EMPLOYMENT LAW AND
GENERAL LIABILITY
PLAYBOOK

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TABLE OF CONTENTS

Employment Law

Difficult Employee Terminations ................................................................. Tab 1
  Difficult Employee Termination PowerPoint ........................................... Page 1
  Difficult Employee Terminations Materials ............................................ Page 15
  Documenting Employee Counseling (4 +2 Handout) ............................. Page 33
  Questions and Answer: EEOC’s Final Rule with RFOA .......................... Page 35
  Questions and Answer: EEOC’s Enforcement Guidance under Title VII... Page 43

Immigration Law .......................................................................................... Tab 2
  Immigration Law PowerPoint ................................................................ Page 1
  Immigration Law Update ...................................................................... Page 9
  ICE Best Employment Practices ......................................................... Page 19
  Form I-9 .............................................................................................. Page 21

ADAAA and EEOC’s Final Regulations ...................................................... Tab 3
  ADAAA and EEOC’s PowerPoint .......................................................... Page 1
  ADAAA: Court Cases and Final Regulations ....................................... Page 11
  Considerations for Handling Potential Disabilities in the Workplace...... Page 21

10 Things Your Employment Attorney Doesn’t Want To Hear .................. Tab 4
  Things Your Employment Attorney Doesn’t Want To Hear PowerPoint .... Page 1
  Things Your Employment Attorney Doesn’t Want To Hear .................... Page 5

General Liability

Subrogation ................................................................................................. Tab 5
  Subrogation PowerPoint ................................................................. Page 1
  Subrogation in Workers’ Compensation ............................................. Page 7
  Subrogation Statutes ........................................................................ Page 11
  Subrogation Case Law ................................................................. Page 17

Premises Liability ...................................................................................... Tab 6
  Premises Liability PowerPoint ........................................................ Page 1
  Premises Liability Handout .......................................................... Page 9

Ethics Session

Insurance Bad Faith and Claims Handling .............................................. Tab 7
  Insurance Bad Faith and Claims Handling PowerPoint ....................... Page 1
  Insurance Bad Faith and Claims Handling ....................................... Page 15
DIFFICULT
EMPLOYEE
TERMINATIONS

A disciplined approach to employee discipline.
“‘I love you, I love you, I hate you, GOODBYE,”©

PRESENTATION OBJECTIVES
- 4+2 Documentation Procedure
- Selected case review
- Overview of 2012 EEOC Guidance Title VII (criminal convictions)
- Overview 2012 EEOC Guidance: ADEA and RFOA

INVENTORY RESOURCES
- 4+2 Documentation Procedure
- Selected case review
- 2012 EEOC Title VII update
- 2012 EEOC ADEA and RFOA
One of the most persistent employer deficiencies in defending challenges to discipline by employees, at both the judicial and administrative levels, is the employer’s failure to capture, in writing, evidence of employee misconduct. The reason often given for this omission is a lack of time. Even so, there is a rule of thumb that we must all acknowledge and live by. Say it with me.

Caveat: Of course, the prior sentiment is not a statement of fact. Instead, it is a reality check informs employers that poor documentation could mean the return of the Earl’s of the world.
WHY DOCUMENT?
- Protect yourself and Employer
- If it is not documented, it did not happen
- You may not remember later
- Provides basis for future employment actions
- Gives third-party the information that is needed to assess the situation and make decisions

WHEN TO DOCUMENT?
- Complaints of harassment and/or discrimination
- Misconduct or alleged misconduct
- Workplace violence
- Any violation of the Policy Handbook

4+2 DOCUMENTATION
- It only takes four sentences:
  - Briefly summarize the events of the meeting
  - Set forth the management directive
  - Note the employee’s response
  - Closing and consequences
THE TALE OF EARL

- You see Earl Employee giving a female coworker a backrub at her desk. She looks less than thrilled and tells him he can stop anytime. As Earl passes by your office you pull him in and remind him of the Employer’s workplace harassment policies.
- Do you need to document this? How and why?

DOCUMENTATION EXAMPLE

- Memo to File
  - On February 14, 2010, I observed Earl Employee giving a female employee an unwanted backrub.
  - I told Earl to knock it off and made him read him the policy against sexual harassment.
  - Earl said he didn’t mean anything by it.
  - Since this is Earl’s first offense, I felt a verbal warning was appropriate.

  Signed ________________

DOCUMENTATION EXAMPLE (CONT.)

- In the weeks that follow, you receive a number of complaints from female employees that Earl is touching them inappropriately and making “almost” sexually offensive comments.
- You call Earl into your office again to discuss the matter. Should you document? Why and how?
**DOCUMENTATION EXAMPLE**

Dear Earl Employee,

We met on April 22, 2010 to discuss complaints made against you after the Company’s Earth Day celebration. Instead of planting pine trees, you were pining after your female coworkers which are a clear violation of company policy. In your defense, you shared that you were merely smelling the roses, not your coworkers’ hair. Because you have exhibited similar conduct in the past, you are receiving a written warning which will be placed in your official personnel file.

Sincerely,
Supervisor

**CASE LAW UPDATE**

- **Lessons learned** refer to the horrific or chilling tales that one should take note of.
- **Best practices** include a technique, practice, guideline or approach to a particular problem, situation or circumstance designed to avoid legal and/or human resource errors. Similar to “lessons learned,” whether a best practice is right for you will depend on your workforce, management style and corporate culture.
- **Court ruling or decision** is what the Court decided. Judicial decisions are mentioned to offer insight and to facilitate understanding. The opinion decided may or may not be binding on you or your employer. If you are uncertain, please ask for clarification.
- **A brief discussion about documentation**

**RYNDERS V WILLIAMS**

- Rynders claimed violation of First Amendment rights and the Family and Medical Leave Act (“FMLA”), 29 U.S.C. § 2601 et seq.
- Lesson learned: Document employee requests for FMLA leave especially where Employee conveys inclination to litigate.
KOLLER V RILEY RIPER

- Koller was an attorney who alleged violation of FMLA, among other things.
- Lessons learned: Timing is important! An employee will generally survive a dispositive motion upon a showing of temporal proximity between the protected activity and adverse employment action.

KOLLER (CONTINUED)

- Best practices: Prior to terminating, consider all circumstances surrounding the employee’s termination, including any recent disability, complaints made by the employee, claims filed by the employee, etc.
- Judicial decision: Defendant’s motion to dismiss claim for interference with FMLA and retaliation denied.

GUIMARAES V. SUPervalu

- Employee alleged Supervalu retaliated against her for taking FMLA leave.
- In 2008, Guimaraes transferred from another department and began reporting to Grubbs. The two agreed to an open and honest working relationship where each was receptive to the other’s feedback. However, by July 2008, their relationship was deteriorating.
- Guimaraes felt Grubbs was assigning her tasks that Grubbs should be handling herself. She also believed Grubbs was setting unreasonable deadlines.
- Guimaraes informed Grubbs of her concerns, and (according to Guimaraes) Grubbs was “insulted,” responding “I would never tell my boss what you’re telling me right now.”
Guimaraes continued to believe Grubbs was harassing and discriminating against her. She identifies the following behaviors and incidents:

- Grubbs often acted like she could not understand Guimaraes when Guimaraes was speaking and asked her to repeat herself in personal conversations as well as in front of coworkers and vendors, Guimaraes.
- Sometimes Grubbs asked Guimaraes to recite back verbatim things Grubbs told her.
- When Guimaraes asked Grubbs questions, Grubbs would respond “you should know the answer” and fail to provide further direction.
- Grubbs occasionally walked away from Guimaraes in the middle of conversations, sometimes rolling her eyes or smirking.
- Grubbs provided unreasonably short timelines for projects she assigned to Guimaraes and then criticized Guimaraes for failing to meet these deadlines.
- Grubbs reprimanded Guimaraes for failing to complete a project that Grubbs had never relayed to her.
- On at least one occasion, Grubbs instructed the another department not to help Guimaraes complete a task, even though it required the department’s skill-set.

Best practices: Be aware of the potential risk associated with terminating an employee who is making allegations of unlawful conduct against the employer, but do not necessarily shy away from taking action if the employee should be terminated for legitimate non-discriminatory reasons.

Grubbs played no role in identifying the positions or employees to be eliminated; the decisions were made by higher-level management. In making its selection, SuperValu analyzed all employees holding Guimaraes’s position by performance and service dates. SuperValu only looked at FY08 performance ratings and any current performance issues. Then, it looked at service dates. Based on this analysis, SuperValu identified Guimaraes as the impacted associate.
AS THE EIGHTH CIRCUIT EXPLAINED

"[a]n inference of a causal connection between a charge of discrimination and [an adverse employment action] can be drawn from the timing of the two events, but in general more than a temporal connection is required to present a genuine factual issue on retaliation."

PENBERG V. HEALTHBRIDGE MGMT

- Penberg was a director of marketing with HealthBridge.
- Alleged violation of ADEA and FMLA.
- Employer countered by pointing to fiscal stability and necessity.

PENBERG (CONT)

- Lessons learned: An employee will often come up with an unlawful reason for being terminated, even if that employee admits the potential existence of a lawful reason for termination.
- Best practices: Be prepared to demonstrate that the lawful reason for termination was the primary, if not only, reason for termination. If possible, show that other employees have been terminated for the same reason before this employee’s termination. Consistency is key.
- Judicial decision: Employer Summary Judgment Denied. A plaintiff alleging that an employment decision was motivated both by legitimate and illegitimate reasons may establish that the "impermissible factor was a motivating factor, without proving that the employer’s proffered explanation was not some part of the employer’s motivation."
PERFORMANCE EVALUATIONS

- Supervisors and employees are strongly encouraged to discuss job performance and goals on an informal, day-to-day basis.
- Formal, written performance evaluations shall be conducted within the third and sixth months of the initial probationary period.
- Additional formal performance evaluations conducted during “regular” employment.

Performance evaluations enable supervisors and employees to:
- Discuss job tasks
- Identify and correct weaknesses
- Encourage and recognize strengths
- Discuss positive, purposeful approaches for meeting goals.

FOOD FOR THOUGHT...

- Why do performance evaluations matter?
- Are there any implications if you constantly give all employees satisfactory remarks without any specific thought to individual strengths and weaknesses?
- Why does it matter that performance evaluations are completed on a timely basis?
LEE V. WAUKEGAN HOSPITAL, CORP.

Mary Lee was radiologic technologist. Her job was to perform x-rays, bone density exams, electrocardiography (attaching electrodes to a patient’s chest to record the electrical signals emanating from the heart) and phlebotomy (drawing blood from patients for lab work).

Lessons learned: Because Lee’s prior performance evaluations differed markedly from those given immediately before trial, Employer’s motion for summary judgment was denied.

Best practices: Train supervisory employees to conduct evaluations in a consistent manner, using criteria that is as objective as the circumstances warrant. Managers are human beings, and sometimes do not realize their own biases are affecting their objectivity, which is particularly important during the evaluation process.

WALLS V. CENTRAL CONTRA COSTA TRANSIT AUTHORITY

Lessons learned: Characterization of leave as suspension versus termination and reinstatement may implicate certain employee rights that are only vested after a continuous period of employment, such as under the FMLA. There may also be provisions in a collective bargaining agreement that only vest after a certain period of employment.

Best practices: Of interest to public employers is the following mulling by the Court which is an established best practice:
WINBORNE V. SUNSHINE HEALTH CARE INC.

- Lessons learned: It behooves employers to take note and heed that the Court connects the “number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area” and the “number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area” from which SHC perceived she was disqualified.
- Best practices: When dealing with ADA matters, engage in the interactive process with the employee. This process should include a two-way communication with the employee which permits both the employer and employee to voice concerns about the employee’s ability to perform a particular job, as well as brainstorm potential solutions. As a practical matter, this process can also give the employee the sense that an effort was made, and he or she will likely have a better understanding of the basis for the decision to terminate.

UNITED STATES EEOC V. AUTOZONE, INC.,

- Lessons learned: The existence of written company policies, along with communication and training on those policies, can not only prevent unlawful conduct by managerial employees, but can also provide evidence to support the employer’s defense in the event of a lawsuit.
- Best practices: Create policies. Disseminate policies. Conduct refresher training on policies. Consistently enforce policies.

MAKOWSKI V. SMITHAMUNDS, LLC

- Lessons learned: When meeting with a discharged employee, have your own witness. Less is more.
- Judicial ruling decision: The district court granted summary judgment in favor of the defendants. On appeal, Makowski challenged evidentiary rulings denying the admission of statements allegedly made by the Human Resources Director; the district court’s failure to consider all of Makowski’s additional evidence in the record; and the district court’s grant of summary judgment in favor of the defendants on the pregnancy discrimination claim and FMLA interference and retaliation claims. The Seventh Circuit reversed the trial court.
KASTEN V. SAINT-GOBAIN PERFORMANCE PLASTICS CORP

We conclude that the Seventh Circuit erred in determining that oral complaints cannot fall within the scope of the phrase “filed any complaint” in the Act’s anti-retaliation provision. We leave it to the lower courts to decide whether Kasten will be able to satisfy the Act’s notice requirement. We vacate the Circuit’s judgment and remand the case for further proceedings consistent with this opinion.

GWENDOLYN DONALD V. SYBRA, INCORPORATED,

Best practices: When issuing discipline, make little, if any reference, to employee disability.

EEOC UPDATE AND GUIDANCE ON USE OF CRIMINAL CONVICTION

There are two ways in which an employer’s use of criminal history information may violate Title VII. First, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin (“disparate treatment discrimination”).
Second, even where employers apply criminal record exclusions uniformly, the exclusions may still operate to disproportionately and unjustifiably exclude people of a particular race or national origin ("disparate impact discrimination"). If the employer does not show that such an exclusion is "job related and consistent with business necessity" for the position in question, the exclusion is unlawful under Title VII.

The rule responds to two Supreme Court decisions[1] in which the Court criticized one part of the Commission’s existing ADEA regulations. The Court upheld EEOC’s longstanding position that the ADEA prohibits policies and practices that have the effect of harming older individuals more than younger individuals, even if the harm was not intentional. However, it disagreed with the part of the regulations which said that, if an employee proved in court that an employment practice disproportionately harmed older workers, the employer had to justify it as a "business necessity."[2] The Court said that, in an ADEA disparate impact case, the employer did not have to prove business necessity; it need only prove that the practice was based on an RFOA. The Court also said that the RFOA defense is easier to prove than the business necessity defense but did not otherwise explain RFOA.
EEOC UPDATE ADEA AND RFOA

- The rule does two things:
- It makes the existing regulation consistent with the Supreme Court’s holding that the defense to an ADEA disparate impact claim is RFOA, and not business necessity; and
- It explains the meaning of the RFOA defense to employees, employers, and those who enforce and implement the ADEA.

U.S. CONSTITUTION: FIRST AMENDMENT

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
DIFFICULT EMPLOYEE TERMINATIONS

“Employment at will” is the notion that either the employer or the employee can break the employment relationship with no liability, assuming there is no controlling employment contract or collective bargaining agreement. Thus, in theory, absent such an agreement, an employer should be able to terminate an employee at anytime for any reason, or no reason at all. Unfortunately, it is rarely that simple.

The purpose of this presentation is three-fold. First, to identify proven strategies for addressing difficult, sensitive and/or embarrassing employee terminations. Second, to conduct a brief overview of selected court decisions with an eye towards spotting trends in employment litigation and the responses, both successful and unsuccessful, by human resource professionals. And finally, to share amongst ourselves the personal secrets, strategies, and solutions learned over the years.

Today you will see at least one of three phrases following each of the case summaries.

-Lessons learned refer to the horrific or chilling tales that one should take note of. You do not have to adopt the outcome wholesale, but you should file it away for prosperity.

-Best practices include a technique, practice, guideline or approach to a particular problem, situation or circumstance, designed to avoid legal and/or human resource errors. Similar to “lessons learned,” whether a best practice is right for you will depend on your workforce, management style and corporate culture.

-Court ruling or decision is what the Court decided. Judicial decisions are mentioned to offer insight and to facilitate understanding. The opinion decided may or may not be binding on you or your employer. If you are uncertain, please ask for clarification.

A brief discussion about documentation

One of the most persistent employer deficiencies in defending challenges to discipline by employees, at both the judicial and administrative levels, is the employer's failure to capture, in writing, employer's claims of employee misconduct. The reason often given for this omission is a lack of time. This answer, while understandable, is of little comfort for an employer in its moment of need. The attached technique offers a practical and efficient response for an employer. It is called the 4-and-2 because it requires only 4 sentences and 2 paragraphs. The 4-and-2 is a strategy for documenting employee misconduct and employer concerns. Admittedly, the 4-and-2 will not solve every ailment of this sort, but it does provide an efficient and effective way to document employee misconduct and an evidentiary tool for both administrative and trial proceedings.
Buddy Rynders sued Larry Williams for wrongful termination, in violation of Rynders's rights under the First Amendment and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 et seq.

On June 8, 2003, Rynders commenced working for the Garland County, Arkansas Road Department. Nearly three years later, on April 6, 2006, Rynders was involved in a workplace incident with three other Road Department employees. During the incident, Rynders purportedly came to the defense of one employee against the other two, who were carrying a rock and a knife. Rynders called the police and filed charges against the two attacking employees, but the charges were later dropped. Rynders maintains that Williams, who was responsible for the Road Department as part of his duties as judge for Garland County had the prosecutor dismiss the charges. Rynders also alleges that Williams expressed his disappointment in how the situation was handled.

On December 17, 2007, a local paper published a letter Rynders wrote to the editor. In that letter, Rynders asserted that the Garland County Quorum Court, the legislative body for Garland County, was unjustifiably refusing to raise the wages of County employees. The letter mentioned Williams only once, stating that: “Garland County Judge Larry Williams has asked for raises and been turned down on more than one occasion.”

On September 12, 2008, Bobby Maughan, the Road Commissioner appointed by Williams to run the Road Department, issued Rynders a written warning, stating in total: “You have been late to work on several occasions. In August you were late 13 times and so far in September you have been late 7 times. This is not acceptable. If this behavior continues, further disciplinary action will be taken.” According to Rynders, he informed the Road Department at this time that some of his tardiness and absences were due to his coworkers hiding his timecard and that some tardiness and absences were due to severe complications from taking an ace inhibitor, a medication primarily used for the treatment of high-blood pressure. Rynders also claims that he requested and was denied information on how to take FMLA leave even after stating that he may have to miss more work due to his illness.

On January 13, 2009, Lampo gave Rynders a written suspension for excessive absences and abuse of sick time. In that letter, Lampo stated that Rynders was being suspended because Rynders had been late to work fifty-two times in 2008 and because he had abused sick time by taking twenty days in 2008, even though he did not have paid time for seven of those days. The letter further informed Rynders that the suspension was to last three days until a final decision on Rynders's employment was made and that, if Rynders wanted to respond, Rynders must do so in writing by January 15, 2009. The letter finally stated that Garland County would be making the final decision on Rynders's employment on January 16, 2009.
According to Rynders, he subsequently prepared a response and attempted to deliver it to Lampo on January 15, 2009. Rynders maintains that Lampo was acting as the head of the Road Department by this point because of Maughan's declining health and that Lampo refused to accept his written response, stating that Rynders should “go to the Judge’s office because it was out of his hands.”

Before going to Williams's office, Rynders called a friend, Diane Silverman, and asked her to accompany him so that he would have a witness. Silverman agreed, and they traveled to Williams's office, where Williams agreed to meet only with Rynders. According to Silverman, she was forced to wait outside of his office, but she was nonetheless able to hear most of the conversation by sitting next to the door and later a wall. Both Silverman and Rynders assert that Williams told Rynders in the ensuing conversation: “I am firing you because of ... that letter you wrote about my finance committee.” Williams denies making this statement or even being involved in the decision to terminate Rynders, but he does admit that he had the authority to fire Rynders and that he had been apprised of Rynders’s employment situation prior to his termination. Moreover, Williams admits he used Rynders's letter to the editor as an example of Rynders's disloyalty during his conversation with Rynders.

On January 20, 2009, after temporarily extending Rynders's January 13 suspension, Lampo sent Rynders a letter stating that Rynders's employment had been terminated. Rynders subsequently filed suit against Williams in both his individual capacity and official capacity as judge of Garland County pursuant to the First Amendment, via § 1983, and to the FMLA. In his lawsuit, Rynders alleges that Williams violated his First Amendment rights by firing him for writing the letter to the editor and for reporting the 2006 altercation to the police. Rynders also asserts that Williams interfered with his rights under the FMLA by refusing to provide him notice of his rights under the Act and by retaliating against him for taking medical leave to which he was entitled.

Judicial Decision: Employer's Summary Judgment denied

First Amendment Claims

“A public employer may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech.” McGee v. Pub. Water Supply, Dist. No. 2 of Jefferson Cnty., Mo., 471 F.3d 918, 919 (8th Cir.2006) (internal quotation marks omitted). This is because “public employees do not surrender all their First Amendment rights by reason of their employment.” Garcetti v. Ceballos, 547 U.S. 410, 417, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). Indeed, “[a] public employee retains a degree of First Amendment protection when [he] speaks as a citizen addressing matters of public concern.” Bonn v. City of Omaha, 623 F.3d 587, 592 (8th Cir.2010). To establish a prima facie case of retaliatory termination, a plaintiff must both allege and prove: (1) his speech was protected by the First Amendment; (2) the governmental employer discharged him from employment; and (3) the protected speech was a “substantial or motivating factor in the defendant's decision to take the adverse employment action.” Davison v. City of Minneapolis,
Minn., 490 F.3d 648, 654–55 (8th Cir.2007). “If the plaintiff meets this burden, the burden shifts to the defendant to demonstrate that the same employment action would have been taken in the absence of the protected activity.” Id.

Construing the record in a light most favorable to Rynders, we believe that a genuine issue of material fact exists as to whether Williams terminated Rynders's employment because of the letter Rynders wrote to the editor in 2007. As County Judge, Williams had the responsibility to oversee the Road Department and the authority to make all personnel decisions, including the decision whether to continue or terminate Rynders's employment. Moreover, Rynders, through his own testimony and that of Silverman, presented substantial, direct evidence that Williams used his authority to punish Rynders for writing the 2007 letter. Specifically, Lampo purportedly stated that Williams was making the final employment decision and Williams purportedly stated he was firing Rynders because of the letter. While certain aspects of the record do indicate that Rynders was fired due to his frequent absenteeism and tardiness, such evidence only goes to the credibility of Rynders's and Silverman's statements. It does not demonstrate, as a matter of law, that Rynders's employment would have been terminated regardless of the 2007 letter. Accordingly, because a court's “function is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial,” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), we reverse the grant of summary judgment on this ground.

FMLA Claim

“A claim under the FMLA cannot succeed unless the plaintiff can show that he gave his employer adequate and timely notice of his need for leave....” Woods v. DaimlerChrysler Corp., 409 F.3d 984, 991 (8th Cir.2005); see also Scobey v. Nucor Steel–Ark., 580 F.3d 781, 789–90 (8th Cir.2009). An employee provides adequate notice to the employer “when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave.” Thorson v. Gemini, Inc., 205 F.3d 370, 381 (8th Cir.2000) (internal quotation marks omitted). The employee “need not invoke the FMLA by name in order to put an employer on notice.” Id. “Our cases instruct that the adequacy of an employee’s notice requires consideration of the totality of the circumstances and is typically a jury question.” Murphy v. FedEx Nat'l LTL, Inc., 618 F.3d 893, 903 (8th Cir.2010) (citation omitted).

Viewing the evidence in a light most favorable to Rynders, we believe that a genuine issue of material fact exists as to whether Williams received notice in his official capacity but not as to whether he received notice personally. As stated earlier, the suit against Williams in his official capacity is a suit against Garland County, and crediting Rynders’s testimony, Rynders informed the Road Department on September 12, 2008, of his exact medical condition, his debilitating symptoms resulting from the condition, and likelihood that he would need to take intermittent leave in the future to cope with the condition and receive treatment. See generally Sarnowski v. Air Brooke Limousine, Inc., 510 F.3d 398, 401–02 (3d Cir.2007). In
addition, Rynders specifically referenced the FMLA and repeatedly requested information regarding how to properly take leave at that time and over the ensuing months, only to have the Road Department deny his requests. Although Lampo testified that Rynders lost interest in taking FMLA leave after learning it was unpaid, Rynders disputes this with his own testimony. Since we must accept Rynders's statements as true, we hold that Rynders has created a jury question on whether he provided sufficient notice to Garland County starting on September 12, 2008.


Employee, David M. Koller, began his employment with Defendant, Riley Riper Hollin & Colagreco in August, 2007. Koller was an experienced attorney, and had been awarded the distinction of “Rising Star Super Lawyer” by Philadelphia Magazine in 2007, 2008, 2010 and 2011. Defendant hired Koller to work under partner George Randolph. Under Randolph, Koller was required to work from 7 a.m. to 7 p.m. on weekdays and come to the office almost every weekend. Koller alleges that Randolph impeded his attempts to attend marketing events, and when Koller did attend, Randolph demanded he report back to the office. Despite this, in December, 2008 Randolph gave Koller an excellent performance review, stating that Koller was “the best associate that he had ever had when it came to client relations and that Koller would have a 'long tenure' with the Riley firm.” Following this favorable review, Koller was given a 5% pay raise and was told by Riley that “he was doing very well.”

On January 11, 2009, Koller tore his anterior cruciate ligament (“ACL”). Koller met with Human Resources Director, Colleen Mintzer on January 12, 2009, to advise her of his injury, at which point he voiced his concerns that the injury may cause him to lose his job. Ms. Mintzer assured Koller that he would not lose his job and that necessary treatment time would be accommodated. Koller was pre-approved by Ms. Mintzer and Randolph to take time off, possibly up to one month or more, for the necessary medical treatment and rehabilitation.

On February 2, 2009, Koller underwent surgery to repair his ACL. Up to that point, his work hours were severely reduced, and during the two weeks Koller took off to recover, he was heavily medicated and had trouble staying awake but still kept in contact with his secretary and Randolph. On February 17, 2009, Koller returned to work, despite being in pain, medicated, and having difficulty moving and driving. Beginning on February 24, 2009, Koller attended physical therapy appointments twice a week in the morning, which caused him to arrive at the office at approximately 10 a.m. Defendant refused to accommodate his tardiness that resulted from the therapy sessions.

On March 2, 2009—one week after the therapy sessions began—Koller was discharged. Defendant cited tough economic times as the reason for the termination, and specifically told Plaintiff that he was not being discharged for work performance
issues. Koller was the only associate terminated at that time; just three months after being given a favorable review and 5% raise.

**Lessons learned:** Timing is important! An employee can generally survive a dispositive motion upon a showing of temporal proximity between the protected activity and adverse employment action.

**Best practices:** Prior to terminating, consider all circumstances surrounding the employee’s termination, including any recent disability, complaints made by the employee, claims filed by the employee, etc.

**Judicial decision:** Defendant’s motion to dismiss claim for interference with FMLA and retaliation denied.

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SuperValu is a nationwide grocery retailer and wholesaler. In 2008, the company implemented a volume reduction-in-force. Guimaraes, a manager, was Rif’d while on FMLA leave. Guimaraes’s leave followed a rather tumultuous period in her employment with SuperValu. Guimaraes sued in the United States District Court in Minnesota alleging retaliation for taking FMLA leave.

In the beginning of 2008, Guimaraes transferred from another department and began reporting to Grubbs. The two agreed to an open and honest working relationship where each was receptive to the other's feedback. However, by July 2008, their relationship was deteriorating. Guimaraes felt Grubbs was assigning her tasks that Grubbs should be handling herself. She also believed Grubbs was setting unreasonable deadlines. Guimaraes informed Grubbs of her concerns, and (according to Guimaraes) Grubbs was "insult[ed]," responding "I would never tell my boss what you're telling me right now."

