

The background of the slide is a photograph of a stage. It features heavy, deep red velvet curtains that are drawn back to reveal a dark, empty stage. The curtains have white tassels at the bottom. The floor of the stage is made of light-colored wooden planks. The text is centered on the dark background of the stage.

Ogletree  
Deakins

2020: An Employment  
Law Odyssey

February 18, 2020 • Charlotte

Presented by:

Margaret S. Hanrahan, Charlotte

Michael D. Ray, Charlotte

# 2020—what to expect???

## Blockbusters for 2020

- Independent Contractors/Wage and Hour/Arbitration
- Election Year Issues -- Politics in the Workplace
- Marijuana
- Pay Equity
- Title VII and the EEOC

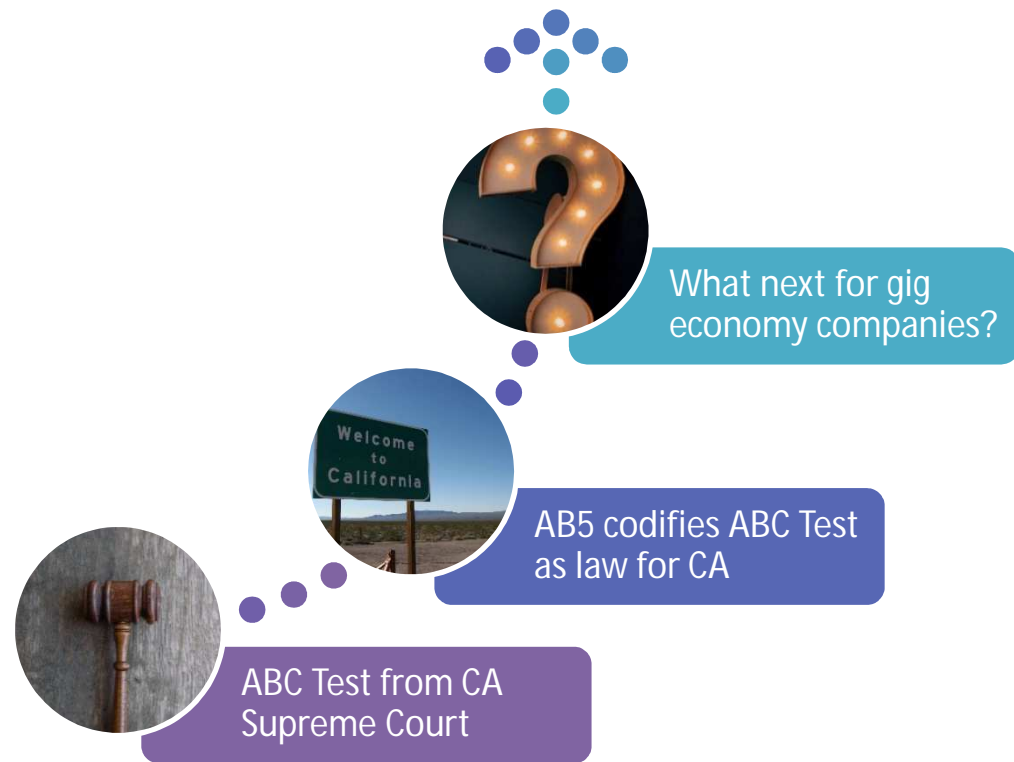
# Independent Contractors

## Who is an Employee?



# AB5 in California! Earthquake for Gig Economy?

ABC Test from California Supreme Court applies to all aspects of the Labor Code for businesses not exempted



