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CLASS ACTION TRENDS REPORT

Class action developments: 2019 in review

In this issue of the Class Action Trends Report, *we look back at the most significant class action developments over the past year, including litigation trends, key court decisions, and legislative and regulatory changes that are certain to invite class litigation.*

Employers continued to face class litigation in 2019 as employees, independent contractors, and job applicants pursued a variety of claims, ranging from wage and hour class and collective actions (a perennial liability risk) to emerging causes of action posing new compliance challenges. Meanwhile, the courts continue to calibrate the rules of class litigation, issuing decisions on some of the most critical procedural matters shaping how these complex cases will unfold.

In addition to a review of class action developments in 2019, we'll look ahead to the legal issues and class action trends likely to vex employers in 2020. Will the reshaping of the federal judiciary under President Donald Trump alter the trajectory of these litigations as they make their way into the courts? We'll discuss this prospect as well.

Independent contractor claims proliferate

Workers who allege that they are "employees" but were improperly treated as independent contractors continued to be a steady source of litigation in 2019, in part due to the explosive growth of the "gig" or sharing economy. These cases typically arise in the wage and hour context, with plaintiffs suing under the Fair Labor Standards Act (FLSA) or state wage laws and seeking minimum wage, overtime pay, or expense reimbursements. However, independent contractor misclassification lawsuits increasingly assert causes of action under the Employee Retirement Income Security Act (ERISA), with plaintiffs claiming they are entitled to health insurance coverage and other employment benefits that independent contractor status seldom affords. Moreover, these cases are commonly filed as putative class and collective actions.

To a lesser degree, the related, but distinct question of "joint employer" liability arose as well in 2019. The law on joint employment is critical to the growing

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A WORD FROM STEPHANIE, DAVID AND ERIC

Our final issue of 2019 provides a review of developments in class and collective actions over the past year. From independent contractor classification to joint employment, class action waivers to arbitration exceptions, #MeToo confidentiality exceptions to privacy laws, the ever-changing face of complex litigation gave companies a little bit of everything this year. As the face of the federal judiciary changes under the current administration — and going into an election year — it is time to take a step back, see where we are, where we are going, and what we should do moving forward.

Independent contractor classification remains a hot-button issue nationwide. While California lawmakers tightened the ABC Test, making it more difficult for a company to establish an independent contractor relationship, other state legislatures have followed suit by introducing similar bills that may lead to increased litigation. Indeed, legislative efforts against the "gig economy" may change the way businesses operate as lawsuits filed by workers seeking benefits and overtime continue to proliferate. While the U.S. Supreme Court has ruled that employers may enter into mandatory arbitration agreements with class action waivers, it also ruled that the Federal Arbitration Act's transportation worker exception applied to independent contractors, not just employees. Accordingly, transportation industry employers will certainly look to state law and other potential alternatives for owner-operator engagements in the coming year.

And while there may be no more fundamental right than the right to be left alone, litigants continue to pepper companies with privacy-related class action suits under an ever-expanding variety of laws. Decisions under the Fair Credit Reporting Act, Telephone Consumer Protection Act, and Illinois Biometric Information Privacy Act on data breaches are highlighted in this issue. Moreover, we cover the future in data privacy, as businesses prepare for the January 1, 2020, effective date of the California Consumer Privacy Act, the most sweeping data privacy law to date.

We also look into our crystal ball for potential developments in class actions related to non-compete agreements, data privacy, the decriminalization of marijuana, and serial arbitrations that continued to emerge throughout the year. Moreover, we review the potential impact of the current administration's judicial appointments on class and collective action litigation as we move into 2020.

While we never know what the future holds, as Benjamin Franklin once said: "*By failing to prepare, you are preparing to fail*." Here's something to help you prepare for the coming year.

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About the *Class Action Trends Report*

The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Law & Business *Employment Law Daily*, the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

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franchise industry, as the joint employment cases this past year reflect.

Transportation workers. A unanimous U.S. Supreme Court in January held, in *Oliveira v. New Prime, Inc.,* that the Federal Arbitration Act's (FAA) exemption for transportation workers applies regardless of whether those workers are employees or independent contractors. Section 1 of the FAA excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This language, including the broad term "workers," the Supreme Court stated, encompasses transportation workers who labor on an independent contractor basis, meaning that the federal statute favoring private arbitration of disputes as a matter of national policy does not apply to workers, be they employees or independent contractors, who are engaged in transportation.

At first glance, *New Prime* would seem to have a narrow reach. However, since the decision, plaintiffs' attorneys are arguing that "transportation workers" are far broader than "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Plaintiffs' attorneys are arguing that "transportation workers" comprise much of the "gig" workforce including local, last-mile delivery drivers. Many "gig" economy workers sign onto arbitration provisions in their operating agreements, and disputes over whether they must resolve their claims through individual arbitration are exploding. Consequently, the decision is having a broader affect than initially anticipated. In a September decision, the U.S. Court of Appeals for the Third Circuit vacated a district court's decision compelling New Jersey rideshare drivers to arbitrate their claims, citing the Supreme Court ruling. Thus, the Supreme Court decision is threatening to upend the arbitration agreements of rideshare drivers and the growing class of gig workers transporting goods, and humans despite the apparent narrow definition of "transportation worker."

The result: gig workers are attempting to proceed in court, on a classwide basis, with the threat of far greater liability. For example, a rideshare company had struck a $20-million settlement in 2019 in a landmark misclassification suit brought by drivers claiming they were incorrectly classified as independent contractors under the FLSA and California and Massachusetts laws. The deal is considerably less than the $100-million settlement proposal rejected by a federal court, largely because the number of potential class members had been whittled from nearly 400,000 to about 13,600 after a federal appeals court ruled that most drivers signed arbitration provisions and must individually arbitrate their claims.

The result: gig workers are attempting to proceed in court, on a classwide basis, with the threat of far greater liability.

The settlement did not address the merits of the question of whether the drivers were in fact statutory employees under the statutes in question. That issue, the parties acknowledged, would "undoubtedly continue to be litigated in other cases and other fora."

California's A.B. 5. The employment status of rideshare drivers and other gig workers gained greater urgency in 2019 with the passage of a California law that codified the "ABC test" of employment status adopted by the California Supreme Court in *Dynamex v. Superior Court of Los Angeles County*. In that 2018 decision, the state's high court held that to lawfully classify someone as an "independent contractor," a company must prove that the worker is largely free from control and direction in the performance of their work; perform work that is outside the usual course of the company's business — a particular sticking point in the case of gig workers; and customarily engage in "an independently established trade, occupation, or business of the same nature as that involved in the work performed." Unless an employer can establish all three criteria, the workers in question are employees. This makes it harder for companies with business models that rely on gig workers and other industries that routinely use contingent workers to manage their operations accordingly.

