MVP Law Seminar 2024

Employment Law & General Liability

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AI IN THE WORKPLACE

I. WHAT IS AI (ARTIFICIAL INTELLIGENCE)?

A. Software: refers to information technology programs or procedures that provide instructions to a computer on how to perform a given task or function.

1. Many different types of software and applications are used in the hiring process and the workplace, 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.

B. Algorithm: a set of instructions that can be followed by a computer to accomplish a task or solve a problem.

1. 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.

2. Software or applications that include algorithmic decision-making tools are used at various stages of employment, including hiring, performance evaluation, promotion, and termination.

C. 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.

1. 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.

D. ChatGPT: AI tool created by OpenAI (Version 3.5 released to public; Version 4.0 available to subscribers).

II. AI IN THE LAW

A. 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.

B. 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.

C. 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.

D. Cost: With AI, time is saved, which means money is saved. Because of higher efficiency, time spent on a matter can be allocated differently, potentially resulting in lower fees.

III. EXISTING APPLICATIONS

A. Casetext “Co-Counsel”

1. Application that can review materials to determine discrepancies, respond to specific questions, and can provide direct citations similarly to Westlaw.

B. Spellbook

1. Has been described as ChatGPT for lawyers, which uses predictive text for drafting legal documents.

C. Zuva

1. Contract analysis tool.

D. Thomson Reuters with Microsoft Copilot, Lexis+ AI, and BloombergGPT are all recently announced AI products.

IV. USES OF AI IN DIFFERENT BUSINESSES

A. <u>Healthcare</u>

1. mGene was developed to take a photo of a babies face and diagnosis the baby with certain genetic disorders.
2. AI is being used to study patient medical history, genetics, and disease symptoms to diagnose the underlying conditions and offer treatment recommendations.
3. Nabla AI acts as a medical scribe to make notes from doctor-patient interactions.
4. Foresight analyzes health records and predicts the medical future of patients.

B. <u>Police departments</u>

1. Fort Collins police force is using AI to transcribe body camera video into a police report
2. Facial recognition technology.

C. Education

1. Gradescope is AI that grades students' assignments and provides written feedback.
2. Ello is an AI reading machine that helps kids learn how to read and advance their reading skills.

V. INSURANCE COMPANIES USING AI FOR DIFFERENT TASKS

A. Process claims

1. Allows for faster claims intake and processing.
2. Document analysis through machine learning.

B. Fraud detection

1. Examine claims to detect trends that may indicate fraudulent conduct.
2. AI can flag claims that seem suspect and send it to an investigator for further investigation.

C. Customer service

1. Using chatbots that give more immediate answers or lead customers to answers on insurers' websites.
2. AI being used to answer the phone and direct customers to the correct department.
3. Able to report claims through AI.

D. Billing review

1. Examine bills for accuracy and reasonableness.
2. Ensure bills comply with policy provisions.
3. Provides cost predictions.
4. Real-time adjudication.

VI. LAWSUITS AGAINST INSURANCE COMPANIES BECAUSE OF AI AND SPECIFIC LEGISLATION TARGETED AT AI USE

A. Cigna Corp. pending class action lawsuit

1. Cigna rejected more than 300,000 claims in just two months in 2022. The company was using AI called PXDX to identify whether claims met certain pre-set requirements. The algorithm spent an average of 1.2 seconds on each claim. The denials were then sent to doctors who signed off on the denials without review.

B. UnitedHealth Care and Humana Inc. pending class action lawsuits

1. Both insurance companies have separate lawsuits pending against them, both of them used AI called nH predict. Patients on Medicare Advantage Plus were being illegally denied care that physicians prior had deemed medically necessary by nH

predict. It is alleged that the AI in use was prematurely and in bad faith discontinuing payment to its elderly beneficiaries, causing them medical and financial hardships.

C. Legislation being made to focus on AI
   1. At least 40 states introduced or passed AI regulation in 2024.
   2. Alaska, Connecticut, New Hampshire, Illinois, Vermont, Nevada, and Rhode Island have adopted the National Association of Insurance Commissioners on the Use of Artificial Intelligence Systems by Insurers.
      a. Insurers are expected to develop, implement and maintain a written program for the responsible use of AI systems.
      b. Sets out guidelines covering governance, risk management, internal controls, and acquisition and/or use of third-party AI systems and data.
   3. Other states are expected to adopt the National Association of Insurance Commissioners on the Use of Artificial Intelligence Systems by Insurers in the coming months.

VII. AI IN EMPLOYMENT DECISION-MAKING

A. How can algorithmic decision-making tools, commonly known as AI, assist in employment decisions?
   1. AI can be used in recruitment, hiring, retention, promotion, transfer, performance monitoring, demotion, dismissal, and referrals. AI is used for these decisions for the same reasons listed above – time, effort, efficiency, cost, etc.

B. Employers may rely on different types of software that incorporate algorithmic decision-making at different stages of the employment process.
   1. Examples include:
      a. Resume scanners that prioritize applications using certain keywords;
      b. Employee monitoring software that rates employees on the basis of their keystrokes or other factors;
      c. “Virtual assistants” or “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements;
      d. video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and
      e. 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.

C. Additional Methods of AI Usage

1. Resume Screening
    a. Automation of the initial screening process of candidates by analyzing resumes and cover letters and identifying relevant qualifications.
2. Candidate Sourcing
    a. 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.
3. Video Interviews
    a. 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.
4. Predictive Analytics
    a. 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.
5. Employee Engagement and Retention
    a. 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.
6. Performance Evaluation
    a. 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.

VIII. PRACTICAL AND ETHICAL CONCERNS

A. Confidentiality

1. 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)).
2. "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.

B. Bias

1. "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).
2. 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*

C. Supervision

1. 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).
2. "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*.

D. Kruse v. Karlen, et al. No. ED111172 (E.D. Mo. 2/13/2024)

1. Facts: Pro se appellant filed an appeal seeking to overturn the trial court's grant of final summary judgment in favor of Respondent.
2. What happened?: Appellant submitted a brief to the court containing twenty-two fictious case citations. The only two genuine citations presented in Appellant's brief also did not stand for what they were purported to. Appellant claimed in his Reply Brief that he had hired an online "consultant" alleging to be an attorney licensed in California to prepare the Appellate Bried.
3. Outcome: Respondent drew the Court's attention to the citation deficiencies, as well as other issues with Appellant's brief. The Court noted that being pro se is no excuse for submission of fictious cases and the appeal was dismissed as frivolous. Appellant was ordered to pay $10,000 in damages towards Respondent's attorneys' fees.

E. *Mata v. Avianca, Inc.,* No. 1:22-cv-01641 (S.D.N.Y.)

1. 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.

2. 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.

IX. AI AND TITLE VII

A. 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.

B. 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.

   1. Title VII
      a. Generally, Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin.
      b. 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."
      c. 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.
   2. 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.

C. EEOC v. iTutorGroup Inc., E.D.N.Y., No. 22-CV-02565

1. Facts: The EEOC filed suit against a company providing English-language tutoring services to students in China for age discrimination. A previously rejected applicant brought the complaint to the agency after they were granted an interview upon resubmitting an identical application with a more recent date of birth.
2. What happened?: The employer utilized AI software in screening employment applications that automatically rejected female applicants over the age of 55 and male applicants over the age of 60.
3. Result: The employer denied any wrongdoing but settled the case and entered into a consent decree with the EEOC. The agreement requires the employer to pay $363,000 in damages to the rejected applicants and submit to monitoring and reporting requirements from the EEOC.

X. EXISTING LEGAL GUIDANCE ON AI AND WAYS YOU CAN SAFEGUARD THE USE OF AI IN YOUR WORKPLACE

A. President's Blueprint for an AI Bill of Rights

1. Intended as a broad guideline for employers to mitigate or address potential negative impacts of AI.

B. Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.

1. AI use required to comply with all federal laws.
2. Directs all federal agencies to develop regulations to address AI use.
3. Specifically mentions civil rights issues, wage-and-hour compliance, and labor concerns.

C. Safeguard the use of AI in your workplace

1. Transparency and accountability
    a. Be clear to everyone what process the AI is using, how the AI is being used, what information the AI is storing and has access to, and tell people what third-parties may gain access to the information through the AI system.
2. Clear standards and guidelines
    a. Have clear standards and guidelines of how the AI will be used, what material the AI will store, and what to do if the AI malfunctions.
3. Acknowledgment
    a. Acknowledge that AI cannot do it all and is not a human, the work of AI must still be reviewed.

4. Training
    a. Provide continuous training and development to ensure safe and responsible use of AI.
5. Storage
    a. Ensure there is a way to go back and get the data the AI processor has used in case something goes wrong.

XI. CONCLUSION

A. 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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SUPPORTING PARENTHOOD AT WORK: NAVIGATING THE PUMP ACT AND PWFA

I. PWFA

A. Overview of PWFA: Pregnant Workers Fairness Act (PWFA) requires a covered employer to provide a "reasonable accommodation" to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an "undue hardship."

1. *Relevant covered employers*: The PWFA applies to private employers and public sector employers (state and local governments) that have 15 or more employees, Congress and Federal agencies, labor organizations, and employment agencies.

2. *Qualified employees:* Employees, applicants, and former employees who are currently covered by: Title VII, the Congressional Accountability Act of 1995 and 3 U.S.C. § 411(c), the Government Employee Rights Act of 1991 (GERA), and section 717(a) of Title VII, which covers federal employees.

B. Relevant findings from the recent final EEOC regulations (took effect 6/18/24)

1. Reasonable accommodations: Similar to the ADA's definition, essentially a change in the work environment or how things are usually done.

   a. *Examples of a reasonable accommodation under PWFA:* frequent breaks, sitting/standing, schedule changes/part time work/paid and unpaid leave, telework, parking, light duty, making existing facilities accessible or modifying the work environment, job restructuring, temporarily suspending one or more essential functions, acquiring or modifying equipment/uniforms/devices, adjusting or modifying examinations or policies

2. Qualified

   a. The PWFA allows an employee or applicant to be qualified even if they cannot perform one or more essential functions of the job if the inability to perform the essential function(s) is "temporary," the employee could perform the essential function(s) "in the near future," and the inability to perform the essential function(s) can be reasonably accommodated.

   b. Temporary suspension of essential functions: if the employee is pregnant, it is assumed that the employee could perform the essential function(s) "in the near future" because they could perform the essential functions within generally 40 weeks of the temporary suspension of the essential function. However, the essential function(s) of a pregnant employee must not always need be suspended for 40 weeks, similarly if a pregnant employee seeks the temporary suspension of an essential function(s) for 40 weeks it is not automatically granted.

