2020

Advanced corporate counsel

Indiana Continuing Legal Education Forum (ICLEF)

Advanced Corporate Counsel
September 24-25, 2020
Index

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August 2020

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URL: https://iclef.org

ADVANCED CORPORATE COUNSEL

September 24-25, 2020

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The information and procedures set forth in this practice manual are subject to constant change and therefore should serve only as a foundation for further investigation and study of the current law and procedures related to the subject matter covered herein. Further, the forms contained within this manual are samples only and were designed for use in a particular situation involving parties which had certain needs which these documents met. All information, procedures and forms contained herein should be very carefully reviewed and should serve only as a guide for use in specific situations.

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Agenda

September 24, 2020

1:30 P.M. **Program Registration and Refreshments – outside of EB Rhodes Room, lower level of WB**

2:00 P.M. Welcome! Program Begins
The "Generalist Counsel" - Embracing the ever evolving roles and demands of the corporate counsel
- *Adam J. Richter*, Program Chair

3:30 P.M. **Refreshment Break**

3:45 P.M. Trade Secrets and Non-Competes: One Size Does Not Fit All
- *Adam Arceneaux*

5:15 P.M. **Adjourn Day One**

5:30 P.M. Hosted Reception – Caddy Sinclair Room - located near WB Hotel Desk in Lobby

September 25, 2020

8:00 A.M. **Continental Breakfast Items and Coffee Available – EB Rhodes Room, lower level of WB**

8:30 A.M. Implications of Lawyer Wellness for Corporate Counsel
- *Timothy A. Haley*

10:00 A.M. **Coffee Break**

10:15 A.M. The Impact of the Pandemic from an Operations, HR and Legal Perspective
- *Steven F. Pockrass, Matthew A. Doss*

11:45 A.M. **Adjourn**

September 24-25, 2020

ADVANCED CORPORATE COUSEL

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September 24-25, 2020

WWW.ICLEF.ORG

Adam J. Richter
Vice President, General Counsel Gene B. Glick Co., Inc.

Adam Richter joined Glick after several years of large-firm private practice where he routinely represented high profile real estate developers, investors, and institutional clients in a wide range of commercial real estate related issues. Prior to becoming an attorney, Adam developed his own successful portfolio of investment properties, and he continues to be an active real estate investor.

In addition to his corporate duties, Adam is the Board Chairman of Indianapolis Cultural Trail Inc., the former Board Chairman of Morning Light, Inc. (f/k/a the Visiting Nurse Service Foundation Inc.), an active member of the Indiana Affordable Housing Council, and a mentor for and member of the Urban Land Institute (Indiana Chapter). He is also a graduate of the United Way of Central Indiana Leadership United Generation Now Series.

Adam received his bachelor of science degree in business from Indiana University Kelley School of Business and his JD from Indiana University School of Law-Bloomington, both with honors.

When not tending to his professional duties, Adam enjoys spending time outdoors with his wife, Jennifer, and their two young boys.

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Education

Undergraduate School
Bachelor of Science in Business Analysis and Marketing (with highest honors), Indiana University Kelley School of Business 1988

Law School
Indiana University Robert H. McKinney School of Law (*summa cum laude*) 1993

Admissions

United States District Court - Northern District of Illinois

United States District Court - Southern District of Illinois

Indiana

United States District Court - Northern District of Indiana

United States District Court - Southern District of Indiana

United States District Court - Eastern District of Michigan

United States District Court - Western District of Michigan

United States District Court - Eastern District of Texas

United States District Court -

Adam Arceneaux

Partner Indianapolis

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Overview

As chair of Ice Miller's Commercial Litigation Group, Adam Arceneaux is dedicated to helping businesses achieve their goals through the strategic use of litigation, alternative dispute resolution and litigation avoidance planning. Early case assessment, meticulous preparation, regular status updates and proactively addressing client needs are at the core of Adam's personal commitment to those he serves.

Adam has developed and implemented successful strategies for multi-million dollar claims. Adam has litigated cases in state and federal courts in 22 states across the country. Adam has served as lead defense counsel in eight significant class action lawsuits filed in five states. Among his clients are businesses of all sizes, including both privately held and publicly traded companies. He has represented clients in health care, agriculture, manufacturing, distribution and technology, among other industries.

With a focus on complex commercial litigation and around the clock accessibility for emergency claims, Adam's practice includes drafting, defending or defeating covenants not to compete, non-solicitation clauses, confidentiality agreements and trade secrets claims. He has obtained, and defended against, temporary restraining orders and preliminary injunctions, as well as other forms of emergency relief in state and federal courts. Adam has advised clients on more than 200 such matters and has litigated over 50 such matters, including three significant cases which resulted in published opinions by the appellate courts.

In addition, Adam has significant experience resolving business disputes involving termination of dealer/distributorship agreements, contract disputes, Uniform Commercial Code disputes and warranty disputes. He also represents municipalities and municipal utilities in a variety of litigated matters.

Adam serves as a trusted advisor who is frequently called upon as outside general counsel to emerging, fast growth and middle market companies. Persuasive and

Southern District of Texas

United States Court of Appeals - Fifth Circuit

United States Court of Appeals - Sixth Circuit

United States Court of Appeals - Seventh Circuit

Awards & Recognitions

- *Best Lawyers*®, Commercial Litigation, 2021
- AV-Preeminent, Martindale-Hubbell, Peer Review Ratings
- Indiana Super Lawyer
- Senior Fellow, Litigation Counsel of America Honorary Society
- Distinguished Fellow, Indianapolis Bar Foundation
- Peter Perlman Service Award, Litigation Counsel of America, 2017
- Partners in Philanthropy: Keystone Award, Indiana University Foundation, 2013
- Presidential Leadership Award, Martin University, 2009
- Spirit of Philanthropy Award, Indiana University-Purdue University at Indianapolis, 2008

Memberships

- Senior Fellow, Litigation Counsel of America Honorary Society
- Chair, Complex Commercial Litigation Institute of the Litigation Counsel of America
- Member, Seventh Circuit Bar Association
- Member, Indiana State Bar Association
- Member, Indianapolis Bar Association

Community Involvement

- Board of Directors, The Center for the Performing Arts
- Board of Directors, Hamilton County Community Foundation

practical, Adam is valued by clients and colleagues alike for his civility and personal dedication to professionalism. Notably, Adam currently serves as chair of the Complex Commercial Litigation Institute of the Litigation Counsel of America honorary society.

Adam was born in Cambridge, Maryland and raised in Indianapolis. He and his wife, Margaret, have three adult children.

Reported and Representative Cases

- *Williams-Diggins v. Permanent General Assurance Corporation of Ohio*, 2020-Ohio-3973, 2020 WL 4516931 (Ohio Ct. App. 2020)
- *LigTel Communications, Inc. v. Baicells Technologies, Inc.,* 2020 WL 1934178 (N.D. Ind. 2020)
- *University of Louisville v. Stites & Harbison, PLLC,* 2020 WL 1655963 (Ky. App. 2020)
- *In re hhgregg, Inc.,* 949 F.3d 1039 (7th Cir. 2020)
- *Lab Verdict, Inc. v. Labequip Ltd.*, 436 F.Supp.3d 1181 (S.D. Ind. 2020)
- *Badger Daylighting Corp. v. Palmer*, 2019 WL 4572798 (S.D. Ind. 2019)
- *HARDI North America, Inc. v. Schindler*, 2019 WL 5866588 (N.D. Miss. 2019)
- *Evan v. Diners Club Int'l Ltd.*, No. 2:16-CV-178-RL-PRC, 2017 WL 4784667 (N.D. Ind. Oct. 24, 2017)
- *Evan v. Diners Club International, Ltd.*, 2017 WL 1836906 (N.D.Ind. May 5, 2017)
- *Vickery v. Ardagh Glass, Inc.*, 95 N.E.3d 213 (Ind.Ct.App. 2017)
- *In re hhgregg, Inc.*, 578 B.R. 814 (Bkrtcy. S.D. Ind. 2017)
- *Evan v. Diners Club International Ltd.*, 2017 WL 4784667 (N.D. Ind. 2017)
- *Vickery v. Ardagh Glass Inc.*, 85 N.E.3d 852 (Ind. Ct. App. 2017), *transfer denied* (Ind. April 12, 2018)
- *Elder Care Providers of Indiana, inc. v. Home Instead, Inc.*, 2017 WL 1106093 (S.D. Ind. 2017)
- *PRN Pharmaceuticals, LP v. Kentuckiana Healthcare, LLC*, 2016 WL 149769 (S.D. Ind. 2016)
- *CMW International LLC v. Amerisure Insurance Co.*, 2016 WL 7438846 (S.D. Ind. 2016)
- *Maschio-Gaspardo North America, Inc. v. High Plains Apache Sales and Service, LLC*, 2016 WL 7487915 (S.D. Iowa 2016)
- *Sasso v. Warsaw Orthopedic, Inc.*, 45 N.E.3d 835, (Ind. Ct. App. 2015)
- *Elder Care Providers of Indiana, Inc. v. Home Instead, Inc.*, 2015 WL 4425679 (S.D. Ind. 2015)
- *In re Kentuckiana Healthcare, LLC*, 2014 WL 906121 (W.D. Ky. 2014)
- *Sasso v. Warsaw Orthopedic, Inc.*, 2014 WL 524639 (N.D. Ind. 2014)
- *R&M Fleet Services, Inc. v. Caribbean Truck & Equipment Co., Inc.*, 2013 WL 5754923 (N.D. Ind. 2013)
- *Shawn Massey Farm Equipment, Inc. v. CLAAS of America, Inc.*, 2012 U.S. Dist. LEXIS 185594 (E.D. Tex. 2012)
- *TDM Farms, Inc. of North Carolina v. Wilhoite Family Farm*, LLC, 969 N.E.2d 97 (Ind. App. 2012)
- *1100 West, LLC v. Red Spot Paint and Varnish Co.*, 2009 WL 6969461 (S.D.Ind. 2009)

- Board of Trustees, Indiana Historical Society
- Board of Directors, The Historical Society of the United States District Court for the Southern District of Indiana, Inc.
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- Member, Indianapolis Bar Foundation Impact Fund Committee
- Graduate, Stanley K. Lacy Executive Leadership Series, Class XXVI
- Member, Lacy Leadership Association

- *In re Manchester, Inc.*, 2009 WL 2243592 (Bkrtcy. N.D.Tex. 2009)
- *LoTurco v. Terminix*, 2009 WL 2044343 (S.D.Ind. 2009)
- *1100 West, LLC v. Red Spot Paint & Varnish Co., Inc.*, 2009 WL 1605118 (S.D.Ind. 2009)
- *DryAir 2000, Inc. v. Blue Winged Olive, LLC*, 2009 WL 311132 (E.D.Tenn. 2009)
- *Air Liquide America L.P. v. Independent Welding Distributor Co-op, Inc.*, 2008 WL 2498138 (S.D. Ind. 2008)
- *Dunnivan v. ETS, Inc.*, 887 N.E.2d 1028, 2008 WL 2191048, (Ind. App. 2008)
- *Selective Ins. Co. of the Southeast v. Cagnoni Development, LLC*, 2008 WL 126950 (S.D. Ind. 2008)
- *Morabito v. Swager*, 2007 WL 1892078 (S.D. Ind. 2007)
- *Lehman Bros. Holdings, Inc. v. Laureate Realty Services, Inc.*, 2007 WL 2904591 (S.D. Ind. 2007)
- *Utility Center, Inc. v. City of Fort Wayne*, 868 N.E.2d 453 (Ind. 2007)
- *Hoffa Engineering, LLC v. Craney*, 2007 WL 831820 (S.D. Ind. 2007)
- *Glenn v. Dow AgroSciences, LLC,* 861 N.E.2d 1 (Ind.App. 2007)
- *Gupta v. Sprint Spectrum, L.P.*, 2007 WL 188986 (S.D. Ill. 2007)
- *Mail Boxes, Etc., Inc. v. McDougal*, 2006 WL 770132 (S.D. Ind. 2006)
- *Utility Center, Inc. v. City of Fort Wayne*, 834 N.E.2d 686 (Ind.App. 2005)
- *Conde v. SLS West, LLC*, 2005 WL 1661747 (S.D. Ind. 2005)
- *City of North Vernon v. Jennings Northwest Regional Utilities*, 829 N.E.2d 1 (Ind. 2005)
- *Bloomington Country Club, Inc. v. City of Bloomington*, 827 N.E.2d 1213 (Ind.App. 2005)
- *U.S. Land Services v. U.S. Surveyor*, 826 N.E.2d 49 (Ind. App. 2005)
- *Marwil v. Farah*, 2003 WL 23095657 (S.D. Ind. 2003)
- *E & S Mems, LLC v. Eagen*, 795 N.E.2d 508 (Ind. App. 2003)
- *CSL Community Ass'n, Inc. v. Jennings Northwest Regional Utilities*, 794 N.E.2d 567 (Ind. App. 2003)
- *Made2Manage Systems, Inc. v. ADS Information Systems, Inc.,* 2003 WL 21508235 (S.D. Ind. 2003)
- *Quality Carriers, Inc. v. MJK Distribution, Inc.,* 2002 WL 506997 (S.D. Ill. 2002)
- *Schwentker v. A.G. Edwards & Sons, Inc.,* 2000 U.S. Dist. LEXIS 10133 (S.D. Ind. 2000)
- *Kenro, Inc. v. Fax Daily, Inc.,* 962 F.Supp. 1162 (S.D. Ind. 1997)
- *Kenro, Inc. v. Fax Daily, Inc.,* 904 F.Supp. 912 (S.D. Ind. 1995)

Published In

- "Litigating Forum Selection Clauses: Supreme Court Guidance on Practice and Procedure," *6 Litigation Commentary & Rev. 33,* July/August 2014
- "Non-Competes Are Not Worth the Paper They Are Written On ... And Other Myths," *Inside Indiana Business*, September 7, 2007

News

- 8/20/2020 - 121 Ice Miller Attorneys Listed in *The Best Lawyers in America*© 2021

- 2/14/2020 - Ice Miller Announces 37 Attorneys Named 2020 Indiana Super Lawyers
- 1/29/2019 - Ice Miller Announces 46 Attorneys Named 2019 Indiana Super Lawyers
- 4/18/2018 - Adam Arceneaux Mentioned in *Litigation Commentary & Review*: "2018 CCLI Winter Conference"
- 2/20/2018 - Ice Miller Announces 51 Attorneys Named 2018 Indiana Super Lawyers
- 6/16/2017 - Adam Arceneaux featured in *Litigation Commentary & Review* article: “Four LCA Fellows Receive Peter Perlman Service Awards”
- 2/15/2017 - Ice Miller Announces 52 Attorneys Named in 2017 Indiana Super Lawyers
- 2/15/2016 - Ice Miller Announces 53 Attorneys Named in 2016 Indiana Super Lawyers

Speaking Engagements

- Chair and Moderator, Complex Commercial Litigation Institute Summit, Las Vegas, Nevada, February 7-8, 2020
- "Trade Secrets and Covenants Not to Compete: Prevention and Cure," Ice Miller CLE Forum, Indianapolis, Indiana, December 5, 2019
- "Maintaining Civility in Civil Litigation," Complex Commercial Litigation Institute, Santa Barbara, California, May 2, 2019
- The Indiana Commercial Courts," ICLEF Masters Series, Advanced Corporate Counsel 2018, French Lick, Indiana, October 4, 2018
- "Unintended Consequences in Business Litigation," Complex Commercial Litigation Institute, Las Vegas, Nevada, February 10, 2018
- "Protecting Your Business: Covenants Not to Compete, Restrictive Covenants, and Trade Secrets," Ice Miller CLE Forum, Columbus, Ohio, November 29, 2017, and Indianapolis, Indiana, December 5, 2017
- "The Emergence of State Business and Commercial Courts," Complex Commercial Litigation Institute, Santa Fe, New Mexico, May 4, 2017
- "Anti-Kickback Statute and The Stark Law/Litigation Avoidance and Preparedness," Client Presentation, Company-wide Meeting, Albuquerque, New Mexico, June 29, 2016
- "Moonlighting? Protecting Your Start-up from Your 8-5 Employer," TechPoint Entrepreneur Boot Camp Series, Indianapolis, Indiana, November 12, 2015
- "Trial Techniques: How to Bring a Boring Breach of Contract Case to Life," Litigation Counsel of America, Spring Conference, Newport Beach, California, April 16, 2015
- "Crisis Management," Young Presidents' Organization, Indianapolis, Indiana, March 14, 2011
- "Injunctive Relief in Business Litigation: Procedure and Strategy," Litigation Counsel of America, Spring Conference, Miami Beach, Florida, May 1, 2008

Timothy A. Haley
Latitude Indiana, Indianapolis

Tim is President of Latitude Indiana. A native Hoosier, he joined Latitude after working as a Partner at AmLaw 100 firm Barnes & Thornburg LLP in Indianapolis. Tim represented Fortune 500 companies, not-for-profits and privately-held businesses ranging from multinationals to family-owned enterprises.

During his 14 years of private practice, Tim advised and represented clients on complex environmental litigation, transactions, and compliance matters. His roles included serving as lead counsel in a successful appeal before the Indiana Supreme Court, serving on the victorious defense trial team in a high-profile federal criminal case, and advising on numerous noteworthy corporate transactions. Tim also regularly advised general counsel on sophisticated environmental compliance matters and handled administrative appeals.
Tim is active in the Indianapolis civic community. His community leadership roles include service as the Fair Chair for the 53rd Annual Penrod Arts Fair® (Indiana's Nicest Day®), one of the largest single-day art fairs in the world. Additionally, Tim co-created and led The Penrod Society's first "Magic in the Making" event with the Stutz Artists Association, and is a former President of the Board of the Friends of Indianapolis Animal Care Services Foundation. You might also catch him coaching little league at Broad Ripple Haverford, or high school swimmers at Center Grove.

Tim earned his J.D. from Indiana University's Mauer School of Law. He earned an M.P.A. from IU's O'Neill School of Public and Environmental Affairs in Bloomington, and his B.A., from North Carolina State University, where he was captain of the swim team, All-ACC and a U.S. Olympic Trials qualifier.

Tim and his wife Kären live in Butler-Tarkington. They have three children and a three-legged cat named Wolf.

Steven ("Steve") Pockrass is a Shareholder in the Indianapolis office of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., an international boutique law firm that represents management in employment, labor, immigration and benefits matters. Ogletree Deakins has more than 850 lawyers located in 53 offices in the U.S., Canada, Mexico and Europe.

Steve was a founding Co-Chair of the Firm's Wage and Hour Practice Group and held that position for more than 10 years. He also is a member of Ogletree's Indiana COVID-19 team, which focuses on providing Indiana-specific guidance to employers. In addition to his wage and hour and COVID-19 practices, he also advises and defends employers on a full range of labor, employment and personnel matters, including non-competition agreements and trade secret protections, discrimination claims, and leave of absence issues. He represents clients in federal and state court litigation, as well as arbitrations, administrative proceedings and collective bargaining. He provides training; drafts and reviews policies, handbooks and contracts; and conducts internal investigations.

A 1995 graduate of the University of Virginia School of Law, Steve is AV rated by Martindale-Hubbell. He has been recognized as an Indiana *"Super Lawyer"* every year since 2010 and has been named to *Best Lawyers* every year since 2013.

Prior to attending law school, Steve worked as a newspaper reporter for *The Indianapolis News*, as a free-lance writer, and as Communications Director for the Indiana Housing Finance Authority. An Eagle Scout, he is a member of the Executive Board of the Crossroads of America Council, Boy Scouts of America, and is a recipient of the BSA's Silver Beaver Award for distinguished service.

Matthew A. Doss
TLC Management, Inc., Marion

Matt Doss is General Counsel with TLC Management, Inc. in Marion. He has over 16 years of experience working as an attorney and human resource professional. Currently, he works as a strategic partner to TLC Management's leadership team, providing legal counsel and development of practices and plans that will help drive company growth. As the Corporate Counsel and Senior Director of Human Resources, he acts as a legal advisor to the CEO, COO and other partners on employee engagement, talent imperatives, compliance and overall corporate goals.

Matt is also a Midwest Representative to the USA Rugby Congress, providing legal oversight on governance.

Previously, Matt was an Administrative Law Judge, where he conducted hearings on unemployment, fraud and labor dispute benefit claims.