The following excerpt from the Court’s opinion details the specific claims of Guimaraes:

“Guimaraes continued to believe Grubbs was harassing and discriminating against her. She identifies the following behaviors and incidents: Grubbs often acted like she could not understand Guimaraes when Guimaraes was speaking and asked her to repeat herself in personal conversations as well as in front of coworkers and vendors. (Guimaraes Dep. 53-54.) Sometimes Grubbs asked Guimaraes to recite back verbatim things Grubbs told her. (Id. 97-98.) When Guimaraes asked Grubbs questions, Grubbs would respond "you should know the answer" and fail to provide further direction. (Id. 178-79.) Grubbs occasionally walked away from Guimaraes in the middle of conversations, sometimes rolling her eyes or smirking. (Id. 57, 91.) Grubbs provided unreasonably short timelines for projects she assigned to Guimaraes and then
criticized Guimaraes for failing to meet these deadlines. (Id. 48, 103.) Grubbs reprimanded Guimaraes for failing to complete a project that Grubbs had never relayed to her. (Id. 78.) On at least one occasion, Grubbs instructed the BSS not to help Guimaraes complete a task, even though it required the BSS's skill-set. (Id. 62-66.) Grubbs assigned tasks to Guimaraes that should have been done by the BSS. (Id. 45, 136.) Beginning in September 2008, Grubbs excluded Guimaraes from vendor meetings and then assigned follow-up tasks to Guimaraes without giving her the relevant information needed to complete them. Additionally, Grubbs often refused to meet with Guimaraes, claiming to be too busy even though she had time to meet with the BSS on a daily basis. (Id. 53, 55.) Guimaraes believed Grubbs was doing all these things intentionally to set her up for failure. (Id. 60-61, 76, 244-45.)

**Lessons learned:** Credible documentation, even in the wave of allegations, can tip the scales in favor of the employer.

**Best practices:** Be aware of the potential risk associated with terminating an employee who is making allegations of unlawful conduct against the employer, but do not necessarily shy away from taking action if the employee should be terminated for legitimate non-discriminatory reasons. Always keep in mind the bigger picture, as well. For example, if an employer fails to terminate an employee who has engaged in misconduct or has performance deficiencies, merely because that employee has also filed for FMLA, the employer may be increasing exposure to future liability for terminating another employee for similar conduct.

Example: White male files for FMLA right after the employer finds out he falsified his employment application. The employer, weary of the temporal proximity to the FMLA request, opts not to fire the employee for the falsified application. Two months later, a Hispanic female also falsifies information on her employment application and is terminated. The Hispanic female now has evidence to show she suffered from disparate treatment based on her race and gender because the white male was not terminated for the same or similar conduct.

**Judicial ruling decision:** Summary Judgment for the Employer

Grubbs played no role in identifying the positions or employees to be eliminated; the decisions were made by higher-level management. In making its selection, SuperValu analyzed all employees holding Guimaraes’s position by performance and service dates. SuperValu only looked at FY08 performance ratings and any current performance issues. Then, it looked at service dates. Based on this analysis, SuperValu identified Guimaraes as the impacted associate. Guimaraes received disciplinary action in November and December for not meeting expectations for her job position. At that time, the employer was not aware of any improvement in Guimaraes’s performance. Guimaraes was the only BSM on disciplinary action. Though there were less tenured BSMs than Guimaraes, their performance met expectations.
As the Eighth Circuit explained, "[a]n inference of a causal connection between a charge of discrimination and [an adverse employment action] can be drawn from the timing of the two events, but in general more than a temporal connection is required to present a genuine factual issue on retaliation." Arrella, 461 F.3d at 977-78 (internal quotations omitted) (emphasis added). The protected conduct here (Guimaraes reporting that she was being discriminated against) first occurred in October 2008. Her placement on a PAP occurred on November 11, 2008. Guimaraes points to this temporal proximity as evidence that her placement on a PAP (which ultimately resulted in her termination) was retaliation against her reporting discrimination by Grubbs. However, while temporal proximity may support a prima facie case, it is generally insufficient to prove pretext, particularly in the absence of any other evidence. See id.


Mr. Penberg worked for HealthBridge Management from 2003 to 2007 as director of marketing and supervisor of the marketing team. He brought suit against his employer for wrongful termination in violation of the Age Discrimination in Employment Act and Family Medical Leave Act among other things. On Aug. 15, 2007, Penberg was notified that he was terminated from his employment. The employer defendant claims he was terminated due to financial needs of the business and Penberg’s lack of clinical skills.

Penberg conceded that other departments were asked to evaluate their personnel in connection with the reduction in force, but denies that he was laid off “due to his lack of a clinical license and qualifications in regards to the screening of potential patients....” However Plaintiff argued that HealthBridge’s stated reasons for discharging him were pretextual and that he was laid off “because of his disabilities, because of the perception that his disabilities might cause additional absences, because he had exercised his right to a 12–week medical leave, and because of his age.”

**Lessons learned:** An employee will often come up with an unlawful reason for being terminated, even if that employee admits the potential existence of a lawful reason for termination.

**Best practices:** Be prepared to demonstrate that the lawful reason for termination was the primary, if not only, reason for termination. If possible, show that other employees have been terminated for the same reason before this employee’s termination. Consistency is key.

**Judicial decision:** Employer Summary Judgment Denied

A plaintiff alleging that an employment decision was motivated both by legitimate and illegitimate reasons may establish that the “impermissible factor was a motivating factor, without proving that the employer's proffered explanation was not some part of the employer's motivation.”

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In 2007, Mary Lee, began working for Waukegan Illinois Hospital Company ("Waukegan"). Lee worked as a radiologic technologist. Her job was to to perform x-rays, bone density exams, electrocardiography (attaching electrodes to a patient's chest to record the electrical signals emanating from the heart) and phlebotomy (drawing blood from patients for lab work). In 2008, Lee was diagnosed with peripheral neuropathy. Lee discussed her condition with her supervisor who told Lee that her own mother had the same condition and was confined to a wheelchair. In 2009, Lee's physician recommended that she undergo an outpatient surgical procedure to treat a neuroma (a growth of nerve tissue) associated with her peripheral neuropathy. Shortly thereafter, Lee met with Waukegan's HR representative, who gave her an application for FMLA leave. Lee submitted the paperwork to her supervisor who immediately approved the request. Notwithstanding the approval, the supervisor was upset that Lee requested FMLA leave without first consulting her and was upset that Lee did not provide her with what she considered adequate notice of the request.

Unbeknownst to Lee, a month prior to her request for FMLA leave, Waukegan determined that it needed to reduce its workforce. In late February or early March 2009, Waukegan's senior managers directed Lee's supervisors to fire one full time employee. The supervisors consulted with HR and through the use of a qualitative evaluation device, Lee was assigned a lower score than her peers. Consequently, on March 20, 2009, Lee's supervisors met with her and told her she was fired. Lee sued.

"Lee claims that Waukegan retaliated against her for exercising rights protected by FMLA. Although Lee styles that under the rubric of "retaliation," her charge is actually one of interference with her right to take FMLA leave. Section 2615(a)(2) prohibits retaliation for "opposing any practice made unlawful by this subchapter," and Section 2615(b) prohibits retaliation for filing a charge of FMLA discrimination, providing information regarding a charge of FMLA discrimination or testifying in a proceeding regarding FMLA discrimination. Lee did none of those things. Section 2615(a)(1), however, prohibits interference with the exercise of FMLA rights, which includes firing the employee because she took FMLA leave (29 C.F.R. §825.220(c))."

Lessons learned: Because Lee's prior performance evaluations differed markedly from those given immediately before trial, Employer's motion for summary judgment was denied.

Best practices: Train supervisory employees to conduct evaluations in a consistent manner, using criteria that is as objective as the circumstances warrant. Managers are human beings, and sometimes do not realize their own biases are affecting their objectivity, which is particularly important during the evaluation process.

Judicial ruling decision: Employer's motion for summary judgment was denied and the action cleared to be tried by jury.
Walls v. Central Contra Costa Transit Authority, __F.3d__ (9th Cir. 2011)

Kerry Walls ("Walls") was a bus driver for the Central Contra Costa Transit Authority ("CCCTA"). After being terminated in January 2006, Walls was reinstated on March 2, 2006 pursuant to an agreement executed over the course of a grievance process between Walls, his union representative, and CCCTA ("Last Chance Agreement" or "Agreement").

On March 3, 2006, Walls incurred an unexcused absence that violated the attendance requirements of the Agreement and CCCTA terminated Walls on March 6, 2006. After grieving his termination, Walls brought suit claiming that his March 6 discharge violated the Family Medical Leave Act ("FMLA") and his due process right to a pretermination hearing under the United States and California Constitutions. The parties filed cross-motions for summary judgment.

The district court granted summary judgment in favor of CCCTA on both claims, reasoning that Walls was not an employee eligible for FMLA benefits when he requested leave, and that he had waived his due process rights.

"FMLA entitles an "eligible employee" to twelve workweeks of leave for certain family and health-related situations. 29 U.S.C. § 2612. "The term 'eligible employee' means an employee who has been employed (i) for at least 12 months by the employer with respect to whom leave is requested . . . ." Sullivan v. Dollar Tree Stores, Inc., 623 F.3d 770, 780 (9th Cir. 2010) (citing 29 U.S.C. § 2611(2) (A)) Therefore, FMLA rights and benefits are contingent upon the existence of an employment relationship. See Smith v. BellSouth Telecomm., Inc., 273 F.3d 1303, 1311 (11th Cir. 2001) (the right to FMLA leave “obviously cannot be exercised after the termination of an employment relationship”)."

Regarding the Last Chance Agreement, Wall argued that it retroactively changed his status and rendered him an FMLA eligible employee on March 1.

Walls argues that his termination on March 6, based upon his March 3 absence, interfered with his FMLA rights because he was entitled to protected leave on the basis of a verbal request he made during a March 1, 2006, meeting with his union representative and CCCTA. Although the parties provide different accounts of Walls’s communication with CCCTA at the March 1 meeting, they agree for purposes of summary judgment, that, at this meeting, Walls verbally requested to be absent from work until April 10. They also agreed that Walls was not reinstated to his position until March 2, when he signed and executed the Last Chance Agreement. Therefore, he had not yet been reinstated to employment when he made his request for leave.

Walls argues, however, that the Last Chance Agreement retroactively changed his status and rendered him an FMLA eligible employee on March 1. While Walls makes a novel legal argument, the facts of this case, and the terms of the Last Chance Agreement...
Agreement, do not support his position. As an undisputed matter of fact, Walls was no longer employed at CCCTA on March 1, the day he requested medical leave.

**Lessons learned:** Characterization of leave as suspension versus termination and reinstatement may implicate certain employee rights that are only vested after a continuous period of employment, such as under the FMLA. There may also be provisions in a collective bargaining agreement that only vest after a certain period of employment.

**Best practices:** Of interest to public employers is the following mulling by the Court which is an established best practice:

“Having established that Walls had a protected property interest, we examine the process to which he was entitled. Due process requires that any deprivation of life, liberty, or property “be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). As the *Loudermill* Court explained, in cases of discharge from employment, “the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect.” *Loudermill*, 470 U.S. at 543. Therefore, a public employee with a property interest in his continued employment must be provided with “oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story.” *Id.* at 546. While the pre-termination hearing need not be elaborate, the root of this requirement is that an individual have the opportunity to be heard before he is deprived of his property interest.”

**Judicial ruling decision:** The Court held:

“While Walls makes a novel legal argument, the facts of this case, and the terms of the Last Chance Agreement, do not support his position. As an undisputed matter of fact, Walls was no longer employed at CCCTA on March 1, the day he requested medical leave. . . The Last Chance Agreement says nothing of, and does nothing to change, Walls’s status on this date. The Agreement states only that the period from January 20, 2006 to January 27, 2006 would be changed to an unpaid suspension; it does not expressly revoke the fact of Walls’s termination on January 27.”

Interestingly, the Court also remarked, that “This novel question may have presented itself if, for example, the Agreement had indicated that the entire period from Walls’s January termination to his March reinstatement was changed to an unpaid suspension.”

**Winborne v. Sunshine Health Care Inc., 5th Cir., No. 09-60755 (Nov. 17, 2010).**

In 1993, Winborne, a licensed practical nurse (“LPN”) at Sunshine, was diagnosed with transient ischemic attacks (“TIAs”). The symptoms of TIAs include temporary loss of
awareness, weakness, severe headaches, dizziness, and difficulty concentrating. Winborne took medication to control the attacks and reported no problems in performing her job duties. In 2005, Winborne informed Sunshine’s Director of Nursing, Amy Heatherly (“Heatherly”), that she suffered from TIAs. Heatherly was under the impression that Winborne’s symptoms were controlled by medication.

On July 8, 2005, Winborne made her rounds through the facility, performing her duties as a treatment nurse. Winborne checked on an elderly female patient (the “Patient”), who required restraints because she suffered from dementia and was prone to agitation, finding her safely in bed. Approximately thirty minutes later, Winborne returned to the Patient’s room to find the Patient hanging over the side of her bed, suspended by her pelvic restraints. The bed rails were down at the time. The Patient was rushed to the hospital and was later returned to SHC. Following this incident, as required by law, SHC contacted the Mississippi Department of Health (“MDOH”) to report the Patient’s injury.

An investigation ensued and Winborne was terminated by her supervisor who concluded that Winborne’s condition had interfered with her ability to safely work alone with patients. Winborne sued contending that the company regarded her as having a disability.

At trial, Winborne presented the following evidence to show that SHC regarded her as disabled: (1) Holland’s testimony that he contracted the BON to inquire whether a nurse with TIAs could practice; (2) Holland’s testimony that he did so because he was concerned that TIAs might influence Winborne’s ability to work; (3) Holland’s testimony that he terminated Winborne because he could not take a chance of jeopardizing his patients’ safety; and (4) Heatherly’s testimony that she recommended Winborne’s termination because she was concerned about Winborne’s ability to practice as a nurse, that she believed Winborne was not safe to work with patients because of her altered thinking, and that she wanted a note from Winborne’s neurologist stating that Winborne was competent and safe to work as a nurse.

Lessons learned: It behooves employers to take note and heed that the Court connects the “number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area” and the “number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area” from which SHC perceived she was disqualified.

Best practices: When dealing with ADA matters, engage in the interactive process with the employee. This process should include a two-way communication with the employee which permits both the employer and employee to voice concerns about the employee’s ability to perform a particular job, as well as brainstorm potential solutions. As a practical matter, this process can also give the employee the sense that an effort was made, and he or she will likely have a better understanding of the basis for the decision to terminate.

Judicial ruling decision: In favor of the employer.
“We reject Winborne’s argument that this evidence is sufficient to carry Winborne’s burden of proof on this element of her claim. Winborne offered no evidence at trial that SHC regarded her as unable to perform a class of jobs or a broad range of jobs. It is clear that both Holland and Heatherly were concerned about Winborne’s ability to care for patients and that the role of Winborne’s TIAs (9) in causing the incident with the Patient were a primary concern that led to her discharge from her job as a treatment nurse. However, Winborne offered no evidence to show that her condition disqualified her from other nursing positions or a broad range of healthcare-related positions that did not involve patient care.”


John Sheppard and the EEOC sued AutoZone when the company failed to accommodate Sheppard’s disability. Sheppard also alleged AutoZone forced him to perform a job which violated his medical restrictions. AutoZone filed for summary judgment which was granted in part and denied in part. A jury trial was held as to the part of the case that had survived summary judgment, and the jury returned a verdict in favor of AutoZone. The EEOC appealed the summary judgment ruling only. The Seventh Circuit reversed.

A second trial was held as to the reversed portion of the case. This time, the jury returned a verdict in favor of the employee and awarded $100,000 in compensatory damages and $500,000 in punitive damages. The discussion then turned to whether the damages were authorized under applicable law. In this regard, the Court said:

In EEOC v. AutoZone, the EEOC claimed the employer violated the Americans with Disabilities Act ("ADA") by failing to accommodate an employee's disability at its Macomb, Illinois facility. The EEOC asserted that the AutoZone forced one of its sales managers to perform jobs that violated his medical restrictions and that he ultimately experienced additional back and neck impairments. A jury found against the employer, and awarded lost wages, compensatory damages, and punitive damages. The EEOC then sought a post-trial injunction against the company designed to keep the employer from engaging in similar conduct in the future. The Court agreed with the EEOC's injunctive relief requests in part, and in its order found that "the conduct of the defendant's managerial employees at the highest level was clearly an intentional violation of the ADA" and was concerned with the "possibility of future infractions." ld. at *40-42. The Court entered an injunction covering all of AutoZone's stores in Central Illinois, requiring the company to report all requests for accommodations by employees to the EEOC for three years, and to maintain certain company records for four years, including how AutoZone responded to each request for a reasonable accommodation. Finally, the order granted access to the EEOC to view any such records on 48 hours notice. ld. at *41-42.
The first provision that the EEOC wants would require AutoZone to comply with the reasonable accommodation requirements of the ADA. AutoZone complains an injunction ordering compliance with the law is overbroad under general equitable principles, citing two Eighth Circuit cases that relied on a 1905 Supreme Court case. More recently, however, Courts within the Seventh Circuit have recognized significant value in requiring future compliance with employment discriminations laws (which of course did not exist and were not considered in the 100 year old Supreme Court case). The value lies in the fact that such injunctions can be enforced by a motion invoking the contempt power of the issuing court, rather than requiring an already-successful plaintiff to file additional EEOC charges and subsequent new litigation. See O’Sullivan v. City of Chicago, 478 F.Supp.2d 1034, 1041 (N.D.Ill.2007), citing EEOC v. Harris Chemin, Inc., 10 F.3d 1286, 1292 (7th Cir. 1993). Accord, EEOC v. Management Hospitality of Racine, Inc., F.Supp2d- 2010 WL 3431822 at *16 Case No. 06C0715, Aug. 2010 (E.D. Wis) This, according to AutoZone, shows that an injunction to comply with the ADA is no longer needed, especially in light of the fact that the single violation proved occurrence eight years ago.

The fact that AutoZone has updated its policy is commendable, but the fact that it took eight years to do so tends to show, at least on some level, reluctance on AutoZone’s part. Even in the motions following the verdict in the second trial, AutoZone has glossed over the necessary implications of that verdict. For example, AutoZone describes the incident as “only an isolated incident related to one employee, one store and one supervisor, despite the fact that the evidence included knowledge of Shepperd’s disability and request for accommodation by upper management (at least 3) and HR personnel.

Lessons learned: The existence of written company policies, along with communication and training on those policies, can not only prevent unlawful conduct by managerial employees, but can also provide evidence to support the employer’s defense in the event of a lawsuit.

Best practices: Create policies. Disseminate policies. Conduct refresher training on policies. Consistently enforce policies.

Judicial ruling decision (excerpted):

“To the extent stated herein, EEOC’s motion for injunctive relief is granted. Pursuant to 42 U.S.C. 2000e-5, this Court imposes the following injunctive provisions against AutoZone:

1. AutoZone shall make reasonable accommodations to the known physical limitations of any qualified employee with a disability who is working at an AutoZone retail store within the Central District of Illinois and who requests an accommodation or whose need for an accommodation is otherwise known to AutoZone.
(2) For three years for the date of this Order, AutoZone shall notify EEOC in writing within 30 days after an employee who is working at an AutoZone retail store within the Central District of Illinois requests an accommodation for his or her disability or within 30 days after AutoZone otherwise becomes aware of the need for such accommodation.

(3) AutoZone shall maintain complete records for 4 years from this date of how it responded to such requests, including a description of the request, the investigation that was conducted, the interactive process, and the resolution of the complaint. Those records shall be made available for inspection by the EEOC upon 48 hours notice to AutoZone’s HR department."

Makowski v. SmithAmundsen, LLC, 662 F.3d 818 (7th Cir. 2011)

Makowski, an employee of SmithAmundsen, LLC ("SmithAmundsen"), took FMLA leave for the birth of her child. During her leave, Makowski’s supervisors informed her that her position had been eliminated as part of an organizational restructuring and terminated her employment. Makowski filed suit alleging pregnancy discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Pregnancy Discrimination Act ("PDA"); interference with Makowski’s exercise of her rights under the FMLA; retaliation under the FMLA; and a violation of her right to a bonus under the FMLA.

Lessons learned: When meeting with a discharged employee, have your own witness. Less is more.

Judicial ruling decision: The district court granted summary judgment in favor of the defendants. On appeal, Makowski challenged evidentiary rulings denying the admission of statements allegedly made by the Human Resources Director; the district court’s failure to consider all of Makowski’s additional evidence in the record; and the district court’s grant of summary judgment in favor of the defendants on the pregnancy discrimination claim and FMLA interference and retaliation claims. The Seventh Circuit reversed the trial court.

The reversal was based upon the statements already made by the employers HR department and an outside law firm indicating that Makowski was let go because she took maternity leave.


Kevin Kasten, brought an antiretaliation lawsuit under the Fair Labor Standards Act of 1938 ("FLSA") against his former employer, Saint-Gobain Performance Plastics Corporation. Kasten alleged Saint-Gobain unlawfully 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. The location prevented
workers from receiving credit for the time they spent putting on and taking off their work clothes—contrary to FLSA requirements. In a related suit, the District Court agreed with Kasten, finding that Saint-Gobain's "practice of not compensating . . . for time spent donning and doffing certain required protective gear and walking to work areas" violated the Act. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F.Supp.2d 941, 954 (W.D.Wis.2008).

In this suit, the United States Supreme Court observed:

Saint-Gobain discharged him because he orally complained to Saint-Gobain officials about the timeclocks. In particular, 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 (quoting Saint-Gobain's Code of Ethics and Business Conduct as imposing upon every employee "the responsibility to report . . . suspected violations of . . . any applicable law of which he or she becomes aware"); *id.*, at 4-5 (quoting Saint-Gobain's Employee Policy Handbook as instructing employees with "questions, complaints, and problems" to "[c]ontact their supervisor[s] immediately" and if necessary "take the issue to the next level of management," then to the "local Human Resources Manager," then to "Human Resources" personnel at the "Regional" or "Headquarters" level).

Kasten adds that he "raised a concern" with his shift supervisor that "it was illegal for the timeclocks to be where they were" because of Saint-Gobain's exclusion of "the time you come in and start doing stuff;" he told a human resources employee that "if they were to get challenged on" the location in court, "they would lose;" he told his lead operator that the location was illegal and that he "was thinking about starting a lawsuit about the placement of the timeclocks;" and he told the human resources manager and the operations manager that he thought the location was illegal and that the company would "lose" in court. Record in No. 3:07-cv-00686-bbc (WD Wis.), Doc. 87-3, pp. 31-34 (deposition of Kevin Kasten). This activity, Kasten concludes, led the company to discipline him and, in December 2006, to dismiss him.

Saint-Gobain presents a different version of events. It denies that Kasten made any significant complaint about the timeclock location. And it says that it dismissed Kasten simply because Kasten, after being repeatedly warned, failed to record his comings and goings on the timeclock.

**Judicial ruling decision (excerpted): In favor of Employer**

The sole question presented is whether "an oral complaint of a violation of the Fair Labor Standards Act" is "protected conduct under the [Act's] anti-retaliation provision." Pet. For Cert. i. The Act protects employees who have "filed any complaint," 29 U.S.C. §215(a)(3), and interpretation of this phrase "depends upon reading the whole statutory test, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis,"
We agree with Saint-Gobain that the statute requires fair notice. Although the dictionary definitions, statutes, regulations, and judicial opinions we considered, see supra, at 4-7, do not distinguish between writings and oral statements, they do suggest that a “filing” is a serious occasion, rather than a triviality. As such, the phrase “filed any complaint” 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.

At oral argument, the Government said that a complaint if “filed” when “a reasonable objective person would have understood the employee” to have “put the employer on notice that [the] employee is asserting statutory rights under the [Act].” Tr. Of Oral Arg. 23, 26. We agree. To fall within the scope of the anti-retaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the stature and a call for their protection. This standard can be met, however, by oral complaints, as well as by written ones.

We conclude that the Seventh Circuit erred in determining that oral complaints cannot fall within the scope of the phrase “filed any complaint” in the Act’s anti-retaliation provision. We leave it to the lower courts to decide whether Kasten will be able to satisfy the Act’s notice requirement. We vacate the Circuit’s judgment and remand the case for further proceedings consistent with this opinion.


In 2007, Gwendolyn Donald was an assistant manager for Sybra Inc. In 2008, Donald suffered from a number of health problems and was frequently ill and away from work. Over the regular course of an internal review, Donald’s employer discovered irregularities in receipts from Donald’s drive-in window. The irregularities were in how customers were charged. The receipts showed that orders were taken at full price, customers were given a full price total, but that the orders were then changed to a discounted price. With this information, the employer preliminarily concluded that Donald was likely taking money from the company.

After her termination, Donald filed a complaint through the company’s grievance hotline. A Sybra official contacted Donald and, in addition to providing three weeks of paid leave, offered her employment at one of the Detroit stores. Donald declined.
Thereafter, Donald filed a complaint in federal court and alleged that Sybra fired her because of her serious medical conditions, and that such an action violates the FMLA, the Americans with Disabilities Act ("ADA"), and Michigan's Persons with Disabilities Civil Rights Act ("PWDCRA"). Sybra moved for summary judgment, which the district court granted. Donald appealed.

**Best practices:** When issuing discipline, make little, if any reference, to employee disability.

**Judicial ruling decision (excerpted):**

"To broaden the definition of "disability," Congress passed the ADA Amendments Act of 2008, which became effective on January 1, 2009; we have held that those amendments are not retroactive. Milholland v. Sumner Cnty. Bd. of Educ., 569 F.3d 562, 565 (6th Cir. 2009). As Donald's termination occurred in 2008, the prior version of the ADA applies, which defined a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (2006) (current version at 42 U.S.C. § 12102(1)).

Donald argues that she falls under the third prong of the disability definition, in that Sybra regarded her as having an impairment. In support of this argument, she puts forth Houston-Barocko's statement that Donald "should be disabled like [Houston-Barocko's] husband because [Donald] had all the medical issues." But, the prior version of the ADA makes clear that in order to be regarded as disabled, one must be regarded as having an impairment that limits a major life activity. This difference is technical, but important.

Ruling for employer with the Court holding that bad timing is not enough to fault employer and establish claim for its action as pretextual.
A common error made by supervisors is the failure to document incidents of employee misconduct and/or poor performance. When pressed for an explanation, supervisors rightly cite “a lack of time” as the primary culprit. Even so, experience teaches that all too often, the time saved on the front end by not documenting an employee’s poor performance or misconduct, in this writer’s opinion, virtually guarantees a time investment five times greater on the back end. The enhanced time investment is usually spent in disciplinary and counseling sessions necessary to sustain management’s recommendation to discipline the employee. The sad part is that much of the wasted time can be avoided with a very simple technique, the four-sentence-two-paragraph-letter “42P.” And the beauty of it is that in most cases, one paragraph will be sufficient.

Employment lawsuits are often won or lost on documentation. Proper documentation helps clarify employment expectations and reduce surprises to the employee. It only takes four sentences:

Sentence 1: Include the date and briefly describe the activity and the circumstances.
Sentence 2: Summarize the position stated by management. (“We informed you …”)
Sentence 3: Record the response made by the employee. (“You stated that …”)
Sentence 4: Invite the employee to contact you if he/she disagrees with your summary of events or has questions. (“If I have misstated any aspect of our discussion, please contact me at ph: (    ) _________ or provide a written copy of your suggested corrections.”)

Look, you can always add more details and in some case you should and you will. Use your best judgment. This form however, will cover the basics. Again, each situation will be judged on its own merits so exercise your judgment. If unsure, seek the counsel of a colleague or legal counsel.

