MVP LAW SEMINAR 2022

Employment Law & General Liability

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THE GOOD, THE BAD, AND THE UGLY OF BAD FAITH

I. What is Bad Faith?

a. Basic Definition

i. <u>First Party Insurance</u>
Refusal to pay a claim without a reasonable basis or even if insurer has a reasonable basis for denial, failing to properly investigate the claim in a timely manner.

ii. <u>Third Party Insurance</u>
Failure to defend or indemnify or settle claim within policy limits without a reasonable basis or failing to properly and timely investigate or defend the claim.

b. Types of conduct which may be bad faith:

i. Deceptive practices or deliberate misrepresentations to avoid paying claims.
ii. Deliberate misinterpretation of records or policy language to avoid coverage.
iii. Unreasonable litigation conduct.
iv. Unreasonable delay in resolving claim or failure to investigate.
v. Use of improper standard to deny a claim.
vi. Arbitrary or unreasonable demands for proof of loss.
vii. Abusive and coercive tactics to settle claim.
viii. Compelling an insured to contribute to settlement.
ix. Failing to thoroughly investigate the claim in accordance with your own procedures.
x. Failing to maintain adequate investigative procedures.
xi. Failing to disclose policy limits and explain applicable policy provisions or exclusions.

c. Sources of bad faith law

i. <u>Common Law</u>

The implied duty of good faith and fair dealing.

ii. <u>State Legislation</u>

While some states have enacted statutes which generally prohibit bad faith or vexatious refusal to pay policy benefits, others have enacted Unfair Claims Practices Acts which specifically set forth various types of conduct which are prohibited. States may also attempt to control insurance claim adjudication through regulations promulgated by an insurance commission.

iii. <u>Federal Legislation</u>

The most obvious example of federal legislation which governs insurance practices is the Employee Retirement Security Act of 1974, 29 U.S.C. 1001-1461 (ERISA) which governs group employee benefit plans. ERISA generally preempts any state law claims referencing an employee benefits plan. *Hall v. Blue Cross/Blue Shield*, 134 F.3d 1063 (11th Cir. 1998).

In the past, it has also been suggested that bad faith conduct by insurance companies might fall within the scope of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961-1968 (RICO).

d. Bad faith may exist even in the absence of coverage

   i. *Judah v. State Farm Fire and Casualty*, 266 Cal.Rptr. 455 (Cal. App. 1990). *Judah v. State Farm* has been rejected by many courts, including California courts, but this principle was supported in *Lloyd v. State Farm Mutual Automobile Ins. Co.*, 943 P.2d 729 (Ariz. Ct. App. 1996).

   ii. Even if there is no coverage, the manner in which the claim is handled as opposed to the fact that the claim is denied may subject the insurer to a bad faith claim.

   iii. Determination of whether an incident or occurrence is "covered".

e. Unenforceable Provisions

   i. One potential source of bad faith claims arises when attempts are made to enforce a provision of an insurance policy which is not enforceable. Provisions contained within the policy may be unenforceable if they are contrary to the law or impossible to perform.

f. Bad Faith Law from Selected States

   i. <u>Oklahoma Bad Faith Law</u>

   Oklahoma bad faith law springs from the Oklahoma Supreme Court decision in *Boling v. New Amsterdam Cas. Co*. 46 P.2d 916 (Ok., 1935). The Court recognized that an insurer may be liable for the entire amount of a verdict in excess of its policy limits where it fails or refuses, in bad faith, to take advantage of an opportunity to settle within those limits prior to trial. *Id.* However, not until the late 1970's did the Oklahoma Supreme Court establish bad faith as an independent tort upon which an insurer could be held liable for both compensatory and punitive damages for the delay or denial in payment of a claim not reasonably in dispute. *Christian v. American Home Assur. Co.*, 577 P.2d 899 (Ok., 1977).

   For decades, Oklahoma recognized bad faith as an intentional tort (*see McCorkle v. Great Atlantic Ins. Co.*, 637 P.2d 583 (Ok., 1981); *see also Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105 (Ok., 1991) but this language was repudiated in 2005 when the Oklahoma Supreme Court held that, ""the minimum level of culpability necessary for liability against an insurer to attach is more than simple negligence, but less than the reckless conduct necessary to sanction a punitive damage award against an insurer." *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080 (Ok., 2005).

   The compensatory damages recoverable in a bad faith case include those for financial losses, embarrassment and loss of reputation, and emotional distress proximately resulting from the insurer's improper conduct. *See Oklahoma Uniform Jury Instruction – 22.4*.

Oklahoma has also extended bad faith liability to TPAs under certain limited circumstances. *See Wathor v. Mutual Assur. Admin. Inc.*, 87 P.3d 559 (Ok., 2004). The Court noted that, "In a situation where a plan administrator performs many of the tasks of an insurance company, has a compensation package that is contingent on the approval or denial of claims, and bears some of the financial risk of loss for the claims, the administrator has a duty of good faith and fair dealing to the insured." *Id*.

In 2006, the Oklahoma Supreme Court handed down the *Sizemore* decision. *See* 142 P.3d 47, (Ok., 2006). This decision held that an insurer or self-insured employer would be subject to bad faith liability for the failure to pay a workers' compensation award but that such liability would only arise where the workers' compensation claimant had first followed the procedure set forth within 85 O.S. Ann., § 42(A). It is arguable that this ruling allows for a bad faith claim to be filed in District Court if benefits are not paid within 10 days.

The most recent case regarding bad faith in Oklahoma was handed down in February 2018. *See Gaasch Estate of Gaasch v. St. Paul Fire and Marine Insurance Co.*, 412 P.3d 151. Here, the claimant's estate brought action against a worker's compensation carrier to recover for wrongful death, breach of contract, and bad faith in delaying nutritional consult for hospitalized claimant until days before his death. Here, the Oklahoma Supreme Court ruled that the representative was required to use the exclusive remedy provisions provided by the Workers' Compensation Act and obtain a certification order from the Workers' Compensation Court. Because it did not do so, the suit was precluded by the exclusive remedy doctrine.

ii. <u>Kansas Bad Faith Law</u>

Kansas does not recognize a common law action for bad faith. *Spencer v. Aetna Life & Casualty*, 227 Kan. 914 (1980). Kansas has adopted a Uniform Trade Practices Act which includes a section identifying and prohibiting unfair claim settlement practices. K.S.A. 40-2404(9). Courts have found, however, that this Act does not give rise to a private right of action as the sole authority under the Act to redress violations is granted to the Kansas Insurance Commissioner. *Bonnel v. Bank of America*, 284 F.Supp.2d 1284, 1289 (D.Kan. 2003); *Earth Scientists v. United States Fidelity & Guarantee*, 619 F.Supp. 1465, 1468 (D.Kan. 1985).

In Kansas, the sole remedy for an insured with a first party claim against an insurance company is for breach of the contract and/or to report the insurer to the Kansas Insurance Commissioner under the Unfair Claim Settlement Practices Act. However, Kansas law does provide for extra-contractual damages for first party claims under certain circumstances:

> That in all actions hereafter commenced, in which judgment is rendered against any insurance company as defined in K.S.A. 40-201, and including in addition thereto any fraternal benefit society and any reciprocal or interinsurance exchange on any policy or certificate of any type or kind of insurance, if it appears from the evidence that such company, society or exchange has <u>refused without just cause or</u>

> excuse to pay the full amount of such loss, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action, including proceeding upon appeal, to be recovered and collected as a part of the costs: Provided, however, That when a tender is made by such insurance company, society or exchange before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed.

K.S.A. 40-256. Determination of whether the refusal was "without just cause or excuse" is based on the facts and circumstances of each case. "If there is a bona fide and reasonable factual ground for contesting the insured's claim, there is no failure to pay without just cause or excuse." *Evans v. Provident Life & Accident Ins. Co.*, 249 Kan. 248, 261 (1991). "When an insurance controversy involves an issue of first impression, the award of attorney fees is inappropriate." *O'Donoghue v. Farm Bureau Mut. Ins. Co.*, 30 Kan.App.2d 626, 636 (2002). The presence of an issue raised in good faith bars an award of attorney fees under K.S.A. 40-256. *Id.*

iii. Missouri Bad Faith Law

The tort of bad faith in first party disability insurance cases has not been recognized in Missouri (although a tort claim for bad faith refusal to settle is recognized in Missouri). *Rossman v. GFC Corp. of Missouri*, 596 S.W.2d 469 (Mo.App.E.D. 1980). Missouri does provide a statutory claim for "vexatious refusal":

> In any action against any insurance company to recover the amount of any loss under a policy of automobile, fire, cyclone, lightning, life, health, accident, employers' liability, burglary, theft, embezzlement, fidelity, indemnity, marine or other insurance except automobile liability insurance, if it appears from the evidence that such company has refused to pay such loss without reasonable cause or excuse, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed twenty percent of the first fifteen hundred dollars of the loss, and ten percent of the amount of the loss in excess of fifteen hundred dollars and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict.

RSMo. 375.420. The vexatious penalty cannot be used as a weapon to intimidate insurers from asserting a good faith defense. *Hammontree v. Central Mutual Insurance Co.*, 385 S.W.2d 661, 668 (Mo.App. 1965). An insurer "has the right to defend a suit with all weapons at its command so long as it has reasonable ground to believe its defense is meritorious." *Loulos v. United Security Insurance Co.*, 350 S.W.2d 87, 89 (Mo.App. 1961) (citing *Suburban Service Bus Co. v. National Mut. Casualty Co.*, 183 S.W.2d 376, 378 (Mo.App. 1944)). "[W]hen there is an open question of law or fact, the insurer may insist upon a judicial determination of these questions without being penalized." *Mears v. Columbia Mutual Insurance Co.*, 855 S.W.2d 389, 394 (Mo.App. 1993).

iv. Illinois Bad Faith Law

Illinois law regarding the existence of a common law action for breach of the implied covenant of good faith in the context of first party actions is confused. This action was initially recognized by some Illinois courts. In 1996, the Illinois Supreme Court finally concluded that while a common law action for bad faith is available in third party claims for bad faith failure to settle, Illinois does not recognize such an action for first party claims. *Cramer v. Insurance Exchange Agency*, 675 N.E.2d 897 (Ill. 1996). The Court did recognize that well established torts (such as fraud) may arise in addition to a breach of insurance contract action from an insurer's conduct. The Cramer decision was based in large part upon the existence of 215 ILCS 5/155 which provides additional remedies for breach of insurance contract:

1. In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:
   a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
   b) $60,000;
   c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.
2. Where there are several policies insuring the same insured against the same loss whether issued by the same or by different companies, the court may fix the amount of the allowance so that the total attorney fees on account of one loss shall not be increased by reason of the fact that the insured brings separate suits on such policies.

g. Why bad faith is important – **DAMAGES**

i. An insurer which is found to have operated in bad faith could be liable for damages far in excess of the policy limits.

ii. The types of damages a plaintiff is allowed to seek in a bad faith claim vary from state to state. They include:

1. Statutory penalties
2. Statutory interest
3. Liability for judgments in excess of the policy limits
4. Attorney's fees
5. Emotional distress
6. Economic loss
   a. This may include loss of credit reputation, loss of business and loss of property.

7. Punitive damages

    a) Juries and judges have shown a tremendous willingness to enter huge punitive damage awards against insurers when they perceive that the insurer acted in bad faith.

    b) Punitive damages are assessed against an insurer based on the insurer's assets or wealth, not on the losses incurred by the claimant.

    c) *Perez v. Farmers Groups of Insurance Companies d/b/a Fire Insurance Exchange*, 2005 WL 3193848 (Tulare County, California, 2003) (not reported).

        i. Plaintiff sought representation through his homeowners policy after he was sued in connection with a collision between a tractor trailer and a farm tractor borrowed by plaintiff from a farm at which he was employed and operated by a non party after it stalled on a state highway. Plaintiff claimed that the default judgment entered against him after defendant refused to defend him caused emotional distress. Jury returned a verdict for $327,231 pain and suffering, $535,769 for the default judgment and $25,000,000 in punitive damages for insurance bad faith.

    d) *Amoco Chemical Co. v. Certain Underwriters at Lloyd's of London* (Cal. Super. Ct. 1993)

        (a.) Jury returned a verdict of $425,600,000 for refusal to defend and indemnify in a series of lawsuits. This included $386M in punitive damages which the trial court later lowered to $71M.

    e) *Fox v. Health Net* (Cal. Super. Ct. 1993)

        (a.) Total verdict of $89,320,000 ($12.32M in compensatory damages and $77M in punitive)

    f) Even small coverage questions can balloon into huge punitive damage awards for the insured.

    g) *Principal Fin. Group v. Thomas*, 585 So.2d 816 (Ala. 1991)

        i. Refusal to pay burial expenses of deceased child under life insurance policy (no reasonable basis for denial). $750,000 punitive damage award for bad faith denial of $1000 claim. This amount was affirmed on appeal. Court suggested that the very fact that the policy was so small was a reason to impose such severe punitive damages because very few insureds would proceed with such a case and insureds would have an extremely difficult time obtaining an attorney to take a case with such a small policy at issue. This could be a cause of the insurers intentional and reckless failure to properly investigate the claim prior to denying coverage.

    h) *Fuller v. Preferred Risk Life Insurance*, Montgomery County, Alabama Circuit Court, Case No. CV 88 744 (a.) Plaintiff alleged that defendant misrepresented the policy deductible of her health insurance. Plaintiff claimed past medical of $14,000. Defendant offered $6,000 prior to trial. Jury returned a verdict of $14,000 for past medical expenses and $1,000,000 in punitive damages.

iii. Understand that the insurer/insured relationship is one which invokes sympathy for the insured and not the insurer as shown in the following quote from the California Supreme Court:

> As one commentary has noted, 'The insurers' obligations are ... rooted in their status as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements ...' Moreover, 'the relationship of insurer and insured is inherently unbalanced: the adhesive nature of insurance contracts places the insurer in a superior bargaining position. *Hunter v. Up-Right Inc.,* 864 P.2d 88, 90 (Cal. 1993).

h. Appearance is everything.
It is easy to avoid *actually* acting in bad faith in administering claims. However, given the apparent willingness of juries to return astronomical bad faith verdicts and a judicial willingness to allow bad faith claims to proceed to a jury, not acting in bad faith may not be sufficient to avoid a bad faith verdict. The mere appearance of impropriety must also be avoided.

II. Investigating the Claim

a. Duty to Investigate - The duty to investigate, and the specific conduct which is required to fulfill that duty, arise from a variety of sources:
   i. Statutes
   ii. Internal claim handling policy
   iii. Common Law - implied covenant of good faith and fair dealing

b. Timing
   i. Investigation should begin as quickly as possible following notice of the claim.
   ii. Investigation itself should progress in a timely manner.
   iii. Timely decision to deny coverage must be made, particularly in the context of third-party claims where the insured may be prejudiced by a last-minute denial of coverage.

c. Evaluating the investigation
   i. Principal yard stick is whether the investigation was "reasonable."
   ii. Does it appear that the claims adjuster was investigating the claim to determine if coverage existed, or investigating the claim to determine that no coverage existed?

d. Develop evidence of the insured's bad faith
   i. Some courts have recognized the application of comparative bad faith in which the amount of the insured's bad faith will reduce the damage award against the insurer and may even act as a complete bar to the insured's bad faith claim.
   ii. Examples of insured's bad faith:
      1. failure to completely fill out relevant information on claims forms when that information would harm insured's chances of coverage
      2. misrepresentation of relevant information
      3. abusive conduct by insured (profanity, yelling, threats, etc.)
      4. failure to cooperate
   iii. Reverse bad faith:
      1. At least one court has even recognized that an insurer may bring a claim against its insured for bad faith. *Liberty Mutual Insurance Co. v. Altfillisch Constr. Co.*, 139 Cal Rptr. 91 (Cal. App. 1977) (doctrine of bad faith creates an independent tort that allows the insurer to seek affirmative relief for an insured's breach of the duty of good faith and fair dealing).

e. Third party coverage - two-part investigation
   i. Is the insured required to defend and indemnify?
      1. Duty of defense arises for claims that are even potentially within coverage.
   ii. If there is coverage, what is the extent of the insured's (and therefore the insurer's) liability?
   iii. Excess coverage - Second part of analysis is central to an insurer's liability in excess of the policy limits for failure to settle within policy limits.
      1. An insurer who fails to accept a settlement within the policy limits by not giving the insured's interests at least as much consideration as its own, is liable for any resulting judgment against its insured regardless of policy limits. *Crisci v. Security Ins. Co. of New Haven*, 426 P.2d 173 (Cal. 1967). One test that has been applied is to consider whether a prudent insurer without policy limits would have accepted the settlement offer.
      2. Court reinstated a $590,000 bad faith judgment against an insurer, finding that a jury may consider an insurer's failure to inform its insured of a settlement offer as some evidence of bad faith. *Smith v. General Accident Ins. Co.*, 697 N.E.2d 168 (N.Y. 1998).
      3. Courts have delineated several factors used to determine if an insurer's failure to settle was "reasonable."
      4. *Brown v. Guarantee Insurance Co.*, 319 P.2d 69 (Cal. App. 1958)
         a) Strength of the injured claimant's case on the issues of liability and damages;
         b) attempts by the insurer to induce the insured to contribute to a settlement;
         c) failure of the insurer to properly investigate the circumstances so as to

ascertain the evidence against the insured;

d) the insurer's rejection of advice of its own attorney or agent;

e) failure of the insurer to inform the insured of a compromise offer;

f) the amount of financial risk to which each party is exposed in the event of a refusal to settle;

g) the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and

h) any other factor tending to establish or negate bad faith on the part of the insurer.