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Section Four

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Matthew A. Doss, Esq., SPHR, SHRM-SCP

Section One

The "Generalist Counsel": Embracing the Ever Evolving Roles & Demands of the Corporate Counsel

Adam J. Richter
Vice President, General Counsel
Gene B. Glick Company, Inc.
Indianapolis, Indiana

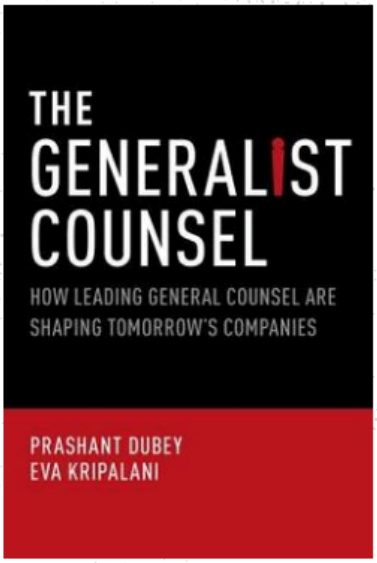
Section One

The "Generalist Counsel": Embracing the Ever Evolving Roles & Demands of the Corporate Counsel…….. Adam J. Richter

"The Generalist Counsel – How Leading General Counsel are Shaping Tomorrow's Companies" *By Prashant Dubey and Eva Kripalani*

Discussion/Topic Agenda

1. Introduction
2. Why Make the Move?
    a. Perceived differences and pros/cons of law firm vs in-house
    b. Interview results
3. Evolution of Corporate Legal Departments Compared to Law Firms.
4. Continuum of Corporate Engagement.
5. A Brief History of the General Counsel Position.
6. The Three Types of "Generalist Counsels"
7. Building, Leading and Managing a Team
8. Becoming a "Generalist Counsel"
9. Becoming CEO?



The Generalist Counsel: How Leading General Counsel Are Shaping Tomorrow's Companies

by Dubey, Prashant/ Kripalani, Eva

In the past two decades, the General Counsel in many companies has risen in importance, and the GC is now often involved in business strategy from the inception. Consequently, the position has become more desirable, lucrative, and competitive. Those who achieve it are required to be better versed in the same fundamental principles of business practice and leadership as other senior executives. In The Generalist Counsel: How Leading General Counsel are Shaping Tomorrow's Companies, Prashant Dubey and Eva Kripalani offer guidance for lawyers making the transition to company leadership. They describe the steps a lawyer should take to blend legal training with other business disciplines to perform a much broader and more strategic role for the organization. Further, the authors provide a view into the GC role that will enable non-lawyers to better understand how their in-house legal departments execute their role. Through research and in-depth interviews with sitting and former General Counsel and executives in the sphere of influence, the authors identify a deliberate evolution in the fabric and tenor of the role of the GC. The personal stories are not only thought-provoking, but also entertaining. The authors also discuss how this shift is leading to other innovations within the legal profession, such as the evolving relationship with outside counsel, General Counsel demands for new products and services, and models for service delivery that are similar to Information Technology and Business Process Outsourcing delivery models. Read less

Legal Profession

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Publication Year: 2013

Continuum of General Counsel Engagement

(*developed from the Generalist Counsel*)

1940's **Today**

Historical Perspective (aka "Silos")

1. GC is a minor management figure.
2. Perception as law firm failure.
3. Department as a necessary evil.
    a. Not perceived as adding value.
    b. Brought in at the end of deals for "blessing".
    c. Exists to provide comfort for the CEO.
4. Rolodex lawyer.
5. Reviews and approves the work of outside counsel.
6. Business prevention department.

Modern Perspective (GC as Executive)

1. Member of senior management team.
2. Must demonstrate leadership skills.
3. Relied upon for strategic advice on a wide range of topics.
4. Develops enterprise strategies, most often focused on legal and risk management.
5. Has the ear of the CEO.
6. Might be considered to run important implementations, transactions or even business units.
7. Views themselves as a businessperson first and lawyer second.

Section Two

Trade Secrets and Non-Competes: One Size Does Not Fit All

2020 Advanced Corporate Counsel
A Master Series Seminar
Indiana Continuing Legal Education Forum

West Baden Resort & Spa
West Baden, IN
September 24, 2020

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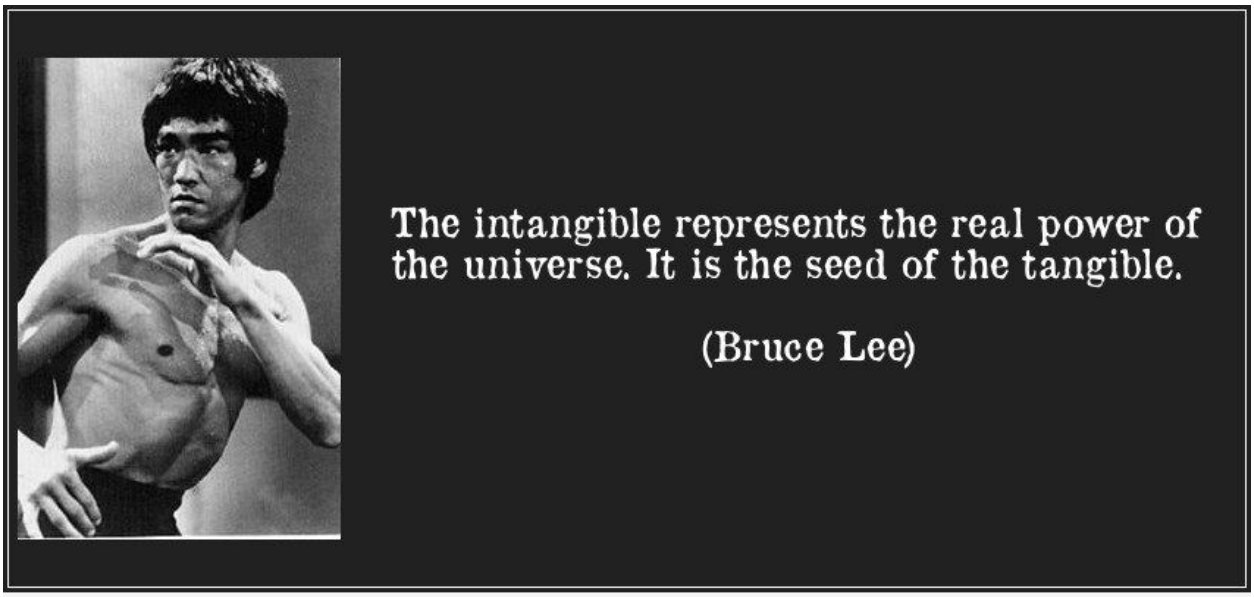
Section Two

Trade Secrets and Non-Competes: One Size Does Not Fit All……...Adam Arceneaux

If you think of the market value of all of the corporations that trade on the New York Stock Exchange and the Nasdaq, the vast majority of the value of those businesses is tied up in intangible assets and intellectual property. It's because of that -- that these values are primarily intangible and intellectual -- that the need for this specialized area is coming about.

Bill Kennedy

QUOTEHD.COM


The intangible represents the real power of the universe. It is the seed of the tangible.
(Bruce Lee)
GeniusQuotes.net

The liabilities are always 100 percent good. It's the assets you have to worry about.

Charlie Munger

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I. Trade Secrets

A. Indiana Uniform Trade Secrets Act (IUTSA), Ind. Code §24-2-3-1 *et seq.*:

24-2-3-1. Short title; construction; purpose

(a) This chapter may be cited as the Uniform Trade Secrets Act.
(b) This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject matter of this chapter among states enacting the provisions of this chapter.
(c) The chapter displaces all conflicting law of this state pertaining to the misappropriation of trade secrets, except contract law and criminal law.

24-2-3-2. Definitions

As used in this chapter, unless the context requires otherwise:
"Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.
"Misappropriation" means:
(1) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
(2) disclosure or use of a trade secret of another without express or implied consent by a person who:
(A) used improper means to acquire knowledge of the trade secret;
(B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
(i) derived from or through a person who had utilized improper means to acquire it;
(ii) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
(iii) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
(C) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.
"Person" means a natural person, limited liability company, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.
"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
(1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

24-2-3-3. Injunction against misappropriation; exceptional circumstances

(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(b) If the court determines in exceptional circumstances that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.
(c) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

24-2-3-4. Damages for misappropriation and unjust enrichment; royalty; exemplary damages

(a) In addition to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.
(b) When neither damages nor unjust enrichment are provable, the court may order payment of a reasonable royalty for no longer than the period during which the use could have been prohibited.
(c) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (a).

24-2-3-5. Attorney's fees; conditions
If:
(1) a claim of misappropriation is made in bad faith;
(2) a motion to terminate an injunction is made or resisted in bad faith; or
(3) willful and malicious misappropriation exists;
the court may award reasonable attorney's fees to the prevailing party.

24-2-3-6. Preservation of secrecy of trade secret

In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

24-2-3-7. Limitation of action

An action for misappropriation must be brought within three (3) years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

24-2-3-8. Continuing misappropriation commenced prior to September 1, 1982

If a continuing misappropriation otherwise covered by this chapter began before September 1, 1982, the chapter does not apply to the part of the misappropriation that occurred before that date. It does apply to the part that occurs after August 31, 1982, unless the appropriation was not a misappropriation under the law displaced by this chapter.

1. “Trade Secret” is:

    a. information;

    b. that derives independent economic value;

    c. that is not generally known, or readily ascertainable by proper means by others who can obtain economic value from its disclosure or use;

    d. that is the subject of efforts, reasonable under the circumstances, to maintain its secrecy.

    U.S. Land Services, Inc. v. U.S. Surveyor, Inc., 826 N.E.2d 49, 63 (Ind. Ct. App. 2005).

2. “Where the duplication or acquisition of alleged trade secret information requires a substantial investment of time, expense, or effort, such information may be found ‘not readily ascertainable’ so as to qualify for protection under the Indiana Uniform Trade Secrets Act.” *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 919 (Ind. 1993).

3. “A trade secret can exist in a combination of characteristics and components, each of which, by itself, if in the public domain, but the unified process and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.” *Id.* at 919-20. A compilation of data, some of which is already in the public domain, may be entitled to trade secret protection. *Northern Elec. Co. v. Torma*, 819 N.E.2d 417, 426-29 (Ind. Ct. App. 2004). *See also United States Land Services v. United States Surveyor, Inc.*, 826 N.E.2d 49 (Ind. Ct. App. 2005) (while some information contained

in databases at issue is readily available over the Internet and other sources, other elements of the database are not readily available; therefore, the compilation contained in the databases entitled to trade secret protection).

4. However, "business information whose release harms the holder only because the information if embarrassing or reveals weaknesses does not qualify for trade secret protection." *Chapel Ridge Secondinvestments LLC v. US Bank Natl'l Ass'n for Registered Holders of Greenwich Capital Commercial Funding Corp.*, 2018 WL 2739988, *2 (N.D. Ind. 2018). It must give the holder an economic advantage and threaten a competitive injury. *Cook Inc. v. Boston Sci. Corp.*, 206 F.R.D. 244, 247 (S.D. Ind. 2001).

5. The mere availability of "other proper means" will not excuse a trade secret misappropriation. It is "no defense to claim that one's product could have been developed independently of plaintiffs, if in fact it was developed by using plaintiff's proprietary rights." *Id.* at 919.

6. Owner of a trade secret must only take "reasonable" steps to maintain the secrecy of the information; "overly extravagant" measures and "absolute secrecy" are not required. *Northern Elec. Co. v. Torma,* 819 N.E.2d 417, 427 (Ind. Ct. App. 2004). Examples of such actions include:
   a. Requiring employees to sign confidentiality agreements or otherwise advising them of the confidential nature of the [trade secret];

b. Posting warning or cautionary signs, or placing warnings on documents;

c. Requiring visitors to sign confidentiality agreements, sign in, and shielding the [trade secret] from their view;

d. Segregating [trade secret from non-confidential] information;

e. Using unnamed or code-named ingredients;

f. Keeping secret documents under lock.

Zemco Mfg. v. Navistar Int'l, Inc., 759 N.E.2d 239 (Ind. Ct. App. 2001). Recently, the Indiana Court of Appeals affirmed the following findings of sufficient efforts to maintain secrecy: "(1) a key fob and passcode is required to enter [employer's] corporate offices; (2) its computers and emails are password protected; (3) [employer] limits access to certain files; and (4) the code of conduct and the Noncompete require employees to protect [employer's] intellectual property, trade secrets, and confidential information." *Vickery v. Ardagh Glass Inc.*, 85 N.E.3d 852 (Ind. Ct. App. 2017).

7. Examples of types of information that may constitute trade secrets:

a. Scientific data such as chemical processes, manufacturing methods, machines and devices;

b. Business information such as strategic and/or marketing plans, financial information, and credit and/or pricing policies;

c. Customer/Account/Client lists, needs, preferences, or contacts;

d. Computer programs and/or data compilations;

e. Employee's specialized training and skills;

f. Other

8. Types of relief available under the IUSA:

   a. Injunctive relief to enjoin "actual or threatened misappropriation."

   b. Damages

      i. Actual loss

      ii. Unjust enrichment

      iii. Punitive/Exemplary ("willful or malicious")

   c. Attorney's Fees (bad faith; willful or malicious)

B. Defend Trade Secrets Act

On May 11, 2016, President Obama signed the Defend Trade Secrets Act (DTSA) into law. This important legislation creates a federal, private civil cause of action for trade secret misappropriation in which "[a]n owner of a trade secret that is misappropriated may bring a civil action … if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce." The Act states:

> **(a)** The Attorney General may, in a civil action, obtain appropriate injunctive relief against any violation of this chapter.
>
> **(b) Private civil actions.—**
>
> > **(1) In general.**--An owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.
> >
> > **(2) Civil seizure.—**
> >
> > > **(A) In general.**--

(i) Application.--Based on an affidavit or verified complaint satisfying the requirements of this paragraph, the court may, upon ex parte application but only in extraordinary circumstances, issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.

(ii) Requirements for issuing order.--The court may not grant an application under clause (i) unless the court finds that it clearly appears from specific facts that—

(I) an order issued pursuant to Rule 65 of the Federal Rules of Civil Procedure or another form of equitable relief would be inadequate to achieve the purpose of this paragraph because the party to which the order would be issued would evade, avoid, or otherwise not comply with such an order;

(II) an immediate and irreparable injury will occur if such seizure is not ordered;

(III) the harm to the applicant of denying the application outweighs the harm to the legitimate interests of the person against whom seizure would be ordered of granting the application and substantially outweighs the harm to any third parties who may be harmed by such seizure;

(IV) the applicant is likely to succeed in showing that—

> **(aa)** the information is a trade secret; and
> **(bb)** the person against whom seizure would be ordered--
> **(AA)** misappropriated the trade secret of the applicant by improper means; or
> **(BB)** conspired to use improper means to misappropriate the trade secret of the applicant;

(V) the person against whom seizure would be ordered has actual possession of—

> **(aa)** the trade secret; and
>
> **(bb)** any property to be seized;

(VI) the application describes with reasonable particularity the matter to be seized and, to the extent reasonable under the circumstances, identifies the location where the matter is to be seized;

(VII) the person against whom seizure would be ordered, or persons acting in concert with such person, would destroy, move, hide, or otherwise make such matter inaccessible to the court, if the applicant were to proceed on notice to such person; and

(VIII) the applicant has not publicized the requested seizure.

(B) Elements of order.--If an order is issued under subparagraph (A), it shall—

(i) set forth findings of fact and conclusions of law required for the order;

(ii) provide for the narrowest seizure of property necessary to achieve the purpose of this paragraph and direct that the seizure be conducted in a manner that minimizes any interruption of the business operations of third parties and, to the extent possible, does not interrupt the legitimate business operations of the person accused of misappropriating the trade secret;

(iii)(I) be accompanied by an order protecting the seized property from disclosure by prohibiting access by the applicant or the person against whom the order is directed, and prohibiting any copies, in whole or in part, of the seized property, to prevent undue damage to the party against whom the order has issued or others, until such parties have an opportunity to be heard in court; and
(II) provide that if access is granted by the court to the applicant or the person against whom the order is directed, the access shall be consistent with subparagraph (D);

(iv) provide guidance to the law enforcement officials executing the seizure that clearly delineates the scope of the authority of the officials, including--
(I) the hours during which the seizure may be executed; and
(II) whether force may be used to access locked areas;

(v) set a date for a hearing described in subparagraph (F) at the earliest possible time, and not later than 7 days after the order has issued, unless the party against whom the order is directed and others harmed by the order consent to another date for the hearing, except that a party against whom the order has issued or any person harmed by the order may move the court at any time to dissolve or modify the order after giving notice to the applicant who obtained the order; and

(vi) require the person obtaining the order to provide the security determined adequate by the court for the payment of the damages that any person may be entitled to recover as a result of a wrongful or excessive seizure or wrongful or excessive attempted seizure under this paragraph.

(C) Protection from publicity.--The court shall take appropriate action to protect the person against whom an order under this paragraph is directed from publicity, by or at the behest of the person obtaining the order, about such order and any seizure under such order.

(D) Materials in custody of court.—

(i) In general.--Any materials seized under this paragraph shall be taken into the custody of the court. The court shall secure the seized material from physical and electronic access during the seizure and while in the custody of the court.

(ii) Storage medium.--If the seized material includes a storage medium, or if the seized material is stored on a storage medium, the court shall prohibit the medium from being connected to a network or the Internet without the consent of both parties, until the hearing required under subparagraph (B)(v) and described in subparagraph (F).

(iii) Protection of confidentiality.--The court shall take appropriate measures to protect the confidentiality of seized materials that are unrelated to the trade secret information ordered seized pursuant to this paragraph unless the person against whom the order is entered consents to disclosure of the material.

(iv) Appointment of special master.--The court may appoint a special master to locate and isolate all misappropriated trade secret information and to facilitate the return of unrelated property and data to the person from whom the property was seized. The special master appointed by the court shall agree to be bound by a non-disclosure agreement approved by the court.

(E) Service of order.--The court shall order that service of a copy of the order under this paragraph, and the submissions of the applicant to obtain the order, shall be made by a Federal law enforcement officer who, upon making service, shall carry out the seizure under the order. The court may allow State or local law enforcement officials to participate, but may not permit the applicant or any agent of the applicant to participate in the seizure. At the request of law enforcement officials, the court may allow a technical expert who is unaffiliated with the applicant and who is bound by a court-approved non-disclosure agreement to participate in the seizure if the court determines that the participation of the expert will aid the efficient execution of and minimize the burden of the seizure.

(F) Seizure hearing.—

(i) Date.--A court that issues a seizure order shall hold a hearing on the date set by the court under subparagraph (B)(v).

(ii) Burden of proof.--At a hearing held under this subparagraph, the party who obtained the order under subparagraph (A) shall have the burden to prove the facts supporting the findings of fact and conclusions of law necessary to support the order. If the party fails to meet that burden, the seizure order shall be dissolved or modified appropriately.

(iii) Dissolution or modification of order.--A party against whom the order has been issued or any person harmed by the order may

move the court at any time to dissolve or modify the order after giving notice to the party who obtained the order.

(iv) Discovery time limits.--The court may make such orders modifying the time limits for discovery under the Federal Rules of Civil Procedure as may be necessary to prevent the frustration of the purposes of a hearing under this subparagraph.

(G) Action for damage caused by wrongful seizure.--A person who suffers damage by reason of a wrongful or excessive seizure under this paragraph has a cause of action against the applicant for the order under which such seizure was made, and shall be entitled to the same relief as is provided under section 34(d)(11) of the Trademark Act of 1946 (15 U.S.C. 1116(d)(11)). The security posted with the court under subparagraph (B)(vi) shall not limit the recovery of third parties for damages.

(H) Motion for encryption.--A party or a person who claims to have an interest in the subject matter seized may make a motion at any time, which may be heard ex parte, to encrypt any material seized or to be seized under this paragraph that is stored on a storage medium. The motion shall include, when possible, the desired encryption method.

(3) Remedies.--In a civil action brought under this subsection with respect to the misappropriation of a trade secret, a court may—

(A) grant an injunction—

(i) to prevent any actual or threatened misappropriation described in paragraph (1) on such terms as the court deems reasonable, provided the order does not—

(I) prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows; or
(II) otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business;

(ii) if determined appropriate by the court, requiring affirmative actions to be taken to protect the trade secret; and

(iii) in exceptional circumstances that render an injunction inequitable, that conditions future use of the trade secret upon payment of a reasonable royalty for no longer than the period of time for which such use could have been prohibited;

(B) award—

(i)(I) damages for actual loss caused by the misappropriation of the trade secret; and

(II) damages for any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss; or **(ii)** in lieu of damages measured by any other methods, the damages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the misappropriator's unauthorized disclosure or use of the trade secret;

(C) if the trade secret is willfully and maliciously misappropriated, award exemplary damages in an amount not more than 2 times the amount of the damages awarded under subparagraph (B); and

(D) if a claim of the misappropriation is made in bad faith, which may be established by circumstantial evidence, a motion to terminate an injunction is made or opposed in bad faith, or the trade secret was willfully and maliciously misappropriated, award reasonable attorney's fees to the prevailing party.

(c) Jurisdiction.--The district courts of the United States shall have original jurisdiction of civil actions brought under this section.

(d) Period of limitations.--A civil action under subsection (b) may not be commenced later than 3 years after the date on which the misappropriation with respect to which the action would relate is discovered or by the exercise of reasonable diligence should have been discovered. For purposes of this subsection, a continuing misappropriation constitutes a single claim of misappropriation.