SAMPLE LETTER

Dear Employee:

This letter summarizes our meeting of January 1, 2011 in which we discussed your recent unauthorized absences from work. In the meeting, we informed you that you have had more than thirty unauthorized absences this year, which according to our policy warrants a three-day suspension without pay. You responded that you were aware of the policy, and would try not to have any future unauthorized absences. If I have misstated any aspect of our conversation, please contact me immediately with corrections.

Sincerely, Human Resources
On March 29, 2012, the Equal Employment Opportunity Commission (EEOC) issued the “Final Regulation on Disparate Impact and Reasonable Factors Other than Age” (RFOA) under the Age Discrimination in Employment Act of 1967 (ADEA). An EEOC guidance document issued with the final rule is provided below. **Note:** A modified version of the 4+2 procedure may be used in connection with an employer’s existing EEO compliance program and/or to demonstrate compliance with the new EEOC regulations.

The following questions and answers explain the EEOC’s final rule concerning Disparate Impact and Reasonable Factors Other Than Age (RFOA).

1. **What are the purposes of the ADEA related to this rule?**

   The purpose of the ADEA is to prohibit employment discrimination against people who are 40 years of age or older. Congress enacted the ADEA in 1967 because of its concern that older workers were disadvantaged in retaining and regaining employment. The ADEA also addressed concerns that older workers were barred from employment by some common employment practices that were not intended to exclude older workers, but that had the effect of doing so and were unrelated to job performance.

2. **What does the ADEA do?**

   It prohibits discrimination against workers because of their older age with respect to any aspect of employment. In addition to prohibiting intentional discrimination against older workers (known as “disparate treatment”), the ADEA prohibits practices that, although facially neutral with regard to age, have the effect of harming older workers more than younger workers (known as “disparate impact”), unless the employer can show that the practice is based on an RFOA. **This rule concerns only disparate impact discrimination and the Reasonable Factors Other than Age defense** to such claims.

3. **What is the purpose of the rule?**

   The rule responds to two Supreme Court decisions[1] in which the Court criticized one part of the Commission’s existing ADEA regulations. The Court upheld EEOC’s longstanding position that the ADEA prohibits policies and practices that have the effect of harming older individuals more than younger individuals, even if the harm was not intentional. However, it disagreed with the part of the regulations which said that, if an employee proved in court that an employment practice disproportionately harmed older workers, the employer had to justify it as a “business necessity.”[2] The Court said that, in an ADEA disparate impact case, the employer did not have to prove business necessity; it need only prove that the practice was based on an RFOA. The Court also
said that the RFOA defense is easier to prove than the business necessity defense but did not otherwise explain RFOA.

The rule does two things:

It makes the existing regulation consistent with the Supreme Court’s holding that the defense to an ADEA disparate impact claim is RFOA, and not business necessity; and

It explains the meaning of the RFOA defense to employees, employers, and those who enforce and implement the ADEA.

4. **Who is required to follow the rule?**

The rule applies to all private employers with 20 or more employees, state and local government employers, employment agencies, and labor organizations. Although the ADEA applies to the federal government as an employer, the rule does not apply to federal employers by virtue of section 633a(f) of the ADEA.

5. **Does the rule apply to all employment practices?**

No. The rule applies to only a few kinds of employment practices. Specifically, it applies only to practices that are **neutral** on their face, that **might harm older workers** more than younger workers, and that apply to **groups** of people. For instance, it applies to tests used to screen employees or to some procedures used to identify persons to be laid off in a broad reduction-in-force (“RIF”).

6. **When does an employer have to show that its practice was based on an RFOA?**

An employer would be required to prove the defense only after an employee has identified a specific employment policy or practice, and established that the practice harmed older workers substantially more than younger workers.

7. **Do other statutory defenses apply to disparate impact claims?**

RFOA is the standard defense to ADEA impact claims. The final rule revises section 1625.7 of the regulations, which only addresses the RFOA defense, and does not change other regulatory sections that apply to the ADEA’s other affirmative defenses.[3] However, the rule does not preclude an employer from asserting another statutory provision in response to a particular claim. For example, if an employee alleged that a practice required by a seniority system had a disparate impact, the employer could defend the claim by relying on section 4(f)(2) of the ADEA, which precludes using disparate impact analysis to challenge the provisions of a seniority system.

8. **What determines whether an employment practice is based on Reasonable Factors Other than Age?**
An employment practice is based on an RFOA when it was reasonably designed and administered to achieve a legitimate business purpose in light of the circumstances, including its potential harm to older workers.

Example 1:

If a police department decided to require applicants for patrol positions to pass a physical fitness test to be sure that the officers were physically able to pursue and apprehend suspects, it should know that such a test might exclude older workers more than younger ones. Nevertheless, the department’s actions would likely be based on an RFOA if it reasonably believed that the test measured the speed and strength appropriate to the job, and if it did not know, or should not have known, of steps that it could have taken to reduce harm to older workers without unduly burdening the department.

The rule emphasizes the need for an individualized consideration of the facts and circumstances surrounding the particular situation. It includes the following list of considerations relevant to assessing reasonableness:

The extent to which the factor is related to the employer’s stated business purpose;

The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;

The extent to which the employer limited supervisors’ discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;

The extent to which the employer assessed the adverse impact of its employment practice on older workers; and

The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

9. Must employers show that they used each of the considerations listed in the EEOC’s regulation to establish the defense?

No. The considerations merely describe the most common characteristics of reasonable practices. The rule makes clear that the defense could be established absent one or more of the considerations, and that there could even be a situation in which the defense is met absent any of the considerations. Similarly, the defense is not automatically established merely because one or more of the considerations are present.
10. **Consideration 1625.7(e)(2)(i)** refers to the extent to which the factor is related to the employer’s stated business purpose. What is a “stated business purpose”?

The “stated business purpose” is the business reason articulated by the employer for adopting, or implementing, the employment practice in question. “Stated” does not mean that the purpose must be written.

Note that **consideration 1625.7(e)(2)(i)** focuses on the method that the employer used to achieve its purpose, rather than the purpose itself. For example, if a police department is concerned about losing its employees to neighboring departments and decides to raise police officer salaries to match those in surrounding communities, the goal of retaining officers is not relevant to the determination of reasonableness. On the other hand, the extent to which the chosen method (raising salaries for certain employees) relates to the purpose (retaining staff) is relevant to the determination of reasonableness.

11. **Consideration 1625.7(e)(2)(ii)** is “[t]he extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination.” How would an employer show that it defined and applied the factor fairly and accurately?

The extent to which the employer defined and applied the factor fairly and accurately refers to the steps the employer took to make sure that the practice was designed and applied to achieve the employer’s intended goal while taking into account potential harm to older workers. The following examples illustrate the point:

**Example 2:**

A nursing home decided to reduce costs by terminating its highest paid and least productive employees. To ensure that supervisors accurately assessed productivity and did not base evaluations on stereotypes, the employer instructed supervisors to evaluate productivity in light of objective factors such as the number of patients served, errors attributed to the employee, and patient outcomes. Even if the practice did have a disparate impact on older employees, the employer could show that the practice was based on an RFOA because it was reasonably designed and administered to serve the goal of accurately assessing productivity while decreasing the potential impact on older workers.

**Example 3:**

The same employer asked managers to identify the least productive employees without providing any guidance about how to do so. As a result, older workers were disproportionately rated as least productive. The design and administration of the practice was not reasonable because it decreased the likelihood that the employer’s stated goal would be achieved and increased the likelihood that older workers would be disadvantaged. Moreover, accuracy could have been improved and unfair harm decreased by taking a few steps, such as those discussed in Example 2, above.
12. **Does considering the extent to which the employer defined and applied the factor fairly and accurately mean that an employer must validate a test or other selection criterion as it would under Title VII?**

No. If a particular employment practice disproportionately harms applicants or employees based on race, color, religion, sex, or national origin, Title VII requires the employer to demonstrate that the practice is “job related for the position in question” and “consistent with business necessity.” For example:

Title VII’s business necessity defense would typically require an employer that gave a physical fitness test that disproportionately excluded women to produce a validation study in accordance with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607, showing that the test accurately measures safe and efficient job performance.

In contrast, the ADEA’s RFOA defense does not require employers to formally validate tests or other selection criteria. Instead, employers are required to demonstrate only that their choices were reasonable. The extent to which a practice measures skill related to a job informs the reasonableness of the practice.

13. **Does the reference in consideration 1625.7(e)(2)(ii) to “the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination” require employers to train their supervisors or provide a certain type of training?**

No. As noted, the considerations are not requirements, and many employer practices will necessitate little, if any, guidance. However, showing that it provided guidance or training in appropriate circumstances will help the employer establish that its actions were reasonable.

Moreover, the rule’s reference to “guidance or training” recognizes that the manner in which employers convey their expectations to managers will vary depending on the circumstances. For example, a smaller employer might reasonably rely entirely on brief, informal, oral instruction.

14. **Consideration 1625.7(e)(2)(iii) is “[t]he extent to which the employer limited supervisors’ discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes.” Does this consideration mean that it is unreasonable to use subjective decision making?**

No. In many cases, it may be crucial for an employer to assess employee or applicant qualities such as flexibility and willingness to learn -- qualities that are often assessed subjectively. The rule does not say that employers may not seek these qualities in its workforce, or that they are not valuable.

However, consideration 1625.7(e)(2)(iii) does recognize that giving supervisors unconstrained discretion to evaluate employees or applicants using subjective criteria may result in disproportionate harm to older workers, because it allows supervisors'
biases and stereotypes to infect the decision making. Therefore, it is particularly useful to provide guidance when asking supervisors to evaluate subjective criteria that are subject to age-based stereotypes, such as productivity, flexibility, willingness to learn, and technological skills. For example, an employer that wants its supervisors to evaluate technological skills might attempt to reduce possible harm to older workers by instructing managers to look specifically at objective measures of the specific skills that are actually used on the job.

15. Consideration 1625.7(e)(2)(iv) is “[t]he extent to which the employer assessed the adverse impact of its employment practice on older workers.” Does this consideration require an employer to perform an adverse impact analysis of its employment practices?

No. The extent to which the employer assessed the adverse impact of its employment practice on older workers is simply one way of determining whether the employer considered the potential harm to older workers.

In many cases, the employer will not need to assess whether the practice disproportionately harmed older workers, because the practice is not a neutral practice that affects more than one person. For example, terminations for cause and voluntary separations generally are not the kinds of neutral practices that could have a disparate impact.

Where an assessment of impact is warranted, the appropriate method will depend on the circumstances, including the employer’s resources and the number of employees affected by the practice. For example, a large employer that routinely uses sophisticated software to monitor its practices for race- and sex-based disparate impact may be acting unreasonably if it does not similarly monitor for age-based impact. Other employers, lacking the resources or expertise to perform sophisticated monitoring, may show that they acted reasonably by using informal methods of assessing impact.

16. Consideration 1625.7(e)(2)(v) is “[t]he degree of harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.” What does the consideration require?

Again, this is a consideration, not a requirement. The consideration reflects the fact that an employer can increase its ability to defend against a claim of age-based disparate impact if it can show that it balanced the potential harm to older workers against the cost and difficulty of taking steps that would still accomplish its business goal but reduce the harm on older workers.

For instance, where the impact of an employment practice on older workers is minimal, the fact that an employer failed to take multiple steps to reduce harm would not mean that its chosen method is unreasonable. However, the greater the potential harm, the more likely that an employer would be expected to avail itself of available options that would reduce the harm without unduly burdening the business.
17. Does consideration 1625.7(e)(2)(v) require an employer to search for and use the least discriminatory method for achieving its purpose?

No. The rule does not require an employer to search for options and use the one that has the least severe impact on older individuals. However, an employer’s efforts to reduce the harm to older individuals are not irrelevant. There may be circumstances in which the employer knew, or should have known, of a way to noticeably reduce harm to older workers without sacrificing cost or effectiveness; in these circumstances, it could be unreasonable for the employer to fail to use such an option.

18. Must an employer keep special documentation to prove that it reasonably designed and administered the practice to achieve a legitimate business purpose in light of potential harm to older workers?

No. If disparate impact is established, the employer can support an RFOA defense with evidence that would be admissible in court, including testimony. The rule does not change existing recordkeeping requirements under the ADEA (see 29 C.F.R. Part 1627); it does not require, and should not prompt, documentation other than that which an employer would make as part of its normal business operations. However, being able to document the reasons for the design and administration of a practice can help an employer establish the RFOA defense.


[3] See, e.g., 29 C.F.R. §§ 1625.6 (BFOQ), 1625.8 (seniority systems), 1625.10 (employee benefit plans).
On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC or Commission) issued its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. The new guidance is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff. Note: A modified version of the 4+2 procedure may be used in connection with an employer’s existing EEO compliance program to demonstrate compliance with the new EEOC Guidance.

1. How is Title VII relevant to the use of criminal history information?

There are two ways in which an employer’s use of criminal history information may violate Title VII. First, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin (“disparate treatment discrimination”).

Second, even where employers apply criminal record exclusions uniformly, the exclusions may still operate to disproportionately and unjustifiably exclude people of a particular race or national origin (“disparate impact discrimination”). If the employer does not show that such an exclusion is “job related and consistent with business necessity” for the position in question, the exclusion is unlawful under Title VII.

2. Does Title VII prohibit employers from obtaining criminal background reports about job applicants or employees?

No. Title VII does not regulate the acquisition of criminal history information. However, another federal law, the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (FCRA), does establish several procedures for employers to follow when they obtain criminal history information from third-party consumer reporting agencies. In addition, some state laws provide protections to individuals related to criminal history inquiries by employers.

3. Is it a new idea to apply Title VII to the use of criminal history information?

No. The Commission has investigated and decided Title VII charges from individuals challenging the discriminatory use of criminal history information since at least 1969,¹ and several federal courts have analyzed Title VII as applied to criminal record exclusions over the past thirty years. Moreover, the EEOC issued three policy statements on this issue in 1987 and 1990, and also referenced it in its 2006 Race and Color Discrimination Compliance Manual Chapter. Finally, in 2008, the Commission’s E-RACE (Eradicating Racism and Colorism from Employment) Initiative identified criminal record exclusions as one of the employment barriers that are linked to race and color
discrimination in the workplace. Thus, applying Title VII analysis to the use of criminal history information in employment decisions is well-established.

4. Why did the EEOC decide to update its policy statements on this issue?

In the twenty years since the Commission issued its three policy statements, the Civil Rights Act of 1991 codified Title VII disparate impact analysis, and technology made criminal history information much more accessible to employers.

The Commission also began to re-evaluate its three policy statements after the Third Circuit Court of Appeals noted in its 2007 *El v. Southeastern Pennsylvania Transportation Authority* decision that the Commission should provide in-depth legal analysis and updated research on this issue. Since then, the Commission has examined social science and criminological research, court decisions, and information about various state and federal laws, among other information, to further assess the impact of using criminal records in employment decisions.

5. Did the Commission receive input from its stakeholders on this topic?

Yes. The Commission held public meetings in November 2008 and July 2011 on the use of criminal history information in employment decisions at which witnesses representing employers, individuals with criminal records, and other federal agencies testified. The Commission received and reviewed approximately 300 public comments that responded to topics discussed during the July 2011 meeting. Prominent organizational commenters included the NAACP, the U.S. Chamber of Commerce, the Society for Human Resources Management, the Leadership Conference on Civil and Human Rights, the American Insurance Association, the Retail Industry Leaders Association, the Public Defender Service for the District of Columbia, the National Association of Professional Background Screeners, and the D.C. Prisoners’ Project.

6. Is the Commission changing its fundamental positions on Title VII and criminal record exclusions with this Enforcement Guidance?

No. The Commission will continue its longstanding policy approach in this area:

The fact of an arrest does not establish that criminal conduct has occurred. Arrest records are not probative of criminal conduct, as stated in the Commission’s 1990 policy statement on Arrest Records. However, an employer may act based on evidence of conduct that disqualifies an individual for a particular position.

Convictions are considered reliable evidence that the underlying criminal conduct occurred, as noted in the Commission’s 1987 policy statement on Conviction Records.

National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.
A policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity and therefore will violate Title VII, unless it is required by federal law.

7. How does the Enforcement Guidance differ from the EEOC’s earlier policy statements?

The Enforcement Guidance provides more in-depth analysis compared to the 1987 and 1990 policy documents in several respects.

The Enforcement Guidance discusses disparate treatment analysis in more detail, and gives examples of situations where applicants with the same qualifications and criminal records are treated differently because of their race or national origin in violation of Title VII.

The Enforcement Guidance explains the legal origin of disparate impact analysis, starting with the 1971 Supreme Court decision in Griggs v. Duke Power Company, 401 U.S. 424 (1971), continuing to subsequent Supreme Court decisions, the Civil Rights Act of 1991 (codifying disparate impact), and the Eighth and Third Circuit Court of Appeals’ decisions applying disparate impact analysis to criminal record exclusions.

The Enforcement Guidance explains how the EEOC analyzes the “job related and consistent with business necessity” standard for criminal record exclusions, and provides hypothetical examples interpreting the standard.

There are two circumstances in which the Commission believes employers may consistently meet the “job related and consistent with business necessity” defense:

- The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or

- The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Cir. 1977)). The employer’s policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.).

The Enforcement Guidance states that federal laws and regulations that restrict or prohibit employing individuals with certain criminal records provide a defense to a Title VII claim.
The Enforcement Guidance says that state and local laws or regulations are preempted by Title VII if they “purport[] to require or permit the doing of any act which would be an unlawful employment practice” under Title VII. 42 U.S.C. § 2000e-7.

The Enforcement Guidance provides best practices for employers to consider when making employment decisions based on criminal records.

1 See, e.g., EEOC Decision No. 70-43 (1969) (concluding that an employee’s discharge due to the falsification of his arrest record in his employment application did not violate Title VII); EEOC Decision No. 72-1497 (1972) (challenging a criminal record exclusion policy based on “serious crimes”); EEOC Decision No. 74-89 (1974) (challenging a policy where a felony conviction was considered an adverse factor that would lead to disqualification); EEOC Decision No. 78-03 (1977) (challenging an exclusion policy based on felony or misdemeanor convictions involving moral turpitude or the use of drugs); EEOC Decision No. 78-35 (1978) (concluding that an employee’s discharge was reasonable given his pattern of criminal behavior and the severity and recentness of his criminal conduct).

2 479 F.3d 232 (3d Cir. 2007).
WHAT WE WILL COVER

- Criminal Prosecution of Employers
- Civil Penalties for Errors on I-9s
- Form I-9
- E-Verify
- Discrimination Concerns
- Legislative Updates

DEFINITIONS

- Undocumented Worker
- Form I-9
- M-274
- ICE
- USCIS
- E-Verify
- IRCA
- RICO
- MOU
- EAD
- Green Card
IMMIGRATION REFORM AND CONTROL ACT

- Genesis of Current Immigration Enforcement Policy
- Places Requirement on Employers to Verify Identity and Employment Authorization
- Requires Employers to Complete Form I-9
- Criminal Penalties for Employing Undocumented Workers with Knowledge
- Civil Penalties for Discrimination

RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS ACT

- ICE’s Primary Enforcement Tool Against Employers
- “Harboring” Undocumented Workers Considered Racketeering Activity
- Harboring = Employing Unauthorized Workers With Knowledge

THE “KNOWLEDGE” REQUIREMENT

- Both IRCA and RICO Require Employer to Possess Knowledge
- Statutory Definition Includes Both Actual and Constructive Knowledge
- Employers Need Not Actually Know in Order to Incur Liability
CHANGE IN POLICY

II. Criminal Prosecution of Employers
- The criminal prosecution of employers is a priority of ICE’s workplace enforcement.
- ICE is committed to targeting employers, owners, corporate managers, supervisors, and other in the management structure of a company for criminal prosecution through the criminal investigation division of ICE.
- ICE officials should utilize the full range of available investigative methods and technologies, including but not limited to use of confidential sources and cooperating witnesses, introduction of undercover agents, confidential and non-confidential informants, and RICO audits.
- ICE officials should consider the wide variety of criminal offenses that may be present in a workplace case, and ICE officials should be familiar with evidence of the mistreatment of workers, including but not limited to, patterned, characterizing, and complex mistreatment.

AGRIPROCESSOR
- ICE investigation found undocumented workers
- CEO sentenced to 27 years in prison
- Supervisors and HR served 6 months to 3 years in prison.

EXAMPLES: THE SANDOVALS
- Owner of Mexican Food Restaurant Chain
- Husband = 41 Months in Prison
- Wife = 5 Years Probation/12 Months Community Confinement
- $2.2 Million in Restitution to the IRS
ABERCROMBIE & FITCH

- ICE conducted Form I-9 audit of Abercrombie.
- Fined $1,047,110 for incomplete/incorrect I-9s and bad electronic storage system.
- No undocumented workers.

EXAMPLES: CHINA BUFFET

- Not A Single Undocumented Worker
- Fined $6,872.25 for Failing to Properly Complete 7 I-9s
- Appealed to OCAHO
- HELD: Fine reasonable, but Reduced

FORM I-9

- Affidavit Signed by Employee and Employer Under Penalty of Perjury
- Checks Identity and Employment Authorization
- Section 1: Completed by Worker on Date Employment Began
- Section 2: Completed by Employer Within Three Business Days of when Employee Completes Section 1
- Section 2 Requires Employer to Obtain a Document(s) from Employee
- Section 3: Only Completed for Updating and Re-verification Purposes
LIST OF ACCEPTABLE DOCUMENTS

- Only Accept Documents on the List of Acceptable Documents
- All Documents Must Appear Genuine
- All Documents Must Be Unexpired on Date of Acceptance
- Accept Document from List A or Combination of List B and List C Documents

DOCUMENT RETENTION

- Form I-9 must be retained by the employer;
- It is not a document that is filed or submitted to a federal agency
- Employers must keep the completed Form I-9 for all employees for three years after the date of hire or one year after the date employment ends, whichever is later

Example 1:
- Suzy is hired on February 1, 2009, and is terminated on September 1, 2009. The employer must keep her Form I-9 until February 1, 2012, which is three years after her date of hire. This date is used because it occurs later than September 1, 2010, which is one year after the date her employment ends.

Example 2:
- Geoffrey is hired on February 1, 2009, but is not terminated until March 1, 2012. The employer must keep his Form I-9 until March 1, 2013, which is one year after his employment ends. This date is used because it occurs later than February 1, 2012, which is three years after the date of hire.
E-VERIFY

- Checks Identity and Employment Authorization in Conjunction with Form I-9
- Generally Only Used on Employees Hired After MOU Signed
- Use of E-Verify Slightly Changes I-9 Rules
- Does Not Detect Identity Theft

DISCRIMINATION CONCERNS

- Protected Class: Authorized Workers
- Do Not Specify Which Documents You Accept For Completing I-9s
- Do Not Require Additional Documents
- Do Not Refuse to Hire An Individual Because of A Future Expiration Date
- Do NOT RE-VERIFY GREEN CARDS!

E-VERIFY UNDER STATE LAW

- AZ, AL, FL, GA, ID, IN, LA, MS, MO, NE, NC, OK, SC, TN, UT, VA and WV require employers to use E-Verify in some form or another, either currently or through a phase-in process
- Illinois restricts the use of E-Verify by subjecting employers who fail to protect worker privacy to fines and petty offense criminal charges
SSN MISMATCH/NO MATCH

- Notice Generally Received Through Social Security No Match Letter
- W-2 Name and SSN Do Not Match SSA Records
- Employers Must Be Proactive
- Evidence of Inaction Used by ICE to Prove “Knowledge”
- Contact and Attorney to Determine if You are Following Proper Procedure

BEST PRACTICES

- Provide regular training to personnel that will be involved in the hiring and employment verification process.
- Audit I-9s Annually
- Create an internal notification system to provide the appropriate personnel with notice of upcoming deadlines related to employment verification, including:
  - Expiration of an employer's work authorization documents;
  - Deadline for remedying a Form I-9 paperwork violation; and
  - Document retention timelines.
- Complete the Form I-9 on or before the employee's first day of work.
- Maintain documentation of employment eligibility separate from the employee's personnel file, and maintain it for at least as long as IRCA requires.
- Review E-Verify and recruitment policies related to immigrant employees regularly for continued compliance with applicable state and federal laws.
- Refer to the U.S. Citizenship and Immigration Services Handbook for Employers for guidance on completion of the Form I-9.
- If there is any doubt about the legality of a particular course of action, seek legal advice in advance of pursuing that course of action.

LEGISLATIVE UPDATE

- The Fairness for High-Skilled Immigrants Act of 2011
  - Amends the Immigration and Nationality Act
  - Amends the Chinese Student Protection Act of 1992 to eliminate the provision requiring the reduction of annual Chinese (PRC) immigrant visas to offset status adjustments under such Act.
  - Sets forth the following transition period for employment-based second and third preference (EB-2 and EB-3) immigrant visas
  - Sets forth the following per country distribution rules
QUESTIONS?
I. Introduction

Since the enactment of the Immigration and Reform and Control Act (IRCA) in 1986, federal law has placed a burden upon employers to verify that their employees are legally authorized to work in the United States. Employers are required to verify the identity and work eligibility of all employees, and employers are obligated to deny employment to any undocumented or unauthorized employee. However, employers are faced with the difficult task of balancing these obligations with the anti-discrimination provisions of the IRCA, as well as state and federal laws.

II. Legislative Update

The Fairness for High-Skilled Immigrants Act of 2011 (H.R. 3012) was passed by the House on November 29, 2011, and is in the midst of the “Rule 14 Process” within the Senate. It has been read twice in the Senate and placed on the legislative calendar as of January 23, 2012.

If the bill passes, it will eliminate the per country numerical limitation for employment-based immigrants. Currently, the United States limits the number of visas it will issue to immigrants from a single country in a given year; generally, no country can receive more than 7% of the total number of visas issued for that year. The limitations have the most severe effect on countries with large populations. To illustrate, Iceland, with a population of approximately 300,000, is allowed the same number of immigrants as India, with a population of over 1.2 million.1 The bill would not increase the total number of green cards issued.

Supporters of the bill believe that it will allow the United States to take advantage of the education, experience, and talents of foreign workers, rather than losing those talents to global competitors. Opponents of the bill have concerns about protecting Americans in a competitive job market. Some even urge American students to avoid science, engineering, and technology degrees due to the perception that there will be an increased number of foreign workers willing to take those jobs for less money.

The Official Summary of the bill is as follows:

Amends the Immigration and Nationality Act to:

(1) eliminate the per country numerical limitation for employment-based immigrants, and

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(2) increase the per country numerical limitation for family based immigrants from 7% to 15% of the total number of family-sponsored visas.

Amends the Chinese Student Protection Act of 1992 to eliminate the provision requiring the reduction of annual Chinese (PRC) immigrant visas to offset status adjustments under such Act.

Sets forth the following transition period for employment-based second and third preference (EB-2 and EB-3) immigrant visas:

(1) for FY2012, 15% of such visas allotted to natives of countries other than the two countries with the largest aggregate numbers of natives obtaining such visas in FY2010;

(2) for FY2013, 10% of such visas allotted in each category to natives of countries other than the two with the largest aggregate numbers of natives obtaining such visas in FY2011; and

(3) for FY2014, 10% of such visas allotted in each category to natives of countries other than the two with the largest aggregate numbers of natives obtaining such visas in FY2012.

Sets forth the following per country distribution rules:

(1) for transition period visas, not more than 25% of the total number of EB-2 and EB-3 visas for natives of a single country; and

(2) for non-transition period visas, not more than 85% of EB-2 and EB-3 visas for natives of a single country. Provides that the amendments made by this Act will take place as if enacted on September 30, 2011, and shall apply beginning in FY2012.