5. Some courts will look beyond the settlement context to evaluate the reasonableness of the insurer's failure to settle.

6. *Commercial Union Insurance Co. v. Liberty Mutual Insurance Co.*, 393 N.W.2d 161 (Mich. 1986)

    a) Failure to inform the insured of relevant litigation developments;

    b) failure to keep the insured informed of all settlement demands outside policy limits;

    c) failure to solicit a settlement offer or to initiate settlement negotiations when warranted;

    d) failure to accept a reasonable compromise offer of settlement in situations when the facts demonstrate blatant liability and serious injury;

    e) rejecting a reasonable settlement offer within policy limits;

    f) attempting to coerce or obtain an involuntary contribution from the insured in order to settle within policy limits;

    g) failure to properly investigate a claim before rejecting a serious and recurrent negligence by the insurer;

    h) disregarding the advice of an adjuster or attorney;

    i) serious and recurrent negligence by the insurer;

    j) undue delay in accepting a settlement offer within policy limits where the potential verdict is high;

    k) refusing to settle a case within policy limits following an excessive verdict when the chances of reversal on appeal are slight;

    l) failing to appeal following a verdict in excess of policy limits where there exist reasonable grounds for such an appeal.

7. *Johnson v. Allstate Ins. Co.*, 262 S.W.3d 655 (Mo. Ct. App. 2008).

    a) Failure to timely notify the Insured of policy limit demand within time limit.

    b) failure to timely investigate the claim of medical expenses of $325,000.

    c) underlying tort case resulted in $5,000,000 judgment against Allstate insured in excess of $50,000 policy limits.

    d) Allstate claimed it lost the original demand letter and lacked adequate information about the of tortfeasor's injuries.

e) insured assigned 90% of his claim against Allstate to tortfeasors

f) Verdict against Allstate for $5,821,729.97 compensatory damages and $10,500,000 punitive damages.

g) Involved RSMo § 537.065 agreement. *(Updated August 28th, 2021).*

i. The updated statute clarifies that a judgment may not be entered against any insured tortfeasor who has entered into a 537.065 agreement <u>"for at least thirty days after the insurer" has "received written notice" of the agreement</u>.

ii. It also states that "[i]n any … action for bad faith, any agreement between the tort-feasor … and the claimant, including <u>any contract under this section, shall be admissible in evidence</u>."

iii. The statute also clarifies that the insurer's "exercise of any rights under this section [537.065] <u>shall not constitute, nor be construed to be, bad faith</u>."

III. Avoiding Bad Faith in First Party Insurance

a. Documenting files

i. To avoid successful claims of bad faith, you must do more than just act reasonably, you must be able to prove you acted reasonably.

ii. It is important to keep accurate and complete records of the claim as litigation can occur years later. Important events could easily be forgotten over time if they are not reflected in the claims file.

iii. Date stamp all materials received into file. The importance of being able to effectively reconstruct when certain materials were received, sometimes several years after the fact, cannot be overstated. While the underlying breach of contract claim will be determined by looking at all the evidence developed at the time of and after the claim's decision, a bad faith claim is decided by examining what information was available at the time the claims decision was made. In addition, allegations of specific conduct which might be bad faith (e.g. failure to timely respond to demand letter) may rely upon when certain materials were received and how quickly they were acted upon.

iv. Keep complete and accurate phone memorandums, even if the person called is not reached.

1. It is important to keep record of all attempted calls as it shows diligence in the administration of the claim. Failure to keep such memorandums may allow the insured to argue that relevant phone calls were never returned when in fact the adjuster attempted unsuccessfully to reach the insured.

v. Make notations of activity undertaken in connection with the claim.

vi. Assume that everything in the claims file will be discovered by the insured in the event of litigation.

1. Courts are particularly generous in granting all records made prior to the date litigation begins or the date benefits are terminated to the insured in bad faith

cases.

2. Example:

   "Bad faith actions against an insurer, like actions by client against attorney, patient against doctor, can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did. The claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming." (*Prisco Serena Sturm Architects, Ltd. v. Liberty Mutual Insurance Company*, No. 94 C 5716, 1996 U.S. Dist. LEXIS 2216, at *1 (N.D. Ill. February 26, 1996) (citing *Brown v. Superior Court In and For Maricopa County*, 670 P.2d 725, 734 (Ariz. 1983)).

3. Do not make gratuitous comments in correspondence or internal memorandums.

   Ex: "Who does this guy think he's kidding?"

   "Give me a break."

   "This lady is such a liar."

   "I am sick of this guy."

vii. Protect the sanctity of the independent medical evaluation.

1. Denial of claims will often be based at least in part on the opinions of the doctor retained by you to review the medical records. The insured and his or her attorney will already be highly suspicious of the doctor's opinions and will consider him your accomplice.
2. Deal at arm’s length in all written communications.
3. Only set forth the facts in correspondence with the doctor. Do not state your opinions.

viii. Denying coverage.

1. Clearly state all bases upon which the claim can be denied.
   a) Failure to cite all bases upon which it is denied may not foreclose the opportunity to argue all grounds in defense to a breach of contract action but could limit defenses in a bad faith claim.
2. Cite the specific language of the policy upon which you are relying in denying coverage. Do not paraphrase.
   a) A possible ground for bad faith is denying coverage for reasons not in the policy. A loose paraphrase of the actual policy provision might lead to this appearance.

ix. Ensure that relevant portion of policy is enforceable.

1. Generally, the state law of the state in which the policy was issued will control. Each state's insurance act may have provisions which apply to the policy in question. If these provisions are found to apply to the policy they may:
   a) require certain provisions which are read into the policy even if they

are not expressly stated in the policy

b) prohibit certain provisions or exclusions

c) allow some types of provisions or exclusions to be enforced only under certain circumstances (e.g., certain language used in policy)

2. If coverage is denied based upon a policy provision or exclusion which is not enforceable under the applicable state law, this may be strong evidence in favor of bad faith.

   a) An insurer is generally deemed to have knowledge of the applicable state's law because it has issued and/or administered a policy in that state. Ignorance of the law is generally not a defense.

3. Examples:

   Intoxication exclusions:

   States typically have provisions specifying when coverage may be denied in cases of intoxication or the use of narcotics. These provisions generally provide that coverage may be denied in situations where the loss sustained or contracted was in consequence of the insured being intoxicated or under the influence of narcotics. *See, e.g.*, Cal. Ins. Code sec. 10369.12.

   Exclusions have been rendered invalid when they are less favorable than the statute permitting the exclusion. *Olson v. American Bankers Ins. Co.*, 35 Cal. Rptr.2d 897 (Cal Ct. App. 1994). In *Olson*, the exclusion was rendered invalid because it excluded loss sustained, in whole or in part, directly or indirectly, from any intoxicant, whereas the statute only allowed exclusion for loss sustained in consequence of the insured intoxication.

   Pre-existing condition provisions:
   State law generally imposes time limits for how long a person may be barred from recovering on a pre-existing condition. These time limits are often between 6 and 18 months. Permanent exclusion of a pre-existing condition would run contrary to state statute. *See, e.g.*, Cal. Ins. Code sec. 10232.4.

b. Administering the claim

i. Obtain and document all useful information from claimant and others.

ii. Medical history

1. Follow all medical leads. Look for references to other doctors in medical records and request records.
2. Communicate with treating doctors and if necessary, explain the relevant portions of the policy.
3. Confirm as often as possible with the insured his or her medical history from first receipt of claim and as appropriate thereafter.
4. Use Report of Claim Form.

iii. Follow written procedures carefully.

1. Written procedures are established as a uniform method of carefully and effectively administering claims.

2. If the insured's attorney asks for claims handling procedures in subsequent litigation, he will get them.
3. Even conduct which is not inherently poor claims handling could look suspect if it is contrary to the written procedures.
4. Example:
   a) Court denied insurer's motion for summary judgment on the bad faith claim and granted the insured's motion for summary judgment on the bad faith claim. One of the reasons stated was the fact that the insurer failed to take action over an extended period of time contrary to its internal policy of responding to an insured's request for coverage with 45 days. *Prisco Serena Sturm Architects, Ltd. v. Liberty Mutual Insurance Company* (N.D. Ill. 1996).

iv. Be cooperative, courteous, and professional.

c. Patterns or Practices of Bad Faith

i. Increasingly, attorneys will seek not only to establish that the handling a particular claim was bad faith, but also will try to establish a pattern or practice which goes beyond the claim at hand.

ii. To support this strategy, attorneys may seek discovery of one or more of the following:

1. claims handling procedures
2. training material for newly hired employees
3. other claims denied for the same or similar reasons
4. Department of Insurance consumer complaints
5. claim payment goals and incentive programs
6. performance evaluations
7. incentive plans
8. operation reports
9. management conference handouts/presentations
10. communications with insurance rating companies

IV. Subrogation/Assignment/Reimbursement

a. Generally

The ability to recover benefits paid to the insured will vary according to state law. Many states prohibit subrogation by health insurance policies or health and accident insurance policies which require examination of the state's insurance statutes to determine whether the policy at issue falls within the definition of a health policy.

Several states recognize a common law prohibition against assignment of personal injury claims. In some instances, these common law prohibitions have been adopted statutorily by the legislature or in regulations by the insurance commissioner. The insured will argue that an attempt to reimburse is an "assignment" and therefore contrary to statute public policy.

b. **Missouri**

Missouri law prohibits assignment of bodily injury claims as a matter of public policy. *Schweiss v. Sisters of Mercy, St. Louis, Inc.*, 950 S.W.2d 537, 538 (Mo. Ct. App. 1997). Based upon this common law background, Missouri courts have held "that an insurer may not acquire part of the insured's rights against a tortfeasor…by reason of payment of medical expenses, either by assignment or by subrogation." *Waye v. Bankers Multiple Line Insurance Co.*, 796 S.W.2d 660, 661 (Mo. Ct. App. 1990). Statutory exceptions exist for hospital liens, workers' compensation liens, underinsured and uninsured motorist coverage, and Medicare and Medicaid coverage, but none of these exceptions specifies occupational accident plans. Insureds therefore argue that any subrogation provision equates to an assignment which is prohibited by public policy and for which no exception is allowed by statute.

We have argued in favor of "reimbursement" under occupational accident plans. Missouri courts have noted a difference between the assignment of causes of actions and subrogation to a claim. When there is an assignment of a claim, there is a complete divestment of all rights from the assignor, and a vesting of the same rights in the assignee. In the case of subrogation, however, only an equitable right passes to the subrogee and the legal title to the claim is never removed from the subrogor. *Hayes v. Jenkins*, 337 S.W.2d 259 (Mo. App. 1967). In conjunction with this distinction, we argue that since the insurer is only seeking reimbursement for benefits paid, the "reimbursement" clause does not divest the insured of a right of action or of any recovery for the action and therefore does not violate Missouri public policy.

c. **Kansas**

Kansas common law prohibits subrogation for accident and health policies but not for indemnity policies. This common law position was codified by the Kansas Insurance Commissioner in Kansas Administrative Regulation 40-1-20:

> *An insurance company shall not issue contracts of insurance in Kansas containing a "subrogation" clause applicable to coverages providing for reimbursement of medical, surgical, hospital or funeral expenses.*

A subsequent opinion from the Kansas Attorney General found that the Kansas Insurance Commissioner had the authority to issue this regulation. In that opinion, the Attorney General opined that authority existed based upon statutes regulating uniform policy provisions for "accident and sickness insurance" which do not include a subrogation provision and prohibit inclusion of additional provisions which would be less favorable to the insured.

Kansas courts have found Regulation 40-1-20 preempted to the extent there is an express statute authorizing subrogation for a particular type of policy. *Hall v. State Farm Mutual Automobile Insurance Co.*, 8 Kan.App.2d 475 (1983). Kansas authorizes subrogation for workers' compensation, uninsured motorist benefits and personal injury protection benefits.

To the extent a policy is considered an "accident or sickness" policy, subrogation may be prohibited. Kansas defines "accident and sickness" policies to include "any policy or contract insuring against loss resulting from sickness or bodily injury or death by accident, or both, issued by a stock, or mutual company or association or any other insurer." K.S.A. 40-2201(a).

d. **Illinois**

Illinois law does not allow for the assignment of a personal tort. *In re Estate of Scott*, 208 Ill. App. 3d 846, 849, 567 N.E.2d 605, 607 (Ill. Ct. App. 1991). Further, courts have traditionally held that life, accident, medical, and health insurers do not have equitable or implied rights to subrogation. *American Family Ins. Group v. Cleveland*, 356 Ill. App. 3d 945, 950, 827 N.E.2d 490, 494 (Ill. Ct. App. 2005). However, when an insurance policy contains an unambiguous contractual provision that provides for subrogation rights, the courts will enforce such rights. *Id.* In these cases, the courts regard an insurance company's claim for subrogation to be distinct and separate from an assignment. *Scott*, 208 Ill. App. 3d at 849, 567 N.E.2d at 607. The only public policy exception to this rule is that subrogation cannot exist in wrongful death cases.

Although subrogation is permitted under Illinois law, the full assignment of rights is not. Thus, it is important that contractual language reflects only what is permissible by law. *Scott*, 208 Ill. App. 3d at 850, 567 N.E.2d at 607. Subrogation clauses should call for reimbursement for benefits paid under the policy but must not extend to suggest that the insurer will be assigned its insured's rights. Likewise, courts will enforce subrogation rights provided for in a contract but will not create additional common law rights to subrogation not included in contractual language. *Spirek v. State Farm Mut. Auto. Ins. Co.*, 65 Ill. App. 3d 440, 449, 382 N.E.2d 111, 117 (Ill. Ct. App. 1978).

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TOOLKIT FOR ATTRACTING AND RETAINING TALENT

The Great Resignation continues to challenge employers to evaluate how they can retain the talent that they currently have and attract new talent in an ever-competitive workforce. According to the U.S. Bureau of Labor Statistics (BLS), 4.25 million people quit their jobs in January 2022, up from 3.3 million in 2021.[1] The U.S. unemployment level reached 14.7% in April of 2020 due to the COVID-19 pandemic, but as the country navigated through the pandemic and created a "new normal", employees started leaving their jobs in search of positions that offered more flexibility, opportunities for advancement and development, and of lower importance, an increase in compensation.

Gallup estimates that the cost of replacing an employee is one-half to two times the employee's annual salary. So, what can employers do to keep their workforce strong and attract new employees? Strategies for compensation, benefits, company culture, and employee flexibility may be just what you need to add to your toolkit to keep your company on the short list for the place employees want to call home.

1. Compensation

a) Loyalty Incentives
   i. Longevity bonuses
   ii. Employee referral incentives
      - Your current employees know the culture of the firm
      - Employers pay placement fees but can be hesitant to pay employee referrals incentives
      - Make the process straightforward and clearly communicate the requirements

b) Hiring Bonuses
   i. One-time expense
   ii. Good for attracting talent to your team
   iii. Drawbacks could include the current team feeling left out or under appreciated
   iv. As always, avoid offering them in a discriminatory fashion (ex. only offering to male candidates)
   v. Be upfront with a length of service requirement to qualify for hiring bonus

c) Relocation Incentives
   i. One-time expense
   ii. Can be offered for new talent or if you need an employee in a different location
   iii. Require employee to remain with company for a specified period of time (ex. 6 months, 1 year) or have to repay relocation incentive

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[1] (People Managing People, April 1, 2022, Employee Retention Statistics and Insights 2022, https://peoplemanagingpeople.com/articles/employee-retention-statistics/)

d) Salary Advance
    i. 80% of those surveyed said they would participate in a salary advance[2]
    ii. Employees who are not worried about money are more productive at work
    iii. Other options include weekly payday as opposed to bi-weekly or monthly, or even daily pay

Overall, while compensation can be seen as a simple solution to retaining or attracting employees, data shows that it is not the driving force for why people are leaving their jobs.