18 U.S.C. §1836. The pertinent definitions are contained in 18 U.S.C. §1839:

As used in this chapter—

(1) the term “foreign instrumentality” means any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government;

(2) the term “foreign agent” means any officer, employee, proxy, servant, delegate, or representative of a foreign government;

(3) the term “trade secret” means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information;

(4) the term “owner”, with respect to a trade secret, means the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed;

(5) the term “misappropriation” means—

(A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(B) disclosure or use of a trade secret of another without express or implied consent by a person who—

(i) used improper means to acquire knowledge of the trade secret;

(ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was—

(I) derived from or through a person who had used improper means to acquire the trade secret;
(II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(iii) before a material change of the position of the person, knew or had reason to know that—

(I) the trade secret was a trade secret; and

(II) knowledge of the trade secret had been acquired by accident or mistake;

(6) the term “improper means”—

(A) includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means; and

(B) does not include reverse engineering, independent derivation, or any other lawful means of acquisition; and

(7) the term “Trademark Act of 1946” means the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes[1], approved July 5, 1946 (15 U.S.C. 1051 et seq.) (commonly referred to as the ‘Trademark Act of 1946’ or the ‘Lanham Act’)”[1].

18 U.S.C. §1839. The DTSA contains certain exceptions and whistleblower immunity:

(a) In general.--This chapter does not prohibit or create a private right of action for—

(1) any otherwise lawful activity conducted by a governmental entity of the United States, a State, or a political subdivision of a State; or

(2) the disclosure of a trade secret in accordance with subsection (b).

(b) Immunity from liability for confidential disclosure of a trade secret to the government or in a court filing.—

(1) Immunity.--An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that—

(A) is made—

(i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and

(ii) solely for the purpose of reporting or investigating a suspected violation of law; or

(B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

(2) Use of trade secret information in anti-retaliation lawsuit.--An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual—

(A) files any document containing the trade secret under seal; and

(B) does not disclose the trade secret, except pursuant to court order.

(3) Notice.—

(A) In general.--An employer shall provide notice of the immunity set forth in this subsection in any contract or agreement with an employee that governs the use of a trade secret or other confidential information.

(B) Policy document.--An employer shall be considered to be in compliance with the notice requirement in subparagraph (A) if the employer provides a cross-reference to a policy document provided to the employee that sets forth the employer's reporting policy for a suspected violation of law.

(C) Non-compliance.--If an employer does not comply with the notice requirement in subparagraph (A), the employer may not be awarded exemplary damages or attorney fees under subparagraph (C) or (D) of section 1836(b)(3) in an action against an employee to whom notice was not provided.

> **(D) Applicability.**--This paragraph shall apply to contracts and agreements that are entered into or updated after the date of enactment of this subsection.
>
> **(4) Employee defined.**--For purposes of this subsection, the term "employee" includes any individual performing work as a contractor or consultant for an employer.
>
> **(5) Rule of construction.**--Except as expressly provided for under this subsection, nothing in this subsection shall be construed to authorize, or limit liability for, an act that is otherwise prohibited by law, such as the unlawful access of material by unauthorized means.

18 U.S.C. §1833.

1. Creates a federal cause of action.
2. Definition of "trade secrets" appears more expansive and descriptive than IUTSA.
3. Definition of "misappropriation" appears substantially similar to IUTSA.
4. Definition of "improper means" explicitly adds exception implicit in IUTSA: "does not include reverse engineering, independent derivation, or any other lawful means of acquisition."
5. Injunctive relief limited – cannot prevent a person from entering into an employment relationship. No such limitation is explicit in the IUTSA.
6. Provides civil seizure mechanism in addition to injunctive relief and damages.
7. Includes a safe harbor for whistleblower employees that provides immunity from any criminal or civil liability under any federal or state trade secret law for disclosure of a trade secret that is made in confidence to an attorney or federal, state, or local governmental official "solely for the purpose of reporting or investigating a suspected violation of law," or in filing a lawsuit under seal.

8. The remedies for companies suing former employees for trade secret misappropriation under the DTSA include punitive damages and attorney fees. In order to take advantage of these remedies, however, a company must advise its employees of the existence of the whistleblower immunity. As such, companies should strongly consider updating their employment policies and agreements to include the required notice or cross-reference to a policy document provided to the employee that sets forth the employer's reporting policy for a suspected violation of the law.
9. The DTSA does not preempt or displace state or other laws for the misappropriation of trade secrets. 18 U.S.C. §1838.
10. Other considerations. A complaint filed in federal court is subject to federal pleadings standard. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Indiana Commercial Courts are a proper venue for claims brought under IUTSA.

II. Covenants Not to Compete and Other Restrictive Covenants

Are covenants not to compete enforceable in Indiana?

> Covenants not to compete are enforceable in Indiana if there is a protectable interest and if the restraint is reasonable in light of legitimate interests sought to be protected.

Licocci v. Cardinal Assocs., Inc., 445 N.E.2d 556 (Ind. 1983).

> An employer may not simply forbid his employee from subsequently operating a similar business. The employer must have an interest which he is trying to legitimately protect. There must be some reason why it would be unfair to allow the employee to compete with the former employer. The employee should only be enjoined if he has gained some advantage at the employer's expense which would not be available to the general public.

Norlund v. Faust, 675 N.E.2d 1142 (Ind. Ct. App. 1997), *opinion clarified on denial of reh'g,* 678 N.E.2d 421 (Ind. Ct. App. 1997). Covenants in Indiana have been enforced to protect an employer's confidential information, trade secrets, customer lists, established patient base, goodwill, investment in special training or techniques, and actual solicitation of customers. However, courts have held that an employer generally has no protectable interest in restricting contact with *past* customers, in the general knowledge, information, and skills gained by an employee in the course of his or her employment.

The Indiana Supreme Court has recognized a lower level of scrutiny of covenants not to compete in the sale-of-business context than in the employment context. "[P]olicy considerations dictate that noncompetition covenants arising out of the sale of a business be enforced more liberally than such covenants arising out of the employer-employee relationship." *Dicen v. New Sesco, Inc.,* 839 N.E.2d 684, 687 (Ind. 2005).

To determine whether a covenant is reasonable, Indiana courts generally consider three factors: (1) whether restraint is reasonably necessary to protect the employer's business, (2) the effect of the restraint on the employee, and (3) the effect of enforcement upon public interest. *Norlund v. Faust,* 675 N.E.2d 1142, 1154 (Ind. Ct. App. 1997). Reasonableness is to be determined from the totality of the circumstances, i.e., the interrelationship of protectable interest, time, space, and proscribed activity. *McCart v. H & R Block, Inc.,* 470 N.E.2d 756, 764 (Ind. Ct. App. 1984). A postemployment restrictive covenant also must be ancillary to the main purpose of an employment or compensation agreement. *Ohio Valley Commc'ns v. Greenwell,* 555 N.E.2d 525 (Ind. Ct. App. 1990).

A covenant not to compete signed at the inception of employment provides sufficient consideration for the covenant not to compete. *Advanced Copy Prods. v. Cool, 363 N.E.2d 1070*

(Ind. Ct. App. 1977). So, too, will a promise of continued employment. *Ackerman v. Kimball Int'l, Inc.,* 652 N.E.2d 507 (Ind. 1995).

"A covenant not to compete is unreasonable when it is broader than necessary for the protection of a legitimate business interest in terms of the geographical area, time period, and activities restricted." *Smart v. Grider,* 650 N.E.2d 80, 83 (Ind. Ct. App. 1995). "A covenant not to compete must be sufficiently specific in scope to coincide with only the legitimate interests of the employer and to allow the employee a clear understanding of what conduct is prohibited." *Id.*

Indiana courts have generally affirmed covenants for terms of one to three years after employment ends. In the context of a sale of business, Indiana courts have generally upheld five-year covenants.

Absent special circumstances, such as an employee's knowledge of trade secrets or confidential information, the geographic restriction should be no broader than the employee's – not the employer's – geographic area of work. *Coates v. Heat Wagons, Inc.,* 942 N.E.2d 905, 915 (Ind. Ct. App. 2011). However, a covenant not to compete aimed at protecting trade secrets cannot cover the entire world. *Bodemer v. Swanel Beverage, Inc.,* 884 F.Supp.2d 717, 731-732 (N.D. Ind. 2012), *see also Glenn v. Dow AgroSciences, LLC,* 861 N.E.2d 1 (Ind. Ct. App. 2007)(worldwide restriction unenforceable), *vacated as moot.* Courts in Indiana have allowed a customer-specific restriction to substitute for a geographic restriction. *Seach v. Richards, Dieterle & Co.,* 439 N.E.2d 208 (Ind. Ct. App. 1982).

"Indiana courts have found covenants not to compete that restrict an employee from working in any capacity for an employer's competitor or from working within portions of the business with which the employee was never associated to be unreasonable because such

restrictions extend beyond the scope of the employer's legitimate interest." *Hunting Energy Servs., Inc. v. Kavadas*, 2018 WL 4539818, *24 (N.D. Ind. 2018); *see also Burk v. Heritage Food Serv. Equip., Inc.*, 737 N.E.2d 803, 811-12 (Ind. Ct. App. 2000). Likewise, a covenant prohibiting an employee from soliciting for employment "any individual employed by Company" is overbroad because it includes employees in which employer has no legitimate protectable interest, such as those employees who have access to or possess any knowledge that would give a competitor an unfair advantage. *Heraeus Medical, LLC v. Zimmer, Inc.*, 135 N.E.3d 150, 155-156 (Ind. 2019).

If a court finds a restriction to be unenforceable because it is overly broad, Indiana's blue pencil rule only permits the excision of severable words or terms. Under no circumstances will new language be added. *See Heraeus Medical, LLC v. Zimmer, Inc.*, 135 N.E.3d 150, 151 (Ind. 2019). The parties cannot, by reformation clause, allow a court to overstep the bounds of Indiana's blue pencil doctrine by adding terms. *Id.* at 155. "If a contract contains an unenforceable provision which cannot be eliminated without destroying the symmetry and primary purpose of the contract, we may not sever the provision and enforce the rest of the contract; rather, we must deem the entire contract unenforceable." *Blackburn v. Sweeney*, 637 N.E.2d 1340, 1343 (Ind. Ct. App. 1994).

So long as the employer does not materially breach the underlying employment agreement, the covenant remains enforceable even if the employer terminates the employment relationship. *Unger v. FFW Corp.*, 771 N.E.2d 1240, 1245 (Ind. Ct. App. 2002).

In state court actions, a former employer seeking a preliminary injunction to enforce a restrictive covenant must prove that: (1) it does not have an adequate remedy at law; (2) granting the injunction would not disserve the public interest; (3) it has a reasonable likelihood

of success at trial; and (4) the injury to the former employer from failure to issue the injunction outweighs the harm that the former employee would suffer from the injunction. *Vickery v. Ardagh Glass Inc.,* 85 N.E.3d 852, 859-60 (Ind. Ct. App. (2017).

Section Three

Implications of Lawyer Wellness for Corporate Counsel

Timothy A. Haley
President, Latitude Indiana
Indianapolis, Indiana

Section Three

Implications of Lawyer Wellness for Corporate Counsel…… Timothy A. Haley

Report from the National Task Force on Lawyer Well-Being

Visit the new dedicated website at lawyerwellbeing.net.

The Task Force was conceptualized and initiated by the ABA Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers (APRL). It is a collection of entities within and outside the ABA that was created in August 2016. Its participating entities currently include the following: ABA CoLAP; ABA Standing Committee on Professionalism; ABA Center for Professional Responsibility; ABA Young Lawyers Division; ABA Law Practice Division Attorney Wellbeing Committee; The National Organization of Bar Counsel; Association of Professional Responsibility Lawyers; National Conference of Chief Justices; and National Conference of Bar Examiners. Additionally, CoLAP was a co-sponsor of the 2016 ABA CoLAP and Hazelden Betty Ford Foundation's study of mental health and substance use disorders among lawyers and of the 2016 Survey of Law Student Well-Being.

To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being. The two studies referenced above reveal that too many lawyers and law students experience chronic stress and high rates of depression and substance use. These findings are incompatible with a sustainable legal profession, and they raise troubling implications for many lawyers' basic competence. This research suggests that the current state of lawyers' health cannot support a profession dedicated to client service and dependent on the public trust.

The legal profession is already struggling. Our profession confronts a dwindling market share as the public turns to more accessible, affordable alternative legal service providers. We are at a crossroads. To maintain public confidence in the profession, to meet the need for innovation in how we deliver legal services, to increase access to justice, and to reduce the level of toxicity that has allowed mental health and substance use disorders to fester among our colleagues, we have to act now. Change will require a wide-eyed and candid assessment of our members' state of being, accompanied by courageous commitment to re-envisioning what it means to live the life of a lawyer.

This report's recommendations focus on five central themes: (1) identifying stakeholders and the role each of us can play in reducing the level of toxicity in our profession, (2) eliminating the stigma associated with help-seeking behaviors, (3) emphasizing that well-being is an indispensable part of a lawyer's duty of competence, (4) educating lawyers, judges, and law students on lawyer well-being issues, and (5) taking small, incremental steps to change how law is practiced and how lawyers are regulated to instill greater well-being in the profession.

The members of this Task Force make the following recommendations after extended deliberation. We recognize this number of recommendations may seem overwhelming at first. Thus we also provide proposed state action plans with simple checklists. These help each stakeholder inventory their current system and explore the recommendations relevant to their group. We invite you to read this report, which sets forth the basis for why the legal profession is at a tipping point, and we present these recommendations and action plans for building a more positive future. We call on you to take action and hear our clarion call. The time is now to use your experience, status, and leadership to construct a profession built on greater well-being, increased competence, and greater public trust.

Bree Buchanan, Esq.
Task Force Co-Chair
Director, Texas Lawyers Assistance Program
State Bar of Texas

James C. Coyle, Esq.
Task Force Co-Chair
Attorney Regulation Counsel
Colorado Supreme Court

Important Developments

- ABA House of Delegates Adopts Lawyer Well-Being Resolution at Midyear Meeting

    - The ABA House of Delegates approved Resolution 105 at the ABA Midyear Meeting in Vancouver, which supports the goal of reducing mental health and substance use disorders and improving the well-being of lawyers, judges and law students, and urges stakeholders within the legal profession to consider the recommendations set out in *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change* from the National Task Force on Lawyer Well-Being.
    - Resolution 105 was primarily sponsored by the Working Group to Advance Well-Being in the Legal Profession, an ABA Presidential Initiative. Resolution 105 was co-sponsored by the ABA Commission on Lawyer Assistance Programs, the ABA Standing Committee on Professionalism and the National Organization of Bar Counsel.
    - ADOPTED: Conference of Chief Justices - Resolution 6 - Recommending Consideration of the Report of the National Task Force on Lawyer Well-Being

"NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices supports the goals of reducing impairment and addictive behavior, and improving the well-being of lawyers, and recommends that each jurisdiction considers the recommendations of the Report of the National Task Force on Lawyer Well-Being."

- ABA Working Group to Advance Well-Being in the Legal Profession

In September 2017, at President Hilarie Bass's request, the ABA Board of Governors created an ABA Presidential Working Group consisting of representatives from lawyer assistance programs, law firms, bar associations and malpractice insurance carriers to

examine and make recommendations regarding the current state of attorney mental health and substance use issues with an emphasis on helping legal employers support healthy work environments. Read more in ABA Journal article, "ABA works to address attorney substance use and mental health disorders." Access the Working Group website here.

In September 2017, at President Hilarie Bass's request, the ABA Board of Governors created an ABA Presidential Working Group to examine and make recommendations regarding the current state of attorney mental health and substance use issues with an emphasis on helping legal employers support healthy work environments.
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Report - National Task Force on Lawyer Well-Being

Coverage of the Report

- LISTEN: Podcast: Patrick Krill on Addiction in the Legal Industry & the National Task Force on Lawyer Well-Being (Thomson Reuters Legal Executive Institute, September 7, 2017)
- Official ABA Press Release: Growing concern over well-being of lawyers leads to comprehensive new recommendations (ABA News, August 14, 2017)
- 1Ls, Prioritize Mental Health (The Harvard Law Record, August 31, 2017)
- 4 Ways Law Firms Can Help Battle Addiction (Law 360, August 24, 2017)
- ABA releases report on improving lawyer well-being (The Indiana Lawyer, August 14, 2017)
- ABA Report Promotes Changes to Treat Addiction, Depression (The American Lawyer, August 14, 2017)
- ABA report seeks to transform attitudes on lawyer well-being (North Carolina Lawyers Weekly, September 6, 2017) *Subscription required*

- ABA works to address attorney substance use and mental health disorders (ABA Journal, December 2017)
- A Clarion Call for Attorney Wellness (Law Week Colorado, August 24, 2017)
- BigLaw At A 'Crossroads' On Mental Health, Report Finds (Law 360, August 14, 2017)
- COLAP Wellness Corner: New Report Outlines Simple Ways to Improve Lawyer Well-Being ~ By Jonathan White and Sarah Myers (Denver Bar Association, The Docket, October November 2017)
- Confronting a Legal Profession in Distress (Connecticut Law Tribune, December 15, 2017)
- Contemplating Well-Being (or, Secure your own oxygen mask before assisting others…) (ABA Health Law Section Health eSource, November 2017)
- Culture Change Needed (Virginia Lawyers Weekly, September 5, 2017) *Subscription required*
- Ethics and Lawyer Well-Being (Oklahoma Bar Journal, December 16, 2017)
- For the New Year, ABA Aims to Help Firms with Well-Being Policies (Daily Business Review, Dec. 21, 2017)
- How Dare You Send Me A Book On Addiction! Do You Think I Have A Problem? (Above the Law, August 16, 2017)
- How Law Firms Can Help Their Lawyers' Well-Being (Texas Lawyer, August 16, 2017)
- How Lawyers Need to Be Healthier: Q&A (Bloomberg Law Big Law Business, August 6, 2017)
- Keeping Lawyers Mentally Fit Is on the Docket (Bloomberg BNA, August 24, 2017)
- Judicial well-being, Judicial Ethics and Discipline, a blog of the Center for Judicial Ethics of the National Center for State Courts
- Lawyers and Addiction (Illinois Bar Journal, September 2017)
- Law: Mental health resources lacking for attorneys (Bizwomen, August 16, 2017)
- Lawyer Well-Being: A Call to Action (Ethical Grounds, The Unofficial Blog of Vermont's Bar Counsel, August 18, 2017)
- Lawyer well-being and lawyer regulation (Bench & Bar of Minnesota, December 1, 2017)
- Lawyer Well-Being: Creating A Movement To Improve The Legal Profession (Forbes, August 15, 2017)
- Lawyer Well-being: Let's Own This Problem (Wisconsin Lawyer, November 2017)
- Lawyer wellness should be a priority, report says (Minnesota Lawyer, August 25, 2017)
- Mental health issues strike a cord with attorneys (USA Today News-Press, Nove,ber 17, 2017)
- NABE Comm panelists share thoughts on mental health, bar events, and the role of lawyer assistance (ABA Bar Leader, November/December 2017)
- NABE Communications Section Workshop panel discusses how to help deliver a life-saving message (ABA Bar Leader, November/December 2017)
- National Task Force Report: Here, Now, a Watershed for a Lawyer's Well-Being (Thompson Reuters Legal Executive Institute, August 14, 2017)

- The Report of the National Task Force on Lawyer Well-Being and the Role of the Bar Admissions Community in the Lawyer Well-Being Movement (NCBE The Bar Examiner, Summer 2018)
- Shining a Light on Lawyers' Substance Abuse and Mental Health (Illinois Supreme Court on Professionalism 2Civility Blog, August 15, 2017)
- Some Law Schools Take the Lead in Students' Well-Being, Report Finds (The National Law Journal, August 17, 2017)
- State Lawyers' Group Looks To Improve Attorney Well-Being (Wisconsin Public Radio News, August 15, 2017)
- Substance Abuse: Tragic Story Highlights Need for Culture Change (State Bar of Wisconsin Inside Track, August 16, 2017)
- The time to help lawyers with mental health services is now, new report says (ABA Journal, August 14, 2017)
- The Lawyer Well-Being Movement: A National Task Force Recommends 44 Ways to a Healthier Environment for Attorneys (Texas Bar Journal, October 2017)
- To Be a Good Lawyer, One Has to Be a Healthy Lawyer, New Report Finds (IAALS Online, November 16, 2017)
- What Can Law Firms Do To Promote Well-Being? Suggestions From National Task Force on Lawyer Well-Being (Jeena Cho, August 20, 2017)

DEFINING LAWYER WELL-BEING

A CONTINUOUS PROCESS IN WHICH LAWYERS STRIVE FOR THRIVING IN EACH DIMENSION OF THEIR LIVES:

EMOTIONAL

Value emotions. Develop ability to identify and manage our emotions to support mental health, achieve goals, & inform decisions. Seek help for mental health when needed.

INTELLECTUAL

Engage in continuous learning. Pursue creative or intellectually challenging activities that foster ongoing development. Monitor cognitive wellness.

OCCUPATIONAL

Cultivate personal satisfaction, growth, and enrichment in work. Strive to maintain financial stability.

PHYSICAL

Strive for regular activity, good diet & nutrition, enough sleep, & recovery. Limit addictive substances. Seek help for physical health when needed.

SPIRITUAL

Develop a sense of meaningfulness and purpose in all aspects of life.

SOCIAL

Develop connections, a sense of belonging, and a reliable support network. Contribute to our groups and communities.