The Coons-Rubio American Growth, Recovery, Empowerment and Entrepreneurship (AGREE) Act, co-sponsored by Chris Coons (D–Del.) and Marco Rubio (R-Fla.), S. 1866 Title V, Sec. 501 incorporates H.R. 3012. The Senate bill has a broad base of additional co-sponsors from Charles Schumer of New York to Roy Blunt of Missouri.

III. E-Verify

The U.S. Department of Homeland Security describes E-Verify as an internet-based system that allows businesses to determine the eligibility of their employees to work in the United States. E-Verify is fast, free, and easy to use – and it is the best way
employers can ensure a legal workforce.\(^2\) Certain federal government contractors are required to use E-Verify.\(^3\)

### A. E-Verify Under State Law

Several states (Arizona, Alabama, Florida, Georgia, Idaho, Indiana, Louisiana, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, South Carolina, Tennessee, Utah, Virginia and West Virginia) require employers to use E-Verify in some form or another, either currently or through a phase-in process.\(^4\) On the other hand, California forbids state and local governments from using E-Verify unless it is required to receive federal funds, while private employers may use E-Verify if they so choose.\(^5\)

Illinois restricts the use of E-Verify by subjecting employers who fail to protect worker privacy to fines and petty offense criminal charges. Further, a private right of action in civil court is granted to employees who claim their rights under the statute were violated.\(^6\)

### B. Form I-9

Form I-9 is produced by the Department of Homeland Security and is to be used by employers to document the employment verification process. Current copies of I-9 forms are available online at [http://www.uscis.gov/files/form/i-9.pdf](http://www.uscis.gov/files/form/i-9.pdf). Form I-9 requires the employee to attest, under penalty of perjury, that s/he is authorized to work in the United States. The employee must provide proof identity and authorization to work in the United States. The following documents are acceptable to demonstrate identity and work authorization:

- U.S. Passport
- Permanent Resident Card or Alien Registration Receipt Card
- Foreign Passport with a temporary I-551 stamp or notation
- Employment Authorization Document that contains a photograph
- A foreign Passport with Form I-94 or I-94A with an endorsement of the alien’s nonimmigrant status
  - This document applies only to nonimmigrant aliens authorized to work for a specific employer incident to status
- FSM Passport or RMI Passport with Form I-94 or Form I-94A indicating admission under the Compact of Free Association

\(^2\) [http://www.uscis.gov/portal/site/uscis](http://www.uscis.gov/portal/site/uscis).
\(^3\) Federal contractors whose contracts meet the Federal Acquisition Regulation (FAR) threshold are required to use E-Verify. The rules for use of the E-Verify system for FAR E-Verify participants differ from the rest of employers who sign up to use the E-Verify.
\(^4\) [http://www.ncsl.org/?tabid=13127](http://www.ncsl.org/?tabid=13127)
\(^5\) AB1236, Sec. 1 (g)
\(^6\) 820 ILCS 55, Section 12.
If the employee does not provide one of the above-referenced documents, s/he may provide two separate documents to prove identity and work authorization, one document must come from each of the following columns:

<table>
<thead>
<tr>
<th>Documents that Prove Identity</th>
<th>Documents that Prove Work Authorization</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Driver’s license or State ID Card</td>
<td>- Social Security card (Unrestricted)</td>
</tr>
<tr>
<td>- ID Card Issued by federal, state or local government agency</td>
<td>- Certificate of Birth Abroad</td>
</tr>
<tr>
<td>- School photo ID</td>
<td>- Certificate of Report of Birth</td>
</tr>
<tr>
<td>- Voter’s registration card</td>
<td>- U.S. Birth Certificate</td>
</tr>
<tr>
<td>- U.S. Military card</td>
<td>- Native American tribal document</td>
</tr>
<tr>
<td>- Military dependent’s ID</td>
<td>- U.S. Citizen ID card</td>
</tr>
<tr>
<td>- U.S. Coast Guard Merchant card</td>
<td>- ID Card for Use of Resident U.S. Citizen</td>
</tr>
<tr>
<td>- Nation American tribal document</td>
<td>- Employment authorization document</td>
</tr>
<tr>
<td>- Canadian driver’s license</td>
<td></td>
</tr>
</tbody>
</table>

Additionally, individuals under the age of 18 are permitted in some circumstances to provide a school report card, medical record, or day-care record in lieu of providing a document from the first column above.

Once the employee fills out Form I-9 and provides adequate documentation, the employer then must attest that the documents provided by the employee have been examined, appear to be genuine, and appear to belong to the employee. This is accomplished by completing Section 2 of Form I-9.

**Practice tip:** The most conservative approach is to use E-Verify while maintaining the privacy rights of the employee. E-Verify is not perfect. If a negative response is received, give the employee an opportunity to establish the right to work in the United States using alternative means.

**C. Updating and Re-Verification**

Employer must complete Section 3 of the employee’s Form I-9 in order to update the form or re-verify employment authorization. Employer must complete Section 3 of Form I-9 on the employee for all of the following reasons: 1) employee changes their name; employee is re-hired before employee’s Form I-9 is eligible for destruction; and 3) employee provided a document that needs to be re-verified upon expiration. Examples of must be re-verified upon expiration include: an Employment Authorization Document; temporary I-551 stamp in a foreign passport or temporary I-551 printed notation on an immigrant visa; foreign passport with I-94 indicating that the individual is authorized to work for a specific
employer; and certain receipts for documents on the List of Acceptable Documents (such as a receipt for a driver’s license or Social Security card). An employer must never re-verify an employee’s Lawful Permanent Resident card or Alien Registration Receipt card.

D. Document Retention

Form I-9 must be retained by the employer; it is not a document that is filed or submitted to a federal agency though it is owned by the U.S. government. Employers must keep the completed Form I-9 for all employees for three years after the date of hire or one year after the date employment ends, whichever is later.

**Example 1:** Suzy is hired on February 1, 2009, and is terminated on September 1, 2009. The employer must keep her Form I-9 until February 1, 2012, which is three years after her date of hire. This date is used because it occurs later than September 1, 2010, which is one year after the date her employment ends.

**Example 2:** Geoffrey is hired on February 1, 2009, but is not terminated until March 1, 2012. The employer must keep his Form I-9 until March 1, 2013, which is one year after his employment ends. This date is used because it occurs later than February 1, 2012, which is three years after the date of hire.

**Practice tip:** Employers should use a tickler system to notify personnel when re-verification is necessary, or when documents on a particular employee no longer need to be maintained by the company.

E. SSN Mismatch/No Match

An employer generally receives notice of a Social Security no match through a Social Security No Match Letter sent to them by the Social Security Administration. A Social Security no match occurs when the name and Social Security number employer provided on an employee’s W-2 does not match Social Security’s records. A Social Security no match can occur for many valid reasons such as employer making an error in the employee’s name or Social Security number on listed on their W-2 or employee failing to notify the Social Security Administration when they change their name. A Social Security no match can also occur if the individual is unauthorized to work in the U.S. and working under an assumed name and/or Social Security number.

If an employer receives a Social Security No Match Letter they cannot simply disregard it. However, the employer must not treat the employee as though they

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8 *Id.*
are unauthorized. It is in the employer’s best interest to contact their attorney as soon as they receive a No Match Letter in order to ensure that they follow the proper protocol in responding to the No Match Letter.

F. Employing Unauthorized Workers with Knowledge

8 U.S.C. § 1324a(a) states, in pertinent part:

Making employment of unauthorized aliens unlawful

(1) In general
   It is unlawful for a person or other entity -

   (A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

   (B)(i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section . . . .

This means it is illegal for an employer to employ any person who is either an unauthorized alien or any person who cannot provide reasonable proof of eligibility to work in the United States. The scary part for employers that the definition of “knowledge” under 8 U.S.C. § 1324a(a) includes both actual and constructive knowledge. Therefore, an employer may be liable for employing unauthorized workers despite the fact that they did not actually know that their workers were unauthorized.

Mester Mfg. Co. v. INS, 879 F.2d 561 (9th Cir. 1989). In Mester, an INS official performed a review of Mester’s Form I-9s and supporting documentation. The INS official issued a paperwork citation for several minor violations that were found and informally notified Mester that it should verify the employment of three of its employees because their green cards were suspicious. The INS official told Mester exactly how to perform the verification. Three weeks later, Mester still employed the three individuals, despite that a verification search, if performed correctly, would have revealed that those individuals were unauthorized to work in the United States. Mester argued that it did not “knowingly” employ any unauthorized individuals because the INS never provided formal notice of the potential violation. The Court disagreed, noting that IRCA does not specify the manner of method by which an employer must gain knowledge of the potential violation. Here, informal notice was sufficient to hold the employer liable for a knowing violation of the Act.

G. Discrimination Concerns
It is also illegal to ask for too much proof of the right to work in the United States! While 8 U.S.C. § 1324a(a) will punish employers for not taking appropriate steps to figure out if the employee is authorized to work in the United States, 8 U.S.C. § 1324a(b) will punish the employer for asking too many questions or asking for too many documents. Subsection (b) of this statute sets out the types of documents that can establish employment authorization and/or identify for a potential employee, and also requires that both the employer and employee provide attestations related to the employment verification process. 8 U.S.C. § 1324b(a)(6) is called the “document abuse provision” and states:

Treatment of certain documentary practices as employment practices
A person’s or other entity’s request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice if made for the purpose or with the intent of discriminating against an individual in violation of paragraph (1).

Under this statute, the employer must not have discriminatory intent when it asks for more or different documents, or refuses to honor documents submitted by the potential employee. Robison Fruit Ranch, Inc. v. U.S., 147 F.3d 798, 801 (9th Cir. 1998) (government required to prove discrimination).

This statute basically requires the employer to do two things: (1) insure that the person being hired is authorized to work in the United States, and (2) do not ask too many questions while making sure the person is legal. If the employer is wrong on step one, it will be lighter in the wallet and face jail time. If the employer is wrong on step two, it may get sued, thus, ending up lighter in the wallet, however, no jail time.

Zamora v. Elite Logistics, Inc., 478 F.3d 1160 (10th Cir. 2007). Zamora is the horror story. Plaintiff was employed in a warehouse. As part of an internal audit in anticipation of an INS check, the employer hired an independent entity to check every employee’s Social Security number. Many numbers, including plaintiff’s, came up with causes for concern. The employer then hired a separate independent company to rerun the numbers. Some of the issues were resolved but about 35 employees, including plaintiff, still had problems. In plaintiff’s case, his Social Security number was being used simultaneously by another person in California.

The employer then called plaintiff into the office and explained to him that there was a problem with his Social Security number and that he needed
documents to prove he was truly authorized to work in the United States, and the documentation was needed within ten days.\(^9\) In addition, plaintiff was provided with written memoranda, in both English and Spanish, providing the same information. Twelve days later, the employer had received nothing so he called plaintiff back into the office and asked if the employee had documentation. When the employee stated that he did not, the employer put the employee “off the clock” until plaintiff brought documentation.

The next day the plaintiff arrived with a number of documents. One document he provided had the same name and Social Security number, but had a different birth date, making the employer wonder if three people were using the same number. The employee was sent home again, after being told he could come back to work if he provided a Social Security number that was unquestionably plaintiff’s. Plaintiff then went to the Social Security office and provided proof that the SSN in question was, in fact, his. The employer confirmed with the Social Security office and told him to come back to work.

Instead of coming back to work, plaintiff demanded a written apology from the employer and made a Missouri service letter demand, or else he would not return to work. Employer flatly, and somewhat rudely, refused. Plaintiff claimed he was also fired. Employer said plaintiff was not fired; plaintiff said he would not come back to work without an apology, employer was not going to give him one, so plaintiff could “get the hell out.”

Plaintiff sued, contending that his suspension and his termination from employment violated the race and national origin discrimination prohibitions of Title VII. The trial court threw the case out on summary judgment, pragmatically noting that it was highly unlikely that an employer who had asked the plaintiff to come back to work, and had given plaintiff multiple chances to obtain documentation, was acting with some discriminatory motive. Further, once the employer knew that there was a problem with the Social Security number, employer had an obligation to investigate under the Immigration Reform Act. *Zamora v. Elite Logistics, Inc.*, 316 F.Supp. 2d 1107 (D.Kan. 2004).

Plaintiff appealed. In a stunning decision, a Tenth Circuit panel reversed on a 2-1 vote. *Zamora v. Elite Logistics, Inc.*, 449 F.3d 1106 (10th Cir. 2006). There were three opinions, and one judge opined that plaintiff should be able to go to trial over the suspension, but not the termination. The stated reasons were that the employer should have simply honored the original I-9 documents, and that running everyone’s Social Security number might still show discriminatory intent. The Tenth Circuit agreed to rehear the case *en banc*. This means all the sitting Tenth Circuit judges, 14 in number, heard the case.

\(^9\) Recall that under 8 USC 1324b the employer cannot specify what documents the employee must present – or else it is document abuse.
The Outcome: The Tenth Circuit ended up reversing itself and affirming the District Court. It ruled that the employer did not violate Title VII. The outcome was reached through a bizarre split in the vote, with 9 of 14 judges voting that the employer did not discriminate against plaintiff when it refused to meet plaintiff’s conditions for reemployment and terminated the plaintiff’s employment. On the suspension count, however, the judges split 7-7 on whether there was evidence that the employer violated Title VII when plaintiff was suspended. Ties go to the District Court, thus, its original ruling against plaintiff was upheld.

IV. Best Practices

Based upon a review of IRCA and judicial interpretations of its provisions, it is clear that an employer may regularly be faced with the dilemma of trying to verify employment of its employees while not running afoul of the anti-discrimination provisions implicated by the process. Unfortunately, there are no guarantees, but an employer can take certain proactive measures in an effort to avoid fines, criminal penalties, and civil suits.

- Provide regular training to personnel that will be involved in the hiring and employment verification process.
- Audit I-9s annually. The Audit should be conducted by a third party auditor or someone employed by the business who is not otherwise associated with the employment verification process.
- Create an internal notification system to provide the appropriate personnel with notice of upcoming deadlines related to employment verification, including:
  - Expiration of an employee’s work authorization documents;
  - Deadline forremedying a Form I-9 paperwork violation; and
  - Document retention timelines.
- Complete the Form I-9 on the employee’s first day of work.
- Maintain documentation of employment eligibility separate from the employee’s personnel file, and maintain it until the day it is eligible for destruction under IRCA.
- Review E-Verify and recruitment policies related to immigrant employees regularly for continued compliance with applicable state and federal laws.
- Refer to the U.S. Citizenship and Immigration Services Handbook for Employers for guidance on completion of the Form I-9 (M-274).
- If there is any doubt about the legality of a particular course of action, seek legal advice in advance of pursuing that course of action.

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ICE Best Employment Practices

- Use E-Verify, the DHS employment eligibility verification program, to verify the employment eligibility of all new hires.
- Use the Social Security Number Verification Service (SSNVS) for wage reporting purposes. Make a good faith effort to correct and verify the names and Social Security numbers of the current workforce and work with employees to resolve any discrepancies.
- Establish a written hiring and employment eligibility verification policy.
- Establish an internal compliance and training program related to the hiring and employment verification process, including completion of Form I-9, how to detect fraudulent use of documents in the verification process, and how to use E-Verify and SSNVS.
- Require the Form I-9 and E-Verify process to be conducted only by individuals who have received appropriate training and include a secondary review as part of each employee’s verification to minimize the potential for a single individual to subvert the process.
- Arrange for annual Form I-9 audits by an external auditing firm or a trained employee not otherwise involved in the Form I-9 process.
- Establish a procedure to report to ICE credible information of suspected criminal misconduct in the employment eligibility verification process.
- Ensure that contractors and/or subcontractors establish procedures to comply with employment eligibility verification requirements. Encourage contractors and/or subcontractors to incorporate IMAGE Best Practices and when practicable incorporate the use of E-Verify in subcontractor agreements.
- Establish a protocol for responding to letters or other information received from federal and state government agencies indicating that there is a discrepancy between the agency’s information and the information provided by the employer or employee (for example, "no match" letters received from the Social Security Administration) and provide employees with an opportunity to make a good faith effort to resolve the discrepancy when it is not due to employer error.
- Establish a tip line mechanism (inbox, email, etc.) for employees to report activity relating to the employment of unauthorized workers, and a protocol for responding to credible employee tips.
- Establish and maintain appropriate policies, practices and safeguards to ensure that authorized workers are not treated differently with respect to hiring, firing, or recruitment or referral for a fee or during the Form I-9, E-Verify or SSNVS processes because of citizenship status or national origin.
- Maintain copies of any documents accepted as proof of identity and/or employment authorization for all new hires.

These tips can be found at: http://www.ice.gov/image/best-practice.htm
Read instructions carefully before completing this form. The instructions must be available during completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification

(To be completed and signed by employee at the time employment begins.)

Print Name: Last First Middle Initial Maiden Name

Address (Street Name and Number) Apt. # Date of Birth (month/day/year)

City State Zip Code Social Security #

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

Employee's Signature Date (month/day/year)

Preparer and/or Translator Certification (To be completed and signed if Section 1 is prepared by a person other than the employee.)

I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

Preparer's/Translator's Signature Date (month/day/year)

Address (Street Name and Number, City, State, Zip Code) Print Name Date (month/day/year)

Section 2. Employer Review and Verification

(To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number, and expiration date, if any, of the document(s).)

List A OR List B AND List C

Document title: ____________________________ Issuing authority: ____________________________ Document #: ____________________________

Expiration Date (if any): ____________________________ Document #: ____________________________

Expiration Date (if any): ____________________________

CERTIFICATION: I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) ____________________________ and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)

Signature of Employer or Authorized Representative Print Name Title

Business or Organization Name and Address (Street Name and Number, City, State, Zip Code) Date (month/day/year)

Section 3. Updating and Reverification

(To be completed and signed by employer.)

A. New Name (if applicable) B. Date of Rehire (month/day/year) (if applicable)

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment authorization.

Document Title: Document #: Expiration Date (if any): ____________________________

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative Date (month/day/year)
### Lists of Acceptable Documents

**All documents must be unexpired**

#### List A

Documents that Establish Both Identity and Employment Authorization

<table>
<thead>
<tr>
<th>1. U.S. Passport or U.S. Passport Card</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)</td>
</tr>
<tr>
<td>3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa</td>
</tr>
<tr>
<td>4. Employment Authorization Document that contains a photograph (Form I-766)</td>
</tr>
<tr>
<td>5. In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form</td>
</tr>
<tr>
<td>6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI</td>
</tr>
</tbody>
</table>

#### List B

Documents that Establish Identity

| 1. Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address |
| 2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address |
| 3. School ID card with a photograph |
| 4. Voter's registration card |
| 5. U.S. Military card or draft record |
| 6. Military dependent's ID card |
| 7. U.S. Coast Guard Merchant Mariner Card |
| 8. Native American tribal document |
| 9. Driver's license issued by a Canadian government authority |
| **For persons under age 18 who are unable to present a document listed above:** |
| 10. School record or report card |
| 11. Clinic, doctor, or hospital record |
| 12. Day-care or nursery school record |

#### List C

Documents that Establish Employment Authorization

| 1. Social Security Account Number card other than one that specifies on the face that the issuance of the card does not authorize employment in the United States |
| 2. Certification of Birth Abroad issued by the Department of State (Form FS-545) |
| 3. Certification of Report of Birth issued by the Department of State (Form DS-1350) |
| 4. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal |
| 5. Native American tribal document |
| 6. U.S. Citizen ID Card (Form I-197) |
| 7. Identification Card for Use of Resident Citizen in the United States (Form I-179) |
| 8. Employment authorization document issued by the Department of Homeland Security |

*Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)*
General Overview of the original ADA

The Americans With Disabilities Act of 1990 (ADA) requires employers to make reasonable accommodations for the known physical or mental limitations of otherwise qualified applicants or employees with disabilities. Thus, the ADA requires more than treating disabled individuals equally. The ADA compels employers to spend money, alter personnel and work practices and take other steps to affirmatively accommodate the needs of disabled employees and applicants unless to do so would cause the employer undue hardship.

The ADA applies to all employers with 15 or more employees. The ADA protects all qualified individuals with a disability. That means individuals:

1) With a physical or mental impairment that substantially limits one or more major life activities;
2) With a record of such impairment; OR
3) Regarded as having such impairment.
**ADA AMENDMENTS ACT**
- Became effective January 1, 2009
- Does not apply retroactively to ADA claims which arose prior to January 1, 2009
- Abrogates prior case law
- Broadens the scope of protection
- Restores original intent of the ADA

**EEOC FINAL REGULATIONS**
- On September 23, 2009, the EEOC published its Notice of Proposed Rule Making for a 60 day notice and comment period.
- On March 25, 2011, the Final Regulations were published into the Federal Register and became effective May 24, 2011.
- The “New Regs” make a number of significant changes to the manner in which employers and courts should interpret the provisions of the ADA

**DISABILITY DEFINED**
- The basic definition of disability is the same, but the interpretation is not.
- Disability - an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.
DISABILITIES UNDER THE OLD ADA

- The framework for determining the existence of a disability was largely shaped by judicial interpretation.
- Courts in various jurisdictions commonly struggled with a number of disabilities.

YOU BE THE JUDGE

- Consider the following impairments:
  - Cancer that has responded well to treatment and is in remission.
  - Diagnosis of ADHD.
  - Vision that is impaired when uncorrected.
  - High blood pressure.
  - Torn rotator cuff.
- The New Regs set out to simplify whether impairments like these constitute disabilities.

THE NEW REGS: “DISABILITY”

- Old interpretation: the primary focus was whether an individual had a disability.
- New interpretation: the determination “should not demand extensive analysis” and “disability shall be interpreted broadly.”
THE NEW REGS: “SUBSTANTIALLY LIMITS”

- Old interpretation: A limitation that “significantly or severely restricts” a major life activity and is permanent or long term
- New interpretation: A comparison of an individual’s performance of a major life activity to the performance of the same activity by most people in the general population
  - The proposed regulations removed “condition, manner, or duration” as considerations for whether an impairment substantially limits a major life activity. As a result of the comments received, those factors were included in the Final Regs and remain relevant to the determination of disability.

YOU BE THE JUDGE

- Does ADHD substantially limit an employee?
- What if the employee brings in a physician’s note diagnosing him with ADHD? Does the employee automatically have a disability?
- What if the physician’s note further states that as a result of the ADHD, the employee cannot concentrate and think for extended periods of time without breaks?

THE NEW REGS: “MAJOR LIFE ACTIVITY”

- Old interpretation: Whether the activity is one that is of central importance to daily life.
- New interpretation: The Regs provide two non-exhaustive lists of major life activities and specify that “central importance to daily life” should not be a consideration.
YOU BE THE JUDGE
• Does high blood pressure substantially limit a major life activity?
• What if the condition does not have any effect on the employee’s physical or mental ability to do the job?
• Recall that the New Regs state the major life activities include the operation of major bodily functions, such as the cardiovascular and circulatory system. Does this change your answer?

THE NEW REGS: MITIGATING MEASURES
• Old interpretation: whether a person is disabled must account for the individual’s abilities when using mitigating measures.
• New interpretation: the determination shall be made without regard to the ameliorative effects of mitigating measures, with two exceptions:
  • Ordinary eye glasses & contact lenses.

YOU BE THE JUDGE
• Commercial truck driver cannot see at night without his glasses. Is he disabled?
• Commercial truck driver has epilepsy, but seizures are completely controlled with the use of prescription medication. Is he disabled?
• Can the employer require the epileptic truck driver to take prescription medication?
MITIGATING MEASURES

- Both the prior case law and the 2009 Amendments allow for contacts and glasses to be considered when determining if a disability exists.
- However, under the 2009 Amendments, no other mitigating factors can be considered including:
  - medication, medical supplies or equipment, prosthetics, assistive technology, reasonable accommodations or auxiliary aids, or behavioral or adaptive neurological modifications.

THE NEW REGS: EPISODIC CONDITIONS IN REMISSION

- Old interpretation: conditions in remission were generally evaluated based upon whether there was a record of impairment or the individual was regarded as having an impairment.
- New interpretation: an impairment that is episodic or in remission is a disability if it would qualify as one when active.

THE NEW REGS: “REGARDED AS”

- Old interpretation: the employer must perceive the employee to be substantially limited in a major life activity.
- New interpretation: the individual must show that he was subjected to a prohibited action because of an actual or perceived disability.
  - The “regarded” impairment cannot be “transitory and minor”
    - Transitory means lasting six months or less.
    - Minor is not defined by the New Regs.
YOU BE THE JUDGE

An employee has a torn rotator cuff and needs surgery. She cannot do any overhead lifting until the tear is fixed.

- Is she substantially limited in a major life activity?
- Could she be regarded as disabled?
- What if the physician states that she can get the surgery next week, and will be rehabilitated after 4 months of physical therapy?

WHAT HASN’T CHANGED?

- In recent years, interpretation of the ADA has undergone significant modification with the 2009 Amendments and the EEOC’s Final Regulations.
- However, a number of provisions included in the ADA remain largely unchanged.
- Recent court cases have confirmed that while an individual can prove a disability with greater success, the remaining elements of the ADA still require a significant burden.

WHAT HASN’T CHANGED: QUALIFIED INDIVIDUAL

- The ADA prohibits employers from discriminating against a qualified individual with a disability.
- Qualified individual with a disability:
  - Any person who with or without reasonable accommodation can perform the essential functions of the employment position that such individual holds or desires to hold.
WHAT HASN’T CHANGED: ESSENTIAL FUNCTIONS

- Essential Functions determination is case-by-case focusing on the purpose of the function and result to be accomplished, rather than simply considering how the function is currently performed.
- If the function is essential, the question becomes whether the employee can perform it with or without “reasonable accommodation?”

WHAT HASN’T CHANGED: REASONABLE ACCOMMODATIONS

- Employer is required to make reasonable accommodation, if available, unless it would create undue hardship.
  - Undue hardship
    - An accommodation that would be unduly costly, expensive, or substantial, or that would fundamentally alter the nature of the business.

WHAT HASN’T CHANGED: MEDICAL RECORDS

- The ADA strictly prohibits an employer from keeping medical information on employees in the employees’ regular personnel files.
- Such information must be filed separately and should be kept confidential to the greatest extent possible.
WHAT DO THESE NEW CHANGES MEAN, PRACTICALLY?

- More cases will survive summary judgment and proceed to a trial on the merits, as a result of the courts analyzing whether discrimination occurred, as opposed to whether the plaintiff had a disability.
- Employees are more likely to request reasonable accommodations.
- Increase in “actual disability” claims could likely decrease the number of “regarded as” claims.
THE AMERICANS WITH DISABILITIES AMENDMENTS ACT:
COURT CASES AND FINAL EEOC REGULATIONS

I. Purpose of the ADAAA
The ADA Amendments Act (ADAAA) was enacted in 2008 and became effective on January 1, 2009. Congress intended to clarify and modify judicial interpretations of the ADA in order to better conform to the original intent of the Act. In general, the ADAAA calls for a less restrictive analysis when determining who falls within the purview of the Act, and makes it easier for an individual seeking protection under the ADA to establish the existence of a disability.

Not surprisingly, since its effective date in 2009, ADA plaintiffs have pushed for courts to apply the ADAAA when analyzing disability claims. However, courts have overwhelmingly held that the ADAAA does not apply retroactively.

CASE UPDATE: Plaintiff argues court should apply ADAAA retroactively because the subsequent legislation merely declared the intent of the earlier law. The court disagreed because in the context of the ADA, Congress was expressly overturning established Supreme Court precedent, rather than establishing or clarifying interpretation of the law for the first time. Thus, absent a clear intent by Congress to apply the law retroactively, courts should apply the law in effect at the time of the conduct being challenged. Carmona v. Southwest Airlines, Co., 604 F.3d 848 (5th Cir. 2010).