3. Undue hardship: Follows the definition in the ADA, significant difficulty or expense for the operation of the employer.
    a. *Uses same factors as under the ADA*:
        i. Consideration of the length of time that the employee will be unable to perform the essential function(s);
        ii. Whether there is work for the employee to accomplish;
        iii. The nature of the essential function, including its frequency;
        iv. Whether the employer has provided other employees in similar positions who are unable to perform the essential function(s) of their positions with temporary suspensions of those functions and other duties;
        v. If necessary, whether there are other employees, temporary employees, or third parties who can perform or be temporarily hired to perform the essential function(s) in question; and
        vi. Whether the essential function(s) can be postponed or remain unperformed for any length of time and, if so, for how long.
    b. *Reasonable accommodations that do not cause undue hardship*:
        i. Allowing an employee to carry or keep water near and drink, as needed;
        ii. Allowing an employee to take additional restroom breaks, as needed;
        iii. Allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
        iv. Allowing an employee to take breaks to eat and drink, as needed.
4. Requesting additional supporting documentation:
    a. The employee must identify:
        i. *Step 1:* the limitation (the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions).
        ii. *Step 2:* that the employee needs an adjustment or change at work due to the limitation.
5. Leave as an accommodation: (1) PWFA prohibits an employer from requiring a qualified employee with a known limitation to take leave, either paid or unpaid, if another effective reasonable accommodation exists, absent undue hardship, (2) however leave may be a reasonable accommodation under PWFA.
6. Unnecessary delay: unnecessary delay in making a reasonable accommodation may result in a violation of the PWFA *even if* the reasonable accommodation is eventually provided when the delay was unnecessary.

II. PUMP Act

A. Overview: The PUMP Act extended employer obligations under the Fair Labor Standards Act (FLSA) to provide employees reasonable break time and private space to express breast milk for the employee's nursing child to include both non-exempt and exempt employees. The PUMP Act expands the legal right to receive pumping breaks and private space to nearly 9 million more employees.

1. Coverage: Employers with fewer than 50 employees are exempt from the PUMP Act if they can demonstrate undue hardship. Employers with 50 or more employees do not qualify for this undue hardship exemption.

B. Relevant findings from the Dep't of Labor Pump Act compliance guidance (issued in 2023)

1. Employers must give nursing employees reasonable break time each time the employee has a need to pump at work for 1 year after the child's birth.
2. Employer can't use time used to pump against employees when determining if the employee has met a productivity quota.
3. Employers cannot require employees to make up time an employee used for pumping.
4. Employers must provide a space that is not a bathroom, is shielded from view, is free from any intrusion from coworkers and the public and must be available each time the employee needs to pump.
5. *Restaurant and retail employers:*
    a. Can temporarily convert an existing space, other than a bathroom, into a private space for pumping or make a private space available, when necessary, that must be functional for pumping.
    b. Employers can add a table and chair and use dividers and signs to turn a storage room into a temporary space for pumping mothers
    c. A manager's office could also be temporarily used, as long as employees have the ability to block or turn off cameras and use a lock or a sign to prevent intrusion.
    d. The Department of Health and Human Services' Office on Women's Health notes that companies can partner with neighboring businesses to share a space for pumping mothers' use. For example, neighboring restaurants in a food court can provide their employees shared space for pumping that is near the food court. Those who need to use the space receive a code to share the break room and pump in private areas separated by partitions, and the space should have tables, chairs, a cooler, and functional sinks.

C. Relevant findings from the EEOC regulations

1. Lactation Accommodations: EEOC rules go further than the PUMP Act
    a. *PUMP Act*: the final rule goes farther than the PUMP Act's requirement that employers provide reasonable break time each time an employee needs to express milk and provide space that is (1) not a bathroom, (2) "shielded from view," and (3) "free from intrusion from coworkers and the public."
    b. *EEOC Rule*: a reasonable accommodation includes, but is not limited to, ensuring the area for lactation is in reasonable proximity to the employee's workspace, that it is regularly cleaned, that it has electricity, that it has seating and a surface to place a breast pump, and that it is in reasonable proximity to

a sink, running water, and a refrigerator for storing milk. The final rule goes farther than the proposed rule by discussing nursing.

D. PUMP Act Lawsuits

1. A Dollar General worker filed a lawsuit against her manager for allegedly being forced to pump in an unlocked stockroom or hot car. (September 2023 ~settled~)
2. A Minnesotan mother filed a lawsuit against Sun Country Airlines, alleging that she was forced to pump in a main room or backroom, drawing the inappropriate looks of a co-worker. (November 2023 ~settled~)
3. A plaintiff filed a class-action suit against a Maryland Ulta Beauty location, which allegedly forced a worker to pump in her car. (January 2024)
4. A worker alleged that her McDonald's supervisor did not give her enough time to pump — when it gave her a break at all. Her only spaces were a stockroom corner or the women's bathroom. (February 2024)

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SOCIAL MEDIA POLICIES: SAFEGUARDING EMPLOYER NEEDS VS. EMPLOYEE RIGHTS

I. SOCIAL MEDIA IN THE HIRING PROCESS

A. The extent employers can use social media to screen applicants:

1. Risk of opening up an employer to discrimination lawsuits: Under Title VII, since social media can reveal race, sexual orientation, gender identity, national origin, religion, a disability, and other protected characteristics that may not be revealed in a resume, if an employer utilizes social media in its screening it can open up the employer to discrimination claims from prospective candidates.

2. Third Party Social Media Background Check: Under the Fair Credit Reporting Act (the "FCRA"), employers may seek out a third-party to perform social media background checks where they aim to parse out any potential information about a prospective candidate's protected class or lawful off-duty conduct. If they hire a third-party, employers must (i) notify the prospective employee that a consumer report may be obtained in relation to the hiring process and (ii) obtain written consent from the job applicant.

3. Internal Social Media Background Check: If an employer wants to have a social media screening for applicants, it is best to develop a policy that is compliant with state and federal statutes. The process should be documented to ensure individuals tasked with hiring decisions were not given access to any information protected by federal or state law discovered through a social media background check.

II. EMPLOYERS MONITORING AND/OR LIMITING SOCIAL MEDIA USES OF EMPLOYEE'S

A. AI usage in monitoring employee's social media: AI usage in monitoring social media has become a growing trending service offered to employers. Currently there are no federal laws that prohibit an employer from monitoring employees on social networking sites, nor are there federal laws against using AI to do the monitoring.

B. Social media clauses in contracts:

1. **Non-disparagement agreements** – Oftentimes used to counteract social media disparagement by current and former employees. Employers often have non-disparagement provisions in employment contracts particularly with non-compete agreements.

   a. **Overly broad provisions may be unlawful**: In *Mclaren Macomb*, 372 NLRB No. 58 (Feb. 21, 2023), the Board held that non-disparagement confidentiality provisions may violate concerted activity rights. The Board in the matter held that the severance agreement that included broad non-disparagement and confidentiality clauses violated the employee's rights to engage in concerted activity under section 7 of the National Labor Relations Act because it was overly broad in scope.

2. **Morality Clauses** - Morality clauses are becoming more common for workers. Particularly, as the power of social media have grown, companies rely on morality causes to protect their reputation from damage by the individual behavior of employees.
    a. **Generally**: Courts have consistently upheld morality clauses as legitimate contract provisions.
    b. **The conduct must be foreseeable:** Employees have prevailed in situations where courts have determined that the employees' unfavorable conduct was not foreseeable based both on the specific language of the clause and community standards of decency.
    c. **The more narrow, detailed, and specific the clause the better:** Companies will find more success enforcing morality clauses that are clearly written and define specific impermissible behaviors or violations.

III. FIRST AMENDMENT RIGHTS WITH SOCIAL MEDIA & NLRA CONSIDERATIONS

A. First Amendment rights

1. Public Employees – *Pickering Test*

    a. Speech spoken as an employee gets no constitutional protections.
    b. Speech spoken as part of the employee's duties of employment gets no constitutional protection as it is speech spoken as part of the employee's duties of office.
    c. Speech spoken by an employee as a private citizen which has any adverse action by the employer is subject to constitutional scrutiny dependent on public concern.
        1) Public concern? Protected
        2) Not public concern? Possibly unprotected, unless the employee can show it is a matter of public concern
        3) Matters of public concern are: something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication
    d. If an employer's interest in workplace efficiency and preventing disruption outweigh an employee's free speech interest, the employee's 1st amendment speech retaliation claim will fail.
        1) In *Grutzmacher v. Howard County* (2017), a fire department employee posted an offensive joke on his personal Facebook page while on duty. A volunteer replied with a racially charged comment, which the plaintiff liked and responded positively to. The court found that the department provided sufficient evidence of actual or potential disruption in the workplace outweighing plaintiff's First Amendment interests because the comments could interfere with the public's trust in the department and several coworkers had informed plaintiff's supervisor that they were no longer comfortable working with him because of it.

2. Public Officials Using Private Social Media Accounts for Business Purposes
    a. Public Officials – Recent SCOTUS case regulating public officials use of their private accounts.
        1) Lindke v. Freed, 601 U.S. 187, 144 S. Ct. 756, 218 L. Ed. 2d 121 (2024)
            a) **Facts:** James Freed created a private Facebook profile that was originally intended to connect with family and friends. Eventually, he grew too popular for Facebook's 5,000-friend limit on profiles. So Freed converted his profile to a "page," which has unlimited "followers" instead of friends and is public so that anyone may "follow" it. Freed designated the page category as "public figure." In 2014, Freed was appointed city manager for Port Huron, Michigan, so he updated his Facebook page to reflect that new title. On his page, he shared both personal updates about himself and his family and professional updates, including directives and policies he initiated in his official capacity. Kevin Lindke came across Freed's page and did not approve of how Freed was handling the pandemic. He posted criticism of Freed in response to Freed's Facebook page, and Freed deleted the comments and ultimately "blocked" Lindke. Lindke sued Freed under 42 U.S.C. § 1983 for violating his First Amendment rights by deleting his comments and blocking him. The district court granted summary judgment to Freed, and the U.S. Court of Appeals for the Sixth Circuit affirmed.
            b) **Question:** Is it unconstitutional for an elected official to block critics on social media?
            c) **Answer:** Yes, public officials who post about topics relating to their work on their personal social media accounts are acting on behalf of the government, and therefore can be held liable for violating the First Amendment when they block their critics, only when they have the power to speak on behalf of the state and are actually exercising that power
            d) **Reasoning:** a government official's social media posts can be attributed to the government only if (1) the official had the authority to speak on behalf of the government and (2) was exercising that power when he created the social media post at the center of the dispute. Although deleting comments allows an official to target only personal posts, blocking someone from a social media page that contains both personal and official posts could also prevent someone from commenting on official posts. "A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability,"
    b. Lion Elastomers LLC II, 372 NLRB No. 83 (May 1, 2023)
        1) **Facts:** The employer in Lion Elastomers disciplined an employee based on his continued misbehavior during a safety meeting and the investigatory meetings that followed. Specifically, the employee was agitated, continued to interrupt meetings with repeated questions, raised his voice, refused to

allow others in the room to complete their statements, attempted to leave the room, and used an accusatory tone when addressing others in the room.

