Employment Law & General Liability

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ETHICS OF MEDICAL MARIJUANA IN THE WORKPLACE

I. History

A. Legal but regulated until the 20th century.

B. War on Drugs caused the outcry to prohibit use of all drugs including marijuana.

C. Impairment

1. Substantial reduction in blood flow to the temporal lobe of the brain, which governs auditory attention – 29 Quinnipiac L. Rev. 1001
2. Large individual differences attributable to the test subject and other situational factors. – 29 Quinnipiac L. Rev. 1001

D. Medical value

1. Used for nausea, glaucoma, migraines, arthritis, and appetite stimulation for those suffering from conditions like HIV, AIDS wasting syndrome or dementia, and many more medical conditions.

II. Current Status

A. Controlled Substance Act, 21 U.S.C. § 823(f) (2012)

1. Labels marijuana as a Schedule I drug, thus prohibits the cultivation, possession, transportation or use of cannabis.
2. Also does not recognize any medicinal value

B. Preemption

1. CSA only preempts those state medical marijuana statutes that provide an affirmative right to medical marijuana – 29 Quinnipiac L. Rev. 1001
2. Many states avoid preemption by using language that does not legalize marijuana, but does not punish certain marijuana offenses under state power – 29 Quinnipiac L. Rev. 1001

C. State laws began allowing medical marijuana despite the CSA, but federal agents could still enforce federal law

1. *Gonzales v. Raich* – state law allowing marijuana in any capacity does not prohibit federal officers enforcing federal marijuana laws
2. Due to the Supremacy Clause and Commerce Clause

D. Although still illegal, no action can be brought if in compliance with state medical marijuana laws

1. Consolidated Appropriations Act of 2017 – 115 P.L. 31, Sec. 537; Enacted HR 244, Pg. # 154 – division B, title II: Forbids any funding being used by the DOJ for any action that prevents state law made for use, distribution, possession, or cultivation of medical marijuana.
2. This does not apply to states with recreational marijuana.
3. Must be in full compliance with state law in order to apply – *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2015)

III. MVP Practice States

A. Those with medical marijuana have fairly good employer protections and exemptions.

B. The overall issue is the state laws which allow some sort of use of marijuana are in direct conflict with the Controlled Substances Act. The CSA classifies marijuana as a Class I drug which is illegal.

C. Arkansas - Medical Marijuana – tit. IV, Sub. 1, Ch. 124D
   1. Employers not prohibited from making drug-free workplaces (b)(2)
   2. Cannot discriminate based on status as a qualifying patient (f)(3)

D. Illinois – Medical Marijuana
   1. 410 ILCS 130/50 – Employment/Employer liability
   2. Does not prohibit employers from creating and enforcing a drug-free workplace policy unless it is used in a discriminatory manner.
   3. Does not create a defense for a third party who fails a drug test
   4. Does not prohibit employers from disciplining an employee who failed a drug test if failing would put the employer in violation of federal law or cause it to lose a federal contract or funding.
   5. Does afford a qualified employee a reasonable opportunity to contest the basis of a drug test determination.
   6. Does not create a cause of action for any person against an employer for:
      a. Actions based on an employer's good faith belief that an employee used cannabis on the employer's premise.
      b. Actions based on an employer's good faith belief that an employee was impaired while working on the employer's premises during hours of employment.
      c. Injury or loss to a third party if the employer neither knew nor had reason to know that the employee was impaired.
   7. 410 ILCS 130/40 Discrimination Prohibited
      a. No employer may penalize a person solely for his or her status as a registered qualifying patient, unless failing to do so would put the employer in violation of federal law or unless failing to do so would cause it to lose a monetary or licensing-related benefit under federal law or rules.
      b. No employer may be penalized or denied any benefit under State law for employing a cardholder.
      c. Employer does not have to pay for the medical use.

E. Iowa – Medical Marijuana for Epilepsy – HB 524 passed May 12, 2017
   1. Does not address employer's responsibilities
   2. Does not address discrimination

F. Kansas – Illegal

G. Missouri – Medical Marijuana legalized in 2018

H. Nebraska – Illegal

I. Oklahoma – Medical Marijuana for chronic conditions only in 2018

IV. Effects on the Workplace – Federal Issues

A. Federal Criminal Accomplice Liability

1. This may occur if state law requires employers to pay for medical marijuana through the employee's insurance or workers' compensation.
2. May not be an issue, for the moment, since the Consolidate Appropriations Act of 2017 forbids DOJ to use funding to prosecute such matters

B. Loss of Federal Contracts

1. 41 U.S.C.§§ 8102 (contracts), 8103 (grants)
2. Drug-Free Workplace Act of 1988 –
    a. Requires employer who receive federal contracts or grants valued over $100,000 "to certify to the federal agency involved that it will provide a drug free workplace".
    b. An employer's obligations include disciplinary action on any employee who does not comply 41 U.S.C. § 8104
    c. Penalties for failure to comply
        i. Suspension of payments
        ii. Termination or suspension of the contract
        iii. Prohibition from future federal contracts up to five years
3. There are no exceptions for employers bound by state law

C. Workplace Safety Violations - Occupational Safety and Health Act of 1970 (OSH Act) – 29 U.S.C. § 654(a)(1) (2012).

1. An employer must "furnish to each of his employee's employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."
2. OSHA does not explicitly address marijuana in the workplace but covers any impermissible harm.
3. Penalties for noncompliance range from $5,000 to $70,000 in fines and up to a year in prison if hazard caused the employees death. – 29 U.S.C. 666

D. Discrimination through the American with Disability Act

1. Centers on the Employer's Policy
    a. If there is no drug policy, there is a high chance of proving discrimination.
    b. If there is a drug policy, there may still be an issue because most policies require consequences for "under the influence" at work but most drug tests are for use rather than impairment. – 49 J. Marshall L. Rev. 193
2. Employers need not accommodate medical marijuana users as the federal government has not acknowledge marijuana as a legitimate medical treatment.
3. Legalization of Marijuana Raises Significant Question and issues for Employers

a. If medical marijuana users are covered is dependent on whether marijuana is considered illegal under the ADA
    i. ADA defines illegal use of drugs as use of drugs that are unlawful to distribute or possess under the CSA, which includes marijuana.
    ii. The ADA definition excludes use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the CSA or other provisions of Federal law. Every medical marijuana user must receive a prescription card from a licensed health care professional. 42 U.S.C.A. § 12111(6) (West 2011).

4. Protection afforded
    a. Regarded as if an employer mistakenly believes that an employee's use of medical marijuana substantially limits one or more major life activities, when in fact the impairment is not substantially limiting. – 29 Quinnipiac L. Rev. 1001; 42 U.S.C.A. § 12114(b)(3) (West 2011)
        i. A claim could arise if an employer mistakenly believes an employee's use of medical marijuana substantially limits one or more major life activities (work), when in fact the impairment is not substantially limiting.
        ii. A user would need to prove the employer perceived him or her as unable to work in a broad class of jobs rather than just one job such as operating heavy machinery.
    b. Disparate impact – an employer cannot use any selection criteria that results in the rejection of an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria is shown to be job-related for the position in question and is consistent with business necessity. - 42 U.S.C.A. § 12112(b)(6) (West 2011).
        i. A successful case would need to show an employer's policy of excluding those who test positive for marijuana. This tends to screen out a greater proportion of persons with disabilities, compared to persons without disabilities. – 29 Quinnipiac L. Rev. 1001
    c. Medical examinations or inquiry into disabilities - Prohibits employers from requiring medical examinations or making disability inquiries of employees unless such examinations or inquiries are job-related and consistent with business necessity. § 12112(d)(4)(A)
        i. Protects all employees from the employer uncovering the employee's health defects at its own direction.
        ii. The type of medical examination is determined on a case-by-case basis.
            1. If an employer's non-invasive explanation and objective evidence shows its drug-testing protocol is unlikely to reveal employees' medical information, then the testing does not qualify as a medical examination. – *Bates v. Dura Auto. Sys*., Inc., 767 F.3d 566 (6th Cir. 2014)

2. Disability inquiry is also determined on a case-by-case basis
    a. It may include asking an employee whether s/he currently is taking any prescription drugs or medications, or did in the past, or monitoring an employee's taking of such drugs or medications. - *Bates v. Dura Auto. Sys., Inc.*, 767 F.3d 566 (6th Cir. 2014)
    b. Able to ask about non-disability impairment and illegal-drug abuse.

5. Employer's defenses
    a. Job related and business necessity – when an employer has a reasonable belief, based on objective evidence, that: - EEOC instruction – *Bates v. Dura Auto. Sys., Inc.,* 767 F.3d 566 (6th Cir. 2014)
        i. An employee's ability to perform essential job functions will be impaired by a medical condition; or
        ii. An employee will pose a direct threat due to a medical condition
        iii. Significant risk to health or safety of others that cannot be eliminated by reasonable accommodation
        iv. Must be based on the specific position and not general assumptions

V. Effects on the Workplace – State Issues

A. State non-discrimination laws
    1. Varies state to state
    2. Depends on:
        a. Whether the state's disability law excludes coverage for illegal drug users like the ADA and the scope of that exclusion.
        b. The enforceability of a state's medical marijuana statute.
        c. Whether a private cause of action is afforded by either statute.
        d. Whether accommodation is required by either statute.

B. Civil Liability for Employee Actions
    1. Respondeat superior
    2. Negligent hiring
    3. Negligent retention

VI. Proactive Steps for Employers to Protect Themselves

A. Testing procedures
    1. In hiring, wait until a tentative offer is made before requiring a drug test because the ADA prohibits a medical examination prior to such offer. – 29 Quinnipiac L. Rev. 1001
    2. Narrow testing and medical inquiries as much as possible to avoid over intrusive and broad questions.

a. Medical Review and Medical Review Officers aid in this aspect
b. Only ask those questions that are job-related

3. Reasonable Suspicion Testing
    a. Do not inquire into marijuana use unless there is suspicion of use affecting the employee's work or safety issues.
    b. This could avoid some liability in the civil realm.
4. Use Third-party testing
    a. Have them screen out any irrelevant medications or validly prescribed medications. Have a third-party test and discuss the employee medications to assure a valid test then relay only the pertinent medications regarding safety or illegality of employment to the employer. This does not necessarily reveal information about a disability. – *Bates v. Dura Auto Sys*., 767 F.3d 566 (6th Cir. 2014)
    b. Be careful though, because employers may not use third parties to circumvent ADA protections. – *Bates v. Dura Auto Sys*., 767 F.3d 566 (6th Cir. 2014)

B. Assure a causal connection between any screening tool or selection procedures and job-relatedness, business necessity, or workplace safety.
    1. Job relatedness - predictive or significant correlation with performance of the job's essential functions.
    2. Business necessity - substantially promotes the business needs.
    3. Safety in the workplace – considers the magnitude of possible harm as well as the probability of occurrence.

C. Always make an individual determination based on objective findings
    1. If an employee fails a drug test for potential prescription medications, have a physician examine the employee and the employee's medical history to determine if they are capable of performing the job. – 29 Quinnipiac L. Rev. 1001
    2. An employer has an obligation to conduct an individualized review to avoid regarding someone as having a disability – 29 Quinnipiac L. Rev. 1001

D. Avoid any indication of generalized statements about or actions against disabilities.

E. Example of allowable testing: *Wice v. Gen. Motors Corp*., No. 07-10662, 2008 U.S. Dist. LEXIS 106727, at 8 (E.D. Mich. Dec. 15, 2008).
    1. Had blanket policy to send all driver employees with certain medical conditions, such as high blood pressure or diabetes, to employer's physician.
    2. The physician would then make an individual determination based on the specific employee's condition and capabilities, and not disclose medical information to employer.

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REMOTE WORKER

The Remote Workplace
Working "remotely" refers to performing job tasks through a technological medium, such as a smartphone, tablet, laptop, remote desktop, or other device or technology that enables an employee to access work-related materials while away from his or her regular place of employment. Technological advances, mobile devices, and virtual private networks enable employees to check work emails, communicate with co-workers and clients, and perform other, more demanding, job tasks from anywhere in the world. Alternatively, working remotely may constitute an employee's regular workplace; allowing the employee to work entirely from home or other locations.

A remote workplace and a classic workplace differ primarily in location. In addition to smartphones and tablets allowing employees to perform more rudimentary tasks from multiple locations, virtual private networks (VPN) or remote desktop networking generally enable employees to work in any location as if they were working in an office environment. In its most basic form, remote desktop technology[1] refers to the use of a technological device, typically a laptop or desktop, to control another computer, access a virtual private network, or access network functions in a secure environment. Remote desktop technology allows access to files, emails, programs, and other various features on a host computer or network.

The increase in employees' abilities to perform job duties on a plethora of technological devices at a variety of sites away from their normal workplace or beyond normal work hours has created a new set of compliance issues under the Fair Labor Standards Act (FLSA) and Family Medical Leave Act (FMLA) for employers. Moreover, the possibility of performing the essential functions of a position away from the workplace can create implications for employers under the Americans with Disabilities Act (ADA). Finally, employers and remote workers are still subject to workers' compensation laws for injuries arising in the course and scope of employment.

The Fair Labor Standards Act (29 U.S.C. § 201 *et. seq.*)
The Fair Labor Standards Act of 1938 ("FLSA") sets minimum wage, overtime pay, recordkeeping, and other standards for covered, non-exempt employees. Under the FLSA, covered, non-exempt[2] employees must receive one and one-half times their regular rate of pay for all hours worked in excess of forty hours in a workweek. 29 U.S.C. § 207(a)(1).

[1] "Remote desktop" can refer to either a Virtual Private Network ("VPN") or Remote Desktop Protocol ("RDP").
[2] Under the FLSA, an employee is exempt from overtime pay if he/or she qualifies as an executive, administrative, professional, computer systems analyst, highly compensated, or outside sales employee under 29 U.S.C.S. § 213. Generally speaking, the employee must pass the "salary test" and "duties test" of one employee classification to be exempt from overtime pay. These exemptions only apply to "white collar" employees and do not apply to "blue collar" workers who perform intensive work with their hands, physical skill, and energy. For more information on FLSA employee classification, please consult one of our knowledgeable and experienced attorneys.

As a result of employees' constant access and connectivity to work, employers must establish boundaries as to when and where employees may work overtime via remote desktops, smartphones, and similar technologies. Even if such boundaries are established, employees may not always abstain from performing overtime work, placing a higher burden on employers to record employees' worktime. Sometimes, this burden may force employers to limit the availability of technologies that enable employees to work remotely. The frequency of FLSA wage-and-hour cases has skyrocketed in recent times, as shown by the 450% increase in such cases since 2000.[3]

Recordkeeping Requirements of the FLSA (29 C.F.R. § 516)
The FLSA requires employers to keep specific records for non-exempt employees, including figures regarding employees' hours worked and wages earned. Employers must preserve the following records regarding a particular employee:

1. Full name and social security number;
2. Address, including zip code;
3. Birthdate, if younger than 19;
4. Sex and occupation;
5. Time and day of week when employee's workweek begins;
6. Regular hourly rate of pay for any workweek in which overtime compensation is due
7. Hours worked each day;
8. Total hours worked each workweek;
9. Basis on which employee's wages are paid (i.e.: "$10 per hour," "$650 a week.");
10. Regular hourly pay rate;
11. Total daily or weekly straight-time earnings;
12. Total premium pay for overtime hours (excluding the straight-time earnings for overtime hours recorded);
13. All additions to or deductions from the employee's wages;
14. Total wages paid each pay period; and
15. Date of payment and the pay period covered by the payment.

Employers shall retain all payroll records, collective bargaining agreements, sales records, and purchase records for at least three years.[4] Wage computation and related records, such as time cards, piecework tickets, work and time schedules[5], and wage rate tables, should be preserved for at least two years, but employers would be wise to maintain the records for at least three years.

***De Minimis* Doctrine** (29 C.F.R. § 785.47)
"In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are *de minimis*. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680

[3] Aaron Vehling, *FLSA Class Actions to Hit Record High in 2016*, Law360, (Jan. 12, 2016), https://www.law360.com/articles/745603/flsa-class-actions-to-hit-record-high-in-2016.
[4] 29 C.F.R. § 516.5
[5] 29 C.F.R. § 516.6

(1946). This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes' duration, and where the failure to count such time is due to considerations justified by industrial realities.[6] An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.[7]

Case Law Regarding Recordkeeping for Non-Exempt Remote Workers

Fairchild v. All Am. Check Cashing, Inc., 815 F.3d 959 (5th Cir. 2016).

