RISK TRANSFER STRATEGIES

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

A. Overview

In today's business environment, managing risk is an essential component. One effective way to manage risk is through risk transfer. Risk transfer is exactly what it sounds like—transferring risk to another party to limit personal liability. Risk transfer encompasses various methods of protecting businesses from potential financial instability and ultimately acts as a mechanism for business continuity. Effective risk transfer in contractual situations enables parties to reasonably anticipate and manage uncertainties, minimize disputes, and protect themselves from financial exposure.[1] The parties to a contract would likely prefer that no liability arises during the contractual relationship, but each party must take the appropriate steps to ensure that they are either protected from liability or prepared to assume liability. When allocating risk contractually, parties should (1) identify the risks, (2) assess their capabilities and expectations, and (3) evaluate the likelihood and potential impact of identified risks. Keeping these three principles in mind while examining the different types of risk transfer strategies can assist drafters in safely and efficiently allocating their risk.

B. Contractual Risk Transfer Strategies

1. Contractual Indemnity
   a. Indemnification is a contractual obligation that allocates the expense incurred because of a party's breach to the responsible party.[2] Indemnification clauses function like liquidated damage clauses, as they can be enforced when a breach occurs, but in addition, they can be enforced before a breach occurs. In other words, indemnification clauses are enforceable when an anticipated breach arises.[3]
   b. Indemnities can be one-way or mutual.[4] Mutual indemnities require both contracting parties to compensate the other for expenses that arise out of their own breach, while one-way (unilateral) indemnities only provide this protection for one party.[5]
2. Liability vs. Damages
   a. A common way to allocate risk is by indemnifying a party. There is a fine difference in this rule between "liability" and "damages". If the indemnity is against "liability" then it "becomes collectible immediately when the indemnitee

[1] Aaron Hall, *Contract Risk Allocation Guide*, AARON HALL ATTORNEY, https://aaronhall.com/contract-risk-allocation-negotiation-guide/ (last visited June 12, 2025).
[2] Kevin O'Flaherty, *What is Indemnification? Indemnification Clauses Explained*, O'FLAHERTY LAW (Jan. 8, 2024).
[3] Maxim Technologies, Inc. v. City of Dubuque, 690 N.W.2d 896 (Iowa 2005).
[4] *See e.g.,* St. Paul Fire & Ins. Co. v. CP Well Testing, LLC, 489 F. Supp. 635, 641 (W.D. Tex. 2020).
[5] *See id.*

becomes liable to the third person," but "an indemnity against 'damages' becomes collectible only after the indemnitee has paid the third person."[6]

3. Coverage
    a. Some cases hold that the indemnity provision only covers third-party claims unless they say otherwise. Thus, indemnification provisions may not cover claims, losses, expenses, attorneys' fees, associated with a claim between the licensor and the licensee, absent a contrary agreement.[7]

II. IMPLIED VS. EXPRESS INDEMNITY

A. How is Express Indemnification created?
    1. An indemnification obligation can arise "by virtue of express contractual language establishing a duty in one party to save another harmless upon the occurrence of specified circumstances."[8]

B. Indemnity Provisions: Validity and Enforcement
    1. Indemnification agreements are permitted under federal law, so long as they do not transfer liability from a responsible party to a non-responsible party.[9]
    2. Kansas
        a. Indemnity Agreements are disfavored and strictly construed against the relying party in Kansas. Contract language must clearly and unequivocally show an intent to exculpate a party from its own negligence.
        b. K.S.A. 16-121(b) states that an indemnification provision that requires the promisor to indemnify the promisee for the promisee's own negligence or intentional acts is void and unenforceable.
        c. K.S.A. 16-121(c) states that a provision requiring a party to provide liability coverage to another party as an additional insured for their own negligence or intentional acts is void and unenforceable.

C. What constitutes clear and unequivocal language in Kansas and Missouri?
    1. In Kansas, courts have specifically advised parties wishing to include indemnity agreements to use the following language:
        a. "The parties agree that if a loss or damage should result from the failure of performance or operation...of the [Rollins] system, that Rollins' liability, if any, for the loss of damage thus sustained shall be limited...and that the provisions of this paragraph shall apply if a loss or damage...results...from negligence...of

[6] Parks v. Western Washington Fair Ass'n, 15 Wash. App. 852, 553 P.2d 459 (Div. 2 1976)
[7] Hooper Associates, Ltd. v. AGS Computers, Inc., 74 N.Y.2d 487, 491–493, 549 N.Y.S.2d 365, 366–368, 548 N.E.2d 903 (1989)
[8] E. L. White, Inc. v. City of Huntington Beach, 21 Cal. 3d 497, 506–507, 146 Cal. Rptr. 614, 579 P.2d 505 (1978).
[9] 33 U.S.C.S. § 2710.

Rollins, its agents, or employees." *Zenda*, 894 P.2d at 888 (citing *Corral v. Rollins protective Servs. Co.,* 732 P.2d 1260 (1987)).

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

D. Statutory Provisions Invalidating Indemnity Clauses

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

E. How is Implied Indemnification Created?

1. An implied obligation to indemnify can arise "from the contractual or legal relationship implied between the parties."[10] Generally, an implied contractual indemnification arises when a party owes a duty to a third party but transfers the duty by implied duty to another.[11]
2. Types of Circumstances When Implied Indemnification Arises.
   a. There are normally two sets of circumstances when an implied indemnification may be recognized. The first revolves around an implied contract theory, while the second can be implied under an "implied-in-law' theory when one tortfeasor has paid for a loss that should have been the responsibility of the other. The rationale for this relationship arises to indemnify to prevent unjust or an unfair

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

result.[12] The law provides that this theory under the idea that everyone is responsible for the consequences of their own actions, and if someone has been compelled to pay damages that should have been paid by the true wrongdoer, they may be held accountable via implied indemnity.

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

F. Example 1 – *Underwood v. Fulford*[13]
    1. A real estate broker hired an agent to purchase two specific properties for her. Instead, the agent and a partner decided to purchase the two houses for themselves. The broker sued and retained a $150,000 judgment holding the agent and the broker jointly and severally liable. The agent paid the entire balance of the judgment and sued his partner's estate (who had recently passed) for a portion of the judgment he had paid. Despite the absence of a formal contract granting the partner's estate indemnification, the court held that the estate was indemnified from paying the agent any balance of the judgment. The court reasoned that since the duty of care was owed by the agent to the broker, and since there was no wrongdoing by the partner, despite being liable in tort, can be indemnified from paying any amount of the judgment.

G. Example 2 – *Godoy v. Abamaster of Miami, Inc*. [14]
    1. A plaintiff lost four fingers on her right hand while using a meat grinder and sued the retailer, the wholesaler that sold the grinder, and the importer which sold the grinder to the wholesaler. The jury apportioned 40% fault to the plaintiff, 50% to the wholesaler, and 10% to the importer. The court ruled that when the manufacturer was not subject to the jurisdiction of the court, a wholesaler may be entitled to indemnification from an importer which is higher up the distribution chain and closer to the manufacturer, when both are strictly liable to the plaintiff. The court explained that holding the importer liable satisfied the public policy consideration underlying the doctrine of implied indemnity. Implied-in-law

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

indemnity is similar to a tort-based doctrine rather than contract-based. Implied-in-law indemnity is often used in vicarious liability cases to shift the loss from the party who legally was required to pay the loss to the party whose wrongful or negligent conduct actually caused the loss.

H. Indemnity Provisions and Workers' Compensation laws

1. In Kansas, injuries sustained by workers are typically covered by the Kansas Workers Compensation Act under K.S.A. 44-501(b). K.S.A. 44-501(b) was not intended to abrogate contractual rights and duties between consenting parties under a contract entered into with full knowledge of its provisions. Exclusive remedy provisions of the Kansas Workers' Compensation Act won't bar third-party claims against an employer when those claims are based on express indemnification agreements.
2. In Missouri, employers usually enjoy immunity from civil suits due to workers' compensation. However, employers may contract to indemnify a third party for damages owed to an employee. Employer's liability not for employee's personal injury but for the breach of independent duty to a third party expressly agreed to perform.

III. CONTRACTUAL ADDITIONAL INSURED PROVISIONS

A. Definition

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

B. Example

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

C. Pitfalls in Drafting

1. "Active operations"
    a. When used, this phrase can bind those insured to liability resulting from after the contracted work is finished.

2. “Individual negligence”
    a. Provides an exception for the additional insured if the party is individually responsible for the injury that occurred.
3. “State specific rules”
    a. Some states prohibit one party being liable for another party’s own negligence. Check your state’s specific rules before drafting an individual negligence provision.
4. “Within the terms of the agreement”
    a. Including this term can limit one’s liability as claims resulting from other liability such as personal and advertising could be covered under the additional insured provision. This phrase limits this liability even further.

D. Common Phrases Used for Drafting Language
1. “Arising out of”
    a. Can provide easy to identify language to cover specific events.
2. “But only with respect to liability arising out of [insured]’s work”
    a. Narrower language and can name specific parties to avoid confusion.

E. Attorneys’ Fees and Costs to Defend
1. In Kansas, no attorneys’ fees are available where language of an indemnity provision does not provide for them. This is true even if a previous provision provided for attorneys’ fees. Only provisions explicitly including attorneys’ fees will provide for them.
2. In Missouri, the indemnitee/contractor is entitled to legal expenses incurred in defending a claim. The indemnification provision must explicitly provide for legal expenses for “establishing the right to indemnity” to recover expenses incurred in pursuing indemnification.

IV. NON-CONTRACTUAL RISK TRANSFER STRATEGIES

A. Equitable Indemnity
1. When a court requires one party to pay the other party for a wrong or misconduct, absent a contractual provision requiring it, simply because the principle of equity demands it.
2. Also called implied-in-law indemnity.
3. Missouri
    a. R.S.Mo. 537.060
        i. Noncontractual indemnity (equitable indemnity) refers to indemnity “between joint tort-feasors culpably negligent, having no legal relationship

to each other and does not include indemnity which comes about by reason of contract, or by reason of vicarious liability."

ii. Equitable indemnity is dischargeable in the event of a good faith settlement pursuant to R.S.Mo. 537.060.

b. To establish a claim for equitable indemnity, the plaintiff must show:

i. The discharge of an obligation by a plaintiff;

ii. The obligation discharged by the plaintiff is identical and co-extensive to an obligation owed by the defendant;

iii. The discharge of the obligation by the plaintiff is under such circumstances that the obligation should have been discharged by the defendant; and

iv. The defendant will be unjustly enriched if the defendant does not reimburse the plaintiff to the extent that the defendant's liability has been discharged.[15]

4. Kansas

a. Kansas does not have a statute that permits equitable indemnity.

B. Equitable Contribution

1. Doctrine of equitable contribution should be applied "when one is compelled to pay more than his share of a common obligation that several persons are obligated to discharge."[16]

2. Missouri courts note that "indemnity" and "contribution" are frequently used interchangeably, but "indemnity" is proper when full reimbursement is at issue and "contribution" is proper when partial reimbursement is sought.[17]

V. DEFINING RISK LIMITATION – LIMITING OR NARROWING RISK

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

[15] Beeler v. Martin, 306 S.W.3d 108, 111 (Mo. App. W.D. 2010).
[16] Tindall v. Holder, 892 S.W.2d 314, 323 (Mo. App. S.D. 1994).
[17] *See* Stephenson v. McClure, 606 S.W.2d 208, 211 (Mo. Ct. App. 1980).

