MVP Law Seminar 2023

EMPLOYMENT LAW & GENERAL LIABILITY

THE IMPORTANCE OF ETHICAL CLAIMS HANDLING

I. WHAT IS BAD FAITH?

A. Basic Definition

i. First Party Insurance
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. Third Party Insurance
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. Common Law

The implied duty of good faith and fair dealing.

ii. State Legislation

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. Federal Legislation

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. Oklahoma Bad Faith Law

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 May 2021. *See Morgan v. State Farm Mutual Automobile Insurance Company*, 488 P.3d 743. Here, the insured brought action against an automobile insurer to recover compensation for failure to pay judgment and failed to protect workers' compensation carrier's statutory subrogation-lien interest. The Supreme Court of Oklahoma ruled that a bad faith cause of action against an insurer based on an adverse judgment does not accrue until the underlying judgment becomes final and non-appealable.

ii. Kansas Bad Faith Law

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 refused without just cause or 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.*

Most recently, the Kansas Supreme Court reversed an opinion and stated that while insurance companies have a duty to participate in good faith, the companies do not have an affirmative duty to enter settlement negotiations when an arbitrary date is provided. *See Granados v. Wilson and Key Insurance Co.* Here, the claimant filed a garnishment action against the insurance company based on the company's bad faith or negligence in handling the claim. The district court entered judgment for the claimant, finding that the insurance company failed to properly investigate the accident and breached its duty to communicate the risk of an excess judgment to Wilson. The court noted that Kansas courts have recognized that an insurer is not the legal cause of an excess judgment if the claimant rejects a settlement offer that he or she would have accepted earlier solely to manufacture a bad-faith claim. *Gruber*, 59 Kan. App. 2d at 315-316. Additionally, in *Wade v. EMCASCO Ins. Co.*, the court found that the insurer did not act in bad faith when it refused to settle for the first two offers because the claimant set an arbitrary deadline and failed to provide necessary information. *Wade v. EMCASCO Ins.*, 483 F.3d 657 at 670-71. In this case, the court found that the claimant set an arbitrary deadline, meaning that no legal rights or duties would have been compromised if settlement had not been reached by that date. For these reasons, the Kansas Supreme Court ruled that the insurance company's purported negligence or bad faith in handling the claim was not the legal cause of the excess judgment, and the district court erred in finding otherwise.

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).

RSMo. 537.065 was amended in August 2021, which now discusses that the insured tortfeasor provide notice according to the status of the tort lawsuit against the insured if: (1) Any lawsuit is pending at the time of contract execution (2) Any lawsuit is pending at the time of contract execution but is dismissed and re-filed, or (3) No lawsuit is pending. Additionally, all terms of any "covenant not to execute or of any contract to limit recovery to specified assets" are to be in writing, and it states that all unwritten terms are not "enforceable against any party to the covenant or contract, the insurer of any party to the covenant or contract, or any other person or entity." Furthermore, in any action for bad faith "any agreement between the tort-feasor...and the claimant, including any contract under this section, shall be admissible in evidence." Finally, the insurer's "exercise of any rights under this section shall not constitute, not be construed to be, bad faith."

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 confusing. 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).
        (a.) Plaintiff sought representation through his homeowner's 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)

(a.) 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).*

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

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

(c.) The statute also clarifies that the insurer's "exercise of any rights under this section [537.065] shall not constitute, nor be construed to be, bad faith."

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 the 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:
    a) <u>Intoxication exclusions:</u>
    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.

    b) <u>Pre-existing condition provisions:</u>
    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 of 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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AI IN THE WORKPLACE

I. WHAT IS AI (ARTIFICIAL INTELLIGENCE)?

Definitions (in the context of employment law principles):

- Software: refers to information technology programs or procedures that provide instructions to a computer on how to perform a given task or function.
    - Many different types of software and applications are used in employment, including automatic resume-screening software, hiring software, chatbot software for hiring and workflow, video interviewing software, analytics software, employee monitoring software, and worker management software.
- Algorithm: a set of instructions that can be followed by a computer to accomplish some end.
    - Human resources software and applications use algorithms to allow employers to process data to evaluate, rate, and make other decisions about job applicants and employees.
    - Software or applications that include algorithmic decision-making tools are used at various stages of employment, including hiring, performance evaluation, promotion, and termination.
- Artificial Intelligence ("AI"): machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.
    - In the employment context, using AI has typically meant that the developer relies partly on the computer's own analysis of data to determine which criteria to use when making decisions.
- ChatGPT
    - AI tool created by OpenAI (Version 3.5 released to public; Version 4.0 available to subscribers).

II. AI IN THE LAW

- AI offers a massive amount of information, efficiency, and so much more for the future of the legal profession. However, it can, and has proven to, be harmful to the legal profession, also.
- Information
    - With AI, large amounts of information can be skimmed through quickly and be put in words within a matter of seconds. Rather than a person having to read through documents and then putting it on paper, which risks missing relevant information, AI can find and reproduce everything its algorithm knows. One of the bigger problems to date is that AI is limited to its algorithm setup.
- Efficiency
    - One of the most time-consuming activities in the legal profession is going through discovery documents and finding meaningful information. AI software/programs

can vastly accelerate this process. AI can sift through numerous documents within minutes and gather relevant information, a task that could take a person or multiple people weeks. Tasks such as drafting motions, initial drafts, citing relevant caselaw, rebutting arguments, and anticipating arguments, are all legal processes that can be done much quicker through AI. Final products need human review and input, but that is minimal compared to the time that AI saves on everything else.

- Costs
  - With AI, time is saved, which means money is saved. Because of higher efficiency, services can be offered at a significantly lower cost.

III. EXISTING AI APPLICATIONS

- Casetext "Co-Counsel"
  - Application that can review materials to determine discrepancies, respond to specific questions, and can provide direct citations similarly to Westlaw.
- Spellbook
  - Has been described as ChatGPT for lawyers, which uses predictive text for drafting legal documents.
- Zuva
  - Contract analysis tool.
- Thomson Reuters with Microsoft Copilot, Lexis+ AI, and BloombergGPT are all recently announced AI products.

IV. PRACTICAL AND ETHICAL CONCERNS

- Confidentiality
  - After the LLMs that they are based on, AI thrives on the use of user input data. (Lance Eliot, *Generative AI ChatGPT Can Disturbingly Gobble Up Your Private and Confidential Data Forewrans AI Ehtics and AI Law*, FORBES (Jan. 27, 2023)).
  - "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by [next subsection]." Mo Rule 4-1.6, KS Rule 1.6.
- Bias
  - "The American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ('AI') in the practice of law, including: (1) bias, explainability, and transparency of automated decisions made by AI." ABA Resolution 112 (Aug. 12-13, 2019).
  - The models are based on input, which may be inherently biased. *See, e.g.,* A. Narla, *et al., Automated Classification of Skin Lesions: From Pixels to Practice*, 138 J. Investigative Dermatology. "We noted that the algorithm appeared more likely to interpret images with rules as malignant." *Id*

- Supervision
  - Model Rule 5.3 was changed from "responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance." (KS Rule 5.3 reflects this change, Mo Rule 4-5.3 does not).
  - "The change clarified that the scope of Rule 5.3 encompasses nonlawyers whether human or not. . .. [L]awyers are obligated to supervise the work of AI utilized in the provision of legal services, and understand the technology well enough to ensure compliance with the lawyer's ethical duties." Resolution 112 Report, ABA, at 6 (Aug. 12-13, 2019) *available at https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/112-annual-2019.pdf*.
- *Mata v. Avianca, Inc.,* No. 1:22-cv-01641 (S.D.N.Y.)
  - Facts:
    - Plaintiff was injured after being struck by a server cart on a flight from El Salvador to New York. Plaintiff filed suit, defendant declared bankruptcy and obtained a stay of the lawsuit. Defendant's bankruptcy ended, and Plaintiff filed new suit. Defendant removed the matter to federal court and sought dismissal under the statute of limitations.
  - What happened?
    - Plaintiff submitted a brief to the court responding to the motion to dismiss. There was nothing that seemed outrageously "wrong" with the brief, outside of some odd punctuation and editing issues. It turns out, this brief was drafted by AI. It contained a total of nine case citations to cases that do not exist. The Court ended up finding out and ordered the plaintiff to produce the cases, which it could not do, and had to admit to the Court that it used AI to do research after the Court asked the plaintiff and its attorney to show cause why it shouldn't be disciplined. On June 22, 2023, the Court issued a decision that fined each lawyer and their firm $5,000, as well as requiring written admissions of wrongdoing.

V. AI IN EMPLOYMENT DECISION-MAKING

- How can algorithmic decision-making tools, commonly known as AI, assist in employment decisions?
  - Recruitment, hiring, retention, promotion, transfer, performance monitoring, demotion, dismissal, and referral. AI is used for these decisions for the same reasons listed above – time, effort, efficiency, cost, etc.
- Employers may rely on different types of software that incorporate algorithmic decision-making at different stages of the employment process.
  - Examples include:
    - Resume scanners that prioritize applications using certain keywords;
    - employee monitoring software that rates employees on the basis of their keystrokes or other factors;

        - "virtual assistants" or "chatbots" that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements;
        - video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and
        - testing software that provides "job fit" scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived "cultural fit" based on their performance on a game or on a more traditional test.

- Additional Methods of AI Usage
    - Resume Screening
        - Automation of the initial screening process of candidates by analyzing resumes and cover letters and identifying relevant qualifications.
    - Candidate Sourcing
        - Using AI-powered tools can narrow down more qualified and more relevant candidate pools from multiple sources, including job boards, social media websites, and professional networks.
    - Video Interviews
        - AI-powered tools can be used to conduct video interviews, as well as analyze interview responses and other things such as non-verbal cues, facial expressions, and speech patterns, to help assess a candidate's suitability for the role.
    - Predictive Analytics
        - Using historical data on employee performance, turnover, and other employment metrics to assist in identifying candidates who are more likely to succeed in the role.
    - Employee Engagement and Retention
        - Virtual assistants and chatbots, powered by AI, can increase employee engagement through personalized support and timely answers to questions. Additionally, AI can use algorithms to determine the factors that contribute to employee job satisfaction, thereby creating a proactive measure in retaining employees.
    - Performance Evaluation
        - AI-powered tools can assist in tracking different metrics associated with job performance and allow organizations to make decisions based on large amounts of tracked and analyzed data.

