FY2016 SAW AN INCREASE IN EEOC CHARGES, BUT NUMBERS REMAIN BELOW RECESSION ERA LEVELS

The 2016 fiscal year saw 91,503 charges filed with the Equal Employment Opportunity Commission (EEOC), making it the second year in a row this number has grown. But the number of charges in FY2016 was still below the recession era yearly average of 96,948 charges filed from 2008 through 2013. In comparison, an average of 80,218 charges was filed during the ten years before the recession.

The chart below illustrates the types of charges filed:

The primary reasons for the growth of EEOC filings are the sizeable increases in retaliation, disability, and age discrimination claims.
As you might expect, a handful of states led the way with a number of charges filed:

**FY2016 EEOC Charges Filed by State**

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**WORKPLACE CLASS ACTION SETTLEMENT VALUES FELL IN 2016, EXCEPT FOR WAGE AND HOUR**

Big workplace class action settlements were largely lower in 2016. For example, the top ten discrimination class action settlements fell by more than 70%, from about $296 million in 2015 to nearly $80 million in 2016. Likewise, in actions brought by the EEOC and the US Department of Labor (DOL), settlements fell year over year from approximately $83 million to almost $52 million in 2016.² Because year-to-year settlement activity is unpredictable, it remains to be seen whether these downward trends will continue in 2017.

Settlements of wage and hour claims were the notable exception to the general decline in workplace settlements. Wage and hour settlements continued their explosive growth from $215 million in 2014 to $464 million in 2015 to $696 million last year.³ The growth of wage and hour claims and settlements is not expected to slow down in 2017.
WAGE AND HOUR ENFORCEMENT ACTIVITY REMAINS VERY ACTIVE

The DOL’s Wage and Hour Division (WHD) continues to be very active. In FY2016, the WHD responded to over 20,000 complaints and recovered a near record $266,566,178 on behalf of 283,667 employees. The chart below summarizes the WHD’s activity in recent years:

<table>
<thead>
<tr>
<th>FY</th>
<th>Back Wages (Millions)</th>
<th>Employees Receiving Back Wages</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>$96,719,108</td>
<td>189,244</td>
</tr>
<tr>
<td>1998</td>
<td>$163,953,081</td>
<td>252,247</td>
</tr>
<tr>
<td>1999</td>
<td>$131,735,341</td>
<td>259,870</td>
</tr>
<tr>
<td>2000</td>
<td>$163,601,821</td>
<td>257,326</td>
</tr>
<tr>
<td>2001</td>
<td>$131,954,657</td>
<td>216,647</td>
</tr>
<tr>
<td>2002</td>
<td>$175,640,492</td>
<td>263,593</td>
</tr>
<tr>
<td>2003</td>
<td>$212,537,554</td>
<td>342,358</td>
</tr>
<tr>
<td>2004</td>
<td>$196,664,146</td>
<td>288,296</td>
</tr>
<tr>
<td>2005</td>
<td>$166,005,014</td>
<td>241,379</td>
</tr>
</tbody>
</table>

EEOC’S NEW STRATEGIC ENFORCEMENT PLAN (SEP) CONTINUES FOCUS ON COMPLEX EMPLOYMENT STRUCTURES AND EQUAL PAY

The EEOC approved an updated SEP for FY2017-FY2021 that is similar to the one in place and will put renewed emphasis on “complex employment relationships and structures,” including temporary workers, staffing agencies, independent contractors, and the “on-demand economy” exemplified by Uber and other “gig economy” players. For example, the EEOC, when recently filing suit on behalf of Haitian employees, commented that “employers should not be able to avoid liability by using a staffing agency to discriminate when it cannot lawfully do so on its own.”

The EEOC will expand on its traditional gender-based equal pay protections to focus on race, ethnicity, and disability equal pay protections. The EEOC will also concentrate on discrimination against Muslims and Arabs as well as job qualifications and inflexible leave policies that discriminate against disabled persons.