A. Types of Risk Limitation
    1. Contractual Damage Limitations
        a. Overview of Damages
            i. When a party breaches a contract, typical damage remedy analysis is performed to award damages such as expectation, reliance, or restitution to the non-breaching party. These damage awards can often be unpredictable and leave breaching parties responsible for larger damage awards than they anticipated. To remedy this, parties can contract to agree to a specific remedy that will take effect instead of one of the automatic remedies that most courts will impose.
        b. Waiving Liability in a Contract
            i. Generally, where parties contract to agree to a remedy in the event of the breach, their agreement will control, provided the remedy is "mutual, unequivocal, and reasonable".[18] Despite allowing for the parties to agree upon their own remedy, courts still have the authority to decide if the remedy is indeed "mutual, unequivocal, and reasonable".
        c. Example of a Limitation
            i. If a contract provides for liquidated damages, a court may not award damages in excess of the actual damages that occurred (a $10,000 injury cannot be compensated with a $10,000,000 liquidated damage clause).
    2. Contractual Waivers
        a. A contractual waiver is a useful tool to avoid risk by removing all risk completely. The most common contractual waivers are seen when one party is contracting with another party to partake in a sporting or athletic event such as swimming, attending an amusement park, or skiing.
    3. Consideration
        a. In consideration for partaking in the potentially hazardous event, the other party is giving up their right to sue for any injury or breach of the standard of care usually necessary for that activity.
    4. Pitfall in Drafting the Provision
        a. The most important aspect to remember in drafting a contractual waiver is to make the waiver plainly obvious that a reasonable person will be able to understand what they are agreeing to. Despite a party signing, if the provision is not obvious and liberal in its language, courts could disregard the provision.

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

5. Example – *Ferbet v. Hidden Valley Golf and Ski, Inc.*
    a. An example of this is seen in *Ferbet v. Hidden Valley Golf and Ski, Inc.* when a guest at a ski resort went snow tubing down a hill and broke his leg when his foot engaged with a crevice in the sliding surface of the slope.[19] The skier alleged that his injury was due to the negligence of ski resort, and the ski resort insisted that the skier's signing of a 'release of liability' agreement barred him from bringing a claim. The relevant portion of the waiver said:

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

    b. The Missouri Court of Appeals first acknowledged that contractual waivers are disfavored, but not void as against public policy. They explain that the party best positioned to prevent the harm is relieved of liability and instead the burden of loss is placed upon the party least able to prevent it, which disfavors the public policy argument. To counter this position, contractual waivers require words such as "negligence" or "fault" or their equivalents to be used so that a clear and unmistakable waiver and shifting of risk occurs.[20] In other words, to help protect potential plaintiffs, the waiver must not be grouped in with other clauses and must be plainly obvious what the party is contracting to do. The Court held that this ski resort contract can be enforced. There was no doubt that a reasonable person agreeing to the waiver actually understood what the claim he is waiving was about.
6. Check State Specific Laws
    a. It should be noted that it is important to check the state law regarding liability waivers/exculpatory clauses. While the majority of states have similar approaches to Missouri, some states such as Montana statutorily prohibit liability waivers or alternatively strongly disfavor them as a matter of public policy.
7. Arbitration provisions
    a. Arbitration provisions offer an unconventional way to limit risk. Instead of avoiding liability, arbitration provisions offer a way for parties to avoid the costs

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

of litigation and instead allow for an arbitrator to settle the dispute. The obvious hurdle to overcome is to actually draft an effective arbitration clause to ensure that the claims successfully get to arbitration.

VI. SEVEN PITFALLS OF DRAFTING ARBITRATION CLAUSES[21]

A. Equivocation

1. First and foremost, an arbitration clause must clearly state that the parties have agreed to binding arbitration.

B. Inattention

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

C. Omission

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

D. Over-specificity

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

E. Unrealistic Expectations

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

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

F. Litigation-Envy

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

G. Over-reaching

1. A drafter must resist the temptation to unfairly favor its own interests in the drafting of the arbitration clause. For example, the Fourth Circuit Court of Appeals voided an overreaching provision that allowed for the arbitrators to be picked from a list the drafter created, requiring the opposing party to file all witnesses and facts, allowing the drafter to amend, record, modify, or cancel the arbitration provision, but not the opposing party.[22]

VII. SUBROGATION WAIVER

A. Definition

1. A subrogation waiver is a clause in which parties to a contract excuse one another from liability to the extent covered by insurance, allocating the loss to the insurance company. As a general example, an owner's house had burned down, and the insurer paid the owner loss and sued the general contractor to recover the payment. However, the owner and the contractor had a waiver-of-subrogation provision in the construction contract, thus barring the insurer's claim against the contractor.[23]

B. Function

1. Subrogation allows an insurer who has paid a loss to step into the position of the injured party and assert the injured party's or insured's rights against the party who is allegedly responsible for the loss and thereby be reimbursed for the payment. [24]

C. Positive Public Policy

1. The public policy argument behind subrogation waivers differs from liability waivers despite both waivers being similar in execution. Public policy tends to favor enforcing subrogation waivers regardless of the type of conduct involved (even if it is willful and wanton misconduct)[25]. Public policy disfavors liability waivers because enforcing liability waivers could leave an injured plaintiff uncompensated entirely. In contrast, with subrogation waivers, there is no risk that an injured party

[22] Hooters of America, Inc. v. Phillips, 173 F.3d 933, 938-939, 79 Fair Empl. Prac. Cas. (BNA) 629, 75 Empl. Prac. Dec. (CCH) P 45822 (4th Cir. 1999).
[23] Behr v. Hook, 173 Vt. 122, 787 A.2d 499 (2001)
2006 A.L.R.6th 14 (Originally published in 2006)
[24] Reliance Nat'l Indem. v. Knowles Indus. Servs., Corp., 2005 ME 29, ¶ 14, 868 A.2d 220, 226[24] 2006 A.L.R.6th 14 (Originally published in 2006)
[25] Reliance Nat'l Indem. v. Knowles Indus. Servs., Corp., 2005 ME 29, ¶ 14, 868 A.2d 220, 226

will be left uncompensated, and it is irrelevant to the injured party whether it is compensated by the grossly negligent party or an insurer. Some courts are split on this issue, but generally courts are more favorable to subrogation waivers than liability waivers. Courts also tend to favor subrogation waivers due to the beneficial economic effect. Subrogation waivers help parties avoid higher costs that come from retaining multiple insurance policies and overlapping coverage.

D. Drafting pitfall

1. One thing to be on the lookout for when drafting a subrogation waiver is to distinguish what is a subrogation waiver and what is a liability waiver, as they are two separate provisions. Often, courts will rule a general release - such as a release in a settlement agreement - between two parties did not release one party's insurer's right of subrogation to file claims against the alleged wrongful party.[26] The court said that even if the agreement were construed to purport to release the insurer's right of subrogation, the insurer was not a party and the buyer had offered nothing to support its implicit assertion that the seller had the authority to release the insurer's right to subrogation.

E. Subrogation Waivers v. Liability Waivers

1. Subrogation waivers are similar to liability waivers/exculpatory clauses as some courts have found some subrogation waivers void as public policy. Pennsylvania courts found that waivers of subrogation contained within leases were void as against public policy.[27] When a fire broke out in an office building, insurers were required to compensate tenants and sought compensation from the owners and managers or owners of the building. The owners argued that tenants had waived any rights of subrogation through a waiver. The court found that this waiver was against public policy because it relieved the defendants from liability where they violated regulations designed to protect human life. In contrast, when an oil rig worker incurred a back injury while on the job, the Court upheld a subrogation waiver between the employer and the worker because such a waiver clause in an insurance policy did not violate the Louisiana oilfield anti-indemnity act.[28] In short, it is best to check the local state rules regarding subrogation waivers, but the general tendency is they are disfavored similar to liability waivers/exculpatory clauses.

[26] Fireman's Fund Ins. Companies v. Siemens Energy & Automation, Inc., 948 F. Supp. 1227 (S.D. N.Y. 1996)
[27] Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 1993 WL 489771 (E.D. Pa. 1993)
[28] In re Falcon Inland, Inc., 1999 WL 600373 (E.D. La. 1999)

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CLAIMS GONE WILD: SOCIAL INFLATION AND THE NEW NORM

I. WHAT IS SOCIAL INFLATION?

Social inflation has been on the rise over the last decade. The term has been used in passing, but what really is “social inflation”? The term was first coined in the insurance industry, but the world of Law has now adopted it. Social inflation is the significant increase in costs and verdicts in civil litigation. The name social inflation was given because the civil litigation costs and verdicts have surpassed economic inflation without any real significant changes in the cases themselves (i.e. fact patterns that would typically warrant a higher verdict have remained consistent).

There are several factors that influence social inflation— the increase in third parties, such as outside funders or nonlawyer owned firms, being involved; the rise of nuclear verdicts; law firm advertisements; and scare tactics. Each one of these factors stems from different areas. The third-party involvement significantly rebalances credit risk, which increases costs. It also places more pressure on borrowers as they tend to request a larger portion of the verdict. Nuclear verdicts are jury awards that are higher than a rational damage amount. A verdict is usually considered nuclear when it is $10M+, but others place the bar higher. Nuclear verdicts tend to coincide with how law firm advertising influences social inflation. Turn on your local television for an hour, and it is likely you will see a law firm claiming the $10’s of millions it has won for clients. These advertisements make some of the important parties, such as plaintiffs and jurors, become normalized with such large figures. And the more frequently they are awarded, the more normal they become. Think about it from a normal economic inflation standpoint. Many remember when gas was less than $1 per gallon. However, it is now normal to consistently see prices that are $2.50+ per gallon or higher depending on where you travel. The same logic applies to social inflation. Lastly, there are the scare tactics which stem from the Reptile Theory. The “reptilian” region of the mind is the area which is sensitive to danger. So, naturally, plaintiffs try to play into this area of the mind by making the defendant appear dangerous to jurors. If they succeed in convincing the jurors of the danger, then they show the jurors how they can help mitigate this danger by using their power in the verdict and award.

Unfortunately, it does not appear that social inflation is going anywhere. Statistics from the U.S. Chamber of Commerce’s Institute of Legal reform showed that for jury verdicts of $10M+, the median verdicts have increased by 27.5% between 2010 and 2019[1]. Additionally, nuclear verdicts hit a record high in 2024 with 135 cases, a 52% increase

[1] https://www.dri.org/publications/blog/social-inflation

over 2023, having a nuclear verdict. The total sum of these verdicts was $31.3B, which roughly averages the damages to be $231.9M per case. An important note, thermonuclear verdicts, those which are $100M or greater in damages, increased to 49 verdicts in 2024. 5 of those verdicts were greater than $1B.[2]

We will dive further into what third-party litigation funding is, as well as more information on nuclear verdicts, ways to combat them, and the psychology plaintiff's counsel uses in an effort to try and prop up damages awarded by jurors.