In *Fairchild*, the court considered whether a non-exempt employee was entitled to unpaid overtime hours accumulated by working on a computer at home. *Id.* at 965. The court, ruling in favor of the employer, analyzed three factors: (1) the employer's policy and procedure for overtime; (2) whether the employee's conduct was in accordance with the employer's policy and procedure; and (3) whether the employer knew or should have known of the employee's overtime hours. *Id.* at 964. Because the employee did not request authorization to work overtime, as required by the employer's policy, and did not record her overtime in the employer's timekeeping system, the court held that the employer could not have actually or constructively been aware of the employee's overtime and could not be punished for the alleged unpaid overtime. *Id.* at 965.

Allen v. City of Chicago, 865 F.3d 936, 936 (7th Cir. 2017).

In *Allen*, an FLSA collective action, the court considered whether the Chicago Police Department ("CPD") kept an "unwritten policy" to not compensate non-exempt police officers for compensable, off-duty work on CPD-issued BlackBerrys. *Id.* at 940. Although members have scheduled shifts, the nature of their work sometimes requires them to work outside their shifts during what would otherwise be off-duty time. *Id. at 939.* The police department issued plaintiffs mobile electronic devices (BlackBerrys), which they sometimes used in their off-duty work. *Id.* This suit is over whether they were appropriately compensated for off-duty work on their BlackBerrys. *Id.* The district court held that the plaintiffs had not shown that the CPD maintained an unwritten policy to deny them compensation for off-duty BlackBerry work and ruled in CPD's favor. *Id.* at 941-42. The Seventh Circuit affirmed the district court's decision reasoning that the officers did work time they were not scheduled, sometimes with their supervisors' knowledge, but did not use the appropriate means to report that extra time. *Id.* at 942. Since this was no fault of the employer in the failure to correctly report the extra time, reasonable diligence did not require the employer to investigate further. *Id.* The reasonable diligence standard asks what the employer should have known, not what "it could have known" and was the reason the plaintiffs were not successful in proving that the employer had constructive

[6] *See Reich v. Monfort, Inc.*, 144 F.3d 1329, 1333–34 (10th Cir. 1998) (discussing application of *de minimis* exemption).

[7] *See Glenn L. Martin Nebraska Co. v. Culkin*, 197 F. 2d 981, 987 (8th Cir. 1952), *cert. denied*, 344 U.S. 866 (1952), *reh'g denied*, 344 U.S. 888 (1952), holding that working time amounting to $1 of additional compensation a week is "not a trivial matter to a workingman," and was not de minimis; *Addison v. Huron Stevedoring Corp.*, 204 F. 2d 88, 95 (2nd Cir. 1953), cert. denied 346 U.S. 877, holding that "To disregard workweeks for which less than a dollar is due will produce capricious and unfair results*." Hawkins v. E. I. du Pont de Nemours & Co.,* 12 W.H. Cases 448, 27 Labor Cases, ¶ 69,094 (E.D. Va., 1955), holding that 10 minutes a day is not de minimis.

knowledge. *Id.* at 943. For these reasons, the Seventh Circuit affirmed the district court's decision. *Id.* at 946.

Jackson v. Corr. Corp. of Am., 606 Fed. App'x. 945 (11th Cir. 2015).
In *Jackson*, the court analyzed whether a librarian was entitled to overtime compensation for work done at home. *Id.* at 946. While working at home, the librarian kept no records as to the number of hours she allegedly worked, the nature of the work, when the work was completed, or "anything else that would assist a factfinder in approximating [her] unpaid overtime." *Id.* at 952. The librarian worked overtime, despite the employer's instruction to work no more than 40 hours per week. *Id.* at 947. The employer even provided the librarian with timesheets to log hours worked and tasks completed. *Id.* The court ruled that the librarian was not entitled to unpaid overtime because the librarian failed to produce sufficient evidence "to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 952.

Takeaways from FLSA Case Law for Employers
The cases above each allude to three factors upon which the courts focus in analyzing an FLSA unpaid overtime dispute for work performed away from an employee's regular place of employment and/or in excess of regular work hours.

- First, courts analyze the employer's policy regarding overtime hours and the use of smartphones, tablets, and other devices, as well as the employer's timekeeping procedures for overtime hours and technological device usage.
- Second, courts analyze the employee's compliance with the employer's overtime policies and timekeeping procedures.
- Third, courts analyze whether the employer had actual or constructive knowledge that the employee worked overtime and that he/or she was not compensated for the overtime work. If the employer did not know or had no reason to know how many overtime hours an employee worked (typically because of the employee's failure to report such hours through the proper procedure), the employer will likely not be liable for back wages and other FLSA damages.

Tips to Prevent FLSA Overtime Disputes

- To decrease the risk of liability for unpaid overtime for work done on technological devices after normal hours or away from work, employers should not provide non-exempt employees with devices and/or mechanisms that allow access to work materials away from the office.
- If non-exempt employees receive technological devices as part of their employment, be sure to establish ground rules regarding the use of such devices, as well as to clearly articulate overtime policies. Despite being extremely helpful, overtime policies banning employees from working overtime will not completely safeguard employers. If an employee works overtime against company policy, the employer may discipline the employee, but he/or she must be compensated for the overtime.
- If non-exempt employees must access work materials outside of the office or work "off the clock" via technological device, employers must be sure to establish a dependable, uncomplicated, and reasonable timekeeping mechanism to ensure

accurate records. In addition to having a reliable timekeeping mechanism, employers should enforce stringent overtime reporting policies to ensure that employees are paid wages to which they are entitled.

The Family and Medical Leave Act (29 U.S.C. § 2601 *et. seq.*)
The Family and Medical Leave Act of 1993 ("FMLA") entitles eligible employees[8] to take unpaid, job-protected leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for a maximum of 12 weeks per year.[9] An employee may exercise his/or her rights under the FMLA upon the occurrence of[10]:

1. Birth of a child, and to care with the newborn;
2. Placement with the employee of a child for adoption or foster care;
3. To care for the employee's spouse, child, or parent who has a serious health condition;
4. A serious health condition that makes the employee unable to perform the essential functions of his or her job; or
5. Any qualifying exigency arising out of the fact that the employees spouse, son, daughter, or parent is a covered military member on "covered active duty."

In addition, eligible employees of a covered employer may take job-protected, unpaid leave, or substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 26 workweeks in a single 12-month period to care for a covered service member with a serious injury or illness.[11] In certain cases, FMLA leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.[12]

An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave.[13] If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period.[14]

An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave.[15] The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.[16]

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[8] An employee is entitled to FMLA leave if he/or she has worked at least 12 months and 1250 hours before the start of the leave and works at a jobsite where 50 or more employees work within 75 miles. A telecommuting employee's jobsite is the office to which the employee reports and from which assignments are received.
[9] 29 C.F.R. § 825.100(a).
[10] *Id*.
[11] *Id.*
[12] *Id.*
[13] 29 C.F.R. § 825.100(b).
[14] *Id.*
[15] 29 C.F.R. § 825.100(c).
[16] *Id*.

Intermittent/Reduced Schedule Leave Under the FMLA (29 U.S.C. § 2612)
The FMLA also allows employees to take intermittent/reduced schedule leave:

1. Because of the birth of a child of the employee and in order to care for such child (must be approved and agreed upon between employee and employer);
2. To care for a newborn or newly placed adopted or foster care child (must be approved and agreed upon between employee and employer);
3. Because of the employee's serious health condition;
4. In order to care for the spouse, or a son, daughter, or parents, of the employee if they have a serious health condition.
5. Because of any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

An employee in need of intermittent/reduced schedule leave must work with his/or her employer to schedule the leave to ensure that the employer's operations are not disrupted. Sometimes, this may be accomplished by temporarily transferring the employee to an alternative job with equal pay and benefits that accommodates the intermittent/reduced schedule leave more effectively.

Case Law Regarding FMLA Intermittent/Reduced Schedule Remove Accommodations

Wink v. Miller Compressing Co., 845 F.3d 821 (7th Cir. 2017).

In *Wink*, the court analyzed whether an employer's rescission of its employee's FMLA intermittent leave accommodations constituted retaliation. *Id.* at 822-23. The employee "telecommuted" two days per week in order to stay at home and take care of her child with autism. *Id.*at 823. After the employer experienced financial turmoil, it demanded that the employee return to work in-person five days per week. *Id.* The employee, unable to leave her child unattended, was effectively terminated by the employer's ultimatum. *Id.* The court upheld the trial court's ruling in favor of the plaintiff, reasoning that the testimony of the employee's supervisor, who stated that the employee was considered for discharge because of her in-person unavailability, supported the reasonability of the jury's verdict. *Id.*

Reilly v. Revlon, Inc., 620 F. Supp. 2d 524 (S.D.N.Y. 2009).

In *Revlon*, the court considered whether an employer's infrequent, brief communications with an employee on FMLA leave constituted FMLA interference. *Id.* at 537. The employee, who had previously received a cell phone and laptop to work from home, answered the employer's questions regarding the location of electronic and tangible files. *Id.* at 531. The court held that the communications did not constitute FMLA interference because "passing on institutional knowledge to new staff, or providing closure on completed assignments" is a mere "professional courtesy" that does abrogate an employee's FMLA rights. *Id.* at 537.

Vess v. Scott Med. Corp., No. 3:11 CV 2549, 2013 WL 1100068, at *1 (N.D. Ohio Mar. 15, 2013).

In *Vess*, the court considered whether an employer interfered with an employee's FMLA leave by requiring the employee to perform assignments over the phone during the leave. *Id.* at *2-3. During the employee's leave, the employer called to request the employee's computer password. *Id.* at *3. The employee was also required to complete educational competencies and input data into the computer. *Id.* Some of these activities took an hour, some "a large amount of her day." *Id.* The court denied summary judgment for the employer, reasoning that the work required of the employee "exceed[ed] the limited scope of passing along institutional knowledge and providing closure on completed assignments." *Id.* at *4.

Takeaways from FMLA Case Law for Employers

The "remote workplace" enhances the availability of employees, even those on leave, which may create significant FMLA compliance risks for employers. Despite this, as *Wink* and *Vess* indicate, employers should avoid "pushing the boundaries" of the FMLA. In regards to FMLA intermittent leave, employers should attempt to accommodate their employees' needs as best as possible by maintaining an FMLA-compliant policy that does not give employees so much freedom as to disrupt work performance or allow employees to take advantage of the FMLA.

FMLA interference cases tend to turn on the nature and burden of the work asked of an employee on leave. In sum, employers should avoid contacting employees on leave altogether. However, if an employer must, a phone call to request institutional knowledge might not constitute FMLA interference. Whether an employer interfered with an employee's FMLA rights is typically a fact specific issue. For example, if an on-leave employee receives a phone call from her employer while she is visiting her dying spouse, a court would likely find that the employer interfered with the employee's FMLA rights, regardless of whether the call was to request institutional knowledge or the like.

Americans with Disabilities Act (42 U.S.C. § 12101 *et seq*.)

The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination and ensures equal opportunity for persons with disabilities in employment in Title I of the Act. The ADA was revised and expanded by the ADA Amendments Act of 2008. The ADA protects an employee or applicant who is disabled as defined by the ADA, is qualified for the position, and can perform the essential functions of the position with or without a reasonable accommodation. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position. Under the ADA, a person has a **disability** if:

- He or she has a physical or mental impairment that substantially limits a major life activity;
- He or she has a record of a substantially limiting impairment; or
- He or she establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limits a major life activity.

Employers ***must*** make reasonable accommodations to the known disabilities of qualified employees and applicants for employment who possess disabilities unless such an accommodation would result in an undue hardship to the employer. ***Reasonable accommodation*** is any change to a job, the work environment, or the way things are usually done that allows an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other individuals performing the job. The individual may suggest a reasonable accommodation based upon her own life or work experience. However, when the appropriate accommodation is not readily apparent, you must make a reasonable effort to identify one.

Undue hardship means "significant difficulty or expense incurred by a covered entity" with respect to the provision of an accommodation. Factors to consider in whether an accommodation is an undue burden include the follow:

- The nature and cost of the accommodation needed under this Act;
- Overall financial resources of the facility involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- The overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- The type of operation of the covered entity, including composition, structure, and functions of the workplace of such entity; the geographic separateness, administrative, or fiscal relationship of the facility in question to the covered entity

The key question, then, is whether working from home, working remotely, either for part of an employee's time or for the entirety of their duties constitutes a reasonable accommodation. The key issues are whether the employee is qualified for the position, the essential functions of the position, whether attendance is required, and the like.

Case Law Regarding the Provision of Remote Work or Working from Home under the ADA

Robert v. Bd. of Cty. Comm'rs of Brown Cty., Kans., 691 F.3d 1211 (10th Cir. 2012).
Plaintiff had worked as supervisor of released adult offenders for ten years when she developed sacroiliac joint dysfunction. After a lengthy leave of absence, including the period authorized by the Family and Medical Leave Act ("FMLA"), Robert remained unable to perform all of her required duties, and she was terminated. Plaintiff contended that the termination was a discriminatory violation of the American with Disabilities Act ("ADA"). "When an individual can execute the essential functions of her job from home, working remotely may be a reasonable accommodation. When a disability renders an employee completely unable to perform an essential function, however, the only potential accommodation is temporary relief from that duty." *Id.* at 1218, nt. 2 (*citing Rascon v. U.S. West Commc'ns, Inc.,* 143 F.3d 1324, 1333–35 (10th Cir. 1998)). There are factors of reasonable to consider of the reasonableness of the leave. Firstly, the employee must provide the employer an estimated date when they can resume essential duties.

Secondly, a leave request must assure an employer than an employee can perform the essential functions of her position in the "near future." The court found that, on the facts of the case, the employee could not work from home because she was unable to give an estimated time of return and would likely take too long to return to performing essential functions the job, which barred her from being a qualified individual under the ADA.

Mobley v. Allstate Ins. Co., 531 F.3d 539 (7th Cir. 2008).
An employer is not obligated to provide an employee the accommodation they request or prefer, the employer need only provide some reasonable accommodation. In *Mobley*, the court held: "we note that as a general matter, working at home is not a reasonable accommodation." The Seventh Circuit has consistently noted that working from home would only be a reasonable accommodation in an extraordinary case. *See Rauen v. U.S. Tobacco,* 319 F.3d 891 (7th Cir. 2003).

Humphrey v. Memorial Hospitals Association, 239 F.3d 1128 (9th Cir. 2001).
The Ninth Circuit stated that "working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship." *Id.* at 1136. The court concluded that working from home might constitute a reasonable accommodation for a medical transcriptionist and overruled the lower court's summary judgment ruling.

Hanlon v. Missouri Dep't of Health & Human Servs., No. 2:10-CV-04267, 2012 WL 528316, (W.D. Mo. Feb. 17, 2012).
In *Hanlon*, the court held that plaintiff's case for working at home was distinguishable from the facts of *Humphrey,* that the undisputed duties of her employment made it clear that the employee's job involved a supervisory component requiring personal interaction, and that a work-at-home option would not be a reasonable accommodation for her position. Because plaintiff's job description specified "leadership, supervision, selection, directing, and evaluation of staff" and the duties could not be completed outside of the workplace, the court held that she was not qualified (and further held that working from home would constitute an undue hardship to the employer). *Id.* at *3

Takeaways from ADA Case Law for Employers
The EEOC and some courts take the position that where work is performed is simply another policy or practice that may be subject to modification for certain positions. The courts have generally not required employers to permit employees whose positions previously required them to perform their duties in the workplace to work at home or remotely all the time. The courts are increasingly willing, however, to consider the matter – particularly in more limited circumstances. The courts are generally more receptive to allowing juries to determine whether an employee can perform their duties remotely on a part-time basis.

Whether working remotely or from home is a reasonable accommodation is extremely fact-specific and almost always requires a case-by-case determination. Where an employer utilizes entirely remote employment or working from home, the employer is likely to be required to accommodate such proper request. On the other hand, when the

essential functions of the position require attendance, an employee who is unable to come to the workplace is almost certainly unqualified or may only be entitled to leave as a reasonable accommodation.