VI. AI AND TITLE VII

Recently, the EEOC released a new technical assistance document that assessed the adverse impacts created by software, algorithms, and artificial intelligence that are used in employment selection procedures under Title VII of the Civil Rights Act of 1964. This document is part of the EEOC's Artificial Intelligence and Algorithmic Fairness Initiative, which works to ensure that software, including AI, used in hiring and other employment decisions complies with the federal civil rights laws that the EEOC enforces.

Title VII applies to all employment practices of covered employers, including recruitment, monitoring, transfer, and evaluation of employees, among others. The document referenced above limits analysis to “selection procedures,” i.e., hiring, promotion, and firing, which have historically and significantly been affected by Title VII.

- Title VII
  - Generally, Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin.
  - Additionally, Title VII prohibits “disparate treatment,” or intentional discrimination in employment, which includes employment tests “designed, intended or used to discriminate because of race, color, religion, sex or national origin.”
  - Title VII generally prohibits employers from using neutral tests or selection processes that effectually and disproportionately exclude certain persons based on race, color, religion, sex, or national origin, if they are not “job related for the position in question and consistent with business necessity.” This process is “disparate impact” or “adverse impact” discrimination.
- What is important here is that AI algorithms can be systematically biased, so if they are used at all in the employment process, then organizations and HR departments must ensure that biases are eliminated to minimize liability exposure.

VII. CONCLUSION

AI offers numerous benefits in making employment decisions, but it is important to ensure that it is used ethically and responsibly. Organizations must be mindful of potential issues in AI algorithms, especially biases and misinformation, ensure transparency, and continually evaluate any AI systems used to minimize any possible negative impacts.

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2022-2023 TITLE IX UPDATES

2022 NPRM

The Department of Education (ED) released a Notice of Proposed Rulemaking (NPRM) on June 23, 2022 (50th Anniversary of Title IX). ED expects to release its Final Rule in October 2023.

I. Scope (§ 106.10)

A. The scope of the NPRM is broader than the 2020 Regulations.

B. Discrimination on the basis of sex includes:
   i. Sex stereotypes,
   ii. sex characteristics,
   iii. pregnancy or related conditions,
   iv. sexual orientation, and
   v. gender identity.

C. Sex discrimination includes "sex-based harassment."
   i. This phrase replaces the phrase "sexual harassment" from prior Regulations, and now includes:
      1. quid pro quo,
      2. hostile environment,
      3. sexual assault,
      4. dating violence,
      5. domestic violence, and
      6. stalking.
   ii. Hostile Environment Harassment
      1. Unwelcome sex-based conduct that is sufficiently severe OR pervasive, that, based on the totality of the circumstances AND evaluated subjectively and objectively denies or limits a person's ability to participate in or benefit from the recipient's education program or activity.
         - SPOO (2020 Regulations) vs. SORP (2022 NRPM)
         - Severe AND Pervasive AND Objectively Offensive
         - Sufficiently Severe OR Pervasive AND Evaluated Objectively AND Subjectively
         - SORP analysis replaces SPOO analysis
      2. Office for Civil Rights (OCR) proposed definition provides factors for evaluating a hostile work environment claim, including:
         - Complainant's ability to access the education program or activity;
         - The type, frequency, and duration of the conduct;
         - the parties' ages, roles, and previous interaction(s);
         - The location and context of the conduct; and

b) The control the Recipient has over the Respondent.

iii. Potential intersection with First Amendment.

II. Applicability

A. Education program or activity

i. Broadly interpreted to include:

1. Academic, extracurricular, and athletic programs; and
2. Activities on school network, bus, class, or facilities.

ii. De Minimis Harm

iii. Jurisdiction over conduct subject to recipient's disciplinary authority

1. If the conduct (1) occurred in your program or activity; AND/OR (2) is subject to your disciplinary authority; AND/OR (3) has led to a hostile environment within your program or activity; AND (4) would meet Title IX, if proven, then jurisdiction likely exists.

B. Training and Title IX Coordinator Requirements

i. Various training requirements for:

1. All employees
2. TIXC, Investigators, Decision-makers, Informal Resolution facilitators and other persons responsible for implementing grievance procedures or modifying/terminating supportive measures
3. No training requirement for students under NPRM
4. All training materials must be made available on district/school website

ii. TIXC required to monitor for barriers to reporting

iii. Best Practices (Association of Title IX Administrators (ATIXA)):

1. Provide process, policy, and reporting training on a recurring basis.
2. Train Title IX team members on supportive measures.
3. Offer prevention education for employees and students.
4. Integrate student and staff prevention programming and Title IX training requirements into existing efforts around similar topics such as bullying, harassment, and reporting requirements.

III. Reporting and Response

A. Confidential Employee

i. An employee whose communications are privileged under State/Federal law based on their role with the district/school.

ii. An employee who has been designated as a confidential resource for the purpose of providing services to persons in connection with sex discrimination.

iii. Individuals conducting IRB-approved research.

B. Districts/schools can designate confidential employees

i. Such employees are not required to make Title IX reports to the Title IX Coordinator, but they still should be provided the Coordinator's contact information.

ii. All other employees still are required reporters.

C. Best Practices (ATIXA):

i. Require all employees, regardless of confidential status, to provide contact information for the Title IX Coordinator to any person making a disclosure of conduct that may implicate Title IX.

IV. Notice & Complaints

i. "Complaint" replaces "Formal Complaint"

ii. Districts/schools must respond when **any non-confidential employee** receives verbal or written notice or a complaint of discrimination or harassment.

iii. Complaints **do not** have to be submitted to Title IX Coordinator/Title IX Team Member.

iv. Complaints can be made by a Complainant or the TIXC.

- A parent, guardian, or other authorized legal representative who has the authority to act on behalf of a Complainant can also file a complaint.

v. For allegations of sex discrimination, other than sex-based harassment, any student, employee, or third party may make a complaint.

V. Intake & Initial Evaluation

A. Once the TIXC has been notified of discrimination or harassment allegations, they must:

i. Treat parties equitably;

ii. Notify Complainant of procedures and, in the event of a complaint, prepare to notify the Respondent;

iii. Offer and coordinate supportive measures; and

iv. Initiate grievance procedures or informal resolution as requested.

B. Initial evaluation

i. Provides schools/districts with greater latitude to collect information before formal grievance process begins.

C. Dismissals (§ 106.45)

i. All dismissals are discretionary, but can occur when:

- The Respondent is unable to be identified after reasonable steps to do so;
- The Respondent is no longer participating in the educational program or is no longer employed by the Recipient;
- The Complainant withdraws all or a portion of the complaint and any remaining conduct would not be discrimination under Title IX;
- It is determined that the conduct, even if proven, would not be discrimination under Title IX.

ii. Prior to dismissing the complaint, the Recipient must take reasonable efforts to clarify the allegations with Complainant.

iii. Upon dismissal of a complaint,
   a. Districts/schools must notify the Complainant of the basis for the dismissal.
   b. Supportive measures should still be offered to the Complainant.
   c. Must notify the Respondent of the dismissal and offer supportive measures if the Respondent has already been notified of the complaint.
   d. All parties have a right to appeal the dismissal.

D. Best Practices (ATIXA):
   i. Encourage use of a centralized reporting process to ensure that information gets to those who are trained to respond in a timely and efficient manner.
   ii. Provide written notice of any determination, including a notice of dismissal.

VI. Supportive Measures (§ 106.44)

A. Should restore or preserve the party's access.
   i. May not impose burdensome measures for punitive or disciplinary reasons.

B. Supportive measures may be continued, modified, or terminated at the conclusion of the grievance process or informal resolution.

C. Must provide an opportunity to seek modification or reversal of supportive measure (or lack thereof).
   i. An impartial employee, not involved with the initial decision, must have authority to modify or reverse.

VII. Removals (§ 106.44)

A. Administrative Leave
   i. May place employee Respondents on administrative leave during grievance process.

B. Emergency Removal
   i. May remove student respondents, on an emergency basis, if an individualized safety and risk analysis determines:
      1. An immediate and serious threat exists and arises from the allegations.
   ii. Removes the "physical" threat requirement from the 2020 Regulations.
   iii. Following an emergency removal, a Recipient must provide the Respondent notice and an opportunity to challenge the removal.

VIII. Students with Disabilities

A. If a Complainant or Respondent is a student with a disability, throughout the grievance process the Title IX Coordinator must consult with the student's:
   i. IEP team; or
   ii. Section 504 team.
   iii. A consultation must also occur when the Title IX Coordinator implements supportive measures involving a student with a disability.

B. If a student with a disability is subject to an Emergency Removal, all rights under IDEA and Section 504 still apply and must be respected.

IX. Informal Resolution (§ 106.44)

A. Requirements:
   i. Voluntary by parties;
   ii. TIXC must agree;
   iii. Provide notice to parties in advance (detailed requirements);
   iv. Facilitator may not be investigator or decision-maker;
   v. Not permitted in complaints with a student Complainant and an employee Respondent.

B. Informal Resolution can occur without a formal complaint.

C. Information and records form the Informal Resolution cannot be used in the grievance process if the Informal resolution is unsuccessful.

D. Best Practices (ATIXA):
   i. Implement informal resolution processes to allow for an alternative to the formal grievance process.
   ii. Consider offering multiple types of informal resolution that are consistent with the district/school culture and needs and are supported by necessary training and resources.

X. Grievance Procedures (§ 106.45)

A. Section 106.45 requires a written procedure that establishes an equitable process that:
   i. Prohibits conflict of interest or bias;
   ii. Requires institutions to take reasonable steps to protect privacy without restricting a party's ability to obtain and present evidence;
   iii. Allows for streamlined investigation and decision-making process.
      1. No requirement for a separate decision-maker.
      2. Permissible for the investigator to serve as the decision-maker.
      3. Permissible for the TIXC to serve as the investigator (and/or decision-maker).
   iv. Establishes a reasonably prompt timeframe for major stages of the grievance procedures.
      1. Evaluation, Investigation, Determination, Appeal
   v. Requires an objective evaluation of permissible relevant evidence.
   vi. Requires description of range of supportive measures, sanctions, and remedies in sex-based harassment complaints.

B. Best Practices (ATIXA):
   i. Offer a streamlined, § 106.45-compliant, process to provide for a consistent response to stop, prevent, and remedy all forms of discrimination, including:
      1. A process that separates investigation and decision-making responsibilities.

