eleventh Circuit concluded that Title VII protects persons in covered categories with respect to their immutable characteristics, but not their cultural practices. That ruling provoked an immediate firestorm of criticism, and employers can expect that the Commission may well bring similar lawsuits in other areas of the country in order to set up a conflict in the case law in the federal circuits in the hopes of garnering review by the Supreme Court.

[12] *EEOC v. Catastrophe Management Solutions*, 2016 U.S. App. LEXIS 16918 (11th Cir. Sept. 15, 2016).

- **Potential Changes Brought By The New Administration:** The biggest political development that will shape the EEOC's agenda in the coming years is the election of Donald Trump as the next President of the United States. For at least the first two years of Trump's Administration, he will have a Republican majority in both houses of Congress. While there is considerable administrative "inertia" behind the EEOC's current agenda, these political changes are likely to have a profound impact on how the EEOC pursues its mission. In particular, the EEOC's increased focus on the strategic use of large, high-impact "systemic" cases to push forward its strategic goals has come under withering criticism by Republican members of Congress. These types of cases can have a significant impact because they tend to affect a larger number of employees and employers, but also they have often come with overly aggressive litigation positions with respect to the EEOC's "latest and greatest" theories of discrimination. Given the intense focus on this area, this may be one aspect of the EEOC's enforcement agenda that becomes an early target of the Trump Administration.
- Had candidate Hillary Clinton won the White House in the November 2016 elections, most believe that the EEOC, the DOL, and the NLRB would have continued to "push the legal envelope" on joint employer, franchisor/franchisee, and the propriety of arbitration/class waiver issues. With the election of Donald Trump, the future direction of these federal agencies is less clear. The new Administration may well pivot on key policies, which in turn will cause a change in the landscape of workplace class action and governmental enforcement litigation.
- While the WHD is posed to continue its focus on what it calls "fissured" industries, including restaurants, hotels, construction, janitorial services, healthcare, home healthcare, grocery, and retail, the DOL will have a new Secretary who may change course on those policies. In its investigations, an increasing number of which appear to have been coordinated at higher levels of the agency, the WHD had been using its full assortment of enforcement tools, including the assessment of liquidated damages and civil money penalties, investigations spanning the three-year period for willful violations, and the use of media to influence the behavior of employers. Assertion of those litigation strategies remains to be seen in 2017.
- Although the specific priorities of the incoming Trump Administration remain to be seen, it certainly is expected to be more employer-friendly. Its efforts are likely to shift away from these punitive measures toward a more comprehensive strategy of achieving compliance, including employer outreach, education, and other cooperative opportunities. Initial indications – including the nomination of Andrew Puzder, a restaurant executive, as Secretary of Labor – are that the new Administration will not continue with the intense focus of finding ways to pierce traditional business relationships, such as franchising and sub-contracting.

Wage & Hour Class Action Litigation –

Despite the leveling off of FLSA lawsuit filings in the last 12 months, it is expected that the number of wage & hour claims will continue to rise. We expect the needle to point upwards on that issue in 2017.

- News and other commentary regarding the proposed revision to the FLSA overtime exemption regulations that were to become effective on December 1, 2016, attracted the attention of employees and lawyers who represent them. Historically, when the FLSA and related wage & hour laws have received active media attention, the number of lawsuits filed under those laws has spiked.
- Attention paid to the new federal overtime exemption regulations increased even more toward the end of 2016, after the U.S. District Court for the Eastern District of Texas issued an order preliminarily enjoining the DOL from implementing and enforcing them. It rose to a

fever pitch as the Obama Administration appealed the order to the U.S. Court of Appeals for the Fifth Circuit and speculation varied among experts concerning what President-Elect Trump's newly appointed Secretary of Labor and a Republican-held Congress would do with the appeal, the underlying litigation, and the viability of the new regulations. Time will tell as those political nuances play out in 2017.

- The visibility of the newly proposed overtime regulations – which the DOL predicted would make more than 4 million employees newly overtime-entitled and would result in pay increases to many more and the likelihood that they will not survive the challenges made against them in the courts and Congress – have inspired many lawyers who represent allegedly aggrieved employees to vow that they will be even more vigilant in filing exemption-related lawsuits. This would be both in an effort to "fill the gap" perceived to have been left vacant by the invalidated regulations and because they expect employees to be agitated by the fact they did not receive the increased pay they expected because of the changed regulations that were to go into effect on December 1, 2016.
- Legislatures and government agencies in various states have already revised or are actively planning to revise laws and rules governing how businesses pay employees, also in an effort to adapt to the new DOL regulations that failed to become final on December 1, 2016.
- Regardless of the increased activity that could be linked to the new regulations and their potential demise, workers' lawyers have continued to focus on cases challenging the classification status of employees in "gray area" jobs that are more likely to call into question amounts of time spent on exempt and non-exempt activities.
- They have also focused on more sophisticated claims involving questions of whether overtime rates were properly determined, bonus calculations, and amounts of time allegedly spent off-the-clock before and after shifts and during meal breaks.
- The attention garnered from cases filed against Uber, and $100 million settlement of that litigation rejected by a federal judge, has kept in focus questions of whether independent contractors have been classified properly as non-employees. It is expected that the numbers of independent contractor misclassification cases will continue to rise in 2017.
- Likewise, developments in litigation challenging co-defendants – whether franchisees and franchisors or parents and subsidiaries – as joint employers will continue to inspire litigation motivated in part by the WHD Administrator David Weil's views that many business relationships create joint liability for the wage & hour violations of affecting employees of only one party to that relationship.