Employers should carefully evaluate their job descriptions and note when attendance is an essential function of the job. The courts will look first to the employer's job description. If the duties listed do not require on-site attendance, working from home or otherwise performing duties remotely may be considered a reasonable accommodation. In any case, employers should engage in the interactive process with the employee to evaluate and assess possible reasonable accommodations rather than reacting precipitously to requests for accommodation.

Employer Liability for Remote Workers' Injuries

Generally, employers cannot deny workers' compensation because an employee's injury occurred away from the employer's premises or at a time other than the employee's normal work hours.[17] Please find below the general provisions of the Kansas and Missouri Workers Compensation Statutes.

Kansas

"An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work has a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic." K.S.A. § 44-508(f)(2).

"An injury by accident shall be deemed to arise out of employment only if: (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment." K.S.A. § 44-508(f)(2)(B).

Missouri

"Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident or occupational disease arising out of and in the course of employment…" Mo. Ann. Stat. § 287.120.1.

"An injury shall be deemed to arise out of and in the course of the employment only if: (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and in unrelated to the employment in normal nonemployment life." Mo. Ann. Stat. § 287.020.3(2).

[17] 82 Am. Jur. 2d Workers' Compensation § 234.

Security Issues for Remote Workers

Phishing refers to the criminal activity of sending a fraudulent electronic communication that appears to be a genuine message from a legitimate entity for the purpose of inducing the recipient to disclose sensitive information. Employees can avoid phishers by examining emails from unfamiliar sources for bad spelling and grammar and avoiding links in suspicious emails.

Ransomware refers to an attack on a computer system whereby a hacker: (1) obtains control of either the system itself or the data stored on the system; (2) locks the user out of the system or prevents access to the data; and (3) demands an amount of money in exchange for renewed access to the system or data. Employers can avoid ransomware attacks by educating employees, updating computer usage policies, and communicating with their IT department.

Employees must be trained to avoid the possible disasters that phishing and ransomware can cause. Employers benefit from employee education programs that teach cautious habits, such as not opening attachments unless the employee knows both the source and context for the email.

Employees using remote desktop technologies receive some level of natural protection from the programs' encryption of users' internet traffic. Remote desktop technologies sometimes include security patches that are configured to detect infections. Employers should ensure that remote technologies are used primarily for work purposes and permit only incidental personal use, if consistent with company policy.

Mobile Device Management

Employers should have global device management for cellphones, tablets, and other devices, especially if the devices are available for personal use. These policies must also address mobile remote desktop technologies, such as mobile VPN, PPTP, IPsec, and SSL VPN. Employers must ensure that employees can switch access technologies to connect with the VPN without security or operational concerns, especially considering some VPN services' far-from-flawless encryption systems.

Electronic Discovery and Discovery of Electronically Stored Information

Electronic discovery, or e-discovery, refers to the discovery of electronically stored information (ESI). E-discovery typically consists of the discovery of emails, text messages, instant messages, databases, structured data, drafts, files, and voicemails, among other things. Parties who reasonably anticipate potential litigation are required to preserve and retain ESI. Because e-discovery can result in the production of tremendous amounts of data, there are specific limitations to the production of ESI in the Federal Rules of Civil Procedure. Rule 26(b)(2)(B) provides that a party need not produce discovery of ESI from sources that are not reasonably accessible because of undue burden or cost. The party from whom discovery is sought must show that the ESI is not reasonably accessible because of undue burden or cost. If that showing is made, the court may still order discovery of the ESI if the requesting party shows good cause. Fed. R. Civ. P. 26(b)(2)(B).

Employers and employees, alike, should make sure to preserve all ESI in case of future litigation. Rule 37(e) of the Federal Rules of Civil Procedure provides the penalties for failing to preserve ESI. If ESI that should have been preserved in anticipation or preparation of litigation is lost due to a party's failure to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court may order "measures no greater than necessary to cure the prejudice" caused by the failure to preserve. If the court finds that the party intentionally withheld or destroyed the ESI, the court may "(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter default judgment" against the party withholding ESI. Fed. R. Civ. P. 37(e). In sum, the preservation of ESI may become a costly task, but it is required by the law. Moreover, the courts may issue damaging jury instructions directing the jury to find that the party intentionally destroyed damaging evidence if it does not preserve the data.

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FLSA OVERTIME REGUALTIONS

FLSA Basics

- Proposed in the 1930's and finally enacted in 1938.
- One of the "New Deal" pieces of legislation in response to the Great Depression.
- Why was it enacted – to fight unemployment (spread out jobs to more employees when one employee was working more than "one position")
    - Today we focus more on the overtime implications
- FLSA enacted minimum wage and overtime pay for workers
- Minimum wage: $7.25/ hour as of July 24, 2009
- Overtime: one and one-half times their regular rate of pay for all hours worked in excess of forty hours in a workweek.

Exempt vs. Nonexempt employees

Employees whose jobs are governed by the FLSA are either "exempt" or "nonexempt." Nonexempt employees are entitled to overtime pay.

Salary level test:
Employees who are paid less than $23,600 per year ($455 per week) are nonexempt.

Salary basis test:
Being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to exceptions, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. Exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee's predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a "salary basis." If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Effects of improper deductions from salary: The employer will lose the exemption if it has an "actual practice" of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting deductions; the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. If an "actual practice" is found, the exemption is lost during the time period of the deductions for employees in the same job classification

working for the same managers responsible for the improper deductions. Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions.
Safe harbor:

- has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism;
- reimburses employees for any improper deductions, and
- Makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

Job Duties Test
If an employee earns more than $23,660 per year, his or her overtime eligibility is determined by looking at job responsibilities.

As provided by the FLSA, the Department of Labor (DOL) enforces seven classes of potentially exempt workers:

- Executive Employees
- Administrative Employees
- Learned Professionals
- Creative Professionals
- Computer Employees
- Outside Sales Employees
- Highly Compensated Employees

Within each of these classes, an employee's responsibilities and role within the broader organization are considered. Each has its own specific set of rules, exceptions, and pitfalls, all of which will be explored.

Learned professionals:
Includes lawyers, doctors, dentists, teachers, architects, registered nurses (not LPN), accountants, engineers (who have engineering degrees or the equivalents and perform work of the sort usually performed by licensed professional engineers), actuaries, scientists (not technicians), pharmacists, and other employees who perform work requiring "advanced knowledge" similar to that historically associated with the traditional learned professions.

A learned profession is work which is predominantly intellectual, requires specialized education, and involves the exercise of discretion and judgment. Professionally exempt workers must have education beyond high school, and usually beyond college, in fields that are distinguished from (more "academic" than) the mechanical arts or skilled trades. Advanced degrees are the most common measure of this but are not absolutely necessary if an employee has attained a similar level of advanced education through

other means (and perform essentially the same kind of work as similar employees who do have advanced degrees).

Executive Employees:
To qualify as exempt from overtime under this exemption, an employee must complete all of the following:

- Earn more than $455/ week, or $23,660 annually
- Must have a primary duty of managing the enterprise, or "managing work customarily recognized as a department" of the enterprise
- Must manage the work of at least two other full-time employees
- Have the authority to hire, promote, or fire other – or have their suggestions be given "particular weight"

If the above activities account for the majority of the manager's day-to-day tasks, he or she should be considered exempt. While the law does not define a specific methodology for determining what an employee's "primary duties" are, the DOL seems to prefer the 50 percent or more model.

NOTE: name of the job is irrelevant. All based on duties.

Administrative Exemptions:
To qualify as exempt from overtime under this exemption, an employee must:

- Earn more than $455 per week, or $23,660 annually
- Perform office or non-manual work related to "the management or general business operations" of your company
- Be empowered to exercise their "discretion and independent judgment"

Employees qualifying for the administrative exemption do not need to manage others. That being said, they should be empowered to make decisions that can be directly tied to the performance of the business, or per the FLSA's language, "matters of significance."

Job title is a good aid in determining who qualifies for this exemption

Creative Professionals
To qualify as exempt from overtime under this exemption, an employee must:

- Earn more than $455/week, or $23,660 annually
- Perform work that requires "invention, imagination, originality, or talent" in the arts or a creative field

The DOL has considered the following exempt: actors, musicians, composers, soloists, painters, writers, novelists, cartoonists, graphic designers

Computer Professionals
To qualify as exempt from overtime under this exemption, an employee must:

- Earn more than $455/week, or $23,660 annually; **or**, if compensated on an hourly basis, at a rate not less than $27.63 an hour;
- The individual is employed as a computer systems analyst, programmer, software engineer, or "similarly skilled" position; and
- Hold primary duties that consist of systems analysis.

Rule is highly specialized and applies to programmers and engineers specifically. Job titles are listed in the legislation and are not taken lightly.

IT department does not automatically become exempt. An employee that maintains company software or troubleshoots internal issues do not qualify, even with their specialized knowledge.

Outside Sales Exemption
To qualify as exempt from overtime under this exemption, an employee must:

- Spend most of their working hours trying to make sales or secure contracts; and
- Are regularly outside of the company's offices as part of their work.

Minimum salary requirement does not apply.

This exemption only applies to salespeople who spend 50 percent or more of their working hours off-premises making sales.

Exact text of the rule: "Any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property."

Highly Compensated Employees
To qualify as exempt from overtime under this exemption, an employee must:

- Earn $100,000 or more per year;
- Primarily perform office or non-manual work; and
- Regularly perform at least one duty that classifies under the other exemptions.

Bonuses and commission can count in deciding salary for a HCE.

Will likely qualify under executive exemption as well.

<u>Notice of Proposed Rulemaking DOL</u>
Two proposed changes in March 2019.

March 7, 2019 the DOL announced a proposed rule that would change the minimum salary requirement.

- Proposal increases the minimum salary requirement for an employee to qualify for an exemption from $455 to $679/week or ($35,308 annually).
- Proposal also increases the total annual compensation for HCE from $100,000 to $147,414/ year.
- Also committed to periodic review of the salary threshold to maintain the act with the current employment standards

March 29, 2019 the DOL announced proposed rules to clarify how an employee should determine an employee's "regular rate" when determining overtime pay.

Ex: if an employee works 40 hours and makes $400 a week, the employee's regular rate is $10/hr. Easy enough. However, if that employee is provided a $100 discretionary bonus that week because the company was doing well, the regular rate remains the same. Easy, if you don't misidentify a non-discretionary bonus as a discretionary bonus. However, if the employee earns a $100 non-discretionary bonus (i.e. sales incentive plan or other bonus that the employee knows how to earn), the regular rate is $500/40 = $12.50/hr. Thus, the overtime rate increases.

Proposed rules confirm the following are excluded from an employee's regular rate:

- The cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- Payments for unused paid leave, including paid sick leave;
- Reimbursed expenses, even if not incurred "solely" for the employer's benefit;
- Reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and that satisfy other regulatory requirements;
- Discretionary bonuses;
- Benefit plans, including accident, unemployment, and legal services; and
- Tuition programs, such as reimbursement programs or repayment of educational debt.

Impact of the proposed rule changes

Who is affected by the proposed changes:

- Employees now within the threshold of eligible overtime pay
    - It is estimated that the increase will affect nearly a million Americans
- Overtime eligibility and expectations will become more transparent with the regular rate clarifications
- HCE's will be substantially affected with almost a 50% change in exemption salary
- Earliest these changes will take effect are January of 2020.

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DOS AND DON'TS OF A WORKPLACE INVESTIGATION

Employers regularly receive complaints of workplace misconduct by employees, including:

- Discrimination
- Harassment (sexual and otherwise)[1]
- Health and safety violations
- Workplace violence or threats
- Workplace drug and alcohol use
- Violations of employer rules
- Theft or fraud
- Other criminal activity

When are misconduct investigations necessary?

- When an employee complains about conduct of another employee
- When an employee files a grievance
- When an employee files a charge with the EEOC

Why are investigations necessary?

- Instances of discrimination, harassment, safety violations and accidents, and misconduct are required to be investigated by law.
- However, the safest approach is to investigate any reported or suspected claim, whether formally submitted or otherwise.

Why are misconduct investigations important?

They help determine:

- Whether the allegations of misconduct have merit
- Who was involved in the misconduct
- Disciplinary or other measures that should be taken to prevent recurrence and limit employer liability
- Preventative steps to avoid future similar incidents

The information revealed may later be used as evidence and testimony during the due process hearing, or subsequently at trial.

[1] Title VII requires an employer to investigate charges of workplace harassment. See *Wilson v. Tulsa Junior College*, 164 F.3d 534, 542-43 (10th Cir. 1998).

Besides fulfilling legal obligations, the investigation of complaints provides practical benefits as well.

- Affirmative defense to charge of harassment or hostile environment
- Limit liability for discrimination or quid pro quo sexual harassment
- Safe harbor defense for improper deductions from an employee's pay
- Limit claims relating to negligent retention
- Create a less litigious workforce
- Provides a good source of information about the complaint

Also:

- Improves employee morale
- Increases productivity (when coupled with appropriate disciplinary action)
- Reduces turnover rates
- Ends inappropriate conduct on a company-wide level

Who should conduct the investigation?

- An internal or external investigator?
  - Reasons for using an external investigator may include:
    - History between complainant and HR Manager
    - Complaint involves HR Manager
    - Complaint involves department head or elected official
    - Timing/Size of investigation
- If the decision is made to conduct the investigation internally, need to determine who will conduct the investigation
  - HR or employee relations personnel
  - In-house counsel
  - Other (like a risk management team if investigating an employee injury)
- The investigator must be experienced, well trained, impartial, open-minded, and possess insight, compassion, and perseverance
- Consider whether law enforcement should be involved
  - whether unlawful activity requires police involvement
  - legal obligations to report the conduct
  - impact of police involvement
  - media and public opinion

Planning the investigation – things to consider

- When should the investigation begin?
- Should the employee be suspended or transferred pending completion of the investigation?

- Should the complainant be offered paid leave or other accommodation pending completion of the investigation?
- Should supervisory or reporting relationship be modified pending completion of the investigation?
- How should evidence be handled?
- Who should be interviewed?
- What should be the sequence of the interviews?
- Which materials should be reviewed before interviews begin?

The investigation file should be complete, accurate, and thorough. It should include:

- A chronology of events
- List of people involved or contacted
- List of documents reviewed
- All communications with those involved
- Witness statements
- Documents that establish or refute the issue investigated
- Physical evidence
- Investigator's report
- Documentation of results or remedial action taken
- Summary of the allegation and responses
- Complete record showing the employer's prompt and appropriate action
- Do not include conclusions about credibility or the merits of the complaint
- File should only include objective, fact-finding information

After the investigation

- Assess the evidence gathered for completeness.
- Summarize the findings in a written report.
- Take action based upon factual findings, which are consistent with employer policies and procedures.

Weingarten Rights[2]

- Federal law gives private sector employees the right to join unions, have them negotiate with employers for wages and working conditions, and take group action concerning their employment, including the right to strike.

[2] See *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251 (1975).

- As a private sector employer, you may not fire, discipline or lower the salaries of employees for joining a union or exercising their collective bargaining rights.
- A union-represented employee who reasonably believes that an investigatory interview with his employer may lead to discipline has the rights to:
    - Ask for representation by a union agent
    - Ask for representation by a fellow employee
    - Forego representation and proceed with the interview without a union representative or co-worker present
- The statutory rights of employees to get assistance from a union representative are called Weingarten rights and exercising them is considered protected concerted activity under the NLRA. This right does not extend to non-union employees.
- The employer does not have to offer representation unless it is requested.

Potential Risks

- Privacy – unlawful searches
- Defamation – avoid making defamatory statements about any participant, including the accuser and accused, during the investigation that could expose the employer to liability. Avoid conclusory and unsupportable statements.
- Retaliation – avoid retaliatory conduct toward the employee who made the accusations or an employee who participates in the investigation.
- False imprisonment – employees should not be questioned against their will or confined to a room by their employer and prevented from leaving.
- Tort claims – poorly conducted investigations may result in other tort claims, such as intentional or negligent infliction of emotional distress and assault and battery.
- Prohibited practice complaints – Weingarten violations

Criminal Activity

- Many private sector employers are able to simply terminate an “at-will” employee who is charged with a crime without first investigating the alleged misconduct (especially if it happened off the clock).
    - Regardless, it is still good practice to gather relevant facts and establish a good-faith basis for discharge, in case the need arises to defend against a later charge of discrimination filed by the former employee.
    - The employment agreement or collective bargaining agreement may spell out the rights of the private-sector employee who faces discipline.