2. This might involve an investigator making recommended findings to a neutral decision-maker, such as a school-based official or the TIXC.

ii. Provide an appeal, especially if the investigator is also the decision-maker.

XI. Investigating (§ 106.45)

A. Recipients must provide a Notice of Investigation and Allegations (verbal or written) that includes:
   1. Grievance procedures and any informal resolution options;
   2. Sufficient information to allow parties to respond;
   3. Statement prohibiting retaliation.

B. Advisors are not required.

C. The Recipient must conduct an adequate, reliable, and impartial investigation of complaints that:
   1. Allows an equal opportunity for parties to present inculpatory and exculpatory evidence

      D. Investigators must collect evidence and determine relevant evidence.

   1. Provide parties with description of relevant evidence and a reasonable opportunity to respond
      a) First 10-day review period no longer required
      b) Description does not have to be in writing.

E. Best Practices (ATIXA):
   a) Provide a written document with, at minimum, an organized summary of the evidence for parties to review with the Advisors, if any.
   b) Offer an opportunity for the parties to respond to a draft of the document prior to finalizing it.

XII. Standard of Proof (§ 106.45)

A. Must use preponderance of the evidence *unless*
   i. Clear and convincing is used in all other comparable proceedings, including other discrimination complaints (Title VII, Title VI).

B. Best Practices (ATIXA):
   i. Adopt the “preponderance of the evidence” standard of proof in all complaints unless it conflicts with other contract rights.
   ii. Negotiate future contract rights to allow for the preponderance of the evidence to be used.
   iii. Permit access to Advisors for all parties in all formal processes.
   iv. If Advisors are provided by the district/school, provide adequate training on the applicable policies and procedures.

XIII. Decision-Making (§ 106.45)

A. The grievance procedures must provide a process that enables a decision-maker to adequately assess the credibility of the parties and witnesses, and evaluate the evidence to determine whether sex discrimination occurred.
   i. A credibility assessment must not be based on a person's status as a Complainant, Respondent, or witness.
   ii. No second 10-day review period is required.
   iii. No live hearing required

B. Following the outcome determination:
   i. Decision-maker must notify parties of complaint outcome, including determination and appeal procedures, if any.
   ii. Remedies, if appropriate, must be provided and implemented.

C. No written determination letter is required.

D. Appeals are not required under § 106.45.
   i. Recipients are not precluded from offering an appeal.

E. Best Practices (ATIXA):
   i. Provide a written outcome notification including the determination and any opportunities for appeal.
   ii. Offer one level of appeal if comparable procedures for complaints other than sex discrimination offer appeals.
      1. Consider impact of any *Goss*/due process hearing requirements.

XIV. Pregnancy & Related Conditions

A. Pregnancy Discrimination
   i. Pregnancy or related conditions:
      1. Pregnancy, childbirth, termination of pregnancy, or lactation
      2. Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
      3. Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions
   ii. Non-discrimination
      1. Cannot adopt policies, practices, or procedures to treat a **student OR employee** differently based on current, potential, or past pregnancy-related conditions.
   iii. Admissions/Enrollment
      1. No pre-admission or enrollment inquiries as to marital status.
         a) Including asking "Miss or Mrs."
         b) Self-identification of sex is permissible if required from all applicants.
      2. Employees and students should both be able to take voluntary leaves of absences and be reinstated upon return.

B. Response to Pregnancy
   i. Providing information:
      1. When an employee acquires knowledge of a student's pregnancy or related conditions by the student … the employee must inform that person of Title IX support.
   ii. TIXC required response:
      1. Prohibit sex discrimination;
      2. Reasonable modifications (document it);
      3. Allow access to separate and comparable program, if desired;
      4. Voluntary leave of absence;
      5. Availability of lactation space;
      6. Grievance procedures for sex discrimination complaints.
   iii. Best Practices (ATIXA):
      1. When applicable, offer support to non-birthing parents in the event of a medical need for a birthing parent or newborn.
      2. Provide information on district/school website including:
         a) The rights of pregnant students under Title IX;
         b) How to request support for pregnancy or related conditions; and
         c) The processes available for requesting assistance and for challenging when a denial of assistance occurs.

C. Lactation Time & Space
   i. Employees and students must be provided reasonable break times for breastfeeding or expressing breast milk.
   ii. Lactation Space
      1. Not a bathroom;
      2. Clean, shielded from intrusion; and
      3. Can be used by a student or employee, as needed.
   iii. Best Practices (ATIXA):
      1. Offer multiple spaces that include access to sinks, outlets, and refrigerators.
      2. Add lactation spaces to cleaning schedules in that building.
      3. Ensure space is available during any evening and weekend classes or programs.

XV. 2023 Athletics NPRM

A. Current Regulation (§106.41(B))
   i. **Separate teams**. Notwithstanding the requirements of paragraph (a) of this section (*not listed in this document*), a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic

opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

B. Proposed Regulation (§ 106.41(B)(2))
   i. If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:
      1. be substantially related to the achievement of an important educational objective, and
      2. minimize the harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

C. Sex-Related Eligibility Criteria – Element I
   i. Be substantially related to the achievement of an important educational objective.
      1. Proposed regulation does not limit the important educational objectives a recipient may seek to achieve.
      2. Recipients must consider whether the objective could be accomplished through alternative criteria that would not limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity.
      3. Recipients would not be permitted to rely on false assumptions about transgender students.
      4. Any sex-related eligibility criteria must account for factors that affect students in the particular grade or education level.

D. Sex-Related Eligibility Criteria – Element II
   i. Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be <u>limited</u> or <u>denied</u>.
      1. **Limit** – to disallow transgender students from participating fully on a male or female team consistent with their gender identity.
      2. **Deny** – to foreclose students' opportunity to participate on male or female teams consistent with their gender identity.
      3. A recipient would be in violation of the proposed regulation if it can reasonably adopt or apply alternative criteria that would be a less harmful means of achieving the recipient's important educational objective.

E. Effect of the Proposed Rule
   i. The proposed rule effectively prohibits categorical bans applied to entire groups of student-athletes based on gender identity:
      1. Examples of Prohibited Laws and Policies:
         a) A state law that would require that all students participate on athletic teams consistent with their sex assigned at birth.

b) A state law that prohibits all student-athletes who are trans girls or trans women from participating on girls' or women's athletic teams.
c) A policy that requires all prospective trans female student-athletes to submit to hormonal testing but does not require the same of trans male or cisgender student-athletes.

F. What is Unknown?
   i. What does "minimize the harm" mean in application?
   ii. Does the harm minimization element apply to cisgender students who alleged their athletic opportunity is limited or denied by policy permitting participation in accordance with gender identity?
   iii. What creates a competitive lack of fairness?
   iv. How does the regulation apply to middle/junior high school students?
   v. Will the regulation prohibit limiting athletic participation based on hormonal differences?
   vi. How should intersex and non-binary scholarship recipients be counted for purposes of assessing proportionality for equity purposes?
   vii. How should recipients respond in situations in which a student identifies as gender fluid?
   viii. Whether the proposed rule:
      1. Requires recipients to accommodate a student based solely on their own representations of their gender identity.
      2. Permits or prohibits recipients from requiring parental/guardian or doctor verification of gender identity to "prove" gender identity in situations in which the student is a minor.
      3. Permits or prohibits recipients from requiring a birth certificate or updated birth certificate information to "prove" gender identity.
      4. Permits or prohibits recipients from requiring parental/guardian notification of gender identity to "prove" or "confirm" gender identity in situations in which the student is a minor.

G. Minimizing Harm Best Practices (ATIXA):
   i. Permit all student-athletes to participate in athletics in alignment with their gender identity.
   ii. Involve effected student(s) in an iterative process or conversation to identify the harm caused by the policy and determine strategies or remedies that could be successful given the student's circumstances and wishes.
   iii. Establish an all-gender league with no sex- or gender-related criteria. Some situations may lend themselves to this kind of solution, like recreational leagues or some club sports.
   iv. Minimizing harm would probably necessitate a reasonable level of competition in any alternative league.
   v. Collaborate with the student to identify alternative athletic opportunities and facilitate participation in those opportunities.

vi. Another sport or competition may not have the same kinds of safety or fairness concerns, depending on age or level.
vii. Identify opportunities with other recipients that may be suitable for the individual and facilitate pursuit of those opportunities.

XVI. To Do Before Implementation

A. Prepare to expedite policy revisions in your school or district.
B. Educate community about future changes.
    i. The final changes may be different from the NPRMs.
C. Review current policies, practices, publications and websites.
D. Create a checklist of changes that will need to be made to each.
    i. Work with your legal counsel to determine what specific state laws or precedents might apply.
E. Continue to follow the 2020 Regulations until changes are official.

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PROTECTING YOUR WORKPLACE: STRATEGIES FOR PREVENTING AND RESPONDING TO WORKPLACE VIOLENCE

I. STATISTICS ON VIOLENCE IN THE WORKPLACE

According to the U.S. Department of Labor and OSHA:

- Approximately 2 million people are victims of workplace violence every year.
- Of the 5,190 fatal occupational injuries that occurred in 2021, 481 were the result of homicide.
- Gun violence in the workplace increased in 2021, accounting for 387 of the 481 workplace homicides.
    - This was the highest rate of workplace gun violence since 2016.

II. CONCERNS FOR EMPLOYERS

The safety of employees is the primary concern for any employer. However, there are other areas of concern an employer should be aware of.

Workplace violence frequently results in:

- Physical and psychological harm;
- Losses to property and productivity;
- Workers' compensation claims; and/or
- Increased litigation.

III. EMPLOYER LIABILITY

Generally, an employer may be held liable for injuries to another resulting from workplace violence. States vary on whether an employer is liable for injury or damages arising out of the presence of a firearm on their premises. An employer may want to consider the following in determining whether to impose a firearm restriction in their place of business.

Employers should note that workplace violence can result in liability under several different legal theories, including: OSHA, work comp law, and tort law.

