Employment Law & General Liability

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THE ETHICS OF CYBER LIABILITY

I. Definitions

A. Cyber liability is the risk posed by conducting business over the internet, over other networks or using electronic storage technology.

B. Cyberlaw is the field of law dealing with the internet, encompassing cases, statutes, regulations, and disputes that affect people and businesses interacting through computers.

C. Phishing is 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 personal information.

II. Importance

"I am convinced that there are only two types of companies: those that have been hacked and those that will be. And even they are converging into one category: companies that have been hacked and will be hacked again."

- Robert Mueller, III, Former FBI Director

III. The Numbers

A. There are approximately 200 billion connected devices in existence.

B. 95% of cybersecurity breaches are due to human error.

C. Over 77% of organizations do not have a Cyber Security Incident Response Plan.

D. In 2016, 95% of breached data came from only three industries: Government, Retail and Technology. As of 2021, the five sectors considered to be most susceptible to cyberthreats include Healthcare Institutions, Small Businesses, Government Agencies, Higher Education Facilities, and Energy Companies.

E. The global cost of cybercrime exceeded $2 trillion in 2019. Cybercrime is predicted to cause damages totaling $6 trillion globally in 2021 and is predicted to cost the world $10.5 trillion annually by 2025.

IV. Notable Settlements and Fines

A. In 2016, Uber's user data was compromised by hackers who stole personal information of around 25 million drivers and customers in the U.S. Instead of reporting the breach as required by law, Uber paid ransom to the hackers in an amount of $100,000. Thereafter, attorneys general from all 50 states and the District of Columbia brought suit against Uber over the breach. In 2018, a settlement was announced that required Uber to pay $148 million to settle the claims.

B. In 2017, Equifax failed to update its servers allowing hackers to gain access to internal servers on the company's corporate network. Equifax did not discover the breach for 76 days. Information accessed in the breach included social security numbers, addresses, credit card numbers, and other personally identifiable information. Numerous lawsuits against Equifax followed. Ultimately, on July 22, 2019, Equifax settled with the Federal Trade Commission, the Consumer Financial Protection Bureau, 48 U.S. states, Washington, D.C. and Puerto Rico. The cost of the settlement included $175 million to the states and territories involved in the agreement, $300 million to a victim compensation fund, and $100 million to the CFPB in fines.

C. In 2018, British Airways suffered a data breach in which personal and payment data for approximately 380,000 individuals were stolen as a result of hackers using card skimming scripts. In 2019, the airline was fined $230 million by the UK's data protection authority. In 2021, the airline paid out a confidential settlement resulting from a collective litigation in the English courts.

V. 2021 Colonial Pipeline Hack

In 2021, a hack of Colonial Pipeline Company, attributed by the FBI to a group known as DarkSide, caused a shutdown spanning days that led to a spike in the price of gas. This resulted in panic buying and shortages in fuel among certain localities in the United States. Colonial Pipeline paid almost $5 million in ransom to the hackers. Recently, the Justice Department recovered around $2.3 million in cryptocurrency ransom paid by Colonial Pipeline to the hackers.

VI. The Law – Banks & Transfers

A. UCC § 4A-202

i. A security procedure is deemed to be commercially reasonable if:

1. the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and
2. the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

B. Illustrative Case

In *Choice Escrow and Land Title, LLC v. Bancorp South Bank*, the plaintiff, a Missouri real estate escrow service provider, sued its bank after $440,000 was stolen from its account via fraudulent wire transfer requests. 754 F.3d 611, 613 (8th Cir. 2014). The transfer resulted from a Choice employee contracting a computer virus via a phishing attack. The virus gave the third party not only the employee's username and password, but also allowed it to mimic the computer's

IP address and other characteristics. Thereafter, the third party gained access to Choice's online bank and issued a payment order instructing Bancorp to transfer $440,000 to an institution in the Republic of Cypress. Bancorp then accepted and executed the payment order. After attempts to recover the money failed, Choice sued Bancorp.

In *Choice*, the 8th Circuit Court of Appeals considered the issue of whether Bancorp or Choice should bear the loss of the funds from Choice's account. This analysis involved a discussion of the security measures taken by Bancorp. The security measures taken by Bancorp involved the following:

(1) Each user had to register a unique username and password.

(2) They installed software called PassMark that recorded users' IP addresses as well as information about the computer. If a user attempted to login and different information popped up, then the user was prompted to answer challenge questions.

(3) The customer could place dollar limits on the daily volume of wire transfers.

(4) They offered "dual control" which required a second user to independently authorize a payment order.

In addition to considering the security measures taken by Bancorp, the *Choice* court noted that Choice declined to use dual control despite its Director of Business Development being put on notice by a Bancorp underwriter that dual control was the best solution to preventing fraudulent wire transfers. Choice declined to use dual control because a single individual was often tasked with approving the wire transfers.

Ultimately, the *Choice* court held that:

(1) Bancorp's security procedures were commercially reasonable,

(2) Bancorp complied with its security procedures and with Choice's instructions,

(3) Bancorp accepted the March 17 payment order in good faith, and

(4) That the loss of funds from Choice's account fell on Choice.

VII. Notes on Phishing

A. According to the FBI, phishing was the most common form of cybercrime in 2020.

B. According to the FBI, there over 11 times as many phishing complaints in 2020 as there were in 2016.

C. Ways for Employees to Combat Phishing

i. Look for spelling and bad grammar. Cybercriminals are not known for their grammar and spelling.

ii. Beware of links in an email. If you see a link in a suspicious email message, don't click on it.

iii. Beware of improper email addresses. hotfu54389@yahoo.com is not a CEO address.

iv. Threats. Have you ever received a threat that your account would be closed if you didn't respond to an email message?

D. Ways for Employers to Combat phishing

i. Better e-mail filtering before messages arrive in user inboxes

ii. Improved detection and response capabilities

iii. Develop and execute better awareness training. Make employees part of the solution. E.g., administer typical online training and send fake phishing emails to employees from your IT department.

VIII. The Law – Health Information

The Health Insurance Portability and Accountability Act ("HIPAA") protects the privacy of individually identifiable health information, otherwise known as protected health information ("PHI").

The Security Rule protects a subset of information covered by the Privacy Rule, which is all individually identifiable health information a covered entity creates, receives, maintains, or transmits in electronic form. The Security Rule calls this information "electronic protected health information" (e-PHI). The Security Rule does not apply to PHI transmitted orally or in writing.

A. Security Rule Basics

i. There are three types of safeguards covered entities must know about:

1. Administrative Safeguards (over half of all requirements). These include administrative actions, policies, and procedures to manage the selection, development, implementation, and maintenance of security measures to protect electronic protected health information and to manage the conduct of the covered entity's workforce in relation to the protection of that information.

   a. Example: Assigning a security officer and providing training

2. Physical Safeguards. These include physical measures, policies, and procedures to protect a covered entity's electronic information systems and related buildings and equipment from natural and environmental hazards and unauthorized intrusion.

   a. Example: Equipment specifications and access restrictions

3. Technical Safeguards. These include the technology and the policy and procedures for its use that protect electronic protected health information and control access to it.
    a. Example: Person or entity authentication

B. Administrative Safeguards

i. Risk Analysis (Required) – The process of identifying potential security risks and determining the probability of occurrence and magnitude of risks.

    1. How does EPHI flow throughout the organization? This includes EPHI that is created, received, maintained, or transmitted by the covered entity.

ii. Risk Management (Required) – The process used to identify and implement security measures to reduce risk to a reasonable and appropriate level within the covered entity based on the covered entity's circumstances.

    1. Are security processes being communicated throughout the organization?

iii. Sanction Policy (Required) – The application of appropriate sanctions against workforce members who fail to comply with the security policies and procedures of the covered entity.

iv. Information System Activity Review (Required)

    1. What logs or reports are generated by the information systems?

C. Physical Safeguards

i. Facility Access Controls – The limitation of physical access to electronic information systems and the facility.

    1. Do the policies and procedures identify individuals (workforce members, business associates, contractors, etc.) with authorized access by title and/or job function?

ii. Workstation Use – Specification of the proper functions to be performed by electronic computing devices.

    1. Do the policies and procedures identify workstations that access ePHI and those that do not?

iii. Device and Media Controls – The implementation of policies and procedures that govern the receipt and removal of hardware and electronic media that contain electronic protected health information, into and out of a facility, and the movement of these items within the facility.

    1. Have all types of hardware and electronic media that must be tracked been identified, such as, hard drives, magnetic tapes or disks, optical disks or digital memory cards?

D. Technical Safeguards

i. Person or Entity Authentication – The implementation of procedures to verify that a person or entity seeking access to electronic protected health information is the one claimed.

1. Can range from something known only to that individual, such as a password or pin, to something unique to the individual such as a biometric.

ii. Access Control – The implementation of technical policies and procedures for electronic information systems that maintain electronic protected health information to allow access only to those persons or software programs that have been granted access rights as specified in § 164.308(a)(4).

1. Example: Automatic Logoff

E. Penalties

TABLE 2—CATEGORIES OF VIOLATIONS AND RESPECTIVE PENALTY AMOUNTS AVAILABLE

Violation category—Section 1176(a)(1)	Each violation	All such violations of an identical provision in a calendar year
(A) Did Not Know	$100–$50,000	$1,500,000
(B) Reasonable Cause	1,000–50,000	1,500,000
(C)(i) Willful Neglect-Corrected	10,000–50,000	1,500,000
(C)(ii) Willful Neglect-Not Corrected	50,000	1,500,000

i. The covered entity did not know and by exercising reasonable diligence would not have known that a provision was violated.

ii. An act or omission in which a covered entity or business associate knew, or by exercising reasonable diligence would have known, that the act or omission violated an administrative simplification provision.

iii. These base levels are now adjusted for inflation. The factors in determining the amount of a civil money penalty include:

1. The nature and extent of the violation;
2. The nature and extent of the harm resulting from the violation;
3. The history of prior compliance with the administrative simplification provisions, including violations, by the covered entity or business associate;
4. The financial condition of the covered entity or business associate; and
5. Such other matters as justice may require.

F. Illustrative Case – HIPAA

The U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) initiated its investigation of New York and Presbyterian Hospital (NYP) and Columbia University (CU) following their submission of a joint breach report, dated

September 27, 2010. NYP and CU are separate covered entities that participate in a joint arrangement in which CU faculty members serve as attending physicians at NYP. The two entities operated a shared data network and a shared network firewall that is administered by employees of both entities.

The breach involved a physician employed by CU who developed applications for both NYP and CU and attempted to deactivate a personally owned computer server on the network containing NYP patient ePHI. The parties did not have sufficient safeguards, which resulted in the protected information being accessible on internet search engines. The breach was discovered after an individual found the ePHI of the individual's deceased partner on the internet.

Along with the impermissible disclosure of ePHI on the internet, the OCR found the following violations:

i. Neither entity made efforts prior to the breach to assure that the server was secure and that it contained appropriate software protections.

ii. Neither entity had conducted an accurate and thorough risk analysis that identified all systems that access NYP ePHI.

iii. No adequate risk management plan was in place to address potential threats and hazards to NYP's system.

iv. NYP failed to have appropriate policies and procedures for authorizing access to its databases and failed to comply with its own policies on information access management.

As a result, the ePHI of 6,800 individuals, including patient status, vital signs, medications, and laboratory results, was disclosed. Ultimately, the entities settled for a combined $4.8 million, with NYP paying $3.3 million and CU paying $1.5 million. This settlement was effective only between the parties and left open the possibility of individual suits.

G. Additional Examples

i. A woman purchased a used computer from a pharmacy. The computer still contained the prescription records, including names, addresses, social security numbers, and medication lists of customers.

1. Exposure:

a. Costs of notifying affected parties totaled nearly $110,000
b. A lawsuit for over $200,000 where a woman claimed she lost her job as a result of the disclosure.
c. Another lawsuit claiming damages of $100,000 for stolen identity and emotional distress claims.

ii. A part-time hospital employee gained unauthorized access to confidential electronic patient records and discussed with co-workers an individual's HIV status. The individual sued the hospital for lack of adequate IT security measures in protecting the records.

1. Exposure
    a. Hospital was held liable for $250,000
    b. Defense cost of $85,000

IX. Retail Transactions – The Law

Generally, a cyber liability claim in regards to a retail transaction is governed by state negligence law. *See In re Target Corporation Data Security Breach Litigation*, 64 F. Supp. 3d 1304 (D. Minn. 2014). A duty can be bolstered by legislative action in the area. *Id.* (recognizing Minnesota legislation that created "the duty to safeguard credit- and debit-card data"). Also, a statute can expressly create a cause of action. *See* Minn. Stat. Ann. 325E.64.

X. Target Story

A. Affected as many as 1 out of every 3 American consumers

B. As many as 40 million credit and debit card accounts were breached in the attack.

C. 1-3 million of the stolen cards were sold on the black market for about $27 each.

D. Before the cards were cancelled, hackers generated around $53.7 million in income.

E. Timeline

i. Around 6 months prior to the breach Target installed a malware detection tool made by FireEye (also used by the CIA and Pentagon)

ii. November 30: Hackers installed exfiltration malware to move stolen credit card numbers to their computers in Russia.