While *Dynamex* addressed employment status under California's Industrial Welfare Commission (IWC) Wage Orders, A.B. 5 extends the standard to the California Labor

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Code and the state Unemployment Insurance Code. As such, it changes how an "employee" is defined in California. Lobbying on A.B. 5 was fast and furious, however, and the law contains several exemptions for certain occupations, including state-licensed professionals (physicians, attorneys, engineers, insurance and real estate professionals), registered broker dealers and investment advisors, individuals performing "professional services" in marketing, human resources, and freelance writing and photography, among others, and business relationships (such as "bona-fide business-to-business contracting relationships," construction contractors and subcontractors). For those, the determination of employee or independent contractor status will not be assessed under the ABC test, but rather, will be determined under the application of California's longstanding (and more flexible and employer-friendly) "Borello" test or other existing standards under California law.

California Governor Gavin Newsom signed A.B. 5 on September 18; it will take effect January 1, 2020.

California Governor Gavin Newsom signed A.B. 5 on September 18; it will take effect January 1, 2020. Meanwhile, California companies must grapple with the prospect that the 2018 *Dynamex* ruling applies retroactively, leaving them potentially liable for misclassification under a standard that did not exist when the determination was made. The U.S. Court of Appeals for the Ninth Circuit has asked the California Supreme Court to address the question (and vacated its own holding on this point); the state high court announced November 20 that it would do so.

Companies outside of California must take heed as well, as California often proves to be a bellwether of what is to come elsewhere in the country. In New York, Senate Bill S6699A, introduced in September, would codify the ABC test into that state's labor law. And the passage of A.B. 5 likely will breathe new life into prior legislative attempts in Oregon and Washington. (The ABC test is already in place in several other states.)

Joint employment: common-law test applies. In a February decision, the Ninth Circuit adopted the common-law agency test in discrimination cases under Title VII of the Civil Rights Act. It had not previously adopted a test for joint-employer status under Title VII. When the statutory definition of "employer" is circular, the U.S. Supreme Court has turned to common-law agency principles to analyze the existence of an employer-employee relationship, the appeals court explained, in concluding that this test should be applied in the Title VII context as well. Under this standard, the "principal guidepost" would be the extent of control exercised over the details of the work. And while other elements of the common-law agency test did not fit readily to the circumstances here — a lawsuit brought by the Equal Employment Opportunity Commission (EEOC) against two agricultural employers who allegedly, jointly, subjected H2A farm workers to appalling work conditions—the appeals court found the defendants had sufficient control over the workers for this factor to be determinative, and to find they were joint employers.

Franchisor is in the clear. In a closely watched case for the franchise industry — in the federal circuit court (and state) perhaps most likely to have been amenable to finding liability — the Ninth Circuit held that a national fast-food franchise is not a joint employer of some 1,400 employees of a franchise operator. The appeals court affirmed a summary judgment decision in favor of the national corporate entities against the workers' state-law wage claims. The franchisor did not meet the "suffer or permit to work" definition of employer, nor did it satisfy the "control" definition because it did not retain any general right of control over the franchisees' workforce. Any control that it did exercise was related to quality control and brand integrity, not employment terms and conditions. This exercise of control, the appeals court said, "is central to modern franchising and to the company's ability to maintain brand standards, but does not represent control over wages, hours, or working conditions." More is needed, in the franchise context, to establish liability under a common-law definition of employer. ■

See the Winter 2019 *Class Actions Trends Report* for an in-depth discussion of independent contractor issues.

Wage and hour claims: the perennial class action leader

Class and "collective" action lawsuits alleging violations of federal and state wage and hour laws continue to outpace all other employment class actions. This trend continued in 2019, which brought the usual stream of "off-the-clock" claims, overtime actions, and attempts to recover pay for missed meal and rest periods.

California, again. As is often the case, California proves among the most challenging of jurisdictions for employers, as exemplified in one June decision from the Ninth Circuit. The circuit court was considering the "de minimis" doctrine — the principle that certain measures of work time are too trivial to be efficiently measured. It is an important principle in federal wage and hour law; and it offers some measure of relief for employers from runaway liability under the FLSA.

However, the California Supreme Court has held the federal de minimis rule does not apply to wage and hour claims under the California Labor Code. There *is* a California de minimis rule, though, and the California Supreme Court did not hold that the de minimis rule can *never* apply. It explicitly stated that "We do not decide whether there are circumstances where compensable time is so minute and irregular that it is unreasonable to expect the time to be recorded." However, under the facts before the Court and, as a general rule, where several minutes are routinely involved, it held that the California de minimis rule does not apply as a defense (and that the federal de minimis rule is inconsistent with California wage and hour law).

The federal circuit court applied this state high court precedent in a class action suit against a major retailer defending claims that store employees were routinely stuck, off the clock, waiting for a manager to perform mandatory baggage checks before they could leave the store for their breaks or at the end of their shifts.

As a result, California employers must compensate employees for slivers of work time that are regularly and routinely worked. While cumbersome to measure, such time can add up quickly. While the U.S. Supreme Court foreclosed "security check" wage claims under the FLSA, federal courts have found them to be viable causes of action under the laws of several states, including Arizona, California, and Nevada; and the Supreme Court in October rejected an invitation to revisit the security check issue, declining the opportunity to foreclose these state-law claims as inconsistent with its precedent.

The U.S. Department of Labor (DOL) pursued an active regulatory agenda this year, finalizing a new overtime regulation that boosts the salary an employee must earn before he or she can be classified as exempt from overtime under the DOL's "white collar" rule.

On the other hand, the California Supreme Court in September ruled that employees may not use the state's Private Attorneys General Act (PAGA) as a vehicle for recovering unpaid wages on their own behalf, or on behalf of other employees. Claims under the PAGA cannot be compelled into arbitration through a pre-dispute arbitration agreement. Thus, many litigants looking to obtain relief on behalf of a group of employees and avoid arbitration at the same time have elected to file "PAGA-only" actions in recent years. However, PAGA provides only for civil penalties, and unpaid wages are not civil penalties, but compensatory relief. The holding is an important constraint on wage and hour exposure for employers in the state.

Rulemaking. The U.S. Department of Labor (DOL) pursued an active regulatory agenda this year, finalizing a new overtime regulation that boosts the salary an employee must earn before he or she can be classified as exempt from overtime under the DOL's "white collar" rule. The new salary threshold of $35,568 is a significant hike, but is sharply lower than the $47,476 proposed by the Obama Administration in a rulemaking effort struck down by the courts.

The DOL also issued a notice of proposed rulemaking that would eliminate the "80/20" rule. This "sub-regulatory" guidance defines when tipped employees must be paid the full minimum wage under the FLSA

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rather than the subminimum $2.13-an-hour "tip-credit" rate. It requires employers to pay tipped workers the full minimum wage (not the reduced rate) if an employee performs related but non-tip-generating duties (such as labeling sauces, preparing drink machines, and filling sugar caddies) if these untipped duties exceed 20 percent of their work time, and to pay the full minimum wage for all unrelated, nontipped duties (such as sanitizing the kitchen, cleaning tables, or taking out trash).

