



Workplace Class Action Webinar – Litigation Trends For 2014/2015

January 22, 2015



Today's Discussion Leaders

Gerald L. Maatman, Jr.



[@g_maatman](#)

Lorie E. Almon



[@l_almon](#)

Ian H. Morrison



Today's Discussion Points

What Is Hot In The Workplace Class Action World?

Key Trends & Developments In 2014 & 2015

Noteworthy Settlements & And What They Mean For Employers

Leading Decisions & How They Affect Defense Strategies In 2015

What Should Be In Your Compliance Tool Kit?



Some Key Terms For Today's Discussion

Rule 23(a) Requirements

- ***Numerosity*** – The individuals who would comprise the class must be so numerous that joinder of them all to 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.



Some Key Terms For Today's Discussion

Rule 23(b) Requirements

- **(b)(1)** – Decision as to one class member's claim dispositive of all others
- **(b)(2)** – Injunctive/equitable relief
- **(b)(3)** – Money damages



Some Key Terms For Today's Discussion

Rule 23(b)(2) Requirements

- 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.”
- 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 order on all class members without guarantees of personal notice and the opportunity to opt-out of the suit.



Some Key Terms For Today's Discussion

Rule 23(b)(3) Requirements

- 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.
- To qualify for certification under Rule 23(b)(3), a class must meet 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.*
- Rule 23(b)(3) applies to cases where the primary relief sought is money damages. Each class member is entitled as a matter of due process to personal notice and an opportunity to opt-out of the class action.

Introduction

- The 2015 Annual Workplace Class Action Report (“WCAR”)
- Overview Of 2014/2015 Developments
- Our Topics Today Relative To Employment Discrimination, Wage & Hour, Government Enforcement, And ERISA Class Actions

SEYFARTH
SHAW

11th Annual

Workplace Class Action Litigation Report



2015 EDITION

Seyfarth Shaw LLP



What Is Hot In The Workplace Class Action World?

- **The Post-*Wal-Mart* And *Comcast Corp.* Fallout** – 2014 saw new rulings on Rule 23-related issues after defendants challenged class certification based on new theories.
- **Evolving Class Certification Theories** – “Re-booting” of certification theories by the plaintiffs’ class action bar and how this process is impacting defense strategies.
- **Arbitration Comes To The Forefront** – Case law continues to evolve in an employer-friendly manner.



What Is Hot In The Workplace Class Action World?

- **The Shifting Focus Of The EEOC** – The EEOC’s continued focus on investigation and litigation of nationwide pattern or practice cases.
- **Intensified Level Of DOL Enforcement** – The DOL’s enforcement activities and 24/7/365 enforcement strategies.
- **Rapid Changes In Theories And Defenses** – New certification approaches and strategies based on developments in Rule 23 and § 216(b) rapidly evolving throughout substantive areas of workplace class action law.



Key Trends In 2014/2015

- The influence of the SCOTUS opinions in *Wal-Mart v. Dukes* and *Comcast Corp. v. Behrend* on class certification rulings in 2014/2015.
- Wal-Mart* and *Comcast Corp.* influenced settlement strategies and numbers in a profound way.





Key Trends In 2014/2015

- An increase in wage & hour class actions. In 2015, will the wave crest?
- Case law continued to mature under the Class Action Fairness Act of 2005 (“CAFA”) and the U.S. Supreme Court decided its second case under the CAFA in 2014 – *Dart Cherokee Basin Operating Co., LLC, et al. v. Owens.*



Headlines Of 2014 Relevant To Employers

End-Of-Year Statistics

- Workplace litigation filings stayed flat over the past year, while wage & hour cases increased again
 - ▶ ERISA lawsuits totaled 7,163 (down slightly as compared to 7,279 in 2013)
 - ▶ FLSA lawsuits totaled 8,066 (up significantly as compared to 7,882 in 2013)
 - ▶ Employment discrimination lawsuits totaled 11,867 (a decrease from 12,311 in 2013)





Wal-Mart Stores v. Dukes

- Impact of SCOTUS ruling on “class certification architecture”
- Renaissance of Rule 23(c)(4) post-*Wal-Mart*
- General rejection of *Wal-Mart* in the FLSA context



Comcast Corp. v. Behrend

- Significant defense to certification of class actions
- Reaction of the plaintiffs' bar
- Impact on damages theories



Arbitration

- How recent SCOTUS rulings impact workplace arbitration agreements
- Plaintiffs' strategies to “work around” *Concepcion*
- 2014 case law developments
- Implications for 2015