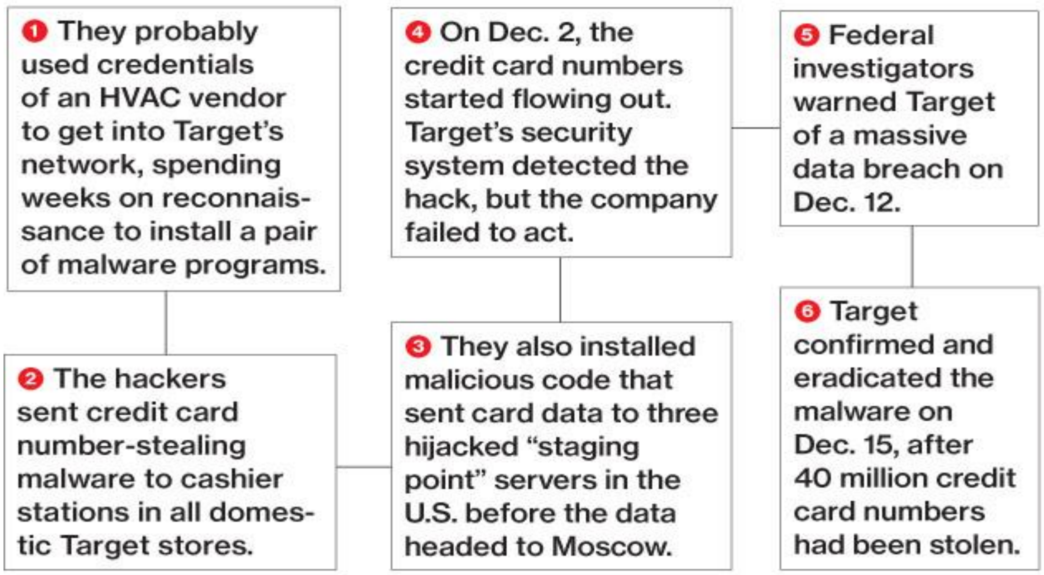
iii. November 30: FireEye spotted the malware and sent an alert to Target's security team in Minneapolis.

iv. December 2: FireEye spots additional malware and sends multiple alerts to Target's security team.

v. December 12: Target receives notification from the U.S. Department of Justice that a serious breach had occurred.

vi. December 15: Target finally acts and eradicates the malware.

How the Hackers Broke In



DATA COMPILED BY BLOOMBERG; GRAPHIC BY BLOOMBERG BUSINESSWEEK

F. The Costs

2013-2014 breach-related expenses $252 Million

<u>2013-2014 insurance proceeds $90 Million</u>

Total Net Expenses $162 Million

G. Lessons Learned

i. Accounts should be restricted to a single network zone if possible.

1. The HVAC vendor had access to Target's network to continuously monitor store temperatures etc.
2. This access did not need to extend to payment systems.

ii. Require multi-factor authentication to log into vendor portal. Monitor use of vendor portal logins. Profile accounts for normal activity and usage periods to spot anomalies.

1. Target would have been alerted when it saw an HVAC vendor consistently in the account relating to point-of-sale equipment.

iii. Train employees and vendor staff in phishing techniques.

iv. Require vendors to use commercial virus checking software and other security precautions.

XI. Ethics

A. Communication

i. Model Rule 1.4 (very similar in most states)

1. A lawyer shall keep the client reasonably informed about the status of the matter

ii. If a data breach occurs involving or having a substantial likelihood of involving material client information, lawyers have a duty to notify clients of the breach.

B. Competence

i. In addition to communication, lawyers have a duty of competence.

ii. ABA Model Rule 1.1 includes keeping abreast of the benefits and risks associated with relevant technology.

iii. Kansas, Missouri, Nebraska, Iowa, and Illinois don't go so far as to write the technological piece into this rule.

iv. ABA Opinion indicated that because the model rule does require a lawyer to understand technology, a lawyer's competence in not using and maintaining those technologies properly called the lawyer's competence into question.

v. Does this really affect me?

1. In 2019, ABA Study revealed 26% of respondents report some sort of security breach. *But 19% said they did not know.
2. Large firms are generally more at risk based on perception of hackers regarding the type of information to be gained: Trade Secrets, Financial Information, Damaging Emails

C. What to do?

i. Create an Incident Response Plan

1. Initial Reporting
2. Confirmation
3. Appropriate Escalation
4. Investigation

ii. Risk Management:

1. Cybersecurity Insurance? Clients may expect it in addition to legal malpractice insurance.

iii. Attorney & Staff Training

Notes Pages

Notes Pages

Notes Pages

Notes Pages

INTERPLAY OF THE ADA, FMLA & GLOBAL RELEASES

I. What is the ADA?

The Americans with Disabilities Act requires employers to accommodate disabled employees by finding other job positions in which the employee can perform with or without an accommodation, if those positions are vacant.

This Act applies to employers who have 15 or more employees, and those workers who have a disability.

- A disability is defined as: a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person is who perceived by others as having such an impairment.
- The ADA does not specifically name all of the impairments that are covered.
- Major life activities include: seeing, hearing, eating, talking, sleeping, learning, standing, bending, lifting, communicating, reading, concentrating and thinking.

Not all situations involving an employee requesting a change at work for a medical purpose are classified as requesting accommodation. Employers should consider whether the ADA applies or not for each complaint or request. Further, employers are able to ask an employee, with a known disability, if he or she needs accommodation when the employer reasonably believes that the employee may need it.

When the employee requests accommodation, the employer and employee should have a general conversation to determine what would be reasonable and appropriate under the circumstances. In some instances, the disability and accommodations will be readily obvious. Under the ADA, employers must limit the scope of a medical inquiry if it is in response to a request for accommodations. Employers may request additional information, such as medical documentation that establishes the specific disability and need for accommodation. It can also be beneficial for learning more about a certain disability and the nature of the symptoms: predictability, frequency of occurrence, duration, etc.

The accommodation must be reasonable. Further, the employer does not need to create a new job to accommodate the now disabled employee, rather only place them in a vacant light duty job that is available. The employer is required to accommodate the disability unless it is unreasonable or they would result in an undue burden. There are no specific procedures or policies that the ADA dictates that employers must follow to accommodate disabilities, but it is recommended that employers create their own in order to be prepared and consistent. It can be useful to employers to document their compliance with the ADA and can also be beneficial to employees in their expectations.

Generally, light duty jobs refer work that is physically or mentally less demanding that the duties of the normal job. Light duty also may refer to merely excusing certain job functions that the employee in unable to do because of their disability. Further, light duty jobs are those that are created specifically for the purpose of providing other forms of work for those employees who are unable to perform a portion of their normal duties. The ADA does not require light duty jobs be created, but the employer must provide some alternative forms of reasonable accommodation in their absence. Therefore, the existence of light duty jobs can force the employer to keep an employee that has been disabled who otherwise would not have been retained.

The employee must be given the vacant job even if other employees are more qualified as long as the employee meets the job's minimum qualifications. The vacancy in that light duty job creates an obligation. However, permanent light duty is not required as indefinite accommodations are not reasonable. The Sixth Circuit Court confirmed that in *Meade v. AT&T Corporation*, No. 15-6362 (6th Cir. 2016).

The employer can still insist that the employee still be able to perform all of the essential functions of the job even if they involve a variety of tasks in a wide range of environments. If that employee is unable to physically work for the employer with or without accommodation, the employee may be subject to termination.

II. What is FMLA?

FMLA is the Family and Medical Leave Act and requires employers to provide up to 12 weeks of unpaid leave during a 12 month period of birth or adoption. The Act also applies to a serious health condition of the employee or family member. At the culmination of the employee's leave covered under FMLA, the employer must reinstate the injured worker to the same job/position that the employee had before. If that is not the case, a job that is substantially the same would qualify as well if the absences could be intermittent.

The purpose of the Act is to either allow the parent to bond with their new child; to care for a spouse, child, or parent who has a serious health condition; or to deal with a serious health condition themselves.

FMLA applies to all government employees and private employers with more than 50 employees in a 75 mile radius. Prior to the start of their leave, employees must have worked at least 12 months and 1,250 hours at a jobsite where 50 or more employees work within 75 miles. However, the 12 month requirement does not have to be consecutive. The 1,250 hour requirement must be within the preceding 12 months. Employees must also give the employer notice of the leave, and medical certification may be required as well. Notice must be given 30 days prior to birth or adoption if it is "foreseeable," and for serious health conditions as well if it is practicable. In order to certify the leave of the employee, the employer can require other proof, such as other medical opinions. This additional proof is at the cost to the employer.

Rights of Employees on Leave:

- Group health benefits must be maintained as if the employee returned to work
- Once the employee returns, the position they left in must be available
- Up to 12 weeks of unpaid leave
- Protection from employer retaliation for exercising rights
- The highest paid 10% of salaried employees have limited rights to return to their position if there is a specific substantial and grievous economic injury to the operations of the employer due to the restoration of the employee.

Events that Qualify:

- Pregnancy
- Birth of a child
- The employee being placed with an adoptive child or foster child
- A spouse, child, or parent (not parent-in-law) of employee has a serious health condition
- Employee has a serious health condition
- Employee's spouse, child, or parent is on covered active duty or call to covered active duty status as a member of the National Guard, Reserves, or Regular Armed Forces

Child care leave should be taken in one lump, unless the employer agrees otherwise. If the parents of a new child – born or adopted – share the same employer, the employer can dictate that the parents must split their leave, in essence each receiving half.

Routine medical care, part-time workers, care for pets, or care for elderly relatives other than parents are situations that do not apply.

III. Retaliation and Work Comp

No employer or agent shall discharge or discriminate against any employee for exercising any of his or her rights under this chapter when the exercising of such rights is the motivating factor in the discharge or discrimination. Any employee who has been discharged or discriminated against in such manner shall have a civil action for damages against his or her employer. For purposes of this section, "motivating factor" shall mean that the employee's exercise of his or her rights under this chapter 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)

Employees need only to prove that the filing of a workers' compensation claim was a "contributing factor" to the employees' discharge, termination, or discipline rather than the "sole, exclusive factor." *Templemire v. W & M Welding, Inc*., 433 S.W.3d 371 (Mo. Banc. 2014). This is a change from the old standard that required that the exercise of workers' compensation rights was the "sole, exclusive factor in the employee's termination." In line with this change, it allows an employer to potentially be held liable if the employer had a legitimate, non-discriminatory reason for the termination or discipline. If the employee can prove that the claim at least contributed in part to the adverse action against him, the employee may have a retaliation claim.

Suggestions on how Employers Can Handle the Change:

- Keep accurate records detailing specifically why an employee was disciplined or fired. The vaguer the circumstances detailing the situation are, the more likely an employer may be subjected to a workers' compensation claim even when they have a legitimate, non-discriminatory reason.
- Be consistent in disciplinary actions against all employees. Employees being disciplined in various lengths or manners for the same wrongdoing can point to exterior variables playing a contributory role.
- Understand that all disciplinary actions are subject to review in subsequent proceedings should a particular employee claim retaliation.

- Strive to ensure fair, transparent, and appropriate disciplinary actions that would be found to be reasonable and upheld when examined by a neutral third party.

Federal law does not prohibit workers compensation retaliation specifically, but various other types of retaliation are covered. Most states have some sort of protection for workers compensation retaliation, however.

Retaliation can be shown in different ways, and while some forms are clearly obvious – termination – others may be more subtle. As so, the circumstances of the situation must be examined as well as the actual employer action. If the employer's adverse action would deter a reasonable person in the situation from making a complaint, then it likely constitutes illegal retaliation. The law protects those who cooperate in Equal Employment Opportunity Commission (EEOC) investigations, or serve as a witness in EEOC litigation, as well as whistleblowers or those on FMLA leave.

For purposes of statute prohibiting employer from discriminating against employee in retaliation for exercising rights under workers' compensation law, discrimination may take various forms, including denying employee advancement, denying salary or hourly pay increases, or assignment to less desirous jobs or locations. Palermo v. Tension Envelope Corp. (App. E.D. 1997) 959 S.W.2d 825, rehearing and/or transfer denied.

IV. Health Insurance and Work Comp

In Missouri, employers generally are required to continue the health insurance of employees who are off work due to a work injury. However, employers are able to require the employee to pay their own premium while they are on leave. While most states prevent retaliation by employers regarding work comp claims, many states do not address the issues of whether benefits must be continued, and as such, some employers choose to cease payments for health coverage.

In response, there are two federal programs that mandate the continuation of health coverage benefits for those employees on leave. These programs aim to assist injured workers and allow for health coverage to go on, but the employee is still required to pay the cost, or their normal share of the premiums. In both situations, if the employee ceases to make the payments on the premiums as required, the employer can terminate the health insurance coverage.

- FMLA:
  - As mentioned prior, the Family and Medical Leave Act can provide employees with up to 12 weeks of unpaid leave per year if the employee and employer both qualify as candidates for the program. If FMLA is applicable, the employer is required to maintain the same level of health insurance benefits the worker had prior to taking the leave.
  - However, if the employee exceeds the 12 weeks allotted for leave, the employer can cancel those continuing health benefits.
- COBRA
  - The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) can come into consideration when either the employee or employer does not qualify for FMLA or the employee has exhausted the extent of his allotted FMLA leave.

This Act applies to private employers with 20 or more employees. This option allows for continuation of health coverage (to the employee, spouses, former spouses, and dependent children) after a “qualifying event” causes an employee to lose health care coverage. The specific health care plan should be consulted to determine if there are standards, like a minimum hours worked requirement, that would leave the employee ineligible for coverage. If so, a COBRA notice should be issued to the employee, as a “reduction of hours of the covered employee’s employment” as one of the qualifying events that triggers COBRA.

- The failure to provide COBRA continuation notices can result in the risk of civil penalties imposed on the employer. Some other triggering events include death of employee, divorce, termination, or a child’s loss of dependent status.

V. Return to Work /Fitness for Duty

Maximum medical improvement, or MMI, occurs when the employee who was injured reaches the stage where his condition is at the full improvement, and the healing process has plateaued with treatment. No additional significant change in the condition of the injury is expected to occur after MMI is reached. At this point, the condition is assessed, and the degree of partial or permanent impairment is determined.

The need for an exam to test for fitness for duty can be significant because the medical and temporary disability benefits end at maximum medical improvement and can do so without any mention from a treating physician about whether the employee is able to return to work. When an employee seeks to return to work following a work comp absence and has restrictions from a doctor, a functional capacity examination is suitable to determine the employee’s capabilities.

