

WELCOME!

1:45 PM – 2:00 PM

Registration

2:00 PM – 2:30 PM

Mediation of Difficult Cases

2:30 PM – 3:00 PM

Discovery Responses and Clients: Dos,
Don'ts, and Disclosure Changes in Texas

3:00 PM – 3:20 PM

Misclassification of Employees and Impact
on Potential Joint Defense

3:20 PM – 3:40 PM

To Remove or Not to Remove – That is the
Question

3:40 PM – 4:00 PM

Getting Back to “Normal” – What Does That
Mean for You?

4:00 PM – 5:00 PM

Ethical Dilemmas: A Day in the Life of Risk
Management and In-House Counsel

Join us at Nine at The National!
9th Floor of the Thompson Dallas
Cocktails 5:30 PM | Dinner 6:30 PM



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BEST PRACTICES IN HIGH STAKES MEDIATION

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ROADMAP FOR TODAY

- The Mediation Decision
- Early Decisions
- Preparing for Mediation
- Real Considerations
- Open Mic

HOW DO YOU GET A DIFFICULT CASE TO MEDIATION

- Agreement
- Court Order of Scheduling Order
- Motion

EARLY DECISIONS

- When do you mediate the difficult case?

EARLY DECISIONS

- Who will mediate the case?
 - Who chooses?
 - Do you care who the mediator is?
 - What traits do you want?

WHAT ARE THE PROBLEMS FACING THE HIGH STAKES MEDIATION

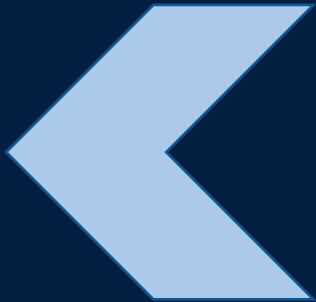
- Zoom or in person?
- Decision makers cannot focus on mediation.
- Parties get off on the wrong foot.

HOW DO YOU PREPARE FOR THE HIGH STAKES MEDIATION

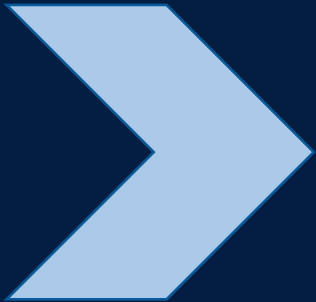
- Make sure lawyer and client are on the same or similar page
- Communicate with the mediator-equip him/her to do their job
- Have an opening number ready

DECISIONS ON THE DAY OF MEDIATION

- Is there a joint session or do you get right to work?
- What about the initial offers-posturing or do you get real quickly?
- What if you are not getting anywhere?
 - Enlist mediator's help
 - Test numbers
 - What about a bracket?
 - Mediator's proposal



REAL CASE STUDY CONSIDERATIONS



REAL CONSIDERATIONS FOR DISCUSSION

- Cypress Lakes Case
 - Apartment complex plagued with security problems
 - Current lawsuits:
 - 1 break-in with death
 - 1 execution shooting
 - 1 shooting in leg (50k meds)
 - 1 torso shooting (250k meds)
 - 2 bystander claims
 - More claims on the way

REAL CONSIDERATIONS FOR DISCUSSION

- How get case to mediation?
- When do you mediate it?
- What are the problems you face?
- How do you prepare for it?

REAL CONSIDERATIONS FOR DISCUSSION

- Which case do you do first?
- What are your concerns?
 - Compensatory values
 - Punitive damages
- What is your strategy?



OUTCOME OF MEDIATIONS

REAL CONSIDERATIONS FOR DISCUSSION PRIME CASE



REAL CONSIDERATIONS FOR DISCUSSION PRIME CASE



REAL CONSIDERATIONS FOR DISCUSSION PRIME CASE

- But...then the shocker

REAL CONSIDERATIONS FOR DISCUSSION PRIME CASE

■ The Positive Drug Screen



First Advantage
A Laboratory for the Workplace

July 14, 2014

Linda San Paolo
Prime Inc.

Re: Daniel Maupin
Specimen ID Y18738672

Dear Ms. San Paolo:

Per your request for information surrounding the review and verification of a drug test for Daniel Maupin collected on June 12, 2014 the following is a chronologic breakdown of the events that occurred.

06/12/2014	Collection date.
06/13/2014	Specimen received at Medtox.
06/19/2014	Result reported to First Advantage MRO Services.
06/19/2014	5:02 p.m., EST. Donor called in. Result was not ready for MRO review. Donor's contact information was verified and updated.
06/20/2014	1:58 p.m., EST. Certified copy of chain of custody was received. Result was sent for MRO review.
06/20/2014	3:11 p.m., EST. Called donor; left message in voicemail.
06/20/2014	4:01 p.m., EST. Called donor; left message in voicemail.
06/23/2014	10:11 a.m., EST. Called donor; left message in voicemail.
06/23/2014	10:19 a.m., EST. Hold for donor contact notice was sent to employer.
06/23/2014	2:25 p.m., EST. Donor called in and was identified by his social security number, asked what state he holds his commercial drivers' license, and transferred to MRO for medical review.

Dr. Hammell informed Daniel Maupin that his urine sample tested positive for Amphetamines; Amphetamine. Dr. Hammell discussed the donor's medical history and any relevant biological factors that may have caused this test to be positive for Amphetamines; Amphetamine. Based on the conversation between Dr. Hammell and the donor, Daniel Maupin was informed that since he did not have a valid medical explanation for his positive test, the result would be reported as positive for Amphetamines; Amphetamine to his employer.

Before ending the call, Dr. Hammell informed Daniel Maupin of his right to have his split specimen tested at an alternative laboratory. Daniel Maupin declined the option of reanalysis at the time of the interview.

06/23/2014 5:56 p.m., EST. Result verified as positive for Amphetamines; Amphetamine and reported to employer.

After thorough review of all biomedical factors and medications, both over the counter and prescription, we have concluded that the drug test of Daniel Maupin collected on June 12, 2014 is positive for Amphetamines; Amphetamine.

Sincerely,


Stuart B. Hoffman, MD, FACP
Chief Medical Review Officer

REAL CONSIDERATIONS FOR DISCUSSION PRIME CASE

- The Positive Drug Screen



402 West County Road D
Saint Paul, MN 55112

Jennifer A. Collins, Ph.D.