Movement For Dramatic Local Minimum Wage Increases – The past year also saw major gains for the movement to increase the minimum wage to $15 per hour. While only a few major cities (*e.g.*, Los Angeles, San Francisco and Seattle) have actually adopted ordinances that will raise the minimum wage to that level, the organized labor-backed push has received widespread media attention and a number of other cities and some states are considering similar proposals. As a result, employers can expect more local minimum wage increases in 2017.

Spill-Over Effect Of The DOL's Focus – Plaintiffs' wage & hour lawyers increasingly share the WHD's focus on challenging the use of independent contractors. This trend may be intensified by several large settlements in 2016 involving this issue, including FedEx's class action settlement of $228 million to California-based delivery drivers who claimed that their classification as independent contractors was improper. As success by the plaintiffs' class action bar often serves to encourage "copy-cat" lawsuits, employers are apt to see an increase in private party class actions in this context.

Expansion Of Joint Employment Liability – The past year also saw significant steps by government enforcement litigators to expand the "joint employment" doctrine, which could impose additional wage & hour liabilities on many "upstream" businesses. Businesses that could be vulnerable to joint employer claims in 2017 include suppliers, contractors, lessors, private equity and venture capital investors, companies that outsource work, staffing agencies, franchisors, creditors, and parent entities that have subsidiary businesses.

Workplace Arbitration – In response to these substantive developments and the continued torrent of wage & hour cases, employers have looked for additional defenses. One continued bright spot was arbitration. As a result, the trend toward enforcing agreements to submit employment disputes, including wage & hour claims, to arbitration – and specifically to individual, non-class arbitration – surfaced in a myriad of rulings in 2016. While the NLRB continues to insist that agreements to arbitrate on an individual basis violate the National Labor Relations Act ("NLRA"), federal courts overwhelmingly continued reject this argument prior to 2016. However, this view changed in the past year. In *Morris, et al. v. Ernst & Young LLP,* 2016 U.S. App. LEXIS 114948 (9th Cir. Aug. 22, 2016), and *Lewis, et al. v. Epiq Systems Corp.*, 2016 U.S. App. LEXIS 9638 (7th Cir. April 14, 2016), the Ninth and Seventh Circuits essentially accepted the NLRB's position and ruled that arbitration agreements with class action waivers violate the NLRA and are unenforceable. Petitions for *certiorari* are pending on this issue from employers in the *Morris* and *Lewis* cases and from the NLRB in *NLRB v. Murphy Oil USA Inc*., 808 F.3d 1013 (5th Cir. 2015). With this circuit split, employers are closely watching the Supreme Court's disposition of these petitions for *certiorari* and the impact that President Trump's future Supreme Court nominee may have on the ultimate ruling.

Certification Standards – The standards for certifying a class action under Rule 23, and for permitting employees to opt-in to would-be collective actions, remain important battlegrounds. Employers have enjoyed increasing success in preventing certification or moving for decertification, but plaintiffs' counsel have responded by seeking certification of class actions as to specific issues, and by attempting – sometimes successfully – to expand the applicability of Rule 23(c)(4). When a class action or collective action has been decertified, some plaintiffs' counsel – hoping to replicate the settlement pressure of a class or collective action – have filed individual wage & hour suits by many of the employees who were class or collective action members. The strategy appears to be to "win" a single plaintiff case and then seek multiple settlements on behalf of other individual plaintiffs. Some plaintiffs' counsel have stated that their initial class action was filed primarily to obtain discovery and a class list of contact information, so that they can locate multiple individual plaintiffs for multiple individual lawsuits. Employer strategies to counter these efforts were sometimes successful in 2016, but plaintiffs' counsel are likely to continue to try this tactic.

Employers had high hopes that the U.S. Supreme Court in *Tyson Foods* would limit the use of statistical sampling based in putative or certified class or collective actions, in which large numbers of employees each assert small-dollar claims. The Supreme Court's decision dashed those hopes.

The battle lines are drawn, and 2017 will see wide-ranging arguments by plaintiffs and defendants on the meaning and impact of *Tyson Foods*. Plaintiffs' lawyers undoubtedly will seek to extend *Tyson Foods* to class actions outside of the wage & hour context and where individualized evidence is not present. Employers surely will contend that *Tyson Foods* should be read narrowly, that there are due process limits on the extent to which expert statistical sampling can establish class-wide liability or damages, and that the ban against "trial by formula" first coined by Justice Scalia in *Wal-Mart* remains good law. Inevitably, rulings on these issues will be akin to a patchwork quilt, and Rule 23 issues will continue to percolate through the courts.

E. Conclusion

The one constant in workplace class action litigation is change. More than any other year in recent memory, 2016 was a year of great change in the landscape of Rule 23. As these issues play out in 2017, additional chapters in the class action playbook will be written.

The lesson to draw from 2016 is that the private plaintiffs' bar and government enforcement attorneys are apt to be equally, if not more, aggressive in 2017 in bringing class action and collective action litigation against employers.

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 2017.

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