IV. OSHA – THE GENERAL DUTY CLAUSE

While there is no federal law establishing an employer's duty to prevent workplace violence, an employer has a duty to provide a safe working environment under the OSH Act, which regulates workplace health and safety. The Occupational Safety and Health Administration can issue citations to employers that violate the OSHA general duty clause:

> The Clause: "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1)

- Georgia Elec. Co. v. Marshall, 595 F.2d 309 (5th Cir. 1979) – There is a four-part test for OSHA to establish a violation of the general duty clause. 1) The employer failed to render its workplace free of a hazard 2) The hazard was recognized 3) The hazard caused or was likely to cause death or serious physical harm 4) The hazard was preventable.
- Secretary of Labor v. Megawest Financial, Inc., 17 O.S.H. Cas. (BNA) (O.S.H.R.C.A.L.J. June 19, 1995) – The second part of the test, that the hazard be recognized, carries a high standard of proof, because although the threat of workplace violence is real, an employer may fail to recognize the potential for a violent incident, or may reasonably believe that the police would be the appropriate institution to handle the conduct.

V. WORKERS' COMPENSATION

State law largely governs employers' obligations to pay, and employees' rights to receive, workers' compensation benefits. Typically, employees can receive workers' compensation benefits for injuries arising out of and in the course of their employment. An employee injured as a result of a gun-related incident at work may be eligible for workers' compensation benefits.

VI. COMMON LAW DUTIES

In addition to the legal requirements under OSHA and workers' compensation, employers have a common law duty to exercise ordinary care to maintain a safe workplace.

- Doe v. Boys Club of Greater Dallas, Inc., 868 S.W.2d 942 (Tex. App. 1994) – An employer may be liable if there is a breach of that common law duty that results in injury to an employee or third party, because the employer/employee relationship is a special one and creates a duty that the employer must control the employee's conduct to prevent injury.
- Conner v. Ogletree, 542 S.W.3d 315, 322 (Mo. 2018): An employer has a nondelegable duty to provide a reasonably safe workplace, but that duty is not unlimited. Like many other common law duties, the duty to provide a safe workplace is limited to risks reasonably foreseeable to the employer.

VII. NEGLIGENCE CLAIMS

The liability of employers for workplace violence under negligence claims typically stems from five main areas: third party liability, negligent hiring, negligent retention, negligent supervision, and negligent training. Because workers' compensation laws do not limit a nonemployee's negligence claims, an employer may face negligence claims from a third-party victim of violence.

- For example – If an employee with a known propensity for violence injures a customer, depending on the facts of the particular case, an employer may be sued for:
    - Negligent hiring
    - Negligent supervision
    - Negligent retention

State law largely governs negligence claims. Primary considerations generally include whether the employer should have known that the employee could cause harm to others and, if so, whether the employer acted reasonably under the circumstances.

VIII. VICARIOUS LIABILITY

Under common law, an employer can be vicariously liable for wrongful acts by an employee in the course and scope of their employment. In general, an employee who acts violently is acting outside the scope of his employment. However, depending on the facts of a particular situation, an employer could be liable if the employee was acting in the course and scope of their employment when they injured another person.

IX. 42 U.S.C. § 1983 LIABILITY

Section 1983 of the U.S. Code imposes liability on anyone who "under color of state law" deprives another of any constitutional right, privilege, or immunity. But governmental employers will not face liability under § 1983 because there is no constitutional right to be protected from criminals.

- Bowers v. Devito, 686 F.2d 616 (7th Cir. 1982) – In a case where a released mental patient murdered a woman, the court said that all plaintiff alleged is failure to protect the woman from a madman, and the state had no constitutional duty to do so.

X. GUNS IN THE WORKPLACE – STATE LAWS

A variety of laws have been established regarding the possession of firearms in the workplace. Most states permit employers to restrict or prohibit the presence of firearms in the workplace.

"Parking Lot Laws"

Parking lot laws prevent employers from prohibiting the legal possession of firearms in an employee's vehicle in an employer-owned parking lot. Many states, including Iowa, Kansas, Missouri, Nebraska and Oklahoma, have enacted a "Parking Lot" or "Guns in Trunks" law. Most states continue to permit employers to prohibit the possession of firearms in employer-owned vehicles.

Kansas Law

Kansas currently permits the concealed carry of firearms in any building. However, a private employer may prohibit an employee from carrying a firearm in employer-owned buildings. An employer cannot prohibit an employee from carrying a firearm while acting in the scope of their employment duties outside of the employer's place of business. An employee may possess a firearm in their private vehicle, even if on the employer's premises.

An employer who permits concealed firearms in the building is not liable for injuries arising out of the use of such firearms. An employer who does not permit concealed firearms in the building is not liable for injuries arising out of the use of such firearms so long as adequate notice was posted regarding the employer's firearm policy.

Missouri Law

Missouri permits employers to determine their own policies regarding firearms in the workplace, meaning employers may prohibit employees from possessing a firearm in their place of business. Employers may also prohibit the possession of firearms in employer-owned vehicles. Under Missouri's gun laws, if an employer does not post-notice of their no-firearm policy, employees and members of the public are permitted to possess a firearm on the premises.

Employers may not be held liable for injuries or damages resulting from the use of a properly stored firearms on their premises.

Illinois Law

Illinois Firearm Concealed Carry Act is the controlling law for the state's employees and employers. Employers must first determine whether the Firearm Concealed Carry Act designates their worksite as a prohibited location (prohibited locations are specifically listed in the Act). If not, the employer may choose to designate its property as a prohibited location by posting a clear and conspicuous sign in accordance with the requirements of the Act. The Act permits an employer to prohibit the possession of firearms by employees inside the employer's workplace, while working at other locations, using company vehicles, or driving one's own vehicle to perform work-related activities.

The Act allows concealed carry licensees to possess concealed firearms on their person inside a vehicle in the parking areas of most prohibited locations. A licensed employee may also store firearms in a case within a locked vehicle and have an unloaded firearm just outside of a vehicle for the purpose of storing or retrieving it.

Employers may be liable for injuries resulting from gun violence in the workplace.

Iowa Law

Iowa recently enacted the Employee Privacy Act. This act prevents employers from prohibiting employees from legally carrying, transporting, or possessing firearms so long as they are out-of-sight in a locked vehicle. The employee must be parked in an area where employees are permitted to park. An employer may still restrict an employee from possessing a firearm in in employer's place of business.

Employers may not be held liable for injuries resulting from parking lot firearm storage.

Nebraska Law

Employers in Nebraska may prohibit the possession of a firearm on their premises, including in vehicles owned by the employer. If an employer prohibits possession of firearms on their premises, they must provide adequate notice of such policy to their employees. If an employee is permitted to possess a firearm on the premises, they are required to keep their firearm locked in a storage compartment or vehicle.

Employers may be held liable for injuries resulting from firearm parking lot storage.

Oklahoma Law

Employers in Oklahoma may prohibit their employees from possessing a firearm in their building, but not in their parking lot. Employees are required to keep their firearm locked in a vehicle when in an employer-owned parking lot.

Employers cannot be held liable for injuries resulting from firearm parking lot storage.

XI. PREVENTION STRATEGIES

It is recommended that employers adopt a general, zero-workplace violence policy. The employer should establish a workplace violence prevention program or incorporate the information into an existing accident prevention program, employee handbook, or manual of standard operating procedures. It is critical to ensure that all employees know the policy and understand that all claims of workplace violence will be investigated and remedied promptly. It is also recommended that employers determine their potential liability for injuries and damages arising out of firearms in the workplace before deciding what their firearm policy will entail.

In addition, employers can offer additional protections such as the following:

- To reduce the risk of liability for firearm accidents, create a clear policy that regulates firearms to the extent permitted by state law. Be sure to check state laws regarding signage and ensure they are complied with.
- Implement a pre-employment screening policy that requires a background check as well as personal and professional references.
    - This ensures the employer does not hire potentially violent employees with a known history of dangerous use of firearms.
- Provide safety education for employees so they know the risks of firearms in the workplace. If firearms are permitted in the workplace, consider encouraging education on the safe possession and storage of firearms.
- Require employees to undergo an employee concealed firearms registration process to confirm that employees who store firearms in their personal vehicles in the employer's parking lot have a valid concealed weapons permit.
    - If firearms can be stored in employees' vehicles, hire security personnel to monitor the parking lot to limit the likelihood that an enraged employee can gain access to his firearm and return to the workplace.
- Provide mental and physical evaluations for employees who exhibit concerning behavior.
- Secure the workplace. Where appropriate to the business, install video surveillance, extra lighting, and alarm systems and minimize access by outsiders through identification badges, electronic keys, and guards.
- Equip field staff with cellular phones and hand-held alarms or noise devices and require them to prepare a daily work plan and keep a contact person informed of their location throughout the day. Keep employer provided vehicles properly maintained.
- Provide drop safes to limit the amount of cash on hand. Keep a minimal amount of cash in registers during evenings and late-night hours.

- Involve security personnel and consider informing local law enforcement if there is concern about a possible violent outburst or if terminating an employee with known violent tendencies.

XII. RESPONDING TO WORKPLACE VIOLENCE

In the event of any immediate threat, call 911.

It is important that an employer responds to workplace violence in a way that minimizes the impact of such an event and reduces the risk of recurrence. There are several helpful ways an employer can respond to violence in the workplace.

Responding to an ongoing incident:

- An employer should remain calm and evaluate the situation. An upset person will not necessarily lead to an incident of violence. If able to safely do so, an employer should attempt to calm the person and solve the immediate issue.
- In the event the situation cannot be safely deescalated, the employer should leave the area and encourage employees to do so as well.
- An employer should ensure the appropriate law enforcement personnel have been notified.
- If reasonably safe for the employer to do so, they should remain with and comfort any injured person until the arrival of emergency responders.
- An employer should document as much of the incident as possible for any subsequent investigations.

Responding to an incident after-the-fact:

- An employer should ensure cooperation with any law enforcement investigation.
- An employer and other relevant personnel should conduct their own investigation of the incident.
    - An employer may want to ask questions such as:
        - Were there warning signs of potential violence by the responsible individual? If yes, were they documented?
        - Was a violence prevention plan in place at the time of the incident? If yes, was it properly adhered to?
        - What prevention measures are currently not being taken that could be implemented?
- An employer should ensure all employees have an opportunity to voice their concerns and suggestions.
- An employer should encourage all personnel to maintain their mental and physical wellbeing following the event.
- If applicable, an employer can provide a list of local resources for victims of violence, such as a rape crisis center.

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FAIR LABOR STANDARDS ACT AS OF 2023

I. FAIR LABOR STANDARDS ACT (FLSA) BASICS

- Proposed in the 1930's and enacted in 1938 in response to the Great Depression.
- 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: 1.5 times their regular rate of pay for all hours worked more than forty hours in a workweek.

