CARLTON FIELDS

Labor and Employment Cases Top the Class Action List in Latest Carlton Fields Survey

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Labor and employment matters lead all other categories of class actions filed against American corporations, according to the findings of the 2019 Carlton Fields Class Action Survey. The survey is based on interviews with general counsel or senior legal officers at 395 Fortune 1000 and other large companies across more than two dozen industries.

Nearly two-thirds of companies responding to the survey said they have faced at least one employment-related class action in the last five years. In addition, respondents said that 28.7% of all class actions they defended against last year were employment-related. This was 4.7% higher than the percentage of class-action matters involving consumer fraud, which was the second-most active category for class actions.

Labor and employment and consumer fraud matters have accounted for the lion's share of spending on class actions each year since 2013.

The significant labor and employment activity reported in this year's survey occurred in the context of steadily rising class-action spending. Companies spent $2.46 billion defending against class actions in 2018, and they expect to spend even more in 2019. It was the fourth consecutive annual increase in total spending following four consecutive years of decreasing expenditures from 2010-2014.

Why Labor and Employment?

Labor and employment matters are reported as the most frequently filed type of class action for at least two reasons.

First, every industry is susceptible to labor and employment litigation, and any company with employees may face a labor and employment class action.

Second, the most prevalent type of labor and employment class action is wage-and-hour litigation. Unlike consumer fraud litigation and other categories of class cases, wage-and-hour matters are subject to an early conditional certification process during which courts do not apply a rigorous analysis of all the elements of class certification required under Federal Rule of Civil Procedure 23.

The defendant generally must then seek decertification after a notice is sent to the conditionally certified class and after the completion of class discovery and expiration of an opt-in period, driving up the costs of litigation.

In prior years, wage-and-hour class actions were focused on the retail and manufacturing sectors. More recently, however, a wider net has been cast toward educational institutions, insurance companies and other previously untargeted sectors.

Independent contractor misclassification claims are also on the rise — a trend that is expected to continue. These include, for example, claims by information technology workers and service contractors who operate in the gig economy. Industries and industry sectors that rely on such workers can expect to be more frequently targeted in class actions.

In 2018, companies hired additional in-house counsel to manage these class actions, reversing a pattern of decreased staffing from 2015-2017, with companies reporting that an average of four to five in-house lawyers now manage their class-action caseloads.

Reducing Labor AND Employment Exposure

To limit exposure to labor and employment class actions, companies must develop a clear understanding of the requirements of the Fair Labor Standards Act. Among other things, the FLSA provides direction as to the appropriate classification of employees and independent contractors for wage-and-hour purposes.

Prelitigation review of employment contracts is likewise essential to determine whether to use arbitration and class-waiver contract provisions, and how to ensure that such provisions are enforceable. This work may be accomplished by in-house counsel and human resources professionals, with the assistance of experienced outside counsel.

Because companies across all industries are exposed to employment-related class actions, employers should make themselves aware of litigation filed against their competitors.

There is often a domino effect whereby class actions proliferate within an industry once one or more employment- related cases gain traction, or when a significant settlement is reached in an initial case.

Other Results of the Survey

Carlton Fields' 2019 survey also found an increase in the average number of class-action matters being managed per company across all categories.

Over the four-year period of increases in class-action spending, the average number of pending class actions per company also increased from 5.1 in 2014 to 7.8 in 2018. Companies also reported that their class actions involve more complex issues and increased risk.

Overall, companies are being more aggressive in their defense strategies as the number, cost and complexity of class actions increases.

In 2018, companies hired additional in-house counsel to manage these class actions, reversing a pattern of decreased staffing from 2015-2017. On average, companies reported that four to five in-house lawyers now manage their class- action caseloads. Most companies also say they rely on a small stable of trusted law firms to help conduct early case assessments, develop case management strategies and defend against these costly litigation matters.

Data privacy and security class actions present concerns for many surveyed companies. The percentage of companies that expect data privacy and security to be the next wave of class actions increased significantly over last year's survey, from 28.9% to 54.3%.

Data breach class actions filed in recent years have been well-publicized in the wake of high-profile security incidents, but companies are also concerned about the proliferation of new data privacy and cybersecurity laws and regulations nationwide. For example, approximately two-thirds of the companies in the Carlton Fields survey reported concern over potential class-action exposure resulting from the California Consumer Privacy Act, which goes into effect next year.

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In addition to expanding internal staffs, companies are increasingly engaging outside counsel to make an early assessment of case facts and win-loss probabilities. More companies are also using arbitration clauses to resolve disputes on a cost-effective, individual basis. In this year's survey, 49% of companies reported using arbitration clauses that preclude class actions, a higher percentage than in any previous survey year.

Companies are likewise experimenting with other cost management approaches. Nearly 40% say that at least some of their class-action defense costs are covered by insurance, and many continue to use alternative fee arrangements. Companies report that they attempt to mitigate class-action discovery costs through the retention of a single e-discovery vendor, the aggressive negotiation of reasonable search terms, and motions to stay discovery or shift costs.

Increasingly, companies that face class actions take a case- by-case approach in formulating a defense strategy. Of the surveyed companies, 53% said they defend against their class-action matters "at the right cost," assessing each case separately.

Despite rising costs, however, only 10.6% said they prefer early settlement of class-action matters. Approximately 21% said they consistently take an aggressive stance, and 14.9% said they employ a "defend at all costs" approach. Still, 73.1% of class actions were resolved by settlement, either on an individual or class-wide basis. Only 2% of cases that were initially filed as class actions reportedly went to trial.

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The 2019 Carlton Fields Class Action Survey has become a standard reference guide for companies, providing data and insights into emerging issues and best practices in the management of class-action litigation. Access a complimentary copy at https://classactionsurvey.com/.

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