While the new SEP was developed under the prior administration, acting EEOC Chair Victoria Lipnic stated that she does not anticipate any changes in enforcement priorities. But many expect the EEOC to become less enforcement-focused and more collaborative with employers and to increase emphasis on job growth.
THE NEW DOL OVERTIME RULES ARE DELAYED AGAIN AND FACE AN UNCERTAIN FUTURE

The DOL rules for overtime exemptions were expected to nearly double the white-collar exemption threshold and dramatically increase the pool of potential wage and hour plaintiffs. But in a surprise 2016 ruling, a Texas federal court issued an injunction precluding the new rule from taking effect until the court decides whether the DOL overreached its federal authority by promulgating the new rule. Ironically, the DOL has been the one lengthening the injunction, asking for multiple time extensions to file its appeal brief to “allow incoming leadership personnel adequate time to consider the issues.” Many expect the new administration’s Secretary of Labor, Alexander Acosta, to let the rule die a slow ignominious death.7

SEVENTH CIRCUIT BECOMES FIRST APPELLATE COURT TO EXPAND DEFINITION OF SEX DISCRIMINATION TO INCLUDE SEXUAL ORIENTATION

Breaking from established precedent, the Seventh Circuit in Hively v. Ivy Tech Community College8 held that discrimination based on sexual orientation is a form of sex discrimination prohibited under federal law. All previous circuit court decisions limited the meaning of sex discrimination to discrimination based on whether someone was male or female. The historic nature of this decision aside, many employers already conduct themselves under this broader standard, as 22 states have laws prohibiting discrimination based on sexual orientation. But this ruling expands such protections to jurisdictions where none previously existed, like Indiana. The Supreme Court has not addressed this issue and the Seventh Circuit limited its holding to exclude religious employers, so this is more likely to be the beginning, and not the end, of this issue.

NINTH CIRCUIT’S PLAINTIFF-FRIENDLY RULING INCREASES LIKELIHOOD FOR WILLFUL VIOLATIONS OF FCRA FOR EMPLOYEE BACKGROUND CHECKS

Employment claims for technical violations of the Fair Credit Reporting Act (FCRA) arising from employee background checks have skyrocketed over the past 18–24 months. The Ninth Circuit in Syed v. M-I, LLC9 added incentive for these suits by becoming the first appellate court to hold that including a liability waiver or any other “extraneous information” to a background check disclosure and authorization is a willful violation of the FCRA, subjecting the employer to statutory damages.

Insurance coverage for FCRA claims is available via workplace privacy wording in Employment Practices Liability (EPL) policies. Much will depend on how the claims are alleged though, as FCRA matters are not traditional EPL hazards that are typically covered under EPL policies.
US SUPREME COURT TO RULE ON ENFORCEABILITY OF COLLECTIVE ACTION WAIVERS IN EMPLOYMENT ARBITRATION PROVISIONS

In 2011, the Supreme Court approved arbitration provisions in consumer contracts that prohibited collective actions, requiring single-plaintiff arbitrations. That same issue will now be addressed for employment contracts. The Seventh and Ninth Circuits ruled that the National Labor Relations Act prohibited such waivers because of workers’ rights to engage in “concerted activities,” but the Fifth Circuit ruled otherwise. The Supreme Court consolidated all three matters and is expected to rule before July 2017. If approved, employers may use such waivers to force single-plaintiff arbitration and potentially avoid wage and hour and other employment-related class actions.

RECENT TRENDS FAVOR FRANCHISORS AND OTHER INDIRECT EMPLOYERS IN JOINT-EMPLOYER BATTLE

For decades, franchisors were not deemed to be employers of their franchisees’ employees because they lacked the necessary control over those employees. Over the past two years, however, this established status came under attack on multiple fronts as employees sought to make franchisors and other beneficiaries of leased employees joint employers and susceptible to workplace lawsuits. But recent trends have gone in franchisors’ favor:

In Salazar v. McDonald’s Corp., a Northern District of California court granted summary judgment to McDonald’s. In two separate orders, the court rejected several legal theories and ruled that McDonald’s was not a joint employer. Plaintiffs have appealed the judgment to the Ninth Circuit.