2) **Question:** Can an employer fire or discipline an employee for using profanity, abusive language, or even racist statements or threats during a union campaign or on a picket line?
3) **Answer:** No, misconduct such as racist remarks, harassing statements, misogynistic insults, and profanities may be immune from discipline if occurring during activity otherwise protected under the National Labor Relations Act.
4) **Context for Social Media:** This Board decision overrules a past Board decision *General Motors* which found that disciplining employees for social media posts did not constitute "protected concerted activity" under the NLRA.
    a) Lion Elastomers II overrules *General Motors*, *General Motors* overruled *Pier Sixty*

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TIPS ON HANDLING EEOC COMPLAINTS

I. WHEN A CHARGE IS FILED:

A. A charge does not mean that you have violated the laws that the EEOC enforces.
   1. It is a complaint of discrimination, not a determination of discrimination.
   2. Review the charge notice carefully.

B. The EEOC will notify the employer within 10 days of the charge being filed.

C. The notification will provide a link for the employer to log into the EEOC portal.

D. Make sure to verify organization contact information within the EEOC portal.
   1. The organization contact will be the organization's designated point of contact for the charge.
   2. The information that must be provided for the contact is:
      a. First name
      b. Last name
      c. Title
      d. Email
      e. Address Line 1
      f. Zip, City, State
      g. Phone Number
   3. An employer may have multiple contacts for the charge.

II. REPORTING THE CHARGE TO INSURANCE:

A. Inform insurance company of the charge ASAP.
   1. If you do not know if you are covered, check with your insurance broker.

B. Ensure that you are following your insurance policy's reporting guidelines.
   1. If an employer waits too long to report, the insurance carrier may deny coverage.

III. LOOK AT CHARGE TO DETERMINE IF CHARGING PARTY IS REPRESENTED:

A. If the charging party has an attorney, do not talk to the charging party directly about their charge.
   1. If they are still an employee, you can talk to them about normal job-related items, just steer clear of the Charge of Discrimination.

IV. MEDIATION FOR EEOC COMPLAINTS:

A. Mediation is a form of alternative dispute resolution offered by the EEOC.
   1. Only trained mediators that specialize in EEO law are assigned.

2. Mediation is voluntary and only occurs if both parties agree to mediate.

B. Mediation now occurs via Zoom.
   1. The parties are sequestered in their own Zoom rooms with the Mediator and do not have to directly engage with one another.

C. If a charge is not resolved in mediation, the charge is returned to an investigative unit for investigation.

V. BENEFITS OF MEDIATION:

A. An independent survey showed 96% of all respondents and 91% of all charging parties who used mediation would use it again.

B. Benefits of mediation:
   1. Free.
   2. Gives both parties a neutral person to discuss the complaints with.
   3. Provides an early look at what the other party is asking for.
   4. Can save time and:
      a. Quicker to proceed to an EEOC Mediation than the EEOC Investigative Process.
      b. Do not need to prepare a Position Statement before Mediation.
   5. Confidential and information disclosed will not be revealed.
   6. Can help avoid the costs of litigating a case.
   7. Allows the parties to design their own solutions.
   8. Because mediation is often required in federal court, EEOC mediation allows parties to get a head-start on possible resolutions to the case

VI. EEOC INVESTIGATION

A. If charge is not sent to mediation or mediation does not resolve charge, the charge will move to investigation.

B. An EEOC investigator for the charge will be assigned.

C. The EEOC begins by asking the employer for a written response called a position statement.

D. The investigation length depends on the facts and kind of information involved.

E. Cooperate with the EEOC investigation.
   1. The EEOC can issue an administrative subpoena to obtain documents, testimony, or gain access to facilities

F. Parties have an obligation to preserve all documentation that could be relevant to the investigation.
    1. If you are unsure if it is relevant, reach out to your attorney.
G. On average, it takes approximately 10 months for the EEOC to investigate a charge.
H. After the investigation, the EEOC will let the parties know the result.

VII. PLANNING THE RESPONSE – THE POSITION STATEMENT:

A. The position statement is your opportunity to explain why the claims in the charge are incorrect or not illegal.
B. Having an attorney draft the position statement (in-house or insurance company assigned) is the best option.
    1. The position statement is a legal document that can be held against the employer.

VIII. ENSURE THAT THE INDIVIDUAL DRAFTING THE POSITION STATEMENT GETS THE INFORMATION THEY NEED:

A. Compile investigative material and provide it to the person handling the Position Statement.
B. Gather documents potentially relevant to the charge.
C. Provide the charging party's personnel file to the person drafting position statement.
D. If an internal investigation has not been conducted, consider whether one is needed to respond to the Charge or investigate any new aspects of the Charge.
E. If you are in litigation, you can interview your own employees, except the charging party.
    1. Determine witnesses to alleged conduct, or perpetrators of alleged conduct, and interview them to find out more information about the charge.

IX. DRAFTING THE POSITION STATEMENT – WHAT SHOULD YOU INCLUDE?

A. The response should focus on the facts relevant to the charge of discrimination and identify the specific documents and evidence supporting its position.
B. Provide an overview about what the company does by including the following:
    1. Company's legal name and address.
    2. Primary nature of the business and the number of employees.
    3. Note the presence of EEO Policies for your company.
C. Address all claims the complaining party is making and respond to each.
    1. Consider whether to provide documents to support your position.

2. Identify all “adverse actions” and respond to each.
3. Pay attention to dates of allegations, or lack of specific dates in allegations.
    a. EEOC can only look at things that occurred in the last 300 days.
    b. Inform the EEOC of anything that happened outside the 300-day window.

D. Provide any policies or procedures applicable to the allegations in the charge.

E. The position statement should be clear, concise, complete, and responsive.
    1. A general denial is insufficient.
    2. Must include your position and supporting information.

F. Employer generally has 30 days to gather information and submit position statement after it is requested by the EEOC.

X. POSSIBLE ACTION AFTER COMPLETION OF EEOC INVESTIGATION:

A. EEOC may send a follow-up Request for Information during investigation.

B. If the EEOC is unable to determine that a law has been violated, they will issue a finding of no probable cause and send a Notice of Right to Sue.
    1. Charging Party cannot file a federal lawsuit until receipt of Notice of Right to Sue.
    2. Charging Party can Request a Notice of Right to Sue if investigation is taking too long.
    3. From the date of receiving the Notice, the party has 90 days to file a lawsuit.

C. If the EEOC determines that a law has been violated, they will attempt to reach a voluntary settlement with the employer.
    1. If the EEOC cannot reach a settlement, the case will be forwarded to EEOC legal staff or the DOJ to determine if the agency wants to sue.
    2. If the agency does not sue, they will issue a Notice of Right to Sue.

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KEEPING YOUR EMPLOYEE HANDBOOKS UP TO DATE WITH CHANGES IN DRUG TESTING AND CLASSIFICATIONS

I. RECLASSIFICATION OF MARIJUANA

A. Controlled Substances Act

1. Marijuana is federally illegal
2. Marijuana is currently classified as a Schedule 1 Drug under the Controlled Substances Act
    a. Schedule 1 drugs have no currently accepted medical use and a high potential for abuse
    b. Other Schedule 1 drugs include heroin, ecstasy, and LSD
    c. This prevents federally-funded research into marijuana
    d. This prevents interstate banking for marijuana
    e. This prevents companies involved in the growing or sale of marijuana from important tax benefits and deductions
3. The Biden Administration supports and has pushed for reclassification from Schedule 1 to Schedule 3
    a. This would not: legalize marijuana federally
    b. This would:
        i. Open the door for the FDA to approve marijuana-based drugs
        ii. Ease restrictions on research into marijuana
        iii. Allow for tax deductions and credits for marijuana industry
        iv. Increase access to banking for marijuana industry
    c. Schedule 3 drugs have moderate to low potential for physical and psychological dependence
    d. Other Scheule 3 drugs include ketamine, anabolic steroids, testosterone, Tylenol with codeine
    e. Department of Justice submitted a proposed regulation to reschedule on May 16, 2024
    f. The DEA has the final say on rescheduling
        i. Has expressed more hesitance than other federal agencies
        ii. Opened a 60-day public comment period, during which almost 43,000 public comments were received
        iii. Has set a public hearing for December 2, 2024 – after the presidential election

B. Most states have undertaken some level of legislation or constitutional amendment to decriminalize marijuana, allow medical marijuana, or allow recreational use of marijuana

1. Missouri: Recreational and medicinal use legal. Missouri legalized both medicinal and recreational marijuana through amendments to the State constitution, enshrining the legalization more secure than legislation
2. Kansas: Still illegal statewide. Efforts to bring medicinal marijuana programs have stalled, but smokeless marijuana appears to have stronger support.
3. Oklahoma: Medicinal only. Notably, in 2023 a statewide vote for legalizing recreational marijuana failed almost 2-1. Oklahoma is not the first state to have a no vote for recreational marijuana, but is a reminder that public support is not 100%
4. Illinois: Passed as a legislative statute in 2020.
5. Iowa: Legal medical marijuana, illegal recreational marijuana. Efforts to legalize recreational marijuana, or to decriminalize marijuana have stalled.
6. Nebraska: Still illegal statewide. However, a statewide election will be held in 2024 for legalizing medical marijuana.