II. THIRD PARTY LITIGATION FUNDING EXPLAINED

While the brief explanation helped to show what factors into social inflation, third party litigation is more complex. Third party litigation funding is when entities other than those directly involved in the litigation gain a direct stake in the litigation by providing funding for the activities involved in the litigation. Essentially, it is a tradeoff—the third party provides a loan for litigation activities and in return they get a portion of the verdict or settlement. Some funders will only take on a single case at a time, while others prefer to spread their risk across multiple cases. This is like hedging in the stock market.

Third party litigation funding originally started with plaintiffs, or their attorney's, receiving funding with consumer and personal litigation claims. Under this model, plaintiffs are enticed because they are receiving a non-recourse loan. If they lose, that's it. Nothing goes to the third party. If the plaintiff wins, the third party tends to take a significant portion of the verdict or settlement. However, it has since spread to commercial litigation where it funds firms and investors for mass tort matters.

By the end of 2017, the litigation funding industry had grown to $5B. Some estimate that the industry has grown to $17-$39 billion since 2017. It's clear—this is a growing industry that shows no sign of slowing down. The American Bar Association has recognized this growth and wrote an extensive paper on the effects. The ABA also adopted a resolution on best practices for third-party litigation funding, but made it clear it was not taking a formal stance on whether the practice should be permitted. A notable concern detailed in the best practices is the loss of control over the litigation which would stem from the influence of the third-party funder. However, proponents of third-party litigation funding believe that this method of obtaining funding helps level the playing field.

Some courts have addressed third party litigation funding:

> In *Maslowski v. Prospect Funding Partners LLC*[3], the Minnesota Supreme Court recognized that ". . . we cannot ignore the disparity in bargaining power between the litigation financing companies and the individuals who may feel financially compelled to turn to them in order to have their day in court." The

[2] https://www.insurancejournal.com/news/national/2025/05/22/824792.htm
[3] *Maslowski v. Funding Partners LLC*, 994 N.W.2d 293 (Minn. 2020)

Court goes on to note that there is a possibility of further regulation by the Legislature, but ultimately abolished Minnesota's common-law prohibition against champerty.

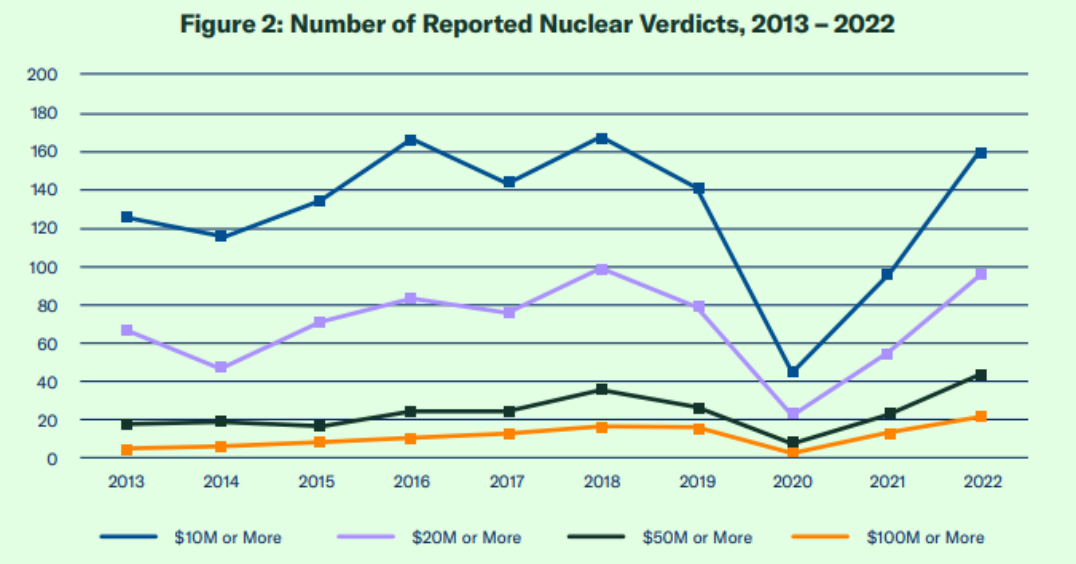
Conversely, in *Miller UK Ltd. v. Caterpillar, Inc.*[4], Illinois' Northern District Court noted, ". . .the costs inherent in major litigation can be crippling, and a plaintiff, lacking the resources to sustain a long fight, may be forced to abandon the case or settle on distinctly disadvantageous terms."

III. RECENT NUCLEAR VERDICTS

A. The term nuclear in most scenarios gets a bad reputation. It is no different here, but surely plaintiffs and their attorneys feel differently. Some recent nuclear verdicts are:

1. After a storm, an insurance company failed to pay for damages. Jurors awarded $39.8 million, including $35 million in punitive damages.[5]
2. Decedent was on vacation with his wife. After drinking, he wandered onto the property of the neighboring hotel and attempted to climb through a window. He got stuck and was eventually asphyxiated. In June of 2025, jurors awarded $31.2 million.[6]
3. After a Black truck driver for a large international trucking and logistics company was subjected to discrimination at work, he was fired. He sued. Jurors awarded $237.6 million.[7]
4. In 2022, a driver of a semi-truck operated a large international trucking and logistics company crashed into the back of a pickup truck travelling at a low rate of speed with their hazard flasher on, causing the death of the pickup truck driver. The New Mexico Supreme Court upheld a verdict of $165 million in damages.[8]

[4] *Miller UK Ltd. V. Caterpillar, Inc*, 17 F. Supp. 3d 711 (N.D. Ill. 2014)
[5] *https://www.tysonmendes.com/cases/*
[6] *Id.*
[7] *Id.*
[8] 512 P.3d 774 (N.M. 2022)



[9]

NUCLEAR VERDICTS BY INDUSTRY (2023)	
SECTOR	SUM OF VERDICTS
Real Estate Management & Development	$2,746,517,193
Chemicals	$2,008,282,000
Automobiles	$1,158,724,410
Oil & Gas	$798,046,602
Home Furnishings	$787,000,000
Food, Beverage & Tobacco	$745,000,000
Railroads	$557,106,000
Air Freight & Logistics	$366,160,000
Interactive Media & Services	$338,760,000
Tobacco	$334,823,983
Technology Hardware, Storage & Peripherals	$303,150,000
Aerospace & Defense	$278,900,000
Internet Services & Infrastructure	$240,000,000
Insurance	$235,500,000
Software	$210,000,000
Leisure Facilities	$194,887,340
Security & Alarm Services	$189,700,000
Trucking	$165,305,262
Independent Power and Renewable Electricity Producers	$135,500,000
Electric Utilities	$123,965,000
Property & Casualty Insurance	$112,219,073

[10]

[9] https://instituteforlegalreform.com/wp-content/uploads/2024/05/ILR-May-2024-Nuclear-Verdicts-Study.pdf
[10] https://www.trucknews.com/wp-content/uploads/2024/11/n-verdicts-by-industry-1.png

B. Time has shown that nuclear verdicts are here to stay. However, it is not all bad news. In June of 2025, one of the landmark cases which is known to many as the start of the nuclear verdict age, was overturned by The Supreme Court of Texas.

1. The driver of an F-350 pickup truck was driving in a winter storm in East Texas. The driver lost control and crossed a 42-foot-wide grassy median. This resulted in the F-350 crashing head on into a Werner Enterprises tractor-trailer. A 7-year-old child in the pickup was killed, and three others were injured. The family sued Werner and was awarded $90 million in damages, even though the pickup driver was considered at fault. The Supreme Court of Texas overturned this ruling holding that the semi-tractor trailer driver, though negligent, was not the proximate cause of the injuries.[11]

This may be the start of a shift in how courts view nuclear verdicts. Time will tell if this trend continues, but for now there are still traditional ways to avoid a nuclear verdict.

IV. WAYS TO COMBAT NUCLEAR VERDICTS

Early claims resolution is perhaps the best way to decrease the risk of a nuclear verdict. It is well known that litigation will substantially increase expenses. Not to mention, it will take time and resources away from the firm, which is a separate cost of its own. In short, when it is possible, settling tends to be the best option. It is important to talk with an attorney and do a cost-benefit analysis on the specific situation. Settling a case is not a one-size fits all sort of situation. Each claim brings unique facts and circumstances surrounding it. However, in many situations, it is best to settle with the guidance of an attorney to limit the damages and negotiate the plaintiff's demand down to a reasonable figure. Keep in mind, plaintiffs are almost always going to request a larger figure than what they reasonably expect to get out of the settlement.

If a settlement is not feasible, it is important that the defense team has a defined strategy to take on the case. One crucial step is an honest and succinct dive into the facts surrounding the case. Specifically, the defense team needs to look at what caused any pretrial litigation settlement to fail. This will lead to a game plan surrounding discovery or any motions that can be submitted to the Court. Another step is for the defense team to analyze the jury. Even very neutral, good jurors are susceptible to emotion. The plaintiff is surely going to play into this, so it is extremely important that the defense team take note of this. Instead of focusing on trivial details, the defense needs to put forth honest arguments that will be relatable to a jury. Defenses need to show the human side of the defense. Not that it is a faceless, greedy employer, which is likely what the plaintiff will attempt to do. Additionally, communication between the defense team and who they are representing is extremely important. New things develop often throughout the litigation

[11] *Werner Enters., Inc v. Blake*, No. 23-0493, 2025 Tex. LEXIS 585 (June 27, 2025).

process. It is never safe to assume that a defense team or the people they are representing have access to the same information or are seeing things from the same perspective. Being on the same page creates unity in the litigation process which helps create reasonable expectations.

Another way to avoid nuclear verdicts is a high-low agreement between the two parties in early litigation. Essentially, this sets a floor and a ceiling for the damages being awarded. It is a mitigation of risk on both sides of the table and a tactic that can save a client money, but is even better used as an expectation setting tool. A high-low agreement may look like something like this: plaintiff agrees that the maximum amount of damages they will accept is $5M and defense agrees that the lowest amount of damages they will payout is $1M. If a jury decides the damages were more than $5M, the plaintiff will be capped at the $5M they agreed on. On the flip side, if the jury decides that the damages awarded are less than $1M, the defense will still pay out the $1M low that they agreed to pay.

V. PSYCHOLOGY BEHIND SOCIAL INFLATION

Every field has some sort of psychology to it. In the legal field, psychology is used in several different ways. For the sake of social inflation, it is best to stick to how plaintiffs and their counsel use it to their advantage.

One psychological tactic used was mentioned previously, the reptile theory. At the core of the reptile theory is the attempt to instill fear and anger among jurors so that when they do eventually decide on a verdict, they are basing their damages figure on instinct, rather than logic.[12] There are two things the plaintiff's counsel must do for the reptilian strategy to take effect. First, plaintiff's counsel focuses on safety being a top priority. Second, plaintiff's counsel attempts to convince the jury of how the defendant violated whatever safety rule was in place, and in violating that safety rule, put *everybody's* safety at risk. This shifts jurors' perspective to that of the victim. Think of it as the jurors seeing themselves in the shoes of the plaintiff. The key difference between the plaintiff being the actual victim and the jurors is that the jurors have the power to decide what will happen to the defendant. Hence where the nuclear verdict comes in. The jurors are in the position to right a social wrong and the desire to make a difference directly influences the damages awarded.