The Equal Employment Opportunity Commission (EEOC) published final regulations interpreting the ADAAA in the Federal Register on March 25, 2011. The regulations became effective on May 24, 2011, and can be found at 29 C.F.R. Part 1630.

II. Applicability of the ADAAA and the Final Regulations
The ADAAA applies to all employers with 15 or more employees. The ADA protects all qualified individuals with a disability.

III. How the ADAAA and the Final Regulations Have Changed the Law
Generally speaking, the ADAAA has primarily lowered the individual’s burden of demonstrating that he or she suffers from a disability. The definition of “disability” under the Act was not altered by the ADAAA. However, the interpretation of the definition has been substantially broadened.

“Disability” is defined as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.

A. “Substantially Limits”
Prior to the ADAAA, the definition of the phrase “substantially limits” was left to the courts.
ABROGATED CASE LAW: The Supreme Court held that the appropriate definition was whether the impairments prevented or severely restricted Plaintiff from performing a major life activity, and also whether the impact of the impairment was permanent or long term. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).

Congress specifically disagreed with this interpretation, and in turn, the EEOC has expressly rejected the above-quoted language. The regulations state that to determine if an individual is substantially limited, one must compare that individual’s performance of a major life activity to the performance of the same activity by most people in the general population.

Note: The proposed regulations removed “condition, manner, or duration” of the activity as considerations for whether an impairment substantially limits a major life activity. However, as a result of the comments submitted on the proposed regulations, the EEOC included “condition, manner, or duration” as factors that remain relevant to the determination of a substantial limitation to a major life activity.

CASE UPDATE: Plaintiff alleges that he was terminated in violation of the ADA. In support of his claim, he provided evidence of a diagnosis of Attention-Deficit Hyperactivity Disorder (ADHD). The Court upheld a grant of summary judgment against the Plaintiff because the Plaintiff failed to demonstrate that the impairment of ADHD substantially limited a major life activity. While the new ADAAA regulations lower the bar for establishing a disability to the extent that there are some diagnoses that are practically per se disabilities, this case supports that a diagnosis alone is insufficient evidence of disability. Johnson v. Sedgwick County Sheriff’s Department, 2012 U.S. App. LEXIS 3086 (10th Cir., February 14, 2012).

Q. Do the regulations require that an impairment last a particular length of time to be considered substantially limiting?

A. No. Under the first prong of the definition of disability (substantially limits one or more major life activities), there is no minimum time period for which an impairment must last to qualify as a disability. However, under the “regarded as” prong of the definition, the perceived impairment cannot be “transitory” which is defined as lasting fewer than six months. See Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008.

B. “Major Life Activity”
Similar to the interpretation of “substantially limits,” prior to the ADAAA, what constituted a “major life activity” was largely the result of judicial interpretation.

ABROGATED CASE LAW: The Supreme Court defined major life activities as “tasks that are of central importance to most people’s daily lives.” Using this definition,. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002).
Congress clearly disagreed with the Supreme Court’s notion that the terms of the ADA “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” as it has now stated just the opposite – that the definition of disability shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the ADA, as amended. To provide further guidance, the EEOC has included two non-exhaustive lists of tasks that are considered major life activities:

“Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.”

“The operation of major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.”

CASE UPDATE: Plaintiff was HIV positive, without AIDS. Upon becoming aware of Plaintiff’s HIV status, Plaintiff’s employer terminated him. The Court noted that relevant ADAAA provisions expressly state “functions of the immune system” constitute a major bodily function. Additionally, an impairment which is in remission may constitute a disability if it substantially limits a major life activity when active. The Court acknowledged that the ADAAA is intended to have broad application, and the question of whether an impairment is a disability should not require extensive or strict analysis. Toward that end, the Court held that HIV positive status could plausibly qualify as a disability because it limits the major life activity of the functioning of the immune system. The EEOC proposed regulations also list HIV as an impairment that will consistently meet the definition of disability. The Court found Plaintiff satisfied the requirements to survive a motion to dismiss, and confirmed that certain medical conditions will consistently qualify as a disability with little analysis. Horgan v. Simmons, 704 F.Supp.2d 814 (N.D. Ill. 2010).

C. Mitigating Measures
Before the ADAAA was enacted, Courts had determined that an individual did not have a disability if the impairment or condition could be managed or controlled with mitigating measures.

ABROGATED CASE LAW: The Supreme Court held that an impairment should be assessed in light of any corrective or mitigating factors, rather than by engaging in an analysis of all potential or hypothetical limitations caused by the impairment. Following this rule, impaired vision that could be corrected with glasses, and hypertension that could be corrected with prescription
medication were not disabilities under the ADA. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); and *Murphy v. UPS, Inc.*, 527 U.S. 516 (1999).

Under the new regulations, it is clear that the determination of whether a disability exists shall be made without regard to the ameliorative effects of mitigating measures, with two exceptions – ordinary eye glasses and contact lenses. No other mitigating measures can be considered, which includes: medication, medical supplies or equipment, prosthetics, assistive technology, reasonable accommodations or auxiliary aids, or behavioral or adaptive neurological modifications.

Q. What if a prescription medication required by an individual’s impairment has negative effects? Can those be considered when determining if a disability exists?

A. Yes. The regulations only state that the *ameliorative* effects of mitigating measures must be ignored when making a disability determination. Therefore, negative effects, if relevant to the determination, can be considered. See Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008.

**EXAMPLE**: An assembly line employee has a heart condition which causes shortness of breath, dizziness, and numbness without warning. The employee can treat these symptoms with prescription medication, but it requires him to step away from his station six times per shift to take his medication with food. The ameliorative effect of the medication – the fact that it prevents the shortness of breath, dizziness, and numbness – cannot be considered when deciding if the employee is disabled. However, the negative effect – the fact that he cannot do an activity for the normal period of time without breaking to eat and take medication – can be considered when determining if he is disabled.

**D. Episodic Conditions or Conditions in Remission**

Impairments that were recurring or episodic presented a challenge for the courts. For example, an individual with neuralgia that only affects major life activities during unpredictable flare ups, might be able to function normally the majority of the time. Thus, if an adverse employment action occurs during a period that the individual is asymptomatic, it would be difficult for a court to go through the analysis of whether the individual is actually substantially limited in any major life activity. Typically, these types of cases would be analyzed within the framework of “a record of impairment” or “regarded as an impairment.”

**ABROGATED CASE LAW**: Plaintiff was diagnosed with and treated for breast cancer. Thereafter, she was laid off by her employer as part of a down-size. Plaintiff made a claim under the ADA, and the trial court dismissed the claim as breast cancer was found not to be a disability. On
appeal, the Court made several findings. First, Plaintiff’s breast cancer was not a disability because she continued to be able to perform her job duties, despite that she may have felt worse while doing them. Second, Plaintiff had no record of impairment because her personnel file showed no missed days of work, nor any substantial limitations due to her breast cancer. Finally, the mere knowledge by Plaintiff’s employer that she had cancer was insufficient to demonstrate she was “regarded as disabled.” Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996).

The Ellison case is representative of how courts would engage in a lengthy analysis of all three prongs of the disability definition prior to the new regulations. **Now, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.** Using this guidance, along with the additional clarity on what constitutes a major life activity, the question of whether an impairment that is in remission constitutes a disability requires must less analysis.

**CASE UPDATE:** Plaintiff alleges wrongful termination because his renal cell carcinoma, though it was in remission at the time of termination, constitutes a disability under the ADAAA, or alternatively, his employer regarded him as being disabled. The Court denied the defendant’s motion for summary judgment noting that “the ADAAA very clearly provides that ‘an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.’” The Court further relied on the EEOC’s Notice of Proposed Rulemaking which states that cancer is an example of an impairment that will consistently meet the definition of disability because it substantially limits normal cell growth. The Proposed Rulemaking also stated that cancer is an example of an impairment that can be episodic or in remission. Thus, the Court found that Plaintiff’s renal cell carcinoma, though in remission, was a disability. Hoffman v. Carefirst of Fort Wayne, Inc., 737 F.Supp.2d 976 (N.D. Ind. 2010).

Q. What types of conditions would be considered episodic?

A. The Appendix to the new regulations provides a number of examples of chronic impairments that would typically qualify, including epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia.

E. “Regarded As”

Under the prior standard for “regarded as,” the employee had the burden of proving that the employer perceived the employee to have an impairment that substantially limited a major life activity. Again, this placed the focus heavily on whether an employee could prove that the perceived impairment would qualify as a disability if it actually were as the employer perceived it to be.
The regulations now only require an employee to show that he was subjected to an adverse employment action because of an actual or perceived impairment. The impairment need not be one that substantially limits a major life activity, but it does have to be more than a “transitory and minor” impairment. Transitory is specifically described as lasting less than six months in duration. Minor is not defined.

Note: The “transitory and minor” exception applies only to claims under the “regarded as” prong of the definition of disability. Therefore, an impairment which lasts less than six months in duration could conceivably be considered a disability if it substantially limits a major life activity or constitutes a record of impairment.

Case Update: Plaintiff was diagnosed with angina which can cause coronary artery spasms without warning. The employer felt Plaintiff could no longer operate a tow motor, and thus could not remain at his current position. Plaintiff began working in a different position. He suffered numerous episodes of coronary spasm, and eventually was taken off his new position and informed he could not work alone. Plaintiff made a claim that he was regarded as disabled under the ADAAA. The Court agreed, noting that to demonstrate a “regarded as” claim under the ADAAA, Plaintiff must only show he was subjected to an action prohibited by the Act because of a perceived impairment, whether or not it actually limits a major life activity. However, in this case, because the employer acted out of genuine safety concerns implicated by Plaintiff operating machinery during a sudden onset of coronary spasm, the action was not in violation of the ADAAA. “Actions motivated by bona fide concerns with worker safety cannot be deemed or found to be prohibited under the ADA, as amended or otherwise.” Wurzel v. Whirlpool Corp., 2010 U.S. Dist. LEXIS 36635 (N.D. Ohio, April 14, 2010).

IV. What Has Not Changed Under the ADAAA?

The Wurzel case illustrates that while the threshold for proving that an individual is disabled has been lowered by the ADAAA and new regulations, the individual will still have to prove the remaining elements of an ADA claim to demonstrate entitlement to relief. The following elements of an ADA claim are being interpreted under the ADAAA and new regulations in largely the same manner as they were being addressed prior to the 2009 Amendments.

A. Qualified Individual with a Disability

Once, the individual demonstrates that he has a disability within the meaning of the ADA, the next determination is whether that individual is “qualified.” A person is qualified if he can perform the essential functions of the employment position, with or without reasonable accommodations. This involves a two-part analysis: (1) is the job function at issue one that is essential
to the position, and (2) if so, can the employee perform the function with or without reasonable accommodation.

1. Essential Functions

Whether a particular job duty is essential to the position is determined on a case-by-case basis. The employer must focus on the purpose of the function and/or the result to be accomplished, rather than considering how the function is currently being performed.

**EXAMPLE:** Is typing an essential function of a secretary’s job? The initial and seemingly obvious answer is yes, because that is what a secretaries spends most of their time doing, and it is something that they are hired to do. However, the true question is not whether a secretary can type, but whether a secretary can produce the end product – a typed document. If this can be accomplished by the secretary, then that individual is qualified under the ADA.

The regulations define job functions as essential if: (1) the reason the position exists is to perform the function, (2) there are a limited number of employees available to perform the function, or (3) the function is highly specialized. 29 C.F.R. 1630.2(n)(2)(I-iii). Other evidence that a job function is essential includes the amount of time spent on the job performing the function, the consequences of not requiring an employee to perform the function, and the past and current work experience of incumbent employees in the job or in similar jobs. 29 C.F.R. 1630.2(n)(3)(iii-vii).

The EEOC has offered further guiding factors in its Technical Assistance Manual:

(a) employer’s judgment,
(b) written job descriptions,
(c) time spent performing the function,
(d) infrequent functions may still be essential if highly important (i.e. pilot must know how to land a plane even though the time spent landing a plane is minimal, thus landing is an essential job function),
(e) terms of a collective bargaining agreement listing job duties,
(f) work experience of previous employees,
(g) work experience of employees performing similar jobs, and
(h) other relevant factors such as the nature of the work operation and the organizational structure of the company.

2. Reasonable Accommodations

The regulations require for the employer to engage in the “interactive process” with a disabled individual to determine if that individual can perform the essential functions of her job with or without reasonable accommodation. If the employer proposes a reasonable accommodation, the employee is not
permitted to reject the proposed accommodation and maintain a claim under the ADA.

Reasonable accommodations include a broad range of job modifications, depending on the circumstances. Some of the more typical reasonable accommodations include the following examples:

Making facilities accessible to and usable by individuals with disabilities (i.e. providing a ladder for an individual who cannot do overhead lifting).

Job restructuring (i.e. reassigning any non-essential job duties, or altering how essential job duties are performed).

Modified work schedules (i.e. allowing an employee to work a longer day with more breaks).

Use of assistive equipment or technology (i.e. providing voice activated software for a secretary who cannot type for long periods).

3. Undue Hardship
The employer is not required to provide an accommodation that would be *unduly* costly, expensive, or substantial, or that would fundamentally alter the nature of the business. Many accommodations will cost the employer something, whether its money or time, but in order to be considered unreasonable, the employer must show that the burden is greater than what the ADA intended to place upon employers.

**EXAMPLE:** An employee complains of chronic low back strain that prohibits her from sitting at her desk for long periods of time, but her condition is not limiting when she is able to alternate standing and sitting. A desk that would raise and lower, so the employee could continue working while standing or sitting, would cost the employer $3,000. The company is a multi-million dollar corporation with 60 employees in four offices. It is unlikely that the company would convince a court that the $3,000 expense would cause an undue burden.

**EXAMPLE:** A small hardware store has an employee that requires the use of a wheelchair due to a recent permanent disability. In order to continue performing the essential job functions of assisting customers, restocking the shelves, etc., the hardware store would need to completely renovate its store to provide for an expansion, and all of the shelves would need to be lowered within the disabled employee’s reach. This would require the store to be closed for at least a month, and incur tens of thousands of dollars in renovation costs. This would be considered an undue burden on the hardware store.
B. Employer Maintenance of Medical Records

The ADA continues to require employers to keep all employee medical records separate from an employee’s regular personnel file. Access to an employee’s medical information should be limited to those managerial and supervisory personnel that need it for a legitimate business reason. For example, an employee’s supervisor can be made aware of the existence of a health condition that places lifting restrictions on one of her subordinates. If a document needs to be placed in the employee’s personnel file, medical information can be redacted.

V. What Employers Can Do to Protect Themselves

Employers should follow the directives given by Congress to the EEOC in drafting the new regulations. Specifically, when confronted with a potential ADA claim, employers should not conduct an extensive analysis of whether an impairment is a disability. Rather, employers should focus their efforts to engaging in a meaningful interactive process with its employees in an effort to identify whether a particular job function is essential and whether there are reasonable accommodations that will allow the employee to continue performing in the employment position.

All conversations between the employee and the employer related to the ADA discussion and determinations should be well documented, including any specific discussions of what accommodations have been considered, and the basis for rejecting a proposed accommodation.

Further, employers should review their personnel policies regularly to evaluate them for compliance with the provisions of the ADA, including the changes implemented with the ADAAA and the EEOC’s final regulations.
CONSIDERATIONS FOR HANDLING POTENTIAL DISABILITIES IN THE WORKPLACE

1. Is the employee suffering from a disability? In other words, is the employee substantially impaired in performing a major life activity?

2. Record of impairment - Does the employee have a history of disability, but the disability does not currently exist?

3. Regarded as impaired – Is the employee being treated as though he/she is impaired?

4. Can the employee's impairment be mitigated with the use of contact lenses or glasses?
   - If so, the employee is probably not disabled.

5. Can the employee perform the essential functions of the job?
   - Check the written job description
   - Amount of time spent performing the function
   - Is the particular function highly important?
   - Check the collective bargaining agreement, if applicable
   - Consider the work experience of previous employees and other employees in similar positions. Are they required to perform the function?

6. Can the employee perform all essential functions if given reasonable accommodations?
   - Changing physical characteristics of the workplace
   - Redistributing non-essential functions to other employees
   - Change when or how the essential functions are performed
   - Modify the work schedule
   - Flexible leave policies
   - Purchase of devices or equipment to assist in job performance

7. Interactive Process - Have you discussed what accommodations might assist the employee with performing his/her job
   - The employee has a duty to initially propose reasonable accommodations
   - The employer has a duty to informally discuss options with the employee
   - The employee has no right to reject a reasonable accommodation suggested by the employer

8. Undue Hardship – Would the reasonable accommodation(s) be unduly costly, expensive, or would it fundamentally alter that purpose of the business?
   - Consider financial expenses as well as other tangible and non-tangible costs
   - The hardship must be undue, not merely a nuisance or difficulty to the company

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10 THINGS YOUR EMPLOYMENT LAWYER DOESN’T WANT TO HEAR

CRIMINAL CONDUCT BY OFF-DUTY EMPLOYEE

USING EMPLOYEE MEDICAL INFORMATION PROTECTED BY ADA AND GINA IN EVALUATIONS
TECHNOLOGY PROTECTING THE CONFIDENTIAL EMPLOYEE INFORMATION

FLSA LABELS - SUBSTANCE MATTERS OVER FORM

SOCIAL MEDIA CHALLENGES
10) I just fired Bob from accounting because I found out he is on the sex offender list. That’s ok, isn’t it?

This issue has rarely been litigated before the courts because: 1) a registered criminal offender is not part of a protected like class like someone with a race or disability; and 2) a sex offender who sues for wrongful termination is not likely to win sympathy from a jury.

Generally, at-will employment states allow employers to fire someone for any reason at any time. This means that in the case of sex offenders, an employer would simply need to explain why it is unable to employ such individuals. Jobs that require employees to work with children would be one obvious situation where an employer has a legitimate reason for firing a convicted sex offender. What employers should avoid, however, is making excuses for firing sex offenders other than their sex offender status.

One article points out the fine line employers must walk between maintaining a comfortable work environment for colleagues who might not enjoy working next to a sex offender and not illegally discriminating against employees who are registered sex offenders. Ho, Catherine, *Firing Sex Offenders Gets Dicey*, Daily Journal, May 16, 2011.

9) So you are saying I shouldn’t have put on Sarah’s evaluation that she should have her meds adjusted as a way to improve her job performance?

Employers are obligated to keep all medical information they obtain confidential. As discussed above, the ADA and GINA prohibits them from commingling medical information with other personal information. Employers are only allowed to share medical information in limited circumstances with managers, supervisors, first aid and safety personnel and government officials investigating compliance with the ADA.

*Example:*

One of the first cases to address whether employers may require employees to provide information about the prescription drugs they take was decided by a Colorado court. This court ruled that an employer’s requirement that employees reveal their prescription drug use is in violation of the ADA, holding that employers cannot require employees to tell supervisors what prescription medications they take, as this policy violates the ADA provision prohibiting disability-related inquiries unless the injury is “job-related and consistent with business necessity.”
8) Can you believe how much money the company is going to save by storing all our personnel files on the cloud?

Employers should be cognizant of the increased security risks that come with advanced technology and their obligation to keep employee information confidential at all times. Regardless of how employers choose to store employee personnel files and information, they should have sufficient safeguards in place to ensure that this information will not be compromised or capable of being hacked.

Example:
In 2010, a 19 year old living in New York hacked the confidential employee database of 200,000 people from a company called Digital River. The hacker attempted to access the password protected server of Digital River and tracked the employee database that included names, email addresses, UIDs and websites. Despite his attempts to sell the employee information to a Colorado marketing firm for $500,000, the company obtained a secret court order to block the selling, destroying, altering or distributing of the sensitive employee information.

7) What do you mean how did I know Bill was blogging about last night’s game in the middle of the work day?

With the continued evolution of technology, employers are able to keep track of virtually all workplace communications by employees, including those in cyberspace. Employers have a legitimate interest in tracking how their employees spend their work hours and may keep track of the internet sites visited by their workers. However, employer monitoring must be within reason and not in violation of their employees’ privacy rights.

Example:
An Illinois court found that, pursuant to the SCA, plaintiff had no reasonable expectation of privacy in communications sent via a Blackberry handheld device, employer email account, and Yahoo! email account because the employer had policy in place regarding monitoring of such communications. According to this court, the Seventh Circuit has previously held that “a party’s expectation of privacy in messages sent and received on company equipment or over a company network hinge on a variety of factors, including whether or not the company has an applicable policy on point.” Shefts v. Petrakis, 2010 U.S. Dist. LEXIS 129974 (C.D. Ill. Dec. 8, 2010).

Employers should keep the following tips in mind when monitoring the internet usage of their employees:

• Adopt a written policy and advise workers that they will be monitored.
• Monitor employee internet usage only for legitimate reasons.
• Be reasonable.
6) I’ve just promoted all the company secretaries to “administrative assistants” making them all salaried employees, that way I don’t have to pay any more overtime, right?

Non-exempt employees are generally “blue collar” or clerical type employees who hold positions where they tend to take orders from superiors, or in the case of a lead worker, pass along orders given by superiors. They are typically paid at an hourly rate but may also be paid a salary. In either case, these employees must be paid at least minimum wage for each hour worked up to forty hours in the workweek and one and one-half times the regular rate for overtime.

Some employers remain under the impression that workers who are salaried rather than hourly are not subject to overtime premium requirements of the Fair Labor Standards Act (FLSA). Although salary is usually one element of exempt status, the kind of work performed has the determining impact.

Example:
In 2009, a class action lawsuit was filed by a group of disgruntled Rite Aid employees who believed that the company had stiffed them out of overtime pay. Specifically, the class alleged that Rite Aid “improperly classified assistant managers as being exempt from overtime,” despite the fact that little skill was required to perform those positions. In essence, if an assistant manager is actually a glorified cashier or stock boy, then the type of work is “arguably not management fare and the standard rate of 1.5 times their normal rate for hours worked beyond 40 hours in a week would be justified.” By classifying these employees as assistant managers, plaintiffs argued that Rite Aid was able to eliminate the necessity of paying them overtime. Rite Aid denied the wrongful classification it was accused of in violation of the Fair Labor Standards Act.

5) Can we fire Ann from marketing for posting pictures of Bob from accounting wearing a bikini top and hotpants on her Facebook page? If not, can we at least fire Bob now?

With the recent explosion of social media websites has come many nightmares for employers, including the discovery of protected information during the hiring process, invading employee privacy, workplace harassment and decreased productivity.

Employers using social media to gain information about potential or current employees are most likely to be faced with a claim for unreasonable intrusion upon the seclusion of another. Such claims can be avoided by implementing a written monitoring plan that employees are required to sign. This plan should disclose that all electronic data and files are subject to monitoring.
Employers are also prohibited from using social media to discriminate against employees on the basis of race, religion, color, sex, disability, national origin or ancestry.

**Example:**

In *Marshall v. Mayor & Alderman of the City of Savannah, GA*, 2010 U.S. App. LEXIS 3233 (11th Cir. 2010), the plaintiff was a probationary firefighter who was disciplined and terminated after posting photographs on her MySpace page. Specifically, she posted photographs with fellow firefighters, a bare-shouldered photo of herself captioned “Fresh out of the shower” and a photo of her backside that suggested she may not be wearing any clothes. A City employee was able to view her MySpace photos after an anonymous caller reported the images. Plaintiff filed suit against the City alleging race and gender discrimination under Title VII, arguing no similarly situated male, black or white employees were subject to discipline for posting similar pictures. Plaintiff also alleged violation of her First Amendment free speech rights and later added a Title VII retaliation claim, asserting her termination was in retaliation for complaining that she was singled out as a female. The court ultimately held that Plaintiff was not discriminated against based on her gender or retaliated against for complaining that she was singled out as a female. In regards to her gender discrimination claim, the court found that Plaintiff failed to meet her burden of showing similarity between her conduct and that of male employees who were treated differently. Plaintiff’s retaliation claim also failed, as she did not sufficiently plead it under the Federal Rules of Civil Procedure.

4) **How was I supposed to know that Edith wasn’t retiring when I made that toast at her 65th birthday party?**

The Age Discrimination in Employment Act (ADEA) prohibits discrimination in the employment context based on an individual’s age. The EEOC points out that the ADEA’s broad ban against age discrimination specifically prohibits:

- Statements or specifications in job notices or advertisements of age preference and limitations.
- Discrimination on the basis of age by apprenticeship programs, including joint labor-management apprenticeship programs; and
- Denial of benefits to older employers.

**Example:**

In 2010, K-mart reached a $120,000 settlement with a former employee who had filed an age discrimination lawsuit against the retail chain at one of their Hawaii locations. At the time of the alleged discrimination, the employee was 70 years old and working as a pharmacist when her boss told her that she was “too old” and should retire. According to an attorney for the EEOC, following her refusal to retire, the woman’s boss began changing her schedule, which included scheduling her on Sundays so that she was unable to attend church.
One source observes that as baby boomers edge toward retirement age, people are working later into life and an increase in age discrimination suits should be expected over the next decade.

3) **Can you believe I had to write Frank up for three absences in a row this week, particularly since he missed so much time last week after he got hurt on the loading dock?**

It is unlawful to discharge or discriminate against an individual for filing a workers’ compensation lawsuit after they sustain an injury on the job.

*Example:*
In *Palmero v. Tension Envelope Corp.*, an employee was injured at work and alleged subsequent acts of discrimination by her employer, including being written up for conduct other employees were not and requiring that she run her machine at almost double the speed than prior to the accident. *Palmero v. Tension Envelope Corp.*, 959 S.W.2d 825 (Mo. Ct. App. 1997). The court found that the plaintiff presented sufficient evidence to create a factual dispute as to whether or not the employer discriminated against the employee in violation of Missouri’s statutory provision against retaliatory discharge and discrimination for worker’s compensation injuries. *Id.* The court noted that other forms of discrimination may include denial of an employee’s advancement and pay increases, as well as less desirable jobs or locations. *Id.*

2) **Wouldn’t you like to see the secret supervisor’s file I have been keeping on all our problem employees?**

Pursuant to strict requirements imposed by the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA), employers should be cautious about who has access to employee files and how these files are kept. GINA requires that covered entities (employers and other entities covered by the Act) generally treat genetic information the same way they treat medical information. Congress adopted the ADA’s general confidentiality regime with the intent that it apply to genetic information under GINA. The information must be kept confidential and in medical files separate from other personnel information.

Moreover, only those individuals who have legitimate business needs to access the files should be able to. For example, it might be necessary for a supervisor to review performance evaluations to determine whether an employee should be promoted or a human resources manager to review salary information before deciding what to pay a new hire in a similar position.

By ensuring that the medical and genetic information is kept confidential and separate from the general personnel files of employees, employers can avoid potential lawsuits.
**Example:**
In September 2010, the EEOC filed suit against a faith-based nonprofit organization that sells life insurance and other financial services and products to Lutherans, Thrivent Financial for Lutherans. The EEOC alleged that Thrivent provided confidential medical information about a temporary employee’s medical condition to prospective employers. According to the EEOC, this disclosure had a “severe and negative impact” on the employee’s ability to obtain employment. One EEOC attorney noted that: “Americans do not give up their privacy rights when they go to work. The ADA makes it clear that an employee’s medical information should remain confidential, and that employers should not be allowed to ruin an employee’s job prospects by revealing that sensitive information to other employers.” *EEOC v. Thrivent Financial for Lutherans*, E.D. Wis. Civil Action No.10-C-853 (E.D. Wis., Sept. 30, 2010).