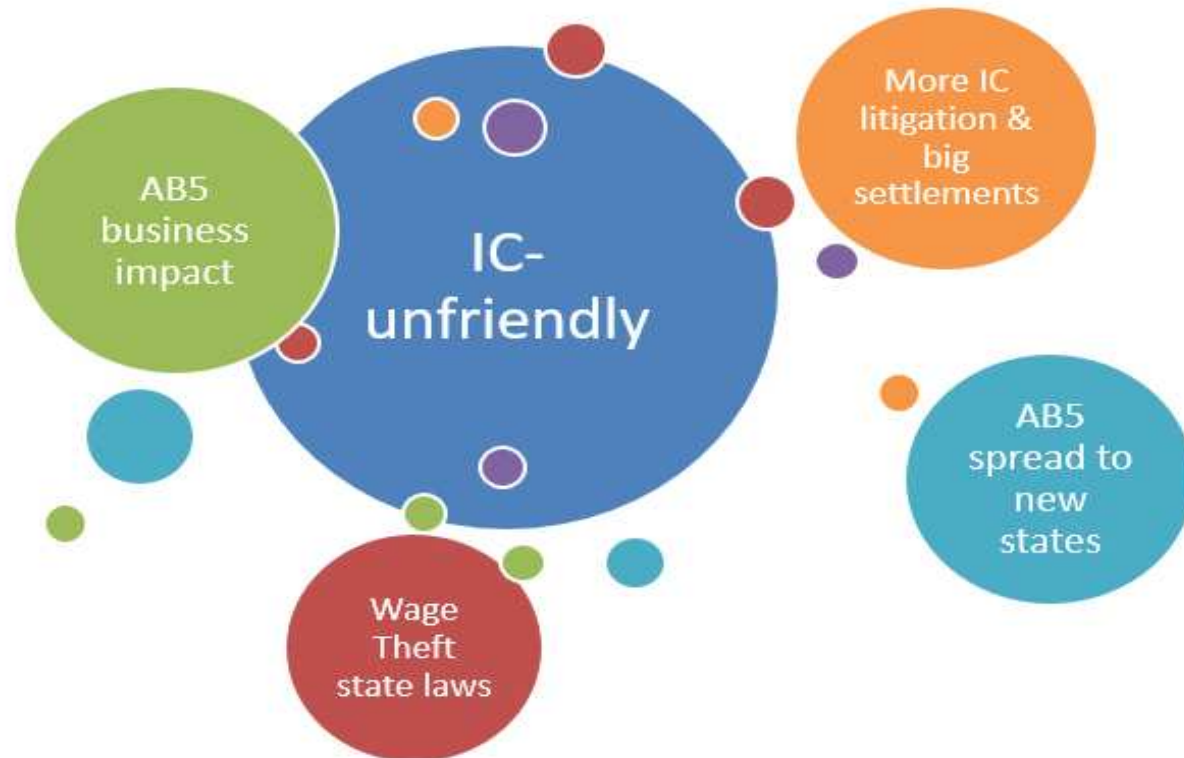


# Independent Contractors in the Carolinas

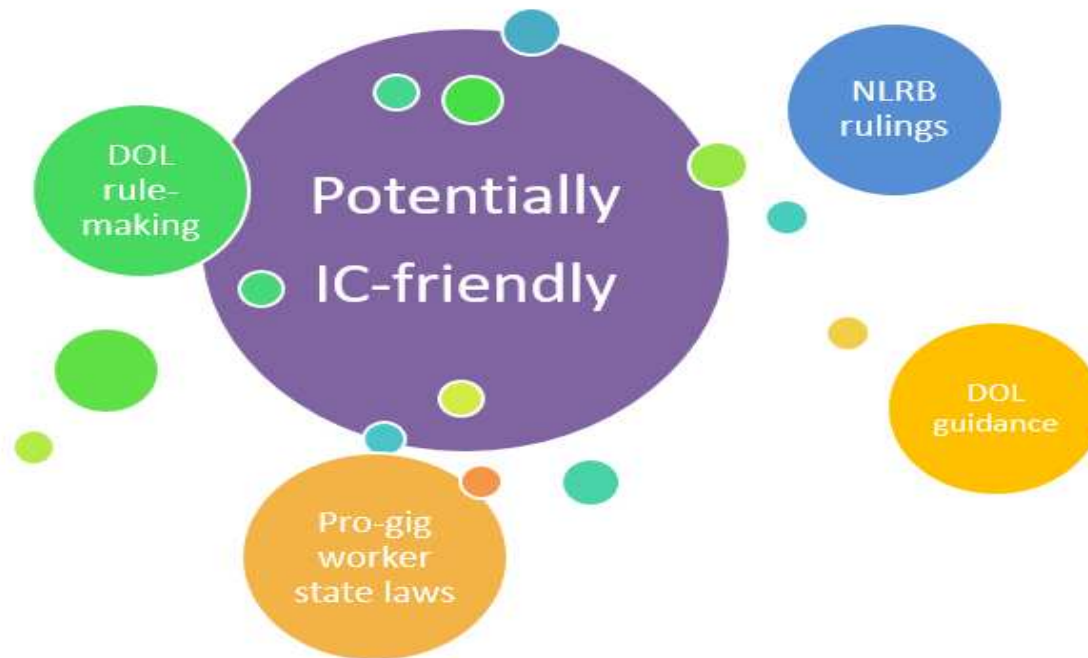
- North Carolina Employee Fair Classification Act (NC agency sharing, disclosure and posting)
- Fourth Circuit (NC and SC) uses six factor economic realities test