2. Benefits

a) Health Benefits
    i. Waiving the waiting period for a new hire to have access to the health care plan
    ii. Mental health benefits – additional coverage to make mental health services more accessible via telehealth. At MVP Law, Ginger, on-demand mental healthcare offered via an app, was added as a benefit in 2021. It was expanded to include employee's teens in 2022 after a successful rollout.
        - Include an employee's family in this coverage – children are undergoing a mental health crisis that started before the pandemic.
        - Consistent communication of the benefits that are available
        - New guidance from the DOL in 2022 states that eligible employees may use FMLA to care for a family member, including adult children over 18, who have a mental or physical impairment that substantially limits one or more of their major life activities
    iii. Family forming benefits – consider adding to your plan
        - Typically excluded from employer health plans
            1. Fertility treatment coverage
            2. Financial assistance for adoption

b) Tuition Assistance
    i. Pay for employees to continue their education – could be through college courses or an industry certification
    ii. Employee and employer can both benefit as the employee is furthering their skills staying on top of new developments in the field
    iii. Employees want the opportunity to learn and develop their skills, by offering tuition assistance you can retain top employees longer
    iv. In LinkedIn Learning's 2021 Workplace Learning Report, 76% of Gen Z stated that learning is the key to a successful career[3]
    v. Tax benefits for the employer

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[2] (Openwage, May 14, 2021, Salary Advances, https://openwage.com/salary-advances-how-the-latest-employee-perk-is-taking-the-world-by-storm)
[3] (LinkedIn Learning, 2021, 5th Annual LinkedIn Learning Workplace Learning Report, https://learning.linkedin.com/content/dam/me/business/en-us/amp/learning-solutions/images/wlr21/pdf/LinkedIn-Learning_Workplace-Learning-Report-2021-EN-1.pdf)

c) Student Loan Assistance
    i. Through 2025, employers can offer up to $5,250 in student loan repayment benefits without paying tax [4]
    ii. A Fidelity study shows that 86% of young workers aged 22 to 33 would commit to an employer for five years if the employer helped pay off their student loans [5]
    iii. Excellent way to create a long-term commitment with employees

d) Childcare Benefits
    i. Paid maternity/paternity leave
    ii. Paid grandparent leave
    iii. Employer provided childcare
        - Employer covers all or part of childcare cost
            1. Onsite childcare facility
            2. Reimbursement for childcare expenses
            3. Pay childcare facilities directly on behalf of your employees

e) Retirement Options
    i. Add 401(k) or 457 plans with or without employer match options, even if a defined benefit plan already exists
        - Employer match is a differentiator – research to make sure you are competitive
    ii. 401(k) Plan = An employer-sponsored, defined-contribution, personal pension account. Periodic employee contributions come directly out of their paychecks and may be matched by the employer.
    iii. 457 Plan = A nonqualified, tax advantaged deferred-compensation retirement plan. The employer provides the plan and the employee defers compensation into it on a pretax or after-tax basis.

3. Flexibility

a) Working remotely
    i. Full time remote
    ii. Hybrid schedule – part in office, part from home
    iii. Working from the road?
        - Employee travels and works as they travel

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[4](Paycor, February 28, 2022, Employer Student Loan Repayment Program, https://www.paycor.com/resource-center/articles/employer-student-loan-repayment-program-5-tips/)
[5] (Fidelity, September 14, 2017, Fidelity Launches New Program for Employers to Help Workers Pay Off Student Debt, https://newsroom.fidelity.com/press-releases/news-details/2017/Fidelity-Launches-New-Program-for-Employers-to-Help-Workers-Pay-Off-Student-Debt/default.aspx)

iv. Legal regulations
   - Remote employees are generally subject to the laws and regulations of where they physically live – not where the employer is located
   - This includes taxes, state and local posting requirements, wage & hour laws, paid leave, workers' compensation and unemployment insurance

b) Side Gigs
   i. Allows employees to engage in other projects they are passionate about
   ii. Additional source of income for the employee
   iii. Have defined guidelines around side gigs to protect the employer from conflicts of interest and confidentiality

c) Job Sharing Program = Two employees each work less than full-time, coordinate their schedules and assignments so they collectively fill a full-time position
   i. Benefits
      - Avoid laying off employees
      - Keep a skilled work force
      - Re-establish a full-time schedule
      - Preserves employer-employee relationships

Flexibility in working hours and where an employee must complete their work are two of the top priorities for job seekers. Many white-collar employers demonstrated that their workforce succeeded in working remotely during the beginning of the COVID-19 pandemic. Now, as employers start bringing their workforce back to the office, many of the employees who lose the flexibility to work remotely will begin their job hunt. In fact, in a study highlighted by the Harvard Business Review, 59% of employees stated that "flexibility" was more important than salary and 77% stated that they would prefer to work for a company that gave them the option to work from anywhere as opposed to a fancy corporate office. [6]

4. Culture

Company culture is made up of all the categories discussed and more, but below are a few strategies to pay attention to when evaluating company success on attracting and retaining talent.

a) Onboarding
   i. Onboarding a new employee is crucial to their success at the company
   ii. Starts with the offer letter and the weeks leading up to their actual start date
   iii. Gives the employee tools to complete their job as well as be introduced to the company culture

[6] (Harvard Business Review, October 29, 2021, Forget Flexibility. Your Employees Want Autonomy, 1https://hbr.org/2021/10/forget-flexibility-your-employees-want-autonomy)

iv. In person vs. remote
    - Onboarding can be wildly different when it is completed in person compared to remotely via video calls or onboarding software
    - Make sure to have a thorough plan for both situations, if needed, to ensure that employees are well equipped for success

b) Recognition
   i. Employees want to feel valued and appreciated
   ii. Simple gestures go a long way

c) Personal Development
   i. Support the employee as a whole through educational opportunities, engagement in industry organizations, and opportunities for advancement
   ii. Educational Leave Policy
       - Leave of absence for a specified period of time
       - Typically unpaid

d) Prioritize Communication and Inclusion
   i. Be consistent and offer communications through a variety of formats – firmwide video calls, email newsletters, intranet, etc.
   ii. Remind employees about their complete benefits package, especially when a new benefit is introduced

e) Sabbaticals
   i. Commonly used by universities, but any company may choose to adopt this benefit
   ii. Employees on sabbatical are often paid either a percent of their salary or their full salary, but can be an unpaid sabbatical
   iii. Anywhere from one month to two years
   iv. Can show that a company cares about their employee’s well-being and in turn encourage employees to remain with the firm

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CATASTROPHIC LOSS SCENES & HOW TO PRESERVE SUBROGATION RIGHTS

Subrogation: General Concept in Workers' Compensation Context

- Seeking payment for workers' compensation payments made when a third party is the one who is truly at fault for the employee's injuries.
- In Kansas: KSA § 44-504
- In Missouri: RSMo. § 287.150

How it Works

- Monitoring – can the employer simply monitor?
- Intervention – can the employer intervene into an action filed by the employee?
- Direct Action – does the employer have the right to file its own action to recover?

Kansas Requirements

- KSA § 44-504 (b) & (c)
    - Right to intervene and participate
    - If a third-party action is not filed by 12 months (injury) or 18 months (death), the action is statutorily assigned to the employer
- Generally, notice is required to effectively monitor
    - Risk that rights not protected, but least costly

Missouri Requirements

- No right to intervene granted by § 287.150
- Must file a motion pursuant to Missouri Rule of Civil Procedure 52.12
    - Must show that the employer's rights would not be adequately protected by the existing parties
- No time limit to wait on an employee to file subrogation action
- At least, must provide notice of lien to protect interests

Timing Requirements to File

- Kansas – 2 years to file a negligence action
- Missouri – 5 years to file a negligence action

What is a Catastrophic Accident?

- Fatality of employee or contractor employee
- Multiple injuries
- Significant property damage

Importance of Handling Catastrophic Accidents Appropriately

- Possibility of extensive OSHA investigations
- Multiple ongoing investigations by law enforcement, other state or federal agencies, insurance companies, and/or internal investigations by the company
- Possible publicity

- Family member issues/concerns
- Employee issues/concerns

Importance of Preserving Critical Evidence

- A legal duty to gather and preserve critical evidence
- Significant liability, civil and criminal, for the destruction of, tampering with or failure to preserve evidence in an accident case
- Local fire, rescue and police control the accident scene until released
- Except as necessary to immediately protect personal safety, the accident scene must remain 'frozen' until released by authorities, management, and/or legal counsel
- Take appropriate steps to control access to the accident scene
- Do not allow anyone, including government agencies, to remove evidence from the scene without approval of legal counsel
- Preservation of accident scene evidence following release

Coordination of the Initial Investigation

- The investigation coordinator mentioned in the below checklist can oversee the initial investigation in order to eliminate confusion.
- The coordinator may also work with an attorney or law firm in handling the initial investigation as well as the defense of catastrophic accidents. Benefits of involving an attorney from the very beginning of the investigation include:
    - Coordination of investigative efforts
    - Assistance with the assignment and hiring of claims adjusters, accident reconstructionists, and other specialized investigators or experts;
    - Undertake necessary action to ensure the preservation of helpful evidence at the accident scene and to avoid spoliation of evidence
    - Protection of all communications concerning the investigation via the attorney-client and attorney-work product privileges
    - Formulate an initial evaluation of the potential liability issues and gear the investigation toward the defense of impending litigation

Checklist for Actions Following a Serious/Catastrophic Event or Fatality Accident [1]

- On the day of the accident
    - Emergency services may provide additional guidance, including access to a coroner if needed.
    - Secure and preserve the accident scene and limit access to those authorized to be there. The scene should be preserved until officials have completed their work.
    - Notify company executives/owners.

[1] Checklist for Actions Following a Serious/Catastrophic Event or Fatality Accident, SAIF (Dec. 2018), https://www.saif.com

    - Determine who within your organization is “in charge” of the accident scene and who will serve as the company contact for information.
    - Notify OSHA within eight hours and work cooperatively with them as well as all other law enforcement or fire department authorities.
    - Determine who will notify immediate family members and confirm it will be done with tact and good judgment. Prepare a plan to notify your workforce before they hear about it from an external source.
    - Notify your state’s division of workers’ compensation to initiate the claims process.
    - Document the accident scene, including the equipment or process involved, through photos, video, written observations, sketches, diagrams, measurements, etc.
    - Collect the names and contact information of all witnesses including employees, management, or the general public.
    - Considered releasing workers to go home after they have provided their statements.
    - Offer counseling assistance to affected employees.
    - Prepare for the possibility of media inquiries. Make sure all employees know to refer these inquiries to the official company contact assigned above as the only person authorized to provide statements to the media.
- During the next few days
    - Complete a thorough accident analysis. One of the primary reasons for this analysis is to seek information that will help protect other employees.
    - Once the major contributing factors are known, take steps necessary to help prevent future injuries and illnesses. This may include employee and management training, system changes, procedure changes, accountability systems, etc.
    - Stay in contact with the family members of the injured. Offer counseling resources and help explain any benefits that may be provided. Consider sending condolence cards, flowers, or assisting with meals and other efforts to help them through the difficult first few days.
    - Continue to offer counseling assistance to employees. Coach your supervisors about the potential psychological impact this can have on employees and equip them with knowledge and tools to support or refer as needed.
    - Inform employees about injury causes and steps taken to prevent future occurrences.

Extent of Subrogation Rights (Kansas)

KSA § 44-504(b)

- The entire amount of the recovery to the extent of compensation & medical aid provided to the date of recovery
  - In other words, what's been paid pursuant to Workers' Compensation Act – future credit if recovery is greater than comp paid to date
- Except for loss of consortium or loss of services to a spouse
  - But – issue with regard to only recovering amounts so that the claimant is not receiving double compensation
    - *Henson v. Davis*, 402 P.3d 1161 (2015) & *Wishon v. Cossman*, 268 Kan. 99 (1999).
- Pain & Suffering & Medical Expenses definitely recoverable from third party action
- Lost wages maybe not; depends on the reason for payment in comp action
  - If compensation was earned, not a WC benefit. If it's being paid pursuant to WC Act, should be recoverable (*Wishon* and *McGranahan v. McGough*, 249 Kan. 328 (1991))
- No future credit for medical when no future medical is awarded in the third-party action
  - *Henson* (medical malpractice case, no future medical sought)

Extent of Subrogation Rights (Missouri)

- The entire amount recoverable by the employee is in play
- But, in Missouri, loss of consortium is an action filed by a spouse, not the injured party
  - Savvy claimant's attorneys frequently try to shield recoveries by allocating a majority of the recovery to their spouse where possible
- Subrogation rights do not apply to someone who can receive wrongful death damages under the Wrongful Death Act but who did not receive workers' compensation benefits (e.g. adult non-dependent children).

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WAGE AND HOUR AND MISCLASSIFICATION CLAIMS

Fair Labor Standards Act (FLSA) Basics

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

Exempt vs. Nonexempt employees

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

Updated Salary Requirements

To qualify for exemption, employees generally must be paid a minimum of $684 per week on a salary basis. These salary requirements do not apply to outside sales employees, teachers, and employees practicing law or medicine. Exempt computer employees may be paid at least $684 on a salary basis or on an hourly basis at a rate not less than $27.63 an hour.

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

Employers may use nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis, to satisfy up to 10 percent of the standard salary level. Additionally, if after the 52-week period, the employer has not met its financial obligation, the employer can make a final "catch-up" payment within one pay period after the end of the 52-week period to bring an employee's compensation up to the required level. Any such catch-up payment will count only toward the prior year's salary amount and not toward the salary amount in the year in which it is paid.

White Collar Exemptions

The three basic tests an employee's job description must satisfy to qualify as a white-collar job exempt from overtime pay requirements are:

- A "salary-level" test, which requires that the employee be paid a minimum of $684 per week.
- A "duties" test, which requires that the job must have as its primary duty the job functions described under one of the exemptions.
    - “Primary duty” means the principal, main, major, or most important duty that the employee performs. Determination of an employee’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee’s job as a whole.
- A "salary basis" test, which requires that the employee be paid a predetermined amount of at least the required minimum without regard to the quality or quantity of work.

Of those three hurdles, the one that receives the least attention—and yet is often the most exasperating to comply with—is the salary basis test. Employers are often focused on the salary-level and duties tests, and they neglect to fully consider salary basis rules.

The salary basis regulations contain seemingly straightforward exceptions to and examples of the general rule against deductions from salary.

The key concept that underlies the technical rules is that paying exempt white-collar employees a salary implies that they have discretion to manage their time. They are paid for the general value of their services, not the number of hours worked. And that, precisely, is why they are not entitled to overtime.

What is the salary basis test?

Employees are considered to be paid on a salary basis if they are paid a predetermined amount, not less than $684 per week, that is "not subject to reduction because of variations in the quality or the quantity of the work performed," according to the FLSA regulations.

This means that, subject to certain exceptions (discussed below), exempt employees must be paid their full salary for any week in which they do any work, regardless of how few or how many hours they work.

Further, employees must earn the minimum salary exclusive of—that is, not including—the value of any noncash items such as room and board.

Are all exempt white-collar employees subject to the salary basis test?

No. The salary basis requirement applies to executive, administrative, professional, and highly compensated white-collar employees, except for:

- Outside salespersons.
- Employees working as teachers, practicing lawyers and doctors, or medical interns and residents.
- Computer professionals who are paid on an hourly basis at a rate not less than $27.63 per hour.
- Executive, administrative or professional employees in the motion picture industry who are paid a base rate of at least $1,043 per week or a proportionate amount based on the number of days worked.

Executive Exemptions

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $684 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.

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

Administrative Exemptions

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $684 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Overuse of the Administrative Exemption

The U.S. Department of Labor issued five opinion letters on June 25, 2020, including one providing analysis of the administrative exemption. Working in an administrative function or having the term “administrative” in an individual’s job title does not necessarily determine that employee’s FLSA exemption.

The DOL also didn't focus on the distinction between production and staff functions in evaluating whether job duties are exempt. "This distinction can be more vexing to draw for government positions because it is sometimes difficult to determine what a government is producing for its citizens' consumption; at least one court has noted the scarce authority … regarding what constitutes the general business operations of a government."

The DOL looked at many of the coordinators' duties, giving examples of which would be exempt or nonexempt if they were the primary duty. For example, many of the coordinators' duties involved planning for the county government's general, rather than day-to-day, operations. This would be exempt administrative work.

Preparing news releases, acting as a press officer and furnishing information to the media were public-relations duties related to the county's general, rather than day-to-day, operations and were exempt, the DOL said.

But delivering educational lectures, materials and presentations were day-to-day work and nonexempt. Nonetheless, preparing the materials might be exempt administrative work, unless preparing means merely assembling already-available materials into a display or distributable folder.

Professional Exemptions

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $684 per week;
- The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $684* per week;
- The employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Highly Compensated Employee Exemptions

To qualify for the highly compensated employee exemption, the following tests must be met:

- The employee must be paid a total annual compensation of $107,432 or more (which must include at least $684* per week paid on a salary or fee basis);
- The employee performs office or non-manual work; and
- The employee customarily and regularly performs at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Computer Exemptions

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis at a rate not less than $684 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
  1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  3. The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
  4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

The computer professional exemption sets a very high bar. The exemption is for system architects, writing software code, and the like. It is a very demanding standard and often times employees who do not come near meeting it are misclassified as computer professionals. For example, in *Martin v. Ind. Mich. Power Co.*, the 6th Circuit held that a computer support specialist did not meet the computer exemption test and that back overtime was owed. That employee maintained computer workstations, monitored network performance, and performed troubleshooting regarding issues with hardware

<u>Missel v. Overnight Motor Transp. Co. (1942)</u>

In *Missel*, the Supreme Court "addressed how to calculate unpaid overtime compensation under 29 U.S.C. 216(b). The Supreme Court held that when calculating the 'regular rate' of pay for an employee who agreed to receive a fixed weekly salary as payment for all hours worked, a court should divide the employee's fixed weekly salary by the total hours worked in the particular workweek. 316 U.S. at 579-80. The court should complete this calculation for each workweek at issue to obtain a regular rate for a given workweek, which could vary depending upon the total hours worked. *Id*. The employee should receive overtime compensation for all hours worked beyond 40 in a given workweek at a 'rate not less than one-half of the employee's regular rate of pay.' *Id*." Five circuits (1st, 4th, 5th, 7th, and 10th) "all have determined that a 50% overtime premium was appropriate in calculating unpaid overtime compensation under 29 U.S.C. 216(b) in mistaken exemption classification cases, 'so long as the employer and employee had a mutual understanding that the fixed weekly salary was compensation for all hours worked each workweek and the salary provided compensation at a rate not less than the minimum wage for every hour worked."