II. DRUG TESTING POLICIES

A. Policies – need to be in writing
   1. If it's not written down, you will struggle to enforce it
      a. Monitor and update as your state laws change
      b. Make it clear for your employees and management to understand and enforce
      c. Include it in on-boarding materials and any on-board training
         i. Have employees sign for receipt and understanding of this policy on their first day at work
      d. Provide training:
         i. Train employees on what is allowed and not allowed
         ii. Train employees on when they might be tested
         iii. Train supervisors on enforcing policies
         iv. Train supervisors on recognizing impairment
         v. Document training materials, when given, when each employee attended (put sign-in sheets in personnel files

B. Types of Tests
   1. Oral Fluid Testing
      a. Sharp rise in number of employers using this since 2019: up to 87% in 2023 from 39% in 2019
      b. Some states (California, Washington) are enacting legislation to encourage oral fluid testing as opposed to urine testing
      c. Confirm with the labs in your area what is offered
         i. Confirm whether oral fluid testing offered is rapid or not
      d. Significantly less intrusive if test is an observed test, and can make it easier to schedule because observer does not need to be the same gender as employee being tested

e. Most importantly, better than urine at detecting recent use. Can obtain a positive result within 5-10 minutes of use, compared to needing 2-5 hours for a urine test

2. Urine Testing
   a. Earliest result with 2-5 hours of use, can detect up to 30 days in past
3. Hair Testing
   a. Not useful for determining impairment
   b. Window is long, can lead to "false" positive if employee used even just one up to three months ago

C. Testing to Consider
1. Pre-Employment Screening
   a. Some companies are moving away from pre-employment marijuana testing – Amazon, Google, Microsoft
   b. Consider whether marijuana testing is needed for the position. Is it a safety-sensitive position? Is it a DOT position?
2. DOT Testing
   a. Federal law requires drug testing for holders of CDLs, pilots, and many train employees.
   b. May 2023 DOT Rule regarding oral fluid testing – not being used yet
      i. Employer can choose between oral fluid and urine testing
      ii. Must use oral flued for transgender or nonbinary individuals
3. Random Drug Testing
   a. Must have this set out in your handbook in writing
      i. Procedure should be clearly outlined
         - How many employees tested per year – DOT may require certain percent of DOT-eligible employees
         - How employees are notified
         - Timeline for employees to take test after notification
         - Where testing is done and how employees get there
         - Observed or non-observed
         - Can employee choose between oral fluid or urine?
   b. Who is doing the selection – consider having an outside third party conduct random selection based on randomly-assigned numbers so there is no way employees can be singled out
   c. Keep records of testing
      i. While selections must be random, track who is being tested and how often
      ii. Conduct reviews to no protected classes are being inadvertently tested more often
   d. Be prepared for complaints that employees are being tested too often – be able to explain the random process

4. Reasonable Suspicion Testing
    a. Need a clear drug-free workplace policy
    b. Training for supervisors
        i. Must train your supervisors on recognizing indications of impairment: red eyes, lethargic, communication issues, confusion, lack of focus, lack of coordination
    c. Record all indications of employment and have observer store in a safe place
    d. Double-check complaints, especially if it comes from a co-worker
    e. Take-home tests: can be useful to determine if employee should be sent to outside lab, but may not be effective basis for disciplinary action
    f. Do not let an employee transport themselves to a reasonable suspicion drug test
    g. OSHA considerations – discussed below
5. Testing for Impairment
    a. There is no breathalyzer-style test that can measure impairment for marijuana
    b. Employee can test positive and not be impaired
    c. Employee can test negative and still be impaired
    d. Beware of products claiming to be able to measure impairment like a breathalyzer
        i. Often based on limited or paid-for research
    e. Oral fluid is the best option because it has the shortest window to detection
6. Post-Accident Testing
    a. Be aware of requirements under your state's Workers' Compensation Act
        i. For example, Kansas requires an employer policy regarding post-accident testing
    b. Testing procedure and admissibility: again, consult your state's Workers' Compensation Act
        i. Missouri: "confirmed by mass spectrometry, [or] using a generally accepted medical forensic testing procedure"
            - Split samples, employees having the options to get their own test
            - Chain of Custody, may need letter of preservation
        ii. Kansas: test admissible if:
            - Result of employer mandated drug testing policy
            - Normal course of medical treatment
            - Employee voluntarily agrees

D. OSHA – does not prohibit safety incentive programs or post-incident drug testing
    1. OSHA allows employer to drug test an employee if the employer has an "objectively reasonable" basis for testing

2. OSHA allows an employer to conduct a drug test for employee who reports a work-related injury or illness – must still have "objectively reasonable" basis for believing that drug use contributed to injury or illness
    a. Test all other employees involved in the incident, not just the employee reporting an injury or illness

E. Disciplining Employees After a Positive Test
1. Clearly outline disciplinary rules is a necessity
2. Consider zero-tolerance policies
    a. Some employers are finding that this limits the employee pool, especially in states where marijuana is recreationally legal
    b. No law requires you to allow employees to be impaired AT WORK, however
    c. 2 unless they were impaired at work
3. Everything hinges around demonstrating that the employee was impaired while at work
    a. Absence of a breathalyzer-style test makes this more complicated, and underlines importance of recording why impairment was suspected and observed

F. Effect on Unemployment Benefits
1. Understand your state laws on how termination for positive testing might affect employment benefits
2. Illinois: employee entitled to benefits unless intoxicated at work
3. Missouri: no benefits for a positive test
4. Oklahoma: no benefits if terminated for violating a drug-free workplace policy

G. Safety-Sensitive Positions
1. Most states have specific provisions for zero-tolerance policies for any consumption, even outside work, for "safety-sensitive positions"
2. This clarifies post-testing discipline and termination for safety-sensitive positions
3. Oklahoma: defines safety-sensitive positions as any job that includes tasks or duties that the employer reasonably believes could affect the safety and health of the employee performing the task
    a. Examples: dispensing pharmaceuticals, operating motor vehicles, direct patient care, carrying firearm
4. Iowa: jobs where an accident could cause loss of human life, serious bodily injury, or significant property or environmental damage
    a. Employers must designate safety sensitive positions on a job-by-job basis rather than making blanket designations for all employees in a category
5. Pennsylvania: employees prohibited from marijuana use where they perform job in small, confined spaces or at great heights
6. Differing judicial decisions on designating safety-sensitive positions
    a. Iowa Supreme Court held in 2021 that employers cannot broadly identify employees as safety sensitive; employer must analyze on a job-by-job basis

b. Federal Court in Arkansas held in 2023 that an employer can use blanket categorization for jobs as safety-sensitive
    i. Arkansas constitutional amendment protects medical-marijuana card holders from employment discrimination, but excludes safety-sensitive jobs from this protection

H. Off-Duty Use Protections
1. Some states protect employees from adverse employment action for off-duty marijuana use, but there are still exceptions within those states
2. California: off-duty protections do not apply to building and construction trade
3. Connecticut: list of excluded positions, such as mining, manufacturing, transportation, health and safety, first responders

III. ADA IMPACT

A. Marijuana use is not covered by the ADA
1. Marijuana is not federally legal, still a schedule 1 drug
2. No requirement to allow use of marijuana as a reasonable accommodation under the ADA
    a. Re-scheduling to Class III should not change this – would likely require FDA to approve marijuana-based medications first

B. State Law Considerations
1. Kansas – not legal in Kansas so no state-law duty to accommodate
2. Missouri – Missouri Human Rights Act (MHRA). Unclear if there would be a cause of action
    a. Article XIV § 1(7)(d) states that no person shall have the right to bring a claim against an employer for discharge, discrimination, or similar causes of action based on any actions taken due to being under the influence of marijuana while at work

C. Questions related to use of medical marijuana
1. Pre-Offer
    a. ADA prohibits questions that are likely to reveal the existence of a disability before any job offer is made
    b. A question about medical marijuana use could fall into this category
    c. ADA prohibits pre-offer alcohol test but NOT pre-offer drug screen because marijuana is not federally legal
2. Post-Offer
    a. Can make disability-related inquiries and require medical examination after conditional offer of employment has been made
    b. Must be done uniformly – cannot only inquire or test certain applicants

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GENERAL LIABILITY & CIVIL PROCEDURES: REMOVAL, HOW AND WHY?

I. GENERAL IDEA/OVERVIEW OF REMOVAL

A. *REMOVAL* = The process of transferring a lawsuit filed in state court to the United States District Court with jurisdiction over the same area.

B. How to Remove a Case to Federal Court

1. Defendant can remove a case from state court to federal court by
   a. filing a notice of removal in federal court; and
   b. then notifying the state court and the other parties.
2. Might need the agreement or joinder of any other defendants, or they might be able to remove the case on their own.

C. When is a case removable?

1. The federal court must have had subject-matter jurisdiction over the case in the first place for the case to be removable.

D. Two most well-known bases for federal court subject-matter jurisdiction:

1. Federal question jurisdiction:
   a. The case arises under the U.S. Constitution or a federal statute.
   b. Sometimes conflated with:
      i. a plaintiff's need to prove a defendant's obligations under federal law OR
      ii. a defendant's reliance on federal law as a defense.
2. Diversity jurisdiction:
   a. The case is between plaintiff(s) and defendant(s) from different states, between U.S. citizens and foreign citizens, or between U.S. citizens and foreign states.
   b. AND the amount in controversy is at least $75,000.

II. AMOUNT IN CONTROVERSY THRESHOLD –

A. Amount in controversy must exceed $75,000.
   1. i.e., plaintiff's complaint seeks damages that clearly exceed the removal threshold.

B. If complaint does not address the matter of damages sought, defendant cannot remove on the basis of diversity jurisdiction until plaintiff produces discovery that specify damages in excess of $75,000.

III. REQUIREMENTS FOR REMOVAL IN CASES WITH MULTIPLE DEFENDANTS

A. When a state court complaint names multiple defendants, all "properly joined and served" defendants must consent to removal unless they are fraudulently joined. 28 U.S.C. §1446(b)

IV. TIMING – DEADLINE TO REMOVE A CASE:

A. A defendant has 30 days from the date of formal service of process of the initial proceeding to remove the case to federal court (28 U.S.C. § 1446(b)(1)).
   1. Starts after plaintiff has effectuated formal service of process.
   2. NOTE: The filing of a summons or complaint alone does not trigger the removal clock; there must also be proper service.

B. OR a case that is not removable when it is first filed can become removable later if:
   1. plaintiff adds new claims,
   2. joins more defendants, or
   3. increases the amount in controversy.
   4. Defendant can remove a case within 30 days of receiving an amended petition or complaint.

C. NOTE: In many cases: defendant cannot remove the case if more than one year has lapsed since the lawsuit was first filed.

V. THE FORUM DEFENDANT RULE

A. A forum defendant is a local, in-state defendant named in a lawsuit

B. When there is a local, in-state defendant named in the lawsuit, the forum-defendant rule prevents removal to federal district court based on diversity jurisdiction.

VI. DIVERSITY OF CITIZENSHIP ISSUES

A. The Forum Defendant Rule – Plaintiffs may attempt to preemptively defeat diversity jurisdiction by naming a defendant that is a citizen of the same state (a forum defendant)

B. Courts generally defer to a plaintiff's choice of forum and endeavor to prevent forum shopping between state and federal systems.

C. Courts exercising diversity jurisdiction will defer to the plaintiff's pleadings as to the jurisdictional amount, so long as they were:
   1. filed in good faith, and
   2. the defense cannot show to a legal certainty that the plaintiff cannot recover above $75,000.