# Coming Attractions: What to Watch for in 2020



# What to Watch for in 2020 cont.



# What Should You Do Now?

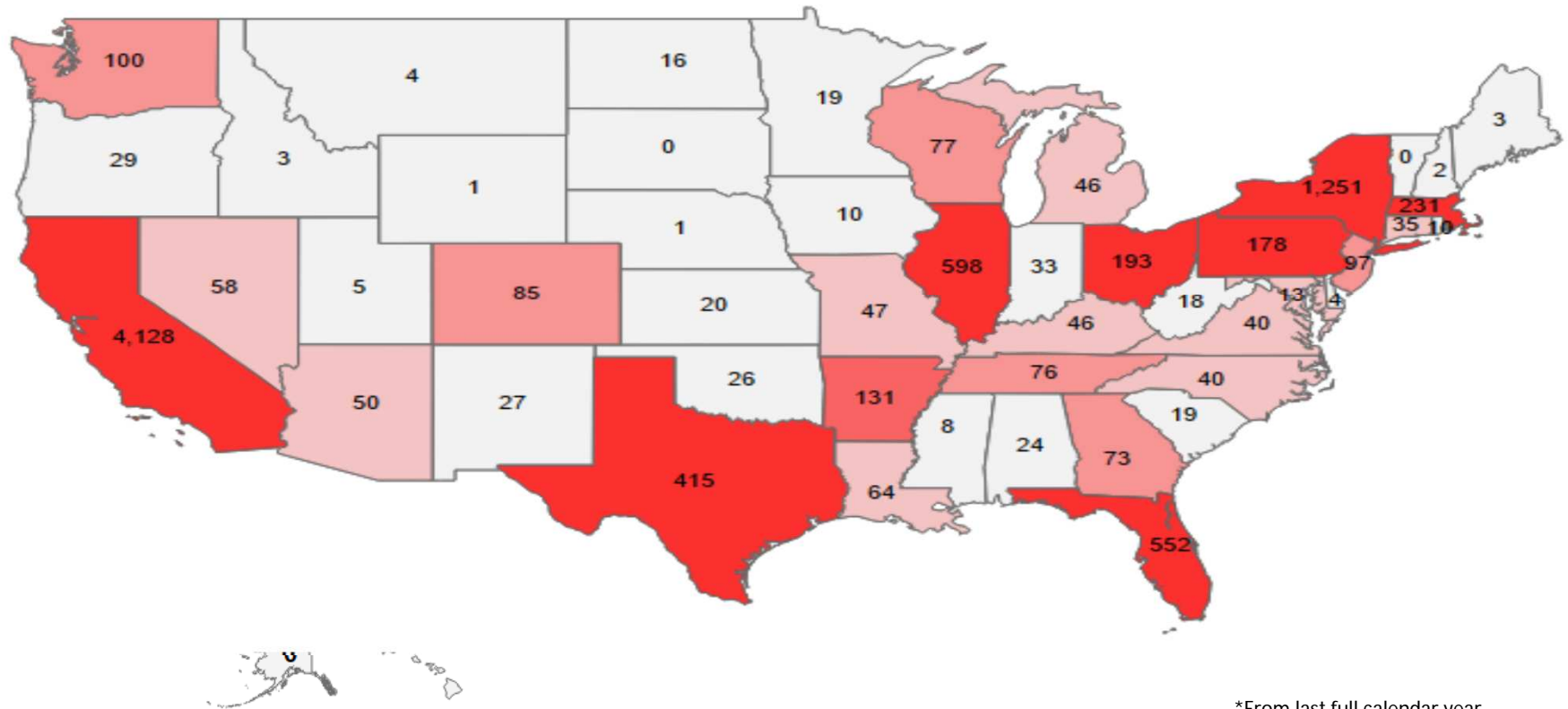
- Know what you've got. Review, analyze and audit your ICs. If you have significant numbers of ICs, the odds are the model will be attacked at some point ---so be prepared!
- Be realistic in assessing the risks and gains in using the IC model, and bank that reserve.