Fitness for duty exams, or return to work exams, can be conducted and determinative regarding the employee’s ability to work again even though the worker’s doctor has given the full or partial release. Under the ADA, the employer cannot discriminate against a disabled worker when hiring, but if the worker is no longer able to perform the essential functions of his job or is posing a threat to the safety and health of himself or those around him, the ADA likely does not cover the prohibition of that employee working.

After taking FMLA leave, an employer may request a fitness for duty certification before the employee returns to work. The law provides the employer assurances that the employee is ready and able to do the previous job duties that they had prior.

VI. Earned Leave, FMLA, and Work Comp

Section 103(c) of the FMLA states that, as a general rule, the leave is unpaid. But there are certain circumstances in Section 102(d) when the employee may substitute accrued paid leave to run concurrently with the unpaid leave. Employees may elect the substitute, or employers may require it if they so choose. When employees seek FMLA leave to care for a qualifying family member’s serious health condition, accrued paid sick, medical, personal, or vacation leave may be substituted. 29 U.S.C. § 2612(d)(2)(B); 29 C.F.R. § 825.207(c).

Employers are not required to provide paid sick leave or paid medical leave in any situation in which such employer would not have normally provided any such paid leave. The circumstances are also dictated by the employer's specific leave plan. Employers can limit the situations in which the paid leave can be substituted, such as FMLA leave to care for a child not qualifying for paid sick leave if the plan allows it only to be for the employee's own condition. Essentially, employers maintain medical or sick leave policies distinct and separate from FMLA and will not be required to provide paid leave where the reason is not covered by their policy.

The regulations provide that when employees are on leave under a short-term disability or work comp claim, the choice to substitute paid leave for unpaid FMLA leave is inapplicable because such benefit plans already provide compensation and thus the leave is "not unpaid." 29 C.F.R. §§ 825.207(d)(1)-(2). If the disability for which the employee is receiving work comp benefits for also qualifies as a serious health condition under FMLA, an employer may designate FMLA leave to run concurrently with the employee's work comp or disability leave.

If the requirements to qualify for disability plan payments are more stringent than those of FMLA, the employee may either satisfy the more stringent plan standards or instead choose not to receive disability plan payments and use unpaid FMLA leave or substitute available accrued paid leave.

VII. Privacy, Medical Records, and Work Comp

The Health Insurance Portability and Accountability Act (HIPAA) is a federal law that protects employee privacy and restricts how medical records may be distributed. However, the HIPAA Privacy Rule permits the disclosure of medical records and other health information without individual authorization in situations concerning workers compensation. This extends to work comp insurers, third-party administrators, and some employers in order to manage the work comp claim at hand. The disclosure laws vary from state to state, and the Privacy Rule intends to provide only the minimally required information needed to manage the claim.

Though work comp claims are generally exempt from HIPAA rules, covered entities are required "reasonably to limit the amount of protected health information disclosed under 45 CFR 164.512(l) to the minimum necessary to accomplish the workers' compensation program."

VIII. General Release and Resignation Agreements

For many years, employers have considered offering additional consideration for an injured worker to execute a General Release and Resignation Agreement at the time the offer is extended to resolve the workers' compensation claim. These release and resignation documents are negotiated separately, and separate consideration is paid by the employer for the release. The payments cannot be issued by the workers' compensation insurance carrier or self-insured as a work comp payment as they are not "workers' compensation" benefits. The respective state Division of Workers' Compensation has no jurisdiction over a Release and Resignation Agreement and will not sign off on such a document or weigh in on the reasonableness of such a document.

The motivations for employers to propose a release and resignation for an employee who is in the process of resolving his or her workers' compensation claim vary and can include the following:

1. The workers' compensation settlement contemplates some aspect of either a temporary or permanent wage loss;
2. Where the employer has a legitimate concern that there is additional civil exposure under the ADA based upon their potential inability to accommodate the permanent work restrictions from the workers' compensation claim, even with reasonable accommodations. Litigation expenses on these types of cases can be expensive and sometimes it is preferred to deal with the issue pre-suit as opposed post-suit;
3. The claimant has already been separated from employment (voluntarily or involuntarily) and the employer wants a clean well-documented separation with regard to former employees;
4. Standard corporate policy.

Workers' compensation benefits in Kansas, Missouri, Illinois, Iowa, Nebraska, Oklahoma, and Arkansas are state entitlements. In other words, if a claimant sustains a compensable accident arising out of and in the course of his/her employment, the injured worker is guaranteed certain benefits per statute. The worker does not have to resign in order to receive his/her workers' compensation benefits. In light thereof, the employer cannot force the claimant to quit his or her job in order to receive the workers' compensation benefit entitlement.

As noted above, employers have been offering additional consideration in order to entice employees to execute Release and Resignation Agreements for years. Recently, however, some employers have begun **insisting** that a claimant resign in order to receive his/her workers' compensation benefit entitlement. In some states, this is the norm and not looked upon unfavorably by the Division of Workers' Compensation or the claimant's bar. In our midwestern states listed above, however, it is not standard operating practice to demand that an employee resign and execute a general release in order to receive his/her workers' compensation benefits in every case.

The workers' compensation systems are designed to run smoothly with a vast percentage of compensable claims settling without requiring significant litigation. Refusing to pay permanent impairment or permanent disability benefits pursuant to the rating of the authorized treating physician or refusing to engage in reasonable settlement negotiations (absent a legitimate reason for doing so) between the rating of the treating physician and the rating of the claimant's attorney's rating physician is met with open hostility by our judges. This is viewed as an impediment to the appropriate functioning of the respective Workers' Compensation Act and, depending upon the respective state statute, could be viewed as a fraudulent or abusive act or expose the employer and/or carrier to additional penalties.

For example, in **Kansas**, K.S.A. 44-5,120 describes fraudulent or abusive acts or practices as including denying or attempting to deny payments of workers' compensation benefits for any person. The list of acts could be interpreted broadly to include not paying the treating doctor's impairment rating when there is no legitimate dispute for not paying it. K.S.A. 44-5,125 even provides potential criminal penalties depending upon the amount of benefits in question. K.S.A. 44-512b provides an avenue for the Administrative Law Judge to award interest as a penalty if the judge finds that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation due. The statute provides that such interest shall be assessed against the employer or insurance carrier and shall accrue from the date such compensation was due. The interest is considered a penalty and shall not be considered a loss or a loss adjustment expense by the insurance carrier with regard to rates. Some lawyers will demand payment of the lowest rating and trigger the statute when there are no other issues in dispute.

In **Missouri**, R.S.M.O. section 287.128 provides that it is unlawful for any insurance company or self-insurer in the state to knowingly and intentionally refuse to comply with known and legally indisputable compensation obligations and provides criminal penalties for violation thereof. R.S.M.O. section 287.780 specifically provides that no employer or agent shall discharge or discriminate against any employee for exercising any of his/her rights under the Missouri Workers' Compensation Act when the exercising of such rights is the motivating factor in the discharge or discrimination. Any employee who has been discharged or discriminated against in such manner shall have a civil action for damages against his/her employer. The statute provides that for the purposes of this section, "motivating factor" shall mean that the employee's exercise of his/her rights under the Missouri Workers' Compensation Act actually played a role in the discharge or discrimination and had a determinative influence on the discharge or discrimination.

The **Illinois** Workers' Compensation Act provides that it shall be unlawful for any employer, insurance company, or adjustment company to interfere with, restrain, or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him or her by the Workers' Compensation Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his/her exercise of the rights or remedies granted to him/her by the Workers' Compensation Act. 820 ILCS 305/25.5(h)

Certainly, nothing mentioned above should be construed to mean that an employer cannot offer additional consideration to entice the claimant to sign the Resignation and Release Agreement. The key in negotiating these releases and resignations is communicating that it is a separate and independent offer from the workers' compensation settlement offer. Furthermore, such releases and resignations are more likely to be accepted, if not expected, when they are offered when the claimant is already no longer working for the employer or when there is a nexus between wage loss and the value of the workers' compensation claim.

In the sections below, we point out those circumstances where there would be a nexus between the workers compensation benefit settlement amount and an element of wage loss:

Kansas:

Certain types of benefits payable under the Kansas Workers' Compensation Act do contemplate the fact that the injured worker has either a partial or complete wage loss as a direct result of the work accident. Those types of benefits are generally referred to as work disability benefits or permanent total disability benefits.

An injured worker in Kansas is entitled to work disability benefits if he/she has sustained a greater than 7.5% impairment to the body as a whole as a result of the work accident. An injured worker is also entitled to work disability benefits if their overall impairment exceeds 10% to the body as a whole in cases where there is preexisting functional impairment, and the injured worker sustains a post-injury wage loss attributable to the work accident of at least 10%. In these cases, the injured worker may have returned to work for the employer against whom the claim is being pursued but at a lower wage rate or may be alleging that there is no work available to him/her with that employer and that he/she will have a wage loss when seeking his/her next job.

In Kansas, there would also be a nexus between wage loss and the workers' compensation benefit entitlement when the injured worker claims that they are permanently and totally disabled from any type of employment. In these circumstances, the claimant and the claimant's employer are more likely to agree to a release and resignation at a low consideration level. Of course, if the injured worker's attorney believes that the employee has valid claims against the employer outside of the workers' compensation system under the ADA, FMLA, or other state/federal action, then the nexus noted above alone will not be enough to encourage the release/resignation for a relatively low consideration.

Missouri:

Missouri workers' compensation benefits are described in terms of overall disability and are not separated between impairment and work disability. Awards for the injured worker's disability take into consideration both the nature of the injury and the impact of that injury on the person's ability to earn comparable wages. The Administrative Law Judges are more likely to nudge up the award of disability if the injury prevents the claimant from doing his/her former job and earning the same type of wages that were earned pre-accident. This simply is not a mathematical formula based upon a specific percentage of wage loss.

In Missouri permanent total disability cases, however, the injured worker is formally alleging that he/she is unable to engage in any substantial and gainful employment. In these situations, absent other civil liability concerns, the injured worker and his/her attorney would tend to be more agreeable to executing a general release and resignation at a lower level of consideration.

Illinois:

In Illinois, if a petitioner sustains a reduction in earnings capacity due to the work injury and is unable to return to their "usual and customary" line of employment, they could be entitled to wage differential benefits. Wage differential benefits are weekly benefits to be paid at two-thirds of the difference between the petitioner's pre-injury and post-injury earnings' capacity. These weekly payments are made to the petitioner for five years or until they are 67 years old, whichever is longer. Along with that, the petitioner could be entitled to formal vocational retraining or rehabilitation to be provided by the employer/insurer.

Additionally, if the work injury prevents the petitioner from returning to their "usual and customary" line of employment but does not reduce their earnings capacity, they could be entitled to a loss of occupation or loss of trade claim, which substantially increases the arbitrator's permanency award. Loss of occupation cases are valued as unscheduled, body as a whole (500 weeks), injuries rather than scheduled injuries. This, in turn, increases the value of the claim.

Permanent total disability means the petitioner is alleging he is permanently incapable of obtaining any type of gainful employment in the labor market. In all of these situations, absent other civil liability concerns, the petitioner/petitioner's counsel, would tend to be more agreeable to executing a general release and resignation at a lower level of consideration, given that the petitioner already cannot return to work at their former employer.

Iowa:

Wage or job loss in Iowa comes into play primarily in a few different scenarios. First, injured workers in Iowa who have suffered a body as a whole injury before July 2017 (which includes shoulder injuries) are entitled to industrial disability benefits regardless of their employment status with the employer for which they were employed at the time of the injury. Industrial disability is a determination of the injured workers loss of earning capacity and consideration may be given to a number of different factors including functional impairment, the workers' age, education, qualifications, experience and his inability to perform work for which the worker is suited. Not all pre-July 2017 injuries will result in higher industrial disability as a result of actual wage or job loss since the determination is based on the loss of earning *capacity*, not necessarily loss of actual earnings. The reason for the wage or job loss would be one factor in the overall determination of industrial disability.

Whole body injuries occurring after July 1, 2017 are handled differently with no automatic right to industrial disability. Iowa Code Section 85.34 (2)(v) states that "if an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity." But, if the employee returns to his job and is later terminated, a reopening proceeding may be commenced for a determination of a reduction of the employee's earning capacity. These are new provisions in the Iowa Workers' Compensation laws that have not yet been subject to any judicial interpretation.

When shoulders were removed from body as a whole injuries in the 2017 amendments, they received a separate section in the Iowa Workers' Compensation laws that states that if injured worker suffers a shoulder injury after July 1, 2017 and is unable to return to work because of the disability they may be entitled to extensive vocational rehabilitation benefits including evaluation for career opportunities in specific fields, specific education programs at community colleges, and financial support for participation in the education program up to $15,000 for tuition, fees and supplies.

Finally, permanent total disability benefits are nearly always alleged and potentially in play for a whole body injury if the injured worker is unable to return to work and can connect that to the work injury. In Iowa there is no particular type of case that would be more likely to result in a resignation and release. Generally, these agreements are included in the settlement discussions when it is apparent that the employment relationship has broken down in some capacity or if it is clear the injured worker either already intends to resign. However, if there appears to be a potential valid claim under employment laws, the resignation and release may become a significant issue in the negotiations, requiring substantial participation and consideration, often at mediation, from the employer.

Nebraska:

Wage loss resulting from a non-scheduled injury in Nebraska is a factor in determining the extent of permanent partial disability (PPD) which is measured by Loss of Earning Power (LOEP).

There are four factors taken into consideration when determining LOEP, as follows:

1) Loss of ability procure employment generally;

2) Loss of ability to earn wages;

3) Loss of ability to perform the tasks of the work; and

4) Loss of ability to hold a job obtained.

It is possible for the injured worker to have a LOEP even if the worker returns to work for the same employer at the same or higher wage because of the other factors considered when determining LOEP. Thus, not every non-scheduled injury and finding of LOEP involves a wage loss, but often a wage loss is involved and due to permanent work restrictions assigned for the injury. A finding of a 100% LOEP is a finding of permanent total disability (PTD) and thus will always include an element of wage loss. Injured workers in Nebraska are often willing to consider a release/resignation for a nominal amount in cases of PTD and in those cases of PPD where the injuries do not allow for return to work for the employer on date of accident.