Mitigating wellbeing challenges for in-house lawyers

Thursday 7 March 2019

In-house counsel, due to the nature of their role, face unique wellbeing challenges, among them the strains brought by tight budgets and working in an environment where many colleagues may be non-legal staff. Susie Lunt reports on how these challenges can be mitigated.

Thanks to long hours, tight budgets and a lack of understanding by non-legal colleagues, mental health issues are far from unknown to in-house lawyers.

But, while the unique stresses of their roles present unarguable wellbeing challenges, according to industry professionals these can be mitigated – particularly with targeted leadership support.

Michelle Bakhos, counsel at Michelle Bakhos Law Practice and Co-Chair of the IBA Young Lawyers Committee (YLC), says life for in-house lawyers is both stimulating and also challenging, thanks to their duty of confidentiality and because they operate within a diverse group of employees who are non-lawyers.

‘As such, they may find they cannot discuss certain things with colleagues, which can leave them feeling alone and under pressure to deal with their wellbeing concerns in private,’ says Bakhos.

Indeed, Elizabeth Rimmer, Chief Executive of mental health charity LawCare, which focuses on prevention, education and support in the United Kingdom and Ireland, says significant research shows higher rates of anxiety and depression for lawyers across the board in comparison to the general public.

‘There’s something about the culture and practice of law having an impact on people – lawyers are the sort of people who are perfectionist and driven and find it hard to admit they are struggling,’ Rimmer notes. ‘At LawCare, the two most common reasons which contribute to lawyers feeling stressed are working long hours and difficult relationships with colleagues, where they don’t feel well supported.’

‘They like to fix other people’s problems, not their own, have a fear of making mistakes and the culture is very pressured, which can create the perfect storm,’ adds Rimmer.

Rimmer says in-house lawyers often are expected to work across a multitude of matters at the same time and to respond very quickly. ‘It can be tough trying to explain to the part of the business you might be supporting what the legal implications are of something they want done yesterday – and that you might be putting the brakes on that.’

‘People don’t always understand what the legal function is and the pressure on lawyers in terms of delivering legal obligations; in a law firm, they’d get that, as everyone around is a lawyer,’ explains Rimmer.

In-house lawyers in smaller organisations can feel isolated in a small legal team: ‘They may be sole counsel and not have colleagues who they can bounce legal things off.’

Mitigating these challenges takes several forms.

Rick Smith (not his real name), a legal counsel, says key steps include integration into the business and facilitating and nurturing relationship-building with other departments and colleagues.

‘An example of this is doing a legal roadshow, where lawyers present their team’s function, role, capacities, preferred method of instruction, et cetera, and thereby educate the business and, in turn, build partnerships,’ he says.

Smith believes organisations should ensure legal teams are well-resourced and supported, ‘having external counsel on standby for busy periods, so work can be out-sourced accordingly’.

Other pointers include regular, informal one-to-ones with managers and teams to encourage open discussion regarding wellbeing and mentor or buddy systems with colleagues across the business.

Rimmer says the nub of the matter is understanding the pressure in-house lawyers are under. ‘Are senior managers aware, are there questions about how they are coping with their work, are they able to recognise warning signs that something may be going wrong?’

‘Firms often have a wellbeing policy, but it doesn’t necessarily translate into people feeling better supported in the workplace. They need to practice what they preach.’

Rimmer explains that good leadership is essential. ‘Wellbeing in the workplace starts at the top and we need to see senior people talking openly about mental health and wellbeing,’ she says, describing this as a leadership duty. ‘People are at their best if they are well supported, mentally healthy and thriving in the workplace and that comes from the top.’

‘Wellbeing in the workplace starts at the top and we need to see senior people talking openly about mental health and wellbeing. People are at their best if they are well supported, mentally healthy and thriving in the workplace and that comes from the top’

Elizabeth Rimmer, Chief Executive of LawCare

LawCare asks employers to embed mental health in training and supervision, communicate policies and do ‘simple things’, such as supporting Mental Health Awareness Week.

Bakhos says in-house lawyers should have an avenue to discuss their concerns, whether outside the organisation or with a professional, to avoid stresses getting out of hand. ‘If you are a part of a legal team, this can be a good support network to leverage on a day-to-day basis; I find being part of teams outside of work very helpful to get a change of scenery and perspective, for example, sports groups, yoga and associations like contributing to a committee in the IBA.’

She says general counsel can also support by being proactive in talking about concerns, taking steps to check in with their people and discussing a self-care plan. ‘Whilst lawyers may have high mental and professional resilience, acknowledging prevention is better than cure is a good start to work towards supporting team members before it gets out of hand.’

Wellbeing is an issue for younger professionals, too.

‘Young lawyers in the in-house world keen to please and make an impact in their organisations may overcommit to their internal clients, which can quickly build,’ says Bakhos.‘It is important to set boundaries and take control of your time.’

‘One of the reasons the YLC was created was to support young lawyers in their foundational years of practice, including managing challenges and wellbeing.’

Amy Clowrey, Chair of the Junior Lawyers Division of the Law Society of England and Wales, says employee wellbeing is also ‘extremely important’ to her committee.

She says that firms need to be doing more to work on their culture. ‘Legal training should be preparing junior lawyers with the skills to build resilience to work in a stressful profession,’ adding that junior lawyers should feel confident enough to speak up and break stigmas, with the upside that a positive working culture means a more productive workforce and better results.

‘Firms that have happy staff have good retention rates and keep staff – the legal profession risks losing its best talent if lawyers are not supported.’

Among other initiatives, Clowrey’s committee is in the third year of a resilience and wellbeing survey, offers employers best practice guidance and signposts charities and other resources.

What needs to change to improve mental health in the legal profession? (171)

By Lauren Henderson & Bill Henderson on June 21, 2020

POSTED IN BIGLAW, DATA POINTS, LEADERSHIP

Word cloud generated from final question on ALM Legal Intelligence Mental Health & Substance Abuse Survey (2019).

Lawyers and allied professionals in their own words.

The title of this article is based on an open-ended question presented to more than 3,800 professionals who responded to ALM Intelligence's recent Mental Health and Substance Abuse Survey (ALM Survey).

Granted, this is a population of very busy people, so not everyone took the time to fill out the text box with their proposed solutions or suggestions to the serious challenge of mental health. That said, 1,882 lawyers and allied professionals shared their views, with responses that ran the gamut from hilarious to blunt to deeply pessimistic. One of us (Lauren) just graduated

with a degree in Anthropology and had the time, skill, and curiosity to read *every response*, looking for patterns and themes. The other (Bill) is skilled in quantitative research and has a strong grasp of the legal marketplace. The open-ended question at the end of the ALM Survey gave us a perfect opportunity to leverage our respective skills.

What did we learn? Here are a few findings presented in more detail below:

- In both volume and substance, women professionals had *a lot* more to say than their male counterparts. If holding on to this talent is important, we wonder, "Is anyone listening?"
- Within law firms, allied professionals appear to be the most tuned in to the mental health challenges, though all professionals are in broad agreement the law firm business model and related cultural factors are significant drivers of unhappiness, anxiety, and stress.
- Cutting against stereotypes, older legal professions tended to be most in tune with mental health awareness and stigma issues, yet cutting in the opposite direction, they were also less likely–often by relatively wide margins–to cite specific causes, such as high billable hour quotas, unrealistic expectations, lean staffing, or inability to disconnect from work.

The careful reading of the lawyers and allied professionals in their own words is highly informative and, at times, somewhat heartbreaking. Yet, it's possible that what we are observing are "market" conditions driven by demanding judges, ambitious partners, and the business needs of clients with no shortage of choices.

This post is organized into three sections. In Section I, we briefly summarize the composition and findings of the ALM Survey, as its multiple-choice format provides a useful backdrop to the open-ended question on mental health in the legal profession. In Section II, we discuss the characteristics of the professionals who answered the open-ended question and the coding system we developed, providing specific examples of each category. In Section III, we present a mix and quantitative and quantitative findings and our collaborative interpretations.

I. Overview of ALM Mental Health & Substance Abuse Survey

The ALM Survey is based on data gathered in November and December of 2019 by the research team at ALM Legal Intelligence, with questions covering several categories, including respondent demographics, mental health, substance abuse, billable hour pressures, work-life balance, adequacy of staffing and personal stress levels.

The full 3,800 respondent sample breaks down as follows:

- 51.1% female, 48.7% male, 0.2% transgender or other.
- 40.6% under 35 years old, 27.5% 35-44, 17.1% 45-54, and 14.9% 55 and over.
- 34.1% in 1000+ lawyer firms, 28.5% 501-1000, 18.8% 201-500, and 18.7% < 200.
- 72.4% of respondents in the US, 12.7% in the UK, with the remainder scattered across North America, South America, continental Europe, Africa, Asia, Australia, and New Zealand.
- The top five cities were New York, Washington D.C., Chicago, San Francisco, and Los Angeles.
- The sample reflects a relatively homogeneous ethnic composition (all too common within the legal profession), with 84.4% of the respondents classifying themselves as white or Caucasian, followed by 5.2% Asian and 3.6% Hispanic or Latina/o.

In terms of job categories, Associates accounted for 50.2% of the sample, followed by Equity Partners (18.6%), Nonequity Partners (12.3%), Other Attorney Timekeepers (8.8%) and a wide array of professional staff that we have grouped as Allied Professionals (10.0%).

To be clear, the ALM Survey is a survey of legal professionals working inside large (or relatively large) corporate law firms, which is only a subset, albeit an influential one, of the broader legal profession.

With that caveat, the survey results as published by ALM Legal Intelligence contain many important and surprising findings regarding the state of mental health and wellness inside corporate law firms. For example, ALM's multiple-choice questions yielded the following results:

- 64% of respondents reported feelings of anxiety; 78.1% knew of colleagues experiencing anxiety.

- 73.4% reported that work conditions were contributing to the respondent's *own issue(s)* of anxiety, depression, substance abuse, or other mental health problems.
- The majority of respondents cite four workplace issues negatively impacting their mental well-being: always on call / can't disconnect (72.0%); billable hour pressure (63.6%), lack of sleep (58.6%), and client demands (58.8%).
- 63.6% of respondents struggle to use all their vacation time; and when on vacation, 72.5% feel unable to disconnect.
- 60.6% of respondents believe their firm has a sincere concern for their mental health, yet only 36.8% believe that concern translates into changes to the firm's practices and business model.
- Two-thirds of respondents (67.0%) report that work has caused their personal relationships to suffer. Nearly three-quarters (74.1%) acknowledge that the profession has had a negative effect on their mental health.

Suffice it say, corporate law firms have a serious problem on their hands.

That said, the professionals working inside law firms are among the world's smartest and most talented problem solvers. Thus, when they are asked in an open-ended way what needs to be changed to address these issues, doesn't it behoove us to carefully listen to what they have to say?

Fortunately, the ALM Survey gave us the opportunity to do just that.

For the purposes of this post, we sidestep the important topic of substance and alcohol abuse, which, according to the ALM Survey, is less pervasive than the broader issue of mental health and well being.

II. Characteristics and coding of open-ended responses

More than 3,800 legal professionals responded to the ALM Survey. However, slightly less than half (1,882), took the additional time to answer what appears to be the final item on the survey, which was an open-ended question that reads, "What do you think needs to change about the legal profession to improve the mental health and well-being of its members?"

The advantage of open-ended questions is that respondents are free to express exactly how they feel, as they control the content, language, emotion, and length of their answer. The primary downside to all this richness and nuance is the need for skilled researchers to carefully sift through and organize the responses so they can be analyzed and interpreted into something that can be acted upon. (Our five-category coding system is presented in detail in Section II.B.)

A. Multiple responses per respondent

A key feature of this type of qualitative research is that a single narrative answer can fall into more than one response category. Thus, our coded sample of 1,710 legal professionals yielded a total of 2,920 discrete responses or an average of 1.51 per individual. (Including noncoded responses, the average was 1.81.)

Regarding the volume of discrete responses that fit the five-factor coding system, as shown in the table below, some groups of respondents had a lot more to say than others.

Variable	Value	Avg. # Responses
Title	Associate	1.71
	Allied Professional	1.52
	Nonequity Partner	1.45
	Other Attorney Timekeeper	1.44
	Equity Partner	1.27
Gender	Women	1.70
	Men	1.38

Firm Size	1000+ lawyers	1.63
	501-1000	1.54
	201-500	1.52
	< 200 lawyers	1.45
Age	Under 35	1.70
	35-44	1.57
	45-54	1.46
	55 or older	1.28

Associates (1.71) and Allied Professionals (1.54) seem to have the most to say about how to improve mental health and well being, versus Equity Partners, who were the least voluble (1.27). Similarly, women (1.70) tend to hit more categories than men (1.38). There is a clear positive correlation between firm size and volume of comments, moving from an average of 1.45 responses in firms of 200 or less to 1.63 responses in firms of over 1000. Finally, legal professionals under 35 (1.70) wrote a lot more than those over 55 (1.28). All of these differences are statistically significant at the $p < 0.01$ level.

B. Coding the data

The task of organizing this rich quantitative data fell to Lauren Henderson, who recently completed her B.A. in Anthropology from the University of British Columbia. Indeed, reading and categorizing narrative comments is very much in her professional wheelhouse. Step one in this process was reading the narratives of all 1,882 respondents while jotting down potential themes and patterns. Step two was developing a coding system and applying it to the sample. Step three was the use of statistical methods (correlations, factor analysis, significance tests) to identify similarities among categories and thus guide their consolidation.

The result is the following five categories, which are roughly even in total number of responses:

Category	Definition
Unrealistic Standards and Lean Staffing (n = 668)	Noting how unrealistic demands from clients and high expectations from partners fuel unhealthy work habits. Also, complaints about the lack of adequate staffing and the inability to disconnect without consequences.
Billable Hours (n = 622)	Focusing on lowering or abolishing billable hour requirements and quotas in favor of alternative performance metrics; noting the detrimental impact on mental well-being; pointing out misguided emphasis on quantity over quality and profit over the welfare of people.
Work-Life Balance (n = 618)	Requests for a healthier work-life balance and the ability to take time off with family, for emergencies, or for mental health without feeling as though their performance or career trajectory will be negatively impacted.
Mental Health and Support (n = 564)	Emphasizing lack of awareness or care for mental well-being by partners and management. Requests to destigmatize conversations about mental health in the workplace and to protect affected individuals from professional and personal discrimination. Appeals for more and better resources.
Culture and Industry Change (n = 448)	Comments appealing for a change in the hierarchical mentality within the legal field; insinuating poor treatment by higher-ups and an inequitable work environment. Noting that current culture is counterproductive to well being and/or promotes alcoholism and other unhealthy habits.

Specific examples are useful in understanding the content of each category.

Unrealistic Standards and Lean Staffing:

"The competitive pressure has to be reduced. We are in internal competition and external competition, and we exacerbate it by reporting annual numbers to things like the AmLaw100 … If a firm slips in the standings, they 'can't recruit'. It's a treadmill with one button: 'Faster'. … No one should be surprised that the tradeoff is mental health and stability." *Male equity partner, 45-54 years old, 1000+ lawyer firm.*

"Trying to go leaner and leaner in a race to the bottom becomes counterproductive at a certain point, not least because it ends up putting so much pressure on associates and staff that their mental health and morale is adversely affected. … [S]etting reasonable client expectations … will not necessarily result in lost clients. Many clients respect boundaries, and, with appropriate boundaries, attorneys are happier and, consequently, more productive." *Female associate, 35-44 years old, < 200 lawyer firm.*

Billable Hours:

"No more billable hours and eliminate origination credits – these two things cause extreme competition within firms and are basically the sole factors that determine compensation; billable hours cause clients to be untrustworthy of bills; it causes unethical billing; it favors men; and it has no bearing on the quality of an attorney's work. Clients would be appalled to know how firms compensate their attorneys, if they don't know it already. … [E]liminate as much as possible the antiquated white male fraternity system . … A lot needs to be fixed." *Female nonequity partner, 55+ years old, 501-1000 lawyer firm.*

"Law firms should stop billing by the hour as it is out of step with the way our clients' businesses run, out of step with modern technology, and creates perverse incentives. … From what I've observed in other industries it appears corporations value [the] mental health of employees more because they are focused on the long term. … [Law firm partners] prioritize short term profitability over employee well-being, employee retention, and adapting to new technologies and changing business models. … [I]f the firms aren't adopting the technology necessary to make leaner staffing feasible, the pressure falls on the attorneys." *Female associate, 35-44 years old, < 200 lawyer firm.*

Work-Life Balance:

"The focus on being available around the clock and working in lean teams has to change. The impact on sleep and mental health cannot be overstated. I think we are working in industrial revolution-level distress, except instead of poisonous gasses and dangerous machines, we are incurring brain damage due to lack of sleep and complete inability to disconnect, ever." *Female associate, 25-34 years old, 501-1000 lawyer firm.*

"There need to be more options to work less and make less money, without this being like you 'can't stand the heat'. I can stand it, I just don't want to.

Surely it would be better for them to allow me to contribute my specialism (sometimes from home) with reasonable targets than just have me leave when I finally crack. I know others feel this way too." *Female other-attorney timekeeper, 35-44 years old, 1000+ lawyer firm.*

Mental Health and Support:

"We need to be more honest and communicate better. Our fear of causing offense has led to isolation borne of cotton candy communications — i.e conversations that are 10% sugar, 90% air, and contain absolutely no intellectually nutritional value. A key to happiness in being embedded in a community and the key to forming a good community is to establish one based on trust and acceptance. Unfortunately, It is increasingly difficult to trust others who pose a threat and seem more willing to judge than accept … ." *Male equity partner, 55+ years old, < 200 lawyer firm.*

"Destigmatize mental illness and addiction. Normalize mental illness and addiction. I spent half my career in addiction and half in recovery. No one in my firm, including my direct supervisors and HR, has ever expressed any support at all for people who are suffering mentally, aside from providing health benefits and an EAP pamphlet. The assumption is that an addicted or mentally ill lawyer can't do the job, so no one talks about it. This is wrong." *Female nonequity partner, 55+ years old, 1000+ lawyer firm.*

Culture and Industry Change:

"[T]here needs to be a cultural shift in the industry. … Women have it the hardest, as I have personally seen women pushed to one side as soon as they have a family. … [t]here is a culture that the client is king, so we can go without sleep for 3 or 4 nights … No partner in a law firm is ever going to say 'no' to a client, and when you are dealing with 5 or 6 transactions at the same time you are pulled in too many directions. … Discrimination is widespread, sexism is very common and there is very little regard for people's well-being and mental health." *Female associate, 25-34 years old, < 200 lawyer firm.*

"The 'caste' system of attorney vs. professional staff needs to be removed from our day-to-day. Everyone should be treated equally and with respect. I can't believe that in (almost) 2020 that we still go through this. I started my career at an AmLaw 100 firm where my first manager told me that I couldn't communicate a certain way due to not being an attorney. Attorneys at the firm were nice to me and saw that I was competent, but my manager didn't see it

the same way." *Female allied professional, 25-34 years old, 1000+ lawyer firm.*

Multiple categories:

Some responses, of course, touched on multiple themes. Below is an excerpt from one of the 48 responses that were coded a "yes" for four of the five categories:

"[(1) **Culture** and (2) **Unrealistic Expectations**:] Language needs to change. Describing someone as 24/7 merely perpetuates the idea that everyone must be on call at all times in order to succeed. People should work more as teams so that expertise is not limited to a single person. When it's a single person that person is effectively on call at all times. People should be encouraged and rewarded for working as teams as opposed to holding everything close to the vest so they get more credit for it. [(3) **Mental Health**:] There needs to be more tolerance for people who need time to take care of their mental health. [(4) **Billable Hours**:] Firms that are focused on billable hours should give lawyers credit for a modest number of health hours per month (e.g., 2-3 hours/month) so people won't put off taking care of their health because they need to meet their billable hours. Firms should focus less on the bottom line and more on the well being of their people (which sadly I don't believe will ever happen)." *Female Equity Partner, 55+ years old, 501-1000 lawyer firm.*

C. Noncoded responses

The overall narrative sample in the ALM Survey contained 3,413 discrete responses provided by the 1,882 respondents. However, 493 responses (14.4%) did not fit into any of the five coded categories. Likewise, 172 legal professionals (9.1%) were excluded from analysis because their narratives proved to be too narrow or idiosyncratic for coding. Thus, the coded sample consisted of 2,920 discrete responses from 1,710 individual respondents.

This is not to say, however, that the noncoded responses lack research value. Our coding system was applied without any knowledge of demographic attributes. Nonetheless, male, older professionals, and equity partners made up an outsized proportion of idiosyncratic noncoded replies.