# Class and Collective Actions



# High Risk Areas for Class Actions in 2020



\*From last full calendar year

## Year in Review- Litigation Statistics

- Wage and Hour Settlements increased by 50%
  - \$449.05 million in 2019
  - \$253 million in 2018

# High Risk Areas for Class Actions in 2020

## Common Issues

- Wage and Hour
  - ICs
  - Misclassification
  - Off the Clock Work
- ERISA
- Other Employment Discrimination

## Emerging Issues

- Job Search Discrimination
- Parental Leave Discrimination
- Equal Pay
- Background Checks
- Website Access
- COBRA
- Testing

# New OT Rules under FLSA

- Primary Changes

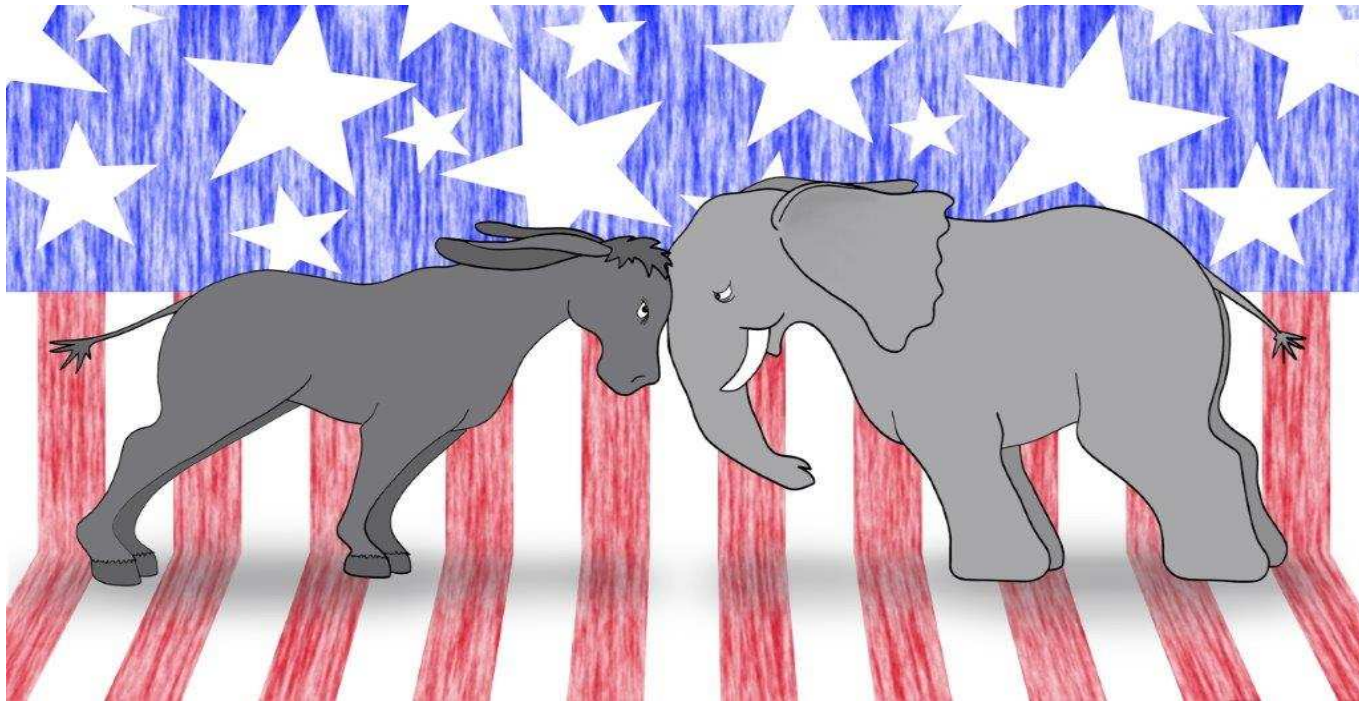
- Increases minimum salary level to \$684 per week (\$35,568 per year) to be exempt
- Increases “highly compensated” exemption to \$107,432 (from \$100,000)
- Allows employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid at least annually to satisfy up to 10 percent of the standard salary level
- **Election may have significant impact on this rule**