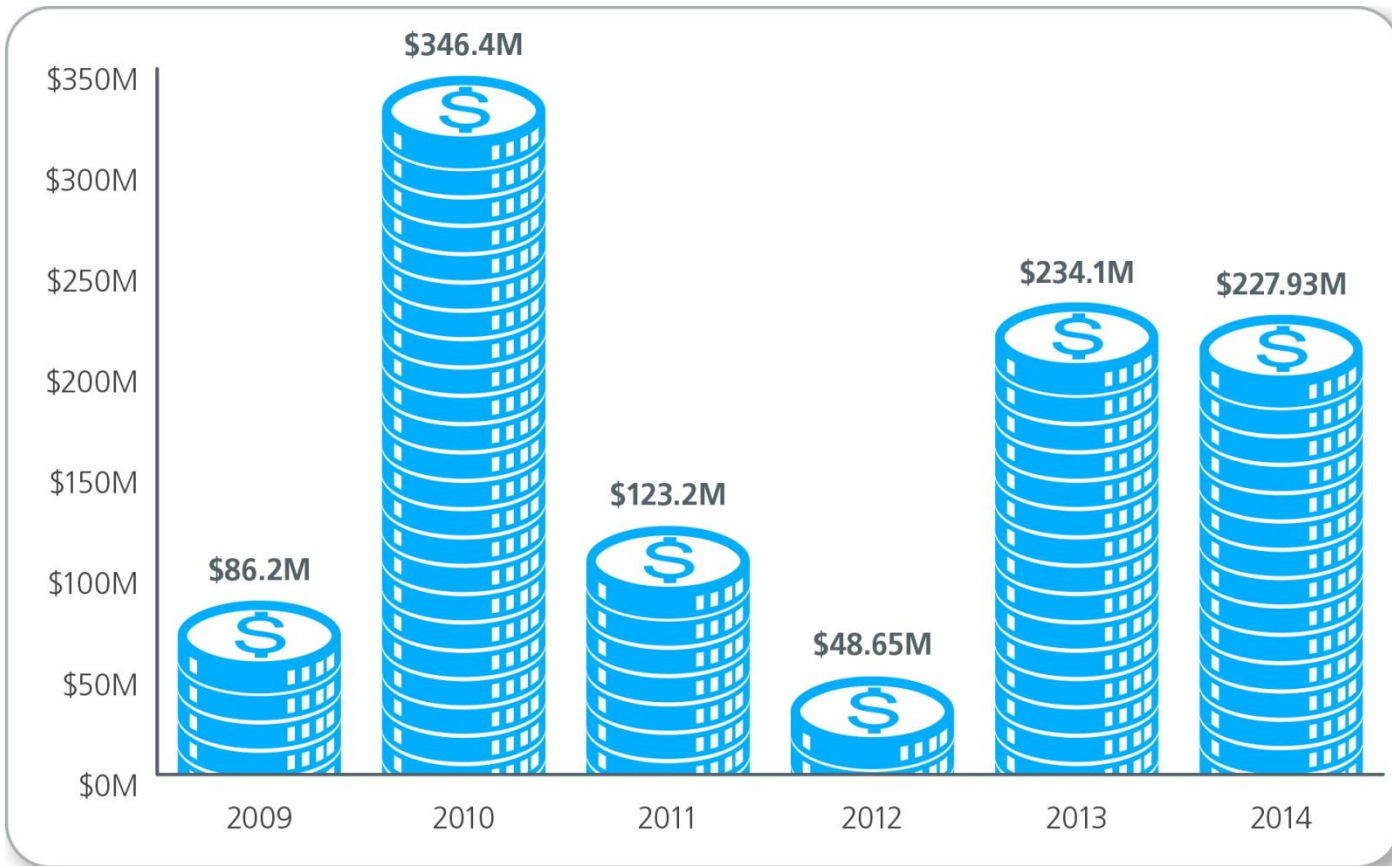


Leading Settlements – Employment Discrimination [Page 19-20 of the WCAR]

Top 10 Settlements Totaled \$227.93 Million, A Slight Decrease From \$234.1 Million In 2013. The 5 Biggest Settlements In 2014 Were:

- *Vulcan Society, Inc., et al. v. City of New York.* (E.D.N.Y.) - \$98 Million
- *Brady, et al. v. Airline Pilots Association* (D.N.J.) - \$53 Million
- *Andrews, et al. v. New York City* (S.D.N.Y.) - \$38 Million
- *Jantz, et al. v. Social Security Administration* (EEOC – Baltimore District Office) - \$9.98 Million
- *Ellis, et al. v. Costco Wholesale Corp.* (N.D Cal.) - \$8 Million

Leading Settlements – Employment Discrimination



Value Of Top 10 Employment Discrimination
Class Action Settlements

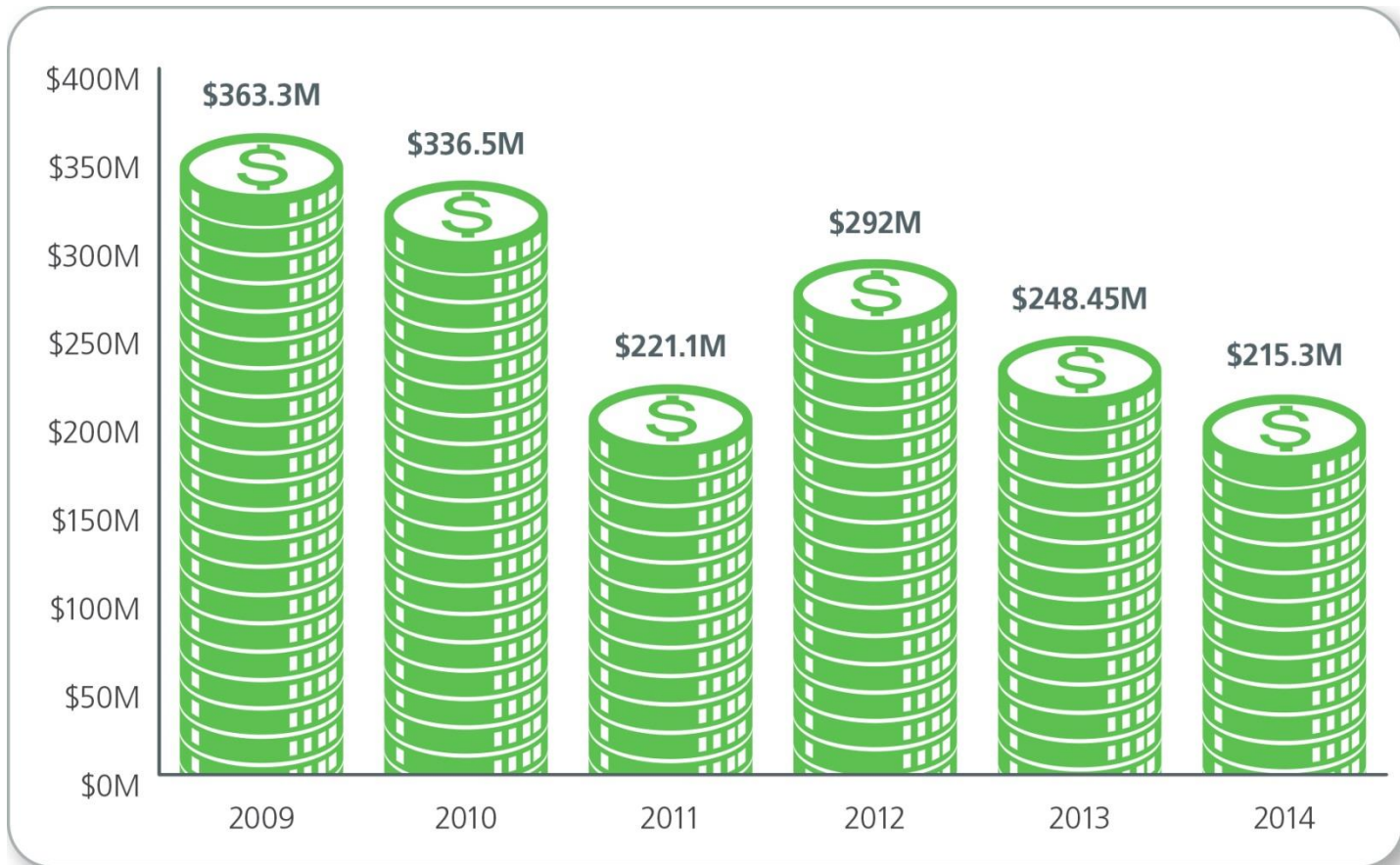


Leading Settlements – Wage & Hour [Pages 20-21 of the WCAR]

