

Should We Catch The Wave?

Practical Considerations After the U.S. Supreme Court's Decision Upholding Class Action Waivers



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INTRODUCTION

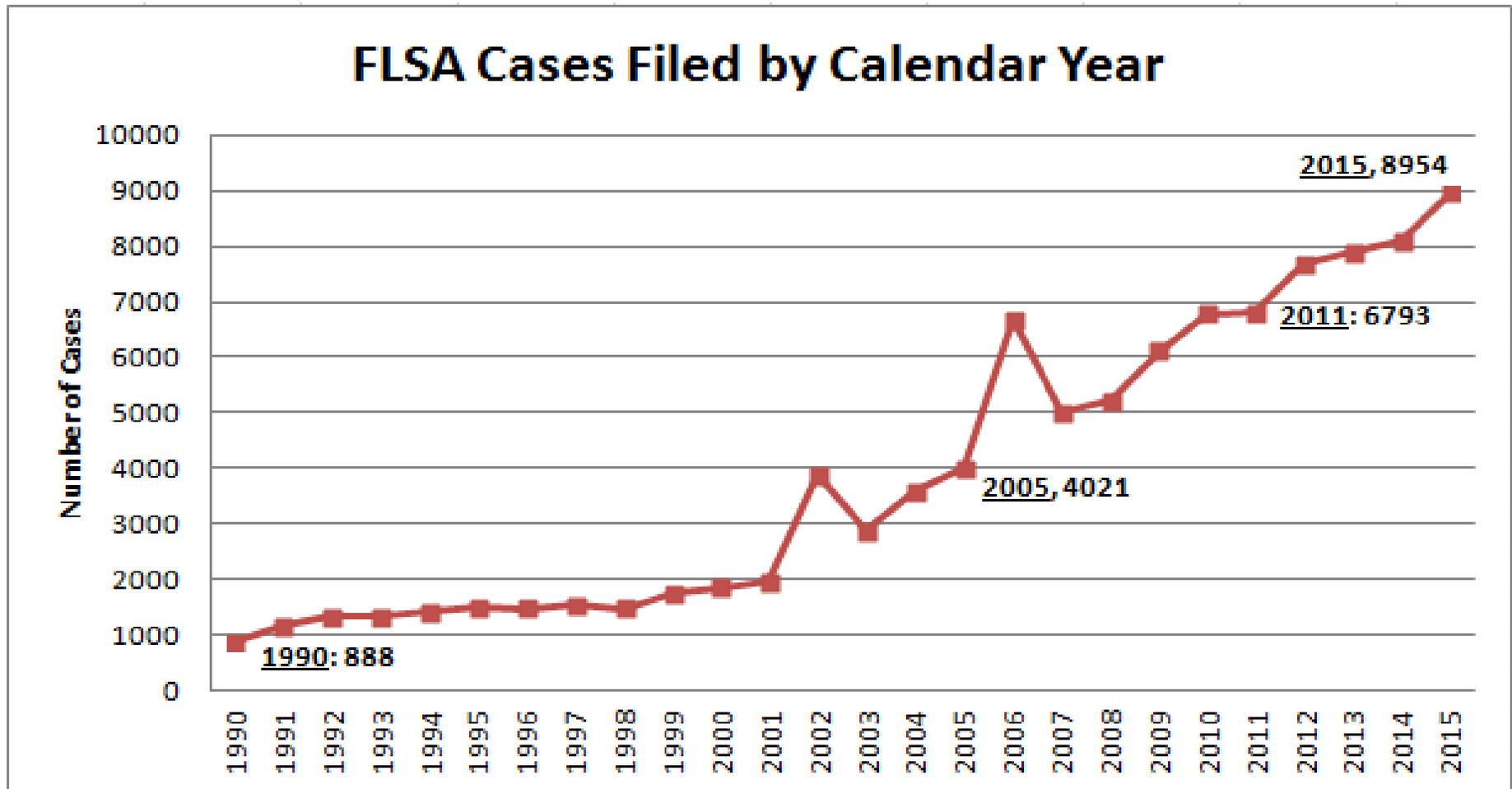
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Background

- ◆ Before *Epic Systems* decision: more than 50% of private employers were using arbitration agreements; more than 30% were using class action waivers.
- ◆ Why is this such a big deal?
- ◆ *Epic Systems* is important because it provides certainty. The Court held that an employer can require employees to agree to resolve disputes in arbitration and can include a waiver of the right to participate in a class or collective action in the agreement. The Supreme Court rejected the argument that Class Action Waivers violate employee's rights to act collectively.