What was on their minds? Here are some examples:

- “People need to suck it up and just do their jobs. … [Q]uit complaining and always making excuses for poor work or non-performance!” *Male equity partner, 55+ years old, < 200 lawyer firm.*
- “When my parents and my generation were coming along, we were too busy focusing on how to be successful to have time to indulge in micro-analysis of our behaviors. If you think I’m not sympathetic to all of this, you are right!” *Male equity partner, 55+ years old, 501-1000 lawyer firm.*
- “Stop putting together obviously biased surveys like this. What a joke! … I can see it now: Law Firm Stress at Crisis Levels, yadayadayada.” *Male equity partner, 55+ years old, 1000+ lawyer firm.*
- “Get rid of women attorneys and computers.” *Male associate, 25-34 years old, 1000+ lawyer firm.*

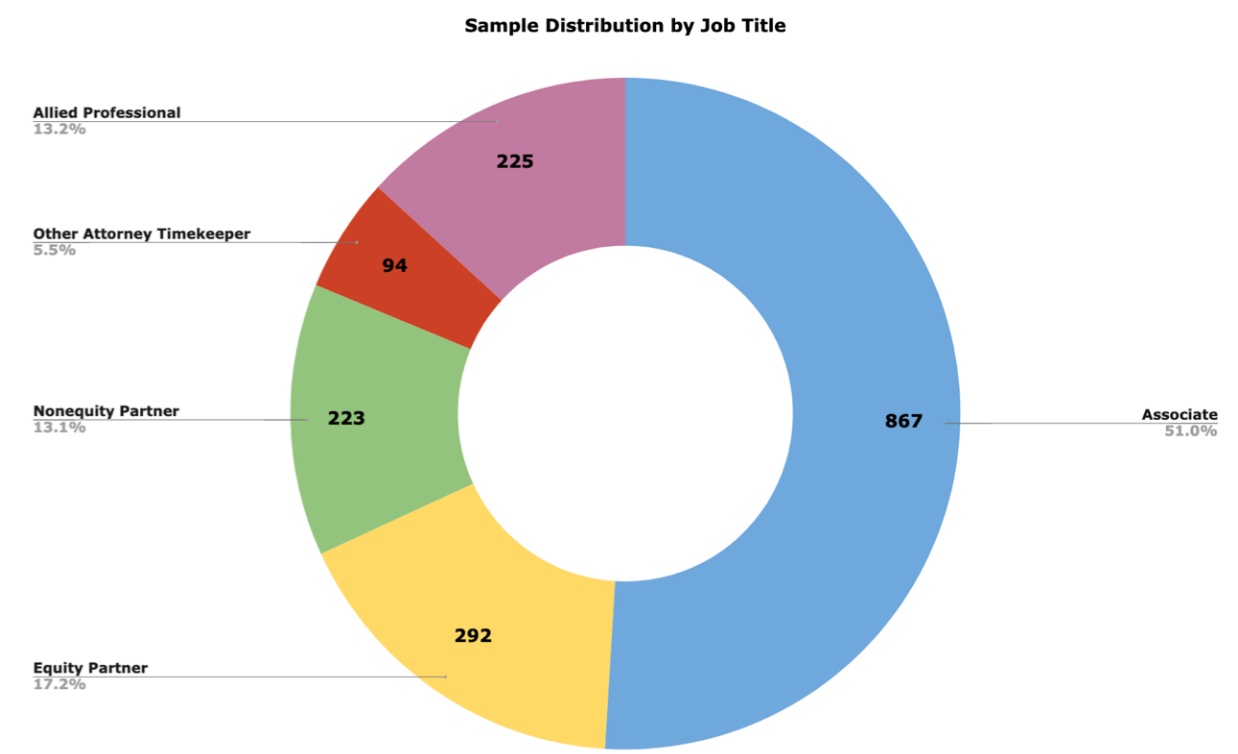
To the extent we can see a common theme across these comments, the total volume of similar responses (roughly a dozen) is not enough to justify a freestanding category.

III. Findings

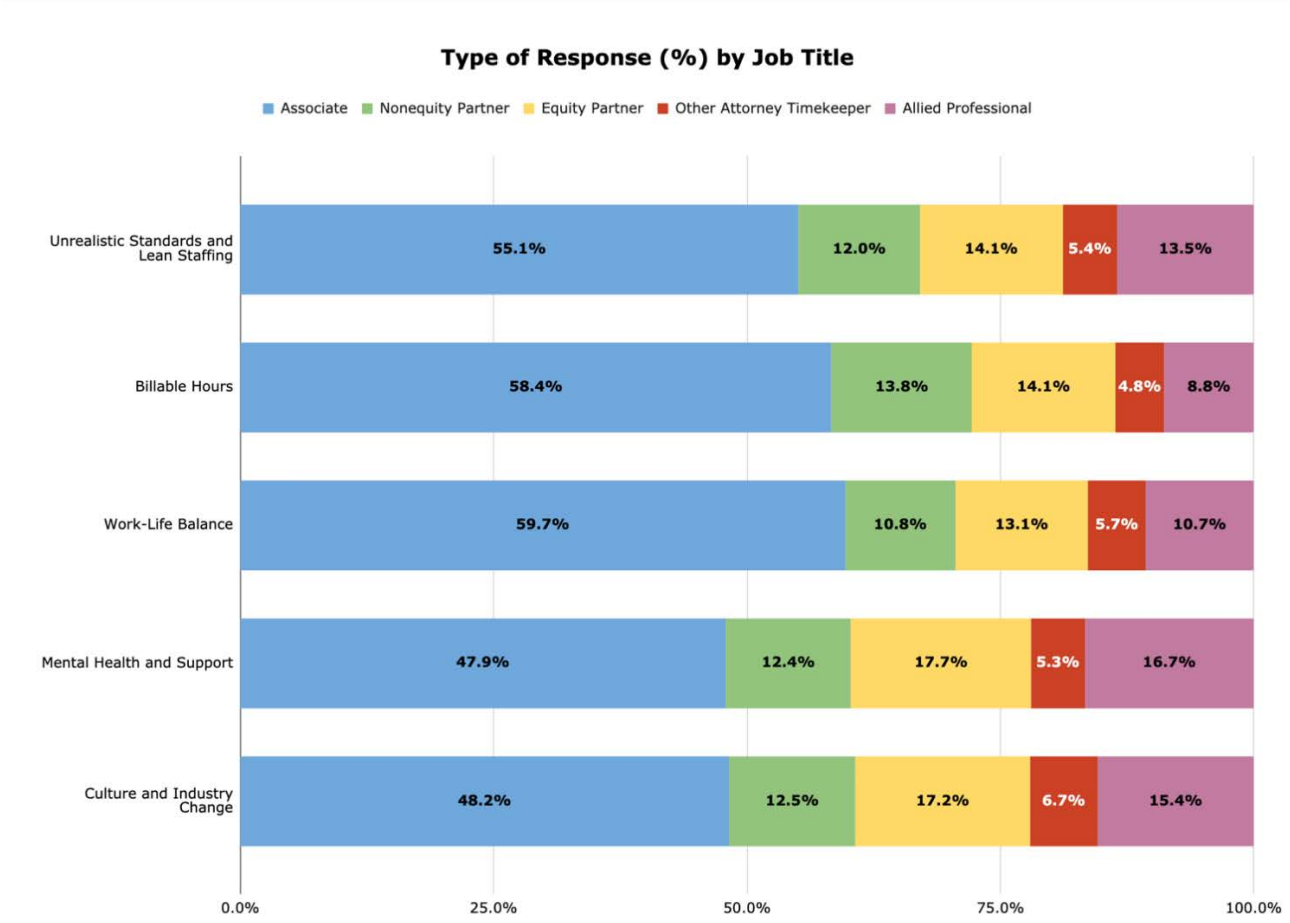
As discussed in Section II, the responses to the open-ended mental health and well-being question were organized into five thematic categories. In the Findings sub-sections below, we evaluate how the importance of these themes vary (or stay the same) across the four dimensions–job title, gender, age, and size of firms–included in the ALM data. We also offer some final interpretive remarks.

A. Job Title: Difference roles see different things

Below is a breakdown of the number of respondents by job title:



[click on to enlarge]Of the 1,710 respondents who provided a response to the open-ended question that fit our five category coding system, the majority (51.0%) where Associates. However, because Associates were, as a group, more voluble than the other respondents (see Section II.B, supra), they provided a larger proportion of overall coded responses (54.3%).
The bar chart below summarizes the coded responses by job title:



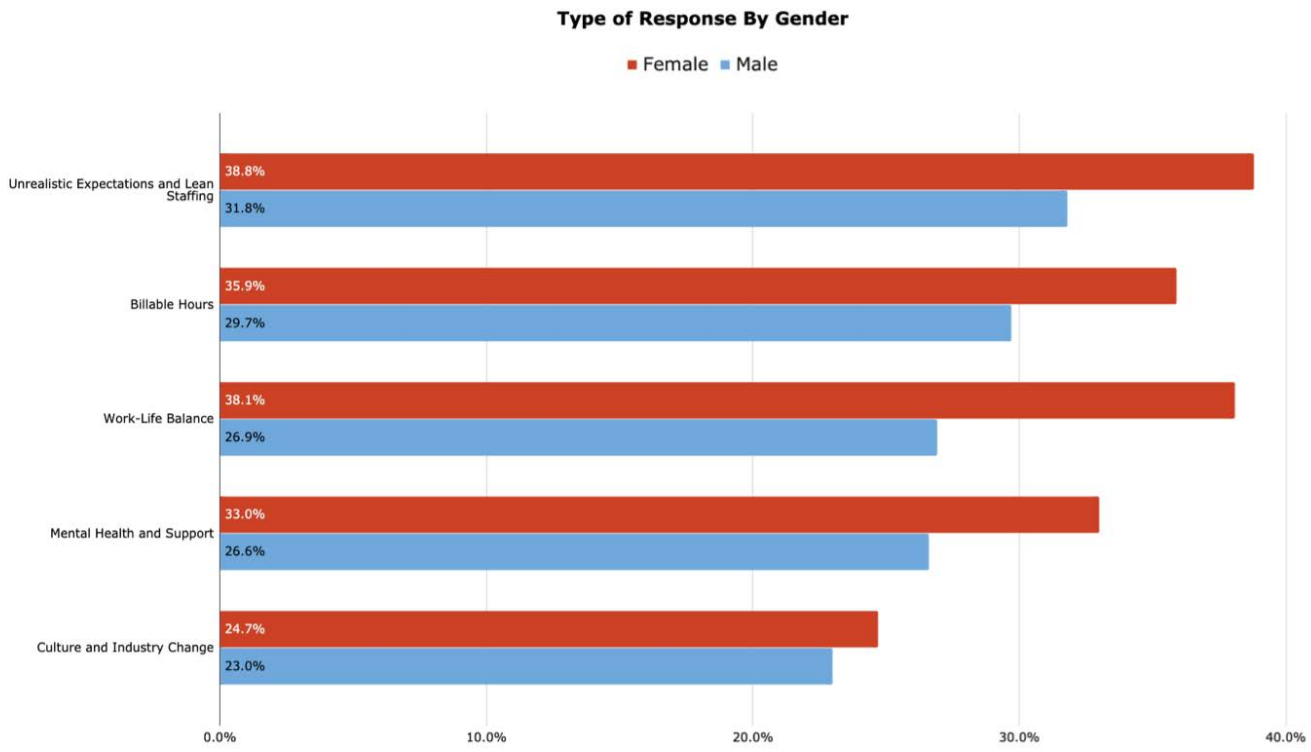
[click on to enlarge]Associates appear to be more focused on the three issues that affect workload (Unrealistic Standards, Billable Hours, and Work-Life Balance), as each category has a higher percentage than the 54.3% baseline for total Associate responses. These concerns were partially shared by Nonequity Partners, who provided 12.3% of the coded responses but were overrepresented in Unrealistic Standards (14.1%) and the Billable Hour (13.8%).

In contrast, Equity partners, who account for 15.1% of the coded responses, are disproportionately focused on Mental Health and Support (17.7%) and Culture and Industry Change (17.2%). Likewise, Allied Professionals, who make up 12.8% of coded responses, are less likely to offer suggestions related to the Billable Hour (8.8%) or Work-Life Balance (10.7%) but are much more attuned to Mental Health and Support (16.7%) and Culture and Industry Change (15.4%).

B. Gender: Women professionals are speaking up. Are we listening?

As a group, the female professionals in the sample provided a large volume of suggestions on how to improved mental health and well being in the legal profession. Women accounted for 55.9% of respondents who provided a coded reply (n =953) yet supplied 58.4% of the number number of responses (n= 1705).

The bar chart below summarizes coded responses by gender:



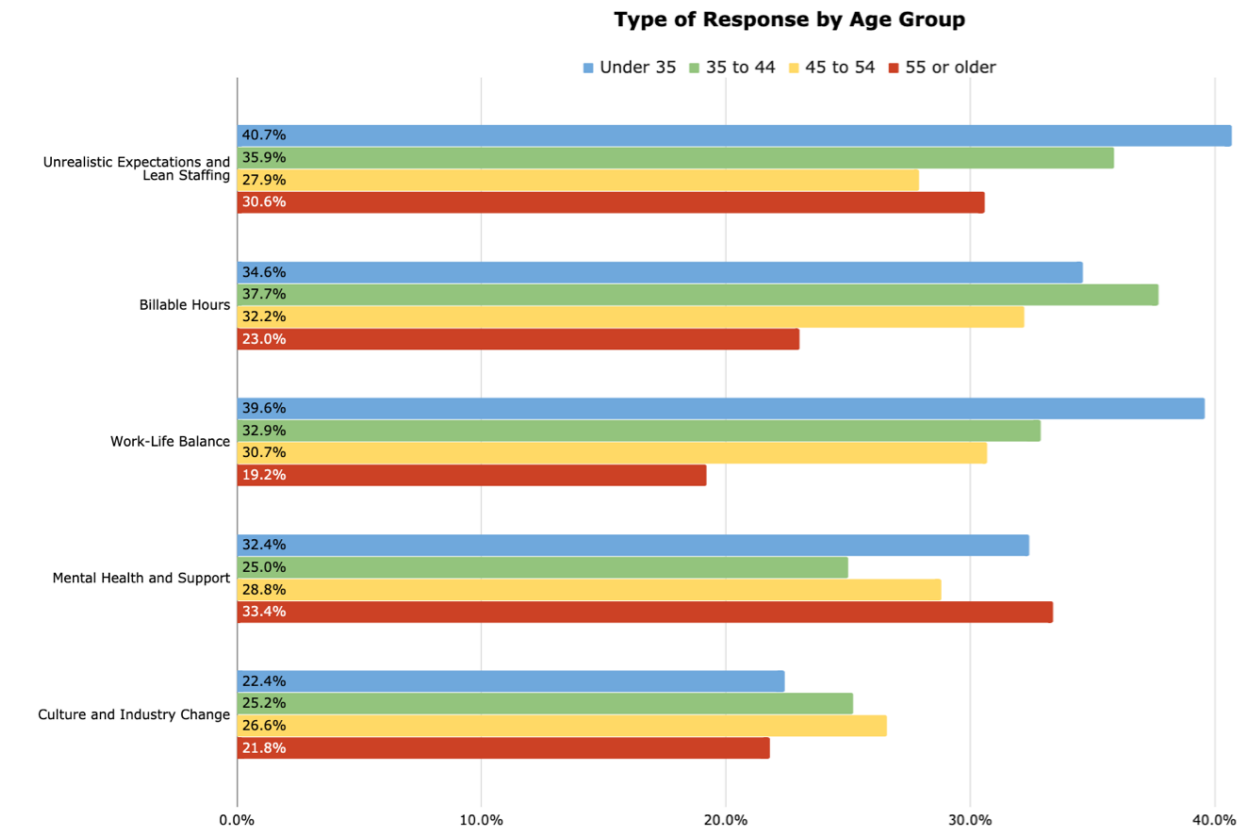
[click on to enlarge]In all five categories, female professionals were more likely than their male counterparts to make a comment or suggestion, with the largest differential for Work-Life Balance. Here is an example of a Work-Life Balance response that may be indicative of significant gender issues:
"The ability to disconnect is non-existent, so much client pressure and internal pressure in BigLaw. I'm on track to bill 2,150 hours this year and I have a 19-month old baby. This set-up is not sustainable and completely unhealthy. Unsure how to fix the problem." *Female Associate, 25-34 years old, 501-1000 lawyer firm.*

Among the five categories, one relative similarity is noteworthy: Only the last category (on Culture and Industry Change) does not reflect a statistically significant difference between male and female responses. In short, this category is a unanimous issue regardless of gender.

C. Age: Predictable differences, surprising consensus

As noted in Section II, the younger the respondents, the more voluble they were on comments or suggestions that fit one of our five coded categories.

The bar chart below summarizes coded responses by age:



[click on to enlarge]The key takeaway to the above chart is similar to the breakdown by job title—younger professionals are directing their suggestions to categories related to workload (Unrealistic Standards, Billable Hours, and Work-Life Balance) while older professionals are more attuned to issues of Mental Health and Support.
With this in mind, it would be research malpractice if we did not give voice to the *intensity* of sentiment of younger legal professionals regarding their unhealthy work conditions.

“There is an expectation, especially at the Associate level, that we need to go well above and beyond the ‘base’ requirements of our jobs. Because we are so connected to everything we do, you feel behind if you’re not constantly responding to email or addressing client problems because you know that

each attorney is competing with each other innately–for partnership, bonuses, raises, recognition, etc. at every level. Law has a culture of work that becomes pervasive to nights and weekends. The nature of billing means our entire days need to be accounted for, and sometimes the only way to hit your billable hour numbers is to sacrifice your well-being to make them." *Male associate, 25-34 years old, < 200 lawyer firm.*

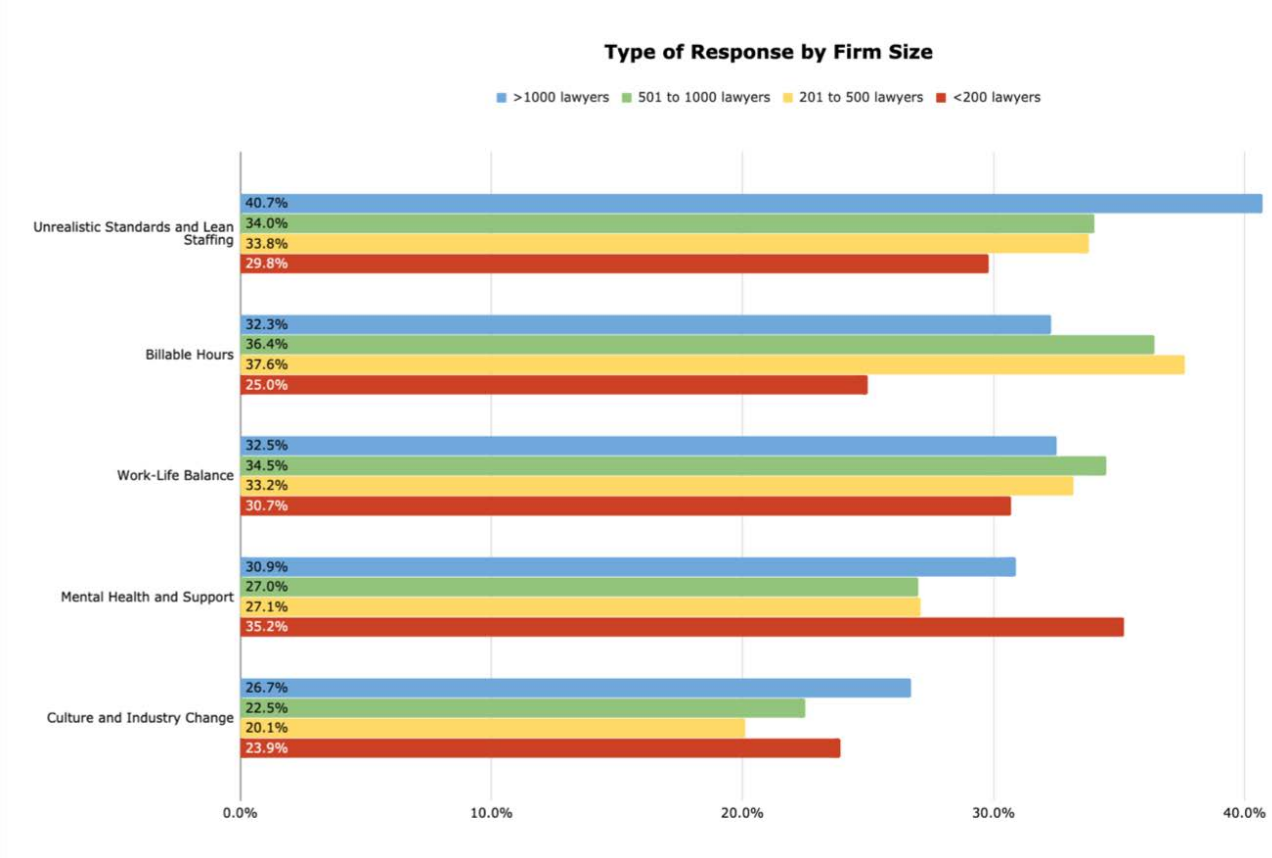
"Lawyers need to be willing to tell clients with unreasonable demands that their demands are unreasonable. It is routine for senior lawyers to dump work on junior lawyers with the statement 'I know this sucks, but this client refers a lot of work to us and we can't push back on any of their requests.' You can. If you can't make a practice work without making people miserable, you don't deserve a legal practice." *Male associate, 25-34 years old, 1000+ lawyer firm.*

Somewhat ironically, a second, more subtle finding is the *absence* of an age effect on the issue of Culture and Industry Change. Specifically, a relatively similar and sizeable proportion of young, middle-aged, and older legal professionals believe that changes in law firm culture and the broader legal industry are necessary to make substantial progress on mental health and wellness.