PRIME INC MRO:STUART B HOFFMAN, MD, FACP FIRST ADVANTAGE 480 QUADRANGLE DR SUITE D BOLINGBROOK, IL 60440 Account #: 41642 Collected by: LATISHA H ROBINSON Collected at: 6158836995 MEDTOX collection site #6617 CONCENTRA NASHVILLE, TN	Specimen ID/CCF: Y18738672 Lab Accession: J7265858 Name: Donor ID 1: 240-41-6772 Donor ID 2: Reason for Test: Post-Accident General Info: Collected: 06/12/2014 4:53 PM Received: 06/13/2014 Reported: 06/19/2014 2:48 PM Report Status: FINAL
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Test	Result	Units	Screen Cutoff	Confirm Cutoff	Reference Range
DRUGS OF ABUSE SCREEN - SAMHSA					
DRUG TEST RESULT	POSITIVE				
AMPHETAMINES	+++POSITIVE+++	ng/ml	500	250	
MDMA	NEGATIVE	ng/ml	500	250	
COCAINE METABOLITE	NEGATIVE	ng/ml	150	100	
OPIATES	NEGATIVE	ng/ml	2000	2000	
6-ACETYLMORPHINE	NEGATIVE	ng/ml	10	10	
PHENCYCLIDINE (PCP)	NEGATIVE	ng/ml	25	25	
MARIJUANA (THC) METABOLITE	NEGATIVE	ng/ml	50	15	
REMARKS					
MRO ON CCP DIFFERS FROM ACCOUNT INFORMATION					
THIS SPECIMEN HAS BEEN TESTED IN ACCORDANCE WITH APPLICABLE REQUIREMENTS. THIS PANEL INCLUDES TESTS FOR SPECIMEN VALIDITY.					
RECOVERABLE ACTION REQUIRED:					
EXPIRED CUSTODY AND CONTROL FORM (FEDERAL)					
CORRECTED FLAW - AFFIDAVIT RECEIVED on 06/14/2014					
Certified by: PAGEL,BECKY					
AMPHETAMINES, GC/MS CONFIRMATION					
AMPHETAMINE	12629	ng/ml			

REAL CONSIDERATIONS FOR DISCUSSION PRIME CASE

- So how do we get this case to mediation?

REAL CONSIDERATIONS FOR DISCUSSION PRIME CASE

- What pre-mediation decisions have to be made?

REAL CONSIDERATIONS FOR DISCUSSION PRIME CASE

- What happens at the mediation?

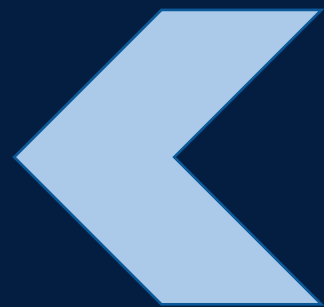
REAL CONSIDERATIONS FOR DISCUSSION PRIME CASE

- Outcome

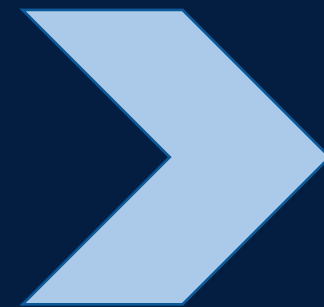


OPEN MIC





QUESTIONS



THANK YOU! IF YOU HAVE ANY QUESTIONS,
PLEASE CONTACT ONE OF THE PRESENTERS



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**DISCOVERY RESPONSES AND CLIENTS:
DOS, DON'TS, AND DISCLOSURE CHANGES IN TEXAS**

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DISCOVERY RESPONSES AND CLIENTS – DO'S AND DON'TS

- DOs:
- No.1 – Client Communication
 - Expectations
 - Drafts
 - Investigation
 - Emails/calls
 - Deadlines



DISCOVERY RESPONSES AND CLIENTS – DO'S AND DON'TS



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"Oh, that's just a HIPAA compliant feature to remind you if you leave patient documents in the copier."

- No. 2 – Documents
 - How to obtain?
 - What to produce?
 - How to produce it?
 - Confidentiality?

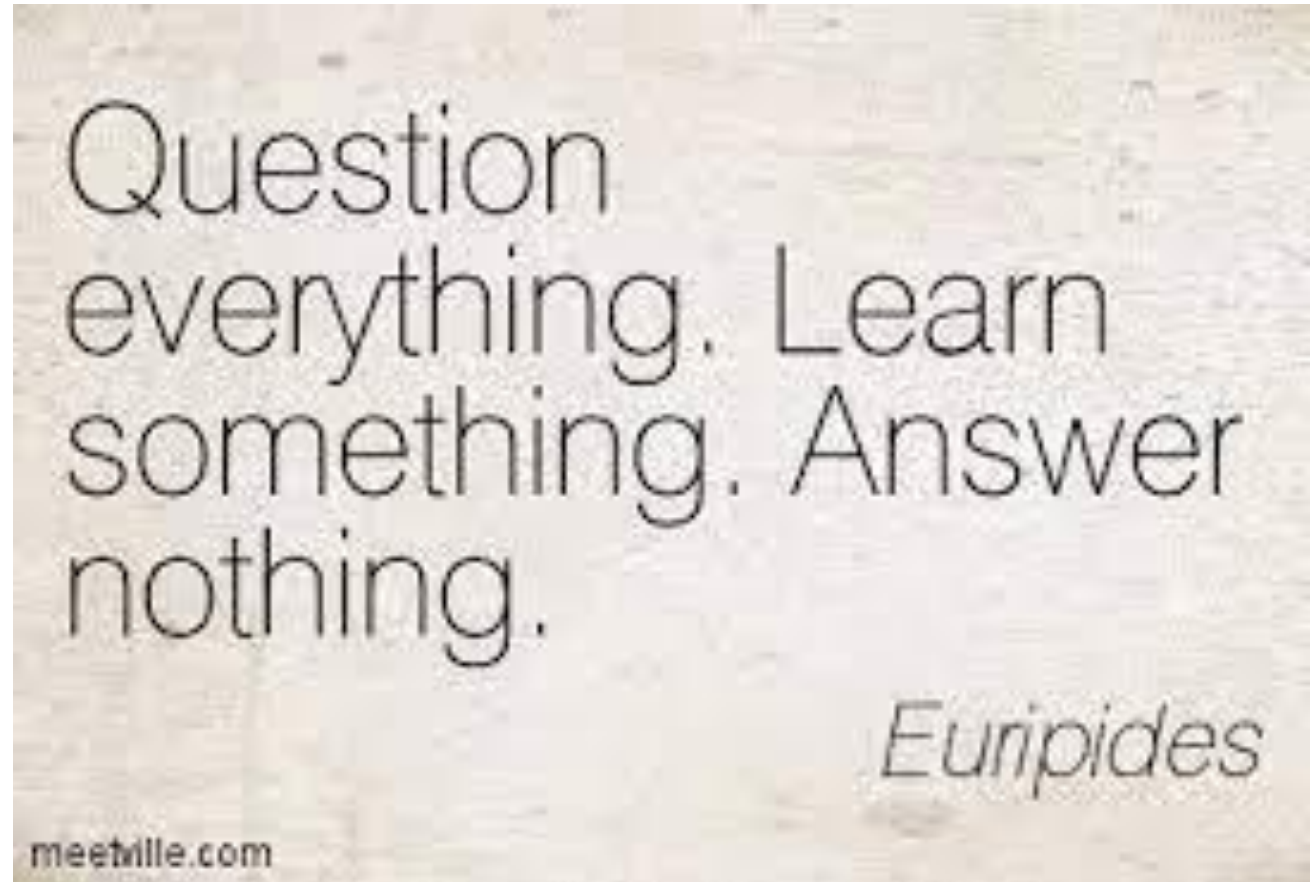
DISCOVERY RESPONSES AND CLIENTS – DO'S AND DON'TS

No. 3 - Interrogatories

Who answers?