D. Humans and corporations can assert their own citizenship, but other entities take the citizenship of their members.

VII. SNAP REMOVAL

A. What is it?
   1. Procedural play: both forum and out of state defendants can remove a case to federal court before any in-state, forum defendant is served.
      a. Allows them to assert federal question or diversity jurisdiction.

B. When can it be used?
    1. Perfect for the intermediate case where is no federal question jurisdiction, complete diversity does exist, and a forum defendant is the only bar to removal under 28 U.S.C. § 1441(b)(2), so long as removal occurs before any in-state, forum defendant is formally served.
        a. Permissible even in a case with arguable or no federal question jurisdiction and complete diversity among the named defendants.
C. How does it work?
    1. Once removed, the defendant(s) can assert federal question jurisdiction (if it exists) and can rely on diversity jurisdiction (if it does not) to stay in federal court.
D. Issues with snap removal:
    1. The biggest barrier to snap removal is the issue of how to leverage the window of time between the filing of a summons or complaint, and formal service.
E. Circuits that do/do not allow it:
    1. Four circuit courts of appeals have upheld the practice of snap removal
        a. 6th Circuit in 2001
        b. 3rd Circuit in 2018
        c. 2nd Circuit in 2019
        d. 5th Circuit in 2020
    2. As of Jan. 19, 2024: U.S. Supreme Court and other circuit courts of appeals have yet to weigh in on the practice.
F. Proponents of Snap Removal:
    1. Believe the plain meaning of the removal statute permits snap removal.
        a. Also absent a significant showing of contrary legislative intent.
    2. Practical and policy arguments supporting the practice:
        a. Snap removals can disincentivize plaintiffs from fraudulently joining in-state defendants that they have no intention of actually serving just to prevent the removal of lawsuits.
G. Opponents of Snap Removal:
    1. Believe it is contrary to the spirit of diversity jurisdiction and an unfair exploitation of a procedural technicality.
H. Efforts to eradicate snap removal*:*
    1. Removal statute was amended by Congress in 2011, after snap removals had become more common. The relevant language allowing snap removals was not altered.
    2. House Resolution 5801 (styled as the Removal Jurisdiction Clarification Act of 2020) would have essentially eliminated snap removals by requiring district courts to remand (i.e., “snap back”) snap removal cases upon a plaintiff’s motion.

a. Congress has contemplated taking action to change the removal statute.
b. The bill has sat for several years in the House Committee on the Judiciary – no current indication that this legislation will ever become law.

I. Takeaways:
1. Federal court's decision on the propriety of removal will generally be final as a practical matter, because the denial of a motion to remand is an interlocutory order that is not usually subject to immediate appeal (28 U.S.C. Sec. 1447(d))
2. Monitor state court docket activity if you have a reason to anticipate litigation and prefer to litigate in state court.
a. Need a keen and vigilant eye on the potential litigation landscape
3. Be fluent in the service of process rules in states where litigation is expected.
4. Good practice, when litigation is anticipated, is to prepare snap removal templates that can be tailored and filed shortly after notice is received.

VIII. WHAT HAPPENS AFTER REMOVAL?

A. After removal, state court no longer has jurisdiction over the lawsuit.
1. Plaintiff can move to federal court to remand the case to state court, but state court otherwise has no further involvement.
2. Before removing a case, a defendant should consider the potential advantages of federal court and review the jurisdictional requirements and local rules for removal.

IX. BENEFITS OF REMOVAL

A. Federal courts historically grant more dispositive motions in favor of defendants than in state courts.
B. The rules of procedure and caselaw are often more consistent in federal court. (procedural consistency)
1. Federal Rules of Civil Procedure (FRCP) are the same throughout the nation.
2. All district courts in a circuit are bound by the same precedents.
C. Federal courts offer reduced liability in the case of adverse judgments.
D. The pace is often faster in federal court.
1. Federal courts tend to have more experience with certain types of lawsuits, so removal could mean that the case makes it through the court more efficiently.
2. Increased opportunities for final resolution of asserted claims through motion practice.
3. Federal courts handle about one million cases per year, while state courts handle approximately 30 million civil and criminal cases per year.
E. Jury pools in federal courts usually come from a wider geographic area.
1. A broader jury pool and greater demographic representation can lead to fairer decisions, mitigate bias, and promote impartiality.

F. Since federal judges have lifetime appointments, their courts often offer more consistency in terms of matters like docketing (efficient docket management).

X. STATE CONSIDERATIONS: WHY IT MIGHT NOT BE ADVANTAGEOUS TO REMOVE

A. State court may offer greater flexibility with procedural and evidentiary rules.

B. Some state courts may issue advisory opinions because they are not bound by Art. III.

C. Kansas:

1. Damage caps in the state of Kansas [i.e., punitive damages protections]:
    a. Punitive damages in any case are subject to damage caps in the state of Kansas pursuant to Kansas law K.S.A. 60-3702. Cap is the lesser of these two amounts:
        i. The highest annual gross income earned by the defendant in the past 5 years or if the court determines that amount will not sufficiently punish the defendant, then the court may award up to 50% of the net worth of the defendant, OR
        ii. $5 million.
2. Caselaw indicates that the Kansas punitive damage restrictions are not applicable when a case is removed because the punitive damages is viewed as procedural rather than substantive.
    a. *Somrak v. Kroger Co.*, No. 17-2480-CM-GEB, 2018 WL 1726346, at *4 (D. Kan. Apr. 10, 2018) (holding K.S.A. 60-3702(c) "merely establishes a burden of proof for punitive damages in the initial phase of the trial" but does not restrict whether a party may make a claim for punitive damages).
    b. *Riley v. PK Mgmt., LLC*, No. 18-CV-2337-KHV-TJJ, 2019 WL 2994547 (D. Kan. July 9, 2019).
    c. *Bailey v. Hyatt*, No. 15-4001-SAC, 2015 WL 4603292 (D. Kan. July 30, 2015) (granting plaintiff's Motion for Leave to File an Amended Complaint to request punitive damages).
    d. *Ayres v. AG Processing, Inc.*, No. Civ. A. 04-2060-DJW, 2005 WL 1799261 (D. Kan. July 22, 2005).
    e. Further indicates that the mechanism for determining the value of punitive damages is left to a jury (might be better staying in state court with no cap and a jury to decide).
        i. **KS Stat § 60-3701 (2021)**. "The trier of fact shall determine whether punitive damages are recoverable. Then a separate proceeding should be conducted by the court to determine the amount of damages to be awarded."
3. Under Kansas law, a party may not plead punitive damages before being granted leave to do so. (K.S.A. 60-3703)

a. **K.S.A. 60-3703. Filing an amended pleading to claim punitive damages**. "No tort claim or reference to a tort claim for punitive damages shall be included in a petition or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim pursuant to K.S.A. 60-209, and amendments thereto. The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed on or before the date of the final pretrial conference held in the matter."

4. Federal court is often unreasonable in deadlines. They will not extend deadlines even when parties are in agreement about extensions.
5. A corporate disclosure statement is required as part of the removal process.
6. <u>There are specific procedural requirements for moving civil cases forward in Kansas state court.</u>
   a. <u>All motions must be written in writing and filed with the clerk.</u>
   b. Original motions should be accompanied by a brief or memo that outlines the reasons and legal authorities supporting it.
   c. When opposing a motion, a party has 10 days after service of the motion to file a written response.
      i. For motions to dismiss or for summary judgment, the response time is extended to 21 days.
      ii. A party may file a memo within 10 days after receiving the response.
   d. Some motions have exceptions to the standard rules, such as initial applications for additional time to plead.
   e. A chamber copy of every civil motion, response, and reply must be simultaneously mailed or delivered to the presiding judge.

D. Nebraska doesn't have punitive damages.
   1. Punitive or exemplary damages are prohibited under the Nebraska Constitution. Nebraska Const. Art. VII, § 5.
      a. Like KS, plaintiffs cannot request punitive damages in state court.
   2. Can they seek once they remove?
      a. Federal district courts, sitting in diversity, must apply the choice-of-law rules of the state in which the court sits. *Dorman v. Emerson Elec. Co.*, 23 F.3fd 1354, 1358 (8th Cir.), *cert. denied*, 513 U.S. 964 (1994).

i. Nebraska Supreme Court has adopted Restatement (Second) of Conflict of Laws § 146. The section provides:

a) "In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied."

ii. Nebraska courts resolve conflicts of law involving tortious conduct and damages by applying the "most significant relationship" test in Restatement (Second) of Conflict of Laws § 145 (1971). *Vanicek Lyman-Richey Corp. v. Kratt*, No. 8:21CV49, 2021 WL 4196969, at *2 (D. Neb. Sept. 15, 2021).

b. *Hanzel v. Life Care Centers of America, Inc.*, No. 8:05CV435, 2005 WL 3143112 (D. Neb. Nov. 23, 2005) (denying defendant's Motion to Strike plaintiff's request for punitive damages).

E. Mediation and Assessment Program (MAP) in Western District of MO

1. W.D. MO's alternative dispute resolution program for civil lawsuits
   a. Offers an early opportunity for litigants to meet in person and explore options for resolving the case or narrowing the issues in dispute.
2. All non-excluded civil cases filed in the W.D. are included in MAP and are randomly assigned for mediation.
   a. Parties are required to mediate cases assigned to MAP within 75 days of Rule 26(f) meeting required under FRCP.
3. When case is filed, Notice of Inclusion in MAP is issued in the case and the party initiating the lawsuit is required to service the Notice of Inclusion on all other parties in the case.
   a. Notice of Inclusion indicates to which of the three categories the case is assigned for mediation.
4. If case is assigned to Outside Mediator category → required to file a Designation of Mediator Certificate within 14 days of Rule 26(f) meeting, identifying the jointly selected mediator and the date, time and location of the in-person mediation (to occur within 75 days of Rule 26(f) meeting)
5. If assigned to Judge or the MAP Director for mediation → will receive notice of the mediation date from his or her respective office.
6. MAP General Order → contains important information.