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EPL CLAIMS CHALLENGES IN A WORLD WITH INCREASED HYBRID AND REMOTE WORK

For the past 30 years, the employment practices liability ("EPL") insurance market has reflected what is currently happening in society. For example, the aftermath of 9/11 brought a drastic increase in religious discrimination claims—the EEOC reporting a 250% increase in charges alleging discrimination against those of the Muslim faith. Similarly, after the #MeToo movement exploded on social media in 2017, employees increasingly started reporting instances of inappropriate workplace conduct. Consequently, the EPL insurance market saw a 50% increase in sex discrimination claims against employers in the following years. Likewise, the Black Lives Matter movement, the increased protections for the LGBTQ+ community after the Supreme Court's decision in *Bostock v. Clayton County* (2020), and the aging workforce are likely to increase race, sex, and age discrimination claims in the coming years.

Just as the EPL insurance market responded to social movements and other significant societal developments, it had to adapt to the COVID-19 pandemic as well. The pandemic serves as the most significant disruption to the American workplace in generations. Businesses had to make drastic changes to their operations to retain their employees and keep their heads above water. Unemployment numbers skyrocketed to a peak of 14.7% in April of 2020 according to BLS statistics, a level not seen since the Great Depression. Social-distancing measures and government-mandated stay-in-place orders forced businesses to rapidly transition their workforces to remote work, a move that completely shocked the workforce but is now the new normal. Those who could not adapt even after instituting layoffs and furloughs had no realistic choice but to close their doors.

Consequently, the EPL insurance market saw an increase in pandemic-related EPL claims. These claims commonly alleged:

- Occupational Safety and Health Administration ("OSHA") violations for forcing employees to work in unsafe working conditions or failing to provide enough personal protective equipment to prevent the spread of COVID-19;
- Retaliation for employees' objections to working in unsafe working conditions or workplace exposure to individuals with COVID-19 symptoms;
- Violations for retaliating against employees on leave due to COVID-19 or not allowing COVID-19 leave altogether;
- Americans with Disabilities Act ("ADA") violations for failing to accommodate employees' disabilities or denying remote work options;
- Worker Adjustment and Retraining Notification ("WARN") Act violations for failing to provide enough notice before a layoff;

- Title VII violations for religious discrimination and retaliation regarding vaccine mandates and employees' refusal to comply with these mandates for religious reasons.

EPL Implications of The American Workplace's New Normal

After two years into the pandemic, businesses have finally begun to regain their footing and find a new normal. However, this new normal looks quite different than the "normal" from before the pandemic hit. One of the most notable differences is the large number of desks and offices that remain empty. Even though employees were forced into working remotely, many came to enjoy the benefits of convenience and comfort working from home has to offer. So much so that when it became safe enough to resume working in-person at the office, many employees chose to continue working remotely from home.

A study by Pew Research Center reveals that as of January 2022, 59% of employees whose jobs can be performed remotely are still working from home all or most of the time. A majority of these employees (61%) stated that they work from home because they choose to do so, not because their workplace was closed or unavailable as was the case earlier in the pandemic. Furthermore, 60% of employees who have jobs that can be done from home state that when the pandemic is over, they would like to continue working from home all or most of the time if they have the choice. Similarly, 78% of employees currently working from home all or most of the time state that they would like to continue doing so as well.

The above statistics suggest that despite being forced into working from home at the beginning of the pandemic, American workers are not looking back; remote work is here to stay. The expected long-term future of remote work brings some new questions to the forefront, the answers to which will inform the degree of exposure to EPL claims employers should expect to see.

Physical Presence at Work May No Longer Be an Essential Function Under the ADA

The first new question is whether working at the office is an essential job function under the ADA. Only qualified individuals with a disability are entitled to a reasonable accommodation under the ADA unless reasonably accommodating such person would impose an undue hardship on the employer. A "qualified" individual is one with a substantially limiting impairment who with or without an accommodation can perform the essential functions of the job they have or want. To determine what the essential or core functions of a job are, courts start with the job description. Then, they will look to the employees who hold this job to see if the functions included in the description are actually being carried out and are, thus, essential to the job. If the court finds that the asserted function is essential to the job and the employee meets the other threshold ADA coverage requirements, then the employee is entitled to a reasonable accommodation for their disability unless providing one would impose an undue hardship on the employer.

Given the newness of widespread teleworking and how slowly court dockets usually move, there is not much post-pandemic legal precedent on the issue of whether physical presence at the office is an essential job function under the ADA. Before the pandemic, several circuits accepted physical presence at work as an essential function of many jobs. However, the Sixth Circuit found the opposite back in 2018. In *Mosby-Meachem v. Memphis Light, Gas & Water Division* (6th Cir. 2018), the employer's in-house attorney was put on bed rest for 10 weeks during her pregnancy due to the medical condition of preeclampsia. She requested the ability to work from home while she was on bedrest. Her employer denied this request, alleging that being physically present in the office was an essential function of her job. The court rejected this argument. The court looked at whether the attorney's job would fundamentally change if she worked from home for the designated 10-week period to determine the essential function issue. Notably, the attorney never had to perform the two in-person functions listed on her job description her entire 8-year tenure at the company. Accordingly, the court held that it would not fundamentally change her job if she worked from home for 10 weeks while on bedrest for her pregnancy.

Even though post-pandemic legal precedent on this issue is lacking, courts facing the question of whether physical presence in the office is an essential job function may very well likely come to the same conclusion the 6th Circuit did in *Mosby-Meachem*. Although it is a fact-intensive inquiry, the statistics discussed above show that many workers are still working from home even though it is safe to return to the workplace. Workers were forced to adapt their jobs to a remote-only setting. This made some employers and workers realize that some aspects of jobs were better performed in a telework setting as opposed to an in-person setting. Thus, it may be hard for courts to say that working from home will fundamentally change some jobs.

The jobs that would likely fundamentally change if working from home was requested as a reasonable accommodation under the ADA would be blue-collar jobs. Blue-collar jobs usually involve some type of manual labor, which can be difficult to do outside the workplace. White-collar workers, on the other hand, usually are found in offices, making their work more much transferable to a home office. A recent study from Gallup reveals that from October 2020 to April 2021, an average of 72% of white-collar workers performed all or part of their jobs from home. In contrast, only 14% of blue-collar workers could say the same. Consequently, white-collar workers are much more likely to receive teleworking as a reasonable accommodation under the ADA.

Vaccine Mandates

Another question that arises as a result of the pandemic is how courts approach vaccine mandates, and specifically, how the mandates interact with anti-discrimination laws. Vaccine mandates were an incredibly hot topic once COVID-19 vaccines became available to the general public. In an effort to keep their workplaces safe, employers took a variety of approaches to COVID-19 vaccination policies. These ranged from all-out mandates to policies that did not require vaccinations but provided incentives like one-time cash payments or paid time off to those employees who did get vaccinated. The mandatory policies prompted many religious and health-related objections, raising questions about how far an employer's duty to reasonably accommodate disabilities and religious beliefs extends.

In November of 2021, the Biden Administration issued two vaccine mandates. The first mandate was to be enforced by OSHA. It required employees at private businesses with 100 or more employees to either be fully vaccinated or submit a negative COVID-19 test every week to enter the workplace. It also required all unvaccinated employees at these workplaces to wear a mask while there. This mandate was projected to cover 84 million employees. The second mandate, enforced by the Centers for Medicare and Medicaid Services ("CMS") at the Department of Health and Human Services, applies only to healthcare workers at federally-funded facilities who do not qualify for a medical or religious exemption. This mandate requires healthcare workers at facilities receiving Medicare or Medicaid payments to be fully vaccinated. Together, these mandates were meant to cover two-thirds of the American workforce.

These mandates made their way to the Supreme Court, which ended up blocking the OSHA mandate but upholding the one from CMS. The Court held that OSHA exceeded its authority in promulgating a rule that is essentially a broad public health measure when Congress only gave OSHA the authority to set workplace safety standards. Conversely, the Court ruled that the Secretary of Health and Human Services had the authority to issue the CMS mandate. It reasoned that the mandate fulfilled that Department's responsibility of ensuring healthcare workers who treat Medicare and Medicaid patients adequately protect those patients' health and safety.

Even though the OSHA mandate did not survive constitutional scrutiny, employers remain generally free to implement such mandates. Courts have upheld such efforts on the basis that employers have an obligation to maintain a safe workplace. Therefore, there is likely limited EPL claims exposure when it comes to claims challenging an employer's authority to institute vaccine mandates.

Exposure to claims challenging an employer's enforcement of these policies is a different story, though. EPL claims challenging enforcement of these policies under Title VII's or the ADA's failure to accommodate provisions are expected to increase. Religious objections appear to dominate the lawsuits challenging workplace vaccine mandates. Recent statistics from Bloomberg Law reveal that from May 17, 2021, to May 17, 2022, 39% of lawsuits challenging private-sector employers' vaccine mandates in federal court were brought asserting religious objections. In contrast, health concerns accounted for only 5% of these lawsuits, and 22% included both objections. Employees requesting an ADA exemption from their employers' vaccine mandates must identify a specific condition that makes getting vaccinated a health risk. Specific conditions include a known allergy to an ingredient in the vaccine or an adverse reaction to a previous vaccination. This request must be coupled with documentation from a doctor. Dorit Reiss, a professor at the University of California Hastings College of the Law who specializes in vaccine policy, stated that, "there really are only a few medical-related reasons not to take vaccines." As of May 2022, courts have seen barely any health-based lawsuits.

Conversely, courts have started to see quite a few lawsuits challenging private employers' vaccine mandates for religious reasons. In fact, they have thrown out about a quarter of them. As of May 2022, no workers have prevailed. This is likely due to the very low burden employers must meet in proving that an accommodation for a religious belief would impose an undue hardship on the employer.

Under Title VII, employers have a duty to reasonably accommodate bona fide religious beliefs they knew about that conflict with an employment requirement. This duty applies unless providing a reasonable accommodation would impose an undue hardship on the employer. Courts have held that employers do not have to accommodate an employee's asserted religious beliefs if doing so would impose more than a *de minimis* cost on the employer. The Supreme Court ruled in *Trans World Airlines, Inc. v. Hardison* (1977) that anything more than a "trivial expense" qualified as an undue hardship on the employer. Accordingly, it is not surprising that when weighing an employee's religious concerns against the costs to the employer of granting the accommodation request, the employer has, so far, won out.

Vaccine mandates in the workplace will remain a challenge for employers as the virus continues to mutate into different variants. Some practices employers can implement to limit their exposure to EPL claims challenging vaccine mandates are discussed in the "Best Practices" section below.

<u>Best Practices to Limit Exposure to Post-Pandemic EPL Claims</u>

As described above, the COVID-19 pandemic completely shocked the American workforce. It necessitated monumental changes to the way employees work and workplaces function, some of which we have chosen to keep. These changes raised unique questions and invited new legal challenges. Given these new questions and challenges, here are some of the best practices employers can implement to try to limit their exposure to post-pandemic EPL claims:

- Stay current with market trends because certain claims may increase depending on what is happening in society.
- Pay attention to local and state ordinances regarding COVID-19 protection measures.

- Enforce adequate COVID-19 protection measures in the workplace as the virus continues to mutate into new variants (i.e. case reporting, mask wearing, social distancing, and sanitizing).
- Discuss requirements regarding vaccinations and the protection of employees' medical information.
- Carefully track employees' time worked, especially those working from home or working during a furlough, to avoid wage-and-hour law violations. Relying on employees to track their time invites unnecessary risk.
- With regard to vaccine mandates in the workplace: Employers with vaccine mandates should regularly document their communications with employees, prepare for religious and medical accommodation requests, and make sure higher-level employees understand the employer's responsibilities under Title VII, the ADA, and other applicable state anti-discrimination laws.
- When in doubt, consult legal counsel.

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PAID LEAVE TRENDS IN THE UNITED STATES

Paid leave can take many forms: sick leave, vacation, holidays, bereavement, maternity/paternity/parental, compensatory time, and general paid time off (PTO). Currently in the United States, there is no federal requirement that employers provide any paid leave. However, more states and cities are starting to create their own requirements for paid leave that apply to employers within their jurisdictions. On the federal level, legislation has been proposed and there have been varying levels of support, but little movement is imminent. This presentation will focus on two types of paid leave that are commonly supported: sick and family leave.

<u>Family and Medical Leave Act</u>

The Family and Medical Leave Act (FMLA), passed in 1993, provides up to 12 weeks of unpaid, job protected leave during a 12-month period. It can be taken for the following reasons:

- Birth and care of newborn child of employee;
- Placement with the employee of a child for adoption or foster care;
- To care for an immediate family member (spouse, child, or parent) with a serious health condition; and/or
- To take medical leave when the employee is unable to work because of a serious health condition.

While this provides a benefit to employees who need extended absences from work for these reasons by allowing them to retain their job and position upon return, the unpaid aspect of FMLA leaves many employees wanting more. Even at the time of its passing, there was controversy over whether the leave should be paid or not.

The FMLA was not a new concept in 1993 – a prior bill, the Family Employment Security Act, had been proposed but not formally introduced in 1984. Similar bills were introduced in the 1980s, and the FMLA was passed in Congress in 1992 but vetoed by the President. Debate on these bills, and the FMLA, focused on issues such as length of leave, minimum employer size for coverage, and how much the benefit would cost employers. The same themes permeate proposed paid leave legislation today.

A 2016 survey found broad support for making at least some types of FMLA leave paid. 85% of workers opined that employees should receive paid leave to deal with their own health condition and 67% supported paid leave to help an employee's family member with a serious health condition. There was a split in support for paid maternity/paternity leave: 82% of respondents supported paid maternity leave compared to 69% who supported paid paternity leave.

With the COVID-19 pandemic, the federal government temporarily transitioned some FMLA leave to paid leave. The Families First Coronavirus Response Act provided up to 12 weeks of paid FMLA leave, but only for employees who were caring for a child whose school or childcare had closed due to COVID-19.

Most recently, a Democratic **proposal**, the FAMILY Act, would provide 12 weeks of paid leave for:

- Birth or placement of a child;
- To care for an employee's spouse/domestic partner, child, or parent who has a serious health condition, or
- The employee's serious health condition

Benefits would amount to approximately 2/3 of the employee's wages, with a minimum of $580/month and a maximum of $4,000/month. This benefit would be provided by the government and funded by a 0.2% payroll tax. It would also create the Office of Paid Family and Medical Leave to administer the paid leave. It would apply to any employer, differentiating it from the FMLA, which only applies to employers with over 50 employees.

Paid Sick Leave

The U.S. Bureau of Labor Statistics Employee Benefits Report reveals that 79% of civilian employees had access to some sort of paid sick leave as an employment benefit in March of 2021. That means 21% of employees lack access to paid leave, which equates to roughly 33 million workers. This number represents an increase from 67% in 2010. Pew Research Center also evaluated the share of U.S. workers with access to paid sick leave. It broke the respondents down by average wage level and there was a stark difference between high and low earners: 92% of workers in the top quarter of earnings (which was hourly wages over $32.21) have access to some form of paid leave while only 51% of workers in the lowest quarter ($13.80 or less) do. The gap is wider for the lowest 10% of wage earners ($10.80 per hour or less), where 31% of workers have access to some form of paid leave.

The public-private distinction also carries a differential in paid sick leave: 91% of public sector employees (state and local governments) receive some paid sick leave, compared to 75% of workers in the private sector. Employer size is also relevant: 91% of employers with over 500 employees offer paid sick leave, compared to 64% of employers with less than 50 employees.

In March 2020, the Bureau of Labor Statistics estimated that the average cost of providing paid leave to employees would be $0.45 per hour worked. While costs of paid leave may be easier to quantify, benefits are not. However, it has been suggested that paid sick leave would result in increased productivity, fewer workplace injuries, and decreased employee turnover. It has also been thought that by allowing for paid leave, employees can take a full day and thus have time to see their regular doctor instead of going to hospitals and urgent care centers, which would reduce stress on the healthcare system.

At the state level, several states have enacted legislation that requires employers to provide paid sick leave. Colorado, Maine, New Mexico, and New York have recently enacted these laws. New York's paid sick leave program is unique in that it considers an employer's size *and* net income in determining accrual. For example, employees who work for an employer with fewer than 5 employees are still eligible for paid sick leave if their employer made a net income of greater than $1 million in the previous tax year. If the same employer makes less than $1 million in net income the previous tax year, then the employee is still entitled to sick leave, it's just unpaid.