Who signs?

Drafts?



DISCOVERY RESPONSES AND CLIENTS – DO'S AND DON'TS

- No. 4 – Depositions
 - Preparation?
 - Notice?
 - Video?



Priscilla wondered if her client was taking his deposition seriously enough.

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DISCOVERY RESPONSES AND CLIENTS – DO'S AND DON'TS

- **DON'TS:**
 - Procrastinate
 - Forget to involve the client
 - Be sloppy
 - Not answer
 - Be unorganized



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REQUESTS FOR DISCLOSURE IN TEXAS

THE FEDERALIZATION OF DISCOVERY IN TEXAS

- For cases filed January 1, 2021 forward:
 - Requests for Disclosure are now “Required Disclosures”
 - Due 30 days after first answer filed
 - Based on FRCP 26(a) to require disclosure of basic discovery automatically
 - Other parties – due 30 days after being served/joined
 - TRCP 192.2 prohibits plaintiffs from serving discovery with initial petition – no service of discovery until after that party’s disclosures due
 - Citations must contain language regarding disclosures

DOCUMENTS TO PRODUCE WITH REQUIRED DISCLOSURES

- Instead of “amount and method of calculating economic damages” – the rules now require:
 - A computation of each category of damages and the production of the non-privileged documents or other evidentiary material on which each computation is based, including materials bearing on the nature and extent of injuries suffered.
- Tracking FRCP 26(a) – parties must also produce:
 - All documents, electronically stored information, and tangible things that the responding party has in its possession, custody, or control, and may use to support its claims or defenses, unless the use would be solely for impeachment.

EXPERT DISCLOSURES

- Information related to testifying experts is no longer disclosed in the initial disclosures.
- TRCP 195 requires parties to disclose automatically
- Unless otherwise ordered by court – due 90/60 days before end of discovery period.
- Must disclose all previous information PLUS
 - Expert qualifications, including all publications authored in last 10 years
 - A list of all cases in prior 4 years expert testified in trial/depo
 - State compensation to be paid

EXPERT COMMUNICATIONS/DRAFT REPORTS

- Communications between expert and hiring attorney are protected from discovery except:
 - When communication relates to compensation
 - When communications identify facts or assumptions that attorney provided, and expert considered in forming opinions
- Draft expert reports are now protected from discovery

PRETRIAL DISCLOSURES

- TRCP 194.4 requires pretrial disclosures at least 30 days before trial unless court orders otherwise.
- Must separately identify: witnesses, documents, evidence that the parties expect to present at trial, and those to be presented only “if the need arises.”

COMMENTS

- A party is not excused from making its disclosures simply because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

COUNTY COURT/EXPEDITED ACTIONS

- In a statutory county court that has concurrent jurisdiction with district court – and the amount in controversy for a case exceeds \$250,000 – the jury must have 12 members instead of the 6 members normally required
- Amount in controversy to escape the expedited action status raised from \$100K to \$250K (excluding punitive damages and attorneys' fees)
- In expedited actions, increase in total hours allowed for depositions from 6 to 20

THANK YOU! IF YOU HAVE ANY QUESTIONS,
PLEASE CONTACT ONE OF THE PRESENTERS



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**MISCLASSIFICATION OF EMPLOYEES AND
IMPACT ON POTENTIAL JOINT DEFENSE**

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WHAT IS EMPLOYEE MISCLASSIFICATION ?

- Employee misclassification is the practice of labeling workers as independent contractors, rather than employees

FEDERAL VS STATE LAW ISSUE?

- Legislation
 - Federal – 579 legislative mentions
 - States – 47 states have a statute
- Reported Litigation
 - Federal – 529
 - State – 202 (almost 50% California)

WHY THE FOCUS ON MISCLASSIFICATION?

- Employers avoid paying unemployment and other taxes on workers, and from covering them on workers compensation and unemployment insurance
- State and federal governments, lose millions of dollars in tax revenue
- Workers misclassified as independent contractors work without the legal protections typically afforded to employees, such as wage and hour laws, workers compensation, and unemployment benefits

TESTS USED TO DETERMINE IF EMPLOYEE OR INDEPENDENT CONTRACTOR

- Common law test
- The common law test is used by the IRS for employed tax purposes. Additionally, 18 states and the District of Columbia use it as their own law
- ABC Test
- The US Department of Labor uses the ABC test to determine independent contractor status for labor law purposes, including minimum wages, overtime, and workers' compensation. Also, 33 states use the test.
- A&B or A&C of the ABC Test
- Eight states use either A&C or A&B rather than all of the ABC Test

ELEMENTS OF ABC TEST

- Absence of control: The worker must be free from control or direction by the company, both under the terms of the parties' contract and as a matter of reality.
- Business of worker: The work the worker is performing for the company cannot be the same work that the company is primarily engaged in for its customers. Is it off-premises?
- Customarily engaged: The worker needs to have his or her own ongoing business with multiple customers and the work done for the company has to be the same kind of work the worker's own separate business customarily engages in on behalf of other customers.

STATUS OF DOL FINAL RULE ON INDEPENDENT CONTRACTORS UNDER FAIR LABOR STANDARDS ACT

- 1/7/21 New Business friendly rule promulgated
- 3/4/21 Delay Rule from new Administration
- 5/6/21 Withdrawal Rule from new Administration
- Lawsuit filed in USDC ED of Texas (Coalition for Workforce Innovation et. al. v DOL) challenging withdrawal of rule (Fall of 2021 before briefing completed)

CURRENT FLSA “ECONOMIC REALITY TEST” FOR MISCLASSIFICATION

- The DOL and Courts deciding FLSA cases determine independent contractor status based on the totality of the circumstances using the “economic reality test” that focuses on multiple factors including the following:
 - The extent to which the services rendered are an integral part of the principal’s business;
 - The permanency of the relationship between worker and business;
 - The amount of the alleged contractor’s investment in facilities and equipment;
 - The nature and degree of control by the principal;
 - The alleged contractor’s opportunities for profit and loss;
 - The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor; and
 - The degree of independent business organization and operation

Lawsuits by Misclassified Employees

Lawsuits by Third Parties

LIABILITY DEPENDENT ON EMPLOYER-EMPLOYEE RELATIONSHIP

INDIRECT LIABILITY

- Based on conduct of employee
- Strict vicarious liability
- Respondent superior

NO LIABILITY IF INDEPENDENT CONTRACTOR*

*A principal may be liable for hiring a negligent or unqualified independent contractor provided that the employer either failed to exercise reasonable care in the selection of the contractor or had actual or constructive knowledge of the contractor's insufficiency.

