



Summary of Key Trends in Employment Practices Class Action Litigation 2023

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Published annually, the *Duane Morris Class Action Review* is "the Bible" on class action litigation and an essential desk reference for business executives, corporate counsel, and human resources professionals. The review is a must-have resource for in-depth analysis of class actions in general and workplace litigation in particular. The *Duane Morris Class Action Review* analyzes class action trends, decisions, and settlements in all areas impacting corporate America and provides insight as to what companies and corporate counsel can expect in terms of filings by the plaintiffs' class action bar and government enforcement agencies like the Equal Employment Opportunity Commission (EEOC) and the Department of Labor (DOL). The review is authored by Duane Morris attorneys Gerald L. Maatman Jr, Esq., and Jennifer A. Riley, Esq.¹

1. Class Action Settlement Numbers Continue To Spike at Unprecedented Levels

In 2023, settlement numbers exceeded expectations for the second year in a row. The cumulative value of the top 10 settlements across all substantive areas of class action litigation hit near-record highs, second only to the settlement numbers we observed in 2022. When the numbers for 2022 and 2023 are combined, the totals signal that we have entered a new era of heightened risks and higher stakes in the valuation of class actions. Reminiscent of the Big Tobacco settlements nearly 2 decades ago, 2022 and 2023 marked the most extensive set of billion-dollar class action settlements in the history of the American court system. Many of these settlements emanated outside of the products and pharmaceutical space (especially in workplace-related litigation), signaling a wider base and greater threat to businesses as settlements continue to redistribute wealth at a substantial rate. On an aggregate basis, class actions and government enforcement lawsuits garnered more than \$51 billion in settlements in 2023, bringing the combined total for 2022 and 2023 to \$114 billion. Corporations should expect such numbers to incentivize the plaintiffs' class action bar to be equally, if not more, aggressive with their case filings and settlement positions in 2024.

2. Privacy Class Actions Gained Momentum, Increasing in Number and Sophistication

Class action litigation in the privacy space—especially involving rights of employees in the workplace—has continued to generate a multitude of filings as it continues its reign as the hottest area of growth in terms of activity by the plaintiffs' class action bar. The Illinois Biometric Information Privacy Act continues to fuel a swell of class action litigation as its technical requirements, coupled with stiff statutory penalties and fee-shifting, and provides a recipe for big cases and hefty settlements from the plaintiffs' class action bar. In 2023, the suits continued to grow in number and sophistication as they targeted more advanced and innovative technologies. Various provisions of state antisurveillance statutes had a similar impact, fueling creativity by the plaintiffs' class action bar as it looked to apply

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many preexisting laws to challenge the use of innovative and novel technologies to collect information about consumers and their online activities.

3. The Likelihood of Class Certification in 2023 Remained Strong

In 2023, the plaintiffs' class action bar continued to succeed in certifying class actions at a high rate. The plaintiffs' class action bar obtained the highest rates of success in securities fraud, antitrust, and Fair Labor Standards Act (FLSA)/wage and hour actions. In cases alleging FLSA/wage and hour violations, plaintiffs obtained first-stage certification rulings in 75 percent of the suits that resulted in decisions this past year. As judicial nominations emanate from the White House to fill open slots in federal courts, we can expect the makeup of the judiciary to continue to evolve toward the left during the upcoming year, reducing the likelihood we will see any significant shift in this trend.

4. US Supreme Court Rulings Continue To Impact the Class Action Landscape

Rulings by the US Supreme Court traditionally have had a substantial impact on the class action landscape. The past year did not buck that trend. On June 29, 2023, the US Supreme Court ruled in [Students for Fair Admissions, Inc. v. President](#) that colleges and universities that consider race as a factor in the admissions process violate the Equal Protection Clause of the US Constitution and Title VI of the Civil Rights Act of 1964. The decision caused private sector employers to ask whether the decision impacts their diversity, equity, and inclusion initiatives, and the plaintiffs' class action bar and advocacy groups moved promptly to take advantage of that uncertainty with a deluge of lawsuits. As these questions continue to percolate and courts start to weave a patchwork quilt of rulings, such uncertainty is likely to fuel class action filings and settlements in the workplace class action space at an increasing rate.