The most common requirement is that employees accrue one hour of leave for every thirty hours worked. Arizona, California, Colorado, Maryland, Massachusetts, New Jersey, New Mexico, New York, and Oregon use this rate. Other states use different accrual rates: Michigan and Rhode Island accrue one hour of leave per thirty-five hours worked; Connecticut, Maine, and Washington accrue one hour leave per forty hours worked; and Nevada and Vermont accrue one hour leave per fifty-two hours worked. The District of Columbia provides for a variable accrual rate based on the size of the employer, ranging from one hour leave per thirty hours worked to one hour leave per eighty-seven hours worked. Many of these states also either impose a statutory cap of paid sick leave an employee can have or allow employees to impose a cap at a certain minimum amount. The most common cap is forty hours of paid sick leave.

Many larger cities have also enacted paid sick leave policies that apply to employers within their boundaries. This includes New York City, San Francisco, Chicago, Philadelphia, Seattle, Portland, Minneapolis, San Diego, and more.

Several states that have not passed laws requiring employers to provide paid sick leave have actually passed laws preempting cities within their borders from passing ordinances requiring the same. As of 2020, 18 states passed laws preempting their municipalities from passing their own paid sick leave policies. For example, in Texas, the cities of Dallas, Austin, and San Antonio all passed ordinances requiring employers in those cities to provide paid sick leave to their employees. Texas courts recently held that these ordinances were unconstitutional because the Texas Minimum Wage Act preempted the passage of such ordinances.

Back to cities that have enacted paid sick leave policies. After 5 years of battling it out in court, the Paid Sick Days Act enacted by the city of Pittsburgh, PA, came into effect on March 15, 2020. Only private employers are covered under the Act. Like the states of Michigan and Rhode Island mentioned above, the city of Pittsburgh permits employees to accrue one hour of paid sick leave per 35 hours of work within the city. Pittsburgh caps the permitted hours of accrued paid sick leave depending on the size of the employer. The cap for employers with 15 or more employees is 40 hours per year, whereas the cap for employers with less than 15 employees is 24 hours per year. Additionally, Pittsburgh's Paid Sick Days Act does not apply to independent contractors, public employees, seasonal employees, or members of a construction union covered by a collective bargaining agreement.

The city of Chicago, IL, on the other hand, has a more veteran paid sick leave ordinance. The Ordinance went into effect on July 1, 2017, and an amendment in July 2020 made it applicable to all employees in the city, even if their employer does not have a brick-and-mortar location in the city. Any employee who works at least 80 hours for a Chicago employer within any 120-day period is eligible for paid sick leave under the Ordinance.

Leave is accrued at one hour paid sick leave per 40 hours worked, and employers can limit the total amount of leave accrued to 40 hours in a 12-month period. Employees can carry over between 20 and 40 hours of unused leave, depending on whether their employer is covered by the FMLA or not. Employees can use the leave for their own illness or that of a family member, to care for a child whose school or place of care has been closed, to stay home pursuant to a public health order, or for any FMLA-eligible purpose. There is also an anti-retaliation provision: employees who are discriminated against or retaliated against for using or trying to use paid sick leave can sue civilly and can recover damages equal to triple the amount of full sick leave lost or denied plus costs and attorney's fees.

Family Leave

Among member nations to the Organization for Economic Cooperation and Development (an organization of 38 leading economies in developed nations), only the United States has no requirement for paid parental leave. Paid family leave in the United States has become more accessible. Even so, a Bureau of Labor Statistics study reveals that paid family leave remains the least accessible across all wage categories. A different BLS study shows that just like with paid sick leave, there is a huge disparity in accessibility when the data is sorted by income level. Notably, there is a 37% difference in access to paid family leave between private industry workers with an average wage in the highest 10% and lowest 10%.

Support for paid parental leave is broad, although there is a split in support for paid maternity/paternity leave: 85% of respondents supported paid maternity leave compared to 69% who supported paid paternity leave. Support for maternity leave focuses on the effect that having a child has on women in the labor force. A study in 2019 found that nearly 30% of women leave the labor force when they have a child, but in two states with paid maternity leave (California and New Jersey), labor market participation for mothers increased by 5%. The study also found that on the whole, mothers are 14% less likely to participate in the labor force than other women. This study, then, does suggest that the availability of paid maternity leave is an important tool towards keeping mothers in the labor force and reducing barriers to entry (or barriers to remaining) in the labor force.

Statistics reveal that paid family and medical leave is one of the most important issues to the U.S. general public currently. In fact, 73% of U.S. adults support federally funded paid family and medical leave.

There have been some efforts to enact paid family leave programs at the federal level. In the 2020 National Defense Authorization Act, the Federal Employee Paid Leave Act allows for up to 12 weeks of paid parental leave for federal employees for foster care placement, adoption, or birth of a child. President Biden's proposed American Families Plan would establish a national comprehensive paid family and medical leave program. The goal of the program is to guarantee 12 weeks of paid parental, family, and personal illness/safe leave by its 10th year in effect. The paid leave program will pay workers on leave up to $4,000 a month, with a minimum of two-thirds of average weekly wages replaced and up to 80% for the lowest wage earners.

On November 19, 2021, the U.S. House of Representatives passed a scaled-down version of President Biden's Build Back Better Act. The proposal would provide four weeks of paid leave for the same reasons under the FMLA. However, this bill deviates from the FMLA's unpaid leave program in significant ways. First, the leave proposal applies to all employers, regardless of their size, whereas the FMLA only applies to employers with 50 or more employees. Second, the bill expands the FMLA's definition of "family members" to care for while on leave to include siblings, grandparents, and "any other individual who is related by blood or affinity and whose association with the individual is equivalent to a family relationship." Third, the proposal would not cover employees in states that already have a paid leave plan in place. The bill, as it currently stands, is unlikely to pass the Senate, but it may have better success if broken up into smaller portions.

While the Build Back Better bill has yet to be voted on by the Senate, some previous federal legislation which attempted to establish a national comprehensive paid family leave program never found its way to the President's desk. The issue of paid family leave has some bipartisan support – two prior Republican proposals would have allowed for paid paternity leave, but both bills paid for the leave from the parents' future social security benefits. Essentially, then, the proposed legislation allowed for parents to borrow against their future social security benefits for the paid parental leave.

Currently, seven states and the District of Columbia have paid family leave laws, and another three states have passed laws that will become effective soon (Oregon, Colorado, and Maryland). The states where these laws have gone into effect are all on the coastlines. Many of them wrap parental leave into an overarching paid family leave act rather than having standalone legislation. Washington, Massachusetts, Connecticut, Oregon, Colorado, and Maryland offer the most parental leave – 12 weeks. Even though not many states have enacted paid family leave laws, the issue continues to be a hot topic in state legislatures across the country.

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ASCERTAINING AND MINIMIZING DAMAGES IN EMPLOYMENT CASES

One of the most common things employers want to know before jumping in to defend an employment case is what remedies the plaintiffs may have at their disposal. This is a very important question that helps reveal the value of a case and inform the employer's defense strategy. However, the answer to this question can get complicated. Given the numerous types of employment claims out there, the damages actually available in a case vary depending on the specific claim brought, the type of employer, the standards that apply to certain capped damages, and the defenses available to the employer. This handout attempts to streamline and highlight the information important for employers to ascertain and minimize the extent of their liability in employment cases.

As an introduction, the following tables include relevant employment law statutes and the remedies available under them. This handout will cover the remedies available under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), the Equal Pay Act ("EPA"), Section 1981 of the Civil Rights Act of 1866 ("§ 1981"), the Fair Labor Standards Act ("FLSA"), the Family and Medical Leave Act ("FMLA"), the Kansas Act Against Discrimination ("KAAD"), and the Missouri Human Rights Act ("MHRA"). The various caps and standards that apply to these remedies are discussed below.

	Back Pay	Front Pay	Compensatory Damages	Punitive Damages	Liquidated Damages	Attorney's Fees
Title VII	✓	✓	✓*	✓*		✓
ADA	✓	✓	✓*†	✓*†		✓
ADEA	✓	✓			✓	✓
EPA	✓	✓			✓	✓
§ 1981	✓	✓	✓	✓		✓
FMLA	✓	✓			✓	✓
FLSA	✓	✓			✓	✓
KAAD	✓	✓	✓*			
MHRA	✓	✓	✓	✓		✓

* = damages are capped

† = cannot obtain compensatory or punitive damages on an ADA retaliation claim

	Injunction	Reinstatement
Title VII	✓	✓
ADA	✓	✓
ADEA	✓	✓
EPA	✓	✓
§ 1981	✓	✓
FMLA	✓	✓
FLSA	✓	✓
KAAD	✓	✓
MHRA	✓	✓

Plaintiff's Duty to Mitigate Damages

It is important to note at the outset that Title VII, the ADA, ADEA, EPA, and § 1981 all impose on plaintiffs an affirmative duty to mitigate their damages. Failure to mitigate is an affirmative defense for employers that, if proven, can reduce the plaintiff's damages award. To avoid such a reduction, plaintiffs must use reasonable diligence to locate substantially equivalent employment. Courts have held that simply skimming through employment ads is not enough to fulfill a plaintiff's duty to mitigate their damages. Instead, plaintiffs need to be proactive in looking for available jobs that are substantially comparable in terms of salary, benefits, status, working conditions, and duties to the ones they discriminatorily lost. Reasonable steps to locate other employment include registering with employment agencies, interviewing for open positions, and networking with friends and acquaintances about job prospects. Whether a rejected offer for a substantially comparable position is reasonable depends on the plaintiff's circumstances.

Monetary Relief

1. Back Pay

Back pay is available under Title VII, the ADA, ADEA, EPA, FMLA, FLSA, KAAD, MHRA, and § 1981.

Back pay is the amount of lost wages and benefits owed to the plaintiff from not working during the time between the alleged violation and the date when a jury verdict or court judgment is entered on liability. Any element of compensation that the plaintiff would have earned during this period is included in a back pay award. This includes things like salary, overtime pay, raises, bonuses, and fringe benefits such as vacation pay, medical and life insurance benefits, pension and retirement benefits, and stock options.

Back pay liability begins at the time of the employer's illegal act which caused the plaintiff to suffer an economic injury. Under Title VII, plaintiffs may not recover back pay earlier than two years before they filed a charge of discrimination with the EEOC. Under the ADEA, the back pay period is extended to three years for willful violations of the statute. Under § 1981, the applicable state's statute of limitations constrains the back pay period.

The back pay accrual period generally ends on the date the court enters a judgment or a jury returns a verdict regarding the employer's liability. However, the employer can reduce their liability for back pay by demonstrating that the plaintiff:

(1) Failed to mitigate their damages (as described earlier);
(2) Was reemployed or is currently unable to work;
(3) Refused the employer's unconditional offer of reinstatement;
(4) Engaged in misconduct or fraud prior to the employer's discriminatory act as shown by after-acquired evidence; or
(5) Would not still hold their position due to the shorter-than-average tenure of employees in that position.

Additionally, in an effort to prevent double recovery, some courts have reduced plaintiffs' back pay awards because they are receiving income from collateral sources. Such sources consist of social security disability benefit payments, retirement benefits paid by the employer, unemployment compensation, and workers' compensation disability benefit payments.

Along with these ways to reduce back pay liability, there are two defenses employers can assert to avoid it completely. The first is that employers can avoid back pay liability when the plaintiff fails to prove a constructive discharge claim. If the plaintiff is alleging constructive discharge, they must establish that the alleged discrimination made the work environment so intolerable that they could not reasonably be expected to keep working there. This high bar is often difficult for plaintiffs to meet. If they fail to meet it, employers are not liable for any back pay. The second defense is an equitable one called laches. It allows employers to avoid back pay liability if the plaintiff exercises unreasonable delay in pursuing their claim.

2. Front Pay

Front pay is available under Title VII, the ADA, ADEA, EPA, FMLA, FLSA, KAAD, MHRA, and § 1981.

Front pay represents the plaintiff's future lost earnings as a result of the employer's violation. For example, if it is unfeasible to reinstate the plaintiff and she is unable to find another job within the next year, then front pay is likely a suitable remedy. Although front pay involves compensating plaintiffs with money, it is really more of an equitable remedy that aims to make the plaintiff "whole" for the harm suffered. An award of front pay attempts to put plaintiffs back in the place they would have been in had there been no statutory violation.

Front pay is awarded in two situations, the first being when reinstatement is not feasible. Reinstatement is not a feasible remedy when (1) there is no open, comparable position, (2) the work environment was so intolerable that an antagonistic relationship would form were the plaintiff to be reinstated, or (3) the employer has a record of long-term resistance to anti-discrimination efforts. When reinstatement is a feasible remedy, front pay is awarded to compensate the plaintiff during the interim period between the judgment and the estimated date of her reinstatement.

Front pay picks up where the period for back pay accrual left off: at the point where the court has rendered a judgment or a jury verdict determining the employer's liability. Courts consider a variety of factors in determining how much front pay to award a particular plaintiff. These include: (1) the plaintiff's age; (2) the reasonable length of time for the plaintiff to obtain a comparable job; (3) how long the plaintiff has worked for the employer or previous employer(s); and (4) the length of time other employees in similar positions had worked for the employer. Although the result of this factor analysis ultimately depends on the facts at hand, older workers may receive larger front pay awards because they typically have a harder time finding jobs than younger workers.

Employers may argue the same defenses and bases for reductions of back pay for front pay awards.

3. Compensatory and Punitive Damages

Compensatory and punitive damages are available under Title VII, the ADA, KAAD, MHRA, and § 1981.

Under Title VII, the ADA, KAAD, and MHRA, compensatory and punitive damages are available only for intentional acts of discrimination. Similarly, under § 1981, compensatory and punitive damages are only available in cases of intentional *race* discrimination since that statute only covers race.

The table below breaks down the various damage caps and standards required to qualify for punitive damages. Awards of back and front pay do not count toward the caps on compensatory and punitive damages. Additionally, the caps under Title VII and the ADA do not limit plaintiffs' recovery under relevant state anti-discrimination statutes.

	Compensatory & Punitive Damages	Standards
Title VII & ADA	Capped based on size of employer: • 15-100 employees: $50,000 • 101-200 employees: $100,000 • 201-500 employees: $200,000 • 500+ employees: $300,000	Punitive damages only available if plaintiff proves employer acted with malice or reckless disregard
§ 1981	No cap	
KAAD	Compensatory damages capped at $2,000; punitive damages not available	
MHRA	Compensatory and punitive damages shall not exceed (1) actual back pay plus interest; and (2) a certain dollar amount based on size of employer: • 5-100 employees: $50,000 • 101-200 employees: $100,000 • 201-500 employees: $200,000 • 500+ employees: $500,000	Punitive damages only available if plaintiff proves by clear and convincing evidence that employer acted willfully or with reckless disregard for the act's consequences

Compensatory damages are meant to compensate plaintiffs for actual losses. These losses can be monetary like out-of-pocket medical expenses or non-monetary like "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life." 42 U.S.C. § 1981a(b)(3). Specific non-monetary losses include injury to professional standing, injury to credit standing, and injury to character and reputation. To recover compensatory damages, plaintiffs must provide evidence of their asserted non-economic injuries which were allegedly caused by the employer's illegal conduct. To support a damage award for emotional distress, plaintiffs must provide competent evidence of genuine injury. Medical evidence is not necessary to bolster the plaintiff's case, but it certainly helps, especially when asking for a lot of compensatory damages.

Punitive damages are designed to punish employers for egregious violations and deter employers from repeating them in the future. To recover punitive damages, plaintiffs must prove that the employer acted with malice or reckless indifference. Plaintiffs can prove this by showing that the employer had "guilty" knowledge that it may be acting in violation of federal law rather just being aware that it may be engaging in unlawful discrimination. Plaintiff fails to meet this burden when the employer reasonably believed that it was not violating the law because the standard requires the employer to have some culpable state of mind.

Beyond the malice or reckless indifference standard, plaintiffs must also prove some basis for imputing liability to the employer to receive punitive damages. This basis is established when (1) the employer authorized the act; (2) the employer was reckless in employing the unfit agent who performed the act; or (3) when the agent was acting in the course and scope of employment.

Courts consider several factors in determining how much punitive damages to award. These factors are the nature and severity of the discriminatory conduct, duration and frequency of the conduct, and the employer's financial status.

Employers have a few defenses at their disposal to potentially avoid or reduce an award of compensatory or punitive damages. The first is the same-decision defense in a mixed-motive case. In a mixed-motive case, the employer has a lawful and an unlawful reason for taking an adverse employment action against the plaintiff. If the plaintiff can prove that the unlawful reason was a motivating factor in the adverse employment action, then they have established an actual violation of the statute. In this case, the plaintiff is entitled to the full range of damages under the applicable statute unless the employer can prove by a preponderance of the evidence that it would have made the same decision absent taking the unlawful motive into account. If the employer succeeds in proving this, then the plaintiff still prevails but is limited to the remedies of declaratory relief, injunction, and attorney's fees and costs directly related to bringing the claim. Notably, plaintiffs may not recover compensatory or punitive damages when the employer succeeds in proving the same decision defense.

The second defense employers can potentially use in an employment case to avoid a punitive damage award is the good faith defense. When it is an agent of the employer that committed the discriminatory action, the employer can avoid punitive damages by proving it made good faith efforts to comply with anti-discrimination laws. Evidence of such compliance could be promptly responding to and thoroughly investigating complaints of unlawful conduct, accommodating a disability, or hiring outside specialists to ensure its internal investigations are effective.

4. Liquidated Damages

Liquidated damages are available under the ADEA, EPA, FMLA, and FLSA.