DOCUMENTING EMPLOYEE COUNSELING

One of the most common errors made by managers is the failure to document incidents of misconduct. When pressed for an explanation, managers cite "a lack of time" as the primary reason. What these managers fail to recognize is that the time saved on the front-end by not documenting an employee's poor performance, virtually guarantees a time investment five times greater on the back end. The enhanced time investment is usually spent in disciplinary and counseling sessions necessary to sustain management's recommendation to discipline the employee. The unfortunate part is that much of the wasted time likely could have been avoided with a very simple technique, the four-sentence-two-paragraph-letter "42P." And the beauty of it is that in most cases, one paragraph will be sufficient.

Employment lawsuits are often won or lost on documentation. Proper documentation helps clarify employment expectations and reduce surprises to the employee. It only takes four sentences:

Sentence 1: Include the date and briefly describe the activity and the circumstances.

Sentence 2: Summarize the position stated by management. ("We informed you …")

Sentence 3: Record the response made by the employee. ("You stated that …")

Sentence 4: Invite the employee to contact you if he/she disagrees with your summary of events or has questions. ("If I have misstated any aspect of our discussion, please contact me at ph: ( ) _____ or provide a written copy of your suggested corrections.")

You can always add more detail in a second paragraph, and in some cases you should do so. Use your best judgment. This form will cover the basics and get you started. Again, each situation must be judged on its own merits, so consider the contents of your letter carefully. If unsure, seek the advice of a colleague or legal counsel.

SAMPLE LETTER

Dear Employee:

This letter summarizes our meeting of January 1, 2018 in which we discussed your recent unauthorized absences from work. In the meeting, we informed you that you have had more than thirty unauthorized absences this year, which according to company policy warrants a three-day suspension without pay. You responded that you were aware of the policy, and would try not to have any future unauthorized absences. If I have misstated any aspect of our conversation, please contact me immediately with corrections.

Sincerely, Human Resources

MANAGER'S PREDISMISSAL CHECKLIST

(To Be Referenced Prior to Termination of Employee for Misconduct)

		YES	NO
1.	Do I have ALL the facts recorded accurately?	☐	☐
2.	Have I documented all facts and actions?	☐	☐
3.	Have I assembled the records?	☐	☐

Length of service_____.
Performance records. (Keep examples of unsatisfactory work product.)
Attendance record.
Performance review records, reflecting candid appraisals.
Discipline and warning records.
Special Action records.

4.	Is my decision based on facts, not inference, suspicion or emotion?	☐	☐
5.	Has the employee fully understood the job requirements and behavior standards?	☐	☐
6.	Have I given the employee specific information where he/she has fallen short in job performance or behavior standards?	☐	☐
7.	Has the employee received at least one written warning of possible dismissal?	☐	☐

(Where serious misconduct is involved, immediate suspension without warning may be justified. Examples: drinking or drunkenness on duty, dishonesty, theft, immoral or indecent conduct, fighting, insubordination, violation of secrecy of communication rules, sabotage.)

8.	Am I SURE the employee understood the warning?	☐	☐
9.	Has the employee had sufficient time and opportunity to correct the condition that led me to take this action?	☐	☐
10.	Has the employee had a full hearing?	☐	☐
11.	Have I considered the employee's point of view?	☐	☐
12.	Have personal difficulties or special, mitigating circumstances been considered?	☐	☐

		YES	NO
13.	Where the situation warrants, has consideration been given to transferring or demoting this employee?	☐	☐
14.	Am I sure that discharge will come as no surprise to the employee?	☐	☐
15.	Is dismissal in this case consistent with past practice?	☐	☐
16.	Would our company be able to justify treatment of this employee if he/she claims discrimination or unjust dismissal?	☐	☐
17.	Would a jury conclude that our treatment of this employee was fair?	☐	☐
18.	Has this decision been discussed with and approved by appropriate levels of higher management?	☐	☐
19.	Am I prepared to handle this dismissal tactfully and objectively?	☐	☐
20.	Have I scheduled the dismissal interview at a time that will eliminate or minimize the employee's personal contact with other employees before he/she leaves the premises?	☐	☐
21.	Have I made arrangements to notify the employee in private?	☐	☐
22.	Have I arranged for the final paycheck and am I prepared to explain the amount?	☐	☐
23.	Do I know what group life and health insurance the employee has and am I able to explain what will happen to it after dismissal?	☐	☐
24.	Is the HR Department prepared to conduct a careful exit interview?	☐	☐
25.	Have I decided what statements will be made to other employees concerning this person's discharge?	☐	☐

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RETURN TO WORK & FITNESS FOR DUTY EXAMS

Overview
Examine when you can do examinations, when you can't, and if you are going to do an examination what you need to do to make sure you aren't violating the law.

What is a fitness for duty examination?
A medical examination to determine whether an employee is medically able to perform the essential functions of their job.

What laws do I need to be concerned about in conducting fitness for duty examinations?
Primarily the ADA and the FMLA.

Fitness-for-duty examinations are sometimes required by employers in order to gauge whether an employee is able to perform essential job functions.

Federal law places several restrictions on the way the tests are conducted and what results can be used by the employer.

Fitness-for-duty examinations for prospective employees

A fitness-for-duty exam may only be given **after** a job offer has been made.

It is **strictly prohibited** to ask a prospective employee in the pre-offer stage to submit to a fitness-for-duty examination.

42 U.S.C. §12112(c)(B)(1994); 29 C.F.R. §1630.13(a)(1998)

However, an employer can make pre-employment inquiries into the ability of the prospective employee to perform job-related functions such as whether the applicant has a driver's license, is able to lift heavy objects, or is able to climb stairs.

42 U.S.C. §12112(d)(3)(1994); 29 C.F.R. §1630.14(b)(1998)

An employer is allowed to make a job offer conditioned upon the successful completion of a medical exam if two conditions are met

a. The exam must be applied uniformly to all entering employees in the same job category.
b. The medical information must be kept confidential and stored in separate medical files.

42 U.S.C. §12112(d)(3)(1994); 29 C.F.R. §1630.14(b)(1998)

Fitness-for-duty examinations for current employees under the ADA

In order to ask for a fitness-for-duty examination of current employees, the employer must have a "**reasonable belief, based on objective evidence"** that:

a. Employee's **ability to perform essential job functions will be impaired by a medical condition; <u>or</u>**

b. An employee will pose a **direct threat** due to a medical condition.

Sometimes this standard may be met when an employer:

1. Knows about a particular employee's medical condition, has observed performance problems, and can reasonably attribute the problems to the medical condition; or
2. An employer may also be given reliable information by a credible third party that an employee has a medical condition; or
3. The employer may observe symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat.

An employer **cannot** "require a medical examination or make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability"

- All you can ask for is a certification whether they can return to work and perform the essential functions of their job.
- Can't ask – what the nature or severity of the condition(s) are.
- Voluntary medical examinations and wellness programs sponsored by the employer are permissible as part of employee health programs.

However, employers are allowed to ask disability-related questions and require mandatory medical examinations if the inquiry is "job-related and consistent with business necessity."

Example 1:
A forklift driver with an impeccable 10 year record transports and stacks pallets weighing up to a thousand pounds in a storage warehouse with numerous workers on the floor.

One day the forklift driver crashes into a wall of stacked pallets, narrowly missing a co-worker. The driver explains that he felt dizzy and became disoriented, and that this had happened in the past, but not at work.

The employer believes the driver's dizzy spells may impose a direct threat and sends him for a medical examination to determine if he is fit to perform his job.

The employer provides the doctor with a description of the job to ensure an accurate determination.

This examination would be considered job-related and consistent with business necessity.

Example 2:
Several months ago, a supervisor overheard two employees talking about another co-worker, who had told them about having a serious heart condition that necessitates the use of medication and frequent doctor's visits.

The individual comes to work every day and successfully performs her duties as a computer programmer.

In this case, the employer does not have a reasonable belief that the computer programmer's ability to perform her essential job functions are impaired or that she poses a direct threat due to a medical condition.

The employer may not make disability-related inquiries or require a medical examination.

What if an employee applies for a job transfer or promotion?

The EEOC requires employers to treat these employees as if they were a job applicant. As a result, the employee may only be given a fitness-for-duty examination **after** a job offer has been extended to the applicant.

The job offer may be conditioned, however, on passing of the medical examination.

42 U.S.C. §12112(d)(3)(1994); 29 C.F.R. §1630.14(b)(1998)

What if an employee requests accommodation for his/her disability?

An employer may request documentation to substantiate the employee's need for the requested accommodation but cannot ask for unrelated documentation.

Thus, the employer cannot ask for the employee's complete medical record, in most cases.

29 C.F.R. pt. 1630 app. §1630.9 (1998)

When an employee requests an accommodation, the employee has the choice of which doctor to see.

An employer can only require an employee to go to a doctor of their choice if the information provided by the employee is insufficient to establish either:

1. that the employee is disabled; or
2. that the employee needs a reasonable accommodation.

What if an employer reasonably believes the employee poses a direct threat?

The employer is allowed to have the employee examined by a medical professional of the employee's choice.

Any medical examination must be limited to determining whether the employee can perform his/her job without posing a direct threat, with or without reasonable accommodation.

Fitness-for-duty examinations for current employees under the FMLA

An employer can request the employee to obtain a medical certificate regarding his/her serious health condition which made the employee unable to perform his/her job before returning from FMLA leave. This is usually done to ensure that the current employee is able to perform essential job functions after their return.

29 C.F.R. §825.310

Employers may implement a uniformly applied policy or practice that requires all similarly situated employees (same occupation, health-condition etc.) who take leave for such conditions to obtain and present certification from the employee's chosen health care provider that the employee is able to resume work.

The employer can only request information contained in the Department of Labor's "Certification of Health Care Provider" Form. Form information includes:

a. A certification as to which part of the definition of a serious health condition applies and the facts supporting the certification.
b. The approximate date the condition commenced and its probable duration.
c. A statement as to whether it is necessary for the employee to take intermittent or reduced schedule leave and the probable duration of such a schedule.
d. If the condition is pregnancy, or a chronic health condition, or whether the patient is incapacitated and the likely duration and frequency of episodes of incapacity.
e. If additional treatments are required, the estimated number of treatments, the interval between treatments, and the scheduled dates of treatments, if known.
f. If a regimen of continuing treatment under the supervision of a health care provider is required, a description of the regimen.
g. If medical leave is required, whether the employee will be required to be absent from work, or if not, whether the employee is unable to perform certain duties, including one or more essential functions of the job.

Intermittent Leave

- No entitlement to fitness for duty examination upon expiration of FMLA leave when leave taken is intermittent leave.

Other Requirements Under FMLA

- Uniformly applied policy
    - Uniformly applies those occupations which will be subject to fitness for duty examinations
    - Uniformly applied to serious health conditions which shall be subject to fitness for duty examinations
- Required Notices
    - FMLA paperwork provided to employee when they request leave must state they may be subject to a fitness for duty examination.

- Employee handbook must state return to work policy and include fitness for duty evaluations.
- Provide notice to employee once employer is advised of the serious health condition necessitating the fitness for duty exam that employee will be required to complete exam before returning to work.
- Consequences of failure to provide appropriate notice
  - Cannot delay return to work pending results of examination
  - Can still send them out for exam

Clarification of fitness for duty examination.

- Often necessary because certification comes from employee's doctor
- Healthcare provider employed by employer may contact employee's health care provider for clarification **with employee's permission**
- Cannot delay return to work while clarification is ongoing

What about Return to Work Situations?

Under the ADA, employers may require examinations for those returning to work from medical leave if the employer has a "reasonable belief that the employee's present ability to perform essential job functions will be impaired or that he/she will pose a direct threat due to a medical condition.

Any inquiries or examination, however, must be limited in scope as to what is needed to assess the employee's ability to work.

The examination must be tailored to:

1. the actual medical condition that caused the absence; and
2. the ability to perform the essential functions of the job.

<u>Example 1:</u>
A data entry clerk broke her leg while skiing and was out of work for four weeks, after which time she returned to work on crutches.
In this case, the employer does not have a reasonable belief, based on objective evidence, either that the clerk's ability to perform her essential job functions will be impaired by a medical condition or that she will pose a direct threat due to a medical condition.

Therefore, the employer may not make any disability-related inquiries or require a medical examination but generally may ask the clerk how she is doing and express concern about her injury.

<u>Example 2:</u>
As the result of problems he was having with his medication, an employee with a known psychiatric disability threatened several of his co-workers and was disciplined.

Shortly thereafter, he was hospitalized for six weeks for treatment related to the condition

Two days after his release, the employee returns to work with a note from his doctor, which only indicates that he is "cleared to return to work."

Because the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat due to a medical condition, the employer may ask the employee for additional documentation regarding his medication(s) or treatment or request that he submit to a medical examination.

What about drug testing and medication inquiries?

Since individuals who use illegal drugs are not protected by the ADA, employers may engage in testing for illegal drugs

With regards to medication inquiries, questions regarding their use are appropriate **only** if the employer can demonstrate that it is "job-related and consistent with business necessity."

Example:
An airline can require pilots to report when they are taking prescription medication that could impair their ability to fly, but a fire department could not require employees who perform administrative duties to report their use of medication.

Other Examples

"Job-Related and Consistent with Business Necessity"

- **Facts:** Katrina, an investigative typist in the juvenile department of the local police station, took a leave of absence due to "job-related stress." When she attempted to return, the police department requested that she take a fit for duty exam. She refused and filed suit alleging that the police department violated the ADA by requiring her to complete the exam.

- **Result:** Since the police department requested the exam in order to determine if she was fit to complete essential job functions, they did not violate the ADA. Since the environment, which allegedly caused her stress had not changed; the exam was "job-related and consistent with business necessity."

Thomas v. Corwin, 486 F.3d 516 (8th Cir. 2007)

Disability Inquiries / Reasonable and Objective Belief

- **Facts:** For the past two months, Sally, a tax auditor for a federal government agency, has done a third fewer audits than the average employee in her unit. She also has made numerous mistakes in assessing whether taxpayers provided appropriate

documentation for claimed deductions. When questioned about her poor performance, Sally tells her supervisor that the medication she takes for her lupus makes her lethargic and unable to concentrate.

- **Result:** Based on Sally's explanation for her performance problems, the agency has a reasonable belief that her ability to perform the essential functions of her job will be impaired because of a medical condition. Sally's supervisor, therefore, may make disability-related inquiries (ex: ask her whether she is taking a new medication and how long the medication's side effects are expected to last), or the supervisor may ask Sally to provide documentation from her health care provider explaining the effects of the medication on Sally's ability to perform her job.

Yin v. State of California, 95 F.3d 864 (9th Cir. 1996).

- **Facts:** Six months ago, a supervisor heard a secretary tell her co-worker that she discovered a lump in her breast and is afraid that she may have breast cancer. Since that conversation, the secretary still comes to work every day and performs her duties in her normal efficient manner.

- **Result:** In this case, the employer does not have a reasonable belief, based on objective evidence, either that the secretary's ability to perform her essential job functions will be impaired by a medical condition or that she will pose a direct threat due to a medical condition. The employer, therefore, may not make any disability-related inquiries or require the employee to submit to a medical examination.

- **Facts:** Several customers have complained that Richard, a customer service representative for a mail order company, has made numerous errors on their orders. They consistently have complained that Richard seems to have a problem hearing because he always asks them to repeat the item number(s), color(s), size(s), credit card number(s), etc., and frequently asks them to speak louder. They also have complained that he incorrectly reads back their addresses even when they have enunciated clearly and spelled street names.

- **Result:** In this case, the employer has a reasonable belief, based on objective evidence, that Richard's ability to correctly process mail orders will be impaired by a medical condition (i.e., a problem with his hearing). The employer, therefore, may make disability-related inquiries of Richard or require him to submit to a medical examination to determine whether he can perform the essential functions of his job.

