

EMPLOYMENT PRACTICES LIABILITY CONSULTANT

Seyfarth Shaw's Annual Workplace Class Action Litigation Report: A State-of-the-Art Report on Employment-Related Class Actions

By Bob Bregman, CPCU, MLIS, RPLU

For the seventh consecutive year, we are pleased to offer a short summary of (what is now in its 13th edition) Seyfarth Shaw's *Annual Workplace Class Action Litigation Report*. (Read the [2016](#), [2015](#), [2014](#), [2013](#), [2012](#), and [2011](#) overviews.)

The *Report* is a definitive, "must-have" resource for legal research and in-depth analysis of employment-related class action litigation. Anyone who practices in this area, whether as an attorney, a business executive, a risk manager, an underwriter, a consultant, or a broker, cannot afford to be without it. Importantly, the *Report* is the only publication of its kind in the United States. It is the sole compendium that analyzes workplace class actions from "A to Z." Adding to its utility is the fact that the 2017 edition of the *Report* is also available as an e-book. (Previously, it was published solely as a hard-bound volume or as a CD-ROM.) In short, it is "the bible" for

class action legal practitioners, corporate counsel, employment practices liability insurers, and anyone who works in related areas.

Gerald L. Maatman Jr, a partner with Seyfarth Shaw LLP, compiles and edits the *Report*. Mr. Maatman's practice focuses on defending employers involved in employment-related class actions and in Equal Employment Opportunity Commission (EEOC) pattern or practice cases. He is cochair of the firm's class action defense group and also authors the firm's [class action blog](#). Mr. Maatman pioneered the process of conducting employment practices audits to assist employers in structuring effective and practical personnel policies and protocols. His work in this area has been profiled in the *Wall Street Journal*, the *Economist*, and *Time* magazine. He was selected for 2 years running by Law360 as one of the top 4 employment lawyers in the United States.

This article appeared in the Spring 2017 issue of *EPLiC*. Copyright 2017 by [International Risk Management Institute, Inc.](#), 12222 Merit Dr., Suite 1600, Dallas, Texas 75251-2266, 972-960-7693, <http://www.IRMI.com>. All rights reserved. ISSN: 1529-840X. This material may be quoted or reproduced only with written permission from the publisher. The opinions expressed in *EPLiC* are those of the individual authors. Nothing published in *EPLiC* is to be construed as legal, accounting, or professional advice. If such advice is required, the services of a competent professional should be sought.

A Brief Overview of What's Inside

The encyclopedic, 861-page 2017 *Annual Workplace Class Action Litigation Report* insightfully examines and analyzes a total of 1,331 class action case decisions. And, because it is also available on CD-ROM and as an e-book, the *Report* is fully searchable, making its comprehensive, authoritative content readily accessible. The CD-ROM and e-book formats allow the reader to quickly and easily tab through to the desired section(s) of interest. In addition, all of the federal cases examined in the *Report* are indexed by federal circuit—yet another invaluable feature that further enhances its utility.

The following is a synopsis of the 13th *Annual Workplace Class Action Litigation Report*.

- ◆ **Overview of the Year in Workplace Class Action Litigation.** This section summarizes the key legal and procedural trends that emerged in 2016, addresses key developments in workplace class action litigation in 2016, and assesses the implications these developments will have on litigation in 2017.
- ◆ **Significant Class Action Settlements in 2016.** This section lists the top 10 settlements in (a) private plaintiff employment discrimination lawsuits, (b) private plaintiff wage and hour class actions, (c) private plaintiff Employee Retirement Income Security Act (ERISA) of 1974 actions, (d) government-initiated enforcement actions and pattern or practice suits, and (e) the top 10 injunctive relief rulings issued by various courts that were a part of certain class action settlements. Items (a), (b), (c), and (d) are reproduced later in this article.
- ◆ **Significant Federal Employment Discrimination Class Action and EEOC Pattern or Practice Rulings.** This section of the *Report* analyzes discrimination class action cases brought under (a) Title VII of the Civil Rights Act of 1964 and (b) “pattern or practice” enforcement actions brought by the EEOC.
- ◆ **Significant Collective Action Rulings under the Age Discrimination in Employment Act (ADEA), the Fair Labor Standards Act (FLSA), and ERISA.** Cases brought under these federal statutes constitute a substantial portion of all employment-related class action litigation. Therefore, court interpretations of these statutes are important for future cases and understanding corporate risks on the workplace front.
- ◆ **Significant State Law Class Action Rulings.** These rulings are significant because, during the past several years, plaintiffs’ attorneys have been increasingly resorting to state courts as a forum for pursuing employment-related class action litigation.
- ◆ **Rulings on the Class Action Fairness Act (CAFA).** This law facilitates removal of class actions from state court to federal court. In addition, the CAFA regulates the selection of class counsel, tightens control of attorneys’ fees awarded to class counsel, toughens pleading standards, reduces the ability of class counsel to dictate the choice of forum, facilitates interlocutory appeals of class certification rulings, and regulates settlements of class actions. Given these profound effects on underlying case strategy and the structuring of class actions, the *Annual Workplace Class Action Litigation Report* analyzes CAFA-related cases.
- ◆ **Other Federal Rulings Affecting the Defense of Workplace Class Action Litigation.** Throughout 2016, federal courts issued key rulings in class action lawsuits on Rule 23 issues, which significantly impact the defense of workplace actions. As the plaintiffs’ class action bar has pressed new theories, and the nature of claim allegations continues to morph, these rulings are important in formulating effective defense strategies for workplace class actions.