The administrative burdens of implementing the 80/20 provision, as a practical matter, were unworkable, particularly for small businesses seeking to provide optimal service to customers. "Under the Rule, employers, particularly those in the restaurant and hospitality industries, were asked to segregate the daily activities of their tipped employees into 'tip-generating' duties, 'related, but non-tip-generating' duties, and 'unrelated' duties, with little guidance on what activities fell into which bucket and how to capture such time," said David R. Golder, a principal in the Hartford, Connecticut office of Jackson Lewis and Co-Leader of the firm's Class Actions and Complex Litigation Practice.

"The '20%' or '80/20' Rule fueled numerous lawsuits throughout the country over the past two decades," Golder noted. However, in 2018, the DOL abandoned the policy in an opinion letter, allowing employers to pay the tip-credit rate for all related, untipped work — no matter how much time a tipped employee spends performing the untipped work — as long as that work is performed alongside tipped duties. The rulemaking also would revise the tip-pooling provisions of the FLSA regulations to expressly permit employers to mandate tip sharing among tipped and non-tipped workers as long as the employer does not take a tip credit. Employers that do not take a tip credit will be able to include traditionally non-tipped employees, such as cooks or dishwashers, in a mandatory tip pool.

Additionally, in April, the DOL issued a proposed rule to revise the regulations governing the calculation of the regular rate under the FLSA. The FLSA generally requires employers to pay non-exempt employees overtime pay at one-and-one-half times their "regular rate" for all hours worked over 40 in a given workweek. The regular rate is defined, with a few exceptions, as all "remuneration for employment paid to, or on behalf of, the employee," divided by the total number of hours worked during that week. Not surprisingly, employers often struggle with how to properly determine the regular rate when providing various benefits and other forms of compensation to their employees in the modern workplace.

The proposed amendments seek to clarify which benefits and other forms of compensation can be included, or excluded, in an employer's regular rate calculations. For example, among other things, the proposed amendments address the employer trend of consolidating vacation, sick, and personal time into one category, referred to as "paid time off" (PTO). DOL clarifies that payment for PTO (when not worked), as well as payouts for unused PTO, need not be included in the regular rate, as this is pay for non-working time.

The proposed amendments also seek to provide clarification regarding the inclusion or exclusion of certain benefits or compensation, such as "bona fide" meal periods, reimbursement for reasonable expenses, call-back pay, predictability pay, schedule change premiums, "clopening" pay, contributions pursuant to bona fide benefit plans, and voluntary premium payments, in the regular rate calculation. Further, the proposed amendments add a number of examples to a non-exhaustive list of excludable benefits currently found in the regulations, as well as elaborate on the types of bonuses that are, and are not, discretionary.

Finally, the DOL in November issued a proposed rule regarding the "fluctuating workweek" (FWW) method of compensation under the FLSA, under which an employer may pay an employee who works fluctuating hours a fixed salary for all hours worked, and then an additional half-time for all hours over 40, a number that decreases as the number of hours increases. The agency's recent proposal clarifies that employers may award bonuses, pay premiums, and other forms of additional pay without undermining the use of the FWW method in paying their workers. ■

Class settlements and verdicts of note

Here are some of 2019's largest class settlements and court verdicts reflecting the scope of liability and the variety of claims with which employers and other defendants must contend:

- A California state court approved a $100-million deal ending a long-running class action brought by security guards who sued to recover pay for uncompensated meal and rest periods. The class numbered almost 14,000; of whom 8,751 class members participated (and will receive an average recovery of $7,000 each). The employer will pay $4.47 million in PAGA penalties and $43.2 million in attorneys' fees to class counsel.
- A class of more than 1,000 flight attendants was awarded $77 million in damages in a case alleging violations of California's wage and hour laws. The flight attendants claimed the airline did not pay them for all time spent before, after, and between flights, for completing written reports, for time spent training and for undergoing required drug testing, and for overtime. They also contended the employer did not permit them to take meal or rest breaks. Although the employer argued the plaintiffs' damages model improperly assumed all class members reported to work one hour before a flight, the judge noted that the model did not need to capture the precise time each employee reported to work for each shift in order for the court to award damages. The judge rejected the airline's challenges to the plaintiff's damages model and reduced the damages requested by the workers by only $8 million.
- A federal jury in Pennsylvania awarded $1,000 to each of 68,000 correctional facility inmates who claimed that a county and several other municipal entities violated Pennsylvania's Criminal History Records Information Act (CHRIA) by making their criminal records public. The class alleged that the county's inmate search tool, which was made available to the public in 2008, included access to an online database with criminal history records for all current and former county inmates — setting up the county for up to $68 million in damages.
- Ending a lawsuit brought on behalf of more than 100,000 au pairs alleging that sponsoring agencies kept wages artificially low and failed to pay minimum wage or overtime, a federal court in Colorado approved a $65-million settlement between the au pairs and sponsoring agencies. The settlement also included a requirement that the sponsoring companies inform host families and au pairs that their weekly stipend was a minimum and that they were free to agree to higher compensation. The court also approved $22.9 million in attorneys' fees and $3.3 million for litigation expenses to come from the settlement fund.
- The U.S. Court of Appeals for the Fourth Circuit upheld a $61-million award in a class action brought under the Telephone Consumer Protection Act (TCPA) after concluding that plaintiffs are not required to show injury in order to have standing to sue, but only that the statutory elements of a TCPA claim are established — and that TCPA claims are "conducive to class-wide disposition."
- A federal court approved a settlement resolving a class action lawsuit accusing a university's medical school and several related entities of violating federal antitrust law through a mutual no-hire agreement with another area school of medicine. As part of the settlement, the defendant university will pay out $54.5 million and has agreed to additional injunctive relief. The court awarded $18.2 million in attorney fees, $3.3 million for expenses, and a $125,000 service award for the class representative.
- A federal court in California gave preliminary approval to a $22.7-million settlement agreement resolving claims that a food manufacturer misclassified its product distributors as independent contractors. The class of roughly 925 distributors includes three subclasses of distributors from California, Illinois, and Massachusetts — all states that utilize the "ABC" test for determining whether workers are independent contractors or statutory employees under the operative state law.

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#MeToo's seismic impact persists

The shock waves that followed the sudden, powerful reckoning that came to be known as the #MeToo movement are still strong.

The EEOC's 2018 charge-filing data (the latest reported) showed a surge in sexual harassment and related retaliation charges, a 13.6 percent increase over 2017, amounting to 7,609 sexual harassment charges.

"[W]e cannot look back on last year without noting the significant impact of the #MeToo movement in the number of sexual harassment and retaliation charges filed with the agency," then-acting EEOC Chair Victoria A. Lipnic said of the agency's 2018 numbers.

Suits against Weinstein survive. In the first month of 2019, a federal court in New York issued a lengthy opinion allowing sexual assault and related claims to advance against Harvey Weinstein, the disgraced movie mogul who unintentionally launched a social movement, and his eponymous movie company. The company declared bankruptcy after more than 100 women broke their silence (and, often, their nondisclosure agreements) and came forward with accounts of sexual harassment and abuse. In this instance, most of the 22 claims asserted against Weinstein survived, based on allegations of quid pro quo sexual harassment, disparate impact sex discrimination, rape, sexual assault, and related claims of abuse, threats, and intimidation. The court also refused to dismiss the plaintiff's Trafficking Victims Protection Act (TVPA) cause of action, squarely rejecting any argument that the statute did not apply to the factual scenario alleged.