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KEEPING IT COMP: HOW TO AVOID CIVIL LIABILITY IN YOUR WORK COMP MATTERS

I. WORKERS' COMPENSATION VS. CIVIL LIABILITY

A. Workers' Compensation

1. Under Missouri law, compensation shall be paid by an employer to an employee for his/her personal injury or death from an accident or occupational disease arising out of an in the course of the employee's employment
    a. MO. Ann. Stat. §287.120
2. Under Kansas law, compensation shall be paid unless the employee intended to cause the injury, the employee is reckless, voluntary fighting or horseplay with coworkers, etc.
    a. KS. Ann. Stat. §44.501
3. Regulated by Workers' Compensation Commission or state statutes
4. Dealt in the Workers' Compensation Commission

B. Civil Liability

1. Dealt with in district/county/local court that handles civil disputes
2. Brought by a plaintiff against a defendant for civil claims such as negligence, discrimination, or other torts
3. Regulated by state and federal law

II. EXCLUSIVE REMEDY PROVISION

A. If an employee files a workers' compensation claim against an employer, the employee is generally not entitled to also file a negligence claim against that employer for the same injury.
    1. MO. Ann. Stat. §287.120
    2. KS. Ann. Stat. §44.504

B. Exceptions are below.

III. WAYS TO MESS UP AND GO CIVIL?

A. If an employer fails to pay workers' compensation or have workers' compensation insurance, the employer may be liable for civil penalties.

B. If an employer retaliates, discriminates, acts in bad faith, fails to accommodate restrictions, etc., the employer can be liable for both workers' compensation and civil liability.

C. If employer fails to have workers' compensation insurance, then they could be civilly liable.

IV. DISABILITY

d. What is a disability?
    1. Under the ADA a person with a disability is someone who:
        a. Has a physical or mental impairment that substantially limits one or more major life activities,
        b. Has a history or record of such an impairment (such as cancer that is in remission), or
        c. Is perceived by others as having such an impairment (such as a person who has scars from a severe burn).
            i. This prong, and only this prong, has an exception for transient and minor impairments, which generally refers to smaller impairments lasting less than six (6) months.

e. Restrictions for work
    1. Under the ADA, an employer is obligated to provide reasonable accommodations to an employee with a disability
        a. A reasonable accommodation for an employee is any change to the job or the way the job is done to allow an employee with a disability to perform the “essential functions” of that job.
        b. Essential functions are those that are the reason the job exists.

V. RETALIATION

A. If an employer retaliates, by firing the employer for filing a workers’ compensation claim, the employer can be civilly liable while also liable for workers’ compensation benefits.

B. Wrongful discharge
    1. Can also apply to subsequent employers who fire an employee for filing a workers’ compensation claim against another employer.
        a. *Gonzalez-Centeno v. North Cent. Kansas Regional Juvenile Detention Facility*, 278 Kan. 427 (2004).

VI. TERMINATION OF BENEFITS

A. Kansas
    1. When can Temporary Total Disability (TTD) benefits be terminated?
        a. Once a Claimant reached MMI

b. When the Claimant returns to any type of substantial and gainful employment without restrictions.
c. When the Claimant refuses accommodated work within the temporary restrictions.
d. If the Claimant is terminated from employment for-cause if valid accommodations for work have been supplied.

B. Missouri
1. When can TTD benefits be terminated?
a. If a Claimant fails to adhere to treatment plans or fails to submit to medical evaluations prescribed by the treating physician or the court.
b. When an employee is terminated due to post-injury misconduct.

VII. CAN I VS. SHOULD I (EVEN IF YOU HAVE GROUNDS TO, SHOULD YOU?)

A. Terminate Benefits
1. Can I?
a. Maybe. It depends on the facts of the situation and termination could be an option. If the facts in your situation match any of the exceptions above, then you do have the ability to terminate benefits without possible recourse.
2. Should I?
a. Probably not. The potential loss from a civil lawsuit heavily outweighs the amount paid in benefits to the employee. Even if it is determined termination was the correct route, the cost for a defense of a filed lawsuit would likely be higher than the cost of the paid benefits.

B. Retaliation
1. Can I?
a. You can terminate an employee if he/she files a workers' compensation claim.
2. Should I?
a. No. Any form of retaliation carries with it a high cost from civil litigation. Defense for this type of claim is much higher than the general outcomes for workers' compensation claims.

C. Fail to adhere to an employee's restrictions
1. Can I
a. Send an employee home from work?
i. Probably. Sending a worker home due to restrictions can be done and save labor costs.
b. Assign an employee to light duty?
i. Yes. Changing the role of the employee is within the purview of the employer.

2. Should I
    a. Send an employee home from work?
        i. No. Sending an employee home due to their work restrictions can be viewed as a form of discrimination which could create exposure to civil liability.
    b. Assign an employee to light duty?
        i. No. Restrictions are set by treating physicians and should not be changed by the employer. Going against the treatment plan of the physician could create civil liability due to discrimination or retaliation claims.

VIII. COST OF WORKERS' COMPENSATION CLAIM VS. CIVIL LIABILITY CASE?

A. Workers' Compensation Claim
    1. For comp claims, only 2/3rds for lost wages are paid.
    2. Benefits, whether PPD or TTD, are paid for a set amount of time.
    a. Usually, a small amount of money compared to civil awards.
    3. Lower rate for legal representation.
    4. Comp claims are usually quicker to reach a resolution.

B. Civil Liability Case
    1. Full amount of lost wages are paid in civil liability cases.
    2. Possible to pay attorney's fees of the Plaintiff.
    3. Higher rates for legal representation.
    4. Much longer process at a higher rate.
    5. Plaintiffs' attorneys can be "file happy" meaning they will file a case for civil litigation any chance they get.

IX. WORKERS' COMPENSATION COURT VS. STATE/LOCAL COURT

A. Workers' Compensation Commission/Court
    1. In front of Administrative Law Judge
    2. No jury
    3. Faster process
    4. Easier/looser court rules

B. State court
    1. Can be in front of judge or jury
        a. Juries can be more volatile for businesses
    2. Longer process for discovery and being seen in front of judge, ruling on motions, or issuing an order
        a. Increases defense costs

X. VIOLENCE IN THE WORKPLACE

A. Employers have a general duty to provide a safe working environment

1. 29 U.S.C. §654(a)(1)

2. *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.

3. *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.

B. Common law duties

1. *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.

C. Gun related injuries to an employee could be covered under workers' compensation if the injury arose out of and in the course of their employment.

1. See *Connon v. Colony Hotel*, 2000 WL 33676717 (finding that if the shooting of Employee A occurred in the course of his employment, then his death would be covered under Workers' Compensation. However, if the incident, i.e. Employee B shooting Employee A, was "purely personal" then such a claim would not be covered under workers' compensation.)

Notes Pages

MANAGING WORKPLACE INCIDENTS: INCIDENT REPORTS AND CIVIL LIABILITY PREPAREDNESS

I. Overview

Although the goal is always prevention, workplace incidents happen. When they happen, it is essential to be prepared for potential litigation. Therefore, always begin by reading your workplace policies to ensure that you are ready to handle the case. Litigation is stressful; acting immediately after the incident occurs is essential for civil preparedness.

A. What to do after an incident occurs:
   1. Provide necessary medical care to the individual. This may require you to recommend the employee seek professional medical advice.
      a. This can include: first aid, onsite nurse, urgent care, calling for an ambulance.
   2. Check for the hazard to ensure there is no continued threat of harm.
      a. Also check on other employees.
   3. Inform Insurance Carriers
      a. Your insurance company needs to be informed of an employee's injury as quickly as you can make them aware. They may also have their own investigation process to begin.
      b. Your insurance can help you with next steps: what forms to complete, who to contact, and what evidence needs to be saved.

II. Investigating

A proper investigation will make things run smoothly once litigation begins. Proper documentation and organization will help you in the long run. The quicker you begin the investigation after an incident, the fresher memories will be. Then, your investigation should be put into an incident report.

A. How did the incident occur?
   1. What caused the accident; has something similar occurred before.

B. Witnesses
   1. Make note of all potential witnesses to an incident.
      a. This is all individuals who witnessed AND those in the vicinity.
   2. Have each witness write a statement immediately after the incident.
   3. Be sure the witness signs their statement and/or your report.

C. Check for video footage
   1. Preserve it
      a. This may be subject to the tort of spoliation if not properly preserved.

D. Check if the accident was a violation of safety standards.
    1. Recall workplace policies, agency guidelines, and State & Federal law.

E. Drug screening
    1. It is common practice to have an employee take a drug test as close to the incident as possible.

F. Begin determining if the incident is likely compensable.
    1. Reach out to your insurance and/or attorney to assist in these determinations.

G. Make sure everything is being appropriately documented.
    1. Employees likely have forms that they need to fill out; employers also have forms.
    2. If it can be deduced to writing, have it put in writing. Memories are most fresh when the incident occurs, and these writings can be consistently reviewed.

H. Know when to contact legal counsel.
    1. If an injured employee files a claim, seek legal counsel to respond and learn your next steps.
    2. Your insurance agency and legal counsel are here to help you. Do not navigate claims alone.

III. Incident Reports

Making quality incident reports is one of the most effective tools that a workplace can implement in their investigative process. Remember, others are going to read it to become familiar with the incident. The reports should also include:

A. Contact information for the employee.
    1. It can be beneficial to include their position title and hire date.

B. Contact information for witnesses.

C. Details of what occurred and the surrounding circumstances.
    1. Include specific damages.
    2. Step-by-step analysis of the occurrence provides the most accurate detail.
    3. Note specific location.
    4. Consider what could have prevented this.
    5. Detail everyone that you spoke with.

D. Names of investigators

E. Treatment
    1. What sort of aid did the employee immediately receive.
    2. What medical facility were they sent to.

3. Who are their physicians and what is their treatment plan.

F. Follow-Up recommendations
   1. Ensure that you are retaining all necessary evidence.
   2. This should not stop you from taking subsequent changes to make safety improvements.

G. Attach/Make note of supporting evidence.
   1. Photos and videos can provide clarity around an incident. Be sure to document what supporting evidence you reviewed and what supporting evidence may still be out there.
   2. If you spoke on the phone with the injured party or witnesses, offer a recording of it to your insurance/attorney.

H. Reread your report
   1. Read the report as if you do not already know the circumstances. Is the report clear and concise? Is it only factual assertions?

I. Importance of quality reports:

   Keeping proper reports and managing workplace incidents may prevent you from being liable for sanctions or opposing party attorney fees. For example, in a case where the employer denied a claim, did not file a report of injury, denied employee's request for medical treatment, and did not authorize medical treatment, the employer/insurer was forced to pay the employee's attorney fees and costs associated with medical treatment. *Employee: Nivian Mazariegos Hernandez Employer: Butterball, LLC Insurer: Ace Am. Ins. Co.,* No. Injury Nos. 17-105883, 17-107000, 19-056530, 2021 WL 5034886, at *1 (Mo. Lab. Ind. Rel. Com. Oct. 21, 2021)

IV. What is expected to be retained?

Retention of evidence is key. Many states provide sanctions for improperly removing evidence or improper handling of the evidence. Therefore, give special attention to the following:

A. Video/Surveillance Footage

B. Drug and Alcohol Testing and Results

C. Witness Statements

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

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

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

G. Information of Other Witnesses

H. Accident Reports

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

J. Electronically Stored Information/ESI

1. Federal Rules of Civil Procedure 34(a)(1)(A) – "…any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form…"
2. The rule covers—either as documents or as electronically stored information—information "stored in any medium," to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments. *Committee Notes on Rules—2006 Amendment*.