1) **Isn’t the ability to lift 50 lbs overhead an essential function of every job?**

Pre-employment hiring tests, procedures and requirements must be compliant with the Americans with Disabilities Act (ADA) to ensure that Employers will not be subject to an unlawful discrimination claim based on an applicant’s disability. A disability can be a problem with the mind or body that substantially limits an individual’s major life activities, including the performance of manual tasks, standing, walking, bending, lifting, seeing and hearing, to name a few. 42 U.S.C.S. 12102(2).

If an employer revokes a job offer after an applicant explains his or her disability, the employer must show the following to prove it was not discrimination:

1. The offer was revoked based on the needs of the job;
2. The applicant was unable to perform the most important tasks or essential functions of the job, with or without accommodations; and
3. The employer could not accommodate the applicant.

Additionally, if the employer can show that the applicant would pose a real safety or health risk, even with an accommodation, then the otherwise discriminatory action may be permitted.

**Example:**
Sophia applies for a job in a supermarket. She is hired and assigned to work as a clerk at the bakery counter. Her job duties include ringing up sales and getting baked goods for customers. Before beginning work, Sophia is required to show that she can lift 50 pounds. According to the employer, all store clerks must be able to lift this weight without assistance. Sophia suffers from arthritis and is unable to lift 50 pounds without help. The employer revokes the job offer.

For the following reasons, revoking the job offer is against the law:
1. Lifting 50 pounds is not essential to being a bakery counter clerk. The important parts of Sophia's job include ringing up sales and transferring baked goods to customers. It is not really necessary for her to be able to lift the weight by herself to do her job.

2. It would be simple for the employer to accommodate Sophia because there is always more than one employee working in the bakery and thus always someone available to help her.
SUBROGATION IN WORKERS’ COMPENSATION
McAnany, Van Cleave & Phillips

DEFINITION
- The substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that he or she who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies.

WHEN IT ARISES FOR WORKERS’ COMPENSATION CLAIMS
- If an employee suffers a work related injury which gives rise to a claim common law claim for damages against anyone other than the employer.

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HOW IT WORKS

• Intervention - can the employer intervene into an action filed by the employee?
• Direct Action - Does the employer have the right to file its own action to recover?
• Notice - Is the employee required to give the employer notice of a third party action?
• Settlement/Release - Can the employee resolve the third party claim without the employer?

CALCULATION OF RECOVERY

What counts toward the lien?
- disability benefits
- death benefits
- medical expenses
- medical management expenses
- medicare set asides
- claims handling expenses
- legal fees

What does the lien apply toward?
- UM/UIM
- medical malpractice
- legal malpractice
- loss of consortium
- wrongful death
- Formula applied to third party recovery
- Future credit
**EVALUATION OF THIRD PARTY CLAIMS**
- Comparative Fault
- Statutes of Limitation
- Statutory Employer Bar
- Co-Employee Bar

**COMPARATIVE FAULT - ILLINOIS**
- Illinois has statutorily adopted modified comparative fault. 735 ILCS 5/2-1116. Under this form of comparative fault, the injured party is entitled to recover damages from the responsible tort feasor even if the injured party was partially at fault as long as the injured party is less than 50% at fault. Fault on the part of the injured employee or the employer does not reduce the workers' compensation lien. The employer’s fault can only be addressed in a third party action for contribution.

**COMPARATIVE FAULT - KANSAS**
- Kansas - The contributory negligence of any party in a civil action shall not bar such party or such party’s legal representatives from recovering damages for negligence resulting in death, personal injury, property damage or economic loss, if such party’s negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent’s wrongful death, the negligence of the decedent, if any, shall be imputed to such party. K.S.A. 60-258a
The Missouri Supreme Court adopted a system of pure comparative fault for negligence cases. Gustafson v. Benda, 661 S.W.2d 11 (Mo.banc 1983). “Pure” comparative fault refers to the concept set forth in the Uniform Comparative Fault Act (UCFA) § 1(a) which states that a plaintiff in a tort action based on fault may recover in accordance with the apportionment of fault among all parties. Under Missouri’s pure comparative fault approach, plaintiffs may still recover some damages even if they are 99% at fault in the transaction at issue.

STATUTE OF LIMITATIONS

- **Illinois**
  - Personal injury: 2 years
  - Construction: 4 years
  - Wrongful death: 2 years
  - Municipalities: 1 year
  - Products liability statute of repose
    - Action must be brought within 12 years of the first sale or lease or within 10 years of first purchase or lease by initial user or consumer, whichever period is earlier. 735 ILCS 5/13-213

- **Kansas**
  - Personal injury: 2 years
  - Products liability statute of repose: KSA 560-513(a)(4)

- **Missouri**
  - Personal injury: 5 years
  - Damage Limitation
    - Kansas
      - Noneconomic damages: $250,000
  - Statutory Employer Bar
    - If the third party tortfeasor can argue it was a statutory employer of the injured employee, the claim may be barred by immunity and the exclusive remedy under the workers’ compensation act.
STATUTE OF LIMITATIONS

Co-Employee Bar

Most states will not allow a third party recovery against co-employees. Missouri no longer prohibits actions against co-employees under the immunity provision of the Missouri Act.

INVESTIGATION AND PRESERVATION OF EVIDENCE

- Identification of causes
- Identification of potential defendants
- Interviews of witnesses
- Preservation of evidence
  - Photographs
  - Business records
  - Witness identities
  - Machinery
SUBROGATION IN WORKERS’ COMPENSATION

I. Definition
The substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that he or she who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies.

II. When it arises for workers’ compensation claims
If an employee suffers a work related injury which gives rise to a claim common law claim for damages against anyone other than the employer.
A. Injuries caused by machines
   1. Manufacturer
   2. Supplier
   3. Refurbisher
   4. Maintenance Company
   5. Testing/inspection company
B. Automobile Accidents
C. Premises Liability Claims
   1. At the employer’s premises
      a. Co-employees
      b. Contractors
   2. Away from the employers premises
      a. Owner/Operator of premises

III. How it works
Intervention – can the employer intervene into an action filed by the employee?
Direct Action – Does the employer have the right to file its own action to recover?
Notice – Is the employee required to give the employer notice of a third party action?
Settlement/Release – Can the employee resolve the third party claim without the employer?

IV. Calculation of Recovery
A. What counts toward the lien?
   1. Disability benefits
   2. Death benefits
   3. Medical expenses
   4. Medical management expenses
   5. Medicare set asides
   6. Claims handling expenses
7. Legal fees

B. What does the lien apply toward?
   1. UM/UIM
   2. medical malpractice
   3. legal malpractice
   4. loss of consortium
   5. wrongful death

C. Formula applied to third party recovery

D. Future Credit

V. Evaluation of Third Party Claims

A. Comparative Fault
   1. Illinois
      Illinois has statutorily adopted modified comparative fault. 735 ILCS 5/2-1116. Under this form of comparative fault, the injured party is entitled to recover damages from the responsible tortfeasor even if the injured party was partially at fault as long as the injured party is less than 50% at fault. Fault on the part of the injured employee or the employer does not reduce the workers’ compensation lien. The employer’s fault can only be addressed in a third party action for contribution.

   2. Kansas
      The contributory negligence of any party in a civil action shall not bar such party or such party’s legal representatives from recovering damages for negligence resulting in death, personal injury, property damage or economic loss, if such party’s negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent’s wrongful death, the negligence of the decedent, if any, shall be imputed to such party. K.S.A. 60-258a

   3. Missouri
      The Missouri Supreme Court adopted a system of pure comparative fault for negligence cases. Gustafson v. Benda, 661 S.W.2d 11 (Mo.banc 1983). “Pure” comparative fault refers to the concept set forth in the Uniform Comparative Fault Act (UCFA) § 1(a) which states that a plaintiff in a tort action based on fault may recover in accordance with the apportionment of fault among all parties. Under Missouri’s pure comparative fault approach, plaintiffs may still recover some damages even if they are 99% at fault in the transaction at issue.
4. Statute of Limitations
   a. Illinois
      i. personal injury 2 years 735 ILCS 5/13-202
      ii. construction 4 years 735 ILCS 5/13-214
      iii. wrongful death 2 years 740 ILCS 180/2
      iv. municipalities 1 year 705 ILCS 505/22-1
      745 ILCS 10/8-101
      v. products liability statute of repose
         (a.) Action must be brought within 12 years of the first sale or
             lease or within 10 years of first purchase or lease by
             initial user or consumer, whichever period is earlier. 735
             ILCS 5/13-213
   b. Kansas
      i. personal injury 2 years KSA §60-513(a)(4)
   c. Missouri
      i. personal injury 5 years RSMo 516.120
   d. Damage Limitation
      i. Kansas
         (a.) Noneconomic damages $250,000
   e. Statutory Employer Bar
      If the third party tortfeasor can argue it was a statutory employer of
      the injured employee, the claim may be barred by immunity and the
      exclusive remedy under the workers’ compensation act.
   f. Co-Employee Bar
      Most states will not allow a third party recovery against co-
      employees. Missouri no longer prohibits actions against co-
      employees under the immunity provision of the Missouri Act.

VI. Investigation and Preservation of Evidence
   A. Identification of causes
   B. Identification of potential defendants
   C. Interviews of witnesses
   D. Preservation of evidence
      1. photographs
      2. business records
      3. witness identities
      4. machinery
ILLINOIS
820 ILCS 305/5(b)

Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act.

Out of any reimbursement received by the employer pursuant to this Section the employer shall pay his pro rata share of all costs and reasonably necessary expenses in connection with such third party claim, action or suit and where the services of an attorney at law of the employee or dependents have resulted in or substantially contributed to the procurement by suit, settlement or otherwise of the proceeds out of which the employer is reimbursed, then, in the absence of other agreement, the employer shall pay such attorney 25% of the gross amount of such reimbursement.

If the injured employee or his personal representative agrees to receive compensation from the employer or accept from the employer any payment on account of such compensation, or to institute proceedings to recover the same, the employer may have or claim a lien upon any award, judgment or fund out of which such employee might be compensated from such third party.

In such actions brought by the employee or his personal representative, he shall forthwith notify his employer by personal service or registered mail, of such fact and of the name of the court in which the suit is brought, filing proof thereof in the action. The employer may, at any time thereafter join in the action upon his motion so that all orders of court after hearing and judgment shall be made for his protection. No release or settlement of claim for damages by reason of such injury or death, and no satisfaction of judgment in such proceedings shall be valid without the written consent of both
employer and employee or his personal representative, except in the case of the employers, such consent is not required where the employer has been fully indemnified or protected by Court order.

In the event the employee or his personal representative fails to institute a proceeding against such third person at any time prior to 3 months before such action would be barred, the employer may in his own name or in the name of the employee, or his personal representative, commence a proceeding against such other person for the recovery of damages on account of such injury or death to the employee, and out of any amount recovered the employer shall pay over to the injured employee or his personal representatives all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this Act, including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act, and costs, attorney's fees and reasonable expenses as may be incurred by such employer in making such collection or in enforcing such liability.

KANSAS
K.S.A. §44-504

Remedy against negligent third party; employer and workers compensation fund subrogated, exclusion; credits against future payments; limitation of actions; attorney fees. (a) When the injury or death for which compensation is payable under the workers compensation act was caused under circumstances creating a legal liability against some person other than the employer or any person in the same employ to pay damages, the injured worker or the worker’s dependents or personal representatives shall have the right to take compensation under the workers’ compensation act and pursue a remedy by proper action in a court of competent jurisdiction against such other person.

(b) In the event of recovery from such other person by the injured worker or the dependents or personal representatives of a deceased worker by judgment, settlement or otherwise, the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer to the date of such recovery and shall have a lien thereof against the entire amount of such recovery, excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse. The employer shall receive notice of the action, have a right to intervene and may participate in the action. The district court shall determine the extent of participation of the intervener, including the apportionment of costs and fees. Whenever any judgment in any such action, settlement or recovery otherwise is recovered by the injured worker or the worker’s dependents or personal representative prior to the completion of
compensation or medical aid payments, the amount of such judgment, settlement or recovery otherwise actually paid and recovered which is in excess of the amount of compensation and medical aid paid to the date of recovery of such judgment, settlement or recovery otherwise shall be credited against future payments of the compensation or medical aid. Such action against the other party, if prosecuted by the worker, must be instituted within one year from the date of the injury and, if prosecuted by the dependents or personal representatives of a deceased worker, must be instituted within 18 months from the date of such injury.

(c) Failure on the part of the injured worker, or the dependents or personal representatives of a deceased worker to bring such action within the time specified by this section, shall operate as an assignment to the employer of any cause of action in tort which the worker or the dependents or personal representatives of a deceased worker any have against any other party for such injury or death, and such employer may enforce the cause of action in the employer's name or in the name of the worker, dependents or personal representatives for their benefit as their interest may appear by proper action in any court of competent jurisdiction. The court shall fix the attorney fees which shall be paid proportionately by the employer and employee in the amounts determined by the court.

(d) If the negligence of the worker's employer or those for whom the employer is responsible, other than the injured worker, is found to have contributed to the party's injury, the employer's subrogation interest of credits against future payments of compensation and medical aid, as provided by this section, shall be diminished by the percentage of the recovery attributed to the negligence of the employer or those for whom the employer is responsible, other than the injured worker.

(e) In any case under the workers compensation act in which the workers compensation fund has paid or is paying compensation, the workers compensation fund is hereby subrogated to the rights of the employer under this section and shall have all the rights of subrogation or to credits against future compensation payments which are granted to the employer by this section. The commissioner of insurance may exercise all such rights for the fund to the same extent that such rights may be exercised by the employer under this section, including the right to intervene, to enforce a lien or to bring any cause of action, all as provided in this section.

(f) As used in this section, “compensation and medical aid” includes all payments of medical compensation, disability compensation, death compensation, including payments under K.S.A. 44-570 and amendments thereof, and any other payments made or provided pursuant to the workers compensation act.
1. Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person shall be apportioned between the employer and employee or his dependents using the provisions of subsections 2 and 3 of this section.

2. When a third person is liable for the death of an employee and compensation is paid or payable under this chapter, and recovery is had by a dependent under this chapter either by judgment or settlement for the wrongful death of the employee, the employer shall have a subrogation lien on any recovery and shall receive or have credit for sums paid or payable under this chapter to any of the dependents of the deceased employee to the extent of the settlement or recovery by such dependents for the wrongful death. Recovery by the employer and credit for future installments shall be computed using the provisions of subsection 3 of this section relating to comparative fault of the employee.

3. Whenever recovery against the third person is effected by the employee or his dependents, the employer shall pay from his share of the recovery a proportionate share of the expenses of the recovery, including a reasonable attorney fee. After the expenses and attorney fee have been paid, the balance of the recovery shall be apportioned between the employer and the employee or his dependents in the same ratio that the amount due the employer bears to the total amount recovered if there is no finding of comparative fault on the part of the employee, or the total damages determined by the trier of fact if there is a finding of comparative fault on the part of the employee. Notwithstanding the foregoing provision, the balance of the recovery may be divided between the employer and the employee or his dependents as they may otherwise agree. Any part of the recovery found to be due to the employer, the employee or his dependents shall be paid forthwith and any part of the recovery paid to the employee or his dependents under this section shall be treated by them as an advance payment by the employer on account of any future installments of compensation in the following manner:

(1) The total amount paid to the employee or his dependents shall be treated as an advance payment if there is no finding of comparative fault on the part of the employee; or
(2) A percentage of the amount paid to the employee or his dependents equal to the percentage of fault assessed to the third person from whom recovery is made shall be treated as an advance payment if there is a finding of comparative fault on the part of the employee.

4. In any case in which an injured employee has been paid benefits from the second injury fund as provided in subsection 3 of section 287.141, and recovery is had against the third party liable to the employee for the injury, the second injury fund shall be subrogated to the rights of the employee against said third party to the extent of the payments made to him from such fund, subject to provisions of subsections 2 and 3 of this section.

5. No construction design professional who is retained to perform professional services on a construction project or any employee of a construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project shall be liable for any injury resulting from the employer's failure to comply with safety standards on a construction project for which compensation is recoverable under the workers' compensation law, unless responsibility for safety practices is specifically assumed by contract. The immunity provided by this subsection to any construction design professional shall not apply to the negligent preparation of design plans or specifications.

6. Any provision in any contract or subcontract, where one party is an employer in the construction group of code classifications, which purports to waive subrogation rights provided under this section in anticipation of a future injury or death is hereby declared against public policy and void. Each contract of insurance for workers' compensation shall require the insurer to diligently pursue all subrogation rights of the employer and shall require the employer to fully cooperate with the insurer in pursuing such recoveries, except that the employer may enter into compromise agreements with an insurer in lieu of the insurer pursuing subrogation against another party. The amount of any subrogation recovery by an insurer shall be credited against the amount of the actual paid losses in the determination of such employer's experience modification factor within forty-five days of the collection of such amount.
ILLINOIS


The Illinois Supreme Court confirmed in this opinion that the workers' compensation lien does not attach to a recovery by an uninjured spouse for consortium as a consortium claim is an independent action to recover the damages suffered by the uninjured spouse. In *Blagg*, plaintiffs agreed to a settlement in which the injured plaintiff received $100,000 and the uninjured spouse received $250,000. Finding that the allocation may have been an attempt to avoid the lien, the Court of Appeals reversed the trial court’s approval of the settlement and this reversal was affirmed by the Supreme Court.

In discussing the relationship between a consortium award and a workers' compensation lien, the Court stated:

> It is of utmost importance that the trial court protect an employer’s lien. When a settlement agreement allocates an award between an employee’s claim for personal injuries and a spouse’s claim for loss of consortium, the trial court must closely scrutinize the agreement so that an employer’s rights are not abused.


In *Prince*, a surviving spouse received workers compensation benefits following her husband’s fatal automobile collision. As personal representative she filed a wrongful death action against the negligent tort feasors and recovered damages of $250,000, one third of which was allocated to the surviving spouse. The Illinois Court of Appeals found that the workers compensation lien applied to the entire award, not just the one third allocation to the surviving spouse based upon the use of the term “personal representative in Section 5(b) of the Act.


The workers' compensation lien may be exercised against an employee's medical malpractice recovery, but the lien only extends to expenses attributable to the medical aggravation of the injury. The Court also found that to the extent the employee’s temporary and permanent disability were caused by the medical mistreatment, an award for such disability would also be subject to the lien.

A workers’ compensation lien cannot be asserted against an employee’s recovery from a legal malpractice claim. The Court reasoned that a legal malpractice claim does not arise out of the workers’ compensation injury itself, but is a separate claim for negligence against the employee’s attorney.


A workers’ compensation lien does not attach to a recovery of uninsured or underinsured benefits by the employee. The Court reasoned that uninsured or underinsured claims are based on contractual liability, not liability in tort as required by Section 5(b) of the Act.


The Second District Court of Appeals held that in calculating the employer’s share of costs and expenses on a third party recovery, the 25% fee owed by the employer to employee’s counsel must first be deducted. As a result, the pro rata determination is calculated using a lower number (net recovery instead of gross recovery) and results in a lower pro rata share of expenses to be borne by the employer.


In this case the Illinois Supreme Court confirmed that the lien reimbursement can only be reduced in the manner provided for in Section 5(b) of the Act, namely 25% as a fee to employee’s counsel and a pro rata share of expenses. In this case, the trial court and Court of Appeals approved a wrongful death settlement for an amount less than the lien. The law firm retained by the deceased employee’s widow took one third of the settlement pursuant to the private fee agreement and an additional 25% on the remainder pursuant to Section 5(b).

On appeal, the Supreme Court agreed with the lien holder’s argument that the reduction of the lien recovery by the fee agreement between the widow and her law firm was prohibited by Section 5(b), even if the gross recovery was less than the total lien.

There is nothing in the statute that suggests a limitation on the employee’s obligation of reimbursement from the third party recovery. If an employer has made workers’ compensation payments, the obligation of reimbursements exists regardless of the amount that the employee recovers. Thus, if the amount of compensation paid by the employer exceeds the employee’s third party recovery, then the employer is entitled to the entire recovery, less fees and costs. [internal citations omitted]

Section 5(a) of the Act provides the employer immunity from tort claims of the injured employee for which benefits have been paid. Illinois courts have held, however, that it does not bar a third party sued directly by the injured employee from filing a contribution claim against the employer. These decisions originally found that although the employer received a credit for payments made under the Act, the employer’s liability could exceed the amount of those payments.

In Kotecki, the Illinois Supreme Court held that an employer’s liability in a contribution action is limited to the amount of workers’ compensation benefits paid to the injured employee. Thus, contrary to prior appellate opinions, regardless of the degree of fault found against an employer it will not be responsible for “fresh money”.


The Illinois Supreme Court held that an employer can satisfy all potential contribution liability by waiving its workers compensation lien. This will also allow the employer to receive an immediate dismissal with prejudice of all pending contribution actions. This assumes, however, that the employer has not contractually waived the Kotecki limitations. Braye v. Archer-Daniels, 175 Ill.2d 201 (1997) (employer can contractually waive the Kotecki limitations on its liability in contribution to other tortfeasors).

KANSAS
1. PMA Group v. Trotter, ___ Kan. ___, 135 P.3d 1244 (June 16, 2006)

The Supreme Court addressed the issue of whether an employer had a subrogation lien against the amount recovered by a worker from a coworker’s insurer who failed to assert the exclusive remedy of workers’ compensation as a defense. Claimant was injured when she was struck by a car driven by her coworker in their employer’s parking lot. Claimant accepted worker’s compensation benefits from her employer and its insurer. She subsequently entered into a settlement agreement with her coworker’s insurer after the insurer failed to assert the worker’s compensation defense. The Court held that an employer cannot assert a subrogation lien against an amount recovered by an employee from a coworker, because K.S.A. 44-504 is inapplicable to such a situation.


The Court of Appeals addressed, for the first time, whether recoveries are duplicative when the nature of the damages in a workers’ compensation case and tort settlement are the same, but the amount recovered in the tort settlement does not fully compensate claimants for their loss. Here, employee died as a result of injuries sustained in a work related automobile accident. His heirs brought suit against the
other driver’s insurance carrier, who settled the claim for the policy limits. It was
unknown at the time of this suit whether the settlement was conditioned upon the
release of the other driver personally.

The respondent employer asserted its subrogation rights against the settlement under
K.S.A. 44-504, which lead to this action. Claimants contend that the settlement was not
duplicative of the workers’ compensation benefits paid by the employer because the
settlement did not exceed the amount of actual lost wages. In Jerby, Alan Jerby died
following a collision with a third-party who had only $100,000 in third-party liability
coverage. Despite suffering a loss of more than $350,000 in lost wages, Jerby’s family
settled for the $100,000 limits, and then sued the workers’ compensation carrier for a
declaratory judgment that the carrier should not be entitled to a future credit because
the third party settlement did not exceed the $350,000 lost wage damages.

In construing the relevant statute, the Court of Appeals compared it to the Kansas
Automobile Injury Reparations Act and relied on decisions under that Act to reach its
holding. The Court found that the answer turned on whether claimants had preserved
their claim against the other driver individually. If they had, settlement proceeds are not
duplicative inasmuch as the widow’s share attributable to workers’ compensation-
related losses exceeded the amount of the respondent’s lien at the time. But, if the
claimants released their claim against the other driver, respondent was entitled to
reimbursement for workers’ compensation benefits paid, to the extent of duplicative
benefits. The trial court concluded that the American Family settlement was not
duplicative of the workers’ compensation benefits paid by Truck Ins. Exchange because
the settlement did not exceed the amount of Jerby’s actual lost wages.


The Kansas Court of Appeals’ recent decision in Richard v. Liberty Mutual has clarified
the laid down the law on efforts to circumvent and avoid repayment of carriers’ workers’
compensation liens.

This case affirmed the principle set forth in McGranaham v. McGough, 802 P.2d 593
(Kan. Ct. App. 1990), aff’d in part, rev’d in part, 820 P.2d 403 (Kan. 1991), that
employers subrogation liens only extend to the portion of a worker’s recovery which
duplicates the compensation and medical expenses paid by the employer under the
Workers’ Compensation Act.

Plaintiffs’ counsel may try to gerrymander settlements and releases in such a way as to
disguise third party settlements as compensation for items of damage not duplicative of
the workers’ compensation lien. Obviously, they do this to avoid repayment of the lien.
However, the court held such efforts must be supported by the evidence, or the attorney
making such a claim in an effort to avoid the lien may be subject to sanctions. *Richard v. Liberty Mutual Ins. Co.*, 2007 WL 1747886 (Kan. App. 2007).

A statement that an award is not duplicative must be supported by substantial competent evidence. If there is "substantial competent evidence" that a plaintiff's attorney had no basis to support his claim that the settlement is not duplicative, the court is justified in awarding sanctions against him. This amount may include the carrier’s attorney’s fees incurred in defending the spurious "non-duplicative" gerrymandering argument asserted by the plaintiff.

A workers’ compensation carrier is not entitled to reimbursement from a settlement between a third party and a worker's surviving spouse and children when:

1. They entered into a partial settlement with the third party,
2. Reserved the right to preserve their claims against the third party for the balance of their loss, AND
3. The spouse’s share of the settlement regarding damages compensable under the workers’ compensation law exceeded the workers' compensation lien at the time.

The recent *Richard* decision recognizes that if a plaintiff's attorney attempts and fails to gerrymander a settlement he may not be entitled to an attorney fee out of the workers’ compensation lien. The *Richard* court focused on the language of K.S.A. 44-504. The attorney's fees mandated in Section 44-504(b), (c) and (g) are designed to compensate a plaintiff's lawyer who recovers an award which is subrogated to the employer's insurer.1 However, as noted by the court in *Richard*, the one-third fee to the plaintiff's attorney is not automatic. If the one-third fee is excessive due to the ease of obtaining the settlement or the amount of services provided, then the court may award a lesser fee. Additionally, where the plaintiff's attorney attempts to gerrymander the settlement or hide a settlement from the carrier so as to defeat the lien, no attorney's fee should be awarded.

The trial court should use the reasonableness standard in awarding attorney's fees. When considering the reasonableness of attorney's fees, the trial court should consider “the time and labor required, the novelty and difficulty of the questions involved, and the

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1Section 44-504(b) provides “the district court shall determine the extent of participation of the intervenor, including the apportionment of costs and fees.” The language of Section 44-504(c) provides “the court shall fix the attorneys’ fees which shall be paid proportionately by the employer and the employee in the amounts determined by the court.” Section 44-504(g) provides “the court shall fix the attorney fees which shall be paid proportionately by the workers’ compensation fund, insurer or qualified group-funded workers’ compensation pool and the worker or such worker’s dependents or personal representatives in the amounts determined by the court based upon the amounts to be received from any recovery pursuant to an action brought under this section.”
skill requisite to perform the legal service properly.” Id.; K.R.P.C. Section 1.5(a). The trial court has wide discretion in awarding attorney’s fees; however, the amount of the fees must be supported by substantial competent evidence and a hearing may be necessary.


In Kroeker, the Kansas Supreme Court found that settlement proceeds are not duplicative of the workers’ compensation benefits received if the widow’s share, which relates to damages compensable under workers’ compensation law exceeded the amount of the carrier’s lien at the time. On the other hand, if the widow and the children settled their entire claim against the third party and released him, then the workers’ compensation carrier is entitled to reimbursement to the extent of any duplicative benefits.

In Kroeker, the issue was the insurer’s right to PIP reimbursement when its insured made a partial settlement of claims against tortfeasor’s estate but reserved the right to proceed against the estate for the balance of the claim. The Supreme Court distinguished these facts from those in Russell v. Mackey, 592 P.2d 902 (Kan. 1979). It held that when there is a partial settlement of a claim and the settlement exceeds the PIP benefits paid, the proceeds of the partial settlement are not duplicative of the PIP benefits paid. However, “if the injured insured settles his total claim with the tortfeasor and releases the tortfeasor from all further liability, the recovery is duplicative as a matter of law, and the PIP carrier has a lien and is entitled to reimbursement for the total amount of PIP benefits paid out of the recovery made by the insured, subject to the two statutory exceptions provided for in sections (d) and (e) of K.S.A. Section 40-3113(a).”