Top 10 Settlements Totaled \$215.3 Million, A Significant Decrease From \$248.45 Million In 2013. The 5 Biggest Settlements In 2014 Were:

- *Hohnbaum, et al. v. Brinker Restaurant Corp.* (Cal. Sup. Ct.) - \$56.5 Million
- *Gravina, et al. v. City of Los Angeles* (Cal. Sup. Ct.) - \$26 Million
- *In Re Walgreen Co. Wage & Hour Litigation* (C.D. Cal.) - \$23 Million
- *Carrillo, et al. v. Schneider Logistics Trans-Loading & Distribution, Inc., et al.* (C.D. Cal.) - \$21 Million
- *Escano, et al. v. Kindred Healthcare Operating, Inc.* (C.D. Cal.) - \$16.5 Million

Leading Settlements – Wage & Hour



Value Of Top 10 Wage & Hour
Class Action Settlements

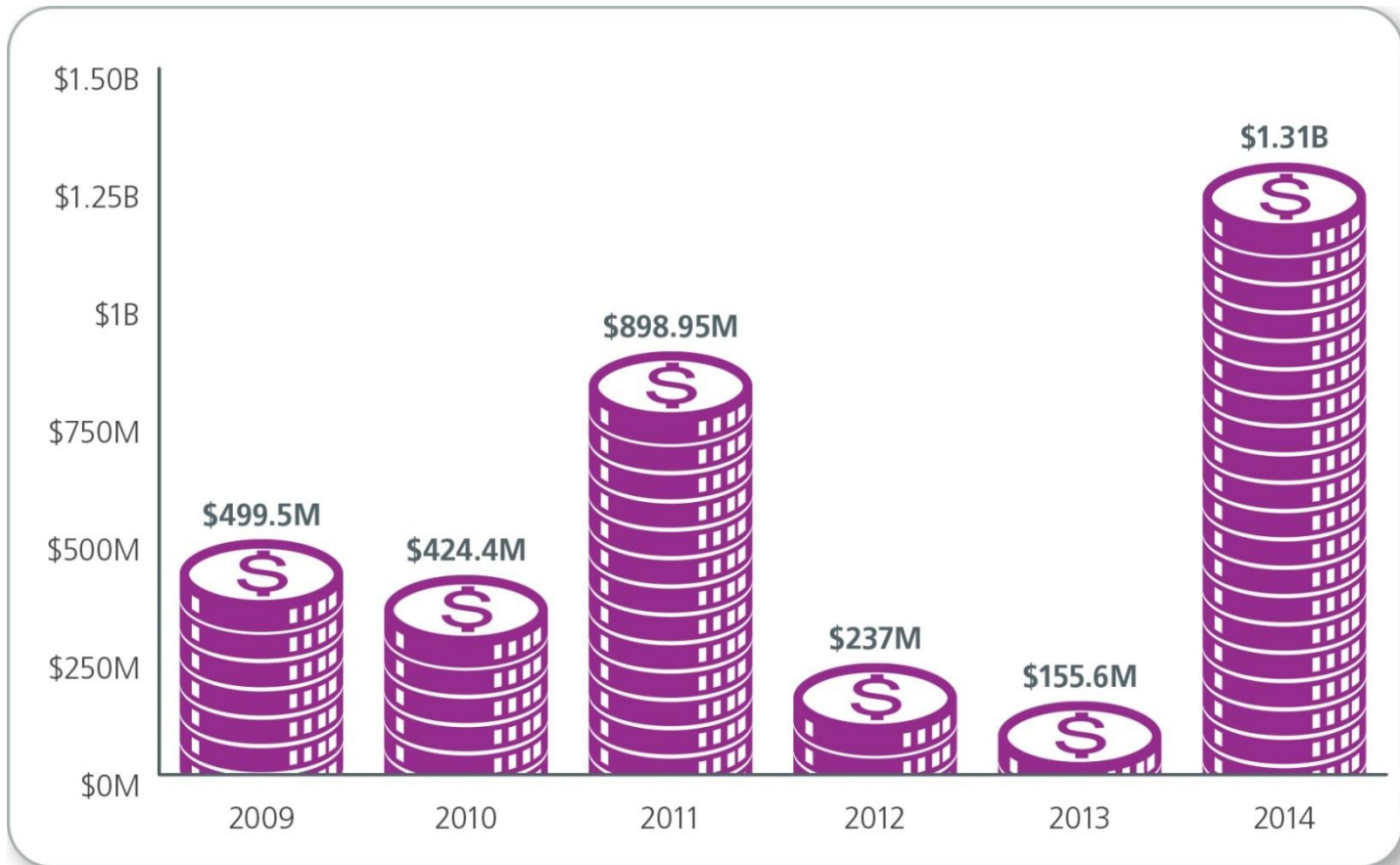


Leading Settlements – ERISA [Pages 22-23 of the WCAR]