Background

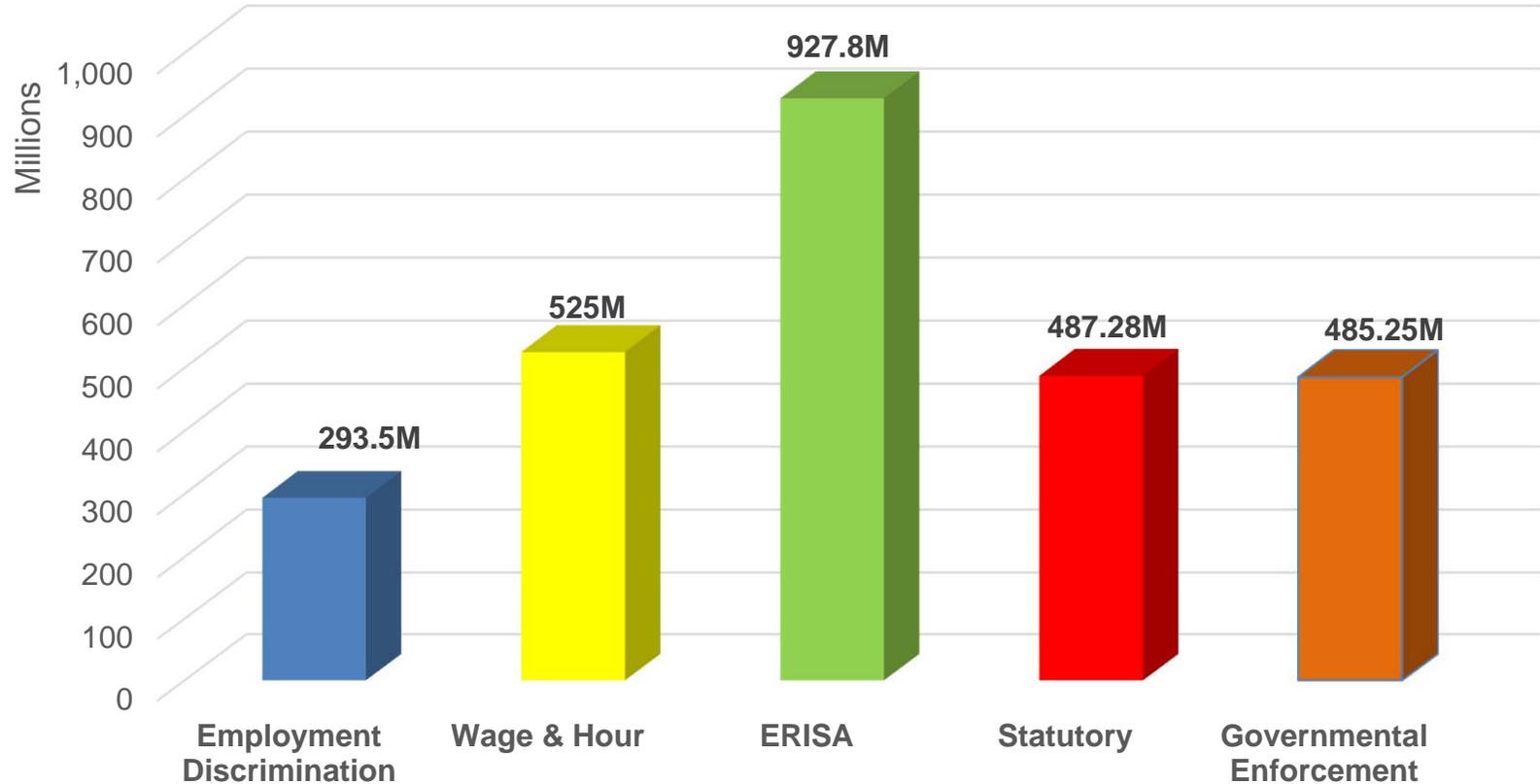
Employment cases continue to be filed in record numbers.