5. PAGA Filings Reached an All-Time High

California has always been a difficult jurisdiction for employers, and in 2023, employers saw claims filed under the California Private Attorneys General Act (PAGA) reach an all-time high. According to data maintained by the California Department of Industrial Relations, the number of PAGA notices filed with the California Labor and Workforce Development Agency has increased exponentially over the past 2 decades. As the adoption of arbitration programs gained popularity as a mechanism to contract around class and collective actions, the plaintiffs' class action bar identified workarounds. Although the PAGA workaround suffered its first significant setback in 2022 with the US Supreme Court's decision in [Viking River Cruises, Inc. v. Moriana](#), the setback was short lived as, in 2023, the California Supreme Court minimized the impact of the *Moriana* decision. By deciding that an individual who signs an arbitration agreement can return to court after arbitration to pursue representative proceedings, the California Supreme Court relegated arbitration agreements to a mere hurdle rather than a bar to representative actions. Given the technical requirements of California wage and hour law, coupled with the potentially crushing statutory penalties available to successful plaintiffs, we anticipate continued growth in 2024 with no pullback in sight.

6. Government Enforcement Lawsuit Filings Reflected a Resurgence

In 2023, the EEOC litigation enforcement activity showed that its previous slowdown in filing activity is well in the rearview mirror, as the total number of lawsuits filed by the EEOC increased from 97 in 2022 to a whopping total of 144 in fiscal year (FY) 2023. In accordance with tradition, the EEOC filed more

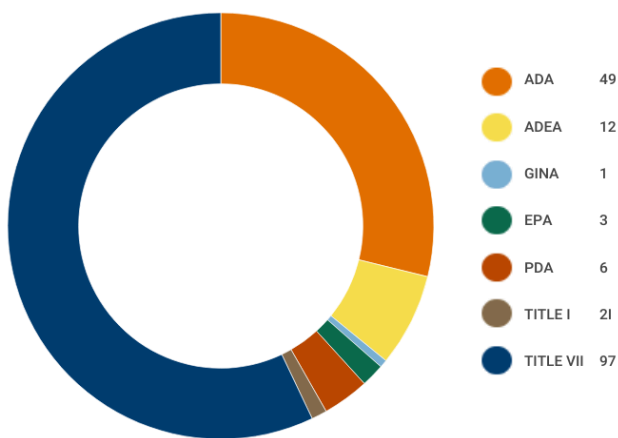
lawsuits in September 2023, the last month of its fiscal year, than in any other month from October 2022 forward. This past year, the EEOC filed 67 lawsuits in September, up from 39 filed in September 2022. Overall, the 2023 lawsuit filing data confirms that aggressive EEOC enforcement activity is back on the menu, and the litigation filing machine is back in full throttle with no signs of slowing down.

Now that the EEOC has a majority of Democratic-appointed commissioners firmly in place, along with a significantly increased proposed budget, corporate America can expect to see a resurgence of enforcement activity in 2024. Amplifying its renewed activism, the EEOC issued a press release at the end of the fiscal year touting its increased enforcement litigation activity. This media statement is unprecedented in that 2023 is the first year the EEOC issued a media statement touting its numbers, a signal that its renewed activity reflects a strategic priority.

In July 2023, the Senate confirmed Kalpana Kotagal, President Joe Biden's nominee to fill the fifth commissioner slot, for a term ending in July 2027. After her confirmation, Democrats gained a 3–2 majority among commissioners. Employers are likely to see increased litigation enforcement activity in 2024 as the EEOC continues to gain momentum with its full component of Biden appointees and can utilize its majority power to advance its agenda.

"EEOC FY 2023 Filings by Statute" depicts Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), Genetic Information Nondiscrimination Act (GINA), Equal Pay Act (EPA), Pregnancy Discrimination Act (PDA), Title I of the ADA, and Title VII of the Civil Rights Act filing counts for fiscal-year 2023.

EEOC FY 2023 Filings by Statute



7. Generative AI Began Transforming Class Action Litigation

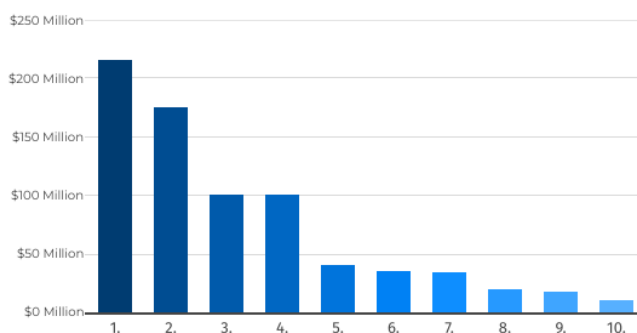
Generative artificial intelligence (AI) hit the mainstream in 2023 and quickly became the most talked-about and debated subject among corporate legal counsel across the country as companies jumped to incorporate AI while managing its risks. In 2023, we saw the tip of the iceberg relative to how generative AI is poised to transform class action litigation. As the COVID-19 pandemic brought video-conferencing tools into the mainstream, they enabled more litigants to conduct and to go to more hearings, more depositions, and more mediations in less time. While the debate continues as to their effectiveness, generative AI is poised to enable lawyers to far surpass those gains in efficiency, potentially enabling the plaintiffs' class action bar to do "more with less" like never before,

leading to more lawsuits that can be handled by fewer lawyers in less time and a potential surge of class action lawsuits on the horizon. Less than a year into the generative AI movement, we have seen the technology influence various parts of the legal process, including by helping legal professionals analyze vast amounts of data; streamlining the discovery process; automating the review of documents, contracts, and communications; increasing the speed and potentially enhancing the accuracy of e-discovery; helping with class member communications; and automating the dissemination of information in the settlement administration process.