The case was one of several civil suits pending against Weinstein in the federal court in New York, including what appeared to be the first attempt to sue under the TVPA for the kind of predatory conduct allegedly committed by Weinstein. The New York Attorney General also sued the defendants, alleging egregious violations of New York's civil rights, human rights, and business laws. Criminal prosecutions are also ongoing.

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- A federal court in California has given final approval to a $16.5-million settlement resolving wage claims brought by a group of delivery drivers in the state who alleged that their employer, a logistics company that provides delivery and installation services for retailers, erroneously treated them as independent contractors, and shorted them on overtime and expense reimbursements as a result. There are 832 drivers in the settlement class, and 116 opt-ins to the FLSA collective.
- A pharmacy chain reached a $15-million deal to settle claims that it violated California's "suitable seating" law, which requires employers to provide seating to employees (in this case, store cashiers) whenever feasible. Class counsel will receive $5.2 million in fees.
- A national retailer will pay $14 million to resolve class claims that it maintained a (discontinued) written policy that denied pregnant workers the same benefits offered to other workers similar in their ability or inability to work, in violation of the Pregnancy Discrimination Act (PDA). The classes total an estimated 740 workers.
- A tech giant will pay up to $11 million to resolve allegations of systemic age discrimination asserted in a collective action brought under the Age Discrimination in Employment Act (ADEA). The plaintiffs alleged the employer discriminated against job applicants age 40 and older when hiring for such positions as site reliability engineers, software engineers, and systems engineers.
- A class of 671 current and former female pharmaceutical sales representatives will share a $6.2-million settlement after a federal court in New Jersey approved a deal to resolve their claims under Title VII, the Equal Pay Act (EPA), Family and Medical Leave Act (FMLA), and ERISA.

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Two particularly notable holdings emerged:

First, the defendants argued the plaintiff's quid pro quo claim was not adequately pleaded because she did not allege an adverse employment action — to the contrary, her career was promoted due to Weinstein's "predatory attentions." They argued that, while Weinstein allegedly threatened to damage the plaintiff's career, he did not make good on those threats. But the court rejected this defense, explaining that the defendants "erroneously elide refusal and submission quid pro quo harassment cases." The U.S. Court of Appeals for the Second Circuit has refused to require a showing of adverse action in quid pro quo cases lest victims of harassment who succumb to unwelcome sexual encounters be punished, the court observed. It was enough that Weinstein threatened to ruin the plaintiff's career if she reported the assaults, it held.

Second, the defendants argued the plaintiff did not adequately plead a disparate impact claim because she did not cite a facially neutral company policy that disadvantaged women. Again, the court disagreed. The plaintiff had alleged that The Weinstein Company was aware of "Weinstein's prolific predatory behavior against women" and that it lacked a meaningful process for reporting sexual misconduct, and that there were company practices of reporting any such complaints to Weinstein himself, allowing him to retaliate, and entering into non-disclosure agreements to conceal his conduct. Accordingly, she pleaded company policies that enabled Weinstein's conduct, and thus, "a coherent theory of disparate impact sex discrimination."

Lawmakers tackle the problem. In the wake of #MeToo, state legislatures moved to strengthen protections for employees facing sexual harassment, to beef up workplace training requirements, and to reevaluate the effect of procedural mechanisms such as mandatory arbitration and nondisclosure agreements in ensuring legal relief is available to victims of harassment.

For example, in New York, the venue for much of Weinstein's worst alleged conduct, New York Governor Andrew Cuomo signed sweeping sexual harassment legislation — bills that had never been introduced in the legislature before. Said to be among the most robust measures in the nation, the legislation eliminates New York's "severe or pervasive" standard for proving harassment and restricts employers' ability to avoid liability for the behavior of their employees, among other provisions. It also extends protections for non-employees in the workplace to all protected classes; prohibits mandatory arbitration clauses for discrimination claims; bars non-disclosure agreements in any settlement for a claim of discrimination (unless it is the complainant's preference); and provides that any term or condition in a non-disclosure agreement is void if it prohibits the complainant from initiating or participating in an agency investigation or disclosing facts necessary to receive public benefits.

Predator's club. Among the most troubling sexual harassment cases to surface in 2019 was a Title IX of the Education Amendments Act class action suit brought by nine Jane Doe plaintiffs against an Ivy League college alleging that three tenured psychology professors "leered at, groped, sexted, intoxicated, and even raped female students" for well over a decade. The plaintiffs claimed that the assailants had a "predator's club" that subjected the plaintiffs and other women to "pervasive sexual harassment and gender-based discrimination," linking female students' academic success to their willingness to tolerate unwanted sexual attention, and favoring students "who accompanied the men on their frequent drinking binges and engaged in sexual banter or submitted to unwanted touching and sexual contact." Members of the predator's club publicly ranked women on a "Papi" scale, based on the circumstances under which they would "bang" the female in question.

The plaintiffs asserted that college administrators had known about the professors' conduct for nearly two decades. During mediation, the parties reached a settlement agreement in principle: $14 million in monetary damages and other relief, including college-funded initiatives to identify and rectify current issues on campus and to prevent future problems. The "predator's club" professors are no longer teaching at the institution.

Coming forward. "Sexual harassment has been a persistent problem in the workplace," said Stephanie Adler-Paindiris, Co-Leader of Jackson Lewis' Class Actions and Complex Litigation Practice. "What has changed is the increased media focus on harassment and the willingness of victims to report harassment." ■

Disparate impact rears its head

The general trend in employment litigation has been toward class actions, and the disparate impact theory of discrimination has continued to fuel that trend in 2019. Employers' increasing reliance on HRIS systems, applicant tracking systems, and other electronic data, make the pursuit of disparate impact litigation easier, and thus more enticing, for plaintiffs' lawyers. Consequently, the rise in disparate impact class litigation likely will continue unabated.

Vacating a prior panel decision, a divided en banc court held that the ADEA's plain language protects employees from disparate impact discrimination but does not extend the same protection to external job applicants.

No ADEA disparate impact claim for applicants. The U.S. Court of Appeals for the Seventh Circuit tackled whether the ADEA provides for a disparate impact claim for outside job applicants, or if "status as an employee," as set forth in ADEA Section 4(a)(2), compels a contrary holding. Vacating a prior panel decision, a divided *en banc* court held that the ADEA's plain language protects employees from disparate impact discrimination but does not extend the same protection to external job applicants. The statute is clear: Congress intended that only employees are entitled to bring disparate impact age discrimination claims, the Seventh Circuit majority concluded. Therefore, it affirmed dismissal of an ADEA claim brought by a 58-year-old attorney who was rejected for a senior in-house counsel position based on the employer's seven-year experience cap. In so ruling, the Seventh Circuit aligns with the Eleventh Circuit's position. The U.S. Supreme Court has declined a petition for *certiorari* in the case.