Background

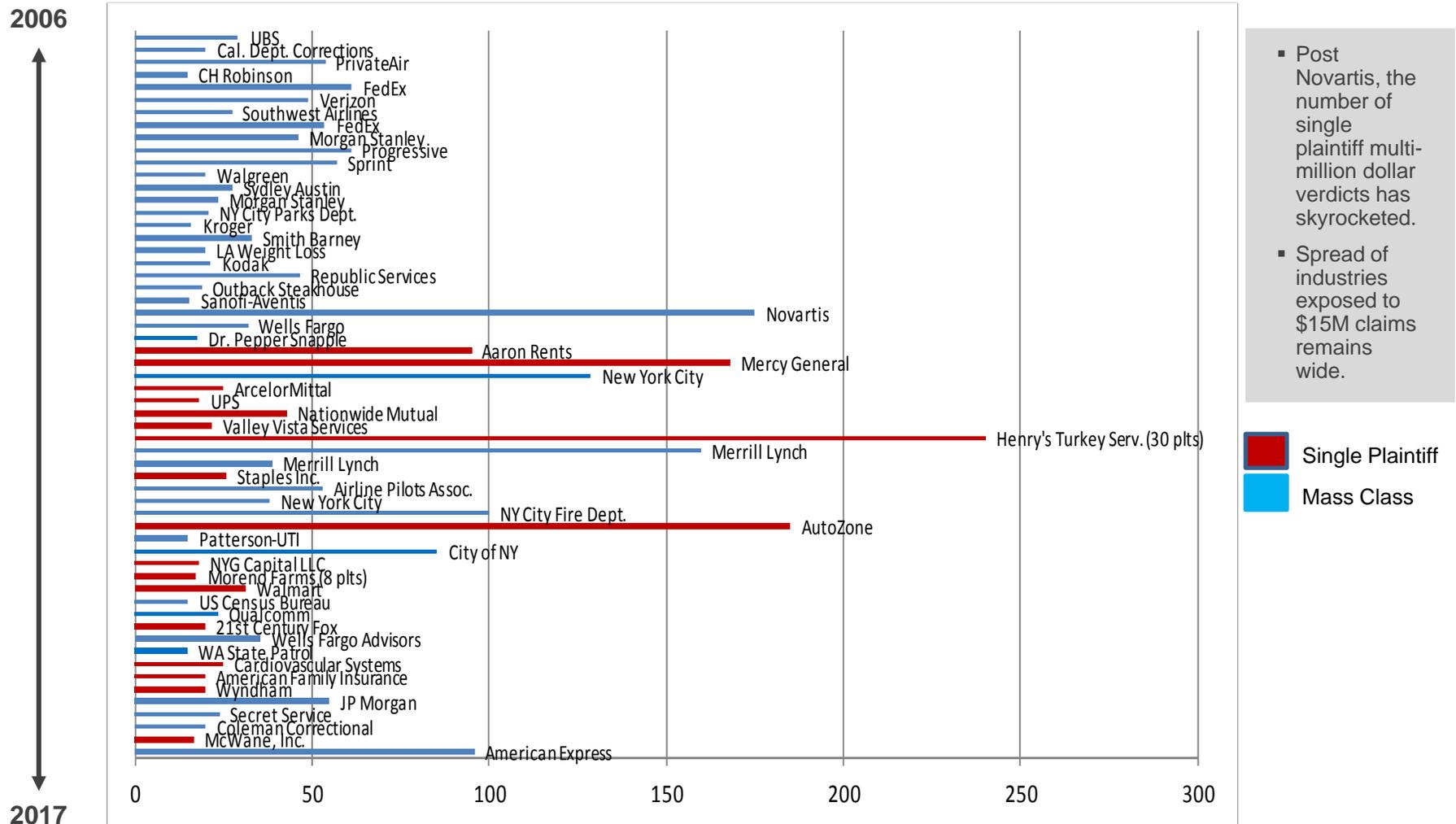
Class actions are expensive to settle. Average settlements in 2017:

Class Action Settlement Amounts by Type of Action



Background

Runaway juries are real. Verdicts in excess of \$15 million:



SHOULD WE CATCH THE WAVE?



Should My Company Implement An Arbitration Agreement and Class Action Waiver?

Advantages of Arbitration

- ◆ No risk of runaway jury
- ◆ Greater privacy
- ◆ Shorter time to resolution
- ◆ Ability to tailor discovery rules

Should My Company Implement An Arbitration Agreement and Class Action Waiver?

Disadvantages of Arbitration

- ◆ In individual cases, arbitration tends to be more expensive for employers.
- ◆ Risk of coordinated, individual actions
- ◆ Difficult to obtain summary judgment
- ◆ Arbitrators tend to “split the difference”
- ◆ Almost no right to appeal

Should My Company Implement An Arbitration Agreement and Class Action Waiver?

Deciding Factor: **Class Action Risk**

Understand your class action risks first.