# Arbitration Issues for 2020

- Pro-Arbitration Supreme Court --*Epic Systems*: Class/collective waivers are valid and enforceable
- State law legislative challenges—impact of FAA preemption to be litigated; California statute
- The risk of mass arbitration and filing fees
- Beware of *New Prime* for transportation workers
- Consider third party implications—covering your clients or having your clients cover you (e.g., joint employment claims).



# Political Speech In An Election Year



# Political Speech in Workplace

- 80% of employees believe political speech in the workplace is protected by law
- 72% of employers discourage political activity in the workplace
- 4% of employers encourage workplace political activity

# Politics in the Workplace

- Workplace issues:
  - Discrimination, harassment, and retaliation claims based on political affiliation, activities and expression (consider adverse impact on race and related characteristics)
  - Unfair labor practice charges based on Section 7 rights under the NLRA
  - Workplace bullying
  - Decreased employee morale and productivity

# Politics in the Workplace—North Carolina

- North Carolina: prohibit employers from restricting employees' off-duty use of "lawful products"—this can include social media platforms, signage and other products used to deliver political speech
  - Employer defense: the employer must show the activity adversely affects the employee's ability to fulfill her job responsibilities

# Politics in the Workplace—South Carolina

- South Carolina prohibits discrimination on the basis of political activity or beliefs. S.C. Code Ann. 16-17-560.
- “It is unlawful to ... discharge a citizen from employment or occupation ... because of political opinions or the exercise of political rights ... guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of [South Carolina].”
- *Culler v. Blue Ridge Elec.*, 309 S.C. 243 (1992) (terminating employee for refusing to donate to political action fund would give rise to wrongful discharge claim).

# 2020 Issues to Consider

- Be Proactive—What is the going to be the Company's stance on political speech?
- Is the Company going to be involved in taking corporate stands on political issues?
- Be aware of differences in geography and demographics at your workplaces.



# Practical Strategies

- Review your policies: “work is for work”
- Policies for bulletin boards and other company property and equipment
- Review non-solicitation/non-distribution rules
- Consider training on civil discourse as part of anti-harassment/anti-discrimination policies
- Social media policy
  - Address speaking on behalf of the Company
  - Address harassment, discrimination and bullying

# Marijuana

Reefer Madness: Rapid Changes in State Laws



# Budding Issues:

- Resolving tension with federal law
- Federal contractor requirement
- Anti-discrimination
- Testing at work
- Carolinas—no protection for weed
- CBD oil/THC



# Pay Equity





snoopdogg • Follow  
Milwaukee, Wisconsin

snoopdogg us. Soccer team. Ladies  
need. They issue. Break bread or fake  
dead

17w

Pay them girls what they're  
worth! The women should  
be getting \$500K per  
athlete.