The reptile strategy has gained strength from societal changes:

> *"[O]nly 41.6% of respondents have a positive view of corporations, and 81.5% believe large corporations often manipulate government agencies. With increased exposure to news stories via social media, news apps, and televisions in every room, there has been a great deal of publicity on corporate*

[12] https://www.uslaw.org/wp-content/uploads/2022/03/Litigation-Insights_What-Causes-Nuclear-Verdicts_LR.pdf

scandals, including Volkswagen emissions, Wells Fargo accounts, the opioid crisis, and price hikes on treatments like the EpiPen. Because of the increased awareness of corporate wrongdoings, many jurors come in with the idea that Big = Bad; coupled with the amount of money corporations have (or are perceived to have), these attitudes can make the Reptile Strategy more resonant."[13]

Another psychological tactic used by plaintiff's counsel is anchoring. The damages awarded by jurors is typically influenced by the demand. The anchor is the suggested reference point. For example, if the demand is $1M, that is the anchor. Then, jurors adjust this figure based on additional information or assumptions. The research has shown that these adjustments are pretty insignificant, which is why the original anchor figure is so important. An interesting aspect of this is how jurors can be given an anchor figure that, for the lack of better words, is ridiculous. So ridiculous, that the jurors themselves know the figure is too high. However, they still see the outrageous amount as the anchor and adjust downward from there. An example of this would be a plaintiff requesting $100M in damages and the jurors thinking that is a ridiculous amount. However, when it is time to make a decision on damages, they view themselves as being tough on the defendant by awarding, $70M instead. In their minds, they are cutting the defendant a break by not awarding the $100M, but still being tough on them at $70M.

Furthermore, there is another aspect to anchoring that makes the practice successful. Scalar Variability which can be defined as a person's decreased comprehension of numbers as the numbers increase. In essence, it is very difficult for the average person to comprehend the difference between $1B and $2B, even though it is a substantial difference. Plaintiff's counsel uses this to their advantage when deciding what their anchor figure is going to be. If the average person can't really decipher the difference between $1B and $2B, why not shoot for the stars?

VI. FINAL THOUGHTS

To be direct, social inflation and nuclear verdicts are now normal in the legal world today. There are many things that affect this—third party litigation funding, law firm marketing, and psychology used in the court room to name a few. This does not mean there are not effective ways to combat this, but it does mean having competent, up-to-date, and reputable counsel is at an all-time high and this need continues to grow with the increase in nuclear verdicts.

[13] *Id.*

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NAVIGATING THE NUCLEAR VERDICTS ERA

I. OVERVIEW AND EXAMPLES

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

Williams et al. v. Wabash National Corporation, is a recent example of a nuclear verdict. In that case, a Missouri jury awarded a $462 million verdict against Wabash National Corporation in a case involving the deaths of two young fathers who were killed in an underride crash when their vehicle went underneath the rear of a trailer, and they were both decapitated. The jury awarded $12 million in compensatory damages—$6 million to each family—and $450 million in punitive damages. The trailer involved, manufactured in 2004, was equipped with a "U.S. RIG," a rear impact guard design dating back to 1985 that remained largely unchanged until 2007. Evidence presented during the trial showed that Wabash did not conduct any crash testing on this design from 1985 to 1996. In the crash, the guard allegedly failed, allowing the vehicle to slide under the trailer and resulting in fatal injuries. Plaintiffs successfully argued that while the RIG met the 1998 federal minimum safety standard, it had been ineffective and weakened through industry lobbying.

On March 20, 2025, a Circuit Court ruled that the $450 million punitive damages award was inconsistent with the company's constitutional rights and therefore reduced the punitive damages to $108 million, while maintaining the compensatory damages at $11.5 million.

Another recent example of a nuclear verdict is the case of *Melissa Dzion v. AJD Business Services and Kahkashan Carrier* in Florida. The tragedy began when a Kahkashan truck driver, operating on cruise control, failed to stop in time and caused a severe traffic accident that brought traffic to a complete halt. While the 18-year-old victim was stuck in this stopped traffic, an AJD driver struck the victim's stationary vehicle, causing fatal injuries. The jury assigned 90% of the fault to Kahkashan and 10% to AJD, awarding the victim's parents $100 million for pain and suffering. In addition, AJD was ordered to pay $900 million in punitive damages for negligently hiring and retaining a driver who was unlicensed, driving beyond legal limits, and using his cellphone at the time he flipped his truck, which led to the initial traffic obstruction.

In *Margo Gill v. Abbott Laboratorie*s, another Missouri case, Margo Gill was awarded $495 million in the first trial concerning allegations that Abbott Laboratories' cow's milk-based baby formula can cause intestinal harm to infants. The award comprised $95 million in compensatory damages and $400 million in punitive damages. Gill claimed her infant developed necrotizing enterocolitis (NE) from the milk.

It is likely that the damages awarded in both the *Margo Gill* and *Melissa Dzio*n cases will be reduced, like what occurred with the *Wabash National Corporation* verdict.

II. CAUSES OF NUCLEAR VERDICTS AND WHAT TO LOOK FOR

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

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

A. What to Look For

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

There are also certain accelerants to litigation that indicate a possible nuclear verdict. Company misconduct such as a lack of vetting in the hiring process, the operation of trucks with known physical defects likely to cause hazardous or unsafe driving conditions, and inadequate (or nonexistent) policies and procedures. Driver misconduct is another accelerant to litigation. When a driver experiences fatigue due to working extremely long hours or lack of sleep, the likelihood of a nuclear verdict goes up. Other driver misconduct

such as driving under the influence, texting while driving, driver dishonesty, speeding, or violation of safety regulations also increase the chances of a jury returning a nuclear verdict. Plaintiff's attorneys may also focus on the trucking company conduct including turning a blind eye to driver misconduct such as exceeded hours of service, a lack of safety practices and training, or a company culture that promotes profits at the expense of safety. Anything that can rouse a juror's sympathy or emotions will likely be the target of a plaintiff's attorney's attention.

III. WAYS TO PREVENT NUCLEAR VERDICTS

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

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

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

IV. RECENT CHANGES IN DAMAGES CAPS

A. Kansas

The Kansas Supreme Court issued an opinion on June 14, 2019, ruling that non-economic damage caps provided for in K.S.A. 60-19a02 are unconstitutional. For decades, Kansas has had caps on non-economic damages (pain and suffering, and other such damages that do not have a particularly clear dollar value). This statute required the District Court Judge to reduce any jury award over the cap back down to the damage cap range. Generally, the caps ranged from $250,000 to $325,000 depending on the year the action accrued. Over the years, various challenges have been made, unsuccessfully, to render these caps unconstitutional.

In the case of *Hilburn v. Enerpipe*, the Kansas Supreme Court determined that the damage caps violate the jury's right to determine the value of an injured party's damages. Unless and until further action is taken in the legislature (or if the Kansas Supreme Court reverses itself), from this day forward, Kansas law no longer supports a cap on non-economic damages.

B. Oklahoma

Those seeking non-economic damages in Oklahoma will no longer be limited by a legislative cap, opening defendants up to further liability in the state. The Oklahoma Supreme Court ruled 6-3 to reverse a trial court ruling, finding a non-economic damages cap in personal injury actions unconstitutional. In *Beason v. I.E. Miller Services Inc.*, the plaintiff, Todd Beason, was struck by a boom that fell from a crane operated by an employee of I. E. Miller services Inc.; Beason underwent two amputations to parts of his arm, and he and his wife filed suit against the defendant. A jury awarded $14 million to Todd Beason and $1 million to his wife, and a "supplemental verdict form" allocated $5 million of the $14 million awarded to Todd Beason as non-economic damages.

The Oklahoma legislators passed a law that took effect in 2011 stating that compensation awarded for non-economic losses in a civil action arising from bodily injury cannot exceed $350,000. Because of this law, the district court reduced the award to a total of $9.7 million: $6 million in non-economic damages and $350,000 to each of the Beasons. The couple then filed a motion arguing the law was unconstitutional. The Oklahoma Supreme Court agreed, finding non-economic damages "highly subjective and inherently unpredictable," and added the cap violated Oklahoma's constitution. The court reversed the trial court's judgement, reasoning that the cap statute provided different treatment to persons who are killed in an accident compared to those who survive an accident:

> *"By forbidding limits on recovery for injuries resulting in death, the people have left it to juries to determine the amount of compensation for pain and suffering in such*

cases, and no good reason exists for the Legislature to provide a different rule for the same detriment simply because the victim survives the harm-causing event."

This opinion ultimately upholds the sanctity of a jury and makes it more difficult to value civil cases in Oklahoma, exposing defendants to unanticipated damages at the direction of juries. It is likely that the legislature will work to impose a limit on damages in future legislation.

1. What The Future Holds In OK

A recent bill, Senate Bill 1065, has been introduced and passed through the Senate and is now waiting to be passed by the House and signed into law. This bill amends Section 61.2 of Title 23 of the Oklahoma Statutes, specifically addressing compensation for non-economic losses in civil actions arising from bodily injuries. The bill increases the cap on non-economic damages from $350,000 to $500,000, while maintaining that there is no limit on non-economic damages if the defendant's actions are found to be in reckless disregard, grossly negligent, fraudulent, or intentional. Additionally, the bill stipulates that in jury trials, jurors will not be informed of the cap on non-economic damages, ensuring that their decisions are based solely on the facts of the case. This bill could lead to vast changes in the future landscape of nuclear verdicts in Oklahoma.

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AI & THE INSURANCE BUSINESS

I. DEFINITIONS

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

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

C. Computer Vision - A field of AI that uses machine learning and neural networks to derive meaningful information from digital images, videos and other visual inputs to make recommendations or take actions when they see defects or issues.

II. OVERVIEW

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

Insurance litigation and claims handling is a never-fading industry that provides constant work. AI can be beneficial to reduce one's workload when trained to do mundane and repetitive tasks, such as claims processing, billing review, fraud detection, and real-time customer assistance, which are all integral parts of claims practice. Through machine learning AI can be taught to perform and perfect these tasks with minimal oversight.

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

III. CLAIMS PROCESSING

One of the most fundamental tasks of insurers is to process claims. This task is repetitive and complex in nature. Reviewing various policies, documents, and more can all be done through machine learning. AI technologies like computer vision are trained to analyze and quickly define the important information within the many pages of documents, much of which is not pertinent to the claim. It then pulls key data fields from each document and feeds that data to the correct location to present a predicted outcome that is reviewable. Additionally, AI can provide estimated settlement amounts for claims through machine learning of similar cases that are processed.

IV. BILLING REVIEW

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

V. FRAUD PREVENTION

Within insurance claims, fraudulent claims present serious concerns that take up a significant percentage of claims. The process of identifying fraudulent claims can be tedious work. While many within the industry manually review claims for fraud, machine learning algorithms can quickly analyze potential fraud by studying human behavior of similarities in fraudulent claims.

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

VI. CUSTOMER SERVICE

The insurance industry demands prompt and meaningful customer service in order to attract and retain customers. Conversational AI has the ability to assist customers through AI chatbots. These AI assistants are able to learn from customer engagements to enhance their knowledge. They provide instantaneous communication with customers and can be programmed with the organization system in order to provide personalized customer service or accommodate small requests made by customers. This capability provides agents with more time for complex customer inquiries and provides customers with instantaneous problem resolution.