In the landmark Browning-Ferris case, the National Labor Relations Board (NLRB) established its new plaintiff-friendly joint-employer test. That test has since been appealed to the DC Circuit, where the court referred to the test as “vague and conflicting” during oral argument. While reversal remains uncertain, any modification or criticism of the test by the court would be beneficial for franchisors and other users of temp agencies or contractors.

A district court in Oregon granted summary judgment in favor of Jack in the Box, holding that it was not a joint employer under the economic-realities test that focuses on elements of control, like hiring/firing, setting pay and schedules, and direct supervision.

Finally, the new administration may exert business-friendly influence over the NLRB. The NLRB has two Democrats, one Republican, and two vacant seats. The new administration’s pro-employer mindset could see likeminded appointees fill those vacancies and change the NLRB’s focus on expanding the joint-employer definition. Any meaningful changes are unlikely to occur until 2018 or later, however.
INSURERS ARE CHALLENGED TO PROFITABLY UNDERWRITE EMPLOYMENT PRACTICES LIABILITY POLICIES

Insurers report that in some parts of the US, notably California, they continue to pay more in losses than they receive in employment practices liability insurance premiums. This is leading some insurers to try to significantly increase premiums and policy retentions. Other insurers are not following suit and are making opportunistic moves to win new EPL business.

Insurers are also seeking to control claim costs. They are stringently enforcing requirements that insureds use panel defense counsel to defend claims, and limit what they will pay to law firms where no panel counsel requirement exists. Insurers are also vigorously asserting all legitimate coverage defenses available to them to limit the size of claim payments.

The absence of meaningful coverage for wage and hour claims in EPL policies is driving increased interest in separate policies that cover such claims. As a result, more insurers are offering the policies on better terms than in years past.

It has never been more important to select the right EPL insurer and to get the best-possible policy wording.

1 https://www.eeoc.gov/eeoic/statistics/enforcement/charges.cfm
4 https://www.dol.gov/whd/data/datatables.htm
5 https://www1.eeoc.gov/eeoc/newsroom/release/4-18-17.cfm?renderforprint=1
7 http://www.hrmorning.com/another-delay-for-the-dol-s-new-overtime-rule/
SELECT CLASS ACTION SETTLEMENTS

EMPLOYMENT DISCRIMINATION

- **$19.5 million settlement** in California by Qualcomm for alleged gender pay discrimination for class of 3,290 female employees. (2016)
- **$15 million settlement** in New York by U.S. Department of Commerce for alleged race discrimination based on criminal background checks for 450,000 applicants. (2016)
- **$8.2 million settlement** in California by Dalichi Sankyo for alleged gender pay discrimination for class of 1,400 female employees. (2016)
- **$7.5 million settlement** in Massachusetts by Walmart for alleged discrimination against providing health benefits to same-sex spouses. (2016)
- **$7.21 million settlement** in Illinois by Comcast for alleged race discrimination against class of 385 current and former employees. (2016)
- **$4.6 million settlement** in Virginia by BAE Systems Norfolk Ship Repair for alleged gender discrimination for class of 177 female workers. (2016)
- **$4.1 million settlement** in California by Farmers Group for alleged gender pay discrimination by class of female attorneys. (2016)
- **$3.65 million settlement** in New Jersey by New Jersey Transit for alleged race pay discrimination. (2016)
- **$2.9 million settlement** in New York by Publicis Group for alleged gender pay discrimination. (2016)

WAGE AND HOUR

- **$240 million settlement** in Indiana by FedEx for alleged misclassification and overtime failures. (2016)
- **$226 million settlement** in California by FedEx for alleged misclassification and overtime failures. (2016)
- **$41 million settlement** in Delaware by RS Legacy Corp. (Radio Shack) for alleged overtime and bonus calculation failures. (2016)
- **$36 million settlement** in California by Bank of America for alleged misclassification and overtime failures. (2016)
- **$35 million settlement** in California by Ecolab for alleged misclassification and overtime failures. (2016)
- **$28 million settlement** in California by Schneider National for alleged meal and rest break failures. (2016)
- **$27 million settlement** in California by Lyft for alleged misclassification and tip skimming. (2016)
- **$27 million settlement** in California by Children’s Hospital LA for alleged overtime and meal and rest break failures. (2016)
- **$19 million settlement** in California by Robert Half International for alleged misclassification and overtime failures. (2016)
- **$16.5 million settlement** in Ohio by Bob Evans Farms for alleged overtime failures. (2016)
GOVERNMENT ENFORCEMENT