8. Arbitration Agreements Remained an Effective Tool To Cut Off Class Actions

Of all defenses, a defendant's ability to enforce an arbitration agreement containing a class or collective action waiver may have had the greatest impact in terms of shifting the pendulum of class action litigation. Companies of all types and sizes have incorporated arbitration provisions into their onboarding materials, terms of use, and other types of agreements to require unsuspecting plaintiffs to assert and resolve any claims in arbitration on an individual basis. Despite the setbacks the arbitration defense suffered in 2022, companies continued to enjoy a high rate of success enforcing these agreements and using them to thwart class actions in 2023, as plaintiffs have yet to refocus their attention on claims that could be immune from arbitration. In particular, despite the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, signed into law in 2022, which lets plaintiffs avoid arbitration for cases that include claims of sexual assault and sexual harassment, we have yet to see a spike in these cases. Further, despite the Supreme Court's clarification of the transportation worker exemption to the Federal Aviation Administration in 2022, lower courts continue to grapple with and disagree about its scope, effectively holding a potential wave of workplace litigation against transportation, logistics, and delivery companies in check. However, the future viability of the arbitration defense remains an open question as advocacy groups, government regulators, and political figures push for a ban on class action waivers in arbitration.

Top Discrimination Class Action Settlements in 2023

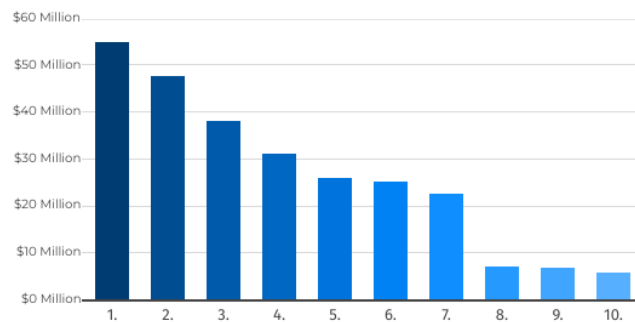


In 2023, the top 10 settlements were \$762.2 million. This was a significant increase over 2022 when the top 10 discrimination class action settlements totaled \$597 million. Here are the top five settlements.

1. **\$215 million**—*Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950 (S.D.N.Y. Nov. 7, 2023) (final settlement approval granted in a class action alleging intentional discrimination, disparate impact discrimination, retaliation, and pregnancy bias).

2. **\$175 million**—*Jock v. Sterling Jewelers, Inc.*, No. 08 Civ. 2875 (S.D.N.Y. Mar. 14, 2023) (final settlement approval granted in a class action alleging gender discrimination in pay and promotions).
3. **\$100 million**—*McCracken v. Riot Games*, No. 18-STCV-03957 (Cal. Super. Ct. May 16, 2023) (final settlement approval granted in a class action alleging claims that the company subjected female workers to systemic sex discrimination and harassment).
4. **\$100 million**—*Doe 16 v. Columbia Univ.*, No. 20 Civ. 1791 (S.D.N.Y. Nov. 13, 2023) (settlement approval sought for the university to establish a "survivors' settlement fund" for victims of a former university obstetrician-gynecologist convicted of sexual abuse and discrimination).
5. **\$40 million**—*Tatum v. Commonwealth of Massachusetts*, No. 0984-CV-00576 (Mass. Super. Ct. May 11, 2023) (final settlement approval granted in a class action alleging that Black and Hispanic police officers throughout Massachusetts were subjected to racially biased promotional exams).

Top EEOC/Government Enforcement Class Action Settlements in 2023



The top 10 settlements in government enforcement lawsuits totaled \$263.58 million in 2023. This constituted a nearly 50 percent drop in settlements as compared to the previous year when the 10 government enforcement lawsuits totaled \$404.5 million.