- **Facts:** Bob and Joe are close friends who work as copy editors for an advertising firm. Bob tells Joe that he is worried because he has just learned that he had a positive reaction to tuberculin skin test and believes that he has tuberculosis. Joe encourages Bob to tell their supervisor, but Bob refuses. Joe is reluctant to breach Bob's trust but is concerned that he and the other editors may be at risk since they all work closely together in the same room. After a couple of sleepless nights, Joe tells his supervisor

about Bob. The supervisor questions Joe about how he learned of Bob's alleged condition and finds Joe's explanation credible.

- **Result:** Because tuberculosis is a potentially life-threatening medical condition and can be passed from person to person by coughing or sneezing, the supervisor has a reasonable belief, based on objective evidence, that Bob will pose a direct threat if he in fact has active tuberculosis. Under these circumstances, the employer may make disability-related inquiries or require a medical examination to the extent necessary to determine whether Bob has tuberculosis and is contagious.

- **Facts:** A crane operator works at construction sites hoisting concrete panels weighing several tons. A rigger on the ground helps him load the panels, and several other workers help him position them. During a break, the crane operator appears to become light-headed, has to sit down abruptly, and seems to have some difficulty catching his breath. In response to a question from his supervisor about whether he is feeling all right, the crane operator says that this has happened to him a few times during the past several months, but he does not know why.

- **Result:** The employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat and, therefore, may require the crane operator to have a medical examination to ascertain whether the symptoms he is experiencing make him unfit to perform his job. To ensure that it receives sufficient information to make this determination, the employer may want to provide the doctor who does the examination with a description of the employee's duties, including any physical qualification standards, and require that the employee provide documentation of his ability to work following the examination.

Drug and Alcohol Policies

- **Facts:** Employer adopted a new drug and alcohol testing policy that stated that prescription drugs could only be used if they have been reported and approved by a supervisor. An accounts manager refused to sign the consent form, stating that the rules invaded her privacy.

- **Result:** The 10th Circuit held that the employer's drug and alcohol testing policy violated the ADA because they failed to demonstrate that the inquiry was job-related and consistent with business-necessity.

Roe v. Cheyenne Mountain Conference Resort, 124 F.3d 1221 (10th Cir. 1997)

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REPTILE THEORY AND THE INCREASING DAMAGES

REPTILE THEORY GENERALLY:

Reptile theory is based off of the work completed by David Ball, Ph.D., and attorney Don Keenan. Specifically, it is derived from a book they authored titled *Reptile: A 2009 Manual of Plaintiff's Revolution*. The underlying premise is that if plaintiff's attorneys can tap into the fight or flight response in the brain, they can achieve higher verdicts.

The underlying basis of the reptile strategy relies on the work of Yale Medical School and National Institute of Mental Health physician and neuroscientist, Paul D. MacLean. Dr. MacLean focused on what is known as the reptilian brain. Specifically, reptile refers to the part of the brain that involves survival mechanism or fight or flight. This has continued to be refined by attorneys, as mentioned above, as well as psychologists. It has been used in successful consumer marketing campaigns such as Folgers Coffee, the Hummer SUV, and other products based on focus groups.

The theory allows plaintiff's attorneys to tap into the primitive human instinct to avoid danger. In doing so, the theory is that the subconscious level of the brain overrides the decision-making portion of the brain. The primary drive is for the jurors to choose safety and survival over rationale thought. If a juror's subconscious is focused on the danger that a case presents to them and their survival, the plaintiff's bar hopes that the response will influence the juror's decision making and create higher monetary damage awards. This primal drive is seen in reptiles in which the fight or flight response is triggered and the reptile instinctively seeks to protect itself and protect its community from danger.

Fitzpatrick v. Wendy's Old Fashioned Hamburgers of N.Y., 2017 WL 60401274 (Mass. 2017)

This Massachusetts case was based on an action for personal injuries sustained when plaintiff bit into a fragment of bone contained in a hamburger she purchased from defendant's Wendy's. On appeal, defendant filed a motion for mistrial based on the plaintiff's actions and conduct during closing argument to impart prejudice on jury into making an incorrect or biased decision. In particular, defendant argued that the closing argument consisted of multiple emotional, inflammatory and prejudicial statements; improper exhortations to the jury to deliver a message by their verdict as the "voice of the community;" requests that the jury put itself in Fitzpatrick's place in violation of the prohibition against use of golden rule arguments; impermissible expressions of personal opinions; and arguments based on facts that were not in evidence, which, in combination, worked to taint the jury's deliberations.

The Court granted defendant's request for a new trial because of the plaintiff's use of the reptile theory. They stated a lawyer uses this theory in a courtroom "to trigger a juror's fear of danger to the community as a result of a defendant's conduct." The next step is to demonstrate that the jury has the power to improve community safety by rendering a verdict, to "send a message" and reduce or eliminate the dangerous conduct. The thesis

is that once danger is suggested, the cure is fair compensation for the plaintiff to diminish the danger within a community.

USE OF THE REPTILE THEORY IN LITIGATION:

Plaintiff's attorneys who utilize the reptilian theory argue that it provides a fairer verdict outcome in order to overcome tort reform and juror bias. Consequently, books and seminars provide plaintiff's attorneys with systematic approaches to working the reptile theory systematically from the start of the case to the finish. When done right, the plaintiff's attorney utilizing the strategy effectively will immediately begin taking efforts to impart the theory on the case.

The strategy requires the creation of safety rules and a demonstration that the defendant violated a safety rule. Thus, ultimately subjecting a plaintiff in the surrounding community to needless danger. The attorney will create a scenario in which negligent conduct violates some basic safety rule. The strategy then requires counsel to show the immediate danger of a defendant's actions and how a large verdict will diminish danger in the community. This is essentially done in three main questions:

1. How likely was it that the act or omission would hurt someone?
2. How much harm could it have caused?
3. How much harm could it cause in other kinds of situations?

Based on these rules, the plaintiff's attorney will develop a theme that governs the case. The strategy requires the attorney to prepare the case from start to finish based on these rules. The focus of the case will be on the conduct of the defendant and not the injuries of the plaintiff, as a general rule. The rationale behind this is that the reptilian instinct will not be activated in the jurors unless the theme requires a specific reaction to the defendant's behavior that threatens the jurors personally or their community.

State v. Corbett, 281 Kan. 294 (Kan. 2006)

This Kansas case revolved around a woman who died from manual strangulation caused by the defendant. On appeal, the defendant argued that the prosecutor used the reptilian theory to impart bias on the jury. Throughout the trial, the prosecutor used the language "we know" or "I/we submit" to strengthen the State's case or, as the defendant viewed it, to inflame the jury by putting them in the place of the victim. Further, the prosecutor used 4 minutes of demonstrative silence to show the premeditation of the murder. The prosecutor explained how the defendant used his hands to strangle the victim for four minutes and then proceeded to be silent for the next four minutes.

The Kansas Supreme Court did not find these two tactics during trial to be an abusive reptilian or golden rule tactic. They reasoned that the prosecutor's actions did not in fact try to put the jury into the position of the victim. The Court saw the period of silence as demonstrating the length of time that Defendant's hands were on the victim's neck shows how long he had to think about what he was doing, which applies to premeditation, not the victim's suffering.

Stiles v. Demoulas Super Mkts., Mass. App. Unpub. Lexis 21 (Mass. App. Ct. 2019).

Where a motion for a new trial is premised on purported misconduct of opposing counsel, The Court will consider (1) whether the [moving party] seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave to the jury which may have mitigated the mistake; and (4) whether the error, in the circumstances, possibly made a difference in the jury's conclusion.

These four elements are analyzed by the Court together with the impact of the prejudice or bias imposed on the jury when determining whether to grant a new trial. For example, the plaintiff made improper concerning damages when the Judge had already found there was no evidence concerning future medical expenses damages. Defense counsel objected and the judge sustained, but the fact that the issue of damages was a central part of the trial severely prejudiced the jury and warranted a new trial.

GENERAL SAFETY RULES – THE REPTILE'S HEART:

The reptile case uses a thematic approach to spotlight defendant's conduct rather than plaintiff's individual harm. Consequently, the theory requires a reliance on a defendant's perceived violation of a general safety rule. This implies that the defendant's conduct endangers the entire community. Safety rules essentially shift the jury's focus away from the actual facts of the case to much larger imaginary dangers. In other words, plaintiffs avoid any sort of standard of care with precision and shoot for an overbroad or oversimplification of general safety issues. There is a general format that plaintiff's attorneys use to achieve this result.

1. The Umbrella Rule:

The deception begins by using a general "umbrella rule" to cross examine defendant's corporate representatives and defense experts. The umbrella rule will likely include the widest general safety rule that the defendant violated so as to encompass every juror's reptilian instinct. Generally, the rule will look something like this: "A [insert defendant] is not allowed to needlessly endanger the public."

The umbrella rule will generally not list a specific defendant company or even the specific industry at issue. The broader the subject, the more jurors that it can relate to. Additionally, the word "needlessly" makes the statement very difficult to disagree with. Even when a witness thinks they have handled this general umbrella question well, their answer can often be fatal for defense's case. For instance, when asked whether or not a defendant should needlessly endanger the public, a common response might be that products or conduct should be as safe as possible. However, this phrase will quickly be turned against a defendant describing the conduct or product as clearly not being as safe as it can be. Therefore, if the conduct or product is not as safe as it can be, the defendant is needlessly endangering the public and, therefore, violating the general umbrella rule.

2. Safety Rules and Specific Targeted Case Issues:

After establishing the umbrella rule, it is common to further lead to questions related to the specific case. This is designed to show that the defendant has, in fact, needlessly endangered the public. Safety rules will generally be overbroad and make the defendant appear foolish. Jurors generally want clear boundaries that delineate right from wrong, good from bad, even if they are not particularly relevant. Some examples of this general theory would be to confirm that if a defendant has not created a product that warns of a specific danger, or if a defendant has engaged in general conduct that creates a risk of serious injury or death, the defendant has needlessly endangered the public. There are general guidelines crafted by Ball and Keenan for creating irrelevant rules in every case. Examples are as follows:

A. **The Rule Must Prevent Danger**

1. It must protect people in a wide variety of situations so as to gather all the jurors in a general consensus.

2. It must explicitly state what a person or defendant must or must not do.

3. The rule must be practical and easy so that someone in the defendant's position could have followed it.

4. The rule must be one the defendant has to agree with or reveal himself as stupid, careless, or dishonest for disagreeing with it.

These general and broad rules are designed to spread the element of danger throughout the case. They lend themselves to analogies that might involve members of the jury. Therefore, a product is not simply about the use of a particular incident, but a general hazard to anybody sitting in the jury box. Similarly, a trucking accident is not based off of the truck and the car involved in the case, but is a danger to the juror as that person drives home and sees a semi during trial.

Effectively used, the reptile theory makes every rule violation appear pre-meditated. The effective plaintiff's attorney will make the jury believe that the company knew about the danger but chose profits over safety. Once a witness agrees with a general rule and ratifies the rule in an oversimplified analogy, it renders the danger uncontested. This creates the fight or flight response in the jury's subconscious.

3. The "Gotcha" Questions:

After establishing broad safety rules as discussed in Section 2. above, the reptilian theory does its real damage with the hypocrisy paradigm questions. These questions are designed to make a defendant look like a liar. Or if not a liar, it will force an admission of fault. For instance, if a Safety Manager approves of conduct of its employee, it must be allowing dangers to pervade society. Whereas, if the Manager does not approve of the defendant's or employee's conduct, the Safety Manager has undercut the conduct of its employee. Consequently, in either event, the actions of the employee/defendant have

created an unreasonable danger to the community at large including every juror sitting in the jury box.

4. Changing the Standard of Care:

Effective plaintiff's counsel will create a scenario in which there is only one way to act. That is in the safest manner possible. If there is a deviation from acting at the safest level possible, such a choice was intentional, profit motivated and creates an undue danger to each and every juror hearing the evidence. When establishing plaintiff's standard of care in this way, industry standards are irrelevant. The only allowable choice turns out to be the safest choice. Perpetuation of fear allows jurors to impose higher standards of care on defendants when defendants have the opportunity to control bad outcomes. Nothing could ever be an unfortunate accident because the accident might happen to the juror. The reptilian brain is engaged, and the burden of proof replaced.

Fyffe v. Massachusetts Bay Transportation Authority, 17 N.E.3d 453, 455 (Mass. App. Ct.)

A new trial was warranted in a trolley rider's action against the transportation authority and an operator due to injuries sustained from a trolley collision, as consideration of errors by her counsel in their totality, including her counsel's multiple improper statements during opening and closing, as well as counsel's willful disregard and defiant challenge of the judge's explicit rulings, injuriously affected the substantial rights of defendants and deprived them of a fair trial. Courts do not view favorably any attempt "to play fast and loose" with the judicial system. Too often a lawyer loses sight of his primary responsibility as an officer of the court. While he must provide "zealous advocacy" for his client's cause, courts encourage this only as a means of achieving the court's ultimate goal, which is finding the truth. Deceptions, misrepresentations, or falsities can only frustrate that goal and will not be tolerated within the judicial system.

DEFENDING AGAINST REPTILE THEORY:

1. Choose the High Ground:

Traditionally, defense attorneys have been slow to react to plaintiff's themes. This is true with reptile theory as well. Most defense opening statements begin with a narrative about how good the corporate citizen is sitting in the defense chair. Then quickly moves to an acknowledgment but refutation of plaintiff's allegations. Thus, creating an unintentional landmine for the defense.

This defense plays into the reptilian theory by creating the defendant as the central focus of the case. It inherently creates the proposition that the general danger that presents itself to the jury can be punished by a verdict against the person sitting in the defense chair. In order to combat this, defense strategies need to include a good offense.

Jurors want to make decisions they feel good about. Jurors are everyday people which is something that an attorney needs to keep at the forefront and center in his or her mind.

A juror has to care about the trial's outcome. Therefore, defendants must combat reptilian theory by using emotion to their advantage. Defense counsel should create affirmative themes that present a competing and compelling case theory with its own unique psychological satisfaction.

Where possible, defendants can focus on personal responsibility, for instance. Where possible, a defense theme should focus solely on the theme chosen—take a plaintiff's personal responsibility for example—and ignore superfluous arguments or facts focus on what provides the positive emotional reaction to counteract the attempted negative reaction being perpetuated through plaintiff's reptile theory.

Davis v. Florida, 473 U.S. 913, 913-15 (1985).

As the United States Supreme Court has held, the right to an impartial jury also encompasses the right to take reasonable steps designed to ensure that the jury is impartial. To allow plaintiff to make these "reptile" arguments would be to violate this constitutional right as general fear invoking arguments urge a jury to award damages for potential harm. Plaintiff's counsel's attempts at "reptile" argument go beyond the scope of alleged damages suffered by plaintiff and urges for the recovery of potential damages, violating defendant's due process right to an impartial jury and a fair trial.

2. Evidentiary Challenges:

Ball and Keenan in their book about reptile theory devote approximately 60 pages to defeating Golden Rule challenges. This is because, generally, reptile theory has little to do with the actual case facts and more to do by impelling the juror to protect himself and the community. Consequently, in order to successfully challenge reptilian theory, the trial attorney will need to file Motions in Limine which are focused on deposition topics covered with key witnesses.

Specifically, any questions related to how dangers can affect the community should be cobbled together to create a theme before the court. Point out that in order to prevent the danger, plaintiff has focused on diminishing the danger to the community by monetary damages. Additionally, if a plaintiff's counsel spent time developing a theme that this harm could be translated to other situations, this type of evidence should be presented to the court as evidence of reptilian theory.

In fact, every opportunity the plaintiff takes to underscore the community safety aspect should be referenced in some way, shape or form in a Motion in Limine. When using these types of examples to underscore plaintiff's strategy, a court will be more readily convinced that plaintiffs are attempting to present the traditional Golden Rule argument. Though Motions in Limine generally are not favored for purposes of controlling argument, the effective defense attorney will explain that the evidence being restricted is that of the community and general safety issues related therein. In other words, the defense strategy is to limit evidence not specifically linked to this case.

Even still, Motions in Limine are often effective when attempting to limit arguments that the plaintiff wants to send a message to the defendant. Unless punitive damages are specifically allowed in the liability phase in the particular jurisdiction you are in, sending a message is inappropriate. In this same way, an effective defense attorney can attempt to file Motions in Limine to limit the presentation of evidence that plays on the juror's passions, prejudices, or sympathies.