VII. AI SEARCH ENGINES

In the past few years AI has become readily available and many different search engines have developed. The most popular of these being ChatGPT. Despite ChatGPT's popularity, other search engines exist as well including DeepSeek, Google Gemini, Perplexity AI, Microsoft CoPilot, and many others. ChatGPT and these other search engines are handy in making research more efficient, to summarize materials, write and prepare documents, and other time-consuming tasks.

Despite the efficiency of these search engines, they are not without fault. Some issues posed by these search engines include fabrication of information, misinterpretation of information or tasks, and they present confidentiality issues. It is imperative to review and further research any materials obtained through AI search engines. Further, confidential information should never be put into a generic search engine, as that information is not protected. Over the past two years there have been numerous reports and sanctions issued for AI fabrications of case law, known as "AI hallucinations." In these cases, lawyers have not researched further but instead submitted their materials to the court with hallucinated citations.

Recently in the case of *Wadsworth v. Walmart Inc. and Jetson Electric Bikes, LLC*[1], three attorneys, two from Morgan & Morgan, were sanctioned, fined, and one had his pro hac vice revoked. This all stemmed from their respective roles in submitting their motions in limine with eight non-existent cases. Two of the three attorneys simply signed the work while the third created it. The Judge emphasized that by signing the document they are still liable under Rule 11 for not conducting a reasonable inquiry into the existing law.

VIII. AI BACKLASH

In using AI, it is important to be transparent about the ways it is being used and to use diligence to ensure proper oversight, because despite the evolving use of AI it has faced backlash in regard to its misuse and lack of oversight.

Due to this, many states have proposed or passed legislation to provide structured use of AI including limits and usage laws. For example, Colorado has passed a bill requiring insurers to regulate external customer data and information sources which are used by their algorithms and predictive models, to monitor them, and explain how they are used to protect against unfairly discriminating against consumers. Moreover, Pennsylvania proposed a bill to require disclosure of the use of AI by insurers to healthcare providers, covered individuals, and the general public.

Additionally, lawsuits are beginning to emerge due to AI usage in the insurance business. In 2023 a class action was filed against Cigna, accusing them of violating Californias Insurance Code requiring each insurer to "conduct and diligently pursue a thorough, fair and objective investigation of claims."[2] The Complaint alleges that their AI system instantly rejects claims on medical grounds without any oversight or review by their doctors. Thus, allowing thousands of claims to be denied without proper review in violation of the law.

Similarly, a class action was filed against United Health Care for their usage of AI in place of physicians to make coverage determinations. Further, they claimed that United Health care knew of the AI programs' inaccuracies in doing so, because 80% of preauthorization's are overturned on appeal. A judge recently dismissed five of the seven claims and allowed two to proceed. The proceeding two are for breach of contract and breach of the implied covenant of good faith and fair dealing.

Lokken et al. v. UnitedHealth[3]

[1] *Wadsworth v. Walmart Inc.,* No. 2:23-CV-118-KHR, 2025 WL 511095 (D. Wyo. Feb. 11, 2025), Lawnext, *Federal Judge Sanctions Morgan & Morgan Attorneys for AI-Generated Fake Cases in Court Filing*, Robert Ambrogi, Federal Judge Sanctions Morgan & Morgan Attorneys for AI-Generated Fake Cases in Court Filing | LawSites, (Feb. 25, 2025).

[2] *Kisting-Leung v. Cigna Corp.,* No. 2:23-CV-01477-DAD-CSK, 2025 WL 958389, at 1 (E.D. Cal. Mar. 31, 2025)., Cigna-PxDx-complaint | DocumentCloud

[3] Microsoft Word - *Lokken et al v. UnitedHealth* (Order MTD) 23-3514 (LG) FINAL

IX. CONCLUSION

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

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

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CONNECTING THE DOTS BETWEEN THE ADA, FMLA & WORKERS' COMPENSATION

I. WHAT IS THE ADA?

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

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

A. A disability is defined as: a person who has a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.

B. The ADA does not specifically name all of the impairments that are covered.

C. Major life activities include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

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

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

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

Generally, light duty jobs refer to work that is physically or mentally less demanding than the duties of the normal job. Light duty also may refer to excusing certain job

functions that the employee cannot perform due to their disability. Further, light duty jobs are those that are created specifically for the purpose of providing other forms of work for those employees who are unable to perform a portion of their normal duties. The ADA does not require light duty jobs be created, but the employer must provide some alternative forms of reasonable accommodation in their absence. Therefore, the existence of light duty jobs can force the employer to keep an employee that has been disabled who otherwise would not have been retained.

The employee must be given a vacant job even if other employees are more qualified, so long as the employee meets the job's minimum qualifications. The vacancy in that light duty job creates an obligation. However, permanent light duty is not required as indefinite accommodations are not reasonable as confirmed by the Eleventh Circuit in *Frazier-White v. Gee*, 818 F.3d 1249.

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

II. WHAT IS FMLA?

FMLA is the Family and Medical Leave Act and requires employers to provide up to 12 weeks of unpaid leave during a 12-month period for the birth or adoption of a child, to care for an immediate family member with a serious health condition, or to take medical leave when the employee is unable to work because of a serious health condition. Additionally, an employee is entitled to 12 weeks of unpaid leave under certain circumstances when a spouse, son, daughter, or parent of the employee is on covered active duty in the Armed Forces. Employees who are spouses, sons, daughters, parents or next of kin to covered servicemembers with serious injuries or illnesses are entitled to 26 weeks of unpaid leave to care for the servicemember.

FMLA applies to all government employees and private employers with more than 50 employees in a 75-mile radius. Prior to the start of leave, employees must have worked at least 12 months and 1,250 hours at a jobsite where 50 or more employees work within 75 miles. It is not required that the employee have worked 12 consecutive months with the employer. However, the employee must have worked 1,250-hours within the previous 12 months.

Employees must also give the employer notice of leave, and medical certification may be required. Notice must be given 30 days prior to birth/adoption, or medical treatment if it is "foreseeable." To certify the leave of the employee, the employer can require other proof, such as other medical opinions. This additional proof is at the cost to the employer.

Childcare leave should be taken in one lump, unless the employer agrees otherwise. If spouses are employed by the same employer, their total combined leave for the birth or adoption of a child, or the care of a sick parent can be limited to 12 weeks.

Rights of Employees on Leave:

A. Group health benefits must be maintained as if the employee returned to work

B. Protection from employer retaliation for exercising rights

At the culmination of the employee's leave covered under FMLA, the employer must reinstate the injured worker to the same job/position the employee had before. If that is not possible, then the employee must be reinstated to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. The highest paid 10% of salaried employees have limited rights to return to their position.

III. RETALIATION AND WORK COMP

Workers' compensation retaliation laws vary from state to state. Generally, these laws allow employees who allege workers' compensation retaliation to file a civil lawsuit for money damages against their employer.

Under Missouri law, "no employer or agent shall discharge or discriminate against any employee for exercising any of his or her rights under this chapter [Workers' Compensation Law] when the exercising of such rights is the motivating factor in the discharge or discrimination." Mo. Ann. Stat. § 287.780 (West). Motivating factor means "that the employee's exercise of his or her rights under this chapter actually played a role in the discharge or discrimination and had a determinative influence on the discharge or discrimination." Mo. Ann. Stat. § 287.780 (West).

Kansas does not have a retaliation law specific to workers' compensation. However, Kansas courts recognize that employees have the right to bring a retaliatory discharge claim in the workers' compensation context. To have a prima facie retaliatory discharge claim in that context, "the plaintiff [must have] filed a claim for workers' compensation benefits or sustained an injury for which he or she might assert a future claim for such benefits, the employer had knowledge of the plaintiff's workers' compensation claim injury, the employer terminated the plaintiff's employment, and a causal connection existed between the protected activity or injury and the termination. *Platt v. Kan. State Univ*. 305 Kan. 122, Syl. ¶ 3 (2016). Once the plaintiff's prima facie case is established, the burden shifts to the employer to prove that they had a legitimate, nonretaliatory reason for the discharge. If this burden is met, then the plaintiff must show by a preponderance of the evidence that the employer's legitimate reason is just a pretext. *Gonzalez-Centeno v. N. Cent. Kan. Reg'l Juvenile Det. Facility*, 278 Kan. 427, Syl. ¶ 3 (2004).

Retaliation can be shown in different ways, and while some forms are obvious, such as termination, others may be more subtle, including denying employee advancement, denying salary or hourly pay increases, or assignment to less desirous jobs or locations. *Palermo v. Tension Envelope Corp.*, 959 S.W.2d 825, 828 (Mo. Ct. App. 1997). If the employer's adverse action would deter a reasonable person in same situation from making a complaint, then it likely constitutes illegal retaliation.

Suggestions on how Employers Can Avoid Workers' Compensation Retaliation:

A. Keep accurate records detailing specifically why an employee was disciplined or dismissed. The less precise the circumstances detailing the situation are, the more likely an employer may be subjected to a workers' compensation retaliation claim even when they have a legitimate, non-discriminatory reason.

B. Be consistent in disciplinary actions against all employees. Employees being disciplined in various lengths or manners for the same wrongdoing can point to exterior variables playing a contributory role.

C. Understand that all disciplinary actions are subject to review in subsequent proceedings should a particular employee claim retaliation.

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

In addition to workers' compensation retaliation laws, other laws protect those who cooperate in Equal Employment Opportunity Commission (EEOC) investigations, serve as a witness in EEOC litigation, act as whistleblowers, or those on FMLA leave.

IV. HEALTH INSURANCE AND WORK COMP

Discontinuing the health insurance coverage of an employee after the employee files a workers' compensation claim could give rise to a workers' compensation retaliation claim. However, employers *can* require the employee to continue paying their own insurance premium while on leave.

Two federal programs mandate the continuation of health coverage benefits. These programs aim to assist injured workers and allow for continued health coverage, but the employee is still required to pay the cost, or their normal share of the premiums. *See* 29 C.F.R. § 825.212, 29 U.S.C. § 1162. In both situations, if the employee ceases to make the payments on the premiums as required, the employer can terminate the health insurance coverage.

A. FMLA:

1. As mentioned above, the Family and Medical Leave Act generally provides employees with up to 12 weeks of unpaid leave per 12-month period if the employee and employer meet the law's requirements. If the FMLA requirements are met, the employer must maintain the same level of health insurance benefits the worker had before taking the leave.
2. However, if the employee exceeds the 12 weeks allotted for leave, the employer can cancel those continuing health benefits.

B. COBRA

1. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) can be considered when either the employee or employer does not qualify for FMLA, or the employee has exhausted his allotted FMLA leave. This Act applies to private employers with 20 or more employees. This option allows for continuation of health coverage (to the employee, spouses, former spouses, and dependent children) after a "qualifying event" causes an employee to lose health care coverage. "Qualifying events" for covered employees include:
    a. termination of the employee's employment for reasons other than gross misconduct
    b. reduction in number of hours of employment.

2. For spouses or dependent children of covered employees, qualifying events can include:
    a. termination of the employee's employment for reasons other than gross misconduct
    b. reduction in hours worked by the covered employee
    c. covered employee becomes entitled to Medicare
    d. divorce or legal separation of the spouse from the covered employee
    e. death of the covered employee.

    The specific health care plan should be consulted to determine if there are standards, such as a minimum hour worked requirement, that would make the employee ineligible for coverage. If so, a COBRA notice should be issued to the employee, as a "reduction of hours of the covered employee's employment" as one of the qualifying events that triggers COBRA.
3. The failure to provide COBRA continuation notices can result in the risk of civil penalties imposed on the employer.