DIRECT LIABILITY

- Based on conduct of employer
- Negligent hiring
- Negligent supervision
- Negligent training
- Negligent retention

RESTATEMENT SECOND OF AGENCY

§ 2 MASTER; SERVANT; INDEPENDENT CONTRACTOR

- (1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.
- (2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.
- (3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.
 - 46 States and every federal Circuit Court have cited this section)
 - “Respondent superior” - Latin for "let the master answer," is the maxim underlying the law of agency

STATUTORY EMPLOYEE

- Elements:
 - Work done under contract;
 - On premises;
 - Which is an operation of the usual business of the company.

BENEFITS IF EMPLOYEE

- You control the defense of the case;
- Gives you access to worker's compensation exclusive remedy defense;
- Reduce cost in that particular litigation through early summary judgment ruling.

DRAWBACKS IF EMPLOYEE

- Now you have court ruling finding what could have been an independent contractor is now an employee;
- Entitled to workers compensation benefits;
- May bar you nationwide from ever arguing that this contractor is an independent contractor in the future.

- EXAMPLE: I have a client that prohibits us from using the Statutory Employee defense because they do not want to incur workers compensation liability.

CONSEQUENCES EVEN IF DEEMED INDEPENDENT CONTRACTOR

- Employers Tax Guide states that certain employees are considered statutory employees for tax purposes if:
 - Driver who distributes beverages (other than milk) or meat, vegetable, fruit, or bakery products; or who picks up and delivers laundry or dry cleaning, if the driver is your agent or is paid on commission.
 - A full-time traveling or city salesperson who works on your behalf and turns in orders to you from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments. The goods sold must be merchandise for resale or supplies for use in the buyer's business operation.

WHAT IS THE TEST ?

- The service contract states or implies that substantially all the services are to be performed personally by them.
- They do not have a substantial investment in the equipment and property used to perform the services (other than an investment in transportation facilities).
- The services are performed on a continuing basis for the same payer.

JOINT REPRESENTATION OR JOINT DEFENSE AGREEMENT

- Control over strategy and course of litigation
- Waivable conflicts
- Optics at trial
- Common Interest Doctrine for JDA

THANK YOU! IF YOU HAVE ANY QUESTIONS,
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TO REMOVE OR NOT TO REMOVE?

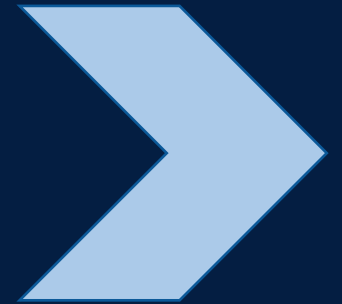
PRESENTER



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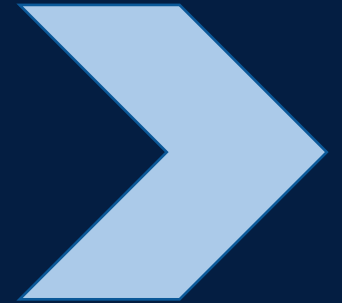


WHAT IS REMOVAL?





WHO CAN REMOVE?



WHO CAN REMOVE?

Any Defendant in an action can file for removal

BUT removal can only occur if:

There is a Federal Question

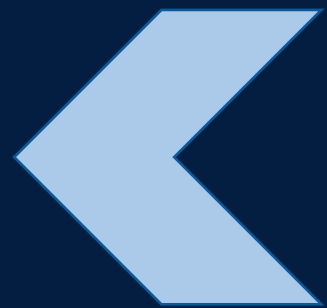
There is Complete Diversity



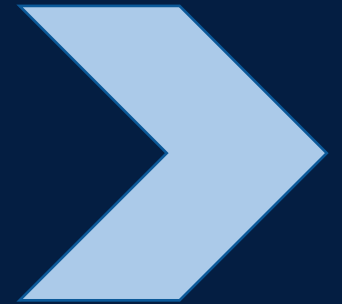
Attorneys must be a member of some federal bar to become admitted in other districts

OR

File a motion to be admitted pro hac vice



DEADLINES FOR REMOVAL



DEADLINES

**30-days
from
service to
remove**
[28 U.S.C.
§§1446(b)]

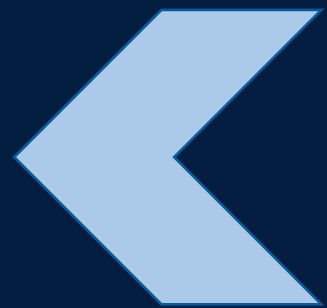
HOWEVER:



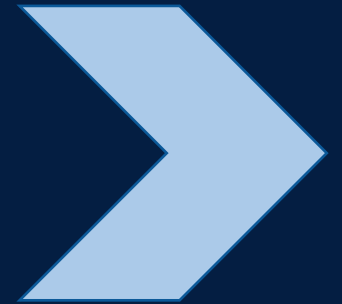
Each **NEW** defendant
gets their own 30-day
window to remove
after service
[§§1446(b)(2)(B)]

If an operative event,
such as amendment or
joinder, occur another
30-day window for
removal occurs*
[§§1446(b)(3)]

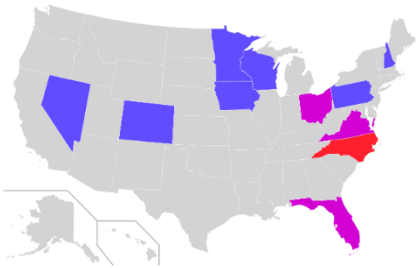
BUT removal for
Diversity Jurisdiction
CAN only occur within
1-YEAR of the action
commencing, unless
bad faith
[§§1446(c)(1)]



DIVERSITY JURISDICTION



WHAT IS DIVERSITY JURISDICTION?