D. Firm Size: Doesn't matter much to mental health and wellness

Although the ALM Survey is framed as a measure of mental health and wellness in the legal profession, the sample itself is limited to legal professionals working in corporate law firms. Yet, the inclusion of a law firm size variable enables us to explore whether these issues vary in midsized versus large versus mega law firms.

The bar chart below summarizes coded responses by age:



[click on to enlarge]In general, there are more similarities than differences, with only one type of response—Unrealistic Standards and Lean Staffing—reflecting a linear relationship based on size. Further, Unrealistic Expectations is the only category where the difference between < 500 lawyers and 500 + lawyers is statistically significant.
Some might find it surprising that the mega firms (1000+) are not also the firms with the highest proportion of responses for Billable Hours and Work-Life Balance. Yet, this could be a geographic effect, as it is often the case that lawyers working in the foreign satellite offices are often not under the same workload pressure as lawyers working in large offices. Unfortunately, we lack the data to isolate such effects.

Regarding differences, legal professionals in “smaller” large firms (< 200) are less likely to cite billable hours pressures as a problem for mental health and wellness. Further, this same group was also more likely to give responses focused on a lack of awareness and support around mental health issues.

Finally, once again, we see an absence of meaningful differences on the issue of Culture and Industry Change. Below are several examples of essentially

the same sentiments coming from younger, middle-aged, and older legal professionals:

"The legal community needs to stop adopting the mentality of the older generation. The current partners at many firms are of the mindset that one should work as hard as possible for as long as possible because that is how one 'gets ahead.' I believe the attitude should change to encourage hard work, but recognize that a balance is necessary. … There is nothing wrong with a work-life balance." *Female associate, 25-34 years old, < 200 lawyer firm.*

"I think the most important change is for people at the leadership levels to understand that these issues are not a result of millennial weakness or whining … [which is] an attitude that … exists at the associate level as well. … The world has changed quite a bit since they were associates and it's not acceptable for them to simply dismiss these concerns." *Male associate, 25-34 years old, 201-500 lawyer firm.*

"[We need] clearer career paths for younger lawyers which [don't] involve working yourself to death." *Female equity partner, 45-54 years old, 1000+ lawyer firm.*

"Need to give young lawyers (especially) a sense that they can achieve their dreams without working long hours every day, that life includes recreation and me time as well as professional responsibilities." *Male equity partner, 55+ years old, 1000+ lawyer firm.*

"We need to become a profession again, where the mission is great, ethical work for clients for which we serve as true counselors. We are managing to profits, rather than to developing people who will be innovators with [a] deep commitment to and enjoyment of the work and their workplace. … Firms need to recognize that work-life balance is critical to the profession's progress on inclusion and attracting people with full lives, who can engage with clients as counselors." *Female equity partner, 55+ years old, 1000+ lawyer firm.*

E. Final interpretative thoughts

An earlier Legal Evolution post chronicled the journey of corporate law firms from regional fiefdoms that enjoyed significant market power, to a national market with dozens of firms competing for the same coveted clients, to a final chapter where London Magic Circle firms are now being vanquished by the

US high-pay/long-hours model. See "Pay-hours tradeoff at London law firms and related existential issues (082)," Feb. 3, 2019. Yet, this is hardly a victory, as few lawyers are enthusiastic about the new equilibrium.

We think a similar dynamic can be observed in the ALM Survey dataset, albeit we are now focused on the consequences to mental health rather than the grueling work conditions themselves. Where does this end? Some respondents in our sampled concluded that the answer was never:

"You would have to postulate a business model that defies social norms and measures success in something other than money. Not likely, I'm thinking." *Female other-attorney timekeeper, 55+ years old, 1000+ law firm.*

*"*It will never change, ever. The basic personality of a lawyer is highly intelligent, highly skeptical with extremely low emotional intelligence." *Male allied professional, 55+ years old, 1000+ lawyer firm.*

"[What is needed is a] fundamental, top to bottom restructuring. It will never happen." *Male associate, 25-34 years old, 501-1000 lawyer firm.*

In terms of root causes, other parts of the ALM Survey provide important clues. For example, when asked "Do your clients have unreasonable demands?," a remarkable 89.9% checked either "Sometimes", "Often", or "Always." When asked, "Does your firm *push back* on unreasonable client demands?," more than 70% replied "No." Finally, 66.1% of legal professionals feel that their coworkers care about their mental health; likewise, 51.8% believe their managers care. Yet, when asked if clients care about their mental health, only 12.6% replied "Yes."

On the one hand, we can conclude that the current state of mental health in law firms is the result of choices and tradeoffs freely made by smart, talented professionals. On the other hand, what we could be witnessing is a deplorable lack of leadership, courage, and professional responsibility.

In part, this may be due to law firm leaders with no formal business training who have been socialized into an antiquated business model that, despite its flaws, still reliably produces large profits. It may also be due to a swing in the marketplace where in-house lawyers have become drunk with their own power and enjoy being treated as the smartest and most important person in the room.

Regardless, rather than speeches, tweets, and op-eds, now is time for building institutions that solve industry-wide problems. This requires real sacrifice and real resources. Thus, the true catalyst for change is more lawyers willing to have the courage of their convictions. Meaningful change comes at a price. For legal professionals, this means risking our careers to fight for things that matter.

Acknowledgment

We would like to thank ALM Legal Intelligence for creating such a fabulous dataset. We would certainly welcome another!

IndyBar: The Parents are Not Alright — Adding E-Learning to a Full Plate

August 5, 2020 | From IndyBar

By Kellie M. Barr & Matthew B. Barr

2020. Who would have thought that one year could change so many things? Things we thought were certain, nonnegotiable, and established norms as lawyers were cast aside along with vacation plans, professional sports and pants with buttons. This fall will bring even more uncertainty into our lives as we send our children back to school. We have a first-grader and a third-grader, and our public school has voted for an all-virtual start until further notice.

The days that followed our school's decision were filled with the same conversation over and over and over again: How can we possibly do this? How can we balance two full-time legal careers while also being able to help our children engage in e-learning? These questions and our doubts only intensified after our district released the virtual learning schedule it will use for its elementary kids. The schedule largely mirrors the timing our kids would follow in their classrooms — it is 8:30 a.m. to 3:30 p.m. with live and recorded lessons scattered throughout the day.

Our school district is not alone. Many schools throughout the Indianapolis area have chosen to push back their start dates or have an all-virtual start, and it is possible that local or state officials will eventually mandate that all schools follow suit. Many virtual school schedules look similar to the one released by our district because of state requirements detailing what a day must look like to constitute a full day of school.

So, what is a working parent to do? We are trying to be honest with ourselves about what we can handle, talk to others about it and get creative. We've paired up with some friends who also have elementary kids at our school and plan to rotate a "parent on duty" for our young e-learners so that the other parents can work when they are not on duty. We've decided to be transparent with our colleagues about what is going on and that sometimes we will need to adjust our typical working hours or take time off to accommodate this. We've brainstormed with friends and joined online communities of parents to get ideas and find additional support. Many schools have Facebook pages where parents can connect with each other to share school information and find help from other families. If your school doesn't have a page like that, perhaps you could be the one to start it?.

Make no mistake about it: We know how fortunate we are to have the ability to work from home right now, to have each other and to have found other people willing to tackle this together. But even with all that, we are still going to need the help of our community and the grace of our colleagues to get through this. Some days it feels impossible to juggle the demands. If you feel that way too, please know that you are not alone. Be honest with yourself and those around you about what you need and what you can handle. Ask for help, and please help others in return when you are able and in whatever manner you are able. Try to be fluid, and remember that you are doing the best you can.

Here’s our ask: If you are in leadership or a position of influence at your firm or company, please know that this is a huge opportunity for you to demonstrate the values touted by your organization and build loyalty among those who work with you. The pandemic has taught us that most lawyers really can work from home and still provide strong client service. Let’s use that flexibility now.

If you’ve read this far and are not a working parent, thank you. We know that everyone has struggles right now whether you have kids at home or not, and nothing said here is meant to diminish that. Please be open with us about your struggles too and let us know how we can help. While 2020 has thrown so many norms out the window, it also has humanized our profession in a way that we hope will last long past the pandemic. We are all in this together — let’s hope that’s a true legacy of 2020.

Kellie M. Barr is in-house counsel at Indiana University Health, and Matthew B. Barr is a partner at Barnes & Thornburg LLP. They live in Indianapolis with their children and dogs. The views expressed herein are their personal opinions.

Other People Matter

MAY 8, 2020 Candice Reed

NEWS

This article was originally published on July 17, 2018 in the Leadings as Lawyers blog, hosted by the Institute for Professional Leadership at The University of Tennessee College of Law.

When I was at Penn, studying positive psychology, I had a professor who claimed to know the "one thing" (for all you Billy Crystal fans out there). Chris Peterson, the renowned psychologist who spent the latter part of his career studying character strengths and teaching others the secret to happiness, was fond of saying (repeatedly) that "other people matter." They matter to our health, our longevity, our success and our enjoyment of life and work. Studies suggest that positive relationships are the most significant source of life satisfaction and emotional wellbeing.[i] Conversely, a lack of close social connections not only decreases mental wellbeing, but also physical health (even more so than smoking cigarettes).[ii]

Yet, as lawyers, we routinely silo ourselves away from other people – we hoard work because we want the billable hours, we fear if we ask questions we may seem dumb, we search for answers on a computer and shut our office doors to avoid interruptions, we call into meetings rather than show-up in person and we eat lunch at our desks. We trick ourselves into thinking that these practices make us better lawyers . . . more efficient, more focused, more productive. But in reality, they are making most lawyers miserable.

A recent study found that lawyers are the loneliest professionals in the country, resulting in decreased job satisfaction, fewer promotions and more frequent job changes. Further, loneliness is a vicious cycle that feeds on itself. As University of Pennsylvania management professor Sigal Barsade explains, when you are lonely you become hypervigilant to social threats and lose your social skills, which often causes you to avoid social interaction and makes you less collaborative (thus repeating the cycle of loneliness). Lawyers are no longer congregating in the public square, chatting about a recent case or deal over blue plate specials at the local diner. Many of us are holed away within the four walls of our office with our eyes locked on a computer screen most of the day, and this social isolation is resulting in wellbeing issues like substance

abuse, depression and even suicide. It's also hurting productivity and profits, as attorneys are less engaged with their work.

Despite the hit that loneliness is taking to our individual wellbeing and firms' bottom lines, most attorneys are reluctant to discuss the value of positive relationships. When I first started speaking to lawyers about relationships in my wellness CLEs years ago, the anxiety was palpable, as if at any minute I was going to lead the group in a round of *Kumbaya*. Talking about relationships to a room full of lawyers was about as easy as watching the first season of *Game of Thrones* with your teenage son or daughter (or your elderly parents . . . take your pick). But why do we quickly dismiss such topics as "touchy-feely crap"? After all, didn't most of us go to law school out of a desire to help *other people*? Aren't there lawyers out there right now working tirelessly to make sure that *other people's* rights are protected? Don't we want to connect with our clients, our colleagues, and even our opposing counsel . . . at least on some level?

Interestingly, until the latter part of the twentieth century, science also historically ignored the study of positive relationships and any discussion of love (stay with me). In 1958, Henry Harlow, then president of the American Psychological Association, said, "Psychologists, at least psychologists who write textbooks, not only show no interest in the origin and development of love or affection, but they seem to be unaware of its very existence."[iii] However, during the height of the behaviorism movement in the 1950s, Harlow famously brought the topic of love into psychological discourse by studying attachment between infant rhesus monkeys and their mothers. The standing belief at the time was that infants were attached to their mothers because their mothers were the infants' sole source of food.[iv] Harlow sought to disprove this theory. Harlow separated infant monkeys from their mothers at birth. He raised the infant monkeys in individual cages in which he had placed two stationary models designed to resemble full-grown, female rhesus monkeys: one model made of wire, which provided milk to the infant monkeys; and a second model made of terrycloth that did not provide milk but had a pleasing texture. According to behaviorism, the infant monkeys should have attached to the wire model due to the fact that this surrogate provided milk; however, all of the monkeys in the experiment bonded with the terrycloth model instead. While the infant monkeys sought food from the wire model when hungry, they stayed closer and "cuddled" with the terrycloth model the rest of the time and clung to their terrycloth mothers when they were frightened by unexpected noises.

Harlow's research was considered ground-breaking because it showed that "even among animals, social bonds reflect more than the satisfaction of physiological needs."[v] In other words, we don't love our mothers just because they fed us as babies. And we don't like our friends solely because they bring us chicken soup when we're sick or a bottle of wine when we break-up with the loser they cautioned us against dating in the first place. In addition to providing for our physical needs, positive relationships (of all types – family, friends, co-workers or spouses) provide us with emotional support, needed validation, and a sense of comfort and belonging.[vi]

Building on Harlow's work with rhesus monkeys, modern-day researchers, Harry Reis and Shelly Gable, have found that most of us have a desire *to belong* – to *relate* closely to another human being. They have concluded that this need for relatedness is just one of three intrinsic needs that most humans share; we also yearn for competence and autonomy.[vii] However, unlike competence and autonomy, studies suggest that when individuals satiate their need for relatedness by sharing with others, their positive affect significantly increases. And increases in positive affect tend to correlate with increases in overall subjective wellbeing (i.e. happiness).

So what does this all mean? Does science suggest an answer for breaking the cycle of loneliness among the legal profession? Even if we all agree that positive relationships are necessary for increasing overall wellbeing and life satisfaction – and positive relationships require that you produce feelings of relatedness with other people – how do we encourage interaction among exhausted lawyers, who even if they wanted to are simply too tired to socialize at the end of a seemingly never-ending day? How do we break the cycle of isolation and loneliness and rebuild a culture of connection and collaboration?

While ditching the billable hour might be one giant leap toward this goal, there are small steps that each of us can take to foster positive relationships both in and outside of the office every day (or at least a couple of times a week).

1. **Share and Actively Listen**

Results of a 2000 study by Reis and his colleagues show that "[f]eeling understood and appreciated by partners" is the strongest predictor of relatedness and often achieved by talking about something meaningful or experiencing pleasant or fun activities with a partner.[viii] Science suggests that one effective way to strengthen relationships is to share good news with each other . . . in person, or at least by phone. Posting on Facebook doesn't count. Researchers refer to this process as *capitalization*. Studies suggest

that when individuals share the news of a positive event with other people, their positive affect increases beyond the valence of the positive event itself.[ix] In other words, sharing good news gives you an extra dose of positivity above and beyond that which you experienced when the positive event first took place. But here is the catch, capitalization only increases positive affect in the person sharing his or her good news if the listener responds constructively, recognizing and validating the good news.

So if your goal is to increase intimacy, trust, life satisfaction and overall wellbeing in both yourself and the people you care about, talk to them. Tell your co-worker what you did over the weekend or how much you are enjoying the latest Patterson novel. And the next time your colleague starts bragging about his kids or telling you stories from her glory days, turn off your mental egg timer and take a few minutes to listen. Get into the story. Be supportive, ask questions, and respond enthusiastically.

2. **Practice Gratitude**

Numerous researchers have studied the effects of habitualizing gratitude, and all of them have reached the same conclusion: counting your blessings on a regular basis makes you happier and contributes to greater life satisfaction. As Derrick Carpenter, another MAPP graduate, explains, "People who regularly practice gratitude by taking time to notice and reflect upon the things they're thankful for experience more positive emotions, feel more alive, sleep better, express more compassion and kindness, and even have stronger immune systems." Expressing gratitude is also an effective means for cultivating positive relationships.

Try incorporating gratitude into your morning routine. Write a short thank-you note to a friend or send an email congratulating a colleague on a job well done at the beginning of your work day. Compliment others on their good ideas (before rushing to tear them apart). Keep a gratitude journal where you write down two or three good things that happened to you during the day, recognizing the people that made them happen. Over time, these simple exercises will begin to train your mind toward the positive and help you build connections with the people around you.

3. **Relax, Rest and Rejuvenate**

A lot of lawyers fail to socialize because they work up until the point of exhaustion each day. It's hard to have a meaningful conversation with a coworker or pleasant dinner banter with your family when you're working long

hours at the office and then incessantly checking your email until your head hits the pillow.

In addition to getting enough sleep, it is critically important for people working in highly stressful jobs to disconnect from work-related activities during the evenings or non-work hours. Research suggests that workers in highly-stressful jobs are more engaged and exhibit better attitudes at the office when they "switch off" after-hours.[x] What does this mean? Quite simply that by putting down your phone (at least one hour before you go to bed), leaving your work files at the office, and engaging in restful activities (like pleasurable reading, a quiet stroll through your neighborhood or playing checkers with your kid) at the end of a long day at work, you'll get a better night's sleep and be more productive and in a much better mood the next day – which will make you far more pleasant to be around.

Further, most lawyers could significantly reduce our stress (and even global professional rates of depression) by going on vacation and participating in social leisure activities.[xi] So join the bar association's softball league, meet up with some friends for trivia night or take a vacation . . . a *real* vacation. Leave your work files and laptop at the office and take several days to rest and play with your family or friends. Not only are you likely to feel better, but the benefits of spending that time together (without the stress of work laying heavy on your mind) will extend to your loved ones as well.

Even when you cannot devote an entire week (or several hours in the evening) towards rest, executive trainers Jim Loehr and Tony Schwartz suggest that you emulate the train, play, recover routine of some of the world's elite athletes and take mini breaks throughout your work day. Every two hours, take 5-10 minutes to get away from your desk, walk around the office or call your mother. Taking time to rest even for small periods of time throughout the day is likely to increase your overall supply of energy and keep you from crashing and burning (and ditching the firm happy hour) later.

Admittedly, engaging personally with other people is not a strength among most lawyers. Dr. Larry Richard, a former-lawyer-turned-psychologist who has been studying lawyers for over 30 years, explains that lawyers generally rank much lower than the general public in sociability, resilience and empathy, which *oh, by the way* are the typical personality traits most valued in and exhibited by highly effective leaders.[xii] So if we want to lead as lawyers – and if we want to thrive as human beings – we need to be intentional and actively work on rebuilding our village, collaborating with colleagues, fostering

positive personal relationships and recognizing (both inwardly and outwardly) that *other people matter*.

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About Latitude

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a. ABA Resources for Lawyer Wellbeing: www.lawyerwellbeing.net

b. Indiana Resources for Lawyer Wellbeing: https://www.in.gov/judiciary/ijlap/

Article Links

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Section Four

COVID-19: The Impact of the Pandemic from an Operations, HR and Legal Perspective

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COVID-19:
The Impact of the Pandemic from an Operations, HR and Legal Perspective

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Potential Discussion Topics

1-The roles (and changing roles) of in-house counsel in responding to a pandemic (that supposedly was going to last for 90 days)

GC often use past experience, familiar research tools, and other attorneys as resources to help guide their recommendations and decisions. How did that change at the start of the pandemic, and how has it changed as the pandemic has continued?

Early information was sketchy and based on "best guesses" and "gut calls."

GC as legal risk manager and as business advisor. Difficult to weigh risks when there is not a baseline for comparison.

Examples of quickly filed lawsuits where employees claimed their employers ignored risks.

- Walmart: Two suits filed by workers: One from the family of a worker who died from COVID-19 and another who survived COVID-19 and who was a part-time employee.
    - Informed supervisor of symptoms: told to just go back to work.
    - Symptoms worsened two days later, and he was sent home. Two days after that, he was found dead in his home.
    - Family / employee claims Walmart didn't follow CDC or OSHA guidelines, putting employees at risk.

- Tyson Foods: Three employees at an Iowa pork processing plant died after contracting the coronavirus and developing COVID-19. The families of the EEs sued, claiming that an outbreak of the new coronavirus occurred at the plant and that Tyson ignored recommendations of local health officials to shut the plant down. Tyson denied the allegations and moved the case to federal court.

- Carnival Corp: 21 of 46 tested aboard a cruise ship carrying more than 3,500 people off the California coast test positive. 19 were crew members. Ship held at sea instead of being allowed to dock in San Francisco while testing is conducted. Since the event, 60 passengers have sued the cruise line and parent company, Carnival Corp, for gross negligence in how passenger safety was handled.

- Contrast the above with Smithfield Foods - temporarily closed plants on account of coronavirus outbreaks among workers, avoiding litigation but costly to continuity of business.

Many businesses created their own COVID-19 response teams. What roles have in-house counsel played as members of those teams (legal advisor, business advisor, both, neither)? If no in-house counsel are on the team, when are in-house counsel being called in to advise?

GC may be a legal expert, but not a medical expert. At the same time, GC must become knowledgeable about what the medical experts are saying. Forces GC to learn more from the ground level. Cannot address changing battlefield unless you get your boots on the ground – in-house attorneys may be called upon to pitch in because a need must be met, even though the work itself seemingly may have no relationship to the law.

As attorneys, most of us do not have medical degrees. However, even individuals with medical degrees do not necessarily agree on the answers or the approaches. And political influences create distrust. What is the role of the GC in wading through this?

- Parameters have been moving targets, causing us to check the agency web pages every day, or at least weekly, for more guidance.