An award of liquidated damages equates to double the amount of back pay to which the plaintiff is entitled. By doubling the amount of back pay, liquidated damages are meant to be a substitute for punitive damages and deter future violations of the statute. Liquidated damages are available for willful violations of the ADEA and EPA. An employer willfully violates the ADEA or EPA if it knew or showed reckless disregard for whether its conduct was prohibited by either of those statutes.

Violations of the FMLA and FLSA are presumed to carry penalties of liquidated damages. This is so, unless the employer can establish that its action or omission was made in good faith and that it reasonably believed it was in compliance with the FMLA or FLSA. Employers have had success in proving this defense when they seek out the advice of experienced employment law counsel regarding their responsibilities under these statutes and proceed to follow that advice.

Injunctive Relief

1. Injunctions

Injunctions are available under Title VII, the ADA, ADEA, EPA, FMLA, FLSA, KAAD, MHRA, and § 1981.

Permanent injunctions are what courts use to cease specific, unlawful employment practices such as height and weight requirements, scored tests, various educational requirements, and age limits. The scope of the injunction is limited to stopping the conduct found unlawful. Courts have the power to order an injunction when it determines that the injunction is necessary to fully remedy the alleged discrimination and deter repeated violations in the future. Employers with a history of consistent past discrimination can avoid an injunction if they show the court that future compliance is likely. A court is likely to be persuaded if the employer demonstrates that the discriminatory practice ceased well before the judgment on liability was entered or if the plaintiff no longer works for employer and is unlikely to be reinstated.

Preliminary injunctions are used to preserve the status quo while the litigation proceeds. To secure a preliminary injunction, the plaintiff must show (1) a strong likelihood of success on the merits, (2) irreparable harm will take place without the injunction, (3) the plaintiff will be harmed more without an injunction than employer will with the injunction, and (4) that issuing the injunction will further the public interest. Irreparable harm is a high burden to meet, but plaintiffs have had success in establishing it when the employer's retaliatory action has a chilling effect on the workplace, impeding the employee's ability to exercise her rights. For example, irreparable harm likely exists if the employer's retaliatory action causes other potential witnesses to stay silent instead of testifying for the plaintiff. Losing the job is not sufficient to show irreparable harm.

2. Reinstatement

Reinstatement is available under Title VII, the ADA, ADEA, EPA, FMLA, FLSA, KAAD, MHRA, and § 1981.

Reinstatement is a form of "make whole," affirmative relief courts order in an effort to restore plaintiffs to the situations they would be in had there been no unlawful employment practice. Other forms of affirmative relief include hiring, transfer, promotion, restoration of benefits, retroactive seniority, and making a reasonable accommodation. This type of relief can only be given to actual victims of discrimination, not third parties who merely observed the discrimination and were not targets of it.

Reinstatement is an appropriate remedy in cases of discriminatory discharge when reinstating the plaintiff would not lead to an antagonistic relationship between the plaintiff and employer. Reinstatement is not an appropriate remedy when:

(1) some intervening, nondiscriminatory event would have ended the plaintiff's employment;
(2) there is no open position;
(3) in a mixed-motive case, when the employer would have made the same decision without considering the unlawful motive;
(4) the plaintiff is unable to work due to an injury;
(5) reinstating the plaintiff would put them in a better position than they would have been in had there been no discrimination.

In these circumstances, front pay is the more appropriate remedy. Employers are generally not required to bump other employees from their positions in order to make room for the plaintiff. Nonetheless, the court may order such bumping when the employer acted in bad faith such as failing to cure a pattern of discriminatory conduct or violating the terms of a settlement agreement.

Attorney's Fees

Attorney's fees are available under Title VII, the ADA, ADEA, EPA, FMLA, FLSA, MHRA, and § 1981.

These statutes differ as to which parties may be awarded attorney's fees. The following table lays out whether these statutes permit prevailing plaintiffs, prevailing defendants, or both to receive attorney's fees. The table also identifies which statutes have fee-shifting provisions which make the losing party pay the prevailing party's attorney's fees as part of its own costs.

	Prevailing Plaintiffs	Prevailing Defendants
Title VII	✓	✓
ADA	✓	
ADEA	✓	
EPA	✓	✓
§ 1981	✓	✓
FMLA	✓	
FLSA	✓	
MHRA	✓	

In the United States, courts follow the "American rule" when it comes to attorney's fees. The American rule provides that parties in litigation are responsible for paying their own court costs and attorney's fees at the end of a case. However, some of the above statutes have fee-shifting provisions that permit the court to order the losing party to pay the prevailing party's reasonable attorney's fees as part of their costs. A plaintiff is a prevailing party when they receives actual relief on the merits that materially alters the legal relationship between the parties. Typically, a plaintiff achieves prevailing party status when they are awarded more than nominal damages, or the relief has an important impact on their statutory rights.

The ADEA and FLSA use the same attorney's fees provisions which provides that the court must render a final judgment in the plaintiff's favor in order for the plaintiff to recover attorney's fees. Conversely, in Title VII mixed-motive cases, courts have held that plaintiffs can recover attorney's fees even when the employer is not liable for damages.

Under Title VII, the EPA, and § 1981, prevailing defendants may be awarded attorney's fees. However, the EPA permits only prevailing plaintiffs to benefit from the Act's fee-shifting provision which shifts a party's own attorney's fees to the other party to pay as part of its costs. For the defendant to prevail under Title VII's fee-shifting provision, it needs to convince the court that the outcome of this case has not resulted in the plaintiff obtaining a material change in their relationship with the defendant.

Employers are also entitled to an award of attorney's fees when the court holds that the plaintiff's claim was brought frivolously, unreasonably, or without foundation. Courts commonly consider three factors to make this determination: (1) whether the plaintiff established their prima facie case, (2) whether the defendant made a settlement offer, and (3) whether the trial court dismissed the case before trial or held a trial on the merits. Even when employers prevail in the case, they are still unlikely to recover attorney's fees when the case has made it through summary judgment, or the plaintiff receives a right-to-sue letter from the EEOC.

Courts use the Lodestar method to calculate a "reasonable" attorney's fee. The Lodestar method requires courts to multiply the number of hours reasonably expended on the litigation by a reasonable hourly rate. Time spent on administrative exhaustion and reasonable hours spent by law clerks or paralegals count toward the number of hours reasonably expended for calculation of attorney’s fees. The reasonable hourly rate is based on the prevailing market rate in the community used by attorneys of reasonably comparable skill, experience, and reputation for similar services. Factors such as the novelty and complexity of a case, the degree of skill or experience required in litigating the case, and the desirability of the representation are taken into account by the court in calculating the appropriate award of attorney's fees.

Conclusion

The type and amount of damages available in employment law cases can vary widely depending on the statute(s) sued under, the different standards that apply to cap certain damages, and the defenses employers are able to assert. This handout attempts to break down some of the variables so that employers can have a better idea of the liability they are facing and what defenses are at their disposal to limit that liability. If there are remaining questions regarding damages in employment cases, please contact a MVP Law attorney so that we can get those questions answered.

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WHAT'S THE DEAL WITH THE NUCLEAR VERDICTS?

I. Overview and Examples

Generally, a nuclear verdict is a verdict greater than $10 million, but can be any verdict wildly in excess of the special damages award. Special damages, also known as economic damages, include damages like medical bills or repair costs where the proper dollar amount of the award can be easily ascertained. General damages, by contrast, are damages like pain and suffering and loss of companionship. The intangible nature of these damages leaves the jury free to speculate on the proper dollar amount of the award.

Blake et al. v. Ali et al is a recent example of a nuclear verdict. In that case, a Texas jury found Werner Enterprises liable in the amount of $89.6 million for a fatal accident near Odessa when a pick-up lost control, crossed the median and hit a Werner truck. Despite the fact that the driver was driving below the speed limit, did not lose control of the truck and brought it to a complete stop after impact, the plaintiff's attorney successfully argued that Werner's lack of safety systems and its training processes for student drivers, combined with the company's business model of assigning student drivers on expedited deliveries was creating a highly dangerous dynamic. On his view, because the driver knew the weather conditions, he should have either slowed the truck to a crawl or pulled off the road. The truck was driven by a student driver with an instructor in the cab. A 7-year-old died in the accident and two other children along with their mother were also hurt.

Another recent example of a nuclear verdict is *Joshua Patterson v. FTSI, LLC et al*. There, another Texas jury found FTS International Manufacturing liable in the amount of $101 million to a man who was rear-ended by a semi-truck driver on his way home from church. The driver, who was operating the vehicle under the influence of alcohol and marijuana, had 3 moving violations within 3 months of his hiring date. He also had falsified documents that he had undergone new driver and defensive driver drug and alcohol training and an official drug test. He walked away from the accident uninjured while the victim was unable to work after suffering back and neck injuries that required surgery.

Additionally, in *Alfredo Morga v. FedEx Ground Package System, Inc.*, a New Mexico jury found FedEx liable in the amount of $165 million when a semi-truck slammed into the back of a pickup truck, killing a 4-year-old and his mother. On appeal, FedEx requested that the court establish a financial limit on the value of life, despite the district court's and jury's efforts to fulfill their duty to quantify something so intangible and difficult to measure. The Court of Appeals found that the plaintiffs' attorney presented sufficient evidence to support the jury's right to perform its unique function. That is, to award all compensatory damages, including any non-economic damages for pain and suffering and loss of life, incurred by the family.

II. Causes of Nuclear Verdicts and What to Look For

Ultimately, nuclear verdicts are possible in trucking cases because there is no legislation controlling the amount of a noneconomic damages award. While in Kansas there was a $250,000 cap, in 2019 the Kansas Supreme Court declared that law unconstitutional, although that ruling does not apply to wrongful death cases or punitive damages. Additionally, there is widespread prejudice against motor carriers in society. Motor carriers have become large litigation targets due to the public's perception that they have deep pockets. Media and social media coverage of dangerous practices in the transportation industry and specifically accidents involving semi-trucks reinforces this perception. The personal experience of jurors encountering semi-trucks on the road who are poor drivers as well as infomercials and other forms of attorney advertising also contribute.

Moreover, jurors are becoming immune to huge verdicts. A society of entitlement that has inadequate appreciation for the value of the dollar, as well as a lack of recognition on the part of jurors that a large award increases downstream costs to consumers, contribute to this immunity. The prevalence of wealth in media detailing the lives of, for example, professional athletes, CEOs, actors, and other high earners on reality TV trivializes nuclear verdicts in the minds of jurors by normalizing an extravagant lifestyle.

<u>What to Look For</u>

There are certain high risk plaintiff's attorneys who are associated with nuclear verdicts. A top 5 plaintiff's attorney in the state or a local legend who has a history of connectivity to the citizens of the county is significantly more capable than the average plaintiff's attorney to obtain a nuclear verdict for his or her client. Punitive damages, i.e., damages awarded to punish a defendant for outrageous conduct and deter them and others like them from similar conduct in the future, are another thing to look for.

There also certain accelerants to litigation that indicate a possible nuclear verdict. Company misconduct such as a lack of vetting in the hiring process, the operation of trucks with known physical defects likely to cause hazardous or unsafe driving conditions and inadequate (or nonexistent) policies and procedures. Driver misconduct is another accelerant to litigation. When a driver experiences fatigue due to working extremely long hours or lack of sleep, the likelihood of a nuclear verdict goes up. Other driver misconduct such as driving under the influence, texting while driving, driver dishonesty, speeding or violation of safety regulations also increase the chances of a jury returning a nuclear verdict. Plaintiff's attorneys may also focus on the trucking company conduct including turning a blind eye to driver misconduct such as exceeded hours of service, a lack of safety practices and training, or a company culture that promotes profits at the expense of safety. Anything that can rouse a juror's sympathy or emotions will likely be the target of a plaintiff's attorney's attention.

III. Ways to Prevent Nuclear Verdicts

Being proactive is the best way to prevent a nuclear verdict. Spending money on safety allows trial counsel to argue how far ahead of the curve their client is compared to the industry in general. It is a good practice to utilize technology such as sensors, cameras, and autonomous tech. This gives transportation companies more control over their fates in the legal system and is proving a vital resource for effectively settling claims. It is also important for clients to manage the public perception of their company. Social media, both of the individual drivers and of the company, is an important part of creating a positive image. Post-accident public relations and crisis management are also crucial. It is better to obtain public relations guidance than to not provide a comment.

It is also a good practice to resolve potential nuclear claims early. Clients should make contact with the claimant and the claimant's family immediately and sincerely admit liability. It is important to be as empathetic as possible. Additionally, clients should be willing to negotiate immediately. The entire team of the insurer, TPA and employer must be in agreement with an early resolution strategy. Any delays by any team members jeopardize the entire strategy. Maintaining candor and sincerity is also important. Clients should challenge what they can challenge but should not hesitate to concede what they cannot reasonably challenge. A belief that juries will always do the right thing, a lack of understanding that catastrophic injuries trump facts, and a mentality by the team that every stone should be unturned prior to final evaluation all stand in the way of early resolution.

Avoiding litigation in certain high-risk venues is another way to prevent nuclear verdicts. Texas, Louisiana, California, Santa Fe, New Mexico, Cook County, Illinois and Philadelphia are all high-risk venues. Additionally, certain racial, socio-economic, small-town realities heighten the probability of a nuclear verdict. Inordinately large verdicts tend to occur in smaller populated, typically depressed, often welfare-sustained communities where everyone knows each other and where the plaintiff was loved not just by some potential jurors, but possibly all of them. To avoid litigation in these high-risk venues, clients can move agents for service of process to less difficult venues.

IV. Recent Changes in Damages Caps

<u>Kansas</u>

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

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

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

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

Oklahoma

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

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

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

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

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

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

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

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LGBTQ+ AS A PROTECTED CLASS

I. Title VII Implications and Enforcement

The American workplace was changed forever when President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law. Title VII of the act prohibits employment discrimination based on race, sex, color, religion or creed, and national origin. (*EEOC Title VII of the Civil Rights Act of 1964*). The Act applies to employers with more than fifteen employees, labor unions, and employment agencies. Title VII makes it unlawful to fail, deny employment, or to otherwise discriminate against anyone because of their membership in a protected class. Additionally, the Act prohibits the limitation, segregation, or classification of employees or applicants for employment that would deprive them of employment opportunities or adversely affect their employment based on membership in a protected class. These prohibitions force employers to re-evaluate their hiring criteria and instead focus on a potential employee's skills and credentials rather than one's membership.

Title VII also prohibits harassment as a form of discrimination. Workplace harassment consists of actions including, but not limited to, making comments, jokes, or slurs regarding membership in a protected class – initially based upon sexual harassment, terminating an employee for refusing sexual advances, or other offensive conduct directed at an employee be either supervisors, co-workers, or even members of the public based upon his, her, or their membership in a protected class.

A. What Does Title VII Include?

Under Title VII, it is unlawful to discriminate in any aspect of employment, including:

- Hiring and firing;
- Compensation, assignment, or classification of employees;
- Transfer, promotion, layoff, or recall;
- Job advertisements and recruitment;
- Testing;
- Use of company facilities;
- Training and apprenticeship programs
- Retirement plans, leave and benefits; or
- Other terms and conditions of employment

Discriminatory practices under Title VII may also include:

- Harassment on the basis of race, color, national origin, sex (including pregnancy, sexual orientation, and gender identity) or religion;

- Refusal or failure to reasonably accommodate an individual's sincerely held religious observances or practices, unless doing so would impose an undue hardship on the operation of the employer's business;
- Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain race, color, national origin, sex (including pregnancy, sexual orientation, and gender identity) or religion;
- Denial of employment opportunities to an individual because of marriage to, or association with an individual of a particular race, color, national origin, sex (including sexual orientation or gender identity) or religion; and
- Other employment decisions based on race, color, national origin, sex (including pregnancy, sexual orientation, or gender identity) or religion.

Both intentional discrimination and apparently facially neutral conduct or work rules resulting in a disparate impact upon a protected class are prohibited under Title VII. An exception to the rule prohibiting disparate treatment is when the lack of a protected characteristic is a bona fide occupational qualification for a specific job. An employer may defend itself from a discrimination claim by contending that there are specific qualifications needed for the job to be done.

B. Title VII Enforcement

Complaints under Title VII require exhaustion of administrative remedies and must be filed with the Equal Employment Opportunity Commission (EEOC) prior to filing suit. The EEOC may pursue suit or issue a Notice of Right to Sue to the employee to bring suit. Title VII authorizes the Department of Justice (DOJ) to prosecute discrimination suits against state and local governments if they are referred to the DOJ by the EEOC. The Department of Justice may also initiate investigations and prosecute enforcement actions against state and local government employers when it has a reason to believe that there is a pattern or practice of discrimination.