- **When all parties are from different states**
(complete diversity requirement) [28 U.S.C. §1441, 1446, and 1332]



- **The amount in controversy is \$75,000 or greater**
(amount in controversy requirement) [28 U.S.C §1332]

COMPLETE DIVERSITY REQUIREMENT

Domicile:

- Need to identify state(s) where all parties are domiciled (citizens) to prove complete diversity [28 U.S.C. §1441(b) and 1332]

Determining Domicile for Persons:

- Domicile can be place where they live or INTEND to live/stay [§1332(a)(1)]

Determining Domicile for Corporations:

- Only domiciled in states in which they are incorporated (example: Delaware) or have their principal place of business [§1332(c)(1)]
- A registered agent within a state is NOT ENOUGH

Determining Domicile for LLC/Partnerships:

- Must evaluate the domicile (citizenship) of each of its members

*Case cannot be removed if any defendant is a citizen of the state in which the case is filed (Forum Defendant Rule)

IMPORTANT DIVERSITY JURISDICTION NOTES

Waiver

A defendant's active defense in a lawsuit in a state court can be considered a waiver of removal

1-year Limit

Past the 1-year mark after action started, case can't be removed for Diversity Jurisdiction UNLESS plaintiff acted in bad faith to prevent removal

Unanimity Rule

Unanimous Consent is a procedural requirement, meaning every served defendant must consent to removal [§1446(b)(2)(A)]

***IMPORTANT:** there is a Circuit split on how consent can be expressed, either each defendant must individually express their consent, OR one defendant can pledge unanimous consent in the notice of removal

Improper or Fraudulent Joinder

Make sure all parties should actually be apart of the action, often plaintiffs will join parties only for the purpose of defeating removal [§1446(c)(1)]

AMOUNT IN CONTROVERSY



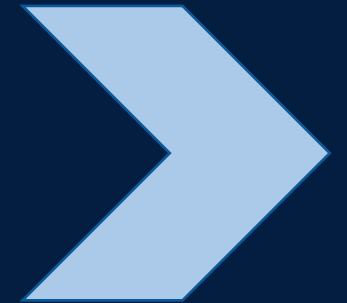
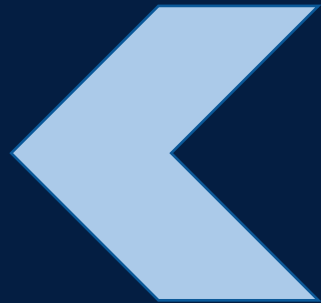
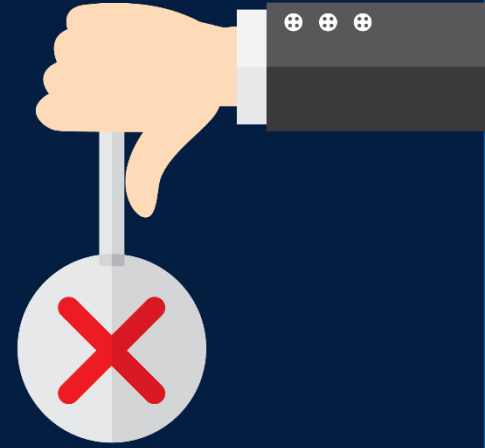
The second prong to satisfy removal for Diversity Jurisdiction

**Amount must be \$75,000 or more
[28 U.S.C. §1332(a)]**

How to determine Amount in Controversy:

- “Other Paper”
- Commence Discovery

WHY REMOVE?



BENEFITS OF REMOVAL

- **Plaintiff generally gets to pick the forum**
 - Removal is a way to disrupt their plan and/or level the playing field
 - Alleviate potential for prejudice or bias against out of state defendant
- **More Familiarity or Comfort with Rules and Procedural Requirements**
 - Can go both ways



BENEFITS OF REMOVAL

Disclosure Requirements Can Differ from State to State

Federal Rules Require Pre-Discovery Disclosures

Knowledge of witnesses

Location and content of documents

Damages calculations

However, only have to disclose what you plan to use to support your case or defenses

Also required to be provided in Scheduling Order

Expert Disclosures Required

Report

Reasons and basis for all opinions

Any exhibit or document used to form an opinion

CV

Publications

Testimony history



BENEFITS OF REMOVAL

Federal Rules Can Limit Discovery

Nationwide Subpoena Power

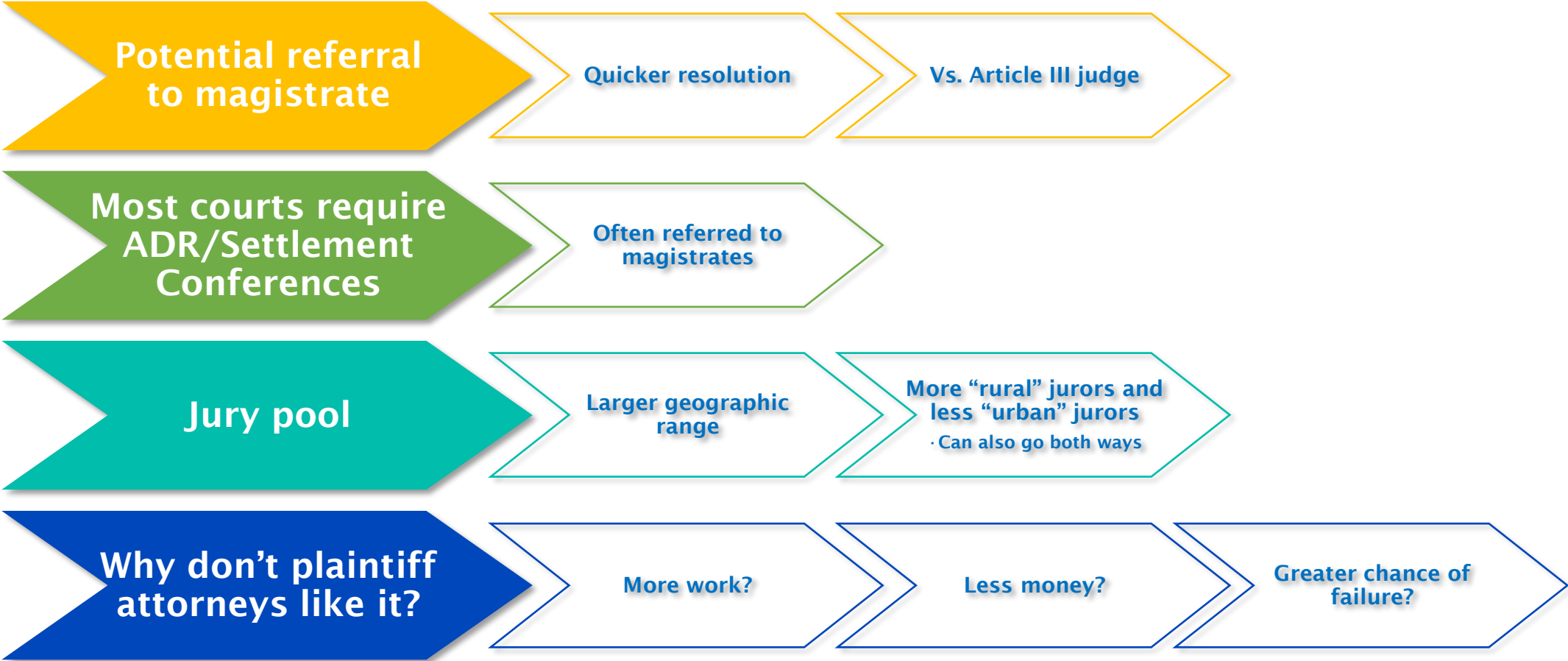
- Witnesses, parties, etc. pay more attention to Fed. Judges, orders and subpoenas