Top 10 Settlements Totaled \$1.3 Billion, Significantly Higher – Nearly A Ten-Fold Increase – Than \$155.6 Million In 2013. The 5 Biggest Settlements In 2014 Were:

- *Meyers, et al. v. Daimler Trucks North America, LLC* (W.D. Tenn.) - \$480 Million
- *Healthcare Strategies, Inc., et al. v. ING Life Insurance & Annuity Co.* (D. Conn.) – \$415 Million
- *Haddock, et al. v. Nationwide Life Insurance Co.* (D. Conn.) - \$140 Million
- *Johnson, et al. v. Meriter Health Services Employee Retirement Plan* (W.D. Wis.) - \$82 Million
- *Kenney, et al. v. State Street Corp.* (D. Mass.) - \$70 Million

Leading Settlements – ERISA



**Value Of Top 10 ERISA
Class Action Settlements**



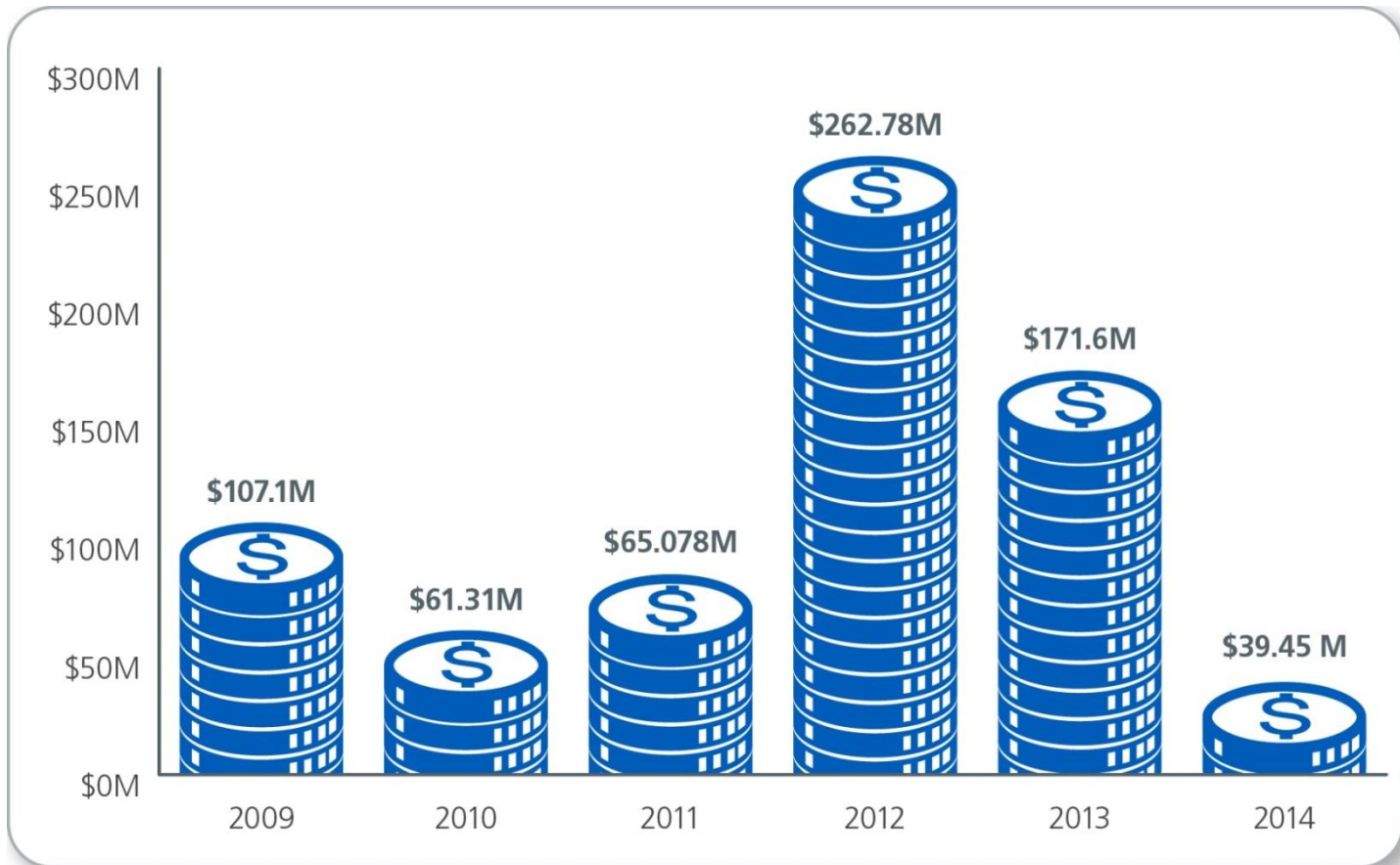
Leading Settlements – Government-Initiated Enforcement Actions