C. Oncale

In *Oncale v. Sundowner Offshore Services, Inc.*, a worker on an eight-man oil crew claimed that he was sexually harassed by some of his male coworkers in front of the rest of his crew. The worker reported the harassment and threats to a supervisor, who allowed it to continue. Eventually the worker quit and wanted the record to show that he left his job due to sexual harassment and abuse. Both the district court and Fifth Circuit held that as a man, the worker was unable to bring a cause of action against his male coworkers under Title VII because they were of the same sex. In a unanimous Supreme Court decision written by Justice Antonin Scalia, the Court held that sex discrimination by members of the same sex is actionable under Title VII and that the regulation's prohibition on discrimination "because of sex" still stands even if the victim and perpetrator are of the same sex. The *Oncale* decision expanded the definition of "sex" under Title VII to include gender, widening the category of actionable offenses under the regulation.

i. Significance of the Oncale Decision

The *Oncale* decision is notable because it set the judicial precedent that Title VII also applies when harassment is between members of the same sex, even in the absence of sexual desire. In summary, *Oncale* expanded Title VII to all instances of sexual harassment. Per *Oncale*, discrimination based on sex or gender is actionable as long as it puts the victim in an objectively hostile or abusive work environment, no matter the perpetrator's gender or the victim's sexual orientation.

D. Obergefell

Obergefell v. Hodges was a historic civil rights decision that guaranteed same-sex couples the right to marry. In a 5-4 decision, the Supreme Court held that the right to marry is a fundamental liberty, that denying same-sex couples the right to marry and enjoy the rights, privileges, and obligations of marriage violated Due Process, and further that such denial defied the Equal Protection Clauses. Marriage is fundamental, because it is a part of individual autonomy, protects an intimate association between two people, benefits families by granting legal recognition to building a home and raising children, and is a keystone of social order. Same-sex marriages should reap those same benefits. *Obergefell* impacted state actors' liability, not only concerning marriage, but also for other rights, privileges, and immunities under federal law and the United States Constitution. This case codified the idea that organizations cannot discriminate toward anyone on the basis of their marriage, including the sex of the person they are married to.

II. Title VII Expansion Under *Bostock*

The United States Supreme Court's landmark decision in *Bostock v. Clayton County,* Georgia gave Title VII another significant expansion. The *Bostock* case was decided on June 15, 2020, and its principal case regarded Gerald Bostock, a juvenile court employee who was fired from his job after expressing interest in a gay softball league at work. Previously, the Eleventh Circuit held that Title VII was not applicable to employment discrimination based on sexual orientation or transgender status. Some states and localities already had laws in place to protect LGBTQ+ workers, but not every state had those regulations in place. In a 6-3 decision written by Justice Neil Gorsuch, the Supreme Court held that an employer who fires an individual merely for being gay or transgender violates Title VII. The Court held that sexual orientation was protected under the "sex" category of Title VII verbiage.

In his opinion, Justice Gorsuch offered the following example as to why sexual orientation and sex are intertwined. He posed a scenario where a fictitious employer has a policy that they will fire any employee who they find out is gay. At a company party, an employee shows up with their wife. There, the employee's sex is what hinges on them being fired or keeping their job. Justice Gorsuch further expanded saying that it is impossible for an employer to discriminate based on sexual orientation without first taking an employee's sex into account and that discrimination based on sexual orientation "inescapably intends to rely on sex in its decision-making." Gorsuch also noted that if changing the employee's sex would have garnered a different response from an employer, it qualifies as discrimination on the basis of sex.

Justice Gorsuch interpreted the language of the Act as closely to its literal meaning as possible and regarded it as a mere question of statutory interpretation. The Court reasoned that since Title VII does not explicitly deny protection to the LGBTQ+ community, they are protected. Because it is impossible to discriminate based on sexual orientation or transgender status without considering one's sex or gender, the discrimination based on either factor constitutes sex discrimination under Title VII.

A. What the Bostock Decision Means for Employers

Post-*Bostock*, employers are forced to take a long, hard, introspective look at their employment practices and their workplace culture. Some employers have gender-specified dress codes that should be revised to include gender neutral language unless these dress codes are specifically necessary. The *Bostock* decision also means practicing intentionality with words spoken in the workplace. While amicable relationships between employees are to be expected and help to boost company morale, making derogatory comments about someone's identity, even in a seemingly lighthearted manner, is problematic.

III. Religious Objections as a Defense to Title VII

R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC was an underlying case decided simultaneously with *Bostock*. In this case, claimant worked for R.G. and G.R. Harris Funeral Homes as a funeral director. She initially presented herself as a man when she was hired, but after five years of employment told her employer she wanted to live and work as a woman. Ms. Stephens was then fired. Her former employer argued a religious exemption and claimed that if the government forced him to employ Ms. Stephens, it would result in a burden on his exercise of religion, violating the Religious Freedom Restoration Act of 1993. As in Gerald Bostock's matter, the Supreme Court held that an employer has violated Title VII when it intentionally fires an employee based, at least partially, on sex – including gender or sexual orientation.

Title VII outlines specific exemptions from the employment discrimination guidelines, such as religious organizations and religious educational institutes. Additionally, a ministerial exception bars Title VII claims by employees serving in clergy roles.

A. Religious Organization Exception

Under the religious organization exception, this type of organization is allowed to give employment preference to members of their own religion. It should be noted, however, that this exemption only applies to an institution whose purpose and character are primarily religious. This exemption also only allows these organization to prefer to hire employees who share their religion and does not give them permission to discriminate based on race, color, national origin, sex, age, or disability. Even if a religious organization were to claim that it is part of their religion not to hire people of other races, they would be barred from doing so under Title VII.

B. Ministerial Exception

Under this exception, clergy members cannot bring claims under federal employment discrimination laws, including Title VII. This exception comes from the First Amendment principle that governmental regulation of the church, including hiring clergy members, is excessive government entanglement with religion. Akin to the requirements for the religious organization exception, the employee must perform an essentially religious function to be covered under the ministerial exception.

IV. Employment Discrimination Remedies

When discrimination is present, the goal of the law is to put the victim in the same position as they would have been had the discrimination not occurred. The type of relief received is dependent on the discriminatory behavior and the effect the behavior had on the victim. The victim of discrimination may also be able to recover back pay, front pay, attorney's fees, expert witness fees, and court costs. The noncompliant employer will be required to cease discriminatory practices and to take action to prevent future discrimination.

Compensatory and punitive damages may be available, the amounts of which depend on the size of the employer.

- For employers with 15-100 employees, damages are capped at $50,000
- For employers with 101-200 employees, damages are capped at $100,000
- For employers with 201-500 employees, damages are capped at $200,000
- For employers with over 500 employees, damages are capped at $300,000

V. Title IX and the Education System

In recent news, several school districts have come under fire for various Title IX issues involving LGBTQ+ youth. Title IX of the Education Amendments Act of 1972 applies to schools, local and state educational agencies, and other institutions that receive federal financial assistance from the U.S. Department of Education. The law requires these organizations must operate their education program or activity in manner free from discrimination based on sex, including sexual orientation or gender identity. (*U.S. Department of Education Title IX and Sex Discrimination* 2021).

A. Bostock and Title IX

On June 16, 2021, the Department of Education issued a Notice of Interpretation applying *Bostock*'s principles and reasoning to Title IX. Although the Court in *Bostock* said that it was not deciding if the ruling applied to Title IX, the Department of Education said in the Notice that Title VII and Title IX were textually similar, likening Title VII's "because of sex" to Title IX's "on the basis of sex". Because neither regulation expressly excludes sexual orientation or gender identity and both are designed to protect against discrimination, *Bostock*'s holding applies to Title IX. The document also notes that following the *Bostock* decision, two appellate courts have also decided to apply the *Bostock* principles to Title IX, supporting their holdings that Title IX protects transgender students from discrimination on the basis of gender identity. After consideration of Title IX's verbiage, Supreme Court caselaw, and developing jurisprudence, the Civil Rights Division determined that the best reading of Title IX's prohibition against discrimination on the basis of sex is that it includes discrimination based on gender identity and sexual orientation.

B. Title IX Enforcement

The Office for Civil Rights (OCR) is an office within the U.S. Department of Education and has the legal authority to enforce Title IX among other regulations. Schools are required to respond promptly and effectively to sexual discrimination. If an institution is found to have violated Title IX, it is given an opportunity to remedy the violation on its own accord. If an institution refuses to remedy the violation, then OCR may initiate administrative procedures to cut off federal funding to the school or refer the case to the U.S. Department of Justice to pursue the case in federal court. Typically, an educational institution will commit to voluntary compliance over which the OCR monitors implementation.

C. Faragher-Ellerth Defense

The *Faragher-Ellerth* defense is primarily used as an affirmative defense to claims of workplace harassment under Title VII. The defense stems from the Supreme Court decisions in *Faragher v. Boca Raton* and *Burlington Industries, Inc. v. Ellerth*. In order to avoid liability using this defense, the employer must be able to demonstrate that the employer used reasonable care to prevent and promptly correct sexually harassing behavior and that the plaintiff employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer to avoid the harm.

VI. Final Thoughts

When it comes to competitive business, the competition at the highest levels of the workforce is for talent. It is crucial for businesses to implement effective policies and training programs for employees to mitigate the risk of employment discrimination claims and to foster an inclusive work environment to better retain employees. Additionally, by enacting clear protocol for reporting discrimination claims, the process of correcting inappropriate behavior is streamlined and employers are better able to avoid liability for prohibited behavior. It is also imperative to enlist consultation to ensure that these protocols and policies are legally sound. Legal review of company policies on harassment is also important to ensure that a business is taking the best course of action to protect itself from Title VII liability.

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FAST MOVING ADA & REHABILITATION ACT DEVELOPMENTS

The Americans with Disabilities Act (the ADA) and the Rehabilitation Act (the Rehab Act) prohibit discrimination against applicants and employees who are qualified individuals with a disability. The ADA applies to state and local governments, and private employers with 15 or more employees. The Rehab Act, which was the predecessor of the ADA, applies to federal agencies, contractors, and recipients of federal funds.

Qualified Individual

In assessing whether an individual with a disability is a qualifying individual, under the ADA and Rehab Act, the employer should determine:

(1) Whether the employee meets the necessary requirements of the position, such as education, work experience, skills, licenses, etc., and other job-related requirements

If the individual meets the necessary, job requirements the employer must next determine:

(2) Whether the individual can perform the essential functions of the job, with or without reasonable accommodation

It is important that the employer identify the essential and nonessential functions of the positions. A written job description is helpful in identifying the essential and nonessential functions of a job, and will be considered evidence, although nonconclusive, of the essential functions of the position. If the individual with a disability does not meet the requirements of the position, regardless of whether they can perform the essential functions of the position, they are not a qualified individual under the Acts. Similarly, if an individual meets the position requirements, yet cannot perform the essential functions of the position with a reasonable accommodation, then they are not a qualified individual under the acts.

A Disability

Under the ADA and Rehab Act, an individual with a disability is defined as a person who:

(1) Has a physical or mental impairment that substantially limits one or more life activities; or
(2) Has a history or record of impairment, even if they do not currently have a disability; or
(3) Is perceived by others as having a disability

Is COVID a Disability under the ADA and Rehab Act?

Since the start of the COVID-19 pandemic, employers have been concerned with whether individuals who become infected with the COVID-19 virus are considered disabled under the Acts. A worker's COVID-19 illness will not be considered a disability if the employee experiences mild COVID-19 symptoms which resolve in a few weeks with no other consequences. However, some employees may experience "Long COVID", which may be a disability under the ADA and Rehab Act.

The Center for Disease Control and Prevention (CDC) describes long COVID as a range of new or ongoing symptoms that can last weeks or months after the employee is infected with the virus causing COVID-19. The symptoms can worsen with physical or mental activity. Long COVID can be considered a disease under both the ADA and Rehab Act if it substantially limits one or more major life activities. Recall that a person can have a disability under both Acts if they have a physical or mental impairment that substantially limits one or more major life activities of such individual.

An employee with long COVID has a disability if the person's condition of symptoms is a physical or mental impairment substantially limiting one or more major life activities. An employee with long COVID is not always disabled, which is why an individualized assessment is necessary to determine whether the employee's condition of symptoms substantially limits a major life activity; because of this, it is extremely important that employers engage in the interactive process.

The Interactive Process:

The interactive process is an informal discussion between employer and employee, regarding the employee's disability. It is used to determine whether a reasonable accommodation is available for the employee under the Acts. An employer's participation in the interactive process evidences a good faith effort to accommodate the employee, which may be helpful down the road if the employer needs to defend their refusal of an accommodation.

The interactive process is "triggered" or becomes necessary as soon as the employee requests an accommodation. However, EEOC guidance regarding the interactive process states that the employer should initiate the process without being asked for an accommodation if the employer knows or has reason to know that:

(1) the employee has a disability;
(2) the employee is experiencing workplace difficulties because of a disability;
(3) that the disability prevents the employee from requesting a reasonable accommodation.

While engaging the interactive process, when the disability is not previously documented, employers can ask employees to provide documentation from their healthcare provider or rehabilitation provider regarding the nature of their impairment, its severity, the duration, the activities limited by the impairment and the extent to which the impairments limit the employee's ability to perform the job's essential duties. With this information, the employer further engages in the process with the employee and can propose alternative accommodations.

An employee with a disability is not automatically entitled to a reasonable accommodation. An employee is entitled to a reasonable accommodation when their disability requires it, and the accommodation is not an undue hardship for the employer. Reasonable accommodations can include job restructuring, permitting use of accrued or unpaid leave, modification of schedules, and modified workplaces. The EEOC considers remote work, a modification of the workplace, and a reasonable accommodation under the ADA. During the pandemic, remote work became a more viable option for employees with disabilities. Now, with instances of employees experiencing long COVID, remote work may be a reasonable accommodation; however, an individualized assessment is necessary.

<u>"Direct Threat" & COVID</u>

Under the ADA, once an employee begins working, disability related inquiries or medical exams must be job related and consistent with business necessity. In prior COVID guidance, the EEOC took the position that screening employees for COVID, which is a medical exam under the ADA, was permitted under the ADA, under a "direct threat" analysis. The EEOC provides that a "direct threat" is a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." In prior guidance, the EEOC stated that testing administered by employers consistent with guidance from the CDC would meet the ADA's business necessity standard. However, in the most recent guidance issued, the EEOC removed language stating that screening could be justified under the direct threat analysis. Now, employers who would like to screen must show that the testing is job-related and consistent with business necessity under the ADA.

<u>Rejection of an accommodation for undue hardship</u>

The employer must decide whether to accept or reject an accommodation. In making this decision the employer should consider:

(1) the nature and cost of the accommodation needed,
(2) the facility's overall financial resource and number of employees, as well as the accommodation's effect on expenses and resources
(3) the employer's overall financial resources, size, and type of location facilities,
(4) the type of operations, including the structure and functions of the workplace, and
(5) the impact of the accommodation of the facility's operations.

The employer can reject a request for accommodation based on undue hardship. In arguing an undue hardship defense, the employer must show that significant difficulty or expense will be incurred with respect to providing the accommodation. However, do note that a defense of undue hardship is subject to a great deal of scrutiny. Whether the defense stands will be determined based upon the overall financial resources of the covered employer, including the availability of tax credits and deductions, and the impact the accommodation will have on operations and other employees.

An employer faces serious consequences if it denies a reasonable accommodation based on undue hardship, and their defense is unsuccessful. Section 12112 (5)(A) of the ADA, which details what is discrimination under the Act, states that not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the employer can demonstrate the accommodation would impose undue hardship, is discrimination under the Act. The employer can be subject to a civil suit from their employee for discrimination under the ADA or Rehab Act.

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SHOULD WORKERS' COMPENSATION AND GENERAL LIABILTY TEAMS WORK TOGETHER?

<u>The Exclusive Remedy</u>

Workers' compensation law is a mutually beneficial method of adjudicating work-related injury disputes between the employer and employee. Workers' compensation is a "no-fault" insurance system. Benefits are paid to workers injured on the job to cover the costs of their medical treatment, lost wages, and permanent disability. In return, the employers receive immunity from civil lawsuits from employees who suffered workplace injuries.

As such, legislators have sought to create a system where work-related injury disputes are kept within the workers' compensation framework. It is against this backdrop, that each state has an exclusivity provision within its workers' compensation statute. The exclusivity provisions immunize the employer from civil suits in cases where an employee suffers a workplace injury. With some exceptions, these provisions provide that the workers' compensation system is to be the only remedy available to the employee for workplace injury.

<u>Missouri</u>

1.) Missouri's Exclusivity Provision:

Section 287.120 states in relevant part:

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

Exceptions to the exclusivity provision:

As previously mentioned, there are exceptions to the exclusive remedy provisions. Missouri recognizes exceptions to the exclusivity provision in cases where: (1) an employer intentionally caused harm to the employee, and (2) where the employer's motivating factor for terminating or discharging the employee was the employee's exercise of their workers' compensation rights. In these instances, the employer can be sued by the employee.

A. *<u>Intentional harm / tort</u>*

In *Brock v. Dunne*, 637 S.W. 3d 22, 28 (Mo. 2021) the Supreme Court stated, "a co-employee enjoys immunity unless he or she purposefully caused or increased the risk of injury." Under the plain meaning of the section 287.120.1 a co-employee will be shielded by the statute, unless the employee can establish that the co-employee engaged in affirmative conduct that constitutes at least negligence, and that the co-employee purposefully and dangerously caused or increased the risk of injury through the conduct.