Oklahoma:

In Oklahoma, like Missouri, permanent disability is not separated between physical impairment and loss of wage earning capacity. Under Title 85 Section 2 permanent disability is defined as, "permanent disability or loss of use after maximum medical improvement has been reached which prevents the injured employee, who has been released, to return to work by the treating physician, from returning to his or her pre-injury or equivalent job. All evaluations of permanent disability must be supported by objective findings."

Based on this definition, only physical impairment can be considered. However, also under Section 2 of Title 85A, disability is defined as, "incapacity because of compensable injury to earn, in the same or any other employment, substantially the same amount of wages the employee was receiving at the time of the compensable injury." Many claimant's attorneys are arguing that this gives a rise to damages in the nature of lost wages. To this date, that has not been successfully pled.

Additionally, Oklahoma can grant vocational training if the employer is unable to put the claimant back to work within a reasonable accommodation. Certainly, the Administrative Law Judges have some discretion on the permanent disability awarded. If the claimant was unable to return to work, we generally see the permanent disability a little higher, or even if they are able to return to work but have some permanent restrictions and require accommodation. For injuries resulting in permanent restrictions where the employer is not able to accommodate, claimants and attorneys are usually more open to a release and resignation generally for a bonus or additional funds for re-training or job placement

Arkansas:

Injured workers in Arkansas are evaluated for purposes of determining both impairment, as well as permanent disability, in the contexts of either permanent total disability, or wage loss situations. Scheduled injuries are calculated pursuant to the statute, and typically, the Commission is not able to consider wage-loss factors when assigning permanent impairment. Impairment will be determined based upon use of the American Medical Association's Guide to the Evaluation of Permanent Impairment, 4th Edition.

However, injured workers in Arkansas can be entitled to wage loss benefits when they have suffered an unscheduled injury, and the evidence is established by a preponderance of the evidence that when viewing additional factors including age, education, and future earning capacity, there is disability above and beyond the value of the impairment.

Employers may wish to seek a resignation and release in situations where this nexus exists between the wage-loss and the worker's compensation benefit entitlement. However, that being said, employers must be very careful when seeking a resignation and release.

Ark. Code Ann. 11-9-107 outlines penalties against employers for either discrimination or retaliation against an injured worker for filing a workers' compensation claim or seeking benefits under the statute. Penalties can include fines up to $10,000, as well as a finding that the employer is guilty of a class D felony. Accordingly, when there is an interest in seeking a resignation and release, employers should be careful to only request that separate agreement for additional consideration paid, as opposed to making it a requirement or a condition precedent of settlement of the underlying workers' compensation claim.

IX. Pitfalls of the Resignation and Release Offer:

If the injured worker accepts the additional consideration for the separate release and resignation, then the employer gets a full release of all potential outstanding claims against them and obtains a clean separation of employment. The claimant receives the additional consideration offered by the employer and formally executes the Release and Resignation Agreement document. In certain situations, however, the injured worker may not want to resign or execute a general release and the mere fact that the employer offered the release and resignation can be used against the employer later when an individual is terminated.

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A REMOTE WORKFORCE OR A RETURN TO OFFICE?
DETERMINING THE BEST POST-PANDEMIC WORKPLACE PLAN

With the availability and implementation of the COVID-19 vaccines, employers nationwide must confront whether to bring employees back to the workplace, maintain remote or partially remote work, and the safest and most productive options. The onset of the Delta variant coupled with lower than anticipated vaccination rates have produced a recent regional surge in COVID-19 infections. Many industries do not lend themselves to remote work, such as food processing, manufacturing, healthcare, retail, and restaurants. For those industries, the question is how to ensure employee safety going forward and navigating vaccinations. For office jobs in which employees have been performing remotely for more than a year, questions remain on whether employees should continue remote work and/or how to bring them back to the workplace in a safe manner.

I. <u>Working from Home</u>

Prior to the COVID-19 pandemic, working from home was on the rise. The availability of cost-effective and fast internet and Wi-Fi, plus decreased computer cost made it more feasible for employees to set up home offices. Despite the increase in remote work, however, just 6% of employees primarily worked from home, while 20% reported doing some of their work from home.

By May 2020, 48.7 million people reported that they had worked from home in the prior four weeks because of COVID-19. In April 2020, 67% of organizations reported an increase in spending on web conferencing software. Indeed, the valuation of Zoom on January 3, 2020 was $67.28 per share, which rose to a high of $559.00 on October 16, 2020.

A study by Pew Research Center conducted in October 2020 found that 54% of respondents wanted to continue working from home when the COVID-19 outbreak ended. The significance of the figure is greater given the study's context: 71% of respondents were working from home at the time, so a large majority of employees working from home wanted to continue remote work even when it became safe to return to the office. Indeed, 36% of respondents indicated that their workplace was open, but they had chosen to continue working remotely.

One concern for employers is the workspace that their employees use while working from home. While some employees may have the space for a home office, many have used converted areas, including dining rooms, spare bedrooms, basements, and kitchen tables. Employers have little to no control over these remote workspaces to ensure that they are safe, ergonomic, and reduce the possibility of injury. Rather, the main area of control employers have is providing the proper equipment for their employees.

To work from home effectively, employees need access to the tools and resources required to accomplish their duties from home. This includes devices such as computers and monitors, mouses, keyboards, printers and scanners, smartphones, tablets, and protected and effective remote desktops/VPN's. The Pew study referenced above found that 87% of workers surveyed noted they had either very or somewhat easy access to the technology and equipment they needed. Employees also need to have a firm grasp and understanding of their role while working from home, what is expected of them, productivity requirements, and to whom they may seek for help all aspects of their work – from equipment and software to duties and supervision. High remote performance requires connectivity – when workers are easily able to communicate with each other and those in their chain of command (in both directions), barriers to working from home can be reduced.

For their businesses to keep running, employers also have specific needs for remote workers. Employers need to maintain some control over the work environment to encourage productivity. Providers have developed numerous software applications that effectively track employee productivity, industry specific metrics, and increase managerial efficiency. Such applications permit employers to see what employees are working on, the time they're spending on tasks, the websites they visit, attendance, billable hours, where applicable, and measure efficiency and performance. Some allow for blocking of sites; others track the keyboard usage of remote employees. These can sync across devices for employees who may use a tablet, phone, and/or computer while working remotely. They can also be as simple as a toggle icon of whether the employee's computer is active. Employers may also need to be able to establish and follow consistency in schedules, hours, and availability. While working remotely is uniquely beneficial in allowing for flexibility with employees – especially those with children – providing clear expectations concerning availability is critical.

As the country may be moving past the necessity of remote work, employers should reevaluate their policies and procedures – particularly regarding reasonable accommodations under the ADA. Many employers have declined to allow remote work as a reasonable accommodation and insisted that many positions must be performed directly in the workplace. The past 18 months have shown that many office jobs can be effectively performed from home. The work-from-home aspect of the pandemic will continue to play a role in employment issues going forward. Workplace policies should be clear about what jobs and duties can be performed remotely, and the expectations for remote workers and positions. Additionally, if an employer's office is in one state, but the employee works from home in another state – a common issue in split-state cities like Kansas City, St. Louis, and Omaha –which state's law apply to employment practices suits and workers' compensation injury claims will need to be determined.

II. Compensability of Work Injuries When Working from Home

To be compensable, an injury must occur in the course and scope of employment. Typically, whether an injury occurs in the course of employment turns on whether the employee was at work at the time of injury – when working from home, the issue is far less clear.

The key question for employees working at home is whether the injury resulted from a hazard or risk to which the employee would not have been equally exposed outside of, and/or unrelated to, their employment, for instance a risk outside of professional duties. So, if an employee working remotely, slips in their kitchen getting coffee, the issue is whether he or she would have encountered that risk in normal, non-employment aspects of life. On the other hand, if an employee develops carpal tunnel syndrome from using a computer to perform his or her job functions, the employee's injury more likely occurred in the scope of his or her employment.

III. Concerns with Returning to the Office

Now that COVID-19 vaccines are widely available, the next question becomes how, and whether, to bring employees back to the office. One of the first questions many employers confront is whether they should, or could, require employees to be vaccinated before returning to work.

Under EEOC guidance, employers can require employees to be vaccinated before returning to work. Many states, including Kansas and Missouri, have proposed legislation to prevent such requirements, but neither state has advanced the legislation out of committee; in fact, competing bills have offered employers immunity from civil suit for COVID-19 infections. Of course, "can I?" often begets the question "should I?" In this case, many employers have determined that while they could require vaccines, they have chosen not to require vaccination. The determination and impact upon employee morale, likely reduced days lost to illness, and decreased long-term benefit costs varies with the specifics of every workplace and should be carefully considered.

If employers choose to require vaccination consistent with EEOC guidance, employers must make reasonable accommodations for individuals who cannot get the vaccine due to a disability or a sincerely-held religious belief. These accommodations may include requiring a mask, requiring unvaccinated employees to distance from others, modified shifts to reduce overlap between vaccinated and unvaccinated employees, or continued remote work, if reasonable. Thus, even with a vaccine requirement, employers may have to treat some employees differently based on vaccination status and must tread carefully to ensure the employer does not discriminate against employees based on disability or sincerely held religious belief.

On June 10, 2021, OSHA issued updated guidance on returning employees to the workplace. The guidance applies to most private sector workplaces outside the healthcare industry. The guidance, however, focused on unvaccinated and "at risk" employees. An "at-risk" employee is an employee with a condition that affects their ability to gain a full-immune response from a vaccine, including, for example, individuals who have had a transplant, prolonged use of corticosteroids, undergoing chemotherapy, or other immune-weakening medications. The focus is on unvaccinated or "at-risk" employees who work in contact with each other or work in a poorly ventilated space.

OSHA re-encourages employers to create a COVID-19 prevention program, which is a sixteen-step guidance first issued in January 2021. The steps to a program are:

1. Assign a workplace coordinator
2. Complete a hazard assessment
3. Identify measures that will limit the spread
4. Consider protections for workers at a higher risk for severe illness
5. Establish an effective communication system
6. Educate and train workers on policies and procedures
7. Instruct workers who are infected or potentially infected to stay home and isolate

8. Minimize negative impact of quarantine on workers
9. Isolate workers who show symptoms at work
10. Perform enhanced cleaning/disinfecting after confirmed or suspected cases in facility
11. Provide guidance on screening/testing
12. Record & report COVID-19 infections and deaths
13. Implement protections from retaliation & set up anonymous system for workers to voice concerns
14. Make COVID-19 vaccine available at no cost
15. Don't distinguish between vaccinated and unvaccinated workers
16. All other applicable OSHA Standards

OSHA also encouraged employers to educate employees about vaccination and to encourage employees to get vaccinated. This includes identifying opportunities to get vaccinated, offering vaccinations at work, and providing paid leave to get and recover from a COVID-19 vaccine. Employers with under 500 employees may be eligible for tax credits if they provide paid time off to receive and recover from a COVID-19 vaccine. The tax credit, subject to some limitations, is equal to the wages paid to an employee for a day off to get vaccinated. This applies to paid sick and family leave from April 1, 2021 through September 30, 2021.

Employers may implement other practices applicable for unvaccinated employees, including requiring face coverings, social distancing, addressing workplace ventilation, and practicing good hygiene. These practices have been a focus since the start of the pandemic. Essentially, OSHA is advising that unvaccinated employees operate similar to the way all workers were treated before vaccines were available.

In high-risk workplaces, OSHA recommends staggering break times, providing additional break areas to reduce congregation, staggering arrival and departure times, and using barriers where physical distancing is not possible. High-risk workplaces are environments with close and lengthy contact, such as manufacturing, meat and poultry processing, high-volume retail, personal hygiene, and grocery.

<u>Emergency Temporary Standard for Medical Field</u>

OSHA has also promulgated an emergency temporary standard specifically for the medical field. This applies to any setting where an employee provides healthcare services and healthcare support services, such as, hospitals, nursing homes, assisted living facilities, emergency responder, home healthcare workers, ambulatory care facilities where patients with COVID-19 may be treated.

Employers in the healthcare field should take the following steps to protect workers from COVID-19:

- Prepare COVID-19 Plan
- Patient Screening and Management
    - Limit and monitor points of entry
    - Screen patients, clients, and other visitors

- Follow CDC guidelines on Standard and Transmission-based Precautions
- Provide PPE
    - Facemasks should be worn inside and when sharing a vehicle with other people for work purposes
- Aerosol-generating procedures for confirmed or suspected COVID-19 case
    - Perform procedures in an airborne infection isolation room, if available
- Physical distancing and barriers
    - Six feet of distance or barriers if not possible
- Disinfection
    - Follow standard practices
    - Use alcohol-based hand rub that is as least 60% alcohol
- Ventilation – MERV-13 or higher
- Health screening
    - Screen employees before each workday and shift
    - Require each employee to promptly notify the employer when the employee is COVID-19 positive, suspected of having COVID-19, or experiencing certain symptoms
    - Notify certain employees within 24 hours when a person who has been in the workplace is COVID-19 positive
    - Follow requirements for removing employees from the workplace
    - Employers with more than 10 employees, provide medical removal protection benefits in accordance with the standard to workers who must isolate or quarantine.

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LAYOFFS, REDUCTION IN FORCE, AND EMPLOYEE RECALLS

I. LAYOFFS

A. What is a layoff?

  i. A layoff is a company's reduction in workforce in response to a temporary or long-term business strategy or economic condition.

B. Short Term/Temporary Layoffs

  i. A layoff of not more than 13 weeks in any period of 20 consecutive weeks.