II. EXEMPT VS. NONEXEMPT EMPLOYEES

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

III. 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.

An employee who is paid on a "salary basis" regularly receives a predetermined amount of compensation each pay period (weekly, bi-weekly, etc.). A change in the quality or quantity of the employee's work does not permit the employer to reduce the predetermined amount. 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.

Up to 10% of the standard salary can be comprised of nondiscretionary bonuses and incentive payments (including commissions) paid on an annual or more frequent basis. 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.

IV. 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.
- (2) 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.
- (3) 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.

V. 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.

VI. 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.

VII. EXECUTIVE EXEMPTIONS

To qualify for the executive employee exemption, all of the following 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.

VIII. ADMINISTRATIVE EXEMPTIONS

To qualify for the executive employee exemption, all of the following 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.

IX. PROFESSIONAL EXEMPTIONS

To qualify for the executive employee exemption, all of the following 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 executive employee exemption, all of the following 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.

X. HIGHLY COMPENSATED EMPLOYEE EXEMPTIONS

To qualify for the executive employee exemption, all of the following 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.

XI. 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:
  - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  - 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;
  - The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
  - 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 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. Also, that employee maintained computer workstations, monitored network performance, and performed troubleshooting regarding issues with hardware.

MISSEL V. OVERNIGHT MOTOR TRANSP. CO. (1942)

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."

HELIX ENERGY SOLUTIONS GRP. V. HEWITT (2023)

Michael Hewitt filed an action against his employer, Helix Energy Solutions Group, seeking overtime pay under the FLSA. Hewitt worked for Helix on an offshore oil rig, typically working 84 hours a week while on the vessel. Hewitt was paid on a daily-rate basis, with no overtime compensation. Thus, Hewitt's paycheck, issued every two weeks, amounted to his daily rate times the number of days he had worked in the pay period. Under that compensation plan, Hewitt earned over $200,000 per year. Helix argued that Hewitt was exempt from the FLSA because he qualified as "a bona fide executive." Hewitt argued that he did not meet the salary basis requirement for the executive exemption. Therefore, the case turned on whether or not Hewitt was paid on a salary basis.

The Court first held that daily rate workers can qualify as paid on a salary basis only if they meet the requirements of the "special rule" in 29 C.F.R. § 541.604(b). The special rule focuses on employees whose pay is "computed on an hourly, a daily or a shift basis." Under 604(b), an employee's earnings can be computed using a shorter basis without "violating the salary basis requirement" if an employer "also" guarantees a weekly payment equivalent to the approximate pay usually earned by the employee. Hewitt was paid a daily rate and was not guaranteed an amount equivalent to his usual earnings. Thus, Hewitt did not meet the conditions of §604(b). Therefore, despite his high pay, the Supreme Court held that Hewitt was not an executive exempt from the FLSA's overtime pay guarantee.

XII. IN THE NEWS

Leah Shepherd, *Manufacturer Must Pay Record $22 Million for Wage and Hour Violations* (May 19, 2023).

The Department of Labor filed suit against East Penn Manufacturing Co., after the company failed to pay 11,400 employees from November 2014 to September 2021 for the time spent putting on their protective gear at the start of their shifts and undressing and showering at the end of their shifts. The DOL claimed East Penn adjusted times to pay employees only for their scheduled shifts rather than based on their clock-in and clock-out times.

East Penn used two types of systems to keep track of employee hours: a time and attendance system based on when an employee clocked in and out for a shift, and the Human Machine Interface (HMI) system, which kept track of when an employee started work on the production line. The HMI data was used by East Penn to calculate hourly pay, overtime, and bonuses.

East Penn was ultimately required to pay $22.25 million for wage and hour violations. U.S. Solicitor of Labor Seema Nanda stated, "Decades of settled law states that employers must pay employees for *all hours worked*, and this includes the time employees spend changing into and out of uniforms and showering *where such activities,* as here*, were necessary and indispensable to their work*. Contrary to the law, East Penn allowed employees to work off-the-clock for years." (emphasis added).

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STRATEGIES FOR DEFENDING VOLATILE & HIGH EXPOSURE CASES

I. OVERVIEW AND IMPORTANCE

What do we mean when we say, “Volatile & High Exposure Cases”? High exposure, often referred to as “nuclear” cases, are claims in which the verdict is generally over $1,000,000 but often return in the mid-seven to eight figures. However, these same cases are considered “volatile” when the value of the case is lower, but the jury comes back with an amount much higher than the requested amount (Plaintiff’s Verdict) or comes back with a defense verdict on a 7-8 figure case. No one factor is dispositive on this issue, but, rather, the trend appears to be a result of the Plaintiff bar aggressively pushing volatile cases to trial, obtaining large verdicts, and using these verdicts to achieve significant settlements.

Non-economic damages are uncapped in most states even in conservative venues. This is due to the general concept that our legal system has historically been designed to allow jurors to assess and determine the damages that will fairly compensate the Plaintiff. The practical issue with this concept is that non-economic damages are inherently undefinable. This reality poses a problem for Defense attorneys because Plaintiffs are now being rewarded with punitive damage without showing what is required. In cases such as these, there is also a concern about the standard of care being muddied. For example, safe premises vs. reasonably safe premises, or the safest course of conduct at all times while driving. The Plaintiff bar has also taken this opportunity to blur the difference between a pattern of conduct, such as indifference, with a unique mistake. However, most noticeably, there has been a concerted effort by the Plaintiff’s bar to enflame juror’s emotions such as fear and anger, such that they are more likely to disproportionately punish the Defendant. These strategies used by Plaintiffs have been coined as Reptile Theory.

Reptile Theory hinges on jurors’ so-called “reptilian” region of the mind, which is biologically sensitive to danger. The strategy works in two separate stages. First, jurors must be presented with the idea that a Defendant is, in fact, dangerous. Second, the attorney’s job is to convince that juror it is within their power to help mitigate this danger by taking action. This can be done, naturally, by awarding massive damages to the plaintiff. Reptile Theory has been further exacerbated through the utilization of the “Golden Rule.” The Golden Rule involves asking jurors to put themselves in the place of an injured person or victim. By doing so, they are then more inclined to deliver a larger, more favorable award to a plaintiff. However, this tactic has been rejected by many as improper, and in some instances outright banned. These tactics begin in the initial pleading phase and continue through written and oral discovery and into trial.

II. THE PETITION

The Petition in these cases is often crafted in a way to sound like a closing argument. It will often refer to, or make accusations of, habit and recurring issues with or by the Defendant. These accusations will often include safety issues unrelated to the accident, violations of safety rules, and other broad peripheral allegations. The thought behind this strategy is that it has been shown to broaden the scope of discovery further into the case. As a result, we look for buzzwords that highlight Plaintiff's intentions of angling towards this style. These include:

- Safety
- Needlessly endanger
- Safety rules
- Danger
- Unnecessary risk
- Safest available choice

Once this pattern is noticed, the defense has the opportunity early in the pleadings stage to push back by responding in the Answer and Affirmative Defenses to specifically reject these accusations. It also warrants discussing whether to file early motions looking to eliminate superfluous claims, strike unnecessary allegations, or allegations contrary to the standard. Additionally, it could be effective to identify rules and statutes that do not apply causatively to the claim as well as filing motions to dismiss that may not be successful but serve as an educational tool to the judge.

III. DISCOVERY: WRITTEN DISCOVERY

Using the themes and strategies discussed above, Plaintiffs often attempt to advance broad interrogatories and requests for production which are not relevant to the claims or defenses of the case. For example, even in a case where there is no cell phone use at the time of the accident, Plaintiffs will often seek phone evidence of phone use hours, weeks, or months before the accident. This is typically used to establish a theme of texting while driving, using apps while driving, or attempting to show logbook violations based on GPS usage. However, in cases where the Plaintiff cannot show a cell phone was being used at or around the time of the accident, it is likely the Defense can prevent discovery regarding cell phone use. The caveat is that if cell phone use is at issue in the case, it may not be completely removed from discovery, but instead must be narrowly tailored such that the scope is not permitted to become too broad. The benefit to this practice is that it serves as another opportunity to educate the judge of reptile or aggressive behavior that is extraneous to any legitimate claim or defense in the case.

Another example of written discovery being overbroad is in fishing for violations of safety rules or policies. This is particularly prominent when the discovery requests are not narrowly tailored to a specific type of issue present in the case.

Some examples include:

- Trucks driving over county bridges that have a significantly reduced capacity.
- Investigation of an incident and or the response to the incident.

To mitigate these attempts at broadening discovery, the Defense should be conscious and ready to push back on overbroad or unrelated discovery requests or third-party subpoenas. This phase of litigation should be used to focus on what the actual claims and defenses are to avoid being taken on a damaging phishing expedition.

IV. DISCOVERY: DEPOSITIONS

Using the themes and strategies in the Petition and written discovery, Plaintiffs will look for opportunities to trap Drivers, Corporate Representatives, and Safety Experts into changing the standard of care applicable to the case. This makes preparation vital to make sure clients and witnesses on the Defense stay out of the trap. Some of the issues and landmine questions we come across include:

- “Safety is a top priority at your company, right?”
- “A company must never needlessly endanger its employees, correct?”
- “A company is never allowed to remove a necessary safety measure, correct?”
- “Is a doctor ever allowed to needlessly endanger a patient?”
- “A driver is never allowed to needlessly endanger the public, right?”
- “You’d agree with me that ensuring patient safety is your top clinical priority, right?”
- “Violating a safety rule is never prudent, correct?”
- “Do you agree that a product manufacturer is never allowed to ignore a known danger to its product?”
- “These safety rules are intended to keep the plaintiff/the public safe, correct?”

Preparation is the best way to combat and negate these tactics. However, there may also be opportunities to use motions to narrow overbroad corporate representative deposition notices. Moreover, if there is a solid basis and reason to suspect that Plaintiff will exceed corporate representative notices, motions for protective orders and requests for discovery masters may be extremely beneficial.