K. Cell Phone Data

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

M. Evidence Relevant to Claimant's case:

1. Wage records
2. Accident reports completed/filed by injured employee.

N. Evidence Relevant to Respondent's case:

1. Medical records
   a. Post and prior to alleged injury
   b. Look for possible pre-existing condition that could affect compensability.

V. Spoliation

Spoliation of evidence occurs when someone has an obligation to preserve evidence regarding a claim and neglects to do so or intentionally fails to. This includes the destruction of evidence; damaging evidence; and/or losing evidence. The risks of spoliation include sanctions, and those sanctions depend on a state-to-state basis.

A. Examples:

1. When requested to produce telephone logs that reflected claimant's on duty driving hours for two years prior to his having a stroke, the employer was reprimanded for not turning over certain logs for specific dates. *Employee: James W. Degraffenried (Deceased) Sub Claimant: The Est. of James W. Degraffenried Employer: R. L.*

Hannah Trucking Insurer: Travelers' Ins. Companies, No. Injury No. 94-148430, 2001 WL 697879, (Mo. Lab. Ind. Rel. Com. June 12, 2001)

2. After being put on notice by a request for production for surveillance footage, the employer did not suspend their routine deletions of footage. This constituted spoliation. *Scalia v. KP Poultry, Inc.*, No. CV193546TJHPLAX, 2020 WL 6694315, at *5 (C.D. Cal. Nov. 6, 2020), report and recommendation adopted sub nom. *Stewart v. KP Poultry, Inc,* No. CV1903546TJHPLAX, 2021 WL 4988034 (C.D. Cal. Mar. 10, 2021)

B. Spoliation: Comparison

1. Spoliation in Kansas
    a. Kansas law does not currently recognize an independent tort action for the spoliation of evidence; The Supreme Court of Kansas concluded in *Koplin v. Rosel Well Perforators, Inc.,* that absent some independent tort, contract, agreement, voluntary assumption of duty, or some special relationship of the parties, the new tort of spoliation of evidence should not be recognized in Kansas under the facts presented. *Id.* at 215; 734 P.2d at 1177. Consequently, the U.S. District Court for Kansas held that the Supreme Court of Kansas would recognize the tort of spoliation under some limited circumstances. *Foster v. Lawrence Memorial Hosp.*, 809 F.Supp. 831, 838 (Kan. 1992)
2. Spoliation in Missouri
    a. “Spoliation is the intentional act of destruction or significant alteration of evidence; the concealment or suppression of relevant evidence, or the failure to determine whether certain evidence exists may also constitute spoliation.” *Wilmes v. Consumers Oil Company of Maryville*, 473 S.W.3d 705 (Mo. Ct. App. W.D. 2015); *Pisoni v. Steak N’ Shake Operations, Inc.*, 468 S.W.3d 922 (Mo. Ct. App. E.D. 2015); *see also State ex rel. Zobel v. Burrell*, 167 S.W.3d 688, 681 (Mo. Banc 3005).
    b. The destructive act must be intentional; mere negligent destruction of evidence does not constitute spoliation, *Pisoni v. Steak 'N Shake Operations, Inc.,* 468 S.W.3d 922, 926 (Mo. Ct. App. 2015).
3. Spoliation in Illinois
    a. “To state a cause of action for negligence, a plaintiff must plead the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, an injury proximately caused by the breach, and damages.” Boyd v. Travelers Ins. Co., 166 Ill. 2d 188, 194–95, 652 N.E.2d 267, 270 (1995), as modified on denial of reh'g (June 22, 1995). The general rule is “that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute.” *Id*.

b. The Illinois Supreme Court upheld *Boyd* almost a decade later noting that *Boyd*: articulated a two-prong test for determining when there is a duty to preserve evidence. As a threshold matter, we must first determine whether such a duty arises by agreement, contract, statute, special circumstance, or voluntary undertaking. If so, we must then determine whether that duty extends to the evidence at issue—i.e., whether a reasonable person should have foreseen that the evidence was material to a potential civil action. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 336, 821 N.E.2d 227, 231 (2004). (internal citations and omissions omitted).

C. Why Spoliation Matters

1. Kansas – *"Adverse Inference Instruction"*

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

2. Missouri – *"Adverse Inference"*

   a. No jury instruction: however, "[a] party who intentionally destroys or significantly alters evidence is subject to an adverse evidentiary inference under the spoliation of evidence doctrine." *Baldridge v. Director of Revenue*, 82 S.W.3d 212, 222 (Mo. App. 2002).

   b. When an adverse inference is urged, it is necessary that there be evidence showing intentional destruction of the item, and also such destruction must occur under circumstances which give rise to an inference of fraud and a desire to suppress the truth.

   c. As noted by the Missouri Supreme Court Committee on Jury Instructions, many things cannot be stated in instructions, including inferences. *Berger v. Copeland Corp., LLC*, 505 S.W.3d 337, 339 (Mo. Ct. App. 2016).

3. Illinois— "Negative Inference Instruction"

   a. If a party to this case has failed [to offer evidence] within his power to produce, you may infer that the [evidence] be adverse to that party if you believe each of the following elements:

      i. The [evidence] was under the control of the party and could have been produced by the exercise of reasonable diligence.

ii. The [evidence] was not equally available to an adverse party.

iii. A reasonably prudent person under the same or similar circumstances would have [offered the evidence] if he believed [it to be] favorable to him. No reasonable excuse for the failure has been shown. Ill. Pattern Jury Instr.-Civ. 5.01, Ill. Pattern Jury Instr.-Civ. 5.01

D. Possible Sanctions for Spoliation

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

1. Kansas

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

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

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

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

2. Missouri

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

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

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

3. Illinois

Rule 219(c) provides that remedies may be those that are just and include “among others: (i) staying the proceedings until the order is complied with; (ii) barring the party from filing any other pleading relating to any issue to which the refusal relates; (iii) barring the offending party from maintaining a particular claim, counterclaim, third-party complaint, or defense relating to that issue; (iv) barring witnesses from testifying concerning that issue; (v) entering a default judgment or a dismissal against the offending party as to claims or defenses about which the issue is material; (vi) striking any pleading relating to that issue; (vii) where a money judgment is entered for fees

or expenses, order interest to be paid for the period of pre-trial delay caused by the behavior." IL R S CT Rule 219.

VI. Privileges

Employers should always work alongside an attorney in dealing with evidence that is requested by the employee. Often, there may be a privilege that can prevent turning over certain evidence.

A. General Attorney-Client Privilege:

This involves communications between the attorney and their client. This is not discoverable unless you wish to turn over this evidence. Consulting your attorney can help you determine when that is the right choice in your case. Note that your attorney will not reveal information related to your representation without informed consent (the attorney can be subject to discipline). It is important to remember that disclosing the advice of an attorney to a third party can break the attorney-client privilege.

B. Kansas Privilege:

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

This means that the privilege applies to what the attorney tells their client; and what the client tells their attorney.

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

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

C. Missouri Privilege:

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

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

The attorney-client privilege prohibits the discovery of confidential communications, oral or written, between an attorney and his client with reference to litigation pending or contemplated. *Ratcliff v. Sprint Missouri, Inc.* (App. W.D. 2008) 261 S.W.3d 534. Privileged matters are not discoverable unless privilege is waived. *Barrett v. Mummert* (App. E.D. 1994) 869 S.W.2d 282.

One additional note to privileges, generally, is whether you must turn over the investigative reports created after the accident. Remember, your attorney represents the employer, not individual witnesses. Therefore, attorney-client privilege will likely only apply to the employer or insurer itself. However, other privileges such as the work product doctrine or insured-insurer privilege may apply to the investigative report.

D. Common-Interest Privilege

The concept known as insured-insurer privilege is defined as the common-interest privilege. “Case law varies regarding the precise meaning of “common.” At the most restrictive end of the spectrum, some cases indicate that a common interest means an identical interest. But other cases state that something less than identical interests can suffice to trigger the privilege.”[1] The insurer and the insured “might jointly argue that their common interest against the third-party claimant is a defensive shield against discovery by that claimant of communications among the insurer, the insured, and their counsel. Accordingly, the common interest doctrine can be invoked both offensively (as a sword by the insurer against the insured) and defensively (as a shield by the insurer and the insured jointly against the third-party claimant).”[2]

There are two general approaches to this issue: the broader view is that an insured's communication to its liability or indemnity insurer as to an incident possibly giving rise to liability covered by the policy is protected from disclosure by the attorney-client privilege, while other courts espouse the view that such communications are only within the attorney-client privilege if actually made for the purpose of obtaining legal advice 48 A.L.R.7th Art. 7 (Originally published in 2020). The insured, the carrier, and the lawyer should be able to communicate without waiving the privilege with respect to the other parties in the litigation, either by virtue of the common interest doctrine or, in some states, by statute. *Id*.

The court held *in Grinnell Mutual Reinsurance Corporation v. Rambo*, 2014 WL 12616792 (W.D. Mo. 2014) that an insurer did not, and could not, waive the insured-insurer privilege, because that privilege belonged to the insureds. The insureds, the court elaborated, had not waived the insured-insurer privilege. While the insureds were listed as defendants in the instant declaratory judgment action, the insureds had

[1] Kenneth Duvall, The Common Interest Privilege, ABA (2021) The Common Interest Privilege: What Exactly Is It, and When Does It Apply? (americanbar.org).
[2] *Id*.

not requested the discovery at issue and had not joined in the motion to compel filed by the defendants. These communications could not be compelled. Id.

This privilege is especially relevant regarding incident reports and additional investigative materials completed by the insurer. For instance, if the report is done in the regular course of business, it is likely discoverable. Whereas, if the report is done at the request of the insurance company, it likely falls within the insured-insurer privilege and in anticipation of litigation. Some courts have indicated that this is challenging to determine if something was done in anticipation of litigation.

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HOW MOCK JURIES AND FOCUS GROUPS CAN STRENGTHEN DEFENSE STRATEGIES

I. IMPORTANCE OF AN EFFECTIVE DEFENSE STRATEGY

A. An effective defense strategy can be the key difference between success and failure in litigation.

B. Central to strategic success are tools like mock juries and focus groups, which play a pivotal role in refining and strengthening defense strategies.