Even if these particular Motions in Limine are not granted, a defense attorney has effectively begun to educate the court on plaintiff's tactics. Therefore, the court has become primed prior to trial to listening to objections by the defense in order to limit argument created by plaintiff either in opening statement or in closing argument to the jury that attempts to sell the jury the reptilian theory.

Wahlstrom v. LAZ Parking Ltd. LLC.,

Defendant was accused of sexually assaulting two women in the same parking garage 12 days apart. During trial, Plaintiff's counsel used several sneaky tactics to try to include evidence or examples that the Judge had refused to allow at trial. The defendant had their Motion in Limine granted on various pieces of evidence and the plaintiff trying to include those excluded pieces were viewed as a way to impart bias on the jury based on the reptile theory.

The Court reasoned that the clear violation of Court decisions on evidence and the plaintiff trying to tactically include those excluded pieces of evidence prejudiced the jury and did not allow a fair trial for the defendant. This resulted in the Court ordering a new trial.

CONCLUSION:

The reptilian theory is innately understandable when presented to a jury. The ability or lack thereof to keep one's self or family or community safe is something that a juror will immediately tap into. Often times, people tend to determine what result they want and then use logic to work backwards to justify their conclusion. Consequently, cutting off reptilian theory early on in the case should be every defense attorney's strategy. Once the reptilian theory creeps its way into the juror's subconscious, it is nearly impossible to overcome the fight or flight response. Effective defense counsel, therefore, must be vigilant and watchful for the reptilian theory.

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TRENDS IN RETAIL LIABILITY

I. Technology

As technology changes, so do the types of liability exposures for businesses. Technological advances can reduce the risk of expensive lawsuits for businesses, but the opposite is also true. As more marketplaces open up, new theories of liability begin to develop. There are two fields in which the legal landscape is rapidly changing as a result of technology: online shopping and video surveillance systems.

Online Shopping

E-commerce is a field that is rapidly growing. E-commerce in the United States grew by roughly 16% over the course of 2017 and continues to grow every day. Amazon accounts for approximately 40% of the revenue that is generated via ecommerce, but there is still plenty of room in the market for competition to flourish. By 2020, e-commerce is expected to reach 15% of all retail sales, as brick-and-mortar stores shut down.

General Trends in E-commerce

- E-commerce peaks in November and December, with the most revenue generated on Black Friday and Cyber Monday, between 4 and 5 PM. On the other hand, February is the slowest month, because of the end of the holidays.
- It is common for customers to start a purchase on a mobile device and finish it out on a desktop computer or laptop—this makes it important to have an online store that is optimized for both desktop computers and for mobile devices.
- Shopping cart abandonment occurs in about 75% of online transactions. However, this does not mean that the sale is lost, as websites can send follow-up emails, and cookies can track the purchase. These cookies can be used to generate suggested shopping options for the consumer, and targeted advertising on social media and other sites can be utilized based on the products that consumers look at purchasing.
- Customers are not shy about buying things online—the average purchase in 2017 was around $227. However, this number goes down towards the end of the month, as consumers tend to prioritize bills as they wait for their next paycheck.
- M-commerce (mobile commerce) is also growing at a rapid rate—by 2020, m-commerce is expected to make up 45% of the U.S. e-commerce market, accounting for a staggering $284 billion of sales.
- Social media can potentially have a substantial impact on e-commerce—the average person spends roughly two hours per day using social media platforms, and teenagers can spend nine or more hours using them. About 76% of consumers view content posted by other consumers as being more trustworthy than advertisements—so this means that social media posting by consumers can drive the market. Using social influencers can be a useful tool for certain brands, as certain groups are heavily influenced by this form of marketing.

Liability and Online Shopping

In 2015, *Earll v. eBay, Inc.* a federal case out of the 9th Circuit, dealt with the issue of whether or not the Americans with Disabilities Act applies to eBay—the court ruled that it did not, as eBay's services are not connected to any "actual, physical place." *See Earll*

v. eBay, Inc., 599 F. App'x 695 (9th Cir. 2015). This case is just the tip of the iceberg, however—some courts have concluded that the ADA should apply to online marketplaces, and other courts have come to the same conclusions as the 9th Circuit. *See*, *e.g. Gil v. Winn Dixie Stores, Inc.,* 242 F. Supp. 3d 1315, 1316 (S.D. Fla. 2017) (stating that the Plaintiff alleged a sufficient "nexus" between the online website and physical store to have a compensable claim). This issue is an exemplar of the issues that need to be addressed with regards to liability and online shopping.

One main concern regarding liability and online shopping is that products that are sold in e-commerce can lead to injuries. This could be either due to misuse by the consumer, or if the product is defective in some way. There are three main types of products liability claims, and all of them could apply in an online marketplace: design defect claims, manufacturing defect claims, and marketing defect claims. Design defects are defects that are inherent in a product, even if the product is manufactured perfectly to specifications. Manufacturing defects are defects in which an individual product is damaged, as a result of something that happened during the manufacturing process. Marketing defects are defects with warnings on products or failures to warn about latent dangers in a product. All of these defects can greatly impact an online business's exposure to liability. One of primary ways to help remediate problems that arise as a result of e-commerce is by purchasing insurance.

Online Shopping and Insurance

E-commerce businesses face challenges that brick-and-mortar stores do not. As such, these businesses need unique types of insurance options in order to address these problems. There are two main types of insurance that an online business can obtain which are relatively unique to e-commerce: data security insurance and business interruption insurance. Data security insurance plans protect companies if there is a security breach that results in potential exposure to liability for the company; business interruption insurance insures companies if a third-party provider has an issue which prevents business from continuing as usual, and this type of insurance allows the company to potentially recover lost profits.

Other Ways to Limit Liability in the Online Marketplace

- Sell only products from trusted vendors who make high quality products.
- Make sure to provide thorough and accurate descriptions of the products that are being sold, both online and on the product itself or its packaging.
- Make sure that your products comply with consumer protection regulations that are in place within your jurisdiction.
- Ensure that the website used as a point of sale has an up-to-date and thorough page dedicated to the terms and conditions associated with purchasing the product.

Video Surveillance Systems

With the advent of video surveillance systems such as Ring and Nest, video surveillance is in the forefront of social consciousness more than ever before. In the context of businesses, video surveillance systems are rarely required by law, but have a mixed effect on liability.

Relevant Legal Principles Related to Video Surveillance

- Property owners owe tenants some duty of reasonable protection, in specific instances. This can apply differently in many various contexts but should be considered. Installing cameras can lead to a property owner assuming a duty to protect, so the purpose of the cameras must be clearly displayed to prevent liability from video surveillance if possible—for example, a sign stating "video cameras are installed, but not monitored" could help limit liability.
- There are some instances where video surveillance is legally required—for example, some jurisdictions require ATMs to have video surveillance at all times. In general, though, businesses will generally opt-in to video surveillance if they want to reduce property damage or to reduce the chances of crimes being committed on the premises.
- As a general rule, installing cameras can expose a property owner to a greater degree of liability—but this applies to any security measures, not just cameras. If a security measure appears reasonably related to the protection of consumers, then the property owner may be exposing themselves to liability. A way to "have your cake and eat it too" would be to have covert cameras—if the consumer doesn't know that a camera is there, then they can't reasonably rely on it. This means that the property owner can monitor the premises, but not be exposed to greater liability. This is becoming more common as cameras become smaller and easier to hide and is probably a good option for any business that is concerned about both security and liability.
- It is also important to look at the area where a property sits. Property that is in high-crime areas must be protected, by law, with greater degrees of security than property in relatively safe areas.

General Trends in Video Surveillance Technology

There are several major changes that are happening in the field of video surveillance. One of the major developments is the rise of greater embedded video analytics. Cameras that are on the market today may have features such as built in motion detection, face detection, and object detection. These cameras can analyze this data immediately, rather than transfer it to a server—this allows for faster processing of the data. To speed things up even more, cameras can record at a low frame rate until something triggers them, at which point the camera will increase the resolution and record a high-quality video—this allows for faster transmission of data, and greater data efficiency.

High end software is likely to use cloud computing—meaning that the data is stored in the cloud, rather than in the device itself. This is highly efficient, because it means that data can be stored in one central location. This also increases the amount of storage that is available. However, there are some security risks involved in cloud computing, in that it opens up the door for hacking. However, with adequate protections in place, data breaches can most likely be avoided.

The use of forensic video analytics as a service is on the rise as well. Using traditional methods, a trained individual can analyze an hour of video in about two hours—this is highly inefficient and can be expensive for companies. However, the development of new deep learning technology (technology that uses algorithms to process data in a way

similar to how the human brain works) has enabled data analytics to become much more streamlined and accurate. At the moment, using these types of data analytics is expensive, due to prohibitively high hardware costs, but it is projected to become much more accessible in the near future. Companies can purchase service packages from companies rather than conduct the analysis themselves, which can potentially be a more effective way to conduct video surveillance analysis.

II. Small, Independent Shops vs. Large Retailers

Small, independent shops and large retailers have different concerns when it comes to the liability that they are exposed to, as well as the methods that they can utilize to minimize their exposure. As a preliminary matter, it is important to consider what makes a business a "small business" and what makes a business a "large business." As a general rule, there a few different ways to measure the size of a business. The two main ways to determine how to classify a business's size are to look at the number of employees that are employed by the business, or to look at the business's total sales within a defined period of time. There is no clear line between small and large businesses, but the U.S. Small Business Bureau does not consider a business with more than 500 employees or generates more than $7 million in receipts to be a small business.

Differences in Liability Between Small Shops and Large Retailers

The legal structure of small shops are typically radically different from the legal structures that large retailers generally employ. Smaller businesses are generally sole proprietorships, partnerships, or LLCs. On the other hand, large retailers will generally be corporations, LLCs, or other similar structures. This has significant ramifications when it comes to the kinds of claims that can be pursued against them. As a general rule, sole proprietorships have full personal liability for the principal, and partnerships can be liable for the acts of their partners. LLC (as well as LLPs, LLLPs, etc.) and corporations have limited liability, as well as protection via the business judgment rule. This means that these types of business entities have increased protection from exposure to liability.

There are a few other salient differences between the potential liabilities for a "big box" retailer and a "mom and pop" store, particularly in the area of premises liability. All store owners, regardless of the size of the store, can be liable if they fail to maintain reasonably safe premises and an injury occurs on the premises. Store owners can be liable if they knew or should have known that there was a dangerous condition (such as a wet floor) and failed to remedy it. While on the surface, this may seem to effect mom and pop stores and big box retailers equally, in practice, this is not the case. This is because big box retailers are corporate entities, with greater knowledge of potential areas in which they can be exposed to liability and are effectively "on notice." At these retailers, there are likely to be corporate policies and procedures that should be followed, and a failure to follow these policies can, in theory, expose these companies to greater liability.

There are also concerns with big box retailers and the distraction doctrine. Essentially, the distraction doctrine states that if a plaintiff fails to discover a hazard as a result of a distraction that is attributable to the defendant, then the defendant may be liable. This applies more so to big box retailers than mom and pop stores—stores like Walmart tend

to have gaudy displays, or televisions that have advertisements on them. If a customer slips and falls as a result of one of these displays, the retailer may be liable to pay out damages. However, it is important to note that the distraction doctrine is a relatively weak doctrine—there are many restrictions on its use that make it difficult for the plaintiff to prove that there was a sufficient distraction to merit the use of the doctrine.

Interchange Fee Litigation

Interchange (or "swipe") fees are fees that accrue to a merchant's bank account whenever a customer uses a debit or credit card to make a purchase. These fees go to the bank that issued the credit or debit card and are used to cover various costs incurred by the bank. Several factors contribute to how large the interchange fee will be for a particular business—the size of the business (larger businesses pay lower fees due to having "clout"), the industry that the business operates in, the card type (cards with PINs incur less fees because of lower risk), and the transaction type.

In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig. 330 F.R.D. 11, 37 (E.D.N.Y. 2019)

The largest settlement of a U.S. antitrust case happened in 2018—and the case was all about these interchange fees. Visa and Mastercard agreed to pay out over $10 billion to more than 12,000,000 merchants, as a result of their illegal inflation of swipe fees. In the case, *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.* the massive settlement was approved, on the grounds that the defendants had violated the Sherman Act, the Clayton Act, and engaged in other unfair business practices that violated California law. The class that was entitled to compensation was defined as follows:

> [A]ll persons, businesses, and other entities that have accepted any Visa-Branded Cards and/or Mastercard-Branded Cards in the United States at any time from January 1, 2004 to the Settlement Preliminary Approval Date, except that the Rule 23(b)(3) Settlement Class shall not include (a) the Dismissed Plaintiffs, (b) the United States government, (c) the named Defendants in this Action or their directors, officers, or members of their families, or (d) financial institutions that have issued Visa-Branded Cards or Mastercard-Branded Cards or acquired Visa-Branded Card transactions or Mastercard-Branded Card transactions at any time from January 1, 2004 to the Settlement Preliminary Approval Date." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,* 330 F.R.D. 11, 37 (E.D.N.Y. 2019).

This class is astoundingly large. The class members that chose not to opt out of the settlement are to receive a pro rata share of the fund based on the interchange fees attributable to their accounts during the time frame in question.

What this means in practice is that while interchange fees are legal, they can't violate antitrust laws or be substantively unfair. This massive settlement has been officially

approved as of 2019 and may change the way that interchange fees work going forward.

III. Product Liability

New products always bring new problems when it comes to product liability claims. As technology advances, there are new legal concerns that arise that couldn't have even been conceived of a few years ago. A few areas where product liability claims are becoming more common are self-driving cars, 3D printers, and medical device cybersecurity. Additionally, more states are beginning to approve of the theory of innovator-liability. Innovator-liability theory is a theory that is used in pharmaceutical cases, where plaintiffs contend that a brand-name manufacturer of a drug owes a duty to warn plaintiffs about risks shared in common with generic versions of the drug. Any product that can cause personal injury, property damage, or economic loss can expose a business to potential liability. In 2016, juries awarded $7.07 million in damages on average in products liability suits, and this number appears to only be going up. Product liability lawsuits can be based on strict liability, breach of warranty, or negligence.

There has been a recent uptick in talcum powder litigation in Missouri—especially in St. Louis. For example, one plaintiff alleged that her use of talcum powder caused peritoneal mesothelioma as a result of the asbestos in talcum powder. *See Douglas v. Imerys Talc Am., Inc.,* 4:18CV1141 RLW, 2019 WL 626427, at *1 (E.D. Mo. Feb. 14, 2019). The plaintiff in *Douglas* alleged "strict liability, negligence, willful and wonton misconduct, and conspiracy." *Id.* There have also been class actions filed against major talcum powder manufacturers in Missouri, on the theory that talcum powder causes ovarian cancer. *See Kannady v. Johnson & Johnson,* No. 4:19CV292 RLW, 2019 WL 954816, at *1 (E.D. Mo. Feb. 27, 2019); *see also Hittler v. Johnson & Johnson*, No. 4:18-CV-1474-SPM, 2018 WL 4333549, at *1 (E.D. Mo. Sept. 11, 2018). All of these cases have been either dismissed, stayed, or remanded at this point in time—at the federal level.

On the other hand, the City of St. Louis has granted sizable awards for talcum powder cases. For example, in the case of *Estate of Fox v. Johnson & Johnson*, a $74 million verdict was overturned by the Eastern District. 539 S.W.3d 48, 49 (Mo.App. E.D. 2017). This case originated in St. Louis. In 2018, there was a $4.6 billion verdict in St. Louis against Johnson & Johnson—this case has not yet been decided on appeal. *See GAIL INGHAM, ET AL. v. JOHNSON & JOHNSON,* 18 N.W.P.I.Lit.Rpts. 268. Largely in response to this, Missouri passed SB 7. SB 7 is intended to break up class action lawsuits in cases like this into smaller lawsuits and also to prevent non-Missourians to join in these lawsuits. In general, the intent was to make it more difficult and expensive for these cases to be brought.