If Risk is HIGH or Moderate	If Risk is Low
<ul style="list-style-type: none">• Address the risk	<ul style="list-style-type: none">• Address the risk
<ul style="list-style-type: none">• Use Arbitration Agreement and Class Action Waiver	

Answer does not have to be all or nothing. For example:

- Use Arbitration Agreement with segment of workforce.
- Use Arbitration Agreement with contingent workers or independent contractors.

**WE WANT TO CATCH THE WAVE
NOW WHAT?**



The Agreement

- ◆ FAA enforces written agreements to arbitrate: is there an agreement under state law and is the claim covered by the agreement?
- ◆ The agreement under state law: offer, acceptance, consideration (what gives?):
 - New employment
 - Continued employment – are you ready to terminate for non-compliance?
 - Money
 - PTO
 - Commission plans/incentive compensation/stock options/bonuses
- ◆ Mutuality:
 - Know what that means for your organization
 - Carve-outs for non-competes or trade secret injunctive relief
 - Do not reserve right to amend
- ◆ How to show assent?

The Agreement

- ◆ Pay forum costs (including arbitrator fees) – at least cover what it would cost to file in court.
- ◆ Require a written award
- ◆ Provide arbitration rules
- ◆ Do not reserve a right to amend
- ◆ Mutuality
- ◆ Severability clause
- ◆ Consider mandatory pre-arbitration mediation and other mechanisms for dispute resolution.
- ◆ Class action waivers

The Rollout

- ◆ It is all about employee relations and communications. Train managers. Communicate. Monitor.
- ◆ Establish a cross-functional team: HR, Communications, IT, Business Unit representatives.
- ◆ Consider a comprehensive dispute resolution program that includes both mediation and arbitration. Take steps to ensure the program is, and is perceived to be, fair.
- ◆ Consider phased roll-out: e.g., Executives and HR first, then G&A, then others.
- ◆ Develop positive communications:
 - Arbitration is fair to employees. The only people who really gain from class actions are lawyers.
 - One-page bullet points with key aspects of program
 - FAQs
- ◆ Communications for non-compliance:
 - Consider an unpaid LOA for those who have not signed by deadline.
 - Consider populations that are vulnerable to organized non-compliance, impact on business, and contingency plan.

FREQUENTLY ASKED QUESTIONS



Frequently Asked Questions

- ◆ Q: Can we require current employees to agree without additional consideration?
 - A: Depends on the state. Most states hold that continued employment of an at-will employee is sufficient consideration. Other states will require additional consideration.

Frequently Asked Questions

- ◆ Q: Are there certain types of disputes that cannot be forced into arbitration?
 - A: Yes. Individuals cannot be barred from pursuing claims with the EEOC, state agencies or through workers compensation or unemployment systems.
 - New York and Washington have passed laws that bar mandatory arbitration of sexual harassment claims (although these laws may be preempted by the FAA).

Frequently Asked Questions

- ◆ Q: Can we have a class action waiver without an arbitration agreement?
 - A: The law is unclear. Some courts have enforced these agreements while others have rejected them.
 - Including a class action waiver in an arbitration agreement increases the likelihood that the waiver will be enforced. As discussed, certain states have enacted laws (and we expect there will be more) that prohibit arbitration of certain types of claims. There is a strong argument that the Federal Arbitration Act preempts these laws.

Frequently Asked Questions

- ◆ Q: Can an enforcement agency (like the DOL or EEOC) bring a claim on behalf of multiple employees?
 - A: Yes. A private arbitration agreement does not trump the enforcement powers of federal, state or local agencies.

Frequently Asked Questions

- ◆ Q: Can an individual stand in the shoes of an enforcement agency and bring a “representative” claim on behalf of other employees?
 - A: Yes, in California. The California Supreme Court has held the right to bring a representative action under the Private Attorney General Act (“PAGA”) is not inconsistent with the FAA. To date, the US Supreme Court has not addressed this issue.
 - In response to the decision in *Epic Systems*, expect other states to enact similar PAGA statutes.

Frequently Asked Questions

- ◆ Q: Should we expect the lawyers who represent employees to close up shop and go away?
 - A: No.
 - They will look for grounds to invalidate the arbitration agreement.
 - If they find an issue impacts multiple employees, they will engage with as many potential plaintiffs as possible and file large number of arbitration claims. The goal is to increase the employer's costs and gain settlement leverage. The firms that are best at rounding up plaintiffs will be the most successful.
 - Unions will use *Epic Systems* as an organizing tool and will work with lawyers for employees.
 - Litigation finance may play greater role.
 - They will lobby for more laws like California's PAGA.

Thank You

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