Disparate impact challenge to skills test gets green light. The Seventh Circuit reversed a district court's order dismissing the disparate impact claims of a class of Hispanic job applicants for positions at an automotive plant who challenged the company's pre-employment basic skills test requirement. The applicants alleged the skills test had a disparate impact on Hispanic and Latino applicants. They also alleged Hispanic applicants had to take the test while some non-Hispanic applicants were not required to take it, and even if they passed, the defendant still refused to hire them. However, the plaintiffs failed to exhaust administrative remedies on their related disparate treatment claims, which alleged the company conspired with a union official and the local unemployment office to prevent them from being hired.

Pre-employment tests present the "classic disparate impact pitfall" and are among the most common targets of disparate impact lawsuits, according to Scott Pechaitis, a Principal in the Denver office of Jackson Lewis and member of the firm's Class Actions and Complex Litigation Practice. "Pre-employment tests are ripe for these claims. You have a facially neutral employment practice or policy, and large numbers of selections and rejections that can be aggregated to show patterns and statistical trends." With the increasing use of pre-employment testing comes a corresponding rise in the risk of classwide litigation and potential liability.

RIFs are subject to disparate impact review. Addressing for the first time whether a reduction in force (RIF) "or, more precisely, the practices through which an employer implements a RIF are subject to disparate-impact review under Title VII," a divided panel of the U.S. Court of Appeals for the District of Columbia Circuit saw "no basis to exempt such practices from otherwise-applicable law," and reversed a grant of summary judgment in an employer's favor on a class-action suit alleging both disparate treatment and disparate impact race discrimination. The plaintiffs had alleged that their employer, a municipality, eliminated those job categories in which African-American employees were most concentrated. Although the district court, as well as the dissenting judge, concluded a RIF is not a "particular employment practice" for purposes of analyzing disparate impact, the appeals court explained that nothing in the federal law suggested the practices an employer used to effectuate a layoff, whether or not they are called a "RIF," are exempt from disparate-impact scrutiny. ■

An onslaught of privacy-related class actions

The growing legislative trend to protect individual privacy and personal data, including within the employment context, not surprisingly, has brought a corresponding increase in class litigation. Thousands of class actions are filed each year under various privacy-related statutes, many of which provide for damages regardless of whether a claimant can demonstrate actual harm or injury as a result of the statutory violation. That makes these claims particularly appealing for the plaintiff's bar.

In the meantime, state privacy and data breach legislation proliferates, bringing more risks of classwide liability.

The federal Fair Credit Reporting Act continues to impose "gotcha" liability on defendants for deviations from its strict disclosure requirements. In a January decision, the Ninth Circuit vacated a grant of summary judgment in favor of an employer in a putative class action that arose because the company included extraneous information in its required FCRA notice to job applicants. Its error? The employer also provided applicants with required disclosures under *state* reporting statutes, and violated the FCRA's "standalone" disclosure requirement. While the employer argued the addition of state-mandated information furthered, rather than undermined, the FCRA's statutory purpose, the appeals court noted the FCRA means what it says: the required disclosure must appear in a document that consists solely of the FCRA disclosure.

On a more reassuring note, a California federal court decertified a potentially 6.5 *million*-member background check class in a case asserting a retail giant breached the notice requirements of the FCRA and California's Investigative Consumer Reporting Agency Act (ICRAA). Despite the defendant's procedural violations, the plaintiffs knew the company might run a background check on the job applicants, and they gave their consent since they wanted to be hired. Accordingly, the plaintiffs failed to show they suffered a concrete harm as required by the U.S. Supreme Court in *Spokeo, Inc. v. Robins*. The court had initially rejected this reasoning when it issued its order certifying the class, finding concrete harm rather than a "mere technical" violation of the FCRA, but it refused to apply the law-of-the-case doctrine here, as the plaintiffs had urged. However, the court refused to grant summary judgment in the company's favor, noting it was bound by the federal statute and Ninth Circuit precedent requiring it to decertify the class and remand the action to state court.

Issuing a similar ruling in a case brought under the Telephone Consumer Protection Act (TCPA) — another popular statute for class action plaintiffs — the U.S. Court of Appeals for the Eleventh Circuit held that a single unsolicited text message from one's former attorney does not meet the harm requirement necessary to proceed. In its September decision, the appeals court drew from the legislative history of the TCPA, its own precedent, and *Spokeo,* which emphasized that a concrete injury must be alleged in order to meet the Article III standing requirement.

In data breach litigation, *Spokeo*'s lack of clarity on what constitutes a concrete injury generated a circuit split on standing, as well as a spate of lawsuits. Until the U.S. Supreme Court weighs in by clarifying its ruling in *Spokeo*, the lack of consistency across the circuit courts will persist.

In the meantime, state privacy and data breach legislation proliferates, bringing more risks of classwide liability. Drawing considerable attention is the Illinois Biometric Information Privacy Act (BIPA), which has made Illinois a central forum for much of this litigation and a source of considerable potential exposure. In January, the Illinois Supreme Court handed down its first BIPA decision, holding that to bring suit under the statute, a plaintiff need not allege actual injury or adverse effect beyond a technical violation of rights under the statute to qualify as an "aggrieved" person and be entitled to seek damages. Those damages can be substantial. The BIPA provides for statutory damages of $1,000 per negligent violation or $5,000 per intentional or reckless violation. No Illinois court has yet to interpret the meaning of "per violation," but the majority of BIPA suits

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have been brought as class actions seeking statutory damages on behalf of each individual affected.

"The public's sensitivity to privacy and security issues continues to grow[.]"

The Illinois Supreme Court's decision "is likely to increase the already significant number of suits, including putative class actions, filed under the BIPA," cautions Joseph J. Lazzarotti, Principal in the Berkeley Heights, New Jersey, office of Jackson Lewis and head of the firm's Privacy, Data and Cybersecurity Practice.

Illinois is not the only state legislating biometric privacy. Several states already have statutes on the books, and another dozen are entertaining similar legislation. Whether these will come to fruition — and whether they will afford a private right of action, and apply to biometric information collected in the employment context — remains to be seen.

Meanwhile, the California Consumer Privacy Act (CCPA), which takes effect January 1, 2020, breaks new ground in this area of the law. The sweeping state legislation reaches well beyond the state. We explored the CCPA in detail, and emerging data privacy threats in class litigation, in our Summer 2019 *Class Action Trends Report*.

While courts have thus far shown some restraint in certifying class actions in data breach cases, this may change. In March, the U.S. Supreme Court rejected an online retailer's petition for a *writ of certiorari* requesting review of a Ninth Circuit decision allowing a class to proceed in a suit arising from a 2012 data breach that affected over 24 million customers. The decision, coupled with the emerging state-law initiatives, "is likely to have a significant impact on data breach class action lawsuits going forward," Lazzarotti said.