Defective Products and Recalls

As a general rule, product liability claims are becoming larger, and product recalls are increasing in both frequency and scope. One major trend in the industry regarding defective products is the use of apps in order to facilitate the spread of recall information. For example, the USDA integrated food recall information into its app, FoodKeeper, in 2017. Many private businesses are following suit. There is also a trend toward customized recall alerts—consumers want recalls information that relates directly to their

needs and interests. There is also a rise in direct notification of recalls—this means that only the customers who purchased a specific product will get notifications, rather than blanket recalls that many consumers tend to ignore.

Breakdown of the Stericycle Recall Index Findings

- Automobile related recalls were primarily for airbags and service brakes.
- Pharmaceutical recalls were primarily for failed specification. cGMP deviation was the top cause for recalled units. Four companies reported at least five recalls each this quarter—the highest since 2013. The overall number of recalls decreased by 7.8%, but this number is still higher than 19 of the past 21 quarters. The total number of recalled units, however, decreased by 75.3%, which is lower than 6 of the 9 last questers.
- Medical device recalls had an average size of 823,126, which is the highest since 2006. Over half of the recalls were for quality issues, and most of these recalls were for one product. However, no individual company reported more than ten recalls for the first time in two years.
- The bulk of food and beverage recalls were due to undeclared allergens, at 38.4% of recalls, and at 98.1% of units. Foreign materials were the top cause of USDA recalled pounds, and the most common foreign material was plastic, which was found in 40% of recalled pounds. The biggest category of recalled food was prepared foods, at 98.1%.

The Law on Recalls

Recalling, or failing to recall a product can be illuminating on the defending business's attitude toward the product. *State ex rel. Ford Motor Co. v. Messina,* 71 S.W.3d 602, 608 (Mo. 2002). Recalls do not create a cause of action for a negligence per se claim—they are merely evidence that can be entered in order to attempt to prove negligence. *Id.* Furthermore, a recall does not necessarily establish causation in a product liability case either. *See Thacker ex rel. Thacker v. Kroger Co.,* 155 Fed. Appx. 946, 948 (8th Cir. 2005) (Stating that "The district court correctly notes that Missouri courts have yet to address whether the mere existence of a recall establishes causation in products liability cases"). If a business is aware of a malfunction and fails to recall it, punitive damages can be awarded to the plaintiff(s). *See Martin v. Survivair Respirators, Inc*., 298 S.W.3d 23, 36 (Mo.App. E.D. 2009).

IV. Personal Injury

Personal injury law is developing alongside technology. Some of the new fields in which personal injury law is being utilized are with regards to ridesharing services (such as Uber), drone usage, and cell phone usage while driving.

With regards to ridesharing services, there hasn't been much case law on the subject of personal injury lawsuits and ridesharing—however, there have been cases which have held ridesharing services liable for other torts. *See Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 791 (N.D. Cal. 2016) (holding that respondeat superior liability is possible for a sexual assault committed by an Uber driver) *Doe* and cases like it have opened the door

for respondeat superior liability for ridesharing providers, such as Uber and Lyft. This means that if an individual is injured as a result of the negligence (or worse) of a rideshare provider, that individual may be able to recover damages as a result of their injuries.

As drone technology progresses, these devices see more use in the public sphere. One case illustrates the potential problems associated with this. In *Philadelphia Indem. Ins. Co. v. Hollycal Prod., Inc.*, the plaintiff was hit in the eye by a drone. No. EDCV18768PASPX, 2018 WL 6520412, at *2 (C.D. Cal. Dec. 7, 2018). The drone was being piloted in order to take photographs of a wedding. *Id.* In this case, the court found that the insurance company had no duty to defend the defendant, because there was an exemption in the policy for injuries caused by aircraft, and the drone was found to be an aircraft. *Id.,* at 4. This case law will continue to develop as drones become more common.

One issue concerning cell phone usage and personal injury cases is whether or not punitive damages can be awarded for individuals who use their cell phones while driving. Most courts say no. *See Fuller v. Finley Res., Inc.,* 176 F. Supp. 3d 1263, 1267 (D.N.M. 2016). In certain negligence and personal injury claims, the fact that a defendant was talking on the phone while driving (thus causing an accident) can be viewed as an aggravating factor, or evidence of negligence (or worse). *See Davis v. Automatic Food Serv., Inc.,* No. 2:14CV308-MHT (WO), 2015 WL 7455544, at *3 (M.D. Ala. Nov. 23, 2015) (Stating that *'*A reasonable jury could find that abruptly stopping on a wet road with two-way traffic while talking on a cell phone is 'inherently reckless conduct' and therefore constitutes wantonness.") The advent of cell phones has brought many changes to the world, and personal injury law will also have to develop as a result of these changes.

V. Cyber Liability

In 2018, cybercrime was estimated to cost American businesses over $400 billion dollars. Cyber risks have broken into the top three risks that risk officers are concerned about, and over 70 insurance carriers have entered the market with cyber insurance policies. Because of the increasing prevalence of these cyber-attacks, and because of the huge potential losses that can be caused by them, it is important to be educated on how these breaches can happen. Furthermore, it is just as important to know what can be done to prevent them—or, at the very least to mitigate the damage caused when a breach does end up happening.

Data Breaches

With the advent of cloud computing, data breaches can happen on a much larger scale. Cloud computing is highly efficient—it allows businesses to store massive amounts of data at a low cost. But, for a cybercriminal, cloud storage can be a goldmine of information. It is important to ask: who owns the data in the cloud? The answer is not cut and dry. In general, who owns the data in the cloud depends on the contract between the company providing the storage in the cloud and the company contracting to use the cloud.

It is also important to understand the concept of "The Internet of Things," or IoT. Essentially, the IoT is a network comprised of all of the different devices in a business or home that are connected to the internet—phones, security alarms, refrigerators, and more may be connected to the internet. As such, any of these devices on the IoT can be hacked, and sensitive data may be stored on these devices.

Following the Equifax breach of 2017, many consumers became acutely aware of how vulnerable they really are to data breaches. Now, so many different entities have access to most of the population's personal information—their cell phone numbers, social security numbers, address, and more. In light of this breach, and others like it, more businesses, even small businesses, are obtaining cyber insurance to protect themselves from these types of breaches.

There are also growing concerns with regards to supply chain liability. If companies rely on outside vendors in order to make money, they open themselves up to potential liability if anyone along the chain gets hacked. Contractual language and cyber policies are becoming more sophisticated in order to deal with concerns of liability for these breaches but is crucial to be aware of the possibility that a breach can happen at any point in the supply chain, resulting in potentially serious data compromises.

Institutions at Risk of Cyber Attacks

- In 2016, at least 12 healthcare institutions documented being the victim of a "ransomware" attack. Ransomware is a type of malware that encrypts data until a certain amount of money is paid out to the hacker. Because of the high risks associated with the healthcare industry, and because of the relatively weak cyber security measures taken by healthcare providers, these types of entities are becoming targets for ransomware and other malware. An average security breach in this industry takes more than $1,000,000 to resolve, and yet most providers only spend about 10% of their IT budget on security. In order to combat this, some organizations have a stockpile of bitcoins available so that they can quickly pay off the individuals who breached their system. There are also reported instances of hackers stealing personal information of patients and attempting to sell it for profit. The OCR released new HIPAA guidance in 2016 which states that when ransomware leads to personal information leaks, a data breach has occurred—this can have legal ramifications for the healthcare institution. Providers can protect themselves from liability by following various measures that are approved by HIPAA.
- Unsurprisingly, financial institutions are also common targets for cyber attacks. Mobile banking is growing, and with this growth comes security concerns for consumers. Blockchain is currently being implemented in by many institutions in order to deal with a variety of different security concerns, but this is not a complete solution. After a major breach in 2016 that cost a Hong Kong company $72 million, many financial institutions have decided to buy cyber insurance and also began stress testing their existing coverage.
- Several major manufacturing and transport industries have experienced major breaches in the past few years. In 2014, hackers gained access to a steel plant's blast furnace, and forced it to stay on, resulting in massive damage to the plant. There

are also concerns with self-driving cars being hacked—and, in 2015, a Tesla car in autopilot mode collided with a big rig, resulting in heavier regulation on these types of cars. There have also been similar situations with airlines, marine shipping, and railway systems, with hackers targeting the digital equipment of these vehicles, resulting in lost control.

- Retailers are also at risk—there have been many high-profile data breaches at many retailers. Many of the largest breaches have targeted these retailer's Point of Sale (POS) systems, stealing unencrypted data from the POS system instantaneously. To limit liability, retailers need to make sure to use a multi-tiered approach that secures these transactions.
- Utility companies that operate nuclear power plants are also at risk of cyber-attacks. The utility sector has to deal with individuals who are financially as well as politically motivated. Oil and gas companies were the second most targeted type of companies in 2015, representing 15.5% of the attacks that year. These cyber-attacks are especially risky, because they can cause bodily injury, environmental damage, property damage, as well as interruption of business on a global scale.

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NUCLEAR VERDICTS IN TRUCKING CASES

What is a nuclear verdict?

- Verdict of more than $10 million
- Verdict of less than $10 million, but special damages that suggested a verdict of less than $50k

Recent Nuclear Verdicts

Blake et al. v. Ali et al. - Werner Enterprises – Texas - May 17, 2018

$89.6 million judgment for fatal accident near Odessa, TX where a pickup truck lost control, crossed the median and hit a Werner semi-truck.

- 7 year old died, 2 other children and the mother were also hurt.
  - Werner truck was driven by a student driver with an instructor in the cab
  - Driver of the Werner truck was operating below posted speed limit, did not lose control of the truck and brought it to a complete stop after impact – driver also did not receive a citation nor did investigating officers find the driver culpable
  - Plaintiff's attorney asserted driver knew the weather conditions and should have either slowed the truck to a crawl or pulled off the road – driver was going 50.5 mph at the time of impact
    - "Werner's lack of basic safety systems and its inadequate training processes for student drivers – combined with its business model of assigning student drivers on expedited deliveries – is creating a highly dangerous and unsustainable dynamic on U.S. Highway."

Joshua Patterson v. FTSI, LLC. et al. – *FTS International Manufacturing* – Texas – July 2018

Texas jury awarded $101 million to a man on his way home from church that was rear ended by a semi-truck driver in 2013.

- The semi-truck driver, who was operating the vehicle under the influence of alcohol and marijuana walked away uninjured, while the victim is unable to work after suffering back and neck injuries that required surgery. The driver also had 3 moving violations within 3 months of hire date and falsified documents that he had undergone new driver defensive driver, defensive driver drug and alcohol training, and an official drug test.

*Alfredo Morga v. FedEx Ground Package System, Inc***.** – New Mexico – February 2018

New Mexico Ct of Appeals affirmed $165 million award

- Semi truck slammed into the back of a pick up truck that was either stopped or moving very slowly along the highway - Mother, 4 year old and driver of the semi truck died

- Appeal – FedEx Ground required the Court establish a financial limit on the value of life, despite the District Court's and jury's efforts to fulfill their assigned duty to quantify something that is legally unique, intangible and difficult to measure – the Court of Appeals refused to implement such a legal threshold or limit
    - Family's attorneys "presented sufficient evidence to support the jury's right to perform its unique function—award all compensatory damages, including any non-economic damages for pain and suffering and loss of life" incurred by the family.

What is causing more nuclear verdicts?

There is no specific legislation controlling nuclear verdicts in the transportation area

- Missouri – no cap
- KS – Previously $250,000 BUT 6/14/19 KS Supreme Court ruled:
    - caps on noneconomic damages for personal injury cases are unconstitutional - does not apply to wrongful death cases nor punitive damages (*see section on economic damages below)*
- Prejudice against motor carriers:
    - Motor Carriers have become larger targets as the public perception of big trucking companies is that they have deep pockets.
        - Media, and now social media, coverage of hazardous transportation history and accidents involving semi-trucks
            - The more you see it the more real it becomes
        - Jurors personal experience – driving with semi-trucks on the road
        - Infomercials/attorney advertising about semi-truck accidents
- Jurors are becoming immune to huge verdicts
    - Society of entitlement v. eat what you kill / appreciate the value of the dollar
    - No recognition that large award increases downstream costs to the jurors – instant gratification
    - Prevalence of wealth in media - Professional athletes, CEO's, actor salaries
        - The Kardashian effect – huge exposure to wealthy individuals on reality TV is making people feel like they should have the same lifestyle as the Kardashians

What to Look For:

High risk plaintiff's counsel:

- Top tier, top 5 Plaintiff's attorney in state, or local legend, history of connectively to citizens of county.

Punitive Damages:

- Award against a company to punish them for outrageous conduct and deter them and others like them from similar conduct in the future

Accelerants to Litigation:

- Company Misconduct:
    - Lack of vetting in hiring process
    - Operation of trucks with known physical defects likely to cause hazardous or unsafe driving conditions
    - Policies and procedures – or lack thereof
- Driver Misconduct:
    - Fatigue
        - Hours of service
        - Obstructive sleep
        - BMI requires sleep study in drivers
        - DOT examination
        - Sleep apnea
    - Distracted driving
        - DUI/Drug Use
        - Cell phone use texting
    - Driver dishonesty
    - Speed
    - Violation of safety regulations
- Reptile theory
    - Plaintiff's attorney focus on:
        - Driver's conduct/appearance
        - Trucking co-corporate representative – conduct/appearance
            - It's one thing that the driver exceeded hours of service but it's another when the company condoned or turned a blind eye to it
            - Lack of vetting in hiring process
            - Lack of safety practices and training
            - Company culture demonstrates profits over safety
                - Policies and procedures of trucking company
        - Emotion / Sympathy

Ways to Prevent Nuclear Verdicts:

Be Proactive:

- Money spent on safety allows trial counsel to argue how far ahead of the curve this "safe company" is over the industry in general.

    - Utilize Technology:
        - Sensors, cameras and autonomous technology – gives transportation companies more control over their fates in the legal system (investigatory – providing accurate snapshots of what's happening on the roads and is proving vital resource in terms of settling claims)
        - Provides for more reliable outcomes for claims
- Actual perception of the company – corporate representatives, websites, PSA's etc.
    - Social Media – of the driver and the company, including fellow company employees
    - Post-accident public relations and crisis management – do not provide "no comment". Get public relations guidance when addressing incidents

Resolve early:

- Make contact with claimant/claimant's family immediately
    - Admit liability – sincerely and early
    - Empathic handling
- Must be willing to negotiate immediately
    - Entire team (Insurer/TPA/Employer) must be in agreement to early resolution – any delays by any team member places the entire strategy in jeopardy
- Candor/sincerity – pick fights wisely, challenge what you can challenge, concede the rest

What stands in way of early resolution?

- Belief that juries will do the right thing
- Lack of understanding that catastrophic injuries trump facts
- Team (Insurer/TPA/Employer/Attorney) want every stone unturned before final evaluation

Venue:

- Common areas for nuclear verdicts:
    - Texas
    - Louisiana
    - California
    - Santa Fe, NM
    - Cook County, IL
    - Philadelphia, PA
- Racial, socio-economic, small town realities
    - High verdicts occur in smaller populated, typically depressed, often welfare-sustained communities where everyone knows each other and where the plaintiff was loved not just by some potential jurors, but possibly all of them.
- Move agents for service of process from difficult venues

Recent Changes in Damage Caps:

Kansas

The Kansas Supreme Court issued an opinion June 14, 2019, ruling that non-economic damage caps provided for in K.S.A. 60-19a02 are unconstitutional.

For decades, Kansas has had caps on non-economic damages (pain and suffering, and other such damages that do not have a particularly clear dollar value). This statute required the District Court Judge to reduce any jury award over the cap back down to the damage cap range. Generally, the caps ranged from $250,000 to $325,000 depending on the year the action accrued. Over the years, various challenges have been made, unsuccessfully, to render these caps unconstitutional.

In the case, *Hilburn v. Enerpipe*, the Kansas Supreme Court has determined that the damage caps violate the jury's right to determine the value of an injured party's damages.

Unless and until further action is taken in the legislature (or if the Kansas Supreme Court reverses itself), from this day forward, Kansas law no longer supports a cap on non-economic damages.

Oklahoma

Those seeking non-economic damages in Oklahoma will no longer be limited by a legislative cap, opening defendants up to further liability in the state.