[Pages 25-26 of the WCAR]

Top 10 Settlements Totaled \$39.45 Million, A Significant Decrease From \$171.6 Million In 2013. The 5 Biggest Settlements In 2014 Were:

- *Department Of Labor v. Chickie's & Pete's Inc.* (E.D. Pa.) - \$6.8 Million
- *Department Of Labor v. LinkedIn* (DOL) - \$5.8 Million
- *Department Of Labor v. GreatBanc Trust* (C.D. Cal.) - \$5.25 Million
- *Department of Labor v. MDG Design & Construction LLC* (DOL) - \$4.9 Million
- *State of New York-Department of Labor v. NYC Car Wash Barons* (N.Y.) - \$3.9 Million

Leading Settlements – Government-Initiated Enforcement Actions



Value Of Top 10 Government Enforcement Litigation Settlements



Significant Decisions – Employment Discrimination

Location, Location and Location is All Important.

The U.S. District Courts for the Northern District of California and the Southern District of New York – And the Second & Ninth Circuits – Remain “Ground Zero” for Plaintiff-Friendly Rulings.

The California & New York Nexus to Significant Filings and Rulings.



Significant Decisions In 2014 – Employment Discrimination

Gulino, et al. v. Board Of Education, 555 Fed. Appx. 37 (2d Cir. 2014)
[Pages 31]

Aviles, et al. v. BAE Systems Norfolk Ship Repair, Inc., Case No.: 13-CV-418 (E.D. Va. June 10, 2014) [Page 32-33]

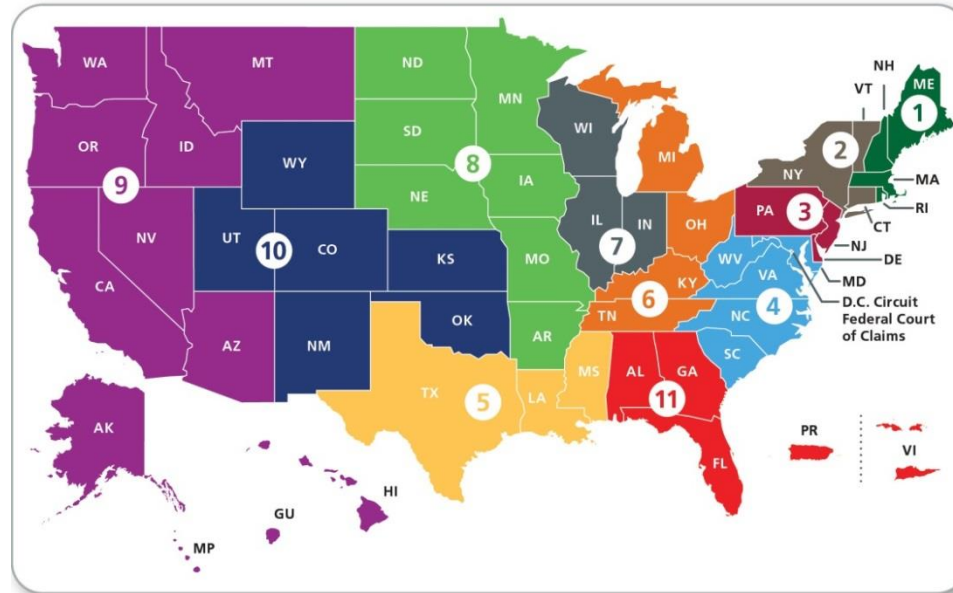
Holmes, et al. v. Service Corp., 2014 U.S. Dist. LEXIS 90501 (S.D. Tex. July 3, 2014) [Pages 33-34]