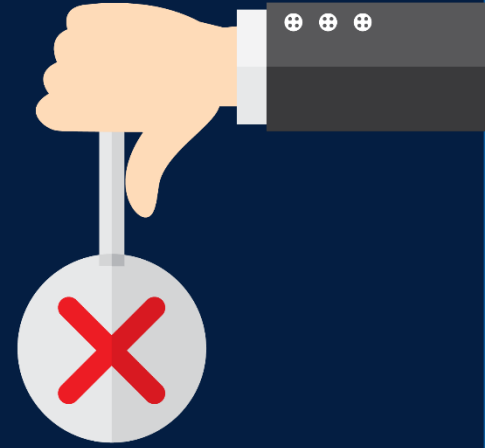
Less Frivolity

- Magistrates/judges don't put up with as much discovery nonsense
 - Bad faith objections
- Potential for better rulings on motions, especially dispositive motions
- Rules are more likely to be vigorously followed



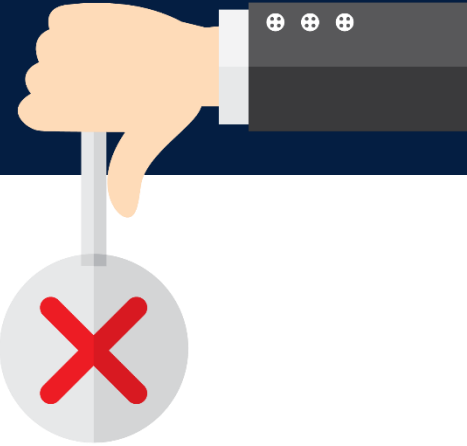
BENEFITS OF REMOVAL





DISADVANTAGES OF REMOVAL

DISADVANTAGES OF REMOVAL



Sanctions for improper removal
• Costs/fees

More expensive?

Takes longer to obtain rulings/hearings

Jury Pool can be affected

Deadlines more stringently followed

Real sanctions for violations are often imposed

THANK YOU! IF YOU HAVE ANY QUESTIONS,
PLEASE CONTACT CHRIS.



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Local Relationships Worldwide



OPEN DISCUSSION OF
GETTING BACK TO "NORMAL" –
WHAT DOES THAT MEAN FOR YOU?

THANK YOU! IF YOU HAVE ANY QUESTIONS,
PLEASE CONTACT THE PRESENTERS.



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**ETHICAL DILEMMAS: A DAY IN THE LIFE OF RISK
MANAGEMENT AND IN-HOUSE COUNSEL**

THANK YOU! IF YOU HAVE ANY QUESTIONS,
PLEASE CONTACT THE PRESENTERS.



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ETHICS IN ACTION

ALFA International Hospitality & Retail Practice Group

Dallas Regional Seminar

June 30, 2021

PLAYERS, FACTS & QUESTIONS

Shades of Grey: Ethical Issues for In-House Counsel

The Players

- **Mary Grey** is General Counsel of Small Lots!, a publicly traded corporation engaged in retail – targeting the booming Tiny House Movement
- **Frank Jones** is the President of Small Lots!. Before becoming Small Lots'! President, Frank was a Senior Vice President of Red Umbrella Insurance Corporation (“Red Umbrella”), a wholly owned subsidiary of Small Lots!.
- **Zoe Conley** is a member of Small Lots'! Board of Directors. She is also the President of Red Umbrella.
- **Claire Dickson, Esq.** is the Chair of Small Lots'! Board of Directors.
- **Doug Brickman** is the Supervisor of Small Lots'! Information Technology Department.
- **Steve Schmidt** is an attorney retained to bring suit against Small Lots! on behalf of a group of Small Lots'! shareholders.

The Facts

Late Monday afternoon, Ms. Grey receives a telephone call from Doug Brickman, the Supervisor of Small Lots'! IT Department, informing her that one of Small Lots'! file servers was breached over the weekend. Doug tells Ms. Grey he is unable to determine the source of the breach, but that some files containing sensitive information appear to have been viewed—and, in some instances, copied—after the breach occurred. The information includes Personally Identifiable Information (“PII”) of some of Small Lots'! customers and employees, as well as data concerning financial transactions between Small Lots! and its subsidiary, Red Umbrella Insurance.

Somewhat puzzled that Doug is calling her directly about this, Ms. Grey asks whether Small Lots'! President, Frank Jones, has been told about the matter. After a short pause, Doug replies that while investigating the security breach he discovered several email messages between Mr. Jones and Zoe Conley, a member of Small Lots'! Board, detailing an ongoing love affair between them which appears to have been financed, in part, with Small Lots'! or Red Umbrella funds. One of the email discussions between Frank and Zoe regarding these arrangements contains the following statement by Frank:

“We may want to rethink this thing going forward, Zoe. It’s a different ballgame with the Consumer Financial Protection Bureau out there. The fines and penalties are ridiculous.”

Ms. Grey thanks Doug for calling and asks him to keep quiet about what he has discovered until he hears back from her.

Before Ms. Grey can decide what to do about Doug’s news, she receives another phone call, this one from Claire Dickson, who is the Chair of Small Lots'! Board of Directors. Claire has just received a call from an attorney in Burlington, Vermont named Steve Schmidt, who informed her that he has been retained by a group of Small Lots'! shareholders to sue Small Lots! for breach of fiduciary duty. Steve refused to provide further details about his clients’ claim, telling Claire: “I shouldn’t even be having this conversation with you. My clients specifically instructed me to bring suit against Small Lots! without prior notice, but you and I have a history so I’m calling you as courtesy. I think you have a serious problem over there which you had better get your arms around fast. If it is not remedied to my clients’ satisfaction quickly, I will have no choice but to involve the authorities. And you didn’t hear this from me, but if I were you, I would reach out to that former CFO your President fired last year.”