C. Mass Layoff (20 CFR § 639.3 (c)):

  i. A reduction in workforce which is not a result of a plant closing and

  ii. results in an employment loss at the single site of employment during any 30-day period for:

    1. at least 33 percent of the employees and at least 50 employees; or
    2. at least 500 employees (all excluding any part-time employees).

D. Short Term/Temporary Layoffs (Continued)

  i. a layoff of more than 13 weeks in any period of 20 consecutive weeks, if the layoff is less than 35 weeks in any period of 52 consecutive weeks and,

    1. the employee continues to receive substantial payments from the employer,
    2. the employer continues to make payments for the benefit of the employee under a legitimate retirement or pension plan or a legitimate group or employee insurance plan,
    3. the employee receives supplementary unemployment benefits,
    4. the employee is employed elsewhere during the lay-off and would be entitled to receive supplementary unemployment benefits if that were not so,
    5. the employer recalls the employee within the time approved by the Director, or
    6. in the case of an employee who is not represented by a trade union, the employer recalls the employee within the time set out in an agreement between the employer and the employee.

II. REDUCTION IN FORCE

A. What is a reduction in force?

  i. An employee is let go from a company due to budgetary reasons, workforce planning initiatives, position eliminations or other right-sizing events.

  ii. Reductions in force are typically permanent because the roles of those let go are usually eliminated with the termination of employment.

B. Regulatory requirements governing reduction in force are contained in Title 5, Code of Federal Regulations, Part 351.

C. Regulatory Factors:
   i. tenure of employment (e.g., type of appointment);
   ii. veterans' preference;
   iii. length of service; and
   iv. performance ratings.

D. How is a workforce reduced?
   i. Reducing the amount of work hours that are available for employees;
   ii. Cutting holiday bonuses and freezing salary increases;
   iii. Shifting employee tasks to reduce the number of employee positions;
   iv. Lowering or getting rid of supplemental payments for overtime; or
   v. Instituting mandatory furlough or layoffs.

E. What isn't a reduction in workforce?
   i. Transfers
      1. Regulations published in subpart C, part 351 of title 5, CFR
   ii. Reassignments

F. Kansas Reduction in Force
   i. Employers who must apply to the Kansas Secretary of Human Resources for authority to limit or cease business operations
      1. Food production
      2. Clothing manufacturing
      3. Fuel mining
      4. Transportation
      5. Public utilities

G. Kansas Application Process for Reduction in Force
   i. Must state reasons for the contemplated action
   ii. Kansas Secretary of Labor must promptly hear the application
   iii. If the application is found to be in good faith and meritorious, approve it

III. Involuntary RIF's Versus Voluntary Separation Incentive Plans or Voluntary Retirement Incentive Plans

A. Employers often offer severance packages incentivizing employees to voluntarily separate employment or to retire from employment.

B. Voluntary Separation Incentive Plans (VSIP's) or Voluntary Retirement Incentive Plans (VRIP's) either increase, or lead to less of a negative impact upon, engagement and employee satisfaction.

C. If not carefully implemented, VSIP's and VRIP's may lead to the loss of high performing employees to the detriment of the organization.

D. Targeted VSIP's and VRIP's provide employers the opportunity to offer targeted packages or make certain employees or groups of employees eligible or ineligible for the plan.

E. Whether voluntary or involuntary, RIF must not result in disparate impact upon protected classes – especially age.

F. Any release or severance package conditioned upon the execution of a release and waiver of claims must comply with the requirements of the Age Discrimination in Employment Act (ADEA) and the Older Worker Benefit Protection Act.

IV. Age Discrimination and Employment Act (ADEA) (29 CFR § 1652)

A. Applies to employers with 20 or more workers

B. Employers cannot engage in personnel practices that discriminate against individuals age 40 and older

C. Age discrimination suits have traditionally been brought when a worker over 40 loses their job

D. Most age discrimination cases grow out of wrongful discharge and mandatory retirement policies, but they can involve any adverse change in working conditions.

E. ADEA Employee Claims

   i. Workers over age 40 who are terminated or allege adverse employment action have two ways to prove age discrimination under the ADEA: disparate treatment or disparate impact.

   ii. Disparate Treatment

      1. Plaintiff must produce direct evidence of intentional discrimination based upon the employee's age. The evidence may consist of testimony containing discriminatory statements or evidence revealing direct discrimination against older employees; or

      2. Plaintiff must establish that he or she:

         a. Is within the protected class (age 40 or older).

         b. Was performing the job satisfactorily.

         c. Was discharged.

d. Was treated less favorably than similarly situated, substantially younger employees.

3. If the plaintiff is able to establish a case, the burden shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for the termination.

4. The plaintiff must then show that the employer's reason was a pretext for discrimination.

5. The plaintiff is not required to produce any new or additional evidence. If evidence in the record contradicts the employer's reason, the case can proceed to a jury, which could infer that the employer was attempting to cover up a discriminatory motive.

iii. Disparate Impact

1. Employee may show that an employer's facially neutral policy produces a significantly disparate impact (effect) upon older workers.

2. Typically involves statistical analysis of plan, policy, or program results and determination of whether applicable the employer's plan, policy, or program adversely impacts a protected group by two or more standard deviations.

F. ADEA & Retirement

i. Congress amended the ADEA, banning mandatory retirement at any age, regardless of early retirement provisions in an employee benefits plan or seniority system.

ii. This amendment does not preclude provisions permitting employees to elect early retirement at a specified age or at their option.

iii. The prohibition against mandatory retirement does not apply to employees who are:

1. at least 65 and who, for the two years immediately preceding retirement,

2. employed in a high policy-making or bona fide executive position and

3. entitled to receive employer-financed pensions or other retirements benefits of at least $44,000 annually.

G. Older Workers Benefit Protection Act (OWBPA)

i. Requires valid ADEA waiver agreements (29 CFR § 1652.22)

ii. Workers still retain the right to sue if the employer's waiver policy strays in any way from the requirements of the OWBPA

iii. Employer possesses the burden to prove that a waiver/release complies with federal law

H. OWBPA Waiver Requirements

i. Individual employee waiver requirements

1. Workers sign the agreements in a “knowing and voluntary” manner
2. Waiver is written so that the employee can clearly understand it and refers specifically to age-discrimination rights and claims
3. Does not ask the worker to waive rights or claims that might come up after the waiver is executed
4. Offers the worker money or something else of value to which he otherwise would not be entitled.
5. Advises the worker—in writing—to consult an attorney before signing the agreement.
6. Allows the worker at least 21 days to consider signing the agreement. However, the agreement can be withdrawn prior to acceptance.
7. Gives the worker at least seven days to revoke the agreement after it is signed

I. OWBPA Group Waiver Requirements

i. Additional requirements when employers fire, lay off, or offer early retirement or severance packages to more than one employee

1. Allow workers at least 45 days, instead of 21, to consider the waiver agreement.
2. Mandates employer provide the job titles and ages of all individuals being laid off or being offered the same early retirement plan. The employer must also provide the ages of workers in the same job “decisional unit” who are not eligible for or selected to participate in the plan.
3. OWBPA applies to both voluntary and involuntary RIF’s if the employer seeks a release from claims from the employees.
4. Recommend counsel develop and/or review RIF plan, waiver, required notice, and conduct demographic impact analysis

V. Employee Recalls

A. What is an employee recall?

i. the process of bringing employees back to work after placing them on a temporary layoff

B. How to recall employees?

   i. In writing and should specify at least:

      1. the date the employee is expected to return to work;
      2. the position the employee will occupy on their return;
      3. the compensation the employee will receive; and
      4. the schedule they will work.

C. An employer is free to implement a policy on recalling employees, if there is no contractual or established policy or commitments that mandate a process.

D. The policy must be specific about the terms and conditions of recall. It should address at a minimum:

   i. How the recall decisions will be made. It should specify that the company retains discretion to consider employee's skills and the needs of the business;

   ii. Notice requirements, including responsibility on the employee to maintain contact to affirm availability and time frame for responding to recall notice;

   iii. Impact of the furlough on vacation accrual and other benefits;

   iv. The time limit on how long an employee will be considered to have recall rights; and

   v. Pay out of any accrued vacation or similar benefits for employees not recalled and/or whose jobs have been eliminated.

VI. WARN ACT

A. Worker Adjustment and Retraining Notification Act

   i. Public Law 100-379 (29 U.S.C. § 2101, et seq.)

   ii. 20 CFR Part 639

B. In August 1988, Congress passed the WARN Act to provide workers with sufficient time to seek other employment or retraining opportunities before losing their jobs.

C. WARN ACT: Application

   i. The WARN act applies to:

      1. an organization if you have over 100 full-time employees
      2. all publicly and privately held companies
      3. all organizations that are for profit or not for profit
      4. affected employees (20 CFR § 639.3 (e))
         a. expected to experience an employment loss

ii. The WARN Act does not apply to:

    1. Strikers, or workers who have been locked out in a labor dispute
    2. Temporary Employees
    3. Non-employee business partners, consultants, or contract employees assigned to the business
    4. Regular federal, state, and local government employees

iii. Employees not counted:

    1. Part-time workers (20 CFR § 639.3 (h));
    2. Workers who retire, resign, or are terminated for cause;
    3. Workers who are offered a transfer to another site of employment within a reasonable commuting distance if:
        a. The closing or layoff is a result of a relocation or consolidation of all or part of the employer's business; and
        b. The transfer involves no more than a 6-month break in employment.
    4. Workers who are offered a transfer to another site of employment outside of a reasonable commuting distance if:
        a. The closing or layoff is a result of a relocation or consolidation of all or part of the employer's business;
        b. The transfer involves no more than a 6-month break in employment; and
        c. The worker accepts the offer within 30 days of the offer or the closing or layoff, whichever is later

iv. Non-triggering Circumstances:

    1. Closure of a temporary facility or completion of a temporary project, and the employees were hired with the clear understanding that their employment was temporary
    2. Closure of a facility or operating unit due to a strike or lockout and the closing is not intended to evade the purposes of the WARN Act.
    3. If a plant closing or mass layoff results in fewer than 50 people losing their jobs at a single site of employment
    4. If 50-499 workers lose their jobs and that number is less than 33% of the employer's total active workforce at a single site;
    5. If a layoff is for 6 months or less; or
    6. If work hours are not reduced 50% in each month of any 6-month period.

D. WARN ACT: Notice

   i. A WARN ACT notice must be provided to all affected employees, regardless of position and must be given if there is a plant closing or a mass layoff

   ii. Employees must receive a written notice 60 days before the date of a mass layoff or plant closing

   iii. Employees may be able to seek damages for back pay and benefits for up to 60 days, depending on how many days' notice the employee actually received.

E. WARN ACT: Notice Requirements

   i. An explanation of whether the layoff or closing is permanent or temporary of 6 months or less;

   ii. The date of layoff or closing and the date of your separation;

   iii. An explanation of bumping rights, if they exist; and

   iv. Name and contact information for a person in the company who can provide additional information

   v. Notice to the local government's chief elected official where the employment site is located and to the State Rapid Response Dislocated Worker Unit

F. WARN ACT: Notice Exceptions

   i. Faltering Company

      1. Not required to give notice of a layoff or plant closing when before the plant closing, it is actively seeking capital or business, which if obtained would avoid or postpone the layoff or closure, and if it reasonably believes that advance notice would hurt its ability to find the capital or business it needs to continue operating

   ii. Reasonably unforeseeable business circumstances that led to a layoff or closing at the time that the 60-day notice would have been required

   iii. Layoff or plant closing is the direct result of a natural disaster

G. WARN ACT: Terms

   i. Employer (20 CFR § 639.3 (a)):

      1. The employer is any business enterprise that employs 100 or more full-time workers or
      2. 100 or more full- and part-time workers who work at least a combined 4,000 hours a week.
      3. Business enterprises include:
      4. private for-profit and not-for-profit entities

5. governmental or quasi-governmental organizations that engage in business and are separately organized from the regular government.

ii. Employment Loss (20 CFR § 639.3 (f)):

1. An employment termination, other than a discharge for cause, voluntary departure, or retirement.

    a. A layoff exceeding 6 months; or

    b. A reduction in hours of work of individual employees of more than 50% during each month of any 6-month period.

    c. An employment loss does not occur when an employee is reassigned or transferred to employer-sponsored programs.

iii. Plant Closing (20 CFR § 639.3 (b)):

1. A plant closing means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees, excluding part-time employees.

iv. Single Site of Employment (20 CFR § 639.3 (i)):

1. A single location or a group of contiguous locations. Groups of structures that form a campus or industrial park or separate facilities across the street from one another may be considered a single site of employment.

2. Separate buildings or areas that are not directly connected but are in reasonable proximity and that share staff and equipment; or

3. For workers who primarily travel:

    a. a home base from which work is assigned; or

    b. a home base to which workers report when: - a worker's primary duties require travel from point to point; - the worker's duties are out stationed; and - the worker's primary duties are outside any of the employer's regular employment sites

v. Bumping Rights:

1. Bumping rights provide for an employee to displace another employee due to a layoff or other employment action as defined in a collective bargaining agreement, employer policy, or other binding agreement. These rights are often created through a seniority system.

vi. Constructive Discharge:

1. In general, a constructive discharge is when a worker's resignation or retirement may be found to be involuntary because the employer has

created a hostile or intolerable work environment or has applied other forms of pressure or coercion that forced the employee to quit or resign.

VII. CASES

A. WARN ACT Purpose

i. Local 1239, Int'l Bhd. of Boilermakers v. Allsteel, Inc.

1. Purpose of WARN Act is to ensure that workers and their communities receive advance notice of their loss of employment so that they may begin search for other employment or, if necessary, obtain training for another occupation.

B. When the WARN Act Doesn't Apply

i. Deveraturda v. Globe Aviation Sec. Servs.