1. **\$54.8 million**—*California Civil Rights Dep't v. Activision Blizzard, Inc.*, No. 21-STCV-26571 (Cal. Super. Ct. Dec. 15, 2023) (preliminary settlement approval sought in a government enforcement action to resolve claims that the company denied women promotion opportunities and paid them less than men for doing similar work).
2. **\$47.5 million**—*McCollum v. Buttigieg*, No. 450-2023-00004X (EEOC Apr. 6, 2023) (following an agency investigation, the parties' settlement was approved to resolve allegations that air traffic control specialists in the US Department of Transportation were discriminated against based on their age).
3. **\$37.5 million**—*Meyer v. U.S. Dep't of State*, Case No. 531-2015-00092X (EEOC Mar. 17, 2023) (final settlement approval granted resolving claims by foreign service officers with disabilities over the US Department of State's requirement that all applicants get a medical clearance saying they can serve anywhere in the world).
4. **\$31 million**—*United States v. City Nat'l Bank*, No. 23-CV-204 (C.D. Cal. Jan. 30, 2023) (consent order entered resolving a lawsuit alleging the bank discriminated against borrowers in Los Angeles County based on race).
5. **\$25.9 million**—*In the Matter of Citibank, N.A.*, No. 2023-CFPB-0013 (Con. Fin. Pro. Bur. Nov. 8, 2023) (consent order entered resolving allegations that the bank discriminated against Armenian borrowers based on their national origin).

6. **\$25 million**—*U.S. Dep't of Labor v. Apple, Inc.* (DOL Nov. 2, 2023) (following an agency investigation, the company agreed to a settlement resolving claims it engaged in discriminatory conduct in the hiring of workers eligible for a permanent labor certification program).
7. **\$22.5 million**—*U.S. Dep't of Labor v. Reliance Trust Co.*, No. 19-CV-3178 (D. Ariz. Aug. 31, 2023) (consent judgment entered resolving claims accusing a company and the trustee of establishing an employee stock ownership plan in which the workers overpaid for their employer's stock).
8. **\$6.88 million**—*EEOC v. Scripps Clinical Med. Grp.* (EEOC Dec. 19, 2023) (following an agency investigation, the company agreed to a settlement resolving claims it discriminated against doctors based on their age in violation of the Age Discrimination in Employment Act).
9. **\$6.7 million**—*U.S. Dep't of Labor v. AEU Benefits, LLC* (DOL May 1, 2023) (following an agency investigation, the company agreed to a settlement resolving claims that its benefit administrator failed to pay millions of dollars in health claims).
10. **\$5.8 million**—*U.S. Dep't of Labor v. Cargill Meat Solutions Corp.*, No. 22-CV-1821 (D. Md. May 17, 2023) (settlement agreement reached and consent decree approved that resolved a lawsuit alleging that the company conspired with other poultry processors to suppress wages).

Conclusion

Class action litigation is a staple of the American judicial system. The volume of class action filings has increased yearly for the past decade, and 2024 is likely to follow that trend. In this environment, corporate programs designed to ensure compliance with existing laws and strategies to mitigate class action litigation risks are corporate imperatives.

The plaintiffs' bar is innovative and resourceful. Given the massive class action settlement figures in 2022 and 2023 (a combined total of \$113 billion), coupled with the ever-developing law, corporations can expect more lawsuits, expansive class theories, and an equally, if not more aggressive, plaintiffs' bar in 2024. These conditions require planning, preparation, and decision-making to position corporations to withstand and defend class action exposures.

Looking at the class action settlement numbers from the past year, it's clear that last year's unprecedented level of settlements was not a one-off phenomenon. We have entered a period of increased risk and heightened stakes in the valuation of class actions. The massive numbers will only work to further motivate the plaintiff's bar in 2024 to increase filings and assert even more aggressive settlement positions.

We hope the summary of the *Duane Morris Class Action Review* provides practical insights into the complex potential of class action employment practices related litigation and other claims that can cost billions of dollars and require changed business practices to resolve.

To order the *Duane Morris Class Action Review* in hard copy or e-book format, contact gmaatman@duanemorris.com.

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Mr. Phin, coeditor of *Employment Practices Liability Consultant*, has been an attorney in California since 1983. He litigated employment and business cases for 17 years and then quit when he realized nobody wins a lawsuit.

Since leaving litigation, Mr. Phin has presented more than 600 times to executives nationwide. He has created over 30 online training programs, including the Great HR Program and Employee Engagement for LinkedIn Learning. He has been the coeditor of the IRMI Employment Practices Liability Consultant journal since 1997.

Mr. Phin was the founder and president of HR That Works, used by 3,500 companies, and acquired by ThinkHR in January of 2014. He worked there for 2 years as a vice president.

He has written numerous books, including *Lawsuit Free!*, *The Great Job Opportunity*, *The 40/40 Solution for Mastering Emotional Energy in Leadership and Sales*, *The Truth About HR and You*, and *Stop Making Mistakes*. Mr. Phin loves coaching executives and investigates challenging workplace problems. He continues to inspire with his speaking and training.

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