14w 1 like Reply



1,415,158 views

JULY 7

Log in to like or comment.



# Pay Equity – Through the Looking Glass



State and Local Legislation  
Expand Rights and Remedies



Pay Transparency?



Salary History Inquiries are Still  
under Attack

# Proactive Steps to Take

- Review compensation processes
  - How are decisions made
  - How are decisions documented
- Review compensation data
  - Monitor starting pay, current pay, promotional pay, bonuses, and other compensation
  - Review raises: consistent with evaluations?
  - Understand the factors behind pay

# Additional Practical Tips

- Written policies for pay increases and bonuses
  - Guidelines based on objective, quantifiable factors
  - Limit subjectivity with objective factors
- Ensure job titles and descriptions are accurate
- Document pay decisions
- Assess performance evaluation process
- Train interviewers and decision-makers

# Title VII and 2020 Expectations with EEOC



# Title VII Landmark Supreme Court Cases

- Threshold Issues of LGBT Rights in the Workplace
- *Bostock v. Clayton County, Georgia*: Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination 'because of sex' within the meaning of Title VII.
- *R.G. & G.R. Harris Funeral Homes v. EEOC*: Whether discriminating against an employee or applicant on the basis of gender identity violates Title VII.

# Continued Proliferation of State and Local Protections

- Equal Pay/Pay Equity
- Paid Family and Sick Leaves
- Ban the Box
- Salary History Restrictions
- Hairstyle Protections
- Victim Protections