1. District court properly granted judgment on pleadings under Fed. R. Civ. P. 12(c) in favor of former employer that provided screening personnel at airports until government federalized airport security services and took over operations at airports pursuant to Aviation and Transportation Security Act of *2001, 49 USCS § 44901*; former employees were not entitled to relief under 29 USCS § 2104(a)(1)(A), part of Worker Adjustment and Retraining Notification Act (WARN Act), 29 USCS §§ 2101 et seq., based on employer's failure to give them 60 days' notice of their mass layoff because, under plain language of 29 USCS § 2102(a), WARN Act only applied when employer ordered mass layoff and not when government ordered layoff.

C. What employers should do

i. Long v. Dunlop Sports Group Ams., Inc.

1. Under Worker Adjustment and Retraining Notification Act, employer did not constructively discharge its employees when it provided notice of its golf ball manufacturing plant shutdown at time of shutdown, but for next 60 days paid full wages and benefits to its employees, where employees claiming constructive discharge voluntarily departed; thus, no employment loss occurred

D. What employers should not do

i. Childress v. Darby Lumber, Inc.

1. Trial court properly granted summary judgment to former employees on their claim that former employers violated Worker Adjustment and Retraining Notification Act, 29 USCS §§ 2101–2109, by giving more

than 100 former employees less than 60 days' notice of mass layoff, especially since former employers were counted as single employer for purpose of law and they did not show that any circumstances existed that would excuse them from notice requirement.

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DRAM SHOP LIABILITY

I. Definition and Overview

A. Dram shop laws hold businesses liable for selling and/or serving intoxicating beverages to customers who later cause injuries or damages as a result of their intoxication.

B. Dram shop laws are civil statutes enacted at a state level, rather than a federal level.

C. Each state has varying degrees and circumstances in which establishments can be held liable. The degrees and circumstances are created by the state legislature and determined by the law approved by their voters.

D. Similar to dram shop laws, social host liability laws hold hosts of private functions liable for injuries or damages caused by a guest whom they overserved alcohol to and/or failed to prevent them from driving when impaired.

II. Minority of States Have No Dram Shop Laws

A. Delaware

B. Kansas

C. Louisiana

D. Maryland

E. Nebraska

F. Nevada

G. South Dakota

H. Virginia

III. Dram Shop Liability in General

A. Who has dram shop liability?

  i. Commercial establishments (restaurants, bars, and taverns)

  ii. Packaged alcohol sales (liquor stores, stadium vendors)

  iii. Social hosts (hosts of private functions)

B. What is the dram shop responsibility?

  i. All businesses have the responsibility to deny the service or sale to underage customers.

  ii. Businesses in states with dram shop liability have the responsibility to avoid overserving alcohol to their patrons.

C. Who can make a dram shop liability claim?

  i. The injured person;

    ii. If injury resulted in death, the beneficiary/survivors of the decedent;

    iii. Intoxicated person?

      - Few states allow the intoxicated person to bring dram shop liability claims.
      - Such claims are typically limited to minors.

D. What are the general elements that make a case under a Dram Shop law?

    iv. An intoxicating liquor, transferred by the defendant to a patron who then becomes intoxicated by its consumption;

    v. An actionable injury to the plaintiff caused by the intoxicated individual;

    vi. A causal connection between the intoxication and the plaintiff's injury; and,

    vii. The plaintiff is of a class entitled to recover under the state's dram shop law.

IV. Varying Degrees of and Circumstances for Dram Shop Liability by State

A. Iowa (Iowa Code Ann. § 123.92)

  i. For injuries occurring on or after July 1, 2018:

    - In Iowa, businesses may be held liable for injuries or damages caused by an intoxicated individual whom they served or sold alcohol to, provided the individual was visibly intoxicated at the time of the sale.

  ii. For injuries occurring prior to July 1, 2018:

    - In Iowa, businesses may be held liable for injuries or damages caused by an individual whom they served or sold alcohol to when they should have known the person was intoxicated, or where they served the individual to the point where they knew or should have known the individual would become intoxicated.
    - Iowa businesses may be held liable if they served intoxicating liquor to individuals that were known to be underage.

B. Illinois (235 Ill. Comp. Stat. Ann. 5/6-21)

  i. In Illinois, businesses may be held liable for any injuries or damages caused by any intoxicated individual whom they served or sold alcohol to.

  ii. Illinois has social host liability for injuries or damages caused by an intoxicated individual under the age of twenty-one.

C. Arkansas (Ark. Code Ann. 16-126-106)

   i. In Arkansas, businesses may be held liable for injuries or damages caused by an intoxicated individual whom they served alcohol to, provided:

      - "it has been proven that an alcoholic beverage retailer knowingly sold alcoholic beverages to a person who was clearly intoxicated at the time of such sale, or sold under circumstances where the retailer reasonably should have known the person was clearly intoxicated at the time of the sale".

   ii. Arkansas has social host liability only for hosts who provide alcohol to guests that are under the legal drinking age.

   iii. Social host liability is prohibited in Arkansas for social hosts who provide alcohol to guests who are of the legal drinking age.

D. Missouri (RSMo § 537.053)

   i. In Missouri, dram shop liability only applies to qualified commercial establishments such as restaurants, bars, and taverns.

   ii. Missouri commercial establishments may be held liable for injuries or damages caused by an intoxicated individual whom they served or sold alcohol to, provided the establishment knew or should have known the patron to be:

      - Under the age of twenty-one; or
      - Noticeably intoxicated.
         - The individual must be inebriated to such an extent that impairment is shown by significantly uncoordinated physical action or significant physical dysfunction.

   iii. Dram shop claims in Missouri require a higher standard of proof of liability than most other states with dram shop laws.

   iv. Missouri does not have social host liability.

E. Oklahoma

   i. Oklahoma does not have a legislatively created dram shop law, but dram shop remedies against businesses are still available to injured parties if the business unlawfully provided alcohol to patrons that they reasonably should have known are:

      - Under the age of twenty-one; or
      - Noticeably intoxicated.

ii. The Oklahoma Supreme Court has found the following elements influential in establishing whether a business should have known a patron was intoxicated:

- Loud argument;
- Slurred speech;
- An inability to walk;
- Failed field sobriety tests when the accident occurred immediately after leaving a dram shop; and/or
- Police observation of intoxication shortly after improper service of alcohol.

iii. Oklahoma does not have social host liability.

V. Damage Caps for Dram Shop Liability Claims

A. Iowa: $250,000.00, unless the jury finds such a limitation would deprive the plaintiff of just compensation for the injuries sustained.

B. Illinois: Adjustable Cap

i. Final judgements or settlements on or after January 20, 2021:

- For injury to the person or property – $72,671.25
- Loss of Support – $88,820.41

ii. Final judgements or settlements on or after January 20, 2020:

- For injury to the person or property – $71,696.18
- Loss of Support – $87,628.66

iii. Final judgements or settlements on or after January 20, 2019:

- For injury to the person or property – $70,091.09
- Loss of Support – $85,666.89

VI. Investigating a Dram Shop Claim

A. Does the state have dram shop liability?

i. If yes…determine what factors the plaintiff needs to show under the state specific dram shop law.

B. Does a neighboring state have dram shop liability?

i. It is especially important for businesses near a state border to be aware of the dram shop laws of neighboring states.

ii. If a business resides in a state with no dram shop liability, but an intoxicated person causes injury after leaving the business in a bordering state that does have dram shop liability…the business may still be liable for injuries and damages that occur in the neighboring state if:

1. The plaintiff brings a lawsuit in the state with dram shop liability; and
2. The court finds the business meets certain criteria such as advertising and seeking to do business with residents of that state.

C. What evidence should be obtained during investigation?

i. Receipts from Sale
ii. Video Surveillance
iii. Employee Records (Timecards and Training)
iv. Medical Records and Blood Tests for Intoxicated Person
v. Whether an Intoxicated Person Drank Anywhere Else
    - Receipts from Sale at Other Establishments
vi. Intoxicated Person's Meals for the Day
vii. Intoxicated Person's Background Regarding Alcohol Consumption

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ALTERNATIVE DISPUTE RESOLUTION: MEDIATION IS NOT THE ONLY OPTION

I. MEDIATION

A. What is mediation?

i. An impartial person called a "Mediator" is selected by the parties to help the parties try to reach a mutually acceptable resolution of the dispute.

B. How does mediation fit into the legal process?

i. Mediation is increasingly mandated by most Federal and State courts at the allocation stage, case management conference and pre-trial review.

ii. Mediation is not helpful if all sides are not willing to cooperate and compromise.

iii. Mediation is non-binding.

II. ARBITRATION

A. What is arbitration?

i. A mutual person called an "Arbitrator" hears arguments and evidence from each side and then decides the outcome of the dispute.

B. How does arbitration fit into the legal process?

i. The arbitration process is less formal than trial, but typically follows some Rules of Evidence and Rules of Procedure.

ii. Arbitration may be binding or non-binding.

iii. Arbitration may be

1. required by contract between parties or
2. agreed to by the parties before or after a suit is filed or
3. completed with other forms of ADR

iv. Arbitration decisions are legally enforceable contracts with some limitations.

C. Federal Arbitration Act

D. Selection of Arbitrator or Arbitration Panel

E. Arbitration service identified by contract or the parties (AAA)

F. Mary Carter Agreement

i. What is a Mary Carter agreement?

1. The liability of the settling defendant is limited, and the plaintiff is guaranteed a minimum recovery;

2. the settling defendant remains a party to the pending action without disclosing the full agreement to the non-settling defendant and/or the Judge and Jury;
3. and if judgement against a non-settling defendant is for more than the settlement any money collected will first offset the settlement so that the settling defendant may, ultimately, pay nothing.

ii. Types of Mary Carter Agreements

1. Minor plaintiff (GAL and/or court approval)
2. Multiple insurance carriers
3. Insured approval

iii. Illinois will not enforce if it appears to be a Mary Carter Agreement.

1. The problem with Mary Carter Agreements is that they give the settling defendant a financial stake in the outcome, which distorts the adversarial process when the settlement is kept from the jury.

III. High/Low Agreements

A. Plaintiff and defendant agree that the outcome of the case will be less than X dollars (the low) and no more than Y dollars (the high).

B. If the verdict is in favor of the plaintiff, and exceeds Y dollars, the plaintiff gets y dollars. If the verdict is in favor of the defendant, and lower than X dollars, the plaintiff gets X dollars.

IV. Risk Mitigation for All Parties

A. Plaintiff with large damages but chance of defense verdict.

B. Defendant with limited resources, or limited insurance policy.

V. Neutral Evaluation/Early Neutral Evaluation

A. Each party presents their case to a neutral person an “Evaluator”.

B. The Evaluator is usually a subject matter expert.

C. The Evaluator provides opinions on strengths and weaknesses of evidence and arguments.

D. The Evaluator provides opinions on how the dispute may be resolved.

E. Neutral Evaluation/Early Neutral Evaluation is non-binding.

F. Neutral Evaluation/Early Neutral Evaluation is good for technical cases but not emotional issues.

VI. SETTLEMENT CONFERENCES

A. The parties and their respective attorneys meet with a judge to discuss possible settlement of the dispute.

B. Settlement judge does not make a decision but assists the parties in evaluating strengths and weaknesses of the case and in negotiating a settlement.

C. Settlement Conferences may be mandatory or voluntary

VII. SUMMARY JURY TRIAL

A. What is a Summary Jury Trial?

   i. Attorneys for each party make abbreviated case presentations to mock jury (usually 6 to 8 jurors) and a presiding Judge or Magistrate.

   ii. Mock Jury renders an advisory verdict which is <u>non-binding</u>.

   iii. Verdict can be used to assist the parties in reaching settlement especially if one party has an unrealistic assessment of the case.

B. California - Expedited Jury Trial Program

   i. All parties and insurance carrier's consent

   ii. 8 jurors can stipulate to less

   iii. 6 of 8 jurors required for verdict

   iv. 1-day-trial (1 hour for voir dire and 3 hours for each party to present case

   v. Waiver of right of appeal

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RISK ALLOCATION AND LIMITATION

I. DEFINING RISK ALLOCATION – PUSHING IT OFF ON SOMEONE ELSE

A. Overview

Allocating risk in contractual situations can be a difficult and somewhat awkward topic to contract around. Both parties would prefer that no liability will arise during the contractual relationship, and its likely neither party wants to accept any liability either. However, allocating liability is a cost of doing business, and parties must take steps to ensure they are either protected from liability, or prepared to assume the responsibility of accepting liability in some way. As a basic rule, parties allocating risk must ask themselves 1) how they are allocating risk; 2) why they are using that particular method; and 3) if there are any alternative solutions to their allocation. Keeping these three principals in mind and examining the discussion below of the different types of risk allocation methods can give drafters a strong starting point in ensuring their risk is allocated in an efficient and safe manner.