V. DISCOVERY: EXPERTS

Defense experts can be a double-edged sword. Just because someone is an expert on safety subject matter, does not make them great communicators of their knowledge in depositions. Depositions can be scary and nerve-racking. Thus, taking the time to vet experts and find deposition transcripts of potential experts is invaluable. The last thing we want to learn in the middle of the deposition is that our safety expert is going to admit that

“a commercial driver should never needlessly endanger the public.” Therefore, during the retention process, or even earlier, if possible, the importance of probing the expert to see how they communicate ideas, particularly about safety, cannot be understated. The good experts are those who will naturally (either instinctively or through training) redirect conversations to the relevant standard of care in the industry for whatever claim is at issue.

VI. TRIAL: VOIR DIRE

Jury selection is one of, if not the most pivotal aspects of a trial. As a result, Plaintiffs will seek to take advantage of this opportunity. Their script will likely play on themes found during earlier points in litigation, including that the Defendant is dangerous, a threat, or unlikeable. However, the common goal is to spark strong emotions from the jury pool. The questions will often follow a theme of insinuating danger and tasking the jurors with protecting the community. They may ask how jurors feel about trials affecting the community. They may try and indicate that the law requires civil cases to be tried in the community where the act happened and question why jurors think that it's important to try cases in the community where the act occurred. Another tactic is to allude to or come out and say that some folks feel that the community must know what the jury has done in these types of cases. This type of commentary leads jurors to believe that they can send a message even if the Court has ruled that such arguments cannot be made directly to the jury.

Aggressive, but not necessarily Reptilian-focused Plaintiff’s attorneys will spend a great deal of time anchoring a juror by presenting an extremely high verdict range as a potential measure of damages. For instance, jurors may be asked if they could return a verdict of $10,000,000 if the evidence and law supported such a verdict. When questions such as these are worded properly, courts will generally allow them to be asked. These questions can be incredibly powerful because some people in conservative venues will automatically say no to that question, no matter what the evidence is. Whether the strikes come for cause or as peremptory challenges, the jurors who are not inclined to come back with a high verdict are likely to be removed. The issue comes with those who remain because they have a very high verdict in their mind as they listen to all the evidence. Therefore, they may be anchored to the idea that the case is worth a significant value before hearing all the evidence.

Skilled plaintiff’s attorneys will combine the themes mentioned above regarding danger, threat, and high case value with examples demonstrating the burden of proof. These examples will seek to make clear that the preponderance of the evidence is a very low bar to meet.

However, skilled defense attorneys will get ahead of these tactics well before they reach a jury by filing Motions in Limine (pretrial motions to argue the inclusion or exclusion of

evidence or testimony). These motions will often be targeted at ironing out the standard of care, the burden of proof, Golden Rule arguments, 'sending a message' statements, and removing prejudicial themes designed to enflame the passions or sympathies of the jury, or otherwise mislead them.

VII. TRIAL: CLOSING ARGUMENT

The course of trial and evidence presented will take much the same nature that has already been discussed in the discovery and voir dire sections. If not properly limited by Motions in Limine or by objection during closing, Plaintiffs have been successful in making some fairly persuasive and damaging closing arguments that have led to nuclear verdicts. For example, here are some famous reptile-based arguments:

> "You are the voice. You are the conscience of this community. You are going to speak on behalf of all the citizens in Riverside County and, in particular, Coachella Valley. You are going to decide what is right and what is wrong. What is acceptable, what is not acceptable. What is safe, and what is not safe. You are going to announce it in a loud, clear public voice, and that is going to be the way it is." (Regalado v. Callaghan [Riverside] - $6.5M verdict, $6M in non-economic damages).

> "And we've heard that the risks here are not just risks to Michael Hemond. The risk when it comes to a utility company following basic safety rules, following good engineering design practices, and making sound and rational decisions, that's a risk to everybody in society who lives and works and walks to school or drives to work where there are power lines and power equipment. It's an important principle that protects everybody, not just Mike, though Mike happens to be the Plaintiff in this case." (Hemond v. Frontier Communications of America, Inc. [Vermont] - $22.5M verdict).

> "Now, the decision about the safety of this community and whether or not they can get away with violating the law and letting somebody – someone getting hurt on their property and get to go on as business as usual, it's up to you." (Norman v. Newport Channel Inn [Orange County] - $38M verdict).

Outside of simply the Reptile theory, Plaintiffs continue to find new ways to analogize the value of human life, and human suffering to bring the nebulous pain and suffering into something tangible that the jury can relate to. Some examples of these come from Shanks v. State of Cal. Dept. of Transp. Which resulted in a $12,690,000 verdict for the family of a motorcyclist killed in a head-on collision with another motorcycle after 90 minutes of deliberation. He had the stealth bomber analogy which went like this:

> "So, I also want you to think, when you're thinking about valuing this loss: If we create the most expensive thing, a billion-dollar B-2 bomber, as a society, even when

> we create the most expensive piece of machinery we possibly can, the most sophisticated, we still value human life over that $2 billion object. So, if that plane is in trouble, we never say, “Save the plane,” we say, “Save the pilot.” Because human life is way more precious than any $2 billion object.”

He had the One-of-a-kind Picasso analogy: “This is a Picasso painting. It sold for over a hundred million dollars. This is just paint and canvas and a talented artist. But when you think about Mr. Shanks as a human being and the testimony you heard about how kind he was, how giving he was, how loving he was, his smile, his joking, his cooking, his laugh, he was a Picasso times 10 to this family. So, when you look at if someone loses a Picasso worth a hundred million dollars, no one would hesitate to say, “Okay. Look. This is the harm you caused. You have to pay 100 million dollars.” When you are thinking about what’s been taken from this family for the next 26 years, their Picasso has been taken from them, and the value of that loss is astronomical. We will all agree a billion dollars probably isn’t enough to compensate for whatever’s taken from this family. But you are going to have to come up with a number.”

He further analogized a professional athlete’s salary as follows: “Kobe Bryant, he gets paid 10s, 20s, whatever. Professional players get 20, $30 million a year to dribble a ball and put it in a basket. And the team will say, “He has that value to our team. He produces a value to our team. He’s our superstar, and that’s what he’s worth.” Mr. Shanks was the Kobe Bryant to his family and his community. You heard Mr. Wickham tell you, he strived to be half the man Mr. Shanks was. You heard how many people looked up to Mr. Shanks. You could see in the photographs how kind and loving and caring he was.”

Especially in high-dollar catastrophic loss cases, not only will the Plaintiffs seek to create an allegory with astronomical damages, they will likely attack the Defendant. Whether or not they can do so through reptilian theory attacks and safety rules, they will do what the court permits to try and focus the jury on the pain of the Plaintiff and the family compared to the uncaring, callous, unfeeling corporation.

So, what can be done about all these tactics throughout the trial process?

1. Create a theme that is powerful and satisfying for the jury

Most defense opening statements begin with a narrative about how good the corporate citizen is sitting in the defense chair. Then quickly moves to an acknowledgment but refutation of the plaintiff’s allegations. Thus, creating an unintentional landmine for the defense.

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

Jurors want to make decisions they feel good about. Jurors are everyday people which is something that an attorney needs to keep at the forefront and center in his or her mind. A juror has to care about the trial's outcome. Therefore, defendants must combat reptilian theory by using emotion to their advantage.

Defense counsel should create affirmative themes that present a competing and compelling case theory with its unique psychological satisfaction.

2. File Pretrial Motions

The Defense needs to create persuasive Motions in Limine with examples from discovery or the Petition or both to allow the Court to definitively prohibit improper evidence and argument. These Motions in Limine will include holding Plaintiffs to the proper standard of care and burden of proof. They will limit Golden Rule arguments. They will seek to have the Plaintiff limited from making Golden rule arguments or general claims of sending a message.

3. Prepare voir dire planning to combat the Plaintiff's attempts to anchor or prime the jury

Focus on the theme that you believe will be the most appropriate for your case. Weave that throughout voir dire. For example, if Plaintiff is focusing on a commercial driver "needlessly endangering" the community and there is a significant theme for comparative fault, it may be helpful to continue to use the jury instruction language for the standard of care throughout the verdict. Get jurors to commit that they understand that every driver has the same duty of care. Focus on personal responsibility. Get commitments to faithfully apply the law and the court's instructions about the standard of care to the facts of the case.

4. Counter Closing

Use the jury instructions and the groundwork that has been laid from voir dire and throughout the trial to implore the jurors to apply the proper standard of care along with the theme you have selected for your case. Combatting Plaintiff's request for extreme damages and attempts to attack the Defendants' character by bringing the jurors back to the law given to them through the jury instructions will be key. They must know where to look for the law, how to apply it, and what to write down on the verdict form.

Catastrophic cases are ones that naturally lend themselves to large verdicts. Counsel should be ready to combat liability and damages where possible. Even if the defense is contesting liability, in a catastrophic case, there should be serious thought given the anchoring of the jury with what a reasonable figure for damages should look like. When jurors have to choose between a proposal of $0.00 and giving Plaintiff a blank check, it is much easier for them to feel sympathy and lean toward that blank check that Plaintiff's

counsel has requested. By thoughtfully acknowledging the economic damages and providing a reasonable amount that will compensate the Plaintiff, putting a number down for the jury gives them something to hang their hats on or, at least, re-anchor them as compared to Plaintiff's request for a stealth bomber.

Notes Pages

Notes Pages

EFFECTIVE ADDITIONAL INSURED AND CONTRACTUAL RISK TRANSFER STRATEGIES

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

A. Overview

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

B. Types of Risk Allocation

i. Contractual Indemnity/Contribution

1. Definition and usage

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

2. Liability vs. Damages

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

3. Coverage

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

a) Some cases hold that the indemnity provision only covers third-party claims unless they say otherwise. Thus, indemnification provisions may not cover claims, losses, expenses, attorneys' fees, associated with a claim between the licensor and the licensee, absent a contrary agreement.[4]

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

ii. Implied vs. eExpress Indemnity

1. How is Express Indemnification created?
   a) An indemnification obligation can arise "by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances."[6]

2. Indemnity Agreements: Validity in Kansas and Missouri
   a) Indemnity Agreements are disfavored and strictly construed against the relying party in Kansas. Contract language must clearly and unequivocally show an intent to exculpate a party from its own negligence.