Questions

Claire asks Ms. Grey for her advice concerning the call from attorney Schmidt. Ms. Grey, in turn, tells Claire about Doug's call to her. Claire, who is an attorney herself, then puts the following questions to Ms. Grey:

1. Is it appropriate for us to be talking about this without including Frank and Zoe in the conversation?
2. Will our conversation be protected by the attorney-client privilege?
3. Do you believe it is necessary to conduct an internal investigation? If so, who should conduct the investigation and how broad should it be?
4. How should Small Lots! manage its communications regarding the data breach and allegations of wrongdoing:
 - a) Within Small Lots!?
 - b) With Doug?
 - c) With Steve Schmidt?
 - d) With third parties who might be involved or impacted (including Frank and Zoe)?
5. What steps need to be taken to preserve relevant documents/data and what documents/data should be reviewed?
6. What threshold decisions need to be made about preserving privilege vs. sharing information with involved third-parties?
7. What ethical issues are associated with conducting witness interviews? What best practices are recommended?
8. How should Small Lots! handle individual representation of employees?

9. If misconduct is found, how does Small Lots! determine whether to self-report to the Government? What is the effect of self-reporting on privilege and exposure to civil suits?

10. Should a written investigation report be prepared and presented?

Assume that you are Ms. Grey. How will you answer Claire's questions?

Hot Topics in Retail & Hospitality

COVID-19 Vaccinations in the Workplace

Navigating
COVID-19 in
the industry

Is it really over?

EEOC

- ✓ Employers may require employees to be vaccinated
- ✓ Employers may offer vaccination incentives
- ✓ Employers must make reasonable accommodations for employees who cannot receive the vaccine

OSHA

- ✓ Employers do not need to take steps where all employees are fully vaccinated
- ✓ Employers should take steps to protect unvaccinated or at-risk workers

Arguments that have reached the courts

1. Mandating vaccines is preempted by 21 U.S.C. § 360bbb-3.
 - ✓ “With respect to the emergency use of an unapproved product. . . individuals to whom the product is administered [shall be] informed. . . **of the option to accept or refuse administration of the product. . .**”
 - *Legaretta v. Macias (N.M. Dist. Ct. 2021)*
2. The right to reject a vaccine without losing employment is protected by the Due Process right of life and liberty under the Fourteenth Amendment.
 - ✓ “Plaintiffs have a universally recognized, fundamental right to be free from human medical experimentation, a right that is protected by recognized international legal standards, international treaties to which the United States is a member, the laws and regulations of the United States, and the Due Process Clause of the Fourteenth Amendment.”
 - *California Educators for Med. Freedom v. Los Angeles Unified School Dist. (Ca. Dist. Ct. 2021)*

Navigating COVID-19 in the industry

What Kind of Incentives Can an Employer Provide?



Cash Incentives

Instacart, Lidl, Publix, Kroger, Dollar General, Trader Joe's



Paid Time Off

Marriott Hotels, Aldi

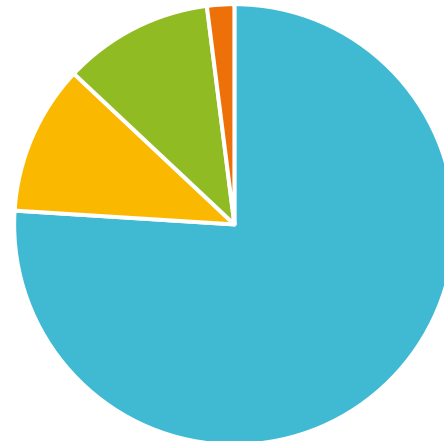


Transportation/ Credits to Vaccine Sites

Target

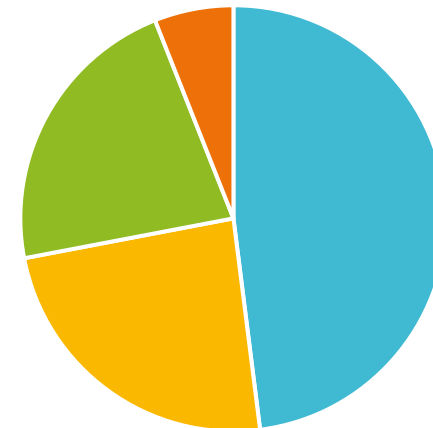
In a survey of over 700 employers...

Those Considering Paid Time Off:



■ Unsure ■ 4 Hours ■ Full Day Off ■ More than 1 day

Those Considering Cash/Gifts:



■ Unsure/other ■ \$100-\$500
■ Under \$100 ■ Nominal swag

States With Pending Legislation Against Mandatory Vaccines Outside of the Healthcare Setting

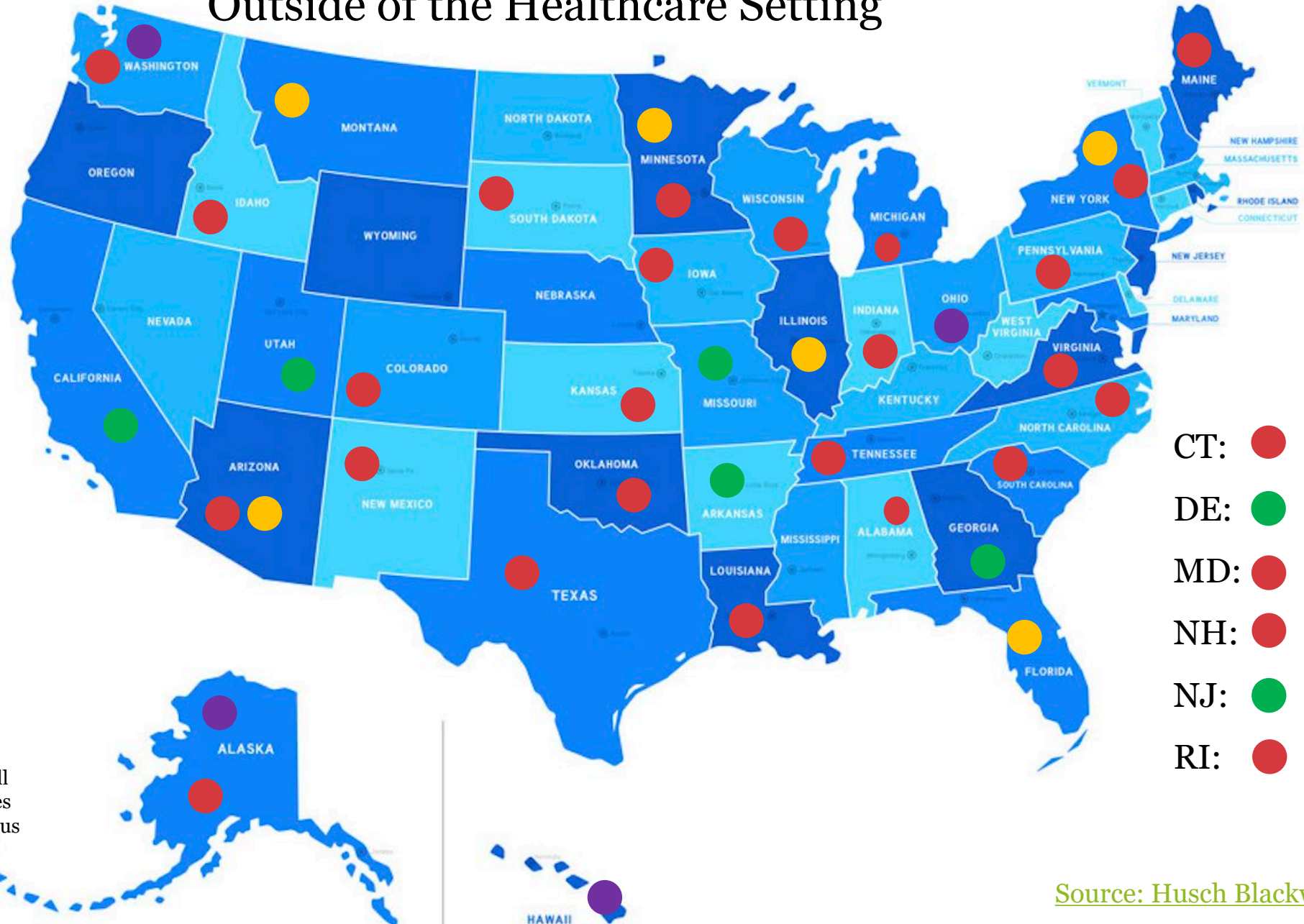
● Would prohibit private and public employers from requiring employees to be vaccinated