B. Types of Risk Allocation

i. Contractual Indemnity/Contribution

1. Definition and usage

a. An indemnification is a contractual obligation to pay for any losses or expenses of the opposing party.[1] Indemnification clauses function similar to liquidated damage clauses, as they can be enforced when a breach occurs, but in addition, they can be enforced before a breach occurs. In other words, indemnification clauses are enforceable when an anticipated breach arises.[2]

2. Liability vs. Damages

a. A common way to allocate risk is by indemnifying a party. There is a fine difference in this rule between "liability" and "damages". If the indemnity is against "liability" then it "becomes collectible immediately when the indemnitee becomes liable to the third person," but "an indemnity against 'damages' becomes collectible only after the indemnitee has paid the third person."[3]

3. Coverage

a. Some cases hold that the indemnity provision only covers third-party claims unless they say otherwise. Thus, indemnification provisions may not cover claims, losses, or expenses, attorneys' fees, associate

[1] § 8:45.Nonwarranty risk allocation: indemnities—What they are, Modern Licensing Law § 8:45
[2] Maxim Technologies, Inc. v. City of Dubuque, 690 N.W.2d 896 (Iowa 2005).
[3] Parks v. Western Washington Fair Ass'n, 15 Wash. App. 852, 553 P.2d 459 (Div. 2 1976)

with a claim between the licensor and the licensee, absent a contrary agreement.[4]

4. **Modern Licensing Law Regarding Warranties and Related Obligations Top Seven Factors**
    a. When does the indemnity or defense obligation arise? When are demands made? When is judgment entered? When is the settlement reached?
    b. Who chooses counsel? Who determines defense strategy?
    c. What notice obligations are involved as preconditions for the assertion of the right or for completion of the defense?
    d. What costs, damages, or fees are covered?
    e. Is the indemnity purely monetary or is there a right to replace technology?
    f. What effect, if any, follows from the fact that the recipient of the indemnity was partly at fault?[5]
    g. In an obligation to defend, who controls the conduct of the litigation and any settlement?

ii. Implied vs. express indemnity

1. **How is Express Indemnification created?**
    a. An indemnification obligation can arise "by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances."[6]
2. **How is Implied Indemnification Created?**
    a. An implied obligation to indemnify can arise "from the contractual or legal relationship implied between the parties."[7] Generally, an implied contractual indemnification arises when a party owes a duty to a third party but transfers the duty by implied duty to another.[8]
3. **Types of Circumstances When Implied Indemnification Arises**
    a. There are normally two sets of circumstances when an implied indemnification may be recognized. the first revolves around an implied contract theory, while the second can be implied under a

[4] Hooper Associates, Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 491–493, 549 N.Y.S.2d 365, 366–368, 548 N.E.2d 903 (1989)
[5] § 8:45.Nonwarranty risk allocation: indemnities—What they are, Modern Licensing Law § 8:45

[6] E. L. White, Inc. v. City of Huntington Beach, 21 Cal. 3d 497, 506–507, 146 Cal. Rptr. 614, 579 P.2d 505 (1978).
[7] Gainsco Ins. Co. v. Amoco Production Co., 2002 WY 122, 53 P.3d 1051, 1067 (Wyo. 2002).
[8] Peoples' Democratic Republic of Yemen v. Goodpasture, Inc., 782 F.2d 346, 351 (2d Cir.1986).

‘implied-in-law’ theory when one tortfeasor has paid for a loss that should have been the responsibility of the other. The rationale for this relationship arises to indemnify to prevent unjust or an unfair result.[9] The law provides that this theory under the idea that everyone is responsible for the consequences of their own actions, and if someone has been compelled to pay damages that should have been paid by the true wrongdoer, they may be held accountable via implied indemnity.

4. **Unfavorable Implied Indemnification Pitfalls**

   a. Implied indemnity can arise when a party has committed no wrongdoing, but a party can still held vicariously liable for the wrongdoing of another. These are separate causes of action from the initial cause of action that created the injustice to which the vicarious liability has arisen to correct. Courts will find there is implied indemnity when:

      1. the parties had a preexisting relationship prior to the occurrence of the tort giving rise to the liability.
      2. the party seeking indemnification is blameless and the other party is at fault.

5. **Example 1 – Underwood v. Fulford[10]**

   a. A real estate broker hired an agent to purchase two specific properties for her. Instead, the agent and a partner decided to purchase the two houses for themselves. The broker sued and retained a $150,000 judgment holding the agent and the broker jointly and severally liable. The agent paid the entire balance of the judgment and sued his partner’s estate (who had recently passed) for a portion of the judgment he had paid. Despite the absence of a formal contract granting the partner’s estate indemnification, the court held that the estate was indemnified from paying the agent any balance of the judgment. The court reasoned that since the duty of care was owed by the agent to the broker, and since there was no wrongdoing by the partner, despite being liable in tort, can be indemnified from paying any amount of the judgment.

[9] Traeger v. Farragut Gardens No. 1, Inc., 201 Misc. 18, 107 N.Y.S.2d 525 (Sup.Ct., Kings County, 1951).
[10] Underwood v. Fulford, 128 N.E.3d 519, 525 (Ind. Ct. App.), transfer denied, 138 N.E.3d 946 (Ind. 2019)

6. **Example 2 – Godoy v. Abamaster of Miami, Inc.** [11]

    a. A plaintiff lost four fingers on her right hand while using a meat grinder and sued the retailer, wholesaler that sold the grinder, and the importer which sold the grinder to the wholesaler. The jury apportioned 40% fault to the plaintiff, 50% to the wholesaler, and 10% to the importer. The court ruled that when the manufacturer was not subject to the jurisdiction of the court, a wholesaler may be entitled to indemnification from an importer which is higher up the distribution chain and closer to the manufacturer, when both are strictly liable to the plaintiff. The court explained that holding the importer liable satisfied the public policy consideration underlying the doctrine of implied indemnity. Implied-in-law indemnity is similar to a tort-based doctrine rather than contract-based. Implied-in-law indemnity is often used in vicarious liability cases to shift the loss from the party who legally was required to pay the loss to the party whose wrongful or negligent conduct actually caused the loss.

iii. Contractual Additional Insured provisions

1. **Definition**

    a. Contractual additional insurance provisions help protect liability when working with 3rd parties such as contractors, subcontractors, and other third-party vendors. This is done by adding these named parties to an insured's policy to protect from bodily injuries, damage, or any on the job accidents that could trigger an insurance claim.

2. **Example**

    a. An investor constructing an office building will hire a general contractor who will hire subcontractors to construct the building. When these contracts are executed, it will typically include a detailed description regarding who is liable for any insurance issues necessary to protect each party. This involves the general contractor needing to add coverage for the investor and the property itself, as when plaintiffs file suit against a general contractor, they will typically file suit against the building as well.

3. **Pitfalls in Drafting**

    a. Active operations – this phrase used in drafting can bind those insured to liability resulting from after the contracted work is finished.

[11] Godoy v. Abamaster of Miami, Inc., N.Y.L.J. Jan. 29, 2003, p. 18, col. 1 (2d Dept. 2003)

b. Individual negligence – this provides an exception for the additional insured if the party is individually responsible for the injury that occurred.

c. State specific rules – some states provide that prohibit one party being liable for another party's own negligence. Check your state's specific rules before drafting an individual negligence provision.

d. Within the terms of the agreement – including this term can limit one's liability as claims resulting from other liability such as personal and advertising could be covered under the additional insured provision. This phrase limits this liability even further.

4. Common Phrases Used for Drafting Language

a. Arising out of – can provide easy to identify language to cover specific events.

b. But only with respect to liability arising out of [insert insured]'s work – narrower language and can name specific parties to avoid confusion.

II. DEFINING RISK LIMITATION – LIMITING OR NARROWING RISK

The previous section discussed methods of distributing risk among parties to an agreement or project. Perhaps viewed as a more favorable option, eliminating risk completely or narrowing the scope of what types of claims can be brought can limit the liability of parties entirely. This can be done by various types of waivers or provisions in contracts that limit liability or provide for an agreed upon remedy. Referring back to the original three rules for allocating risk, the most important aspect to consider here is *how* risk is being limited. Many of the below methods are disfavored by public policy and require specific and limited in scope provisions in order to be enforced. Careful consideration must be taken when drafting these provisions, or even a mutually agreed upon drafted provision could be tossed out by courts.

A. Types of Risk Limitation

i. Contractual Damage Limitations

1. Overview of Damages

a. When a party breaches a contract, typical damage remedy analysis is performed to award damages such as expectation, reliance, or restitution to the non-breaching party. These damage awards can often be unpredictable and leave breaching parties responsible for larger damage awards than they anticipated. To remedy this, parties can contract to agree to a specific remedy that will take affect instead of one of the automatic remedies that most courts will impose.

2. **Waiving Liability in a Contract**

    a. Generally, where parties contract to agree to a remedy in the event of the breach, their agreement will control, provided the remedy is "mutual, unequivocal, and reasonable".[12] Despite allowing for the parties to agree upon their own remedy, courts still have the authority to decide if the remedy is indeed "mutual, unequivocal, and reasonable".

3. **Example of a Limitation**

    a. If a contract provides for liquidated damages, a court may not award damages in excess of the actual damages that occurred (a $10,000 injury cannot be compensated with a $10,000,000 liquidated damage clause).

ii. Contractual Waivers

1. **Definition**

    a. A contractual waiver is a useful tool to avoid risk by removing all risk completely. The most common contractual waivers are seen when one party is contracting with another party to partake in a sporting or athletic event such as swimming, attending an amusement park, or skiing.

2. **Consideration for Waiver?**

    a. In consideration for partaking in the potentially hazardous event, the other party is giving up their right to sue for any injury or breach of the standard of care usually necessary for that activity.

3. **Pitfall in Drafting the Provision**

    a. The most important aspect to remember in drafting a contractual waiver is to make the waiver plainly obvious that a reasonable person will be able to understand what they are agreeing to. Despite a party signing, if the provision is not obvious and liberal in its language, courts could disregard the provision.

4. **Example – Ferbet v. Hidden Valley Golf and Ski, Inc.**

    a. An example of this is seen in *Ferbet v. Hidden Valley Golf and Ski, Inc.* when a guest at a ski resort went snow tubing down a hill and broke his leg when his foot engaged with a crevice in the sliding surface of the slope.[13] The skier alleged that his injury was due to the negligence of ski resort, and the ski resort insisted that the skier's signing of a 'release of

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[12] Seaside Cmty. Dev. Corp. v. Edwards, 573 So. 2d 142, 147 (Fla. Dist. Ct. App. 1991).

[13] Ferbet v. Hidden Valley Golf & Ski, Inc., 618 S.W.3d 596, 609 (Mo. Ct. App. 2020), transfer denied (Apr. 6, 2021)

liability' agreement barred him from bringing a claim. The relevant portion of the waiver said:

"I understand and acknowledge that snow tubing is a dangerous, risky sport, and that there are inherent and other risks associated with the sport and that all of these risks can cause serious and fatal injuries. . . In consideration of the above and being allowed to participate in the sport of snowtubing, I agree that I will not sue and will release from any and all liability [ski resort], owners, operators, lessors, lessees, officers, agents, and employees if I or any member of my family is injured while using any part of the snowtubing facilities."

The Missouri Court of Appeals first acknowledged that contractual waivers are disfavored, but not void as against public policy. They explain that the party best positioned to prevent the harm is relieved of liability and instead the burden of loss is placed upon the party least able to prevent it, which disfavors the public policy argument. To counter this position, contractual waivers require words such as "negligence" or "fault" or their equivalents to be used so that a clear and unmistakable waiver and shifting of risk occurs.[14] In other words, to help protect potential plaintiffs, the waiver must not be grouped in with other clauses and must be plainly obvious what the party is contracting to do. The Court held that this ski resort contract can be enforced. There was no doubt that a reasonable person agreeing to the waiver actually understood what the claim he is waiving was about.

5. Check State Specific Laws

a. It should be noted that it is important to check the state law regarding liability waivers/exculpatory clauses. While the majority of states have similar approaches to Missouri, some states such as Montana statutorily prohibit liability waivers or alternatively strongly disfavor them as a matter of public policy.

iii. Arbitration provisions

1. Definition and Function

a. Arbitration provisions offer an unconventional way to limit risk. Instead of avoiding liability, arbitration provisions offer a way for parties to avoid the costs of litigation and instead allow for an arbitrator to settle the dispute. The obvious hurdle to overcome is to actually draft an effective arbitration clause to ensure that the claims successfully get to arbitration.

[14] *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 337 (Mo. banc 1996)

2. Seven Pitfalls of Drafting Arbitration Clauses[15]

a. Equivocation

1. The goal of drafting an arbitration clause is to produce an enforceable agreement to arbitrate. To do so, the drafter must clearly state that both parties have agreed to a binding arbitration. An unequivocal clause that does not firmly commit the parties to arbitrate their disputes will not be enforced.

b. Inattention

1. An arbitration clause should be designed to fit the circumstances of the transaction and the parties' needs. Drafters will often take a standard, pre-written arbitration clause. Sometimes, a standard clause should be the beginning, not the entire drafting process. Screen all the standard clauses you use to ensure that it is liberally construed to your specific needs.

c. Omission

1. Omissions occur when holes in the agreement can result in issues. This can result from a clause that expresses an agreement to arbitrate but fails to provide guidance on how or where to do so. For example, the clause "Any disputes arising out of this agreement will be finally resolved by binding arbitration." While it is likely enforceable, it does not specifically state any details concerning the arbitration and will result in going to court to have an arbitrator or institution chosen for them.

d. Over-specificity

1. This is the exact opposite of an omission, and results from providing too many details that can result in difficult or impossible arbitration plans. For example, the provision "The arbitration shall be conducted by three arbitrators, each who shall be fluent in Mandarin and shall have twenty or more years of experience in the design of computer chips, and one of whom shall act as chairman, shall be an expert on the law of civil war history." could be rendered burdensome to enforce and will be rejected.

