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## The Next Wave? Serial Discrimination Filings from Prior Class Claims

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Notwithstanding the employers' victory at the U.S. Supreme Court in *Epic Systems Corp. v. Lewis*, which made it clear that arbitration and class action waiver regimes do not violate the National Labor Relations Act, employers are now facing another obstacle: serial arbitration filings. These filings, in an attempt by some plaintiffs' attorneys to overwhelm the system, are intended to pressure employers into waiving their arbitration agreement, as defending dozens or hundreds of individual arbitrations can be extremely expensive. Indeed, some prominent plaintiffs' firms are attempting to "staff up" their ranks in order to handle mass arbitrations. We discuss this issue in greater detail in our [Spring Class Action Trends Report](#).

While many employers are grappling with this phenomenon, the plaintiffs' bar has recently extended this strategy beyond wage and hour cases into a new space: discrimination claims. In 2011, the U.S. Supreme Court rejected a nationwide suit alleging discrimination filed against Wal-Mart. *Wal-Mart v. Dukes*, 564 U.S. 338 (2011). The named plaintiffs in *Dukes*, who sought to represent a putative class of approximately 1.5 million female employees, alleged the company discriminated against them on the basis of their sex by denying them equal pay or promotions in violation of Title VII. The U.S. District Court for the Northern District of California certified a national class of female employees challenging the pay and management promotion policies as discriminatory against women. On June 20, 2011, the United States Supreme Court reversed the class certification order. The Court, in a 5-4 decision authored by the late Justice Antonin Scalia held, among other things, that certification of the class was not consistent with Rule 23. Subsequently, Wal-Mart was sued in numerous class action lawsuits, none of which had class claims successfully advance other than in the Sixth Circuit (which, ultimately, was unsuccessful after the Supreme Court's 2018 ruling in [China Agritech v. Resh](#)).<sup>1</sup>

Now, in an attempt to make employers sorry for winning the *Dukes* case, plaintiffs' attorneys have turned to filing serial individual discrimination suits against Wal-Mart. In the past four months, 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. To date, the complaints alleging gender discrimination have been brought in eight states: Pennsylvania, Kentucky, Ohio, California, Virginia, Tennessee, West Virginia, and Florida. The complaints expressly state that the lawsuits "spring" from *Dukes v. Wal-Mart*, the national class action filed more than ten years ago. According to Christine Webber, a civil rights lawyer and partner with Cohen Milstein Sellers & Toll in Washington, D.C., more are on the way.<sup>2</sup> Cohen Milstein Sellers & Toll previously worked on the *Dukes* class action and is coordinating the multiple state suits with local law firms. Corporate Counsel recently reported that preparations are under way for suits in five more states this year: Alabama, Iowa, Illinois, Mississippi and Texas.<sup>3</sup>

We will continue to monitor and report on this trend of serial filings within the discrimination arena (and other trends related to class actions). Please contact a Jackson Lewis attorney if you have any questions relating to this latest trend or any other employment law issues.



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[1] Robert Iafolla and Paige Smith, [Walmart Faces New Legal Battle From Old Pay Bias Claims](#), Bloomberg Law (May 24, 2019) available.

[2] *Id.*

[3] Sue Reisinger, [Walmart Faces New Round of Gender Discrimination Suits Based on 2001 Dukes Complaint](#), Corporate Counsel (May 14, 2019).

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