"The public's sensitivity to privacy and security issues continues to grow," Lazzarotti continued. "No industry or sector is immune. Whether your organization is public or private, whether it is part of an industry highly susceptible to data breaches, such as healthcare, or believed to be less susceptible like construction, it should be reevaluating its privacy and security programs and ensuring compliance with relevant legislation." ■

ADA accessibility lawsuits continue upward trend

In addition to employment-related claims under Title I of the Americans with Disabilities Act (ADA), business that serve the public also face class actions under Title III of the Act, which prohibits discrimination against persons with disabilities in places of public accommodation and commercial facilities. The number of Title III class actions has soared in recent years and 2019 was no exception. Each year brings novel types of claims and theories of liability; most recently, retailers and other companies are facing a wave of lawsuits alleging that gift cards that do not have braille violate the ADA. Businesses are also defending a growing number of class actions alleging that the aisle widths in their facilities are too narrow to accommodate individuals that use wheelchairs.

We will discuss new developments in ADA Title III litigation in the Winter 2020 *Class Action Trends Report*.

Benefits claims get class treatment

ERISA is the primary federal statute regulating employee benefit plans. ERISA class actions arise under several theories of liability. These include, among other causes of action, independent contractor misclassification, privacy breaches, nominal violations of statutory notice requirements, and efforts to reduce benefits costs through workforce reductions and schedule cutbacks. ERISA class actions in 2019 reflect the range of class action benefits suits that employers commonly face.

Retirement plan data disclosed. Wrongful use of retirement plan participant data was among the claims made by a class of 40,000 participants against the plan sponsor and others in an ERISA action against a university employer. The plan participants claimed the university breached its "loyalty and prudence" duty by failing to protect confidential employee retirement plan participant information, allowing the plan's recordkeeper to obtain access to participant's personal information and to profit from that access. The parties reached a settlement agreement that included a payment of $14.5 million, along with promises to make certain changes in plan administration.

"Retirement plan sponsors have faced litigation concerning plan administration in a number of areas, including investment selection and prudence over plan fees," said Lazzarotti. But the settlement in this case "includes a uniquely heightened focus on protection of data, signaling a trend in this direction. It will be interesting to see if these kinds of claims take hold; after all, this is only a settlement and not a decision in federal court."

Evading ACA coverage mandate. In what may be the first case of its kind suing an employer for cutting employee work hours to skirt Affordable Care Act (ACA) coverage requirements, a federal court in New York gave final approval in July to a $7.4-million settlement resolving a nationwide class action against a restaurant chain. The suit alleged the restaurant chain drastically cut employees' work hours, reducing them to part-time status, in order to avoid providing them with health insurance under the looming ACA employer mandate. (The ACA requires employers with at least 50 full-time employees, defined as those who regularly work at least 30 hours per week, to offer health coverage to full-time employees or face monetary penalties.) The lead plaintiff worked in one of the chain's restaurants where the full-time workforce was reduced from 100 to 40 employees. She filed suit after her hours were cut from 30-45 to 10-25 per week. The court found she asserted a plausible theory of liability under ERISA. In addition to monetary recovery for more than 2,000 current and former employees, the settlement includes injunctive relief barring management from reducing employees' hours or discharging them for the purpose of denying health coverage.

COBRA notice lapses draw class liability. Three separate class action suits filed in Florida in the past year have alleged an employer's Consolidated Omnibus Reconciliation Act (COBRA) notice did not comply with the operative DOL regulation. COBRA, an amendment to ERISA, requires a plan administrator to provide notice to plan participants, both upon initial enrollment in the plan and upon a qualifying event, such as a termination of employment or divorce, if that event results in the loss of health plan coverage or an increase in the premiums charged to the individual. COBRA cases often allege that a notice is provided late or is missing key details required by the regulations, such as the name and contact information of the plan administrator or the address for the remittance of payments. In the most recent case, the plaintiff sought to certify a class of the company's group benefits plan participants and requested statutory penalties of $110 to each participant or beneficiary per day that the company allegedly failed to comply with the notice requirements.

"Can you imagine something as simple as a COBRA notice missing a few technical requirements resulting in an employer needing to pay a 6- or 7-digit damages award? That is happening in Florida," said Suzanne G. Odom, a Principal in Jackson Lewis' Greenville, South Carolina office. "At $110 per person per day, a class of qualified beneficiaries consisting of 100 people who lost their coverage as part of a reduction in force 2 years ago, and whose COBRA notices were arguably deficient, may mean

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Procedural developments affect defense strategy

While the class action is a procedural mechanism, not a substantive claim, a finding on the merits usually is preceded by procedural disputes that have outsized significance in class actions and complex litigation. Several 2019 court decisions clarify the ground rules on some important procedural matters.

Supreme Court provides clarity

The U.S. Supreme Court issued several decisions in its 2018-19 term addressing procedural matters of import for employment class litigation defense.

"The rule against coercing parties into arbitration is particularly important in the class action context[.]"

Equitable tolling does not apply. In a February ruling, the Court held that the 14-day deadline to seek permission to appeal a class certification decision (granting *or* denying class certification) under Federal Rule of Civil Procedure 23(f) cannot be extended through equitable tolling (a legal doctrine providing that a statute of limitations will be suspended or temporarily stopped based on principles of equity). Although the time limitation is not jurisdictional in nature, it is a claim-processing rule that is "unalterable" if properly raised by an opposing party. "This decision will prevent a party from filing a tardy Rule 23(f) motion, and the bright line drawn provides clarity for plaintiffs and defendants alike," said David R. Golder, Principal in the Hartford, Connecticut, office and Co-Leader of Jackson Lewis' Class Action and Complex Litigation Practice.

Standing is *always* an issue. In March, the Court remanded a class action alleging violations of the Stored Communications Act without addressing the merits of the question for which it granted *certiorari*: whether a *cy pres* settlement satisfied Rule 23(e)(2) requirements. The lower court had failed to address the threshold question of whether a named plaintiff had standing before approving the class settlement, which it is required to do, the Court held. A court lacks jurisdiction, the Court explained, if there is not a named plaintiff with standing and it "is powerless to approve a proposed class settlement if it lacks jurisdiction."

Individual arbitration, unless agreement says otherwise. Filling a gap in class arbitration jurisprudence, in an April opinion, the Court held that a party cannot be compelled to submit to class arbitration unless an unambiguous contract provision expressly states the parties' intent to do so. Class arbitration is such a sharp departure from individual bilateral arbitration that a clear expression of the parties' intent to depart from it is required. The Court issued its decision in a putative class action brought on behalf of 1,300 employees whose employer had inadvertently disclosed their personal tax information to a hacker.

"The rule against coercing parties into arbitration is particularly important in the class action context," said Eric R. Magnus, Principal in the Atlanta, Georgia, office of Jackson Lewis and a Co-Leader of the firm's Class Action and Complex Litigation Practice. "Among other things, class actions expose the employer to exponentially greater liability and risk, while eliminating the safeguard

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more than $80,000 in damages. The math is $110 x 365 days x 2 years = $80,300. Now imagine several RIFs over the course of several years or simply adding a zero with a failure affecting 1,000 or more people. This is how the numbers get so big. Plus, when you add in the prospect of receiving a legal fee award, you have an incentive," Odom explained.