C. Mock juries and focus groups provide valuable insight into the minds of potential jurors, and provide attorneys with a unique opportunity to test arguments, assess evidences, and anticipate juror reactions in a controlled environment.

II. UNDERSTANDING MOCK JURIES

A. Definition and purpose of mock juries
   1. A mock jury trial is like a dress rehearsal for the actual trial.
   2. They are simulated jury trials composed of individuals who mimic potential jurors. Their purpose is to replicate real trial conditions to help lawyers test out their case and evaluate arguments and witness testimonies before going in front of the real jury.

B. How mock juries simulate a real jury environment
   1. The format and presentation are similar to an actual trial.
      a. The room is set up to mimic an authentic courtroom: consisting of a witness stand, counsel tables for each side, and a jury box.
      b. The trial team practices their examination and arguments with additional attorneys assuming the role of opposing counsel. These additional attorneys may include in-house jury specialists, outside jury consultants, or firm attorneys otherwise uninvolved in the action.

C. Benefits of using mock juries for defense strategies
   1. Mock jurors offer valuable insight into juror perspectives and reactions, which are essential for thorough case preparation.
   2. During mock jury deliberations, the proceedings are live-streamed or recorded. This includes audio and video recordings of the entire presentation and juror discussion, providing comprehensive feedback to the attorneys.

III. THE PROCESS OF CONDUCTING MOCK JURIES

A. How mock juries are put together
   1. Mock jurors are mostly recruited from online consumer research panels.

a. They are people who have agreed to participate in online research projects in return for some type of incentive (typically monetary).
b. They are then given a short questionnaire to make sure they meet the criteria to serve on juries and to participate in the specific project.

B. Selecting mock jurors
   1. Mock jurors should accurately represent the demographics of potential jurors in the trial's venue.
      a. Therefore, the mock jury should ideally be conducted in or near the city where the trial would occur.
      b. Mock jurors should meet the eligibility criteria to serve on actual juries, such as being registered voters or having a valid driver's license.
      c. Efforts are made to mirror the composition of a real jury, so jurors are carefully selected by gender and occupation.
         i. However, achieving a perfect match to a real jury can be challenging due to scheduling constraints and the modest compensation offered to mock jurors, which may affect availability during regular business hours.
   2. Once chosen, the mock jurors are then given instructions on how to evaluate evidence, arguments, witness credibility and other relevant aspects of the case.

C. Designing case presentations and scenarios
   1. Attorneys for both sides will present their opening statements
   2. Subsequently, each side will present their case by calling witnesses to testify, present relevant exhibits and evidence, and possibly call experts to provide opinions or interpretations of the evidence.

D. Gathering feedback and insights
   1. Throughout the day, the mock jurors are periodically asked to complete evaluations, sharing their perspectives on the arguments, evidence and witnesses presented.
      a. In some instances, jurors are provided with devices for real-time feedback, enabling attorneys to identify moments when jurors were confused, engaged, indifferent, or had favorable or unfavorable reactions to specific aspects of the trial.
   2. Once each side presents their case, the mock jury will deliberate.
      a. The jurors will be given instructions and will discuss the case among themselves and provide a verdict.
      b. Facilitators may be present to guide the jurors and help monitor the process.
      c. The mock jurors will then reach a decision.
   3. Following deliberations, jurors typically provide feedback and insight on various aspects of the case – what they liked, what they didn't like, what was persuasive, and what they didn't understand.

4. The attorneys then analyze this data and adjust their trial strategies accordingly.

IV. KEY BENEFITS FOR DEFENSE STRATEGIES

A. Mock juries help attorneys identify strengths and weaknesses in their case – allowing them to focus on presenting their most compelling evidence and arguments at trial.

B. Mock juries give defense attorneys real data to make settlement decisions.
   1. Should a mock jury offer negative feedback, attorneys may reassess their stance and lean towards negotiating a settlement rather than facing potential adverse trial outcomes.
   2. Conversely, receiving positive feedback from a mock jury can enhance one's negotiating leverage in settlement talks.

C. Testing different trial strategies and approaches
   1. Mock juries provide a controlled environment for testing different trial strategies and approaches.

D. Enhances understanding of the jury's decision-making process by addressing key questions:
   1. How do jurors assess the relative importance of different facts and evidence.
   2. What evidence is readily accepted by jurors, and which requires further substantiation.
   3. How do jurors evaluate the credibility and value of various witnesses and testimonies.
   4. What logical framework do jurors use to synthesize evidence and testimony into a verdict.
   5. Which words and phrases resonate with jurors, and how can communication be optimized to effectively convey points.
   6. What emotional factors influence mock jurors during deliberations.
   7. What demographic profiles of real jurors are likely to favor your client's case.

E. Predicting potential juror reactions, biases, and demographics
   1. Demographic
      a. Mock juries consist of individuals who mirror the expected jury pool demographics such as age, gender, ethnicity, socioeconomic status, and occupation.
      b. By replicating the diversity of potential jurors, attorneys can observe how various demographic groups might interpret the case.

F. Most importantly, mock juries help predict the value of the case
   1. While they cannot predict what the real jury will decide, mock juries provide a reasonable estimate on how jurors may see the case and what award may be given.

2. This predictive value assists attorneys in knowing the potential risks and outcomes of going to trial verses settling.

V. CASE STUDIES AND EXAMPLES

A. Examples of successful defense strategies informed by mock juries

1. Several years ago, a law firm conducted 8 mock trials for an insurance bad faith case.
    a. Initially, the attorneys pursued a strategy that ultimately backfired, resulting in losses in all four mock trials.
    b. Subsequently, they abandoned that strategy and conducted four more trials with a revised approach. This new strategy proved successful, as all four mock juries awarded $1.5 million.
    c. During the actual trial, the attorneys employed the same successful strategy, leading the jury to award them $1.5 million.
        i. Wilson, Mark B. “Mock Trials - One of the Most Powerful Tools for Case Evaluation and Trial Preparation.” Klein & Wilson. Accessed June 26, 2024. https://www.kleinandwilson.com/publications/mock-trials-one-of-the-most-powerful-tools-for-case-evaluation-and-trial-preparation/#:~:text=Mock%20Trials%20Provide%20an%20Unbiased,arguments%20on%20an%20objective%20basis. Impact on trial outcomes and settlements

VI. FOCUS GROUPS: COMPLEMENTING MOCK JURIES

A. Definition and objectives of focus groups in legal contexts

1. Focus groups are structured, moderated discussions involving diverse participants who analyze case themes and potential biases among jurors.

B. How focus groups provide additional insight

1. Feedback on case themes and arguments: participants provide valuable feedback on themes and arguments presented, highlighting what resonates or lacks persuasiveness.
2. Uncover potential biases and prejudices among potential jurors: through open discussions, focus groups reveal implicit biases that could influence jury perception and decision-making.
3. Help refine trial strategies and messaging to better resonate with the jury: insights gathered from focus groups guide adjustments in trial strategies, ensuring that arguments are framed in ways that maximize juror understanding and receptivity.

VII. CONDUCTING FOCUS GROUPS

A. Selecting participants
   1. The selection process mirrors that of mock juries, aiming to recruit individuals who closely match the demographics of the potential jury pool. Diversity of age, gender, and socioeconomic status provide a better range of perspectives.

B. Presentation of the case
   1. Introduction of the case: participants are briefed on the case background and issues at stake to provide context for their evaluation.
   2. Focus on key points, evidence, or legal arguments: attorneys present specific elements of the case they wish to explore or test with the group, fostering detailed discussion.
   3. Facilitated discussion: Participants engage in interactive discussion, and are encouraged to ask questions, share opinions, and discuss initial impressions of the case based on presented information.
   4. Feedback: structured feedback mechanisms capture the strengths, weaknesses, common themes, and areas needing clarification in the case presentation.
   5. Adjustments to strategies and arguments are made to help strengthen the presentation of the case before trial.

C. Difference in methodology compared to mock juries
   1. Focus group exercises can generally be completed in a day or less.
   2. Focus groups are less expensive and time consuming than mock juries.
   3. While utilized across legal contexts, focus groups are predominantly employed by plaintiffs.

D. Leveraging focus groups for specific case aspects
   1. Test multiple arguments: different arguments or interpretations can be tested to gauge their effectiveness with a diverse audience.
   2. Isolate specific arguments: focus groups allow for focused testing in particular arguments, facts, or exhibits to assess their impact on participant understanding or on the case as a whole.
   3. Ensure clarity: important testimony can be presented to ensure jurors understand what is being presented to them and ensure it elicits the desired juror reactions.

VIII.ADVANTAGES OF INCORPORATING FOCUS GROUPS

A. Understanding public perception and community sentiments: insight from focus groups provides attorneys with an understanding on how the case might resonate with potential jurors and the broader community.

B. Fine tuning communication strategies: feedback helps refine communication strategies to ensure legal arguments are clear, compelling, and effectively conveying the client's position.

IX. WHEN WOULD YOU WANT TO USE A MOCK JURY VERSUS A FOCUS GROUP

A. Mock jury
   1. When the case involves complex issues, technical details, or nuanced arguments.
      a. Mock juries replicate jury deliberations, offering insight into how jurors might interpret intricate aspects of the case.
   2. For trial preparation
      a. Mock juries help predict how jurors might react to evidence, witnesses, and arguments presented at trial, helping in the refinement of trial strategies and the identification of strengths and weaknesses in the defense's case.
   3. In-depth feedback
      a. Mock juries typically provide more comprehensive feedback compared to focus groups.
   4. Testing legal strategies
      a. Mock juries closely simulate the trial environment, allowing for testing of specific legal arguments or defenses.

B. Focus groups
   1. Fast and straightforward
      a. Focus groups are preferred when you need a quick, preliminary assessment of how laypersons perceive the case, without going into detailed arguments or trial preparation.
   2. Cost-effective
      a. Mock juries can be costly. If budgetary constraints are a concern, focus groups offer valuable feedback at a lower expense.
   3. Simplified cases
      a. If the case involves facts that are straightforward, focus groups can offer efficient feedback on basic themes or arguments.
   4. Time efficiency
      a. When time is limited, focus groups efficiently provide feedback on basic themes or arguments.

X. CONCLUSION

A. Mock juries and focus groups are valuable tools in helping create effective defense strategies.
    1. Mock juries offer a dynamic rehearsal of trial scenarios, allowing for thorough testing and refinement of legal arguments.
    2. Focus groups offer quick and cost-effective feedback from a layperson perspective, which can be key in identifying potential strengths and weaknesses early in the case preparation process.
B. These tools enable legal teams to develop nuanced and well-informed defense strategies that are better positioned to achieve favorable outcomes in litigation.

Notes Pages

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