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[15] Townsend, *Drafting Arbitration Clause: Avoiding the Seven Deadly Sins*, 58 Disp. Resol. J. 28 (Feb.-Apr. 2003); § 14:72.Pitfalls in drafting arbitration agreements, 22 Tenn. Prac. Contract Law and Practice § 14:72

e. **Unrealistic Expectations**

   1. This problem arises where the parties include a tight timeline with many steps that will likely never be achieved. Adding in steps such as naming arbitrators within a specific number of days, then selecting the second arbitrator seven days later, etc. the risk is collateral litigation.

f. **Litigation-Envy**

   1. Sometimes, out of habit, drafters might inappropriately rely on procedures and processes suitable only to court cases. Stating that the federal rules of civil procedure or the federal rules of evidence. This is needlessly confusing and can create many problems such as whether pre-trial orders are required, or what happens when the federal rules conflict with arbitration rules.

g. **Over-reaching**

   1. A drafter must resist the temptation to unfairly favor its own interests in the drafting of the arbitration clause. For example, the Fourth Circuit Court of Appeals voided an overreaching provision that allowed for the arbitrators to be picked from a list the drafter created, requiring the opposing party to file all witnesses and facts, allowing the drafter to amend, record, modify, or cancel the arbitration provision, but not the opposing party.[16]

iv. Subrogation Waiver

1. Definition

a. A subrogation waiver is a clause in which parties to a contract excuse one another from liability to the extent covered by insurance, allocating the loss to the insurance company. As a general example, an owner's house had burned down, and the insurer paid the owner loss and sued the general contractor to recover the payment. However, the owner and the contractor had a waiver-of-subrogation provision in the construction contract, thus barring the insurer's claim against the contractor.[17]

2. Function

a. Subrogation allows an insurer who has paid a loss to step into the position of the injured party and assert the injured party's or insured's

[16] Hooters of America, Inc. v. Phillips, 173 F.3d 933, 938-939, 79 Fair Empl. Prac. Cas. (BNA) 629, 75 Empl. Prac. Dec. (CCH) P 45822 (4th Cir. 1999).
[17] Behr v. Hook, 173 Vt. 122, 787 A.2d 499 (2001)

rights against the party who is allegedly responsible for the loss, and thereby be reimbursed for the payment. [18]

3. **Positive Public Policy**

   a. The public policy argument behind subrogation waivers differs from liability waivers despite both waivers being similar in execution. The public policy tends to favor enforcing subrogation waivers regardless of the type of conduct involved (even if it is willful and wanton misconduct)[19] Public policy disfavors liability waivers because enforcing liability waivers could leave an injured plaintiff uncompensated entirely. In contrast, with subrogation waivers, there is no risk that an injured party will be left uncompensated, and it is irrelevant to the injured party whether it is compensated by the grossly negligent party or an insurer. Some courts are split on this issue, but generally courts are more favorable to subrogation waivers than liability waivers. Courts also tend to favor subrogation waivers due to the beneficial economic effect. Subrogation waivers help parties avoid higher costs that come from retaining multiple insurance policies and overlapping coverage.

4. **Drafting Pitfall**

   a. One thing to be on the lookout for when drafting a subrogation waiver is to distinguish what is a subrogation waiver and what is a liability waiver, as they are two separate provisions. Often, courts will view a general release such as a release in a settlement agreement between two parties did not release one party's insurer's right of subrogation to file claims against the alleged wrongful party.[20] The court said that even if the agreement were construed to purport to release the insurer's right of subrogation, the insurer was not a party and the buyer had offered nothing to support its implicit assertion that the seller had the authority to release the insurer's right to subrogation.

5. **Subrogation Waivers v. Liability Waivers**

   a. Subrogation waivers are similar to liability waivers/exculpatory clauses as some courts have found some subrogation waivers void as public policy. Pennsylvania courts found that waivers of subrogation contained within leases were void as against public policy.[21] When a fire broke out in an office building, insurers were required to compensate tenants, and

2006 A.L.R.6th 14 (Originally published in 2006)

[18] Reliance Nat'l Indem. v. Knowles Indus. Servs., Corp., 2005 ME 29, ¶ 14, 868 A.2d 220, 226[18] 2006 A.L.R.6th 14 (Originally published in 2006)

[19] Reliance Nat'l Indem. v. Knowles Indus. Servs., Corp., 2005 ME 29, ¶ 14, 868 A.2d 220, 226

[20] Fireman's Fund Ins. Companies v. Siemens Energy & Automation, Inc., 948 F. Supp. 1227 (S.D. N.Y. 1996)

[21] Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 1993 WL 489771 (E.D. Pa. 1993)

sought compensation from the owners and managers or owners of the building. The owners argued that tenants had waived any rights of subrogation through waiver. The court found that this waiver was against public policy because it relieved the defendants from liability where they violated regulations designed to protect human life. In contrast, when an oil rig worker incurred a back injury while on the job, the Court upheld a subrogation waiver between the employer and the worker because such a waiver clause in an insurance policy did not violate the Louisiana oilfield anti-indemnity act.[22] In short, it is best to check the local state rules regarding subrogation waivers, but the general tendency is they are disfavored similar to liability waivers/exculpatory clauses.

22 In re Falcon Inland, Inc., 1999 WL 600373 (E.D. La. 1999)

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COLLECTING AND PRESERVING EVIDENCE IN KANSAS AND MISSOURI

I. What Kind of Evidence?

A. Video/Surveillance Footage

B. Drug and Alcohol Testing and Results

C. Witness Statements

D. Any Equipment or Apparatus Involved in the Incident (i.e., PPE)

E. Photos (of the scene of the accident, injuries, etc.)

F. Evidence Related to Type of Claim (i.e., logbooks, and ECM data downloaded in trucking cases)

G. Information of Other Witnesses

H. Accident Reports

I. Any In-House Memoranda Pertaining to Events (i.e., employment discrimination cases)

J. Electronically Stored Information/ESI

   i. Federal Rules of Civil Procedure 34(a)(1)(A) – "…any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form…"

   ii. The rule covers—either as documents or as electronically stored information—information "stored in any medium," to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments. *Committee Notes on Rules—2006 Amendment*.

K. Cell Phone Data

L. Any Evidence that an Opposing Party Asks You to Preserve (i.e., spoliation issues)

M. Evidence Relevant to Claimant's case:

   i. Wage records

   ii. Accident reports completed/filed by injured employee

N. Evidence Relevant to Respondent's case:

   i. Medical records

      1. Post and prior to alleged injury
      2. Look for any possible pre-existing condition that could affect compensability

II. Why Collect and Preserve?

A. Memories fade or change during the course of litigation, which could take years…

B. Aid potential defenses (i.e., safety policy defense)

C. Assess risks of exposure

D. Get an early sense of evidence that may be presented at trial in order to mitigate exposure

E. May be used to point out the opponent's problems with the case

F. Memorialize facts of cases involving "he said, she said" scenarios

G. Spoliation concerns

III. Privileged Information

Employers should cooperate with and work alongside their attorney to collect evidence needed or requested.

Some communication transmitted between attorney and client will be considered privileged for purposes related to discovery requests.

> This privileged communication will not be discoverable by opposing parties unless you/your attorney wish to provide this information via waiver.

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). *American Bar Association, Model Rules of Professional Conduct, Rule 1.6.*

A. Privilege in *Kansas* (K.S.A. §§60-426, 60-437)

Under Kansas law, attorney-client privilege protects attorney's communications to his client even if communications do not contain confidential matters revealed by client earlier to attorney. *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355 (10th Cir. 1997).

> Attorney-client privilege exists to protect not only the giving of professional advice to those who can act on it but also giving of information to lawyer to enable him to give sound and informed advice. *Id.*

Attorney-client privilege protects from compelled disclosure of certain confidential communications made between an attorney and client in the course of their professional relationship. *State v. Gonzalez*, 234 P.3d 1 (Kan. 2010).

The privilege is waived if the person holding the privilege has either: (a) contracted with a party against whom the privilege is claimed that he or she would not claim the privilege or, (b) without coercion, or without any trickery, deception, or fraud practiced against him or her, and with knowledge of the privilege, made disclosure of any part of the matter or consented to such a disclosure made by anyone. KS ST § 60-437.

B. Privilege in *Missouri* (MO R RCP 50.61)

For purposes of rule excluding from discovery any privileged material, “privileged material” is any professionally oriented communication between attorney and client regardless of whether it is made in anticipation of litigation or for preparation for trial. *State ex rel. Tillman v. Copeland* (App. S.D. 2008) 271 S.W.3d 42.

- The privilege is absolute, and therefore even if an adversary can show a need for the material and hardship in acquiring it, discovery of the privileged communication is not authorized. *Id.*

The attorney-client privilege prohibits the discovery of confidential communications, oral or written, between an attorney and his client with reference to litigation pending or contemplated. *Ratcliff v. Sprint Missouri, Inc.* (App. W.D. 2008) 261 S.W.3d 534.

Privileged matters are not discoverable unless privilege is waived. *Barrett v. Mummert* (App. E.D. 1994) 869 S.W.2d 282.

IV. What is Spoliation of Evidence?

“Spoliation” of evidence occurs when someone with an obligation to preserve evidence with regard to a legal claim neglects to do so or intentionally fails to do so. Such a failure to preserve evidence can take place by destruction of the evidence, damage to the evidence, or losing the evidence. When spoliation occurs, the party responsible may be held accountable in court through a variety of different sanctions. Those sanctions vary from state to state.

Generally, those states that have recognized or created the tort of spoliation in some form, limit such an action to third-party spoliation of evidence related to pending or actual litigation. First-party spoliation claims are those claims for destruction or alteration of evidence brought against parties to underlying litigation.

Conversely, third-party spoliation claims are those destruction or alteration of evidence claims against non-parties to underlying litigation. Moreover, most of these states generally hold that third-party spoliator must have had a duty to preserve the evidence before liability can attach.

The majority of states that have examined this issue have preferred to remedy spoliation of evidence and the resulting damage to a party’s case or defense, through sanctions or by giving adverse inference instructions to juries.

A. Spoliation in Kansas

Kansas law does not currently recognize an independent tort action for the spoliation of evidence; The Supreme Court of Kansas concluded in *Koplin v. Rosel Well Perforators, Inc.,* that absent some independent tort, contract, agreement, voluntary assumption of duty, or some special relationship of the parties, the new tort of spoliation of evidence should not be recognized in Kansas under the facts presented. *Id.* at 215; 734 P.2d at 1177. Consequently, the U.S. District Court for Kansas held that the Supreme Court of Kansas would recognize the tort of spoliation under some limited circumstances. *Foster v. Lawrence Memorial Hosp.*, 809 F.Supp. 831, 838 (Kan. 1992).

B. Spoliation in Missouri

"Spoliation is the intentional act of destruction or significant alteration of evidence; the concealment or suppression of relevant evidence, or the failure to determine whether certain evidence exists may also constitute spoliation." *Wilmes v. Consumers Oil Company of Maryville*, 473 S.W.3d 705 (Mo. Ct. App. W.D. 2015); *Pisoni v. Steak N' Shake Operations, Inc.*, 468 S.W.3d 922 (Mo. Ct. App. E.D. 2015).

C. Why is Spoliation a Bad Thing?

i. Kansas – *"Adverse Inference Instruction"*

1. The applicable jury instruction, K.P.J.I. § 102.73, provides: "If a party to [the] case has failed to offer evidence within his power to produce, you may infer that the evidence would have been adverse to that party, if you believe each of the following elements: (1) The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence. (2) The evidence was not equally available to an adverse party. (3) A reasonably prudent person under the same or similar circumstances would have offered if (he) (she) believed it to be favorable to him. (4) No reasonable excuse for the failure has been shown."

ii. Missouri – *"Adverse Inference"*

1. No jury instruction;
2. however, "[a] party who intentionally destroys or significantly alters evidence is subject to an adverse evidentiary inference under the spoliation of evidence doctrine." *Baldridge v. Director of Revenue*, 82 S.W.3d 212, 222 (Mo. App. 2002).
3. When an adverse inference is urged, it is necessary that there be evidence showing intentional destruction of the item, and also such destruction must occur under circumstances which give rise to an inference of fraud and a desire to suppress the truth.

D. Possible Sanctions for Spoliation

Sanctions can include the dismissal of claims or defenses, preclusion of evidence, and the granting of summary judgment for the innocent party.

i. Kansas

In the 10th Circuit, the Court noted in Herrmann v. Rain Link, Inc., that the elements of spoliation for sanctions is as follows:

1. Duty to preserve evidence arose (by receiving a discovery request, a complaint being filed or other notification that litigation is likely).

2. Adverse party is prejudiced by the destruction of evidence.

   a. If the prejudiced party seeks an adverse inference instruction as sanction, the party must also demonstrate that the destruction was done in bad faith. Mere negligence is insufficient, and prejudice is not presumed if the spoliation was intentional. Case No. 11-1123-RDR (D. Kan. July 19, 2013).

ii. Missouri
The law imposes significant consequences for ignoring a spoliation letter/preservation notice.

1. Missouri law states that the evidentiary spoliation doctrine applies when a person intentionally destroys relevant evidence which would indicate that they sought to commit fraud and prevent the truth from coming to light.

2. Failing to preserve these items after receiving such a notice will result in sanctions being imposed on the defendant and could give rise to the presumption that the evidence would have been harmful to their defense and instruction may be given to the jury to make such an adverse inference.

V. Subrogation/Third Party Claims in Work Comp Context

The insurance carrier holding the worker's compensation policy has a right to legally pursue and seek payment for workers' compensation payments made when a third-party is the one who is truly at fault for the employee's injuries.

The employer can assert a lien or intervene in the third-party matter to protect its right of recovery. If employer fault may be an issue, the employer will likely intervene.

It is important to collect evidence that may implicate a third party for an injured employee's loss.

A. Kansas – KSA §44-504

i. When the injury or death for which compensation is payable under the workers' compensation act was caused under circumstances creating a legal liability against some person other than the employer or any person in the same employ to pay damages, the injured worker or the worker's dependents or personal representatives shall have the right to take compensation under the workers' compensation act and pursue a remedy by proper action in a court of competent jurisdiction against such other person.

ii. In the event of recovery from such other person by the injured worker or the dependents or personal representatives of a deceased worker by judgment, settlement or otherwise, the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer to the date of such recovery and shall have a lien therefor against the entire amount of such recovery, excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse.

B. Missouri – RSMo. §287.150

   i. Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person shall be apportioned between the employer and employee or his dependents using the provisions of subsections of this section.

   ii. When a third person is liable for the death of an employee and compensation is paid or payable under this chapter, and recovery is had by a dependent under this chapter either by judgment or settlement for the wrongful death of the employee, the employer shall have a subrogation lien on any recovery and shall receive or have credit for sums paid or payable under this chapter to any of the dependents of the deceased employee to the extent of the settlement or recovery by such dependents for the wrongful death. Recovery by the employer and credit for future installments shall be computed using the provisions of subsection 3 of this section relating to comparative fault of the employee.

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