Chicago Teachers Union, Local 1 American Federation Of Teachers, AFL-CIO, et al. v. Board Of Education Of The City Of Chicago, 301 F.R.D. 200 (N.D. Ill. 2014) [Page 34-35]

Jones, et al. v. National Council Of Young Men's Christian Associations Of The USA, 2014 U.S. Dist. LEXIS 43866 (N.D. Ill. Mar. 31, 2014) [Page 35-36]

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

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



	1	2	3	4	5	6	7	8	9	10	11	D.C. Circuit	Federal Court of Claims
Conditional Certification Motions Granted	1	20	9	2	8	5	7	4	25	0	5	0	1
Conditional Certification Motions Denied	1	5	1	1	1	3	3	4	15	1	2	0	0
Decertification Motions Granted	0	3	1	0	2	0	0	0	4	0	1	0	0
Decertification Motions Denied	0	5	1	1	0	0	1	1	3	0	0	0	0
Total	2	33	12	4	11	8	11	9	47	1	8	0	1



Significant Decisions In 2014 – Wage & Hour

Hart, et al. v. Rick's NY Cabaret Interational, Inc., 2014 U.S. Dist. LEXIS 160264 (S.D.N.Y. Nov. 14, 2014) [Page 146]

Clark, et al. v. Bally's Park Place, Inc., 298 F.R.D. 188 (D.N.J. 2014) [Page 163-164]

Pullen, et al. v. McDonald's Corp., 2014 U.S. Dist. LEXIS 128364 (E.D. Mich. Sept. 15, 2014) [Page 179]

Jimenez, et al. v. Allstate Insurance Co., 765 F.3d 1161 (9th Cir. 2014) [Page 206-207]

Mathis, et al. v. Darden Restaurants, 2014 U.S. Dist. LEXIS 124631 (S.D. Fla. Sept. 1, 2014) [Page 229-230]

Braun, et al. v. Wal-Mart Stores, Inc., 2014 Pa. LEXIS 3324 (Pa. Dec. 15, 2014) [Page 447]



Significant Decisions In 2014 – ERISA

Fifth Third Bancorp, 134 S.Ct. 2459 (2014) [Page 394] and *Harris v. Amgen*, 770 F.3d 865 (9th Cir. 2014) [Page 359]

Tatum v. RJR Pension Investment Committee, 761 F.3d 346 (4th Cir. 2014) [Page 380]

Laurent, et al. v. PriceWaterHouseCoopers, LLP, 2014 U.S. Dist. LEXIS 87692 (S.D.N.Y. June 26, 2014) [Page 349]

Allbaugh, et al. v. California Field Ironworkers Pension Trust, 2014 U.S. Dist. LEXIS 106531 (D. Nev. Aug 4, 2014) [Page 355]

Stephens, et al. v. Pension Benefit Guaranty Corp., 755 F. 3d 959 (D.C. Cir. 2014) [Page 357]



Significant Decisions – EEOC Enforcement Litigation

EEOC v. Bloomberg L.P., 2014 U.S. Dist. LEXIS 18133 (S.D.N.Y. Jan 24, 2014) [Page 46]

EEOC v. Sterling Jewelers Inc., 3 F. Supp. 3d 57 (W.D.N.Y. 2014) [Page 49]

EEOC v. BMW Manufacturing Co., LLC 2014 U.S. Dist. LEXIS 169849 (D.S.C. Dec. 8, 2014) [Page 54]

EEOC v. Bass Pro Outdoor World, LLC, 2014 U.S. Dist. LEXIS 27019 (S.D. Tex. Mar. 4, 2014) [Pages 60-61]

EEOC v. Kaplan Higher Education Corp., 748 F.3d 749 (6th Cir. 2014) [Page 67-68]

EEOC v. CRST Van Expedited, Inc., 2014 U.S. App. LEXIS 24130 (8th Cir. Dec. 22, 2014) [Page 83-84]

EEOC v. Global Horizons, Inc., 2014 U.S. Dist. LEXIS 116116 (D. Haw. Aug. 20, 2014) [Page 97-98]



Significant Decisions – CAFA

Dart Cherokee Basin Operating Co., LLC v. Owens, et al., 2014 U.S. LEXIS 8435 (U.S. Dec. 15, 2014) [Page 541-542]

Rea, et al. v. Michaels Stores, Inc., 742 F.3d 1234 (9th Cir. 2014) [Page 534]