V. RETURN TO WORK/FITNESS FOR DUTY

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

After an employee returns from FMLA leave, an employer may request a fitness for duty certification before the employee resumes work. The employer must have a policy or practice that requires employees in similar job positions who take leave for similar health conditions to be certified. The employer is required to provide notice of the fitness for duty requirement. The certification must address the employee's ability to perform the essential functions of their job and must only be in regard to the particular health condition which caused the employee to take FMLA leave.

VI. EARNED LEAVE, FMLA, AND WORK COMP

Generally, FMLA leave is unpaid. However, employers can require or an employee may elect to substitute paid vacation leave, personal leave, or family leave for unpaid leave under FMLA. 29 U.S.C. § 2612(d)(2)(A). Additionally, when employees seek FMLA leave to care for a qualifying family member's serious health condition, accrued paid sick, medical, personal, or vacation leave may be substituted. 29 U.S.C. § 2612(d)(2)(B). Employers are not required to provide paid leave in any situation where they would not normally provide such leave. The employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. 29 C.F.R. § 825.207(a).

FMLA regulations provide that when employees are designated as on FMLA leave while on short-term disability or due to a workers' compensation claim, substitution of

employee's accrued paid leave is not allowed because the employee is receiving benefits elsewhere. 29 C.F.R. §§ 825.207(d)-(e). If the disability for which the employee is receiving workers' compensation benefits also qualifies as a serious health condition under FMLA, an employer may designate FMLA leave to run concurrently with the employee's work comp or disability leave.

VII. PRIVACY, MEDICAL RECORDS, AND WORK COMP

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

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

VIII. GENERAL RELEASE AND RESIGNATION AGREEMENTS

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

A. The workers' compensation settlement contemplates some aspect of either a temporary or permanent wage loss

B. Where the employer has a legitimate concern that there is additional civil exposure under the ADA based upon their potential inability to accommodate the permanent work restrictions from the workers' compensation claim, even with reasonable accommodations. Litigation expenses on these types of cases can be expensive and sometimes it is preferred to deal with the issue pre-suit as opposed post-suit

C. The claimant has already been separated from employment (voluntarily or involuntarily) and the employer wants a clean, well-documented separation regarding former employees

D. Standard corporate policy

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

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

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

For example, in Kansas, K.S.A. § 44-5,120 describes a variety of acts that constitute fraudulent or abusive acts or practices under the Workers' Compensation Act. The list of acts could be interpreted broadly. Fraud or abuse under the Workers' Compensation Act is serious. K.S.A. § 44-5,125 provides potential criminal penalties depending upon the amount of benefits in question. Additionally, K.S.A. 44-512b provides an avenue for the Administrative Law Judge to award interest as a penalty if the judge finds that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation due. The statute provides that such interest shall be assessed against the employer or insurance carrier and shall accrue from the date such compensation was due. The interest is considered a penalty and shall not be considered a loss or a loss adjustment expense by the insurance carrier regarding rates. Some

lawyers will demand payment of the lowest rating and trigger the statute when there are no other issues in dispute.

In Missouri, R.S.M.O. section 287.128 provides that it is unlawful for any insurance company or self-insurer in the state to knowingly and intentionally refuse to comply with known and legally indisputable compensation obligations and provides criminal penalties for violation thereof.

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

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

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

A. Kansas:

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

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

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

Senate Bill 430, recent legislation in Kansas that took effect July 1, 2024, includes a reduction in the Social Security offset. Previously, this offset allowed employer's insurance carriers a dollar-to-dollar credit against temporary and permanent weekly disability payments. However, this new enactment states that an award of permanent partial or permanent total disability shall be subject to an offset equal to fifty percent of the Claimant's Social Security retirement benefits. This enactment aims to benefit working seniors injured on the job. Finally, an award of temporary total disability and temporary partial disability benefits shall not be subject to an offset for Social Security retirement benefits.

B. Missouri:

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

For permanent total disability cases, however, the injured worker formally alleges that he/she cannot engage in any substantial and gainful employment. In these situations, absent other civil liability concerns, the injured worker and his/her attorney would tend to be more agreeable to executing a general release and resignation at a lower level of consideration.

C. Illinois:

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

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

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

D. Iowa:

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

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

When shoulders were removed from body as a whole injuries in the 2017 amendments, they received a separate section in the Iowa Workers' Compensation laws that states that if an injured worker suffers a shoulder injury after July 1, 2017, and is unable to return to work because of the disability, they may be entitled to extensive vocational rehabilitation benefits including evaluation for career

opportunities in specific fields, specific education programs at community colleges, and financial support for participation in the education program up to $15,000 for tuition, fees, and supplies.

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

E. Nebraska:

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

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

1. Loss of ability procure employment generally;

2. Loss of ability to earn wages;

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

4. Loss of ability to hold a job obtained.

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

F. Oklahoma:

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

injury or equivalent job. All evaluations of permanent disability must be supported by objective findings."

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

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

IX. PITFALLS OF THE RESIGNATION AND RELEASE OFFER:

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

Offering a release and resignation is a highly fact dependent issue. Consult with your employment attorney to determine the risks associated in offering a release and resignation in conjunction with a workers' compensation settlement.

Notes Pages

Notes Pages

THE RETALIATION RISK: BEST PRACTICES FOR PREVENTION AND DEFENSE

FEDERAL, MISSOURI, KANSAS

I. FEDERAL TITLE VII RETALIATION

Title VII of the 1964 Civil Rights Act protects employees from discrimination and retaliation in the workplace. Specifically, Title VII makes it an unlawful employment practice for "an employer to discriminate against any of his employees . . . because he has opposed . . . an unlawful employment practice . . . or . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). These unlawful employment practices include discrimination on the basis of race, color, religion, sex and national origin. § 2000-e2(a). The statute allows an "aggrieved" party to file a civil action if the EEOC opts not to sue the employer. § 2000e-5(b), (f)(1).

A. Title VII Anti-Retaliation Provision

A company's actions can be challenged as retaliation under Title VII if the plaintiff can show that "a reasonable employee would have found the challenged action materially adverse…".

In *Burlington N. & S. F. R. Co. v. White*, the Court construed Title VII's anti-retaliation provision to cover a broad range of employer conduct. Although Title VII doesn't specify which employer acts are prohibited, the court in *Burlington* held the anti-retaliation provision of Title VII prevents any action by employers that are "materially adverse," meaning the action "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Sheila White was the only woman working in the Maintenance Department of the Burlington Northern Santa Fe Railroad's Tennessee Yard. After she complained of gender discrimination by her supervisor, White was moved from duties as a forklift operator to less desirable duties as a track laborer, though her job classification remained the same. She was also suspended for 37 days without pay but was eventually reinstated and given full back pay. White filed suit in federal court, where a jury rejected her claims of sex discrimination but awarded her damages of $43,000 after finding that she had been retaliated against for her complaints, in violation of Title VII of the Civil Rights Act of 1964. On appeal, Burlington Northern argued that White had not suffered "adverse employment action," and therefore could not bring the suit, because she had not been fired, demoted, denied a promotion, or denied wages. The Supreme Court unanimously agreed that White suffered retaliatory discrimination when she was reassigned to less desirable duties and suspended without pay.
Burlington N. & S. F. R. Co. v. White, 548 U.S. 53 (2006).

B. "But For" Proof Standard

The "Motivating Factor" test has been overruled in favor of the traditional "But For" proof standard.

Dr. Naiel Nassar, a man of Middle Eastern dissent, was a faculty member of the University of Texas Southwestern Medical Center (UTSW). The university is affiliated with the nearby Parkland Hospital and Nassar worked in Parkland's HIV/AIDS clinic. Dr. Beth Levine, the doctor in charge of the entire clinic, began asking Dr. Phillip Keiser, Nassar's supervisor, about Nassar's work habits and billing practices. When talking with Keiser, Levine made a number of offensive comments, including remarks such as "Middle Easterners are lazy" and that the hospital had "hired another one," presumably referring to Nassar's race or ethnicity. Keiser told Nassar about these remarks and that Levine criticized the quality of Nassar's work and number of billing hours more than she did the rest of the doctors. On June 3, 2006, Nassar was officially offered a job in the Parkland clinic on Parkland's payroll, to start as of July 10, 2006. In the interim period, after being offered the job but before starting, Nassar resigned from the University. In his resignation letter, Nassar cited Dr. Levine's conduct, harassment, and discrimination as the primary reasons for his resignation. Dr. Gregory Fitz, Dr. Levine's supervisor, blocked his employment at Parkland and asked Nassar to retract his letter criticizing Levine. Nassar sued the UTSW alleging that this denial of transfer was actually a termination of his original position and that UTSW retaliated against him for claiming discrimination. At trial, the jury agreed with Nassar, but UTSW went to the Fifth Circuit Court to challenge the jury's decision. While affirming the finding of retaliation, the Fifth Circuit reversed the judgment regarding his termination.

In a 5-4 decision, the court held that retaliation claims filed under Title VII are no longer governed by the "motivating factor" standard. Under the previous standard, it would suffice to show that retaliation was a motivating factor for the employer's action against the employee even if the employer had other lawful motives which affected the decision. However, this lessened standard is no longer applicable. The Court conducted a statutory construction analysis and determined that Congress did not intend to make the motivating factor standard applicable to retaliation claims.

The court redefined the proper standard of causation for Title VII claims stating that the traditional "but for" causation test is the correct standard. Under this analysis, the plaintiff has the burden of demonstrating that they would not have experienced the alleged harm but for the improper action of the employer. This standard is more demanding than the motivating factor standard. While this decision makes it more difficult to prove workplace discrimination and will likely reduce the number of meritless retaliation claims, the dissent called on Congress to act to correct this ruling

Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, (2013)

C. First Amendment Protections

The First Amendment protects speech on a matter of public concern by a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.

Edward Lane accepted a probationary position as Director of the Community Intensive Training for Youth ("CITY") program at Central Alabama Community College ("CACC"). He subsequently terminated the employment of Suzanne Schmitz, a state representative who had not performed any work for the program despite being listed on CITY's payroll. He had previously been warned he could face repercussions for firing Schmitz.

Lane, under subpoena, testified against Schmitz in two federal criminal trials between 2008 and 2009. In January 2009, Steve Franks, the president of CACC, sent termination letters to 29 CITY employees, including Lane, but rescinded the terminations of 27 of those employees within a few days.

Lane sued Franks in federal district court and alleged that his termination from the CITY program was in retaliation for his testimony against Schmitz and therefore violated his First Amendment right to free speech. The district court ruled that the doctrine of Qualified Immunity shielded Franks from liability and granted summary judgment in his favor. The federal appeals court in Atlanta said it was unnecessary to decide who was right because public employees have no First Amendment protections for statements they make as part of their official duties. The Supreme Court, in a unanimous opinion by Justice Sotomayor, opined that Lane's testimony was outside the scope of his ordinary job duties and therefore the testimony was as a citizen and a matter of public concern.

The opinion expressly did not address the question of whether the First Amendment should protect the truthful testimony of a public employee where that testimony is part of the employee's job responsibilities. If the employee testifies falsely or misleadingly in such a situation, employer discipline is not barred by the First Amendment.