While this and another case in Florida have settled, a third lawsuit with similar allegations remains pending. The flurry of cases should put employers on notice, even outside of Florida.

"What doesn't start in California often starts in Florida," Odom cautioned. ■

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of an appeal. Class actions also purport to speak for employees who may not want to participate in the action, but nonetheless find themselves bound by an arbitration award. They also introduce complex and time-consuming litigation practices into the arbitration forum, which is intended to be faster, cheaper, and more efficient than ordinary litigation in courts."

The Fifth Circuit, in a February decision, held that a court cannot send notice of a collective action to employees who have signed valid arbitration agreements with class action waivers.

Third-party counterclaimants can't remove a case. In a May decision, the High Court held that a defendant to a third-party counterclaim is not a "defendant" for purposes of the general federal removal statute or the Class Action Fairness Act. Under those statutes, the "defendant" refers only to the party sued by the original plaintiff in a case. In this case, the party seeking removal was not the original defendant; rather, the original defendant had brought the counterclaim against it. Therefore, the third-party defendant could not remove the class action from state to federal court. The procedural posture arises rarely, but the circumstance can surface more frequently with the rise of contingent staffing arrangements, as well as franchising and "fissured" business models.

Appellate courts weigh in

The Fifth and Ninth Circuits also issued decisions in 2019 that will shape class litigation in those jurisdictions.

Class waiver means no notice. The Fifth Circuit, in a February decision, held that a court cannot send notice of a collective action to employees who have signed valid arbitration agreements with class action waivers. Because these employees agreed to individually arbitrate any disputes arising with the employer, they would not be able to participate in the collective action at hand, so it was not necessary for them to receive notice of the litigation. The appeals court explained that to order notice to these employees, the record would have to show that nothing in their arbitration agreements would bar them from joining a collective action. There was no such showing in this case, so the district court erred in requiring the employer to turn over these employees' personal contact information. The ruling was issued in a nationwide "off the clock" wage-hour action, and it was an important decision for employers seeking to control class size and potential liability and to ensure the right to enforce their arbitration contracts. The Fifth Circuit was the first court of appeals to rule on this significant question. (We discussed this issue in depth in the Spring 2019 *Class Action Trends Report*).

Courts determine class arbitrability. In another class arbitration case of first impression for the Fifth Circuit, the appeals court issued a decision in July holding that whether parties to an arbitration agreement have contemplated classwide arbitration is a gateway issue for a court, not arbitrator, to decide — unless the arbitration agreement contains "clear and unmistakable" language to the contrary. The Fifth Circuit fell in line with its sister circuits that have already ruled on this issue.

CAFA removal burden eased. A defendant seeking to remove a class action from state court to federal court under the Class Action Fairness Act (CAFA) must establish the amount in controversy exceeds $5 million. What is the defendant's burden when making this showing? In the Ninth Circuit, which has long-imposed an "antiremoval presumption," a defendant had to offer a strong factual basis to support its amount-in-controversy calculation — perhaps assisting the plaintiffs in their case in the process. However, in a September decision involving a California wage and hour class action, the Ninth Circuit held that a notice of removal "need not contain evidentiary submissions."

The employer had used the class definition in the complaint, as well as its own payroll data on number of employees, hourly rates, and number of workweeks, to show the amount in controversy well exceeded the $5 million jurisdictional requirement. The district court rejected this assumption, finding it was speculative and based on conjecture, and, *sua sponte,* remanded the case for lack of evidence. This was error, the appeals court said, explaining that a defendant must have the chance to submit proof to show it satisfies removal requirements.

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Evidence in support of the amount in controversy is required "only when the plaintiff contests, or the court questions, the defendant's allegation." At that point, the defendant may rely on "reasonable assumption" based on that evidence. This will suffice for removal purposes and greatly facilitate the use of removal to federal court as an important defense strategy.

Certifying a settlement class is different. Class action litigators were troubled by a controversial 2018 Ninth Circuit panel decision vacating certification of a class that was certified for settlement purposes in a nationwide consumer class action against automakers. According to the appellate panel, in this non-employment case, the lower court conducted an insufficiently rigorous Rule 23(b)(3) "predominance" analysis under the CAFA because it failed to resolve choice-of-law considerations. However, in June 2019, an *en banc* Ninth Circuit vacated the panel decision, finding the district court had properly reasoned that a choice-of-law analysis was unnecessary because the class was being certified for settlement purposes, rather than to litigate the action. In overturning the panel decision, the *en banc* court found that Rule 23 calls for a less stringent analysis in the settlement context, as concerns about case manageability and other considerations do not come into play. Two important takeaways: (1) the decision facilitates settlement of class disputes (in a case where the parties labored long and hard to reach a resolution); and (2) when considering class certification for purposes of *trial*, variations in the state laws at issue could pose "intractable" case manageability concerns and defeat predominance. ■

NLRB's sharp course correction on class waivers

When several employees opted into a class and collective action that was pending in court, their employer responded by imposing a revised arbitration agreement that barred them from joining any collective action without its written consent. A National Labor Relations Board (NLRB) judge found this interfered with employees' protected rights under the National Labor Relations Act (NLRA). However, the Board took up the case again after the Supreme Court issued *Epic Systems Corp. v. Lewis*. (In that 2018 decision, the Court held that an employer does not interfere with employees' statutory rights under the NLRA when it requires employees to sign arbitration agreements that waive the right to bring class and collective actions, putting a definitive end to several years of uncertainty regarding the lawfulness of class action waivers under the NLRA.)

In its August decision, the NLRB held that an employer may require employees to sign a class waiver even *after* they engage in the NLRA-protected activity of joining a pending class action without running afoul of the NLRA. Moreover, the divided Board held that it is lawful under the NLRA to threaten discharge of an employee who refuses to sign such an agreement, given that *Epic Systems* makes clear that employer may condition employment on agreeing to resolve claims through individual arbitration.

The Board reaffirmed this stance in an unrelated late-October decision addressing the same question, making it clear that the NLRA is no impediment to employers wishing to control litigation costs by implementing (and enforcing) mandatory arbitration agreements with class waivers as a condition of employment.

2020: A look ahead

Employers in 2020 will face a variety of new legal mandates and, with them, potential new classwide exposure. State laws barring discrimination based on "natural" hairstyles (a form of race bias), violations of newly enacted "predictable scheduling" laws, new consumer and employee privacy protections, and legislation decriminalizing the use of marijuana will demand employers' attention, and test their compliance.

Tried-and-true causes of action will continue to put employers at risk of classwide liability. While wage and hour class and collective action filings may have eased in the past year or so, they remain the biggest source of classwide liability — most likely to get certified and to carry large damage awards. An anticipated resurgence of independent contractor misclassification claims stemming from California's A.B. 5 and copycat legislation elsewhere can also be expected to boost the number in 2020.