The apportioning of attorneys’ fees applies to both actions brought by the employee and the employer. Where an attorney for the employee brings an action and recovers the carrier’s lien, the employee’s attorney is entitled to an attorney’s fee fixed by the court. Nordstrom v. City of Topeka, 613 P.2d 1371 (Kan. 1980).

It is an abuse of discretion to enter an order that divides the payment of attorneys’ fees proportionally between the worker and the employer when the worker’s recovery also included the employer’s subrogation lien recovery. Anderson v. National Carriers, Inc., 717 P.2d 1068 (Kan. App. 1986), aff’d, 727 P.2d 899 (Kan. 1986).
The proportion of attorneys' fees to be paid by the carrier shall be calculated based on the carrier's total potential liability and not on past benefits actually paid by the carrier. *Lemry v. Buffalo Airways, Inc.*, 789 P.2d 1176 (Kan. App. 1990), rev. denied.

Attorneys' fees are not allowed for the workers' compensation carrier's counsel from the third party recovery, but are allowed for the worker's attorney. However, the degree of participation by the carrier's counsel is taken into consideration in determining the percentage of fees to be paid to the worker's attorney. *Leroy v. City of Coffeyville*, 671 F. Supp. 23 (D. Kan. 1987).

If the insurer is not subrogated, the plaintiff's attorney is not entitled to attorneys' fees. *Deffenbaugh Indus., Inc. v. Wilcox*, 11 P.3d 98 (2000), rev. denied, 270 Kan. 897 (Kan. 2001). The statute rewards an attorney who does work, even inadvertently, for the insurer.


The Kansas Court of Appeals in *McGranaham v. McGough* held that all elements of personal injury damages, including medical expenses, lost wages, disability compensation, pain and suffering, and loss of services, are subject to workers' compensation carrier's rights of subrogation. Damages recovered in a third party action for loss of services and loss of consortium are not subject to the workers' compensation carrier's lien because they are not compensable under the Workers' Compensation Act.

After the carrier in *McGranaham* paid $12,616.29 in compensation benefits to the employee, the employee settled his third party action for $10,000. The plaintiff tried to allocate portions of the settlement to avoid the workers' compensation lien. The stipulated settlement provided that $6,000 was for pain and suffering, $3,000 for his wife's loss of consortium, and $1,000 was for future medical expenses, and nothing was allocated to past medical expenses or lost wages.

The court agreed with the plaintiff that the carrier was not entitled to the $3,000 for the wife's loss of consortium claim because the amount did not represent a duplicative payment made by the carrier. The court, however, held that the carrier was subrogated to the $7,000, including the $6,000 in pain and suffering, because pain and suffering is an integral part of the calculation of disability.

The central holding is that subrogation was not allowed where the third party does not duplicate the compensation in medical benefits paid by the workers' compensation carrier.

The Tenth Circuit held that Kansas’s statutory subrogation right is not subject to a reduction for the recipient’s contributory negligence when the recipient and the third-party reach a settlement. Here, a woman was injured in an automobile accident and sued the auto manufacturer. The state had paid plaintiff’s medical treatment and the court ordered that almost all of the settlement proceeds were to be paid to the state as reimbursement for the money spent for Ms. Copeland’s care. Ms. Copeland appealed, arguing that under K.S.A. § 39-719a, the state’s portion of the settlement proceeds should be reduced by the percentage of Ms. Copeland’s negligence. Ms. Copeland submitted evidence that, at the time of the accident, she had been drinking and was speeding.

The Court found that any reduction of recovery under K.S.A. § 39-719a only occurs in conjunction with a recovery made pursuant to K.S.A. § 60-258a, Kansas’s comparative negligence statute. Section 60-258a contemplates a full trial on the merits. In cases where settlement is reached before trial, such as in Copeland, there is no reduction of recovery because 60-258a does not apply.


In Wishon, the court focused on the change in statutory language of Section 44-504(b) following the 1993 legislation session. The Kansas legislature removed the statutory language that was at issue in McGranaham, which stated that the employer “shall have a lien therefore against such recovery.” In its place, the legislature essentially codified McGranaham stating that the employer:

...shall have a lien therefore against the entire amount of the recovery excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse. The employer shall receive notice of the action, have a right to intervene and may participate in the action. The district court shall determine the extent of participation of the intervenor, including the apportionment of costs and fees.

K.S.A. 44-504(b)

The subrogation lien is to be against the “entire amount” of the recovery attributable to the employee, excluding any recovery for loss of consortium or loss of services to a spouse. The carrier, however, is only subrogated to a third party recovery which duplicates the actual workers’ compensation benefits paid. At the time of McGranaham, the statute granted a lien “against such recovery.” The current version of the statute grants a statutory lien “against the entire amount of such recovery.” In Wishon, the court indicated that this was a distinction without a difference. It noted that Section 44-504(b) had a two-fold intent: (1) to preserve injured worker’s claims against third party tortfeasors; and (2) to prevent double recoveries by the injured workers. Lemery v. Buffalo Airways, Inc., 789 P.2d 1176 (Kan. Ct. App.1990).
Despite a workers' compensation lien in excess of $55,000, the court allowed recovery of only $16,890.98, which was the amount it paid in medical benefits. This was because the plaintiff did not offer any evidence or attempt to recover lost wages from the tortfeasor in the underlying third party action. The court indicated that the legislature provides a means to prevent circumvention of the statutory lien by mandating notice, authorizing intervention, and providing for district court supervision. Therefore, if the carrier is apprehensive about the strength of its lien, the court in *Wishon* suggests that it intervenes to protect its lien. The Court of Appeals opined that if widow and the children did not release the tortfeasor and preserve their claims against him, then the rule in *Kroeker* applies.


There is no requirement, under the Workers Compensation Act, that a potential subrogation lienholder file a notice of lien to be subrogated to recovery from a third party, and such subrogation and creation of a lien occurs automatically. *Smith v. Russel*, 58 P.3d 698 (Kan. 2002). To protect and enforce its subrogation lien, the employer may intervene in the District Court proceeding that the employee initiates against the third party. The District Court shall determine the extent to which the intervenor may participate and apportion the costs and fees.

**MISSOURI**


The Missouri Supreme Court interpreted the calculation requirements as set forth by § 287.150.3 as follows:

“(1) the expenses of the third party litigation should be deducted from the third party recovery; (2) the balance should be apportioned in the same ratio that the amount paid by the employer at the time of the third party recovery bears to the total amount recovered from the third party; (3) the amounts due each should be paid forthwith; (4) the amount paid the employee should be treated as an advance payment on account of any future installments of compensation; and (5) in a case such as presented here, the employee should be entitled to future compensation benefits in the event the amount paid him as an advance is exhausted under the provisions of the statute.”
Calculation Example:
Total Workers Compensation Lien $51,000
  $75,000.00 Settlement
- $35,000.00 Attorney fees and expenses
  $40,000.00 Net Recovery for lien and claimant From Third Party Settlement

Reudiger Percentage $51,000.00 Workers’ Comp Lien
$75,000.00 Total Settlement
  = 68%

Workers Comp Lien Recovery $40,000.00 * .68 = $27,200.00


In *Kinney*, the Court of Appeals found that employers are not entitled to an intervention of right in an action by the employee against a third party. In this case, the employee was involved in a motor vehicle accident and recovered workers’ compensation from his employer’s insurer. He then filed a petition against certain third parties to recover for personal injuries under a negligence theory. The employer sought to intervene to protect its subrogation rights pursuant to § 287.150.

The Court of Appeals held that § 287.150 does not confer an unconditional right to intervene on the employer. The language of the statute merely gives the employer a “subrogation interest,” but nowhere does it expressly state that the employer has a right to intervene. The Court further held that intervention is not necessary in order to protect the employer’s interest in the outcome of the litigation. In theory, the employer’s right to recover compensation paid is adequately represented by the employee who seeks to maximize total recovery and § 287.150 which causes a lien to attach to any amount to which the employer is entitled. Therefore, an employer or insurer’s right to intervene in an action against a third party is purely at the court’s discretion.


In *Doss*, the court in determining a jurisdictional issue, set forth all of the ways that an insurer has an opportunity to recover for workers’ compensation paid to an employee.

“The manner in which rights under § 287.150, RSMo 2000 may be invoked, which may lead to a workers’ compensation insurance carrier who paid workers’ compensation benefits to an employee recouping those payments from the third-party tortfeasor, need not take a singular form. The insurance carrier may intervene in the suit brought by the employee (or the employee’s representatives) against the third-party tortfeasor. The insurance carrier may file a separate suit against the third-party tortfeasor after a cause of action between the employee and third person has been settled or arrived at a verdict.
“Other options include the insurance carrier filing a declaratory judgment action against the employee after the employee's suit against the third-party tortfeasor has been resolved. Yet another method is for the employee to file a declaratory judgment action against the insurance carrier when the parties are unable to agree on the application of § 287.150.3, RSMo 2000. We also find cases in which an employee's attorney or an attorney for one of the employee's dependents files an interpleader action to determine the appropriate distribution of settlement proceeds.” (citations omitted).


The employer does not have a subrogation interest in a legal malpractice case, when the malpractice claim is based on the attorney’s failure to timely file a negligence action against a third party for personal injuries. In *ATS*, the injured employee hired an attorney to bring suit against a negligent third party. The attorney failed to timely file, and the suit was dismissed. The employee settled the ensuing legal malpractice case with his former attorney. The employer sought a declaratory judgment giving it a subrogation interest in the legal malpractice recovery.

The Court ruled that the definition of “injury” as used in § 287.150 only applies to physical injuries and not to pure economic loss. The employer argued that denying a subrogation interest would result in double recovery by the employee who has already received workers’ compensation money. The court pointed out that employers have a right to sue third party tortfeasors on their own accord, and therefore could get the same double recovery by suing their own attorney for malpractice and getting a subrogation interest in the employee’s legal malpractice recovery. Any windfall that may exist should lie in favor of the injured employee, so employers are not entitled to a subrogation interest in legal malpractice claims arising out of a work injury.


In *Sommers*, a minor was injured when a driver negligently ran into her while she was at work. The employee’s parents filed suit against the third party on her behalf, and in the claim, they only included damages that were not compensable under workers’ compensation. The insurer asserted a subrogation interest in the third party recovery, but the employee opposed such entitlement. The employee argued that (1) her petition did not include damages that were compensable, and the subrogation lien cannot attach to recovery stemming from other damages, and (2) because she was a minor, the right to recovery vested in her parents, so she technically had no right to recovery.

The Court dismissed the first argument reasoning that the employee, by initiating a third party action, acts in trust for the employer who has already provided compensation. The employee must protect the subrogation rights of the insurer, and cannot extinguish the subrogation interest merely by voluntarily excluding a prayer for the compensable
damages. Furthermore, the court rejected the argument that the employee herself never had any right to recovery. This situation is analogous to if the minor had actually paid for her damages out of pocket. In that situation, the parents would sue on her behalf, but she would still have the "right to recovery." The fact that an employer has a contractual obligation to pay for those damages, rather than the employee, does not change the fact that the parents are only suing on behalf of the minor. Even though the parents obtain the judgment, the employee still has the right to recovery for the purposes of the employer’s subrogation interest.


In Pickett, the court upheld an award to the insurer of pro rata interest that accrued on the subrogation amount of a third party settlement. The employee’s attorney brought an interpleader action to determine the amount of the employer’s subrogation interest. After the settlement between the employee and the third party, the employee’s attorney placed the settlement amount in an interest bearing interplead fund pending the outcome of the interpleader action. Upon determining the amount of the employer’s subrogation interest, the trial court awarded the employer a pro rata share of the interest that had accrued. The employee appealed the award of interest.

The Court of Appeals upheld the award of a pro rata share of interest to the respective parties. Interpleader is an equitable remedy, and therefore "allowance of prejudgment interest is a matter of discretion." The employer is entitled to its share of any third party recovery as soon as it is awarded. While the interpleader action was underway, the employer lost the ability to use the money to which it was entitled. The pro rata share of interest was compensation for the employer’s loss of the use of that money, and therefore was properly awarded by the trial court.
WHEN PREMISES LIABILITY ARISES?

- When a person on your premises is injured as a result of:
  - Condition on the property;
  - Activity on the property;
  - A third-party actor.

- Most common example ➔
  - Slips or trips & falls on parking lots or sidewalks.

SPOLIATION

- Defined:
  - Destruction, significant alteration or non-preservation of evidence relevant to pending or future litigation.

- Why do we care about spoliation?
  - Interferes with proper administration of justice.
  - Gives one party unfair advantage over adversary.

- What happens if spoliation is found?
CONSEQUENCES OF SPOILATION

- Discovery Sanctions:
  - Reimbursement of attorney’s fees
  - Monetary penalty against the party or attorney
  - Recovery of discovery costs
  - Striking an answer
  - Barring presentation of evidence relating to the destroyed material
  - Barring filing of pleadings
  - Entry of default judgment or dismissal against the spoliator

- Unfavorable evidentiary presumptions
  - Under Illinois Pattern Jury Instruction No. 5.01, then an unfavorable interference may be drawn:
    - Evidence was under control of the party and could have been produced by the exercise of reasonable diligence;
    - The evidence was not equally available to an adverse party;
    - A reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed it to be favorable to him;
    - No reasonable excuse for the failure has been shown.

- Criminal sanctions
  - If clear that destruction was knowingly accomplished to frustrate ongoing legal proceedings.

- Independent cause of action in tort
  - Recognized in some states, including Illinois.
WHEN SPOILATION IS PERMITTED

- Evidence may be legitimately destroyed when done pursuant to a document retention policy that is reasonable and evenly applied.
  - *Lewy v. Remington Arms Co.*
    1. A policy should be reasonable considering the facts and circumstances of the documents in question
    2. Courts should consider the frequency and magnitude of similar suits against the company
    3. Courts should evaluate whether the company instituted the policy in bad faith.

- No reported IL case has held that documents destroyed pursuant to a routine document retention policy constitutes spoliation of evidence.

THIRD PARTY ACTIONS

- Some states recognize a special duty of an owner of a business property to protect an invitee from:
  1) a negligent act by a third person; or
  2) a deliberate criminal act by a third person.

THIRD PARTY CRIMINAL LIABILITY

- General rule → no duty
  
  - Exceptions:
    - Person known to be violent;
    - Conduct indicating danger & sufficient time to prevent injury; or
    - Foreseeable likelihood of injury
      - Look at totality of circumstances
      - Prior incidents of crime on patrons
THIRD PARTY CRIMINAL LIABILITY

Some factors considered in the totality of circumstances test:
- Whether the location is a known high-crime area;
- The amount of lighting;
- The time of day the crime was committed;
- Prior incidents involving crimes upon patrons; and
- The feasibility of a reasonable level of security.

The plaintiff must also prove that there is a causal connection between the breach of this duty to provide security and the injury sustained.

Example:

Sherry was attempting to enter a Barnes & Noble when she was pushed down by a shoplifter running out of the store. She suffered injury to her head as a result.

Is Barnes & Noble liable to Sherry for her injuries?

No. There is no general duty to protect customers from third-party criminal activity.

The Missouri Supreme Court found no facts were plead to bring Sherry’s injury within the scope of any exception. Defendant did not know the shoplifter was violent and there was no evidence that the shoplifter conducted himself in a way to indicate danger.

Finally, no special circumstances created a foreseeable likelihood of injury, such as awareness of prior incidents of shoplifters causing injury. The Court concluded plaintiff failed to state a cause of action.

Williams v. Barnes & Noble, Inc., 174 S.W.3d 556 (Mo. 2005)
THIRD PARTY CRIMINAL LIABILITY

- Example:
  - Plaintiff was raped by unknown assailant in the ladies room of the
defendant convenience store and sued the store, alleging negligence
in disabling the restroom door lock, failing to provide adequate
warning of the danger, and failing to provide other security measures
to protect her. Quiktrip argued that it did not owe plaintiff a duty to
protect her from a third party criminal attack because there was no
evidence of frequent and recent similar violent crimes at defendant’s
location. Court held that evidence other than previous, similar
violent acts may be sufficient when all facts and circumstances are
weighed together to establish the requisite level of foreseeability,
including the nature and location of the business, the security
measures in and any other factors bearing on the issue of
foreseeability.

  - Richardson v. Quiktrip Corp., 81 S.W.3d 54
  (Mo. Ct. app. 2002).

WHAT ABOUT NEGLIGENT ACTS OF THIRD PARTIES?

- Business owner may be liable if:
  - Premises open to public for business purpose;
  - Member of public injured by negligent third party while on premises
  for business purpose.

THIRD PARTY NEGLIGENT ACTS

- Example:
  Patron negligently drove her car through the brick half-wall
and windows surrounding the restaurant’s entrance. Person
eating inside was struck and fatally injured. In adopting the
Restatements, the Illinois Supreme Court weighed four
factors – foreseeability of the injury, likelihood of injury,
magnitude of burden of guarding against injury, and
consequences of placing that burden on the defendant.
Court found all factors weighed in favor of plaintiff.

  - Marshall v. Burger King Corp., 856 N.E.2d 1048 (Ill. 2006)
**SNOW & ICE REMOVAL CASES**

- Some of the most common premises liability cases that arise involve injuries related to improper snow & ice removal.

**SNOW & ICE REMOVAL: KANSAS**

- Kansas has adopted the “winter storm” doctrine.
  - Relieves business owners from continually removing precipitation from surfaces during storm.
  - Applies to landlord-tenant relationships in certain circumstances.

**Example:**

- Jury properly found for injured tenant where apartment complex used effective ice removal as a selling point and printed bulletins and letters for tenants to this effect, despite the fact that such removal was not part of their lease agreement with tenants. Moreover, complex admitted that they included the cost of snow and ice removal in rent and expected maintenance crew to treat within an hour of receiving a call from a tenant. *Worley v. Bradford Pointe Apartments, 73 P.3d 149 (Kan. Ct. App. 2003).*
Mi i i h i d

Missouri courts recognize that creating a duty to of entities to make a parking lot safe while precipitation falls would be a duty that is “virtually impossible to perform.”

Exception:
- Duty arises where one obligates himself either by agreement or course of conduct over a period of time to remove the ice and snow.

Exception:
- Duty arises where one obligates himself either by agreement or course of conduct over a period of time to remove the ice and snow.

Example:
- Where an individual slipped and fell on ice that had formed on the stairs of his employer’s premises when exiting the building and no evidence was presented that the landscaping company or property corporation were obligated to clear naturally accumulated ice from the premises until a two inch accumulation or notification by management had occurred, there was no contractual obligation for either company to clear the snow and they were not held liable for the plaintiff’s injuries. This was held distinguishable from cases wherein the natural condition of a parking lot had been altered after snow or ice fell but before someone sustained injury. Richey v. DP Properties, L.P., 252 S.W.3d 249 (Mo. Ct. App. 2008).

General rule:
- Property owners are not obligated to remove natural accumulations of ice and snow at all times.

Exception:
- Voluntary undertaking:
  - Risk of harm to the person who relies on the service must not be increased.
  - Someone who is negligent in such an undertaking will be liable for any foreseeable consequences of the negligent act if another suffers harm from relying on the undertaking.
Example:
- Housekeeper injured after slipping and falling on a snow covered stairway at apartment complex denied recovery because she was able to see that the staircase had not been cleared, she was not aware of the managers' previous pattern of shoveling the stairs and no contractual duty to remove ice and snow from the apartment complex staircase on the day of the accident existed by the managers or management.
- The only contracts regarding snow and ice removal required that the caretaker keep the sidewalks free of snow and ice and did not encompass the staircase.
- Claimsone v. Prof’l Prop. Mgmt., LLC, 956 N.E.2d 1065

Example:
- Plaintiff sued the property owner and a snow-removal company when she slipped and fell on ice in a convenience store parking lot. The court held that “the mere presence of snow and ice does not demonstrate negligence,” reiterating that there was no evidence that the defendants breached any common law or contractual duty.
- Although property owners in Illinois may be liable for unnatural accumulations of snow or ice caused by a “negligent, voluntary undertaking to remove natural accumulation,” the court reiterated that the plaintiff carries the burden of proving that his or her injury resulted from an unnatural accumulation caused by the defendant.
Premises liability may arise when a person on your premises is injured as a result of:

- A condition of the property;
- An activity taking place thereon; or
- A third-party actor (in certain circumstances).

Some of the most common and often litigated examples of premises liability involve slips or trips and falls, such as in parking lots or on sidewalks. However, injury of any kind can give rise to premises liability if the requisite elements are met. Other types of claims include, but are not limited to, injury by criminal attack, dog or animal bite, drowning, and injury caused by machine or appliance.

1) Spoliation

Spoliation is the destruction, significant alteration or non-preservation of evidence that is relevant to pending or future litigation. *Kambylis v. Ford Motor Co.*, 338 Ill. App. 3d 788, 795, 272 Ill. Dec. 697, 788 N.E.2d 1, 7 (1st Dist. 2003).

- **Why do we care about spoliation?**
  
  - Spoliation interferes with the proper administration of justice by giving one party an unfair advantage over an adversary.
  

- **What happens if spoliation of evidence is found?**
  
  - To remedy the imbalance caused by spoliation, a court may impose judicial sanctions against the wrongdoer, including:
    
    - **Discovery sanctions**
      
      - In Illinois, the authority to impose discovery sanctions is derived from *Illinois Supreme Court Rule 219*(c).
        - **Rule 219***(c) gives the court wide discretion to structure the form of sanction.
• Possible sanctions include:
  o Reimbursement of attorney’s fees
  o Monetary penalty against the party or attorney
  o Recovery of discovery costs
  o Striking an answer
  o Barring presentation of evidence relating to the destroyed material
  o Barring filing of pleadings
  o Entry of default judgment or dismissal against the spoliator

• **Unfavorable evidentiary presumptions**

  • Under Illinois Pattern Jury Instruction No. 5.01, if a jury believes the following 4 elements, then an unfavorable inference may be drawn against the spoliator:
    
    o The evidence was under the control of the party and could have been produced by the exercise of reasonable diligence;
    o The evidence was not equally available to an adverse party;
    o A reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed it to be favorable to him; and
    o No reasonable excuse for the failure has been shown.

• **Criminal sanctions**

  • Imposed if there is a clear indication that the destruction of evidence was knowingly accomplished to frustrate ongoing legal proceedings,
    
    o Some jurisdictions now recognize an independent cause of action in tort for the negligent and intentional spoliation of evidence.

    • Illinois has recognized the independent cause of action for the tort of spoliation since 1995.

• **Evidence may be legitimately destroyed when done pursuant to a document retention policy that is reasonable and evenly applied.**

  o In *Lewy v. Remington Arms Co.*, the Eighth Circuit Court of Appeals stated that (1) a policy should be reasonable considering the facts and circumstances of the documents in question; (2) courts should consider the frequency and magnitude of similar suits against the company, such that the firm should have known not to destroy relevant documents; and (3) courts should evaluate whether the company instituted the policy in bad faith.

  o No reported Illinois case has held that documents destroyed pursuant to a routine document retention policy constitutes spoliation of evidence.
2) **Third Party Actions**

Some states recognize a special duty of an owner of a business property to protect an invitee from a negligent or deliberate criminal act by a third person.

a. **Third Party Criminal Liability**

The general rule with regard to third-party criminal liability is that there is no general duty to protect customers from the criminal acts of unknown third persons.


Defendant operates a bar. Plaintiff, a former business invitee, was injured by a third party in a fight after leaving defendant’s premises. The Court refused to extend liability to the bar owner, concluding “[a]s a general rule, business owners are not responsible to protect their customers from the acts of third parties outside the premises of the business.” Thus, the bar owner had no responsibility to insure a former patron’s safety once he left the bar and entered the sidewalk.

Exceptions to the general rule:

1) A person, known to be violent, is present on the premises or an individual is present who has conducted himself so as to indicate danger and sufficient time exists to prevent injury; OR

2) The circumstances are such that there is a foreseeable likelihood that particular acts or omissions will cause harm or injury. The test generally employed to determine the foreseeable likelihood of injury is totality of the circumstances; not just the existence of prior incidents involving crimes upon patrons.

a. **Some factors considered in the totality of circumstances test:**

   i. Whether the location is a known high-crime area;
   ii. The amount of lighting;
   iii. The time of day the crime was committed;
   iv. Prior incidents involving crimes upon patrons; and
   v. The feasibility of a reasonable level of security.

b. The plaintiff must also prove that there is a causal connection between the breach of this duty to provide security and the injury sustained. *Siebert v. Vic Regnier Builders, Inc.*, 253 Kan. 540, 856 P.2d 1332 (1993).

**Example:** *Williams v. Barnes & Noble, Inc.*, 174 S.W.3d 556 (Mo. 2005).

Plaintiff was attempting to enter the Barnes & Noble store on the Country Club Plaza in Kansas City when she was pushed down by a shoplifter running out of the store.
She sustained injuries to her head, for which she filed a premises liability suit against defendant alleging failure to protect a customer from third-party criminal activity. In rejecting the argument, the Court pointed out the general rule that there is no duty to protect customers from the criminal acts of unknown third persons.

Moreover, plaintiff failed to plead any facts bringing plaintiff’s injury within the scope of any exception:

“There is no allegation in the petition that Barnes & Noble knew that the alleged shoplifter was violent. Nor is there an allegation that the alleged shoplifter conducted himself in such a way as to indicate danger and that Barnes & Noble had sufficient time in which to act to prevent injury. Nor is there an allegation that there were special circumstances creating a foreseeable likelihood that particular acts or omissions would cause injury (such as, perhaps, awareness of prior incidents of shoplifters causing injury).

Accordingly, the Court found plaintiff failed to state a cause of action against Barnes & Noble for third-party criminal conduct occurring on the premises.

Example: Richardson v. Quiktrip Corp., 81 S.W.3d 54 (Mo. Ct. App. 2002)

Plaintiff was raped by an unknown assailant in the ladies room of the defendant convenience store. The bathrooms were only accessible from outside the convenience store. The rape occurred at approximately 2:30am. She sued the store, alleging the store was negligent in disabling the restroom door lock, failing to provide adequate warning of the danger, and failing to provide other security measures to protect her. Quiktrip argued that it did not owe plaintiff a duty to protect her from a third party criminal attack because there was no evidence of frequent and recent similar violent crimes at defendant’s location.

The Court held that while previous, similar violent acts occurring on the premises may constitute the most compelling evidence that the criminal act giving rise to an action was foreseeable, other types of evidence may be probative on the issue and, in certain instances, may be sufficient when all facts and circumstances are weighed together to establish the requisite level of foreseeability. Additional evidence may include the nature and location of the business (i.e. hours of operation, proximity to high crime neighborhoods), the security measures in place (i.e. security alarm, surveillance cameras), and any other factors bearing on the issue of foreseeability.

c. Third Party Negligent Acts

The Restatement (Second) of Torts § 344 governs injuries caused by the negligent acts of third persons. It provides for liability where a business owner holds land open to the public for his business purposes and a member of the public is injured while on the land for such a purpose.

A patron negligently drove her car through the brick half-wall and windows surrounding the restaurant’s entrance. The decedent, who was eating inside the restaurant at the time, was struck by the woman’s car and fatally injured.

The Supreme Court of Illinois adopted § 344 of the Restatement (Second) of Torts in finding that defendant did, in fact, owe plaintiff a duty to protect against negligent third party acts. The Court reasoned that “[t]he touchstone of this court’s duty analysis is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.” The Court discussed the policy considerations which inform such a determination, including: (1) the reasonable foreseeability of the injury, (2) the likelihood of injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. Under the circumstances of this case, the Court determined that all factors weighed in favor of the plaintiff. The case was remanded for trial on the remaining issues of breach and causation.