To obtain a free copy of
**THE SEYFARTH SHAW
ANNUAL WORKPLACE CLASS ACTION
LITIGATION REPORT
2017 Edition**

Send an email to:
gmaatman@seyfarth.com
Check out Seyfarth Shaw's
[Class Action Blog](#)

The following sections offer a synopsis of the *Report's* contents.

Six Key Trends in Workplace Class Actions during 2016

The *Report* notes six important developments in class actions during 2016. They are as follows.

1. Class action dynamics increasingly have been shaped and influenced by recent US Supreme Court rulings. During the past few years, the Supreme Court has accepted more cases for review and issued more rulings than ever before, involving cases impacting 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 poised 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. Despite the Supreme Court's reputation for being pro-business, its array of rulings concerning workplace class action issues is anything but one-dimensional. While some rulings may be considered hostile to the expansive use of Rule 23, others are hospitable and, in fact,

strengthen the availability of class actions. Moreover, the Supreme Court has declined several cases in which it would have had the opportunity to impose additional restraints on class actions, and, by often deciding cases on narrow grounds, it has left many gaps to be filled by—and thereby has fueled disagreements arising among—lower federal courts. Thus, given its range of rulings during the last several years, it cannot be said that the Supreme Court is either pro-business or pro-worker regarding class actions.

Note: Rule 23 governs class actions in federal courts, typically involving lawsuits affecting potential class members in different states or that have a connection with federal law. A detailed explanation appears on page iii of the *Annual Workplace Class Action Litigation Report*.

- 2. The monetary value of employment-related class action settlements declined significantly in 2016 after reaching 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 10 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.
- 3. 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*, 131 S. Ct.

2541 (2011), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). In the areas of employment discrimination, wage and 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.

4. Complex employment-related litigation filings increased in 2016 insofar as employment discrimination cases were concerned but decreased in the areas of ERISA class actions, government enforcement litigation, and wage and hour collective actions and class actions. For the past decade, wage and 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 has increased. However, for the first time in over a decade, filing statistics for 2016 reflected that wage and hour litigation decreased over the past year. Additional factors set to coalesce in 2017—including litigation over the new FLSA overtime regulations and the direction of wage and hour enforcement under the Trump administration—are apt to drive these exposures for Corporate America. To the extent that government enforcement of wage and hour laws is ratcheted down, the private plaintiffs' bar likely will "fill the void" and again increase the number of wage and hour lawsuit filings.

5. Wage and hour certification decisions in 2016 increased geometrically as compared to last year. Of the 224 wage and hour certification decisions in 2016, there were 195 conditional certification rulings and 29 decertification rulings. In

contrast, in 2015, there were 175 wage and hour certification decisions, including 153 conditional certification rulings and 22 decertification rulings. While plaintiffs' lawyers won more conditional certifications compared to prior years, employers also won more conditional certification motions at higher rates than in 2016. 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 and hour context. It also reflects the simple truism that, with more wage and 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.

6. Government enforcement lawsuits brought by the Department of Labor (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 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 remain to be seen; most believe there will be wholesale changes, which may well prompt the private plaintiffs' bar to "fill the void" and expand the volume of litigation pursued against employers over the coming year.

A thorough, in-depth analysis of these trends appears within the *Report*.

Top 10 Settlements in Private Plaintiff Employment Discrimination Class Action Lawsuits

The monetary value of the top 10 private plaintiff lawsuits entered into or paid in 2016 totaled \$79.81 million, which represented a major decline from the last 3 years, in which the respective totals were \$295.57 million (2015), \$227.93 million (2014), and \$234.1 million (2013).