- Examples of changes in CDC guidance: face covering recommendations; factors that create high risks of severe illness; testing of asymptomatic individuals; aerosol transmissions.

- Parameters may differ in terms of CDC, state orders, local orders. Particularly challenging for multi-state employers.

What is the role of the GC or other in-house attorneys as business planners, budgeters, and contingency planners in a pandemic, and how does that vary based on the business and/or industry? Has the role changed as time has passed? Do you advise on the business aspects of <u>whether</u> to change your product, service, delivery method, supply chain, employee headcount, expenses, etc.? Do you advise on <u>how</u> to do these things legally and/or <u>how to use the law</u> to achieve these objectives while minimizing risk?

2-Making legal decisions on the fly and assessing risks during COVID-19

In addition to the above, making legal decisions and assessing risks during the pandemic has been difficult for a number of other reasons, including:

- Questions of how existing law will be applied
- Hurried creation and implementation of new federal, state and local laws
- Hurried creation of guidance to interpret and apply these laws
- Issuance of federal, state and local executive orders and public health orders
- Challenges to the legality of the above-referenced laws, guidance and orders

The learning curve for U.S. employers and their in-house counsel has been steep as organizations have scrambled to adapt to everything from shelter-in-place and stop-work orders from state and local governments to the need for social distancing and remote work to the eligibility, application and forgiveness process for PPP loans.

Definitions of what is and what was an "essential business" and an "essential worker" have changed, and rules regarding essential businesses and essential workers can vary from state to state. Evaluate risk to essential workers. How truly essential is the job if it has a risk of exposure. Examine following job titles:

- Housekeeper/janitor?
- Assistant restaurant manager?
- IT help desk

Initial liability lawsuits filed against employers seem to be focused on whether employers followed and reinforced federal, state and local guidance for infection control, such as the use of face masks and physical distancing.

In a recent OSHA investigation (August 17), the investigator seemed to focus more on the training, use and fit test of the N95 masks and infection control protocols, instead of the cause of actual death of an employee.

- Did not directly state N95 masks should be worn throughout facility, but was concerned if such masks were mandated by the facility in an Isolation Unit.
- As of March 20, neither guidelines from CDC nor the state of Indiana recommended wearing masks or social distancing. (That, of course, has changed dramatically.)

Will there be a safe harbor for institutions that make good-faith efforts to follow guidelines available to them?

- Best practice is to track your changes with the changes from CDC and other agencies/entities on a timeline. (i.e., this is what we did, and this is the guidance we received that caused us to do what we did.) A timeline that includes many CDC actions has been provided in your handouts.

Pandemic has created huge unexpected short-term and long-term workforce challenges, as well as ongoing questions about the future of various workforce sectors. Sample workforce reduction issues include:

- Furloughs, layoffs, terminations and early retirement programs
- WARN notices (and state mini-WARN requirements; Indiana does not have a mini-WARN Act, but many states do)
- Resignations because of fear of exposure v. discharges because of refusal to wear PPE.
- Additional UI benefits created disincentives for some workers to return to work
- FFCRA requires paid leave to be provided for various legitimate reasons, but also creates an incentive for abuse

Many changes to the way we do business had to be made quickly and out of necessity. How will that create potential exposure if/when we attempt to resume any of our past practices? Examples include:

- Remote work and telework
- Attendance policy modifications
- PTO and other forms of leave
- Work schedules
- Pay changes
- Changes in job duties

Best Practices:

- Consider any applicable federal, state, local laws and notice requirements before going back to the way things were (in whole, or in part)
- Announce and memorialize in advance what you are going to do

3-Workloads of in-house counsel and resources available to in-house counsel

In-house counsel have had to address many rapid-fire issues during the pandemic, but often with fewer people and resources to provide internal support.

Is "in-house" counsel now "at home" counsel, and how has that impacted the ability to get the job done?

COVID-19 Information / Misinformation Overload – There is so much conflicting information being disseminated on the internet and elsewhere about COVID-19. What research services and other resources are you using to get the information you need to make the best decisions you can within the limited time you have?

Some in-house lawyers still depend on law libraries to conduct research because a Lexis or Westlaw subscription can be cost-prohibitive for a small or solo legal department. Fully stocked law libraries are sparse unless you are located in the vicinity of Indy, Valpo, South Bend or Bloomington. COVID-19 restrictions have made it even more difficult to conduct research.

If your company has decided or is deciding to reinvent itself as a result of the pandemic, what additional work is that creating for in-house counsel?

- Virtual versus in-person meetings
- Entering into contracts with new suppliers, vendors, customers
    - How do you guarantee quality control by suppliers?
    - How do you guarantee timely performance by suppliers?
    - How do you avoid price gouging?
- Investigating regulatory requirements
- Obtaining necessary licenses, permits, etc.
- Workforce training / retraining / new hires
- Finance and tax issues

- Liability risks
- Insurance coverage

The pandemic has not meant that other legal or social issues have gone away. To the contrary, the pandemic is having a disproportionately negative impact on minorities and low wage earners, furthering the divide between the "haves" and the "have nots." The summer marked a period of significant racial unrest, including protests that resulted in significant damage to many businesses that already were suffering due to the pandemic. The deaths of George Floyd, Breonna Taylor, Dreasjon Reed and others have pushed the issue of systemic racism to the forefront and have led to an outcry for change. What is the role of in-house counsel in responding to that outcry?

4-Business best practices for protecting employees and customers

Check CDC and OSHA guidance for best practices. Examples include:

- Safety protocols to keep COVID-positive or potentially COVID-positive individuals out of the workplace
- Reducing the number of people in the workplace at any one time, such as through remote work, alternating shifts, etc.
- Engaging in social distancing and wearing of face coverings
- Changing the physical layout of work spaces and public spaces
- Enhanced cleaning and disinfecting procedures
- Encouraging proper hygiene (frequent and full hand-washing, use of hand sanitizer, avoid touching face)
- Not sharing phones, computers or other equipment
- Increased ventilation

Check state and local health orders for requirements applicable to businesses, employees and customers. Indiana businesses are required to have workplace safety plans, and the extent of those plans will vary depending on the nature of the business.

If customers are required to wear face coverings, post notices to make customers aware.

Train employees on best practices for reducing the risk of violence if a customer does not comply with face covering requirements.

Consider accommodations for employees who may face a higher risk of severe illness if they are exposed to COVID-19. See the EEOC's guidance at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Masks and face coverings:

- Cloth masks are not PPE, it is crowd protection.
    - A cloth mask is meant to limit the transmission of pathogens to others, not primarily to protect the wearer.

    - However, recent guidance also suggests that cloth masks, when worn and used properly, may also help protect the wearer
- According to OSHA, a certified N95 respirator, which filters out particles, used by medical personnel and others, is treated as safety equipment and comes with employer obligations for training. Such training should include a fit test, signed and dated by the employee.
- However, OSHA soon realized mandating N95 masks was becoming difficult and expensive.
    - Allowed them to be used for longer periods of time until supplies could be replenished.
    - Allows to use expired masks
    - Temporarily suspended fit test regs.
- A mask worn too long and/or improperly it becomes a transmitter itself.

Note that the National Retail Federation is monitoring a newly aggressive anti-mask effort that purports to target retail, grocery and restaurants with its message and resources. The group is "organized" under the website The HealthyAmerican.org, which presents a variety of do-it-yourself resources and paperwork that encourage followers to "educate" retailer workers and businesses, and then potentially file formal complaints of religious, disability and other instances of discrimination by businesses and employees with the U.S. Dept. of Justice. The website instructs individuals to take photos of employees, businesses and other examples of such discrimination for an official complaint. They also encourage bringing complaints to state and local health departments. Outreach efforts by these individuals include podcasts and daily video testimonials on YouTube to further expand its anti-mask messaging and reach more consumers. Businesses targeted include retail businesses, grocery stores, bars, restaurants and gas stations; transportation outlets including buses, taxis, metro and airlines; public and private schools; medical offices, clinics and hospitals; city, state, county and federal offices and court houses; and parks and beaches.

5-Contracts and contract renegotiations. Force Majeure language changes.

In-house counsel may face several contract-related issues as a result of the pandemic. These include the following:

- the ability/desire to enforce existing contracts
- potential liability for early termination of existing contracts or for failure to perform under existing contracts
- whether they can make use of a force majeure clause to be excused from any contractual obligations
- whether they can/should renegotiate any contracts
- what language should be used in renegotiated and/or new contracts to protect against risks related to the current pandemic and/or future pandemics

Force Majeure Clauses

A force majeure clause in a contract is meant to protect the parties in the event that a contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care. Whether such a clause can be used to suspend performance of duties under a contract based on a pandemic depends on the specific contract language, applicable law, and the causal connection between the pandemic and the parties' ability to perform their contractual obligations.

Some clauses specifically define what constitutes a force majeure, while others are more general. A clause that lists what constitutes a force majeure, but does not include an epidemic or pandemic in that list, may be more difficult to apply in the context of COVID-19.

In re Hitz Restaurant Group (2020 Bankr. LEXIS 1470 (N.D. Ill. June 2, 2020)), a restaurant tenant used a force majeure clause to successfully challenge making its full rent payments based on an executive order by the Governor of Illinois that limited restaurant operations. The executive order was issued in mid-March and prohibited consumption and dining inside restaurants, and restricted restaurant operations to in-house delivery, curbside pick-up, drive-through or third party delivery services. As a result, the restaurant was unable to make its March, April, May and June rent payments.

The US Bankruptcy Court for the Northern District of Illinois-Eastern Division held that the force majeure clause in the lease excused the restaurant tenant from its obligation to pay a portion of post-petition rent. The force majeure clause in the subject lease provided:

> Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any obligations are prevented or delayed, retarded or hindered by . . . laws, governmental action or inaction, orders of government . . . . Lack of money shall not be grounds for force majeure.

Notably, the tenant had not argued that "lack of money" was the cause of its failure to pay rent, but that instead the executive order was the cause of such inability. As a result of these determinations made by the court, the court held that the tenant's obligation to pay rent would be reduced in proportion to its reduced ability to generate revenue as a result of the executive order.

On the flip side, various commercial landlords have filed legal actions during the pandemic in an effort to collect unpaid rent. See, e.g., Simon Property v Eddie Bauer. (Indy based Simon Property Group's lawsuits claim $65.9 million in unpaid rent and other charges); see also Brookfield v. The Gap.

Ban on Residential Property Evictions

Obligations to pay residential rent and mortgages also are impacted by the pandemic. The executive orders issued by Governor Holcomb in 2020 are much broader than anything we have previously experienced in Indiana. These orders have included a residential eviction ban that was the subject of a lawsuit filed in the Southern District of Indiana by a group of frustrated landlords. See LeMond et. al v. Holcomb (challenging the eviction ban on federal and state constitutional grounds).

In Exec. Order 20-04, dated March 16, 2020, the Governor invoked the emergency management authority granted to the governor under Ind. Code § 10-14-3 et seq. to respond to public health emergencies, allowing: "for the suspension of the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules or regulations of any state agency where strict compliance with any of these provisions would in any way prevent, hinder or delay necessary action in coping with the public health emergency." Ind. Code § 10-14-3-12(d)(1). Three days later, on March 19, 2020, the Governor issued Exec. Order 20-06, ordering that "no eviction or foreclosure actions or proceedings involving residential real estate or property, whether rental or otherwise, may be initiated" between the date of the Order and the end of the public health emergency and suspending any regulatory statutes and rescinding any rules and regulations relating to said proceedings for the duration of the emergency. The Order affirmed that it did not relieve individuals of their obligations to pay rent, pay mortgages, or comply with all their obligations under their leases or mortgages.

Governor Holcomb's ban on residential evictions subsequently was extended. Although the state ban recently expired, the CDC and HHS issued a nationwide order prohibiting residential evictions from September 4 through the end of the year. There are some limitations, including an income cap of $99,000.

While residential landlords are frustrated by the lack of income from their properties, courts and tenant advocates are concerned about the flood of eviction lawsuits that are likely to be filed. A Landlord Tenant Task Force assembled by the Indiana Supreme Court released a report on July 29 that encouraged landlords and tenants to talk to each other, explore options, discuss payment plans and put all agreements in writing.

6-Insurance claims

Another issue that in-house counsel may need to consider is whether insurance will cover any claims for losses caused by the pandemic. Policies may have pandemic specific coverage, business interruption coverage, civil authority orders coverage, and property damage coverage, among other types of coverage, that could come into play.

If coverage is going to be sought, it is important to meet claim filing deadlines and to take appropriate steps to mitigate damages. According to The Insurance Journal, more than 700 business interruption lawsuits had been filed against insurers as of the beginning of August. For more recent statistics about COVID-19 insurance litigation, see Insurance Law Analytics' Covid Coverage Litigation Tracker (CCLT) at https://cclt.law.upenn.edu/

On August 12, the Multi District Litigation Panel issued an order denying industry wide consolidation claims of more than 275 COVID-19 business interruption cases.

The court found that the case for centralization of specific insurer-MDLs as "more persuasive" since it would not encounter the challenges for "an industry-wide MDL involving more than one hundred insurers." If

1. It increases likelihood of common discovery
2. It provides an opportunity for the use of common language on pre-trial rulings and avoids inconsistent rulings.

However, the Court found that in most cases, the plaintiffs shared "only a superficial commonality."

- No common defendants in all cases
- Little potential for common discovery
- Different Insurance policies
    - Purchased by different businesses
    - Purchased in different states.
    - Standardized forms were used, but these forms were heavily modified and "seemingly minor differences in policy language could have significant impact on the scope of coverage."

The Court felt that proposed MDL could cause "significant managerial and efficiency concerns." The Court instructed clerk to issue orders to show cause why the cases against Lloyds (a collection of individual companies and syndicates rather than a single insurer), Hartford, Cincinnati and Society Insurance, should not be centralized.

7-Anticipated litigation arising out of COVID, liability waivers, and federal/state initiatives to limit business liability

Employment-Related Litigation

In a recent article, Law360 predicted that the next COVID-19 employment litigation hotbeds will include the following:

- Discrimination claims arising out of the mass layoffs that occurred in March
- Disability discrimination claims by employees who seek to work remotely as a reasonable accommodation
- Federal and state wage and hour lawsuits
- Federal and state sick leave and family leave lawsuits

Mass layoffs also may lead to WARN Act claims.

Wage-hour claims could be based on a variety of workplace changes, such as:

- Failure to properly pay for all hours worked remotely
- Pay changes that destroy exempt status
- Job duty changes that destroy exempt status
- Claims that business expenses associated with remote work reduced wages below minimum wage or were required to be paid under certain state laws (e.g., Illinois)
- Compensability of time spent waiting during pre-shift temperature checks

Labor unions also are pushing workers to file suits based on workplace safety and wage concerns (e.g., seeking continuation of hazard pay).

- Employees are reporting that they have been terminated or suspended for complaining about their employers not providing adequate PPE or expired or substandard PPE.
    - May argue violations of OSHA's general duty clause
    - Complaints may constitute protected concerted activity under the National Labor Relations Act

The debate over worker's compensation also will be a litigation hotbed.

- Anticipated trend where employees who got sick, or families of employees who got sick and passed away, could take actions alleging that their employers failed to take adequate action to protect them in the workplace, despite companies' attempts to comply with guidelines.
    - Claims may be subject to worker's compensation exclusivity in some states

Customer-Related Litigation

In addition to safety-related claims brought by employee, customers who allege that they contracted COVID19 while at a business (whether it is a restaurant, a retail store, an office, etc.) might also bring claims based on negligence or gross negligence. Some businesses are requiring customers to sign assumption of risk agreements or liability waivers. Enforceability of liability waivers will vary by state, but they are likely to be unenforceable in many states. Although there have been efforts to create federal legislation that would shield businesses from liability based on negligence, those efforts have stalled. Some states have passed their own legislation, but the earliest that Indiana could take up such a proposal would be in the 2021 legislative session.

Colleges ending classes mid-semester

Mellowitz v. Ball State University and Spiegel v. IU. Students filing lawsuits against the university and its Board of Trustees — similar lawsuits filed against universities by students around the country who weren't satisfied with the quality of instruction and services rendered during the COVID-19 pandemic. While both cases deal with public universities, the standard of "quality" in contract/agreement is important. Watch for more litigation against public and private universities.

Consumer Protection Litigation

The National Law Journal reported in mid-April that the Federal Trade Commission, the Food and Drug Administration and state Attorneys General have bumped the protection of consumers in the midst of the COVID-19 crisis to the top of their respective lists, including, but not limited to, price gouging and unsubstantiated product efficacy claims. The U.S. Department of Justice has also issued a broad mandate regarding criminal enforcement of deceptive, fraudulent and predatory practices.

8-Preparing for the future – what are the potential permanent changes we can expect from the pandemic and what will do to address them (e.g., more remote work, less reliance on office space, supply chain changes, etc.)

- Defining return to normal, whether that is "new normal" or "novel alternative".

- Has telework become your "new normal"…or at least "novel alternative"?

    - Have we now set a precedent when an employee seeks telework as an accommodation under the ADA?
    - How will remote workers be compensated and reimbursed?
    - How will performance evaluations be changed?
    - Does it affect vacation and sick time?
    - When it's time return, what if they insist on working from home?

- Has virtual learning become the new normal for any of your employees' children, and how are your employees juggling that with job responsibilities?
    - FFCRA is scheduled to end on December 31, 2020
    - FFCRA provides for Emergency Paid Sick Leave and Emergency Family and Medical Leave for limited reasons
    - Private employers with more than 500 employees are not covered by FFCRA
    - Kids are returning to school…and some are contracting COVID-19\

- Are you requiring your current employees to get flu shots? If so, how are your administering the program?

- Are you going to reduce your office footprint and have more people work remotely?

- Are you going to increase your footprint in places where you need people to be physically present but want them to be socially distanced through the remainder of the pandemic and into the future?

- What sort of modeling are you doing to prepare for the future of your business?

- Do you have a contingency plan in place that accounts for a variety of potential scenarios (ranging from the most positive to the most negative)?

BIGGEST QUESTION:

What will it take for things to return to "normal"?

- Can we get to "normal" and still require masks? Social distancing? Limited in-person interactions?
- When will this occur?
    - After a vaccine? Doubtful.
    - Probably going to be based on yet-to-be-defined a numerical mortality stabilization metric based on an actuarial computation.
- Will vaccine be mandatory for public or by employer?
    - Most likely an exception for medical and religious reasons, like flu vaccine
    - Professionals in healthcare are very concerned about the dangers of an expedited vaccine and many front line workers may refuse to take it

COVID-19 Timeline

January 9 — WHO Announces Mysterious Coronavirus-Related Pneumonia in Wuhan, China (59 cases, 0 deaths)

At this point, the World Health Organization (WHO) still has doubts about the roots of what would become the COVID-19 pandemic, noting that the spate of pneumonia-like cases in Wuhan could have stemmed from a new coronavirus. Travel precautions are already at the forefront of experts' concerns.

January 20 — CDC Says 3 US Airports Will Begin Screening for Coronavirus

Three additional cases of what is now the 2019 novel coronavirus are reported in Thailand and Japan, causing the CDC to begin screenings at JFK, San Francisco International, and LAX airports. These airports are picked because flights between Wuhan and the US bring most passengers through them.

January 21 — CDC Confirms First US Coronavirus Case

A WA state resident becomes the first person in the US with a confirmed case of the 2019 novel coronavirus, having returned from Wuhan on January 15, thanks to overnight polymerase chain reaction testing. The CDC considers use of contact tracing.

January 21 — Chinese Scientist Confirms COVID-19 Human Transmission (200 cases, 4 deaths)

At this point, the 2019 novel coronavirus has killed 4 and infected more than 200 in China, before Zhong Nanshan, MD, finally confirms it can be transmitted from person to person. However, the WHO is still unsure of the necessity of declaring a public health emergency.

January 23 — Wuhan Now Under Quarantine (500 cases, 17 deaths)

China makes the unprecedented move not only to close off Wuhan and its population of 11 million, but to also place a restricted access protocol on Huanggang, 30 miles to the east, where residents can't leave without special permission. This means up to 18 million people are under strict lockdown.

January 31 — WHO Issues Global Health Emergency (9800 cases, 200 deaths)

The WHO finally declares a public health emergency, for just the sixth time. Human-to-human transmission is quickly spreading and now found in the US, Germany, Japan, Vietnam, and Taiwan.

February 2 — Global Air Travel Is Restricted

By 5 pm on Sunday, those en route to the US had to leave China or face a 2-week home-based quarantine if they had been in Hubei province. Mainland visitors, however, will need to undergo health screenings upon their return, and foreign nationals can even be denied admittance. Australia, Germany, Italy, and New Zealand impose similar air-travel restrictions at this point include

February 3 — US Declares Public Health Emergency

The Trump administration declares a public health emergency due to the coronavirus outbreak.