In the discrimination context, pay equity legislation and litigation are clearly on the upswing and threaten to become the next decade's #MeToo movement. Employers must take proactive measures to review their salary data and correct any inconsistencies. Another growing threat: ADEA suits spurred by changing employee demographics as well as a plaintiff-friendly two-stage conditional certification mechanism for bringing classwide claims. Moreover, regardless of the U.S. Supreme Court's determination on whether sexual orientation discrimination claims are cognizable under Title VII, the protected status of LGBTQ employees is settled law in many states, creating additional compliance challenges and litigation risks for employers.

There has been considerable movement on the employment contract front, too. As the use of non-compete agreements continues to draw scrutiny and no-poach agreements, particularly in the franchise industry, draw fire, employers may become targets for litigation. Where these agreements are companywide policies and practices, employers may have to contend with defending them on a classwide basis.

Meanwhile, plaintiffs' attorneys are devising new procedural strategies that add to the challenges of defending class claims. In our Spring 2019 *Class Action Trends Report*, we discussed plaintiffs' use of serial arbitration filings to overwhelm the system and pressure employers into waiving arbitration agreements. The tactic first emerged in wage and hour litigation; indeed, some prominent plaintiffs' firms have "staffed up" their ranks to handle mass arbitrations. Now, the plaintiffs' bar has recently extended this strategy into a new space: discrimination claims.

In 2011, the U.S. Supreme Court rejected a nationwide 1.5 million-member sex discrimination class action against Wal-Mart in its landmark *Wal-Mart v. Dukes* decision reversing a class certification order. Subsequently, Wal-Mart was sued in numerous class action lawsuits, most of which did not advance. In recent months, however, Wal-Mart has been sued at least 18 times in individual pay bias lawsuits, alleging the same claims and brought by the same group of plaintiffs' attorneys. The complaints expressly state the lawsuits "spring" from the *Dukes* litigation. Civil rights plaintiffs have indicated more of these *Dukes* actions, highly coordinated suits across multiple states, can be expected. It is safe to assume the strategy will be deployed in other litigation as well.

Employers have reason for hope that, with a fairly significant remaking of the federal judiciary from a wave of Trump Administration appointments, federal courts will adopt a more measured approach for certifying and overseeing class actions, restoring balance to a litigation environment that now reflects a dangerous disparity between legal liability and actual violations of the law.

The judiciary shapes class litigation

The outcome of any litigation turns in part on the jurist presiding over the case. The Trump Administration has been appointing judges at a rapid pace. President Donald Trump has appointed 161 judges as of November 11, 2019. One in four judges now on the circuit courts of appeal have been nominated by Trump. These judges will shape federal law for the next generation. Many of them already have begun to make their mark on the federal courts, including in the area of class litigation.

U.S. Supreme Court Justice Neil Gorsuch authored one of the most significant opinions in employment law and class litigation in recent years. In *Epic Systems Corp. v. Lewis*, a divided Supreme Court held that, under the Federal Arbitration Act (FAA), employers and employees may enter into mandatory arbitration agreements that include class action waivers. The decision ensures that employers may continue to require individual arbitration of employment disputes to control the costs and risks of class litigation.

Justice Brett Kavanaugh had little opportunity to offer his class action jurisprudence in the D.C. Circuit. However, one can glean his reasoning on the issue in several of his opinions. Dissenting in one case on whether plaintiffs should have to pursue tax refunds individually, he argued that individual lawsuits were an adequate forum for relief. "Plaintiffs' ultimate objectives are class certification and a court order that the U.S. Government pay billions of dollars in additional refunds to millions of as-yet-unnamed individuals who never sought refunds from the IRS or filed tax refund suits," Kavanaugh wrote. "It seems that plaintiffs have deliberately avoided filing individual refund claims with the IRS and filing tax refund suits because they think they have a better chance of obtaining class certification if they don't take those steps. And class certification is a necessary prerequisite to the class-wide jackpot plaintiffs are seeking here." These comments show Justice Kavanaugh recognizes that the class action vehicle is too often prone to misuse.

Class litigation is largely shaped in the federal trial courts, though, where judges decide critical procedural questions on Rule 23 criteria, class notice, and evidentiary standards needed for conditional certification.

Thus far this year, Trump has named 78 judges to the district courts. He also has nominated 15 judges to the circuit courts of appeals. Following are some of their background on class litigation:

- **Paul Matey,** who now sits on the U.S. Court of Appeals for the Third Circuit, has co-authored two articles with Justice Gorsuch criticizing the rise in frivolous securities fraud class actions, noting the high costs of such litigation has damaged small businesses that are forced into burdensome settlements.
- **Allison Jones Rushing**, who serves on the Fourth Circuit, represented Ernst & Young in *Ernst & Young LLP v. Morris*, in which she argued that the FAA permits employers and employees to enter into agreements to waive class arbitration. (The case was later consolidated into the *Epic Systems Corp. v. Lewis* case in which the Supreme Court issued its 2018 landmark decision.)
- **Daniel Bress** was appointed to the Ninth Circuit after years in private practice, during which he defended several businesses against many high-profile class action suits. Bress represented Wyndham Hotels in a suit brought by a class of Wyndham franchisees alleging unfair trade practices and breach of the franchise agreement.
- **Kenneth Lee**, another Ninth Circuit appointee, has commented on the rise of wage and hour class litigation, especially in California, in reference to a case in which a national retailer had to pay $172 million in damages for failing to provide required meal breaks. Lee has written about the crippling effects wage and hour class actions can have on small businesses. While in private practice, Lee was recognized as one of the top lawyers in California for his work defending companies in the food industry in class action matters.
- **Andrew Brasher** was appointed to serve in the Middle District of Alabama. Before his appointment to the federal district court, he served as Alabama's solicitor general. In this position, he joined in two *amicus* briefs to the U.S. Supreme Court arguing that lower courts have failed to adequately check class counsel and class representatives, leading to abuse of the class action forum.

Despite the new class of federal judges, class action filings will not abate any time soon. Employers should still expect to face an influx of class action lawsuits seeking substantial damages. However, several high-profile class actions are pending and may be decided, or reviewed on appeal, by Trump's court nominees, and we soon will see how the new composition of the federal courts will affect class litigation. ■

On the JL docket

Mark your calendars for these timely and informative Jackson Lewis events:

January 16, 2020	2020 Labor Law Update — Reviewing the Shifting Landscape *Melville, NY*
January 23, 2020	Beyond Watching the Cash Register — Preventing Employee Theft & Misappropriation *Riverhead, NY*
February 20, 2020	Watching the Watchmen — Data Privacy in 2020 *Melville, NY*
February 27, 2020	2020 Labor Law Update — Reviewing the Shifting Landscape *Riverhead, NY*
March 3-5, 2020	Corporate Counsel Conference *Beverly Hills, CA*
March 19, 2020	By Popular Demand — Leave Management, Part I *Melville, NY*
March 26, 2020	By Popular Demand — Leave Management, Part I *Riverhead, NY*

*Watch for news on important developments affecting class litigation on Jackson Lewis' **Employment Class and Collective Action Update** blog!*