#	Amount	Defendant
1.	\$19.5 million	Qualcomm Inc.
2.	\$15 million	US Department of Commerce
3.	\$8.2 million	Daiichi Sankyo
4.	\$7.5 million	Wal-Mart Stores, Inc.
5.	\$7.21 million	Comcast Corp.
6.	\$7.15 million	Medicis Pharmaceutical Corp.
7.	\$4.6 million	BAE Systems Norfolk Ship Repair, Inc.
8.	\$4.1 million	Farmers Group, Inc.
9.	\$3.65 million	New Jersey Transit
10.	\$2.9 million	Publicis Groupe

Top 10 Settlements in Private Plaintiff Wage and Hour Class Action Lawsuits

The monetary value of the top 10 private plaintiff wage and hour class action settlements entered into or paid in 2016 was \$695.5 million, a significant increase from the top 10 settlements in 2015, which totaled

\$463.6 million, and in 2014, which totaled \$215 million.

#	Amount	Defendant
1.	\$240 million	FedEx Ground Package System, Inc.
2.	\$226 million	FedEx Ground Package System, Inc.
3.	\$41 million	RS Legacy Corp.
4.	\$36 million	Bank of America Corp.
5.	\$35 million	Ecolab, Inc.
6.	\$28 million	Schneider National, Inc.
7.	\$27 million	Lyft
8.	\$27 million	Children's Hospital Los Angeles
9.	\$19 million	Robert Half International, Inc.
10.	\$16.5 million	Bob Evans, Inc.

Top 10 Settlements in Private Plaintiff ERISA Class Actions

For ERISA class actions, the monetary value of the top 10 private settlements entered into or paid in 2016 totaled \$807.4 million. This amount represents a noteworthy decline from 2015, when the total monetary value of the top 10 private settlements was \$926.5 million, and in 2014, when the top 10 settlements totaled \$1.31 billion.

The largest ERISA class action settlements involved disputes over treating pension plans as "church plans," breaches of fiduciary duty, failures to make required contributions into retirement funds, and various theories of mismanagement.

#	Amount	Defendant
1.	\$352 million	Providence Health & Services
2.	\$156 million	Singing River Health Services Foundation
3.	\$107 million	Saint Francis Hospital & Medical Center
4.	\$75 million	Trinity Health Corp.
5.	\$32 million	Novant Health Inc.
6.	\$30.9 million	Massachusetts Mutual Life Insurance Co.
7.	\$19.8 million	Larsen, Inc.
8.	\$14 million	Bakery & Confectionery Union
9.	\$11 million	Baptist Health System, Inc.
10.	\$9.7 million	Eastman Kodak

Top 10 Settlements of Government-Initiated Enforcement Actions and Pattern or Practice Lawsuits

In 2016, the EEOC and the US DOL continued their previous pattern of aggressively litigating government enforcement actions, albeit with mixed results.

Based on figures for the US government's 2016 fiscal year, the EEOC filed 86 new merits lawsuits, including 31 nonsystemic multiparty suits (i.e., those involving fewer than 20 employee-plaintiffs) and 18 systemic lawsuits (i.e., those involving 20 or more employee-plaintiffs). In 2016, the EEOC increased the number of charges resolved to 97,443 charges, up 6.5 percent from the 91,503 in 2015. However, the EEOC reported that it recovered approximately \$20.5 million in relief for victims of systemic discrimination, down from \$33 million in 2015.

Further, the EEOC obtained \$347.9 million through mediation, conciliation, and settlements, a slight decrease from the \$356.6 million it collected in 2015.

For all types of government-initiated enforcement actions, the monetary value of the top 10 settlements entered into or paid in 2016 totaled \$52.3 million. This was a significant decrease from 2015 when the top 10 settlements in that year totaled \$82.8 million.

#	Amount	Defendant
1.	\$8.7 million	Puerto Rico Police Department
2.	\$8.6 million	Lowe's Co., Inc.
3.	\$8 million	Tesoro Corp.
4.	\$7.1 million	PBI Bank, Inc.
5.	\$4.8 million	Essex County, New Jersey
6.	\$3.7 million	Fred Fuller Oil Co., Inc.
7.	\$3.1 million	Focused Technologies Imaging Services
8.	\$3.1 million	City of Chicago
9.	\$3.1 million	New Prime, Inc.
10.	\$2.1 million	Mavis Discount Tire, Inc.

And this Is Just the Tip of the Iceberg

This article has provided only a brief sample of the depth and breadth of the information this authoritative, comprehensive report contains. No practitioner who deals with employment claims, whether as an underwriter, broker, risk manager, consultant, or attorney, should be without it. Even better, the Seyfarth Shaw *Annual Workplace Class Action Litigation Report*, 2017 edition, is free! For information on how to obtain a complete copy of the *Report*, see the [accompanying text box](#) or send an email to gmaatman@seyfarth.com. EPLiC