The Oklahoma Supreme Court ruled 6-3 to reverse a trial court ruling, finding a non-economic damages cap in personal injury actions unconstitutional. In *Beason v. I.E. Miller Services Inc.*, the plaintiff, Todd Beason, was struck by a boom that fell from a crane operated by an employee of I. E. Miller services Inc. Beason underwent two amputations to parts of his arm, and he and his wife filed suit against the defendant. A jury awarded $14 million to Todd Beason and $1 million to his wife, and a "supplemental verdict form" allocated $5 million of the $14 million awarded to Todd Beason as non-economic damages.

The Oklahoma legislators passed a law that took effect in 2011 stating that compensation awarded for non-economic losses in a civil action arising from bodily injury cannot exceed $350,000. Because of this law, the district court reduced the award to a total of $9.7 million: $6 million in non-economic damages and $350,000 to each of the Beasons. The couple then filed a motion arguing the law was unconstitutional.

The Oklahoma Supreme Court agreed, finding non-economic damages "highly subjective and inherently unpredictable," and added the cap violated Oklahoma's constitution. The court reversed the trial court's judgement, reasoning that the cap statute provided different treatment to persons who are killed in an accident and those who survive and accident:

“By forbidding limits on recovery for injuries resulting in death, the people have left it to juries to determine the amount of compensation for pain and suffering in such cases, and no good reason exists for the Legislature to provide a different rule for the same detriment simply because the victim survives the harm-causing event.”

This opinion ultimately upholds the sanctity of a jury and makes it more difficult to value civil cases in Oklahoma, exposing defendants to unanticipated damages at the direction of juries.

It’s likely the legislature will work to impose a limit on damages in future legislation.

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INTERPLAY BETWEEN CIVIL LIABILITY AND WORKERS' COMPENSATION

I. Exclusive Remedy Doctrine

Workers' compensation law is considered a mutually beneficial way of adjudicating work-related injury disputes for the employer and the employee; the injured employee is entitled to a statutorily fixed amount of lost wages and medical treatment regardless of whether the employer was at fault, and the employer's scope of liability is reduced to a specified and guaranteed sum.

As such, legislators have sought to create a system where work-related injury disputes are kept within the workers' compensation framework.

It is against this backdrop that every state in which we practice has an exclusivity provision in its workers' compensation statute. With some exceptions, these statutory provisions give employers immunity from civil lawsuits in cases where employees are injured on the job.

More simply put, workers' compensation becomes the employee's "exclusive remedy" when injured on the job.

Collectively, states' exclusivity provisions and the body of law surrounding them make up the exclusive remedy doctrine.

Kansas' Exclusivity Provision

K.S.A 44-501b(d) ("Except as provided in the workers' compensation act, no employer, or other employee of such employer, shall be liable for any injury…for which compensation is recoverable under the workers compensation act.…")

Missouri's Exclusivity Provision

Mo. Ann. Stat. § 287.120 (West) ("The rights and remedies herein granted to an employee shall exclude all other rights and remedies of the employee...at common law or otherwise…on account of such injury or death by accident or occupational disease, except such rights and remedies as are not provided for by this chapter.")

Oklahoma's Exclusivity Provision

Okla. Stat. Ann. tit. 85A, § 5 (West) ("The rights and remedies granted to an employee subject to the provisions of the Administrative Workers' Compensation Act shall be exclusive of all other rights and remedies of the employee… on account of injury...")

II. Exceptions

While it is generally the case that work-related injury claims are handled administratively through workers' compensation law, states have varying exceptions to their exclusive remedy provisions. These exceptions allow employees who are injured at work to sue their employers in civil court under specific circumstances.

The following exceptions detail ways states allow employees to sue their employers for work-related injuries in civil court.

Missouri

In Missouri, employees can bring civil claims against their employers if the employer intentionally injured the employee. *See generally Speck v. Union Elec. Co.,* 741 S.W.2d 290 (Mo Ct. App. 1987).

Additionally, in Missouri, employers whose "motivating factor" for discharging or discriminating against an employee was the employee's exercising of workers' compensation rights can be civilly liable for damages.

Missouri's workers' compensation law states that "motivating factor" means that "the employee's exercise of his or her rights to bring a workers' compensation claim actually played a role in the discharge or discrimination and had a determinative influence on the discharge or discrimination." Mo. Ann. Stat. § 287.780 (West).

The current "motivating factor" standard was the result of a 2017 amendment enacted by the Missouri legislature following *Templemire v. W & M Welding, Inc*., 433 S.W.3d 371 (Mo. banc 2014), in which the Missouri Supreme Court changed the standard from "sole, exclusive factor" to "contributing factor."

Kansas

Kansas workers' compensation law has no statutory exceptions to its exclusivity provision. However, Kansas courts do allow civil causes of action to be brought against employers in cases of retaliatory discharge. *See Campbell v. Husky Hogs L.L.C,* 255 P.3d 1, 4 (Kan. 2011) (recognizing that Kansas courts permit the retaliatory discharge exception to the exclusive remedy doctrine).

Kansas Courts also adhere to the "dual capacity" doctrine:

> 1. Under the dual capacity doctrine, an employer who is generally immune from tort liability to an employee injured in a work-related accident may become liable to such employee as a third-party tortfeasor if he occupies, in addition to his capacity as an employer, a second capacity that confers upon him obligations independent of those imposed upon him as an employer.

2. Where the employer's liability is alleged to arise solely by reason of its independent assumption by contract of the obligations of a third-party tortfeasor, the exclusivity provision of the Workmen's Compensation Act does not bar a common law action by the employee against his employer for injuries sustained in the course of his employment.

Kimzey v. Interpace Corp, Inc., 694 P.2d 907, 909 (Kan. Ct. App. 1985).

Accordingly, in Kansas, and in other states which recognize the dual capacity doctrine (including Missouri), employees can bring civil claims against employers who act in a third party capacity, such as a manufacturer, a lessor of workplace products, or a provider of medical services.

Oklahoma

Oklahoma, unlike Kansas, has abrogated the dual capacity doctrine and has statutory exceptions to its exclusivity rule.

Okla. Stat. Ann. tit. 85A, § 5 (West):

"…*No role, capacity, or persona of any employer, principal, officer, director, employee, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this act, and the remedies and rights provided by this act shall be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have."*

Shadid v. K 9 University, LLC, 402 P.3d 689, 700 (Okla. Civ. App. 2017) "We need not analyze whether the dual capacity test is met in this case, because the dual capacity doctrine has been abrogated by 85A O.S.Supp.2013 § 5.".

Okla. Stat. Ann. tit. 85B, § 5 (West): Exclusive remedy shall not apply if:

1. An employer fails to secure the payment of compensation due to the employee as required by this act. An injured employee, or his or her legal representative in case death results from the injury, may, at his or her option, elect to claim compensation under this act or to maintain a legal action in court for damages on account of the injury or death; or

2. The injury was caused by an intentional tort committed by the employer. An intentional tort shall exist only when the employee is injured as a result of willful, deliberate, specific intent of the employer to cause such injury. Allegations or proof that the employer had knowledge that the injury was substantially certain to result from the employer's conduct shall not constitute an intentional tort. The employee shall plead facts that show it is at least as likely as it is not that the employer acted with the purpose of injuring the employee. The issue of whether an act is an intentional tort shall be a question of law.

III. Non-Delegable Duties and Transitory Risks

Non-Delegable Duties

Employers have certain affirmative duties they must fulfill. These duties are called non-delegable duties, which include:

1) The duty to provide a safe place to work
2) The duty to provide safe appliances, tools, and equipment for work (PPE)
3) The duty to give warning of dangers to which the employee might reasonably be unaware of
4) The duty to provide a sufficient number of employees in jobs which require teamwork
5) The duty to set forth and enforce employee-conduct rules that make the workplace safe

Peters v. Wady Indus., Inc., 489 S.W.3d 784, 795 (Mo. banc 2016) quoting W. Keeton, Prosser and Keeton on the Law of Torts, section 80 at 569 (5th ed. 1984).

However, the employer's non-delegable duty to provide a safe working environment is limited. *See, e.g., Graczack v. City of St. Louis,* 202 S.W.2d 775, 777 (Mo. 1947) ("Employers are not insurers of the safety of employees.").

Employers are not liable for civil claims brought against them by employees who are hurt due to risks that are so unforeseeable that they don't fall into the category of being a non-delegable duty. The risks are called "transitory risks."

IV. Co-Worker Liability in Missouri

Transitory Risks

Employers' obligations to protect their workers do not "extend to protecting them from the transitory risks which are created by the negligence of the [workers] themselves in carrying out the details of that work." *Peters v. Wady Indus., Inc*. 489 S.W.3d 784, 796 (Mo. banc 2016) quoting *Kelso v. W.A. Ross Const. Co.,* 85 S.W.2d 527 (Mo. 1935).

But if an employee creates a transitory risk through negligent actions which are separate and distinct from the employer's non-delegable duties, that employee can be liable to the injured co-worker.

Missouri Statutory Co-Worker Liability

"Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability whatsoever, whether to the employee or any other person, except that an employee shall not be released from liability

for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury."
Mo. Ann. Stat. § 287.120 (West)

Missouri Co-Worker Liability Case Law

An affirmatively negligent act by a co-worker is one that "creates additional danger beyond that normally faced in the job-specific work environment." *Burns v. Smith,* 214 S.W.3d 335, 338 (Mo. banc 2017).

"[T]he only duty of a co-employee to another worker that is independent of the employer's non-delegable duty act (and, therefore, actionable in tort) is the duty not to act affirmatively to expose that worker to an unreasonable risk of harm not reasonably foreseeable to the employer." *Peters v. Wady Indus., Inc.,* 489 S.W.3d 784, 801 (Mo. banc 2016).

Affirmative Negligent Act at Common Law

Marshall v. Kansas City (Mo. 1956)

In *Marshall v. Kansas City*, the plaintiff, an employee of the Kansas City sewer department, was injured when his co-worker "suddenly and unexpectedly" jerked a hose, causing him to trip. *Marshall v. Kansas City*, 296 S.W.2d 1 at 3 (Mo. 1956).

In describing the way the injury occurred, the court noted that "the place of work was not unsafe and the hazard was not brought about in a manner in which the work was being done; the danger came about by reason of the manner in which [the co-worker] handled the hose." *Id*.

Accordingly, the court held that the plaintiff's injuries "resulted from the negligent act of his fellow employee and not by reason of the breach of any non-delegable duty owed by the city." *Id*.

Therefore, Kansas City was not civilly liable to Marshall for the transient acts of his co-worker.

The description of an affirmative negligent act in *Marshall* is still instructive today. *See generally Mems* (2019); *Connor* (Mo. banc 2018); *Peters* (Mo. banc 2018).

Seminal Co-Worker Liability Cases in Missouri and Related Statutory Amendments

Sylcox v. Nat'l Lead Co, 38. S.W.2d 497 (Mo. Ct. App. 1931)
Lambert v. Jones, 98 S.W.2d 752 (Mo. banc 1936)
Marshall v. Kansas City, 296 S.W.2d 1 (Mo. 1956)
State ex rel. Badami v. Gaertner, 630 S.W.2d 175 (Mo. Ct. App. 1982)
Kelley v. DeKalb Energy Co., 865 S.W.2d 670 (Mo. banc 1993)

State ex rel. Taylor v. Wallace, 73 S.W.3d 620 (Mo. banc 2002)
2005 Amendment to 287.800 (requiring strict construction and therefore eliminating statutorily-base co-employee immunity)
Robinson v. Hooker, 323 S.W.3d 418 (Mo. Ct. App. 2010)
2012 Amendment to 287.120.1 (reestablishing co-employee statutory immunity with one exception
Peters v. Wady Indus., 489 S.W.3d 784 (Mo. banc 2018)
Conner v. Ogletree, 542 S.W.3d (Mo. banc 2018)
Mems v. LaBruyere, 2019 WL 2182444 (S.W.3d May 21, 2019)

The topic of co-worker liability most recently resurfaced in *Mems v. Labruyere*, a 2019 Eastern District of Missouri appeals case.

Mems v. LaBruyere (2019)

Facts and Procedure

Mems and LaBruyere worked for a contractor that was hired to do renovation work at the St. Louis Convention Center. *Mems v. Labruyere*, 2019 WL 2182444, at 1 (Mo. Ct. App. 2019) ("Mems"). On June 17, 2013, both coworkers were tasked with "removing a heavy overhead roller door from a mechanical assembly above a concession stand window." *Id*. In doing so, LaBruyere "caused the roller door to suddenly detach and fall on Mems," seriously injuring him. *Id*.

Mems pursued a workers' compensation claim against his employer. *Id*. He and his wife then filed a civil suit against LaBruyere alleging negligence and loss of consortium. *Id*.

In response, LaBruyere moved for summary judgment, arguing that under the 2012 amendment to § 287.120.1 he was immune from civil liability on the grounds that the amendment stated that an employee "shall not be liable for any injury or death for which workers' compensation is recoverable…and shall be released from all other liability whatsoever except where the employee has engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." *Id*. His position was that there was no dispute that his actions did not satisfy this statutory language. *Id*.

The court granted LaBruyere's motion for summary judgment, specifically noting that Mems failed to establish as a genuinely disputed fact that LaBruyere had engaged in "purposeful inherently dangerous conduct." *Id*.

The plaintiffs appealed, contending that the court incorrectly applied § 287.201.1 by requiring them to prove that LaBruyere committed "inherently" dangerous conduct, a requirement which is absent from the statute. *Id*. They further contended that they had established as "genuinely disputed factual matters" that LaBruyere engaged in an "affirmative negligent act that purposefully or dangerously caused or increased the risk of injury to Charles Mems." *Id*.

The Issue

The court began their discussion by noting that resolution of the appeal centered "almost exclusively on the meaning the legislature intended for the five operative words" contained within the co-worker liability section of Missouri's workers' compensation statute. *Id*. Those five words are: affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. *Id* at 2.

Reasoning

The court in *Mems* then broke down the elements of the MO workers' comp statute related to co-worker liability. *Mems* at 8-14.

Affirmative = misfeasance; not nonfeasance. Misfeasance requires an affirmative act as opposed to the failure to act. As the court put it, "…an omission could involve something other than nonfeasance if an employee 'undertakes the performance of a positive act and wrongfully omits an act essential to the proper performance of the positive act in which case such omission is regarded as misfeasance.'" *Mems* at 9 *quoting Ryan v. Standard Oil Co. of Ind.*, 144 S.W.2d 170, 172 (Mo. Ct. App. 1940).

Therefore, the court found that "LaBruyere's actions in loosening the bolts and prying the roller door loose from its wall anchors readily satisf[ied] § 287.120.1's requirement of an affirmative act." *Mems* at 10.

A Negligent Act = that which breaches a legal duty to conform to a certain standard of conduct to protect others against unreasonable risks of harm. *Id*.

"We find…at a minimum…the record before us establishes as a matter of genuinely disputed fact that LaBruyere's actions…constituted negligent acts as that phrase is used in § 287.120.1." *Mems* at 11.

Purposefully = the defendant meant to do the physical act in questions and that the physical act was not an accident or inadvertence. Doesn't necessarily mean intended to cause the harm. Doesn't mean intentionally.

"LaBruyere's affirmative acts…were done purposefully in that LaBruyere, without regard to the succeeding consequences, meant to do the physical acts of detaching the bolts and prying the roller door." *Mems* at 12.

Dangerously = a showing that the employee's actions created or caused danger even if there may be some redundancy with other terms in the section such as negligent and risk which also implicate the creation of danger. *Id*.

Holding

The court applied these definitions to LaBruyer's case and concluded that LaBruyere was not immune under § 287.120. *Id*. at 13.

They found that LaBruyere was not merely carrying out his employer's non-delegable duties but that his conduct created a transitory risk to Mems which implicated his own common law duty of care to Mems*. Id.* at 15. They found that the conduct was not reasonably foreseeable to the employer. *Id*. at 16.The employer did not put Mems at an unreasonable risk of harms; it was the co-worker who did so. *Id*.

The court noted that, like in Marshall, the employer could have reasonably foreseen that some employee action or some instrument of the job, such as the compressor hose, might cause the injury. *Id*. at 16. However, the court noted that, "as the Marshall court found, the employer could not have foreseen that type of co-employee conduct involved and the injury that would occur." *Id*.

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