Despite the fate that the Court ruled in Lane's favor, Franks was protected by Qualified Immunity. Qualified Immunity holds that Courts may not award damages against a government official in his personal capacity unless "the official violated a statutory of constitutional right" and "the right was clearly established at the time of the challenged conduct" – *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, (2011)
Lane v. Franks, S. Ct., Decided June 19, 2014.

D. *Thompson v. North American Stainless* Expands Scope of Retaliation Claims

The Supreme Court's decision in *Thompson* dramatically expanded the scope of who could bring retaliation claims under Title VII, no longer limiting these causes of action to the individuals originally discriminated against or engaged in protected activities.

Plaintiff Eric Thompson was engaged to Miriam Regalado after the two met while working for Defendant Employer North American Stainless. Thompson's fiancé filed a charge of sex discrimination against North American with the EEOC. Three weeks after the EEOC notified North American of the charge, Thompson was terminated for alleged "performance-based reasons." After filing his own charges and receiving a right-to-sue letter from the EEOC, Thompson instituted a civil action against North American for discrimination and retaliatory termination.

The Supreme Court addressed two questions in *Thompson*: 1) whether Thompson's firing constituted unlawful retaliation; and 2) whether Thompson had standing to bring a cause of action for retaliation under Title VII. Both questions were answered affirmatively.

1. Third Party Retaliation Unlawful Under Title VII

First, the Court found North American's firing of Thompson was unlawful retaliation. Based on the broad range of employer conduct covered by Title VII under the standard set forth in *Burlington*, the Court said it was obvious that a reasonable worker "might be dissuaded from participating in a protected activity" if she knew her fiancé would be fired. North American argued about the difficult line-drawing issues in the future and which relationships would be entitled to protection if third party retaliation was prohibited. The Court declined to define a fixed class of relationships for which third party reprisals would be unlawful. However, the Court suggested that retaliation against close family members would almost always be unlawful, while retaliation against mere acquaintances almost never would. Ultimately, the Court held that whether retaliation against a third party was unlawful would depend on the particular circumstances. The alleged harm is to be judged on an objective standard regardless of the unusual, subjective feelings of individual plaintiffs.

2. Third Party May Sue for Retaliation under Title VII: "Zone of Interests" Test

The Court further held Thompson had standing to sue North American for retaliation under Title VII. Civil actions may be brought under Title VII "by the person claiming to be aggrieved." This language was interpreted to permit suit by the plaintiff only if he "falls within the 'zone of interests'" the underlying statute is trying to protect. Under the "zone of interests" test, any plaintiff who has an interest "arguably [sought] to be protected by the statutes" is considered "aggrieved" and may sue. Specifically, Thompson was deemed to have met the "zone of interests" test and considered an "aggrieved" person based on his employment with North American, the purpose of Title VII and the fact that Thompson wasn't an accidental victim of retaliation, but an intentional victim targeted to hurt his fiancé who filed the original discrimination claim. The Decision was unanimous 8-0 with Justice Kagan recusing herself.

Outlining the scope, the Court said "We also decline to identify a fixed class of relationships for which third-party reprisals are unlawful. We expect that firing a close family member will almost always meet the Burlington standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."
Thompson v. N. Am. Stainless, 131 S.Ct. 863 (2011)

E. Employment Protections Expanded to the LGBTQ+ Community Under Title VII

The United States Supreme Court issued a landmark ruling expanding employment protection to the LGBTQ+ community under Title VII in *Bostock v. Clayton County, Georgia.* The Supreme Court explicitly ruled that an employer who discriminates against or discharges an employee based on an employee's

homosexuality or gender identity violates Title VII by discriminating against the employee "because of such [employee's] sex." *See* 42 U.S.C. § 2000e-2(a)(1).

In *Bostock*, the Supreme Court considered "whether an employer can fire someone simply for being homosexual or transgender." The Supreme Court unequivocally stated that "an employer who fires an individual for being homosexual or transgender" violates Title VII of the Civil Rights Act of 1964 by taking discriminatory action based upon the employee's sex. The Supreme Court held that if "sex plays a necessary and undisguisable role in the decision" to terminate the individual's employment, Title VII prohibits employers from discriminating against homosexual or transgender employees.

The *Bostock* decision addressed this issue in three cases consolidated for consideration by the Court. In the first case, Clayton County, Georgia fired Gerald Bostock after Mr. Bostock began participating in a gay recreational softball league, despite Mr. Bostock's nationally recognized work in the county's child welfare advocacy department. In the second case, a skydiving business fired Donald Zarda after several productive seasons with the business when Mr. Zarda mentioned that he was gay. In the third case, a funeral home fired Aimee Stephens after she notified the funeral home that she planned to "live and work full-time as a woman." In all three cases, the employer fired the employees because of the employees' homosexuality or gender identity.

Title VII makes it unlawful "for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin." 42 U.S.C. § 2000e-2(a)(1). The *Bostock* decision depended entirely on whether firing an employee for being a homosexual or transgender individual constitutes discrimination "because of such individual's . . . sex" within the meaning of Section 2000e-2(a)(1) of Title VII.

In *Bostock*, the Supreme Court clearly emphasized the two key points underlying its decision. First, "an individual's homosexuality or transgender status is not relevant to employment decisions." Second, "it is *impossible* to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

The Supreme Court's mandate in *Bostock* is clear: an employer violates Title VII if the employer discriminates against or fires an individual for being homosexual or for being transgender. Employment decisions based on an individual's sexuality or gender identity necessarily require that such decisions are based on sex when an employer fires a person for traits or actions that the employer would not have questioned in members of a different sex. In short, when making employment decisions based upon an employee's homosexuality or gender identification, the employer violates Title VII prohibitions.
Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020)

F. Oral and written complaints are protected under FLSA

The petitioner, Kevin Kasten, brought an anti-retaliation lawsuit against his former employer, Saint–Gobain Performance Plastics Corporation. Kasten says that Saint–Gobain located its timeclocks between the area where Kasten and other workers put on (and take off) their work-related protective gear and the area where they carry out their assigned tasks. That location prevented workers from receiving credit for the time they spent putting on and taking off their work clothes—contrary to the Act's requirements.

Kasten says that he repeatedly called the unlawful timeclock location to Saint–Gobain's attention, in accordance with Saint–Gobain's internal grievance-resolution procedure, which was to immediately report unlawful practices to his supervisor and his supervisors' supervisor. Saint–Gobain denies that Kasten made any significant complaint about the timeclock location and says that it dismissed Kasten simply because Kasten, after being repeatedly warned, failed to record his comings and goings on the timeclock.

The district court entered summary judgment for Saint–Gobain, believing that the Act did not protect oral complaints. On appeal, the Seventh Circuit agreed with the District Court that the Act's anti-retaliation provision does not cover oral complaints. The Supreme Court granted certiorari because of conflict among the Circuits as to whether an oral complaint is protected.

Breyer wrote the winning opinion 6-2 with Scalia and Thomas dissenting and Kagan recusing herself. The Supreme Court held that anti-retaliation provision of FLSA protects oral as well as written complaints of violation of the Act. The Court officially defined "filed any complaint," as something that contemplates some degree of formality, certainly to the point where the recipient has been given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns. Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C.A. § 215(a)(3).
Kasten v. Saint-Gobain Performance Plastics Corp., 131 S.Ct. 1325 (2011)

G. The Supreme Court defines "Supervisor" under Title VII.

In a 5-4 decision the Supreme Court created a bright line rule articulating who is considered a "supervisor" for purposes of vicarious liability under Title VII. The majority narrowed the definition of "supervisor" stating that an employee is a supervisor "if he or she is empowered by the employer to take tangible employment actions against the victim." This includes actions which affect a significant change in employment status such as the power to hire, fire, demote, promote, transfer, and discipline.

Generally, supervisor status can be readily determined by written documentation. Therefore, this decision provides employers with greater certainty and a clear workable definition of who qualifies as a "supervisor". As a result, parties can assess the strengths and weaknesses of their case and resolve disputes prior to the commencement of litigation.

It is important to note that this holding does not shield employers completely from vicarious liability. The analysis is contingent upon whether the harasser is a supervisor or merely a co-worker. In the circumstance where the harassing employee is the victim's co-worker, the employer is held liable if it was negligent in controlling workplace conditions leading to the creation or continuation of a hostile work environment. Therefore, under this circumstance, a victim can prevail provided that the employer was negligent in failing to prevent the harassment from occurring. Furthermore, in the event that the harasser is a supervisor, the employer can escape liability by asserting affirmative defenses. This decision drastically narrows the scope of vicarious liability in harassment cases.
Vance v. Ball State University, 133 S.Ct. 2434, (2013)

II. MISSOURI RETALIATORY DISCHARGE

A. Workers' Compensation

An employee must ONLY demonstrate his or her filing of a workers' compensation claim was a CONTRIBUTING FACTOR to the employer's discrimination or the employee's discharge.

John Templemire suffered a work injury in 2006 when a large metal beam crushed his foot. He returned to work on "light duty" and received workers' compensation benefits but was later fired for failing to perform assigned work tasks. Notably, Templemire was on break and resting his foot at the time of his discharge.

In a 5-2 decision, the Missouri Supreme Court reversed the lower courts and effectively overturned three decades of case law. The court held that to make an actionable case for retaliatory discharge under section 287.780, an employee must demonstrate that his or her filing of a workers' compensation claim was a contributing factor to the employer's discrimination or the employee's discharge rather than meeting the more traditional "but for" proof standard.

V.A.M.S. already prohibited an employer from discharging or in any way discriminating against an employee for exercising his or her workers' compensation rights, but this holding makes it inappropriate for an employer to give any consideration to the fact that an employee filed a workers' compensation claim when making employment decisions.
Templemire v. W&M Welding, Inc., Supreme Court of Missouri, En Banc. (Decided April 15, 2014)

B. Wrongful Discharge in Violation of Public Policy

Missouri recognizes a public policy exception to the at-will employment doctrine, making it illegal for an employer to fire an employee for a reason that is contrary to the public policy of Missouri.

For an employee to prevail on a claim of wrongful discharge in violation of public policy she must only show her protected action was a "contributing factor" in the employment decision.

In *Fleshner v. Pepose Vision Center, P.C.*, an employee who worked for a surgery clinic reported to her employer that she has received a call from the U.S.

Department of Labor (DOL) about the employer's pay practices and had spoken to the DOL investigator about the hours worked by the employees. The employee was terminated the day after she reported the telephone conversation to the employer.

The case made it to Missouri's Supreme Court over appeals over jury instructions. Prior to this case, the Court of Appeals had applied the "exclusive causation" standard to wrongful discharge claims under the public policy exception. This changed here when the court held an employee claiming wrongful discharge in violation of public policy based on reporting of illegal conduct or refusing to preform wrongful conduct must show that the reporting or refusal was a "contributing factor" in the employment decision.
Fleshner v. Pepose Vision Center, P.C., 304 S.W.3d 81, (Mo. 2013).

An employee must still specifically identify a provision or law violated by the employer.

In *Margiotta v. Christian Hospital,* an employee was fired in 2007 after he had a violent outburst at work. He then sued the hospital he had worked at alleging that it had terminated his employment because of his internal complaints of safety hazards made on three occasions in 2005. The trial court dismissed the suit.