3. What constitutes clear and unequivocal language in Kansas and Missouri?
   a) In Kansas, courts have specifically advised parties wishing to include indemnity agreements to use the following language:

      (a.)"The parties agree that if a loss or damage should result from the failure of performance or operation...of the [Rollins] system, that Rollins' liability, if any, for the loss of damage thus sustained shall be

[4] Hooper Associates, Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 491–493, 549 N.Y.S.2d 365, 366–368, 548 N.E.2d 903 (1989)

[5] § 8:45.Nonwarranty risk allocation: indemnities—What they are, Modern Licensing Law § 8:45

[6] E. L. White, Inc. v. City of Huntington Beach, 21 Cal. 3d 497, 506–507, 146 Cal. Rptr. 614, 579 P.2d 505 (1978).

limited...and that the provisions of this paragraph shall apply if a loss or damage...results...from negligence...of Rollins, its agents, or employees." *Zenda*, 894 P.2d at 888 (citing *Corral v. Rollins protective Servs. Co.,* 732 P.2d 1260 (1987)).

b) In Missouri, courts have held the following language to be appropriate:
(a.)"[Sachs] shall indemnify, defend, and save [Aqualon] harmless from and against all liability, losses and expenses...for any suit, claim, settlement, award or judgment...arising out of the failure of [Sachs] to comply with safety and security regulations, and out of any negligence on the part of [Aqualon] except to the extent such claim may be caused solely by the negligent act or omission of [Aqualon]." *Fed. Ins. Co. V. Gulf Ins. Co.,* 162 S.W.3d 160, 1693, 166 (Mo. Ct. App. 2005).

4. Statutory Provisions Invalidating Indemnity Clauses
   a) In Kansas, K.S.A. 16-121 voids certain indemnification and additional insured provisions in construction contracts, motor carrier transportation contracts, dealer agreements and franchise agreements only. Indemnification provisions providing indemnity against a party's own negligence, intentional acts or omissions are against public policy, and therefore are void and unenforceable. This does not apply to written agreements when indemnity is supported by liability insurance coverage.
   b) In Missouri, RSMo 434.100 applies only to construction work, and states that indemnification for one's own wrongdoing or negligence is generally unenforceable. However, there are exceptions when a party agrees to hold harmless or indemnify another from the party's or party's subcontractors and suppliers' own negligence. Another exception arises when a party promises to cover another under an insurance contract as an insured/additional insured.

5. How is Implied Indemnification Created?
   a) An implied obligation to indemnify can arise "from the contractual or legal relationship implied between the parties."[7] Generally, an implied contractual indemnification arises when a party owes a duty to a third party but transfers the duty by implied duty to another.[8]

6. Types of Circumstances When Implied Indemnification Arises.
   a) There are normally two sets of circumstances when an implied indemnification may be recognized. The first revolves around an implied contract theory, while the second can be implied under a 'implied-in-law'

[7] Gainsco Ins. Co. v. Amoco Production Co., 2002 WY 122, 53 P.3d 1051, 1067 (Wyo. 2002).
[8] Peoples' Democratic Republic of Yemen v. Goodpasture, Inc., 782 F.2d 346, 351 (2d Cir.1986).

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

7. Unfavorable Implied Indemnification Pitfalls
   a) Implied indemnity can arise when a party has committed no wrongdoing, but a party can still held vicariously liable for the wrongdoing of another. These are separate causes of action from the initial cause of action that created the injustice to which the vicarious liability has arisen to correct. Courts will find there is implied indemnity when:
      (a.) the parties had a preexisting relationship prior to the occurrence of the tort giving rise to the liability.
      (b.) the party seeking indemnification is blameless and the other party is at fault.

8. Example 1 – *Underwood v. Fulford*[10]
   a) A real estate broker hired an agent to purchase two specific properties for her. Instead, the agent and a partner decided to purchase the two houses for themselves. The broker sued and retained a $150,000 judgment holding the agent and the broker jointly and severally liable. The agent paid the entire balance of the judgment and sued his partner's estate (who had recently passed) for a portion of the judgment he had paid. Despite the absence of a formal contract granting the partner's estate indemnification, the court held that the estate was indemnified from paying the agent any balance of the judgment. The court reasoned that since the duty of care was owed by the agent to the broker, and since there was no wrongdoing by the partner, despite being liable in tort, can be indemnified from paying any amount of the judgment.

9. Example 2 – *Godoy v. Abamaster of Miami, Inc*.[11]
   a) A plaintiff lost four fingers on her right hand while using a meat grinder and sued the retailer, the wholesaler that sold the grinder, and the importer which sold the grinder to the wholesaler. The jury apportioned 40% fault to the plaintiff, 50% to the wholesaler, and 10% to the importer. The court ruled that when the manufacturer was not subject to the jurisdiction of the court, a

[9] Traeger v. Farragut Gardens No. 1, Inc., 201 Misc. 18, 107 N.Y.S.2d 525 (Sup.Ct., Kings County, 1951).
[10] Underwood v. Fulford, 128 N.E.3d 519, 525 (Ind. Ct. App.), transfer denied, 138 N.E.3d 946 (Ind. 2019)
[11] Godoy v. Abamaster of Miami, Inc., N.Y.L.J. Jan. 29, 2003, p. 18, col. 1 (2d Dept. 2003)

wholesaler may be entitled to indemnification from an importer which is higher up the distribution chain and closer to the manufacturer, when both are strictly liable to the plaintiff. The court explained that holding the importer liable satisfied the public policy consideration underlying the doctrine of implied indemnity. Implied-in-law indemnity is similar to a tort-based doctrine rather than contract-based. Implied-in-law indemnity is often used in vicarious liability cases to shift the loss from the party who legally was required to pay the loss to the party whose wrongful or negligent conduct actually caused the loss.

10. Indemnity Provisions and Workers' Compensation laws

    a) In Kansas, injuries sustained by workers are typically covered by the Kansas Workers Compensation Act under K.S.A. 44-501(b). K.S.A. 44-501(b) was not intended to abrogate contractual rights and duties between consenting parties under a contract entered into with full knowledge of its provisions. Exclusive remedy provisions of the Kansas Workers' Compensation Act won't bar third-party claims against an employer when those claims were based on express indemnification agreements.

    b) In Missouri, employers usually enjoy immunity from civil suits due to workers' compensation. However, employers may contract to indemnify a third party for damages owed to an employee. Employer's liability not for employee's personal injury but for the breach of independent duty to a third party expressly agreed to perform.

iii. Contractual Additional Insured provisions

1. Definition

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

2. Example

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

3. Pitfalls in Drafting
    a) Active operations – this phrase used in drafting can bind those insured to liability resulting from after the contracted work is finished.
    b) Individual negligence – this provides an exception for the additional insured if the party is individually responsible for the injury that occurred.
    c) State specific rules – some states prohibit one party being liable for another party's own negligence. Check your state's specific rules before drafting an individual negligence provision.
    d) Within the terms of the agreement – including this term can limit one's liability as claims resulting from other liability such as personal and advertising could be covered under the additional insured provision. This phrase limits this liability even further.
4. Common Phrases Used for Drafting Language
    a) Arising out of – can provide easy to identify language to cover specific events.
    b) But only with respect to liability arising out of [insert insured]'s work – narrower language and can name specific parties to avoid confusion.
5. Attorneys' Fees and Costs to Defend
    a) In Kansas, no attorneys' fees are available where language of an indemnity provision does not provide for them. This is true even if a previous provision provided for attorneys' fees. Only provisions explicitly including attorneys' fees will provide for them.
    b) In Missouri, the indemnitee/contractor is entitled to legal expenses incurred in defending a claim. The indemnification provision must explicitly provide for legal expenses for "establishing the right to indemnity" to recover expenses incurred in pursuing indemnification.

II. DEFINING RISK LIMITATION – LIMITING OR NARROWING RISK

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

A. Types of Risk Limitation

i. Contractual Damage Limitations

1. Overview of Damages

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

2. Waiving Liability in a Contract

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

3. Example of a Limitation

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

ii. Contractual Waivers

1. Definition

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

2. Consideration for Waiver?

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

3. Pitfall in Drafting the Provision

a) The most important aspect to remember in drafting a contractual waiver is to make the waiver plainly obvious that a reasonable person will be able to understand what they are agreeing to. Despite a party signing, if the

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

provision is not obvious and liberal in its language, courts could disregard the provision.

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

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

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

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

5. Check State Specific Laws

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

[13] Ferbet v. Hidden Valley Golf & Ski, Inc., 618 S.W.3d 596, 609 (Mo. Ct. App. 2020), transfer denied (Apr. 6, 2021)
[14] *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 337 (Mo. banc 1996)

iii. Arbitration provisions

1. Definition and Function

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

2. Seven Pitfalls of Drafting Arbitration Clauses[15]

a) Inattention

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

b) Omission

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

c) Over-specificity

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

d) Unrealistic Expectations

(a.) This problem arises where the parties include a tight timeline with many steps that will likely never be achieved. Adding in steps such as naming

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

arbitrators within a specific number of days, then selecting the second arbitrator seven days later, etc. the risk is collateral litigation.

e) Litigation-Envy

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

f) Over-reaching

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

iv. Subrogation Waiver

1. Definition

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

2. Function

a) Subrogation allows an insurer who has paid a loss to step into the position of the injured party and assert the injured party's or insured's rights against the party who is allegedly responsible for the loss, and thereby be reimbursed for the payment. [18]

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[16] Hooters of America, Inc. v. Phillips, 173 F.3d 933, 938-939, 79 Fair Empl. Prac. Cas. (BNA) 629, 75 Empl. Prac. Dec. (CCH) P 45822 (4th Cir. 1999).

[17] Behr v. Hook, 173 Vt. 122, 787 A.2d 499 (2001)
2006 A.L.R.6th 14 (Originally published in 2006)

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

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

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

5. Subrogation Waivers v. Liability Waivers
    a) Subrogation waivers are similar to liability waivers/exculpatory clauses as some courts have found some subrogation waivers void as public policy. Pennsylvania courts found that waivers of subrogation contained within leases were void as against public policy.[21] When a fire broke out in an office building, insurers were required to compensate tenants, and sought compensation from the owners and managers or owners of the building. The owners argued that tenants had waived any rights of subrogation through waiver. The court found that this waiver was against public policy because it relieved the defendants from liability where they violated regulations designed to protect human life. In contrast, when an oil rig worker incurred a back injury while on the job, the Court upheld a subrogation waiver

[19] Reliance Nat'l Indem. v. Knowles Indus. Servs., Corp., 2005 ME 29, ¶ 14, 868 A.2d 220, 226
[20] Fireman's Fund Ins. Companies v. Siemens Energy & Automation, Inc., 948 F. Supp. 1227 (S.D. N.Y. 1996)
[21] Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 1993 WL 489771 (E.D. Pa. 1993)

between the employer and the worker because such a waiver clause in an insurance policy did not violate the Louisiana oilfield anti-indemnity act.[22] In short, it is best to check the local state rules regarding subrogation waivers, but the general tendency is they are disfavored similar to liability waivers/exculpatory clauses.