Other Rule 23 Decisions Of Significance In 2014

Diaz, et al. v. Residential Credit Solutions, Inc., 299 F.R.D. 16 (E.D.N.Y. 2014) [Page 563-564] (The Adequacy Of Representation Requirement For Class Certification)

Shakman, et al. v. City of Chicago, Case No. 69-CV-2145 (N.D. Ill. June 16, 2014) [Page 584] (Litigation Over Class Action Consent Decrees)

Carrera, et al. v. Bayer Corp., 2014 U.S. App. LEXIS 15553 (3d Cir. May 2, 2014) [Page 586-587] (Ascertainability Under Rule 23)

In Re Payment Card Interchange Fee And Merchant Discount Antitrust Litigation, 991 F. Supp. 2d 437 (E.D.N.Y. 2014) [Page 598-599] (Attorneys' Fee Awards In Class Actions)

Pearson, et al. v. NBTY, Inc., 2014 U.S. App. LEXIS 21874 (7th Cir. Nov. 19, 2014) [Page 603] (Attorneys' Fee Awards In Class Actions)



Other Rule 23 Decisions Of Significance In 2014

Stein, et al. v. Buccaneers Limited Partnership, 722 F.3d 698 (11th Cir. 2014) [Page 656] (Mootness Issues In Class Action Litigation)

In Re Target Corp. Customer Data Security Breach Litigation, 2014 U.S. Dist. LEXIS 175768 (D. Minn. Dec. 18. 2014) [Page 671-672] (Standing Issues In Class Actions)

Amadeck, et al. v. Capital One Financial Corp., Case No. 12-CV-10064 (N.D. Ill. July 29, 2014) [Page 690] (TCPA Class Actions)

Jones, et al. v. City of Boston, 752 F.3d 38 (1st Cir. 2014) [Page 714-715] (Disparate Impact Issues In Class Actions)

In Re Deepwater Horizon lake Eugenie Land & Development, Inc., 744 F.3d 370 (5th Cir. 2014) [Page 753] (Settlement Administration Issues In Class Actions)

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

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



What Should Be In Your ERISA Compliance Tool Kit?

- Robust, ongoing fiduciary oversight and review of all investments
- Fiduciary education and training
- Disclosure, disclosure, and more disclosure
- Consider how to monitor and evaluate employer stock
- Clear and consistently applied contractual limitations period
- Arbitration agreement?



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

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



Corporate Tool Kit Issues For Employment Discrimination

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



How To Order The 11th Annual Workplace Class Action Report

- The 2015 Workplace Class Action Report is available to clients of the firm and interested corporate counsel. To request a FREE copy of the report, please e-mail your request to ClassActionReport@seyfarth.com.
- The 2015 Workplace Class Action Report Is Also Available In E-Book Format. To Download, Click Here: [2015 Workplace Class Action Report: E-Book](#)
- For Updates And Analysis On Issues Impacting The Workplace Visit [The Workplace Class Action Blog](#)

SEYFARTH
SHAW

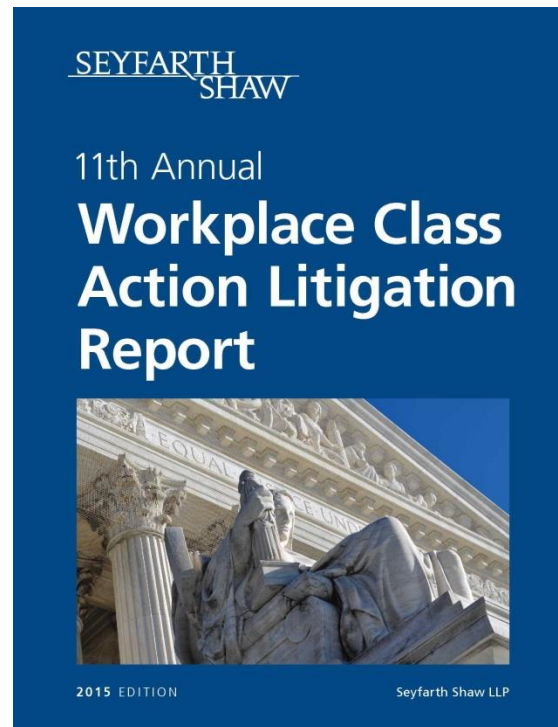
11th Annual Workplace Class Action Litigation Report



2015 EDITION

Seyfarth Shaw LLP

Questions



www.WorkplaceClassAction.com



@sswcab