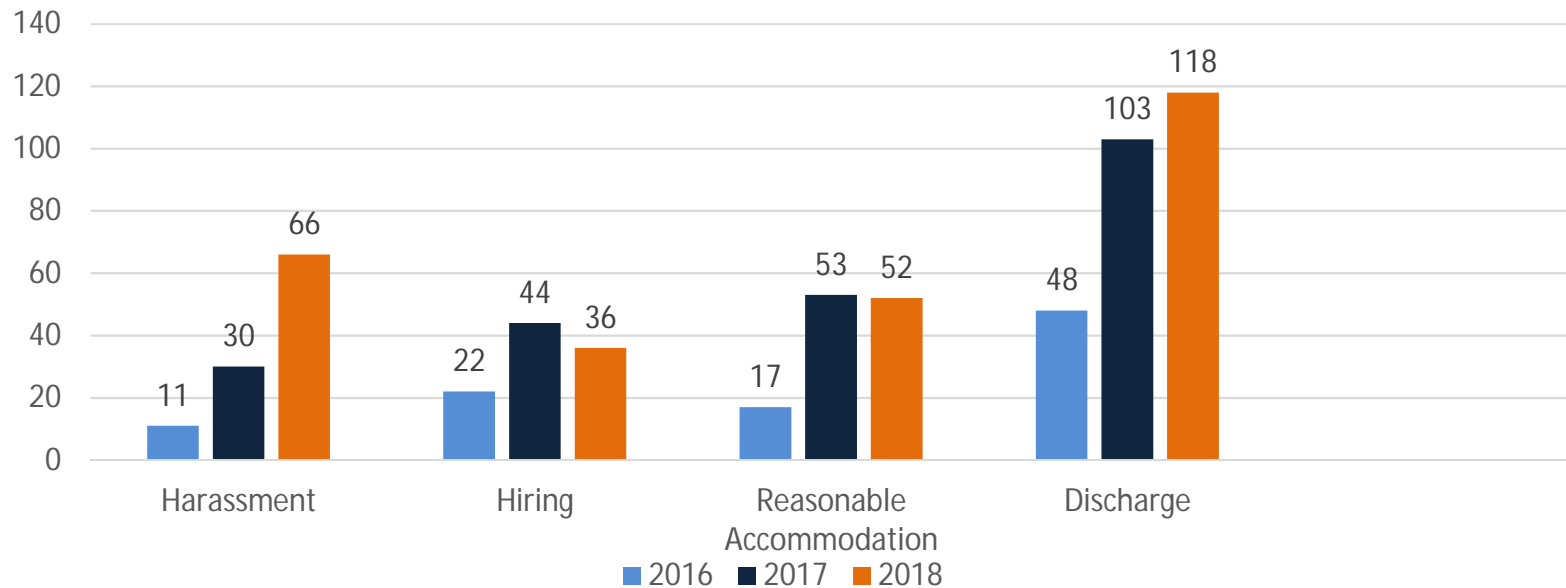


# All Charges Decline

	FY 1998	FY 2016	FY 2017	FY 2018
Receipts	79,591	91,503	84,254	76,418
Settlements	4.6%	7.4%	6.4%	6.1%
No Reasonable Cause	60.9%	67.6%	70.2%	70.6%
Reasonable Cause	4.6%	3.2%	2.9%	3.5%
Merit Resolutions	12.4%	16.2%	14.8%	15.2%
Monetary Benefits (Millions)*	\$169.2	\$348.0	\$355.6	\$353.9

\* Does not include monetary benefits obtained through litigation

# Harassment Suits Increase...





# Systemic Investigations and Suits Increase

Systemic Investigations	2013	2014	2015	2016	2017	2018
Number Completed	300	260	268	273	329	408
Monetary Recovery	\$40 Million	\$13 Million	\$33.5 Million	\$20.5 Million	\$38.4 Million	\$30 Million
Reasonable Cause Findings	106 (35%)	118 (45%)	109 (35%)	113 (41%)	167 (50.7%)	167 (40.8%)
Systemic Lawsuits Filed	21	17	16	18	30	37

# ADA Lawsuits Up



- 84 ADA lawsuits based 199 merits lawsuits filed by EEOC in FY 2018 – 41% of all lawsuits
- 75 ADA lawsuits based on 184 lawsuits filed by EEOC in FY 2017 – 41% of all lawsuits
- 35 ADA lawsuits based on 86 lawsuits filed by EEOC in FY 2016 – 40.6% of all lawsuits
- 53 ADA lawsuits based on 142 lawsuits filed by EEOC in FY 2015 – 37% of all lawsuits
- 49 ADA lawsuits based on 133 lawsuits filed by EEOC in FY 2014 – 36.8% of all lawsuits

# LGBT/Sex Charges Up

	FY 2013*	FY 2016	FY 2017	FY 2018
Receipts	808	1,768	1,762	1,811
No Reasonable Cause	64.1%	67.6%	68.1%	69.9%
Reasonable Cause	1.2%	3.7%	4.3%	3.6%
Merit Resolutions	15.4%	15.3%	16.8%	16.8%
Monetary Benefits (Millions)	\$0.9	\$4.4	\$5.3	\$6.1

*\* The data for FY 2013 is for the last three quarters only.*

# Questions



Presented by:

Margaret S. Hanrahan (Charlotte)

704.405.3119

[maggie.hanrahan@ogletree.com](mailto:maggie.hanrahan@ogletree.com)

Michael D. Ray (Charlotte)

704.405.3133

[michael.ray@ogletree.com](mailto:michael.ray@ogletree.com)

The background of the slide is a photograph of a stage. It features heavy, deep red velvet curtains that are drawn back to reveal a dark, empty stage. The curtains have white tassels at the bottom. The floor of the stage is made of light-colored wooden planks. The text is centered on the dark background of the stage.

Ogletree  
Deakins

2020: An Employment  
Law Odyssey

February 18, 2020 • Charlotte

Presented by:

Margaret S. Hanrahan, Charlotte

Michael D. Ray, Charlotte