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

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AI: THE NEXT FRONTIER IN CLAIMS HANDLING

I. Definitions

A. Artificial Intelligence - Knowledge or intelligence that is generated by a machine created to operate under human-like characteristics.

B. Machine Learning - The ability of computers to learn from repetitive or continual input of data and imitate such input in larger quantities and at a faster rate.

II. Overview

Artificial intelligence has been all the buzz lately. While for some it is a fascinating area, for others it presents as a frightening prediction of what the future could hold. Nevertheless, learning the workings of AI can work for your benefit, providing longevity and sustainability.

Insurance litigation and claims handling is a never-fading industry that provides constant work. AI allows for the more repetitive and mundane work to be done faster and more efficiently. Tasks such as claims processing, billing review, and fraud detection are all integral parts of claims practice. Through machine learning, these tasks that can take up large amounts of time, can now be done much faster.

Overall, AI allows for carriers to spend less time on repetitive tasks and focus human interactions on better quality service to their customers and much more complex issues that present themselves.

III. Claims Processing

One of the most fundamental tasks of insurers is to process claims. This task is repetitive and complex in nature. Reviewing various policies, documents, and more, can all be done through machine learning. Such software identifies the important information within the many pages of documents, much of which is not pertinent to the claim, and presents a predicted outcome that is then reviewable. Additionally, AI can provide estimated settlements amounts for claims through machine learning of similar cases that are processed.

IV. Billing Review

Invoices are constantly being received from attorneys and outside vendors. AI allows for a massive number of invoices to be reviewed and processed at a time. While doing so, any invoice or bill that has inaccuracies is flagged for human review and modification.

V. Fraud Prevention

Within insurance claims, fraudulent claims present serious concerns that take up a significant percentage of claims. The process of identifying fraudulent claims can be

tedious work. While many within the industry manually review claims for fraud, through AI this can be done through studying human behavior of similarities in fraudulent claims.

Though some fraudulent claims many take on similar aspects, some claims can be harder to spot. As technology advances, so do criminals. Thus, it is important to ensure that whatever AI software you use in fraud detection, the data and software is routinely updated with the evolving trends of fraudulent claims.

VI. ChatGPT

The newly generated chatbot of ChatGPT has sparked many conversations. Through ChatGPT, users can insert tasks, questions, and/or prompts into the software, as it immediately generates near on-target responses. Insurance companies have used resources such at ChatGPT to handle insurance claims with much haste. However, there are some downfalls of the new-found software.

In a recent case, *Mata v. Avianca Inc*., it was discovered that case citations provided by ChatGPT were not real. Ultimately, the software made up fake caselaw. This instance further signified that chatbots such as ChatGPT are not search engines. ChatGPT has other issues as it does have biases built within. Additionally, the software is unable to deal with complex policies and perform multiple tasks at a time. ChatGPT is a great example of how AI can be both beneficial and a liability simultaneously.

VII. Liabilities of AI in Claims Handling

While AI does allow for insurers to save money and time, such software still needs human oversight. It is important to review claims that are handled by AI software periodically. Such oversight prevents massive errors in claims.

Additionally, though many claims are similar in nature, they are also very different. Predictions that AI software generate should not be used solely in settlement determinations. Human knowledge should be partnered with the software to ensure accurate and insightful decisions.

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EMPLOYERS BEWARE: DIRECT NEGLIGENCE CLAIMS

I. WHAT IS NEGLIGENCE?

A. Negligence occurs when someone does not exercise the care that a reasonable person would in the same or in a similar situation would.

B. Ultimately, negligence is found to have occurred when a party or company has failed to exercise a reasonable obligation to another party.

II. WHAT IS A DIRECT NEGLIGENCE CLAIM?

A. Direct negligence claims are alleged when a Plaintiff alleges an employer is directly responsible for the claim when they engaged in negligent hiring practices, negligent retention, negligent supervision, and negligent training.

   i. Negligent Hiring: When an employer hires an individual who lacks the proper training, credentials, experience or has dangerous tendencies.

   ii. Negligent Retention: When an employer retains an employee who should have been terminated who may create a risk or hazard in the workplace.

   iii. Negligent Supervision: When an employer fails to supervise and monitor the employee and their daily behavior.

   iv. Negligent Training: When an employer does not provide or have the employee complete proper training and licenses for the work activity or position as a whole.

III. WHEN DO THESE CLAIMS HAPPEN?

A. Direct negligence claims against the employer often occur when a trucking accident occurs, and the driver is at fault and the Plaintiff also includes the employer in the suit for negligence.

B. By including employers in the suit, it allows for the plaintiff to gain a tactical advantage as it often leads to the admissibility of otherwise inadmissible evidence and increases the range of discovery.

IV. HOW ARE DIRECT NEGLIGENCE CLAIMS DIFFERENT FROM VICARIOUS LIABILITY CLAIMS?

A. Direct negligence claims are an independent action against the employer where the employer is held directly liable for its own negligence.

B. Vicarious liability is not a separate cause of action, but instead used as a means for a party to hold another party liable for the conduct of another.

   i. Vicarious liability allows for the sharing of liability.

   ii. Exists when the employer is held liable for the employee's negligence.

V. WHY DO DIRECT NEGLIGENCE CLAIMS MATTER?

A. Evidence Problems: Direct negligence claims against the employer bring in evidence of prior bad acts of the employee which often inflame the jury.

B. Hiring practices: All evidence of what the employer did or did not know about the employee while hiring the employee can be used against the employer to show negligence.

C. Increased Costs: The cost of discovery and litigation fees can increase for employers as they are forced to defend and investigate liability from multiple directions.

D. Punitive Damages: If the employer's behavior is found to be exceptionally egregious, the court can award punitive damages to the Plaintiff.

VI. DIRECT NEGLIGENCE IN MISSOURI

A. Missouri follows the longstanding *McHaffie* rule where employers may waive any direct negligence claims by admitting to vicarious liability.

   i. However, although direct negligent claims can be waived, the risk of punitive damages exists regardless of if the employer admits to vicarious liability.

      1. The Court of Appeals for the Western District of Missouri held in *Robin J. Wilson v. Image Flooring, LLC and Brandon Rapp*, — S.W.3D —, 2013 WL 1110878 (MO.APP. W.D. MARCH 19, 2013) that punitive damages may be awarded to the plaintiff if the plaintiff pleads sufficient facts.

B. Missouri is a pure comparative fault state.

   i. Under *Gustafson v. Benda*, 661 S.W.2d 11, Plaintiff's recovery will be reduced by his share of the fault.

VII. DIRECT NEGLIGENCE IN KANSAS

A. Kansas holds the minority view that stipulating vicarious liability does not eliminate the ability to hold an employer directly liable. Thus, employers are always open to direct negligent claims for negligent hiring, retention, supervision, and training practices.

B. Kansas is a Modified comparative fault state.

   i. Under K.S.A. section 60-258a(a), plaintiffs cannot recover compensation if they are found 50% or more at fault.

VIII. DIRECT NEGLIGENCE IN ILLINOIS

A. On April 21, 2022, the Illinois Supreme Court held in *McQueen v. Green*, 2022 IL 126666, that a plaintiff may pursue separate claims for employer negligence even where the employer admits vicarious liability for its employee.

   i. Prior to this ruling, Illinois along with many other states followed the Missouri Supreme Court ruling in *McHaffie* that held an employer may extinguish separate actions against them for negligence when they admit vicarious liability for the employee's action.

B. Illinois is a Modified comparative fault state.

   i. Under 735 I.L.C.S. section 5/2-116, plaintiffs cannot recover compensation if they are found 51% or more at fault.

IX. DIRECT NEGLIGENCE IN IOWA

A. Iowa has not directly stated its views on direct negligence claims against employers. Currently the theory of vicarious liability is the sole legal action used against employers.

   i. This basis can be seen in *Harris v. FedEx National LTL, Inc.*, 760 F.3d 780, 783 (8th Cir. 2014). In *Harris*, FedEx contracted with Fresh Start to transport its trailers between warehouses. A driver for Fresh Start was involved in a fatal collision. The injured parties sued FedEx under the theory of respondeat superior in hiring, training, and supervising the driver, the court denied relief. It found no vicarious liability for a harm caused by the contractor or it servants as the driver was deemed an independent contractor. When the plaintiff's argued FedEx was liable for the driver's negligence because he was acting as FedEx's employee or servant, the court weighed the factual assertions and determined he was not. The Court held FedEx had no duty to inquire into the certification of the driver who was an employee of Fresh Start. The Court, however, did not address the plaintiffs' negligent-hiring claim, as it went unpled.

      1. This case illustrates the difference in the two claims—vicarious liability of the employer is possible if the employee of the contractor was acting as an employee or servant of the employer. The direct-liability claim is a different theory, and one that our supreme court has not acknowledged. *See Also Est. of Fields by Fields v. Shaw,* 954 N.W.2d 451, 461 (Iowa Ct. App. 2020).

B. Iowa is a Modified comparative fault state.

   i. Under I.C.A. section 668.3(1)(b), plaintiffs cannot recover compensation if they are found 51% or more at fault.

X. WHAT OTHER RISKS DOES DIRECT NEGLIGENCE CLAIMS BRING TO THE EMPLOYER?

A. An increased risk of evidence spoilation is created.

i. Spoilation of evidence occurs when there is any form of destruction to evidence. Accidental mix-ups of evidence or negligent destruction alone is not enough to establish a spoilation tort claim.

ii. Spoilation of evidence is often its own legal claim against the employer or insurance company that increases its own separate legal fees.

iii. In the event of a direct negligence claim it is vital that:

1. Employers keep all documentation of the transfer or equipment, employment records, complaints, hiring materials, training practices, and any relevant materials for possible discovery; and

2. Employers obtain releases from any lawsuit parties or seek a court order giving notice and permission for any such testing or destruction; and

3. Employers and carriers treat all preservation of potential evidence preserved if ever needed to prove a liability defense or claim.

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