- **$8.7 million consent** judgment in Puerto Rico by Puerto Rico Police Department for alleged overtime failure. (DOL, 2016)
- **$8.6 million consent** decree in California by Lowe’s for alleged disability discrimination. (EEOC, 2016)
- **$4.8 million settlement** in New Jersey by Community Education Centers for alleged misclassification and unpaid wages. (DOL, 2016)
- **$3.7 million settlement** in New Hampshire by Fred Fuller Oil for alleged sexual harassment and retaliation. (EEOC, 2016)
- **$3.1 million settlement** in New York by Focused Technologies Imaging Services for alleged disability discrimination. (NY AG, 2016)
- **$3.1 million consent** decree in Illinois by Chicago Police Department for alleged national origin discrimination. (DOJ, 2016)
- **$3.1 million consent** decree in Missouri by New Prime for alleged gender discrimination. (EEOC, 2016)
- **$2.1 million consent** decree in New York by Mavis Discount Tire for alleged gender discrimination. (EEOC, 2016)

OTHER EMPLOYMENT MATTERS

- **$12.8 million settlement** in North Carolina by Merrill Lynch for alleged wrongful termination of 270 former financial advisers. (2016)
- **$5.7 million settlement** in California by AutoZone for alleged FCRA violations for class of 200,000 job applicants. (2016)
- **$2.2 million settlement** in North Carolina by Lowe’s for alleged FCRA violations for class of job applicants. (2016)
- **$160 million settlement** by Bank of America to a class of black brokers who alleged racial bias in pay, promotions, and how large accounts were allocated.
- **$99 million** against Novartis for failure to pay overtime to sales representatives.
- **$95 million** jury verdict against Aaron’s, a large furniture retailer, for failing to act and denying a female employee a promotion, after she alleged her manager had sexually harassed and assaulted her. $50 million of the award was for punitive damages.
- **$42 million awarded** against Staples for alleged misclassification of retail store managers.
- **$39 million settlement** by Bank of America in connection with a class action by female brokers who alleged that they were paid less than men.
- **$32 million awarded** against Tyson Foods for alleged failure to compensate for donning and doffing uniforms.
- **$29 million settlement** by MedLine Industries for retaliation against a Whistleblower.
- **$19.5 million settlement**—reached before a lawsuit was filed—by Qualcomm for gender discrimination that penalized employees with care giver responsibilities.
- **$19 million settlement** by Burger King in a claim for disability discrimination brought by customers in wheelchairs who alleged that the restaurants were not wheelchair-accessible.
- **$18 million settlement** by Dr. Pepper Snapple in a class action age discrimination lawsuit.
- **$17.3 million settlement** by UPS in a class action disability discrimination lawsuit brought by the EEOC.
- **$11 million settlement** by YRC/Yellow Transportation in a race harassment and discrimination lawsuit brought by the EEOC.
- **$8 million settlement** by Costco in gender discrimination class action brought by female employees.

2016 Jury Awards

- **$31.2M awarded** by New Hampshire federal jury to Walmart pharmacist for gender discrimination and wrongful termination.
- **$10.6M awarded** by Alabama federal jury to a train conductor for disability discrimination, but award vacated based on statutory damage caps.
- **$7.3M awarded** by California state court jury to head of Legal and International Affairs of Bikram Yoga enterprise for discrimination, retaliation, and sexual harassment.
- **$3.5M awarded** by California state court jury to four female Sacramento deputies for retaliation and discrimination.
- **$3.4M awarded** by Connecticut federal jury to two workers at painting company for race discrimination.
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