B. <u>Motivating factor for termination or discrimination</u>

Employers whose “motivating factor” for discharging or discriminating against an employee was the employee’s exercising of workers’ compensation rights can be held civilly liable for damages. Missouri statute 287.780 states that “motivating factor” means that “the employee's exercise of his or her rights to bring a workers’ compensation claim actually played a role in the discharge or discrimination and had a determinative influence on the discharge or discrimination.” Mo. Ann. Stat. § 287.780 (West). The current “motivating factor” standard was the result of a 2017 amendment enacted by the Missouri legislature following *Templemire v. W & M Welding, Inc*., 433 S.W.3d 371 (Mo. banc 2014), in which the Missouri Supreme Court changed the standard from “sole, exclusive factor” to “contributing factor.”

2.) Non-Delegable Duties & Transitory Risks

An employer has affirmative duties for which it will always remain liable; these duties are non-delegable duties, they include:

A. The duty to provide a safe workplace.
B. The duty to provide safe appliances, tools, and equipment.
C. The duty to warn of dangers for which an employee might reasonably be expected to remain in ignorance.
D. The duty to provide a sufficient number of suitable co-employees in positions which require teamwork.
E. The duty to set and enforce rules for the conduct of employees to ensure workplace safety.

In spite of these duties, employers are not liable for civil claims brought by employees who are injured due to risks that are so unforeseeable that they do not fall into the category of a non-delegable duty. These unforeseeable risks are called transitory risks. Transitory risks are those risks created by the employees themselves in carrying out their work. *Peters v. Wady Indus*., Inc. 489 S.W.3d 784, 796 (Mo. banc 2016) quoting Kelso v. W.A. Ross Const. Co., 85 S.W.2d 527 (Mo. 1935). An employee who creates such a risk can be held liable to the injured worker if their negligent actions are separate and distinct from the employer’s non-delegable duties.

3.) Co – Employee Liability

Missouri statute 287.120 states in relevant part:

“Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability whatsoever, whether to the employee or any other person, except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury." Mo. Ann. Stat. § 287.120 (West).

Section 287.120 was amended in 2012 to provide immunity to co-employees from liability to other co-employees arising from workplace injuries. Prior to the 2012 amendment, the statute was silent as to co-employee liability. In cases alleging co-employee liability for injury, the analysis turns on whether the statute bars the suit, or whether the co-employee's conduct falls within the exception provided by the statute. To be held civilly liable a co-employee must engage in an affirmative negligent act, that purposefully and dangerously caused or increased risk of injury.

An affirmatively negligent act by a co-worker is one that "creates additional danger beyond that normally faced in the job-specific work environment." *Burns v. Smith*, 214 S.W.3d 335, 338 (Mo. banc 2017). In *Burns*, a supervisor was found civilly liable for the injuries the employee sustained after directing the employee to run a water pressure tank "till it blows". *Id*. at 336-38.

4.) Subrogation

If a person is injured in the course and scope of their employment, they likely have a claim under the Missouri Workers' Compensation Act. However, when a third party is involved and causes injury to the employee, the employee can file a civil claim against the third party, in addition to their workers' compensation claim. When the employee opts to also recover from the third party, the employer is entitled to reimbursement for amounts paid to the employee from the worker's recovery from the third party.

Missouri Statute 287.150 (1), regarding subrogation, states in relevant part:

"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 2 and 3 of this section."

Kansas

1.) Kansas' Exclusivity Provision:

States in relevant part:

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

Exceptions to the exclusivity provision:

Kansas' workers' compensation statute provides no exceptions to its exclusivity provision, however; Kansas courts do recognize the dual capacity doctrine, which acts as an exception to the exclusive remedy provision.

A. The Dual Capacity Doctrine

Under the doctrine, an employer who is generally immune from civil liable to an employee injured in a workplace accident may become liable to the employee as a third-party tortfeasor if he occupies, in addition to his capacity as an employer, a second capacity, such as a manufacturer of workplace products.

Kansas first recognized the dual capacity doctrine in *Kimzey v. Interpace Corp, Inc*., 694 P.2d 907, 909 (Kan. Ct. App. 1985), where an employer, who was also a manufacturer of the roll machine which injured the employee, was sued by the employee under a products liability claim. *Kimzey,* 694 P. 2d. at 909-11. The court stated "in addition to his capacity as an employer, a second capacity that confers upon him obligations independent of those imposed upon him as an employer. It is in this second capacity that liability to an employee may be imposed." *Id*. at 910.

B. Retaliatory discharge

Kansas Courts also recognizes an exception to the exclusive remedy provision in cases where the employer has appeared to terminate the employee based on their exercise of their rights under workers' compensation. *See generally White v. Tomasic*, 69 P.3d 208 (Mo. App. 2003)

2.) Co – Employee Liability

Kansas statutes 44-501 and 44-504(a) provide immunity to a co-employee from liability for the injury or death of a co-employee.

44-501 states in relevant part:

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

44-504(a) states in relevant part:

"When the injury or death for which compensation is payable under the workmen's 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 workman, his dependents or personal representatives shall have the right to take compensation under the workmen's compensation act and pursue his or their remedy by proper action in a court of competent jurisdiction against such other person."

A literal interpretation of these statutes suggests that all suits against co-employees for injuries compensable under the Act are barred. However, the Kansas Appellate Court in Wells v. Anderson, stated that interpretation is too broad, mere co-employee status was insufficient for immunity. Instead, there must be some connection between the defendant's acts and his employment for immunity to act. The Wells court stated that a co-employee is immune "only if he would have been entitled to receive compensation had he been injured in the same accident." 434.

3.) Subrogation

If a person is injured in the course and scope of their employment, they likely have a claim under the Kansas Workers' Compensation Act. However, when a third party is involved and causes injury to the employee, the employee can file a civil claim against the third party, in addition to their workers' compensation claim. When the employee opts to also recover from the third party, the employer is entitled to reimbursement for amounts paid to the employee from the worker's recovery from the third party.

Kansas Statute 44-532 (a), regarding subrogation, states in relevant part:

"Where the payment of compensation of the employee or the employee's dependents is insured by a policy or policies, at the expense of the employer, or the employer is a member of a qualified group-funded workers' compensation pool, the insurer or the qualified group-funded workers' compensation pool shall be subrogated to the rights and duties under the workers' compensation act of the employer so far as appropriate."

Employment Releases

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 nor self-insured as a work comp payment as they are not workers' compensation benefits. The respective state's 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.

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.

Be very careful in negotiating Release and Resignation Agreements in the context of negotiating a workers' compensation claim. Typically make all negotiations regarding the claimant's employment status orally. If you ultimately are not able to obtain the Resignation and Release in conjunction with the workers' compensation settlement and the employee is terminated shortly after the settlement, the employee will attempt to use the negotiations as evidence that the employees exercise of his workers' compensation rights was a "contributing factor" to his termination.

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WHY THE SURGE IN RETALIATION & WHISTLEBLOWING CASES?

In fiscal year 2021, the SEC Office of the Whistleblower saw a record increase in the number of tips received from whistleblowers. The Agency had a 76 percent increase in tips; most of which alleged market manipulation, corporate disclosure, financial statement misconduct, and purported offering fraud. Not only did the Office of the Whistleblower experience a record increase in tips, but protections for the whistleblowers themselves increased.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, (the Act) which was enacted in 2011 to increase transparency and regulate swap dealing in the marketplace to prevent another financial crisis like that of the 2008 crisis, expanded protections for whistleblowers by expressly prohibiting retaliation against whistleblowers by their employers. The Act provides whistleblowers with a private cause of action if they are discharged or discriminated against by their employer in violation of the Act.

Similarly, the SEC also implemented rules to further protect whistleblowers. The Agency's new rules allow it to take legal action against employers who retaliate against whistleblowers. Under these rules employers are prohibited from discharging, demoting, suspending, harassing, or discriminating against an employee who reported conduct that they reasonably believed violated federal securities laws.

Wrongful Termination Claims

In Missouri and Kansas, for the fiscal year 2021, the states saw a decrease in claims of wrongful termination for retaliation. In Missouri there were 1,261 claims of wrongful termination, which was down from 1,434 claims in 2020. Of the 1,261 claims of wrongful termination, 846 of the claims alleged retaliation. In Kansas, there were 571 claims of wrongful termination, which was down from 653 claims in 2020. Of the 571 charges of wrongful termination, 368 of the claims alleged retaliation.

In Missouri, the Whistleblower's Protection Act (WPA) creates an exception to at will employment for violations of public policy. The Act prohibits discharging an employee who has reported an unlawful act, serious misconduct, or an employee who refuses to carry out a directive issued by their employer that would be a violation of the law. Mo. Rev. Stat. § 285.575

Missouri

Retaliation under MO. Rev. 285.575

In a recent Missouri case involving the interpretation of the WPA, the court had to determine whether the protections afforded by the statute extended to an employee who was discharged for co-employee misconduct.

In *Yount v. Keller Motors*, 639 S.W. 3d 458 (Mo. Ct. App. 2021) an employee, Yount, was subject to retaliatory conduct from his supervisor, and eventually terminated after he reported that his coworkers were selling vehicle parts and keeping the payments for themselves. *Yount*, 639 S.W. 3d at 462. When Yount first reported his coworkers, he alleged that his main supervisor berated him for reporting his co-employees and instructed him to ignore the theft. *Id*. at 461. Yount then reported the theft to his employers, the Kellers, who indicated that the matter was serious, and it would be handled. *Id*. After reporting the theft, Yount was written up for deficient performance relating to his work on a vehicle. One week after reporting his co-employees, Yount's direct supervisor fired him, stating that his termination was for his poor workmanship on the vehicle and overall unsatisfactory work performance. *Id*. at 462.

Yount filed suit against Keller, stating a whistleblower claim under the WPA. Keller filed a motion to dismiss for failure to state a claim, arguing that Yount was not a protected person under the WPA because he was alleging that he was terminated for reporting the misconduct of an employee and not employer misconduct. *Id*. The motion was granted, and Yount appealed arguing that the court improperly concluded that co-employee misconduct could not demonstrate misconduct of the employer. *Id*.

The Court of Appeals, reversed the circuit court's judgment, stating that the circuit court erred when it applied the definition of employer in section 285.575 (2) to exclude whistleblower protection for employees who report unlawful acts or misconduct of co-employees. The court stated that any misconduct or unlaw act of the employer necessarily would include the conduct of the employer's employees when the employer acts through its employees. *Id*. at 466. Additionally, the court noted that public policy surrounding whistleblower protection explicitly recognizes that an employee's superiors can be the proper authority to blow the whistle to, and an employee who is fired for informing the superior of wrongdoing by other employees is entitled to bring suit. *Id*. at 467.

Limited Recovery Under § 285.575 (7)

A protected person who suffers a wrongful termination in violation of § 285.575 is granted a private right of action, however the only remedies available are:

1.) Back pay

2.) Reimbursement of medical bills directly related to a violation of the section

If the employee proves by clear and convincing evidence, that the employer's conduct was outrageous due to their reckless indifference to the rights of others, or evil motive, then the employee may receive double the amount awarded as liquidated damages.

Kansas

Kansas, like Missouri, adheres to the employment at will doctrine, and recognizes exceptions to the doctrine where an employee is terminated in violation of public policy. The Kansas Whistleblower Act is one exception to the employment at will doctrine. The Act applies to state agencies and their employees; it prohibits supervisors or the appointing authority of a state agency from prohibiting an employee of the agency from reporting violations of state or federal law or rules and regulations. Kan. Stat. Ann. § 75-2973. Similarly, Kansas' statute 44-615, prohibits employers from discharging an employee because they may testify as a witness before the secretary of labor, or may be instrumental in bringing a controversy between employer and employee to the attention of the secretary of labor. Kan. Stat. Ann. § 44-615.

The Kansas Supreme Court in *Palmer v. Brown*, set the elements a plaintiff must meet for a showing of retaliatory discharge either under 75-2973, or 44-615*. See generally Palmer v. Brown*, 242 Kan.893, 752 P. 2d 685 (1988). Under *Palmer*, a plaintiff must show that (1) a reasonably prudent person would have concluded that the employee's coworker or employer engaged in activities in violations of rules, regulations, or the law; (2) the employer had knowledge of the employee's reporting of the violation(s) prior to the discharge of the employee; (3) the employee was discharged in retaliation for reporting; and (4) the whistleblowing was done in good faith, and not for a malicious purpose.

Retaliation under KS 75-2973(c)

In *Mattice v. City of Stafford*, No. 122,907, 2021 WL 4227730 (Kan. App. Ct. Sept. 17, 2021), the plaintiff, Mattice, sued his employer alleging retaliation under the Kansas Whistleblower Act. Mattice was employed as the Chief of Police and was terminated after reporting to his supervisor, and the Director of Kansas Bureau of Investigation (KBI), allegations that one of the department's police officers had been caught having sexual intercourse with a minor while employed with Stafford Police Department. *Mattice*, No. 122,907, 2021 WL 4227730 at *1-2.

After receiving the allegations, Mattice reviewed the personnel file of the accused officer and found no record of reprimand. *Id*. In his complaint, Mattice alleged that he believed that the previous Chief of Police violated mandatory reporting requirements pertaining to law enforcement officers. *Id*. He then shared his concerns with supervisor, who allegedly questioned the credibility of the allegations and discouraged him from "pressing the issue any further." *Id*. Mattice then went on to report the allegations and the lack of investigation to the Director of the KBI. Id. After reporting the allegations and lack of investigation to the KBI, Mattice began receiving threats from his supervisor and the former police chief's sister. *Id.* The two threatened to report Mattice to the Department of Children and Family Services for neglect of his child. *Id.* at *5.

Mattice reported to the City Council, Mayor's office, and City Attorney, that he was "facing issues arising out of the investigation." *Id*. at *4. The city council voted to allow Mattice's supervisor to take administrative action against him. *Id*. at *5. Mattice's employment was terminated, and he filed a retaliatory discharge claim against the city, which was dismissed. *Id*.

Kansas, like Missouri, follows the at-will employment doctrine, and recognizes an exception to the doctrine for whistleblowing. The Court in Mattice, cited *Palmer v. Brown*, 242 Kan.893, 752 P. 2d 685 (1988) as setting the standard requirements a complainant must meet for a showing of retaliatory discharge.

The court stated that Mattice alleged violations of rules or law, when he alleged that his employer discouraged him from investigating an alleged crime and tried to prevent the investigation by retaliating against and threatening to report him. *Mattice*, No. 122, 907, 2021 WL 4227730 at *3. The court also stated that he met the requirement of reporting conduct of a co-worker or employer. *Id*. at *4. The City argued that Mattice's complaint failed to state a claim because he alleged wrongdoing by the previous Police Chief, and any allegation against him did not involve a coworker, or employer as required by the standard in *Palmer*. *Id*. However, the Court of Appeals stated that the department's failure to investigate the allegations continued into Mattice's employment, where he then discovered the inaction and began investigating. *Id*. The department's failure and continued refusal to investigate and report the alleged conduct constituted a violation by the employer. *Id*. at *5. Finally, the court determined that Mattice sufficiently alleged the Department had knowledge of Mattice's reports, prior to his termination and that he was terminated in retaliation for whistleblowing. The court reversed the circuit court's judgment. *Id.* at *6.

<u>Retaliation under 44-615</u>

In *Palmer v. Pentair*, No. 18-02638-CM-TJJ, 2019 WL 3239350 (D. Kan. July 18, 2019) the plaintiff filed a state claim alleging retaliation, in addition to federal claims of race discrimination, and retaliation under Title 7. No. 18-02638-CM-TJJ, 2019 WIL 3239350 at *8. Palmer alleged that during his employment, he and his Black coworkers were reprimanded for not following performance standards that no other employees followed. *Id*. at *2. In his complaint, Palmer alleged that he was denied overtime and opportunities for promotions, he believed he was experiencing discrimination and retaliation for filing a previous EEOC charge against his employer. *Id*. Palmer's employment with Pentair was terminated, he engaged his union for assistance in keeping his job, however; the union did not help him. *Id*.

Pentair and the union moved to dismiss Palmer's complaint pursuant to rule 12(b)(6) and untimeliness. *Id*. at *2. In granting the dismissal, the Court discussed Palmer's state retaliation claim. A claim of retaliatory discharge requires the plaintiff to allege a violation of a specific, definite, rule, regulation, or law. *Id*. at *22. In his complaint, Palmer cited section 44-615, but did not identify any specific rules, or regulations that the employer violated. *Id*. He failed to identify conduct, if any, by the employer which violated the statute, and he failed to identify what conduct, if any, he reported. *Id*. at *23. The court stated that general allegations of workplace safety violations, without a specific violation giving rise to the report, are not sufficient to show a plausible claim for retaliation. *Id*.

Limiting Exposure to Retaliation Claims

The Occupational Safety and Health Administration (OSHA) created a set of recommendations to assist employers in creating retaliation free workplaces.[1]

- Implement systems and channels for reporting compliance or misconduct.
  - In creating these systems, consider implementing channels which allow employees to report their concerns anonymously if they choose.
- Ensure that your systems and channels for reporting are monitored and evaluated by a manager designated to be accountable for those programs.
- Require trainings for managers to ensure they understand what retaliation is.
- Investigate claims using an objective review process, consider having an independent party review the report.

[1] *See* OSHA, *Recommended Practices for Anti-Retaliation Programs,* *https://www.osha.gov/sites/default/files/publications/OSHA3905.pdf* (last visited Jul. 19, 2022).

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