3) Premises Liability Cases Involving Snow & Ice Removal

Some of the most common premises liability cases involve the injuries that occur when employees, patrons and/or other invitees injure themselves as a result of snow or ice that has not been properly cleared from parking lots or building premises.

a. Kansas

The Kansas Supreme Court has adopted what is known as the “winter storm” doctrine, which relieves a business proprietor from the duty to continually remove precipitation from outdoor surfaces during a winter storm. In addition to business owners, this doctrine has been held to apply to landlord-tenant relationships under certain circumstances.


In *Worley v. Bradford Pointe Apartments*, freezing drizzle had been falling throughout the day when a resident of an Olathe, Kansas apartment complex slipped after exiting his apartment. Although ice and snow removal was not included in the lease agreements with residents, the complex distributed a bulletin to residents with the headline “Let it Snow.” Included in the bulletin and an attached letter was the assurance that the complex would put salt down whenever necessary to treat icy conditions. The apartment complex admitted that they included the cost of snow and ice removal in rent and expected their maintenance crew to treat ice within an hour of receiving a call from a tenant.
Prior to Mr. Worley’s slip and fall, another tenant had placed three phone calls to the apartment complex over the course of the day, reporting the slick nature of the sidewalks and parking lot. The court considered these facts, in addition to the complex’s numerous promises and representations to tenants affecting the duty they owed during inclement weather and the fact that the complex used its promise to provide fast and effective ice removal as a selling point, in deciding that the complex’s motion for directed verdict was correctly denied. It was not improper for the jury to find the complex 51% at fault.

b. Missouri

Landlords, inviters, employers and municipal corporations are not obligated to remove snow or ice that naturally accumulates and is “a condition general to the community” in Missouri. *Richey v. DP Properties, L.P.*, 252 S.W.3d 249, 251 (Mo. Ct. App. 2008). The Missouri courts recognize that creating a duty to entities to make a parking lot safe while precipitation falls would be a duty that is “virtually impossible to perform.” *Id.* However, an exception arises where “one obligates himself either by agreement or course of conduct over a period of time” to remove the ice and snow, in which case a duty is created. *Id.* at 252.


In *Richey v. DP Properties*, an individual slipped and fell on ice that had formed on the stairs of his employer’s premises when exiting the building. The owner of the premises where Mr. Richey fell had contracted with a management services company that was responsible for maintaining the facility. That company contracted with a property corporation, and the property corporation hired a landscaping company to handle snow and ice removal. The contract required snow plowing to begin once two inches of snow had accumulated and required approval by the management company. Because no evidence was presented that the landscaping company and property corporation were obligated to clear naturally accumulated ice from the premises until a two inch accumulation or notification by management had occurred, there was no contractual obligation for either company to clear the snow and they were not held liable for Mr. Richey’s injuries. This case was deemed distinguishable from cases wherein the natural condition of a parking lot had been altered after the time snow or ice fell but before someone sustained injury.

c. Illinois

Like Kansas and Missouri, Illinois recognizes a general rule that property owners are not obligated to remove natural accumulations of ice and snow based on the unrealistic expectation of property owners to “keep all areas where people may walk clear from ice and snow at all times during the winter months.” *Claimsone v. Prof'l Prop. Mgmt., LLC*, 956 N.E.2d 1065, 1070-71 (Ill. Ct. App. 2011).
One recognized exception to this general rule involves a voluntary undertaking. *Id.* at 1071. Under this exception, a duty may be imposed on a party who “voluntarily agrees to perform a service necessary for the protection of another person or property.” *Id.* The service must be performed such that the risk of harm to the person who relies on the service will not be increased. *Id.* Someone who is negligent in such an undertaking will be liable for any foreseeable consequences of the negligent act if another suffers harm from relying on the undertaking. *Id.*


In *Claimsone v. Prof’l Property Mgmt.*, a housekeeper who was injured when she slipped and fell on a snow covered stairway after performing housekeeping services for a tenant of an apartment complex was denied recovery because she was able to see that the staircase had not been cleared – the condition was obvious, not hidden. Further, the housekeeper was not aware of the managers’ previous pattern of shoveling the stairs. Neither the managers nor the management company had undertaken a contractual duty to remove ice and snow from the apartment complex staircase the day of the accident. The only contracts regarding snow and ice removal required that the caretaker keep the sidewalks free of snow and ice, and this did not encompass the staircase Ms. Claimsone was injured on. It was noted that “to find a duty to clear ice and snow, courts require express language imposing such a duty.”

**Example:** *Asmus v. Mac’s Convenience Store, LLC*, 2011 U.S. Dist. 15048 (N.D. Ill. 2011),

In *Asmus v. Mac’s Convenience Store, LLC*, Tina Asmus sued the property owner and a snow-removal company when she slipped and fell on ice in a convenience store parking lot. The court held that the plaintiff offered nothing more than a mere conjecture as to how a black ice patch that she slipped and fell on was the result of an omission or negligent act by the parties. The court noted that “the mere presence of snow an ice does not demonstrate negligence,” reiterating that there was no evidence that the defendants breached any common law or contractual duty. Although property owners in Illinois may be liable for unnatural accumulations of snow or ice caused by a “negligent, voluntary undertaking to remove natural accumulation,” the court reiterated that the plaintiff carries the burden of proving that his or her injury resulted from an unnatural accumulation caused by the defendant.

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WHAT IS BAD FAITH?

Basic Definition
- First Party Insurance
- Third Party Insurance

TYPES OF CONDUCT WHICH MAY BE BAD FAITH

- Deceptive practices or deliberate misrepresentations to avoid paying claims.
- Deliberate misinterpretation of records or policy language to avoid coverage.
SOURCES OF BAD FAITH LAW

- Common Law
- State Legislation
- Federal Legislation

BAD FAITH MAY EXIST EVEN IN THE ABSENCE OF COVERAGE

- Judah v. State Farm Fire and Casualty

UNENFORCEABLE PROVISIONS

- Attempting to enforce a provision of an insurance policy which is not enforceable.
The compensatory damages recoverable in a bad faith case include those for financial losses, embarrassment and loss of reputation and emotional distress.

Oklahoma has also extended bad faith liability to TPAs under certain limited circumstances.

In 2006, the Oklahoma Supreme court handed down the Sizemore decision.

Failure to pay a workers’ compensation award.

BAD FAITH LAW
FROM SELECTED STATES (CONT.)

- Kansas Bad Faith Law
  - Kansas does not recognize a common law action for bad faith
  - In Kansas, the sole remedy for an insured with a first party claim against an insurance company is for breach of the contract and/or to report the insurer to the Kansas Insurance Commissioner.

BAD FAITH LAW
FROM SELECTED STATES (CONT.)

- Kansas Bad Faith Law
  - Determination of whether the refusal was "without just cause or excuse" is based on the facts and circumstances of each case.

BAD FAITH LAW
FROM SELECTED STATES (CONT.)

- Missouri Bad Faith Law
  - The tort of bad faith in first party disability insurance cases has not been recognized in Missouri.
  - Rossman v. GFC Corp. of Missouri
  - Missouri does provide a statutory claim for "vexatious refusal" through RSMo. 375.420.
BAD FAITH LAW
FROM SELECTED STATES (CONT.)

- Missouri Bad Faith Law
  - The vexatious penalty cannot be used as a weapon to intimidate insurers from asserting a good faith defense.
    Hammontree v. Central Mutual Insurance Co.
  - Mears v. Columbia Mutual Insurance Co.

BAD FAITH LAW
FROM SELECTED STATES (CONT.)

- Illinois Bad Faith Law
  - Cramer v. Insurance Exchange Agency
  - 215 ILCS 5/155

WHY BAD FAITH IS IMPORTANT - DAMAGES

- Excess of the policy limits
WHY BAD FAITH IS IMPORTANT -
DAMAGES (CONT.)

The types of damages
- Statutory penalties
- Statutory interest
- Liability for judgments in excess of the policy limits
- Attorney’s fees
- Emotional distress
- Economic loss

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

Perez v. Farmers Groups of Insurance Companies d/b/a Fire Insurance Exchange
Amoco Chemical Co. v. Certain Underwriters at Lloyd’s of London
Fox v. Health Net
Principal Fin. Group v. Thomas
Fuller v. Preferred Risk Life Insurance, Montgomery County, Alabama
APPEARANCE IS EVERYTHING
- It is easy to avoid actually acting in bad faith in administering claims
- The mere appearance of impropriety must also be avoided

INVESTIGATING THE CLAIM
- Duty to investigate
  - Statutes
  - Internal claim handling policy
  - Common law

INVESTIGATING THE CLAIM (CONT.)
- Timing
  - Quickly as possible
  - Progress in a timely manner
  - Timely decision to deny coverage must be made
INVESTIGATING THE CLAIM (CONT.)

- Evaluating the investigation
  - Reasonable
  - Does it appear that the claims adjuster was investigating the claim to determine if coverage existed, or investigating the claim to determine that no coverage existed?

- Develop evidence of the insured’s bad faith
  - Application of comparative bad faith
  - Examples of insured’s bad faith:
    - Failure to completely fill out relevant information on claims forms
    - Misrepresentation of relevant information
    - Abusive conduct by insurer
    - Failure to cooperate

- Reverse bad faith
INVESTIGATING THE CLAIM (CONT.)

- Third party coverage
- Is the insured required to defend and indemnify?
  - Duty of defense arises for claims that are even potentially within coverage

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INVESTIGATING THE CLAIM (CONT.)

- If there is coverage, what is the extent of the insured’s (and therefore the insurer’s) liability?

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INVESTIGATING THE CLAIM (CONT.)

- Excess coverage – Second part of analysis is central to an insurer’s liability in excess of the policy limits for failure to settle within policy limits.

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INVESTIGATING THE CLAIM (CONT.)

- Crisci v. Security Ins. Co. of New Haven
- Smith v. General Accident Ins. Co.
- Commercial Union Insurance Co. v. Liberty Mutual Insurance Co.

- Documenting Files
  - You must be able to prove you acted reasonably

AVOIDING BAD FAITH IN FIRST PARTY INSURANCE

- Keep accurate and complete records of the claim
- Date stamp all materials received into file
- Keep complete and accurate phone memorandums
- Make notations of activity
- Assume that everything in the claims file will be discovered by the insured in the event of litigation
AVOIDING BAD FAITH IN FIRST PARTY INSURANCE (CONT.)

Courts are particularly generous in granting all record made prior to the date litigation begins or the date benefits are terminated to the insured in bad faith cases.
- Prisco Serena Sturm Architects, Ltd. v. Liberty Mutual Insurance Company

AVOIDING BAD FAITH IN FIRST PARTY INSURANCE (CONT.)

Do not make gratuitous comments in correspondence or internal memorandums
- Ex.:  
  - “Who does this guy think he’s kidding?”
  - “Give me a break”
  - “This lady is such a liar”
  - “I am sick of this guy”

AVOIDING BAD FAITH IN FIRST PARTY INSURANCE (CONT.)

Protect the sanctity of the independent medical evaluation
AVOIDING BAD FAITH IN FIRST PARTY INSURANCE (CONT.)

Denying coverage

- Clearly states all bases upon which the claim can be denied
- Cite the specific language of the policy upon which you are relying in denying coverage. Do not paraphrase.
- Ensure that relevant portion of policy is enforceable.

AVOIDING BAD FAITH IN FIRST PARTY INSURANCE (CONT.)

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

AVOIDING BAD FAITH IN FIRST PARTY INSURANCE (CONT.)

Administering the claim

- Obtain and document all useful information from claimant and others
- Medical history
- Follow written procedures carefully
- Be cooperative, courteous and professional
Patterns of Practices of Bad Faith

- Increasingly, attorneys will seek not only to establish that the handling of a particular claim was bad faith but also will try to establish a pattern or practice which goes beyond the claim at hand.
- To support this strategy, attorneys may seek discovery of one or more of the following:
  - Claims handling procedures
  - Training material for newly hired employees
  - Other claims denied for the same or similar reasons, etc.

Subrogation/Assignment/Reimbursement

- Generally
  - Vary according to state law
  - Several states recognize a common law prohibition against assignment of personal injury claims

Subrogation/Assignment/Reimbursement (Cont.)

- Missouri
  - Missouri law prohibits assignment of bodily injury claims as a matter of public policy
  - Statutory exemptions exist for hospital liens, workers' compensation liens, underinsured and uninsured motorist coverage and Medicare and Medicaid coverage
  - Missouri courts have noted a difference between the assignment of causes of actions and subrogation to a claim.
SUBROGATION/ASSIGNMENT/
REIMBURSEMENT (CONT.)

• Kansas
  • Kansas common law prohibits subrogation for accident
    and health policies but not for indemnity policies.
  • An insurance company shall not issue contracts of
    insurance in Kansas containing a “subrogation” clause
    applicable to coverages providing for reimbursement of
    medical, surgical, hospital or funeral expenses.

SUBROGATION/ASSIGNMENT/
REIMBURSEMENT (CONT.)

• Illinois
  • Illinois law does not allow for the assignment of a
    personal tort.
  • However, when an insurance policy contains an
    unambiguous contractual provision that provides for
    subrogation rights, the courts will enforce such rights.
I. WHAT IS BAD FAITH?

A. Basic Definition
   • First Party Insurance
     Refusal to pay a claim without a reasonable basis or even if insurer has a reasonable basis for denial, failing to properly investigate the claim in a timely manner.
   • Third Party Insurance
     Failure to defend or indemnify or settle claim within policy limits without a reasonable basis, or failing to properly and timely investigate or defend the claim.

B. Types of conduct which may be bad faith:
   1. Deceptive practices or deliberate misrepresentations to avoid paying claims.
   2. Deliberate misinterpretation of records or policy language to avoid coverage.
   3. Unreasonable litigation conduct.
   4. Unreasonable delay in resolving claim or failure to investigate.
   5. Use of improper standard to deny a claim.
   6. Arbitrary or unreasonable demands for proof of loss.
   7. Abusive and coercive tactics to settle claim.
   8. Compelling an insured to contribute to settlement.
   9. Failing to thoroughly investigate the claim in accordance with your own procedures.
   10. Failing to maintain adequate investigative procedures.
   11. Failing to disclose policy limits and explain applicable policy provisions or exclusions.

C. Sources of bad faith law
   1. Common Law
      The implied duty of good faith and fair dealing.
   2. State Legislation
      While some states have enacted statutes which generally prohibit bad faith or vexatious refusal to pay policy benefits, others have enacted Unfair Claims Practices Acts which specifically set forth various types of conduct which are prohibited. States may also attempt to control insurance claim adjudication through regulations promulgated by an insurance commission.
   3. Federal Legislation
      The most obvious example of federal legislation which governs insurance practices is the Employee Retirement Security Act of 1974, 29 U.S.C. 1001-1461 (ERISA) which governs group employee benefit plans. ERISA generally preempts any state law claims referencing an employee benefits plan. *Hall v. Blue Cross/Blue Shield*, 134 F.3d 1063 (11th Cir. 1998).
In the past, it has also been suggested that bad faith conduct by insurance companies might fall within the scope of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961-1968 (RICO).

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


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

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

E. Unenforceable Provisions

- One potential source of bad faith claims is attempting to enforce a provision of an insurance policy which is not enforceable. Provisions contained within the may still be unenforceable if they are contrary to the law or impossible of performance.

F. Bad Faith Law From Selected States

1. **Oklahoma Bad Faith Law**

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

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

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

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

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

The most recent case regarding bad faith in Oklahoma was handed down in 2009. See Summers v. Zurich American Ins. Co., 213 P.3d 565 (Ok., 2009). Summers involved the failure to provide non-monetary benefits ordered by the Workers’ Compensation Court for medical treatment and extended the duty of good faith to all benefits, not just monetary. The Court explained Sizemore stating that a claimant need not "seek enforcement of a certified order" in order to bring an action for bad faith. Rather, the Court held that the order need only be "certified for enforcement" before a bad faith action could be maintained. In Summers, the Workers’ Compensation Court Orders evidenced that the Insurer had repeatedly failed to comply with prior Final Orders of the Workers' Compensation Court directing Insurer to provide Claimant with medical care. Notably, the language in Summers appears to provide a District Court remedy regardless of whether the prior unsatisfied order was for specific medical treatment or reasonable and necessary medical treatment.

For monetary awards, there is essentially an election of remedies. Once the order is certified, a claimant may seek enforcement in District Court or bring an action for bad faith. On non-monetary awards, the Court held that a claimant must utilize a similar method so as to give the insurer the same 10 day period to show good cause why the order for medical treatment should not be certified as "not provided."

2. Kansas Bad Faith Law

Kansas does not recognize a common law action for bad faith. Spencer v. Aetna Life & Casualty, 227 Kan. 914 (1980). Kansas has adopted a Uniform Trade Practices Act which includes a section identifying and prohibiting unfair claim settlement practices. K.S.A. 40-2404(9). Courts have found, however,

In Kansas, the sole remedy for an insured with a first party claim against an insurance company is for breach of the contract and/or to report the insurer to the Kansas Insurance Commissioner under the Unfair Claim Settlement Practices Act. However, Kansas law does provide for extra-contractual damages for first party claims under certain circumstances through K.S.A. 40-256:

That in all actions hereafter commenced, in which judgment is rendered against any insurance company as defined in K.S.A. 40-201, and including in addition thereto any fraternal benefit society and any reciprocal or interinsurance exchange on any policy or certificate of any type or kind of insurance, if it appear from the evidence that such company, society or exchange has refused without just cause or excuse to pay the full amount of such loss, the court in rendering such judgment shall allow the plaintiff a reasonable sum as an attorney's fee for services in such action, including proceeding upon appeal, to be recovered and collected as a part of the costs: Provided, however, That when a tender is made by such insurance company, society or exchange before the commencement of the action in which judgment is rendered and the amount recovered is not in excess of such tender no such costs shall be allowed.

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

3. Missouri Bad Faith Law

The tort of bad faith in first party disability insurance cases has not been recognized in Missouri (although a tort claim for bad faith refusal to settle is recognized in Missouri). *Rossman v. GFC Corp. of Missouri*, 596 S.W.2d 469 (Mo.App.E.D. 1980). Missouri does provide a statutory claim for “vexatious refusal” through RSMo. 375.420:

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

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

4. Illinois Bad Faith Law

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

1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:

a. 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
b. $60,000;
c. the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.
2) Where there are several policies insuring the same insured against the same loss whether issued by the same or by different companies, the court may fix the amount of the allowance so that the total attorney fees on account of one loss shall not be increased by reason of the fact that the insured brings separate suits on such policies.

G. Why bad faith is important – DAMAGES

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

2. The types of damages a plaintiff is allowed to seek in a bad faith claim vary from state to state. They include:
   a. Statutory penalties
   b. Statutory interest
   c. Liability for judgments in excess of the policy limits
   d. Attorneys fees
   e. Emotional distress
   f. Economic loss
      - This may include loss of credit reputation, loss of business and loss of property.
   g. Punitive damages
      - Juries and judges have shown a tremendous willingness to enter huge punitive damage awards against insurers when they perceive that the insurer acted in bad faith.
      - Punitive damages are assessed against an insurer based on the insurer's assets or wealth, not on the losses incurred by the claimant.
        - Plaintiff sought representation through his homeowners policy after he was sued in connection with a collision between a tractor trailer and a farm tractor borrowed by plaintiff from a farm at which he was employed and operated by a non party after it stalled on a state highway. Plaintiff claimed that the default judgment entered against him after defendant refused to defend him caused emotional distress. Jury returned a verdict for $327,231 pain and suffering, $535,769 for the default judgment and $25,000,000 in punitive damages for insurance bad faith.
        - Jury returned a verdict of $425,600,000 for refusal to defend and indemnify in a series of lawsuits. This included $386M in punitive damages which the trial court later lowered to $71M.
        - Total verdict of $89,320,000 ($12.32M in compensatory damages
and $77M in punitive)

- Even small coverage questions can balloon into huge punitive damage awards for the insured.
  
  **Principal Fin. Group v. Thomas, 585 So.2d 816 (Ala. 1991)**
  
  - Refusal to pay burial expenses of deceased child under life insurance policy (no reasonable basis for denial). $750,000 punitive damage award for bad faith denial of $1000 claim. This amount was affirmed on appeal. Court suggested that the very fact that the policy was so small was a reason to impose such severe punitive damages because very few insureds would proceed with such a case and insureds would have an extremely difficult time obtaining an attorney to take a case with such a small policy at issue. This could be a cause of the insurers intentional and reckless failure to properly investigate the claim prior to denying coverage.

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

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

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

**H. Appearance is everything**

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

**II. INVESTIGATING THE CLAIM**

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

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

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

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

E. Third party coverage - two part investigation
1. Is the insured required to defend and indemnify?
   a. Duty of defense arises for claims that are even potentially within coverage.
2. If there is coverage, what is the extent of the insured's (and therefore the insurer's) liability?
3. Excess coverage - Second part of analysis is central to an insurer's liability in excess of the policy limits for failure to settle within policy limits.
   a. An insurer who fails to accept a settlement within the policy limits by not
giving the insured's interests at least as much consideration as its own, is liable for any resulting judgment against its insured regardless of policy limits. Crisci v. Security Ins. Co. of New Haven, 426 P.2d 173 (Cal. 1967). One test that has been applied is to consider whether a prudent insurer without policy limits would have accepted the settlement offer.

b. Court reinstated a $590,000 bad faith judgment against an insurer, finding that a jury may consider an insurer's failure to inform its insured of a settlement offer as "some evidence of bad faith. Smith v. General Accident Ins. Co., 697 N.E.2d 168 (N.Y. 1998).

c. Courts have delineated several factors used to determine if an insurer's failure to settle was "reasonable."

   1) strength of the injured claimant's case on the issues of liability and damages;
   2) attempts by the insurer to induce the insured to contribute to a settlement;
   3) failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured;
   4) the insurer's rejection of advice of its own attorney or agent;
   5) failure of the insurer to inform the insured of a compromise offer;
   6) the amount of financial risk to which each party is exposed in the event of a refusal to settle;
   7) the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and
   8) any other factor tending to establish or negate bad faith on the part of the insurer.

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

   1) failure to inform the insured of relevant litigation developments;
   2) failure to keep the insured informed of all settlement demands outside policy limits;
   3) failure to solicit a settlement offer or to initiate settlement negotiations when warranted;
   4) failure to accept a reasonable compromise offer of settlement in situations when the facts demonstrate blatant liability and serious injury;
   5) rejecting a reasonable settlement offer within policy limits;
   6) attempting to coerce or obtain an involuntary contribution from the insured in order to settle within policy limits;
   7) failure to properly investigate a claim before rejecting a serious and recurrent negligence by the insurer;
   8) disregarding the advice of an adjuster or attorney;
9) serious and recurrent negligence by the insurer;
10) undue delay in accepting a settlement offer within policy limits where the potential verdict is high;
11) refusing to settle a case within policy limits following an excessive verdict when the chances of reversal on appeal are slight;
12) failing to appeal following a verdict in excess of policy limits where there exist reasonable grounds for such an appeal.

Edward Johnson, Virginia Johnson and Wayne Davis Jr. v. Allstate Insurance Co. (Jackson County, MO. 2006)

1) failure to timely notify the Insured of Policy limit demand within time limit.
2) failure to timely investigate the claim of medical expenses of $325,000.
3) underlying tort case resulted in $5,000,000 judgment against Allstate insured in excess of $50,000 policy limits.
4) Allstate claimed it lost the original demand letter and lacked adequate information about the of tortfeasor’s injuries.
5) insured assigned 90% of his claim against Allstate to tortfeasors
6) Verdict against Allstate for $5,821,729.97 compensatory damages and $10,500,000 punitive damages.

III. AVOIDING BAD FAITH IN FIRST PARTY INSURANCE

A. Documenting files

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

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

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

4. Keep complete and accurate phone memorandums, even if the person called is not reached.
   • It is important to keep record of all attempted calls as it shows diligence in the administration of the claim. Failure to keep such memorandums may allow the insured to argue that relevant phone calls were never returned when in fact the adjuster attempted unsuccessfully to reach the insured.
5. Make notations of activity undertaken in connection with the claim.
6. Assume that everything in the claims file will be discovered by the insured in the event of litigation.
   a. Courts are particularly generous in granting all records made prior to the date litigation begins or the date benefits are terminated to the insured in bad faith cases.
   b. Example:

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

   c. Do not make gratuitous comments in correspondence or internal memorandums.
      Ex:  "Who does this guy think he's kidding?"
           "Give me a break."
           "This lady is such a liar."
           "I am sick of this guy."

7. Protect the sanctity of the independent medical evaluation.
   a. Denial of claims will often be based at least in part on the opinions of doctor retained by you to review the medical records. The insured and his or her attorney will already be highly suspicious of the doctor's opinions and will consider him your accomplice.
   b. Deal at arms length in all written communications.
   c. Only set forth the facts in correspondence with the doctor. Do not state your opinions.

8. Denying coverage.
   a. Clearly state all bases upon which the claim can be denied.

      Failure to cite all bases upon which it is denied may not foreclose the opportunity to argue all grounds in defense to a breach of contract action, but could limit defenses in a bad faith claim.

   b. Cite the specific language of the policy upon which you are relying in denying coverage. Do not paraphrase.
A possible ground for bad faith is denying coverage for reasons not in the policy. A loose paraphrase of the actual policy provision might lead to this appearance.

9. Ensure that relevant portion of policy is enforceable.
   a. Generally the state law of the state in which the policy was issued will control. Each state's insurance act may have provisions which apply to the policy in question. If these provisions are found to apply to the policy they may:
      • require certain provisions which are read into the policy even if they are not expressly stated in the policy
      • prohibit certain provisions or exclusions
      • allow some types of provisions or exclusions to be enforced only under certain circumstances (e.g., certain language used in policy)
   b. If coverage is denied based upon a policy provision or exclusion which is not enforceable under the applicable state law, this may be strong evidence in favor of bad faith.

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

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

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

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

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

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

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

4. Be cooperative, courteous and professional.

C. Patterns or Practices of Bad Faith

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

2. To support this strategy, attorneys may seek discovery of one or more of the following:
   a. claims handling procedures
   b. training material for newly hired employees
   c. other claims denied for the same or similar reasons
   d. Department of Insurance consumer complaints
   e. claim payment goals and incentive programs
   f. performance evaluations
   g. incentive plans
IV. SUBROGATION/ASSIGNMENT/REIMBURSEMENT

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

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

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

We have argued in favor of “reimbursement” under occupational accident plans. Missouri courts have noted a difference between the assignment of causes of actions and subrogation to a claim. When there is an assignment of a claim, there is a complete divestment of all rights from the assignor, and a vesting of the same rights in the assignee. In the case of subrogation, however, only an equitable right passes to the subrogee and the legal title to the claim is never removed from the subrogor. Hayes v. Jenkins, 337 S.W.2d 259 (Mo. App. 1967). In conjunction with this distinction, we argue that since the insurer is only seeking reimbursement for benefits paid, the “reimbursement” clause does not divest the insured of a right of action or of any recovery for the action and therefore does not violate Missouri public policy.
C. Kansas
Kansas common law prohibits subrogation for accident and health policies but not for indemnity policies. This common law position was codified by the Kansas Insurance Commissioner in Kansas Administrative Regulation 40-1-20:

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

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


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

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

Although subrogation is permitted under Illinois law, the full assignment of rights is not. Thus, it is important that contractual language reflects only what is permissible by law. *Scott*, 208 Ill. App. 3d at 850, 567 N.E.2d at 607. Subrogation clauses should call for reimbursement for benefits paid under the policy, but must not extend to suggest that the insurer will be assigned its