● Would prohibit only public employers/state funding recipients from requiring employees to be vaccinated

● Would prohibit businesses from denying services to clients without vaccines

● Would prohibit the demonstration of “vaccine passports” as condition of employment/Employers from requiring vaccine status disclosure

*Employers that can mandate vaccines must still make reasonable accommodations for employees that cannot get vaccinated for medical or religious reasons



What Employers Are Choosing To Do

In a recent survey, this is what over 700 employers responded:

Mandating the vaccine?

- 9% yes
- 27% unsure
- 64% no

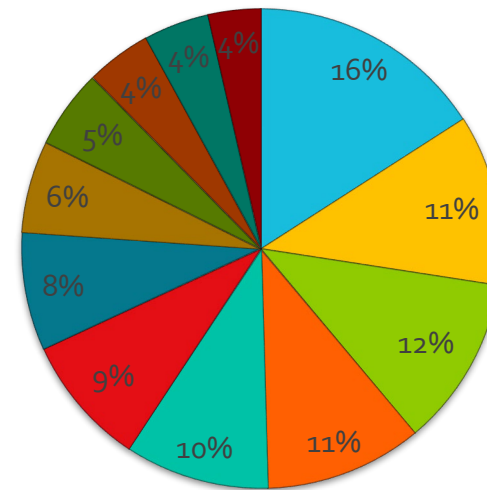
Encouraging the vaccine?

- 78% yes
- 13% unsure
- 9% no

Offering incentives to take the vaccine?

- 21% yes
- 43% unsure
- 36% no

Industry Breakdown of Mandating Vaccines



COVID-19 FAQ's

In conclusion: As of right now, can I....

Make vaccines mandatory in the workplace?

- Yes, but you must check your state's legislation first and you must make reasonable accommodations for those who need it. Federal law does not prohibit required vaccines.

Ask my employees if they have received a COVID-19 vaccine?

- Yes, but that information must be kept confidential. Check your state's legislation first.

Administer a COVID-19 test to my employees?

- Yes.

Offer my employees COVID-19 vaccines?

- Yes, doing so is not a violation of GINA or the ADA.

Offer my employees' family COVID-19 vaccines?

- Yes, as long as there is no incentive.

“Force Majeure” Clauses: How to Prepare for the Worst

Questions to ask when preparing your clause:

1. Am I using broad language?

2. Will I be left to rely too much on a “frustration of purpose” clause?

3. Am I defining the purpose of the Lease adequately?

4. Is it construed to only protect me from physical limitations?

5. Am I relying too much on the term “impossible”?

What's next?

Protect Your Businesses
with “Force Majeure”
Clauses

“Force Majeure” Clauses: Issues Taken by Courts

How to protect your business under the clause

- Strictly comply with the technical requirements of the lease.
 - “Failure to give proper notice is fatal to a defense based upon a force majeure clause requiring notice”
 - *Sabine Corp. v. ONG Western, Inc.*, 725 F. Supp. 1157, 1168 (W.D.Okla.1989)
- Make sure you can prove business was not already down prior to the event
 - You must prove that “but-for” the event, you would not have suffered an economic loss
 - *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 127 F. Supp. 2d 1239, 1243 (S.D. Fl. 1999)
- Make sure you are not responsible for the damage invoking the clause
 - “The frustration of purpose doctrine [requires]: (1) the party's principal purpose in making the contract is frustrated; (2) without that party's fault. . .”
 - *Rembrandt Enters., Inc. v. Dahmes Stainless, Inc.*, 2017 WL 3929308 (N.D. IO 2017).

The Promulgation of Biometric Technology and its Legal Risks

What is biometric technology?

- Uniquely sensitive identifiers
- Biologically unique to the individual
- Retina, iris scan, fingerprint, voiceprint

What is it used for in the industry?

- Time Management
 - Time clocks are facilitated with fingerprint information rather than ID's or pins to help ensure compliance
- Security access
 - Used to secure laptops, keyboards, and physical security

First of many:
The Illinois
Biometric
Information
Privacy Act
(BIPA)

Five key features of the Act

- Requires informed consent prior to collection
- Permits a limited right to disclosure
- Mandates protection obligations and retention guidelines
- Prohibits profiting from biometric data
- Creates a private right of action for individuals harmed by BIPA violations
- Provides statutory damages up to \$1,000 for each negligent violation, and up to \$5,000 for each intentional or reckless violation

Dangerous precedent to watch out for:

“[B]usinesses. . .like restaurants, rely on the added efficiency and safety provided by biometric technologies. The constant threat of lawsuits based on the district court’s decision will stifle operations and eliminate the intended benefits for both owners and employees – thus negating the intent of the BIPA. If the district court’s decision is allowed to stand, it will lead to extreme and absurd results, and raise significant due process concerns by creating penalties far beyond any identified harm,” -- Angelo Amador, executive director of the Restaurant Law Center.

In Re Cothron v. White Castle Sys.,
477 F. Supp. 3d 723, (N.D. Ill.
2020)