The Missouri Supreme Court held that to prevail on a whistleblower wrongful discharge claim, the employee must show that he reported to superiors or to public authorities serious misconduct that constitutes a violation of the law and of well-established and clearly mandated public policy. Merely citing a statute or regulations is not sufficient; the statute or regulation must not be vague or general because it would require a court to decide on its own what public policy is.

In the Court's own words: "What [Plaintiff] asks this Court to do is to grant him protected status for making complaints about acts or omission he merely believes to be violations of law or public policy. The public policy exception to the at-will doctrine is not so broad."
Margiotta v. Christian Hosp. Ne. Nw., 315 S.W.3d 342, 345 (Mo. 2010)

C. Contract Employees Have the Right to Sue Their Employers for Wrongful Discharge

In 1995 the Missouri Supreme Court decided en banc that only at-will employees could sue their employers for wrongful discharge and the contract employees only could sue for breach of contract. This was overturned in 2012 with *Keveney V. Missouri Military Academy*:

Keveney was a teacher under a written employment agreement at a military boarding school. The teacher noticed unusual bruising on a student and suspected that student was suffering from physical abuse. Keveney reported the suspected abuse to three of his supervisors. They warned him that if he reported the suspected abuse of the student to the Missouri Division of Family Services he would lose his job. After maintaining that the law required the student's abuse to be reported, Keveney was terminated.

Keveney sued the employer for both breach of the employment agreement and wrongful discharge in violation of public policy. He identified the public policy as Mo.

Rev. Stat. 210.115 which mandated that all doctors, nurses, teachers etc. immediately report any suspected abuse of a child to the Department of Family Services.

The trial court permitted the breach of contract claim but dismissed his wrongful discharge claim. The Missouri Supreme Court reversed the dismissal and sent the wrongful discharge case back to the trial court, thus holding that a contract employee could sue their employer for wrongful discharge.
Keveney v. Missouri Military Acad., 304 S.W.3d 98, 100 (Mo. 2010)

D. The Missouri Court of Appeals has Broadened the Scope of Public Policy

Phyllis Delaney worked as a data-entry clerk at a nonprofit physical therapy center run by Signature Health Care Foundation. Shortly after her employment began, she learned that her brother had been diagnosed with kidney failure and would require a transplant. Once it was determined that she would be a viable donor, she informed her employer that she was going to donate a kidney to her brother and would have to miss four weeks of work after the surgery.

Although Signature Health initially approved Delaney's request for time off, three days before the surgery, the company informed her that it couldn't hold her position open for four weeks and discharged her instead.

There is no specific law in Missouri that requires a private employer to grant an employee time off to donate an organ. However, after filing a suit for wrongful discharge, Delaney cited multiple Missouri statutes that support organ donation, including 105.266.1 which states that any employee of the State of Missouri shall be granted a paid leave of thirty workdays to serve as a human organ donor. The court held that collectively these statutes reflect a clear mandate of public policy in Missouri encouraging organ donation and remanded the case for a new trial.
Delaney v. Signature Health Care Found., 376 S.W.3d 55, 56 (Mo. Ct. App. 2012)

E. A municipality has Sovereign Immunity from actions at common law tort for those actions they undertake as part of the municipality's governmental functions.

Brooks, a police officer, arrested a woman for a DUI. The suspect subsequently refused a breathalyzer test and made threats to Brooks that she had a "close relationship with the Police Department of the City of Sugar Creek" and that "she could arrange to have the Plaintiff terminated by the Police Department."

Sergeant Jonathan Fields, who was Brooks's superior in the Police Department, was then informed by Brooks that he had arrested this specific suspect. Fields responded by saying, "Do you know who you have in there?" and "Fields then informed Plaintiff that the suspect was the owner of a well-known business in Sugar Creek and was then instructed by his superior to 'Make it go away!'" Fields further instructed Brooks "to shred all records relating to the detention, field testing, and arrest of the suspect."

Brooks did what he was told and shredded the file. Nevertheless, the next day Brooks was summoned to Police Headquarters by Police Chief Herbert Soule and

was terminated. Brooks sued for wrongful discharge but the City of Sugar Creek won on summary judgment based on government immunity.

A municipality has sovereign immunity from actions at common law tort if “those actions they undertake as a part of the municipality's governmental functions-actions benefiting the general public.” The Missouri Supreme Court has repeatedly held that termination of a city employee is a governmental function; therefore, the city was protected by governmental immunity unless some exception applied. The case made sure to point out that “municipalities have no immunity for torts while performing proprietary functions-actions benefiting or profiting the municipality in its corporate capacity.”

Brooks appealed the trial courts dismissal and argued that public policy prevents the City from enjoying sovereign immunity from his wrongful termination lawsuit in that “logic cannot support a doctrine that terminating a police officer for arresting a drunk driver because that drunken driver is a personal friend of the police supervisors or chief of police is in anyway a benefit to the general public.”

Though sympathetic to Brooks, the Court felt bound by precedent and that it had to dismiss the case and find Sugar Creek protected by Immunity.

The Court of Appeals specifically said, “this case presents important issues on which guidance from our Supreme Court would be helpful.” But the Supreme Court declined to hear the case.
Brooks v. City of Sugar Creek, 340 S.W.3d 201 (Mo. Ct. App. 2011)

III. KANSAS RETALIATORY DISCHARGE

A. Workers’ Compensation is an Exception to At Will Doctrine

One of the exceptions to the Kansas employment at will doctrine occurs when an employer discharges an employee in retaliation for the employee's exercise of his rights under the Workers Compensation Act. This is a common law civil action governed by the two-year statute of limitations set out in K.S.A. 60-513(a)(4). In *Pfeifer,* the Court was asked on certification by the United States Court of Appeals for the Tenth Circuit to decide whether an employment contract requiring an employee to file suit within six months of her termination is valid and enforceable in a retaliatory discharge case.

The Court held that although K.S.A. 60-501 contains no express or implied prohibition against contractual agreements limiting the time in which to sue, the public policy recognizing that injured workers should be protected from retaliation when exercising rights under the Workers Compensation Act "invalidates the contractual provision at issue because it impairs enforcement of that protection." Kansas has a thoroughly established public policy supporting injured workers' rights to pursue remedies for their on-the-job injuries and opposing retaliation against them for exercising their rights. The retaliatory discharge cause of action is intended to deter employer reprisal for an employee's exercise of a legal right. "There is little question that restricting an employee's time to bring a retaliatory discharge claim for a job termination suffered following that employee's exercise of a statutory right necessarily impedes the enforcement of that right and the public policy underlying it."

Regardless of the terms of the employment contract, the employee has 2 years in which to sue for retaliatory discharge. The Court's holding "is limited to the circumstances in which there is a strongly held public policy interest at issue."
Pfeifer v Federal Express Corporation, 297 Kan. 547, (June 7, 2013)

B. Kansas law does not recognize a tort of retaliatory discharge when an employee is terminated in an attempt to avoid paying the employee a commission, even if the commission has already been earned.

Deeds was fired from his position as a sales marketing executive at Waddell & Reed in 2007. A year later in 2008, Deeds filed a claim under the Kansas Wage Payment Act with the Kansas Department of Labor seeking more than $1 million in commissions he said he had earned that had not been paid to him. In 2009, he sued his former employer claiming that they fired him in retaliation for exercising his rights under the Kansas Wage Payment Act.

The court found that Deeds complained about changes in the compensation system but that he was personally oblivious of the Kansas Wage Payment Act and never actually made a claim under its provisions during his employment. Consequently, the court held that Deeds could not maintain a lawsuit alleging that he was terminated for exercising rights under the Kansas Wage Payment Act.

The Court further outlined that even if Deeds had filed the complaint while employed, he had not cited any Kansas constitutional provision, statute, or court opinion noting a strong public policy forbidding the firing of an employee for the purpose of avoiding the payment of commissions already earned. They said that if the commissions truly have been earned, the employee could make a claim for them either under the Kansas Wage Payment Act or in a breach-of-contract action.

C. Kansas law recognizes the tort of retaliatory discharge when an employee is terminated for filing a wage claim under the Kansas Wage Payment Act.

Campbell was an at-will employee with Husky Hogs, L.L.C., for about 1 year when he filed a complaint with the Kansas Department of Labor (KDOL) alleging Husky Hogs was not paying him as required by the KWPA. Campbell was fired 1 business day after KDOL acknowledged receiving his claim.

The district court granted Husky Hogs' motion for judgment on the pleadings and held Campbell's termination did not violate Kansas public policy, even though it was required to assume the discharge resulted from filing the disputed wage claim. The district court *sua sponte* determined that even if Campbell had stated a valid common-law retaliatory discharge claim, it was supplanted by the KWPA because that Act provides Campbell an adequate substitute remedy.

The Kansas Supreme Court found that the case law makes it obvious that Kansas courts permit the common-law tort of retaliatory discharge as a limited exception to the at-will employment doctrine when it is necessary to protect a strongly held state public policy from being undermined.

They further held that the KWPA embeds within its provisions a public policy of protecting wage earners' rights to their unpaid wages and benefits. Mirroring how the Court found a common-law retaliatory discharge claim when an injured worker is

terminated for exercising rights under the Workers Compensation Act, they found a cause of action is necessary when an employer fires a worker who seeks to exercise KWPA rights by filing a wage claim.

Anticipating the Court might rule this way, Husky Hogs argued that the statutory remedy under KWPA was adequate and thereby precluding the common-law remedy sought by Campbell. They cited *Hysten v. Burlington Northern Santa Fe Ry. Co*., 277 Kan. 551, (2004) which says, "Under the alternative remedies doctrine, a state or federal statute could be substituted for a state retaliation claim—if the substituted statute provides an adequate alternative remedy"

Hysten had previously recognized a tort for retaliatory discharge based on an injured worker's exercise of his or her rights under Federal Employers Liability Act (railroad workers).

Addressing this issue, the Court found that "the KWPA action and its statutory remedies relate to Campbell's claim that Husky Hogs did not pay him all earned wages. But the retaliatory discharge claim would redress the employment termination. Since these causes do not address the same wrong, it is difficult to conclude the legislature supplanted the retaliatory discharge claim with KWPA."

This entitled Campbell to seek future lost wages, any other actual damages, and applicable remedies for pain and suffering, as well as punitive damages.
Campbell v. Husky Hogs, L.L.C., 292 Kan. 225, (2011)

D. Whistleblowing is one of Kansas' exceptions to employment-at-will.

Whistleblowing is the act of reporting actions of co-workers or supervisors that violate laws, regulations, or rules that pertain to public policy, health, or safety.

Standards of proving Whistleblowing in court:

1. Plaintiff Must Prove:
    a. A reasonably prudent person would have concluded the employee's coworker or employer was engaged in activities in violation or rules, regulations, or the law pertaining to public health, safety, and general welfare;
    b. The Employer had knowledge of the employee's reporting of such violations prior to discharge of the employee;
    c. The employee was discharged in retaliation for making the report;
    d. The whistleblowing was done in good faith based on a concern regarding the wrongful activity reported rather than for a corrupt motive like malice, spite, jealousy, or personal gain.
2. If Plaintiff can prove the above, Employer must prove:
    a. Plaintiff was terminated for a legitimate non-discriminatory reason
3. If the Employer can prove the above, the employee must prove:
    a. That the Employer's motives were pretextual

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