February 10 — China's COVID-19 Deaths Exceed Those of SARS Crisis (908 deaths)

February 25 — CDC Says COVID-19 Is Heading Toward Pandemic Status

Explaining what would signify a pandemic, Nancy Messonnier, MD, director of the CDC's National Center for Immunization and Respiratory Diseases, says that thus far COVID-19 meets 2 of the 3 required factors:

1. Met: Illness resulting in death
2. Met: Sustained person-to-person spread.
3. Not yet met: Worldwide spread

March 6 — 21 Passengers on California Cruise Ship Test Positive

21 of just 46 tested aboard a Carnival cruise ship carrying more than 3500 people off the California coast test positive for COVID-19, with 19 being crew members. The ship is held at sea instead of being allowed to dock in San Francisco while testing is conducted. Since the event, 60 passengers have sued the cruise line for gross negligence in how passenger safety was handled.

On the day, ISDH confirmed the first case of COVID-19 in a Hoosier with recent travel. Governor Eric J. Holcomb, issues Exec. Order 20-02, declaring a public health emergency throughout the state for a period of thirty (30) days.

March 11 — WHO Declares COVID-19 a Pandemic

Tedros Adhanom Ghebreyesus, director general of WHO, said at a briefing in Geneva the agency is "deeply concerned by the alarming levels of spread and severity" of the outbreak. He also expressed concern about "the alarming levels of inaction."

March 13 — Trump Declares COVID-19 a National Emergency

President Donald Trump declares the novel coronavirus a national emergency, which unlocks billions of dollars in federal funding to fight the disease's spread.

March 13 — Travel Ban on Non-US Citizens Traveling From Europe Goes Into Effect

The Trump administration issues a travel ban on non-Americans who visited 26 European countries within 14 days of coming to the US. People traveling from the UK and Ireland ae exempt.

March 16 – ISDH reported the first death in Indiana due to COVID-19. Governor Holcomb issues Exec. Order 20-04, invoking the emergency management authority under IC § 10-14-3 et seq. to respond to public health emergencies, authorizing him to "allow for the suspension of the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules or regulations of any state agency where strict compliance with any of these provisions would in any way prevent, hinder or delay necessary action in coping with the public health emergency." Ind. Code § 10-14-3- 12(d)(1).

March 17 — CMS Temporarily Expands Use of Telehealth

CMS expands its telehealth rules, permitting use during the COVID-19 pandemic to protect older patients from potential exposure. The relaxation allows Medicare to cover telehealth visits the same as it would regular in-person visits.

March 17 — Administration Asks Congress to Send Americans Direct Financial Relief (100 deaths in US)

March 19 — California Issues Statewide Stay-at-Home Order

Becomes first state to issue a stay-at-home order, mandating all residents to stay at home except to go to an essential job or shop for essential needs. The order also instructs health care systems to prioritize services to those who are the sickest.

On the same day, Governor Holcomb issues Exec. Order 20-06,4 ordering the Eviction Ban. Under the Eviction Ban "no eviction or foreclosure actions or proceedings involving residential real estate or property, whether rental or otherwise, may be initiated" between the date of the Order and the end of the public health emergency and suspending any regulatory statutes and rescinding any rules and regulations relating to said proceedings for the duration of the emergency. However, individuals are not relived of their obligations to pay rent, pay mortgages, or comply with all their obligations under their leases or mortgages.

March 23 — Governor issues shelter-at-home directive.

Exec. Order 20-08 was intended to "to ensure that the maximum number of people self-isolate in their homes or residences to the maximum extent feasible," excepting Essential Activities. The Order delineated several essential activities and encouraged them to remain open, subject to social distancing requirements and infection control recommendations.

March 24 — With Clinical Trials on Hold, Innovation Stalls

Overwhelmed hospitals are keeping out everyone who does not need to be there, and that means delaying the start of new clinical trials. Drugs with fresh FDA approvals are not likely to launch, as their chances of making it into circulation are dim with hospitals struggle just to find enough personal protective equipment.

March 25 — Reports Find Extended Shutdowns Can Delay Second Wave

Mathematical models based on social distancing measures implemented in Wuhan, China, show keeping tighter measures in place for longer periods of time can flatten the COVID-19 curve.

March 26 — Senate Passes CARES Act

The Senate passes the Coronavirus Aid, Relief, and Economic Security (CARES) Act, providing $2 trillion in aid to hospitals, small businesses, and state and local governments, while including an elimination of the Medicare sequester from May 1 through December 31, 2020.

March 27 — President Trump Signs CARES Act Into Law

The House of Representatives approves the CARES act, the largest economic recovery package in history, and President Trump signs it into law. The bipartisan legislation provides direct payments to Americans and expansions in unemployment insurance.

March 31 — COVID-19 Can Be Transmitted Through the Eye

A report in JAMA Ophthalmology creates a stir with the finding that patients can catch the virus that causes COVID-19 through the eye, despite low prevalence of the virus in tears. The coverage of the study involving 38 patients from Hubei Province, China, drew some of AJMC.com's highest readership of 2020, as the findings contradicted assumptions by leading professional societies.

April 3 — Governor Holcomb extends the Public Health Emergency

April 6 — Governor Holcomb replaces Exec. Order 20-08 and extends the stay-at-home mandate until April 20.

April 16 — "Gating Criteria" Emerge as a Way to Reopen the Economy

After Trump briefly entertains the idea of reopening the US economy in time for Easter Sunday, the White House releases broad guidelines for how people could return to work, to church, and to restaurants and other venues. The plan outlines the concept of "gating criteria," which call for states or metropolitan areas to achieve benchmarks in reducing COVID-19 cases or deaths before taking the next step toward reopening.

A**pril 28 — Young, Poor Avoid Care for COVID-19 Symptoms**

As the pandemic lingers, the term "deferred care" caught fire in health care circles—referring to the fact that many would avoid a doctor's office or hospital for any procedure that could wait. But a Gallup poll finds a darker side to this phenomenon: 1 in 7 Americans report they would not seek care for a fever or dry cough—the classic symptoms of COVID-19. The reason? Cost concerns. Those most likely to avoid medical treatment for symptoms are younger than age 30 and make less than $40,000 a year. By the end of April, 26.5 million Americans have filed for unemployment since mid-March.

May 1 — Gov. Holcomb issues Exec. Order 20-26,9 outlining a five (5) stage reopening process for the State of Indiana

May 4 — Stage 2 of the re-opening plan was expected to begin for most Indiana counties

May 9 — Saliva-Based Diagnostic Test Allowed for At-Home Use

The FDA broadens authorization of a saliva-based test to detect COVID-19 infection. The test makes it possible for those who cannot get to a collection center to get tested, including those who are home because they are ill, quarantined, or at high risk of infection due to their age or comorbidities.

May 12 — Death Toll Likely Underestimated, Fauci Testifies

Anthony Fauci, MD, director of the National Institute of Allergy and Infectious Diseases, testifies before the US Senate that the US death toll of 80,000 is likely an underestimate. He warns against the relaxation of social distancing and says he is "cautiously optimistic" that a vaccine will be effective and achieved within 1 or 2 years.

May 21 — Gov Holcomb issues Exec. Order 20-28, establishing the standards for Stage 3 and continues the Eviction Ban.

May 28 — US COVID-19 Deaths Pass the 100,000 Mark

The CDC calls it a "sobering development and a heart-breaking reminder of the horrible toll of this unprecedented pandemic." It asks that Americans continue following local and state guidance on prevention strategies, such as social distancing, good hand hygiene, and wearing a face mask while in public.

June 10 — US COVID-19 Cases Reach 2 Million

The number of confirmed cases of COVID-19 hits 2 million in the United States as new infections continue to rise in 20 states. Cases begin to spike as states ease social distancing restrictions.

June 11 — Gov Holcomb issues Exec. Order 20-32, establishing the standards for Stage 4 and continues the Eviction Ban.

June 22 — Study Suggests 80% of Cases in March Went Undetected

A Science Translation Medicine study suggests up to 80% of Americans who sought care for flu-like illnesses in March were actually infected with the virus that causes COVID-19. According to the research, if one-third of these patients sought COVID-19 testing, it may have amounted to 8.7 million infections.

June 26 — White House Coronavirus Task Force Addresses Rising Cases in the South

For the first time in 2 months, the White House Coronavirus Task Force holds a briefing. The focus of the discussion is the rising number of cases and growing positive test rate in some states. As cases rise, Texas and Florida both decide to halt the reopenings as each state records growing numbers of cases.

June 30 — Fauci Warns New COVID-19 Cases Could Hit 100,000 a Day

Fauci warns that while the current daily number of new cases in the United States is hovering around 40,000, that could reach as high as 100,000 new cases per day given the outbreak's current trajectory.

July 1 — Gov Holcomb issues Exec Order 20-25, delating the re-opening available in Stage 5 and enacts an intermediate Stage 4.5.

CDC reports over 50,000 new COVID-19 cases in the United States, bringing the total to over 2.6 million total confirmed cases.

July 4 — POTUS signs into law a bill that reauthorizes lending under the PPP through August 8, 2020

Separates the authorized limits for commitments under the program from other SBA loan programs. Source: White House Announcement (https://www.whitehouse.gov/brie_ngs-statements/bill-announcement-102/)

July 13 — POTUS signs into law the "Emergency Aid for Returning Americans Affected by Coronavirus Act"

Increases EA from $1M to $10M the amount that the Department of Health and Human Services may spend for the provision of assistance to repatriated U.S. citizens in FY 2020.

July 15 — Fed extends rule change for PPP

This rule change, announced in April, allows certain bank directors and shareholders to apply to their banks for PPP loans for their small businesses. The PPP's limits had prevented some small business owners from accessing PPP loans—especially in rural areas. This day's announcement extends the rule change to August 8, 2020.

July 17 — The U.S. recorded what was at the time the highest single-day rise in cases anywhere in the world, with 77,638 infections

July 23 — The U.S. reaches 4M confirmed COVID-19 cases

July 28 — The CDC calls for reopening American schools, in a statement written by a White House working group that includes Redfield but has minimal representation from other CDC officials.

July 29 — U.S. COVID-19 related deaths surpass 150K

August 3 — POTUS extend use of National Guard

Extended through the end of the year for COVID-19 assistance in 46 states and the territories of Guam, Puerto Rico, and the U.S. Virgin Islands. Effective August 21, 44 states and these territories will have a 75% Federal cost share. Florida and Texas will retain a 100% Federal cost share.

August 8 — POTUS takes 4 actions to help Americans

POTUS signs a memorandum authorizing the Other Needs Assistance Program for major disaster declarations related to COVID-19. POTUS also signs a memorandum deferring payroll tax obligations in light of COVID-19. POTUS also signs an Executive Order on fighting the spread of COVID-19 by providing assistance to renters and homeowners. Lastly, POTUS extends student loan payment relief during COVID-19 through the end of the year.

Between August 8 and August 25, the University of Notre Dame had a total of 408 confirmed positive cases. The student newspaper published an op-ed on its front page titled, "Don't Make Us Write Obituaries" In-person classes for undergraduates were canceled for two weeks. Students were not sent home.

August 9 — The U.S. reaches 5M confirmed COVID-19 cases

August 11 — The Big Ten announces that it is cancelling its fall football season

August 23 — The FDA issued an emergency use authorization for convalescent plasma to treat COVID-19

August 20 — Purdue University suspended a cooperative house and 36 students for attending an off-campus party

August 24 — POTUS announces additional steps, including new testing requirements, to help protect nursing home residents from COVID-19

August 27 — Trump Administration announces its purchase and production of 150 million rapid COVID-19 tests, to be distributed across the country

August 28 — Secretary of State Connie Lawson announced the Nov. 3 general election would proceed without modifications to the voting process "since the stay-at-home order has been lifted."

August 29 — AstraZeneca begins Phase 3 vaccine clinical trials

August 31 — U.S. surpasses 6M confirmed COVID-19 cases. Global confirmed cases exceed 25M

September 1 — The CDC extends Eviction Ban through end of year

It is using its authority, derived from POTUS' 8 August Executive Order on assisting renters/homeowners, to temporarily halt evictions through the end of 2020 to slow the spread of COVID- 19

At Indiana University, 30 out of 40 fraternities and sororities were quarantined. Fraternity and sorority housing had a test positivity rate of 8.1%, but residence halls had just 1.63%.

September 2 — Wabash College announces an outbreak of 14 cases and Notre Dame confirms it had 577. In response to student leaving quarantine without authorization, Notre Dame put security personnel at its off-campus COVID-19 quarantine and isolation sites.

The state Board of Education voted to update the definition of "virtual student" for use in the state's school funding formula. As a result, students who opt for virtual learning during the pandemic will still count in a school's funding formula.

September 3 — Feds start Phase 3 vaccine trials

As part of the Operation Warp Speed goal to deliver safe and effective vaccines and therapeutics by January 2021, five DOD medical treatment facilities are identified for Phase 3 COVID-19 vaccine trials. The selected sites are located in the National Capital Region; San Antonio, Texas; and San Diego, Calif.

September 8 —The United States reported less than 25,000 daily cases for the first time since June

September 17 —The Big Ten reverses course and announces that it will play an eight game fall football season beginning on October 24, and each time will play a ninth game during a Champions Week on December 19

September 18 – CDC updates its testing webpage to reinstate its prior guidance regarding the importance of testing asymptomatic persons who have had close contact with an individual who with a documented case of COVID-19. "Due to the significance of asymptomatic and pre-symptomatic transmission, this guidance further reinforces the need to test asymptomatic persons, including close contacts of a person with documented SARS-CoV-2 infection."

CDC ALSO updates the guidance on its "How COVID-19 Spreads" webpage to say coronavirus can commonly spread "through respiratory droplets or small particles, such as those in aerosols," which are produced even when a person breathes

September 21 – CDC states that the language regarding aerosols posted on September 18 was a draft version that was posted in error. "CDC is currently updating its recommendations regarding airborne transmission of SARS-CoV-2 (the virus that causes COVID-19). Once this process has been completed, the update language will be posted."

September 21 – As of 1 p.m., the Johns Hopkins dashboard reported that the total deaths globally due to COVID-19 totaled 961,656, and the U.S. deaths totaled 199,606.

The Indiana Dashboard showed the following:
Total Cases in Indiana: 112,027
Total Deaths in Indiana: 3,287
LTC residents in Indiana: 7,529 cases. 1,916deaths
LTC workers in Indiana: 3,702 cases. 12 deaths
Source: https://www.coronavirus.in.gov/2393.htm

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OUR PRINCIPLES TO GET BACK ON TRACK

Governor Holcomb has used data to drive decisions since our first case of the novel coronavirus in early March. That will continue to be our practice as we contemplate a sector-by-sector reset. These are the four guiding principles that will determine if stages to reopen various sectors of the economy will move forward:

1

The number of hospitalized COVID-19 patients statewide has decreased for 14 days

2

The state retains its surge capacity for critical care beds and ventilators

3

The state retains the ability to test all Hoosiers who are COVID-19 symptomatic, as well as healthcare workers, essential workers, first responders, and others as delineated on the ISDH website

4

Health officials have systems in place to contact all individuals who test positive for COVID-19 and complete contact tracing

As we lift restrictions and more people return to work, visit a store or restaurant, and participate in more activities, the number of COVID-19 cases will increase. If we cannot meet these principles, all or portions of the state may need to pause on moving forward, or we may return to an earlier stage of the governor's stay-at-home order.

STAGE 1

MARCH 24TH - MAY 4TH

- Elective procedures permitted as of April 27; one person may accompany the patient for services
- Essential manufacturing, construction, infrastructure, government, business, healthcare, and other critical businesses and operations open as outlined in Executive Order 20-22
- Essential retail businesses providing necessities of life such as grocery stores, pharmacies, hardware, building materials, and more open as outlined in Executive Order 20-22
- Restaurants and bars with restaurant service may offer carryout, curbside, and delivery services
- Retail stores may offer call-in or online ordering with curbside pickup and delivery
- State parks are open
- Golf courses are open
- Campgrounds are closed except for permanent RV and cabin residents
- State government operations continue without public access to buildings
- Only essential travel is allowed
- Social gatherings with no more than 10 people are allowed
- K-12 school buildings are closed and all activities are canceled until June 30

BACK ON TRACK INDIANA: STAGE 1 – MARCH 24TH - MAY 4TH

PLEASE NOTE THE ROADMAP IS SUBJECT TO CHANGE BASED ON CDC GUIDANCE AND OTHER NEW INFORMATION

All Hoosiers	Stay at home; leave home only for essential work or necessities	Maintain social distancing of at least 6 feet	Remote work whenever possible	No social gatherings of more than 10 people	Recommend use of cloth face coverings in public	
Manufacturing, Industrial, Construction	Essential work permitted					
State, County & Local Government	Operational but buildings closed to public					
Professional Office Settings	Essential businesses open with social distancing & CDC measures	All other professional services conducted remotely				
Retail, Malls, Commercial Businesses	Online, call-in with curbside pickup or delivery only					
Healthcare	Nursing homes remain closed to visitors	Elective procedures allowed to resume April 27; one person may accompany a patient				
Restaurants, Bars with Restaurant Services	Carryout, curbside, and delivery only					

BACK ON TRACK INDIANA: STAGE 1 – MARCH 24TH - MAY 4TH

Bars & Nightclubs	Closed	
Personal Services (Hair, Nails, etc.)	Closed	
Gyms, Fitness Centers, & Similar Facilities	Closed	
Cultural, Entertainment, Sports Venues, Amusement & Water Parks, Tourism Sites	Closed; state parks remain open with social distancing	Golf courses open
Playgrounds, Outdoor Courts, Recreational Sports, Youth Training Facilities	Closed	
Other	Campgrounds closed except for permanent RV or cabin residents	K-12 buildings, facilities, and grounds closed through June 30

STAGE 2

MAY 4TH TO MAY 21ST

STAGE 2 MAY BEGIN MAY 4 FOR ALL INDIANA COUNTIES EXCEPT: Cass, Lake, and Marion counties.
STAGE 2 MAY BEGIN ON MAY 11 FOR: Lake and Marion counties.
STAGE 2 MAY BEGIN ON MAY 18 FOR: Cass County.

Please note that local governments may impose more restrictive guidelines.

GUIDELINES FOR ALL HOOSIERS

- Hoosiers 65 and over and those with high-risk health conditions should remain at home whenever possible. This is the population that is most vulnerable to the coronavirus
- Recommend that residents wear face coverings in public settings. Residents should also continue to practice social distancing and good hygiene
- Social gatherings of no more than 25 people may take place following the CDC social distancing guidelines. The coronavirus is often spread among groups of people who are in close contact in a confined space for an extended period of time. This limit applies to such events as wedding receptions, birthday parties, Mother's Day gatherings, and others where people are in close physical contact for extended periods of time
- Essential travel restrictions are lifted; local non-essential travel allowed
- Continue remote work whenever possible

RELIGIOUS SERVICES – MAY 8

- Religious services may convene inside places of worship. There are specific practices that should be considered for in-person services that are driven by social distancing guidelines and protections for those 65 and older and individuals with known high-risk medical conditions. Examples of services include weddings, funerals, and baptisms. See the Revised Guidance for Places of Worship for more complete details

WHAT OPENS

- Manufacturers, industrial operations, and other infrastructure that has not been in operation may open following OSHA and CDC guidelines. General guidance for these industries may be found in this document
- About half of the state's Bureau of Motor Vehicle branches will open with services by appointment only; the remainder of branches will continue to open over the next two weeks
- Public libraries may open according to their own policies and CDC guidelines

- County and local governments will make decisions based on their policies and CDC guidelines
- Retail and commercial businesses, including those that have been open for the necessities of life during previous executive orders, may operate at 50% of capacity. Examples include apparel, furniture, jewelry, and liquor stores that have been operating as curbside or delivery only
- Shopping malls may open at 50% capacity with indoor common areas at 25% capacity
- Those who work in office settings are encouraged to continue to work remotely whenever possible but may return to offices in small waves

WHAT OPENS

These business sectors may open a week after the start of Stage 2

- Personal services, such as hair salons, barber shops, nail salons, spas, and tattoo parlors. By appointment only with operational limitations. Employees must wear face coverings, work stations must be spaced to meet social distancing guidelines, and other requirements must be met. Customers should wear face coverings to the extent possible
- Restaurants and bars with restaurant service may open at 50% capacity with operational limitations. Bar seating will be closed with no live entertainment. Servers and kitchen staff must wear face coverings
- State government executive branch offices will begin limited public services, and employees will begin to return to offices in small waves
- Boating is permitted, but boaters must follow social distancing guidelines
- Visitors to beaches and shorelines must adhere to the social gathering and social distancing guidelines

WHAT REMAINS CLOSED

- Individuals are not allowed to visit patients in assisted living/nursing home facilities
- Bars and nightclubs
- Gyms, fitness centers, community centers, and like facilities
- Cultural, entertainment, sports venues, and tourism sites
    - o This includes museums, zoos, festivals, parades, concerts, fairs, sports arenas, movie theaters, bowling alleys, aquariums, theme parks, recreational sports leagues and tournaments, and like facilities
- Playgrounds, tennis courts, basketball courts, amusement parks whether indoors or outside, tourist sites, water parks, and social clubs
- Congregate settings for seniors, adult day cares remain closed through at least May 31
- Casino operations
- Community swimming pools, public and private
- Residential and day camps
- Campgrounds, except for those living permanently in RVs or cabins

K-12 Educational Institutions Remain Closed

- All buildings, facilities, and grounds for K-12 educational institutions, public or private, will remain closed through June 30, 2020, except for the purposes previously allowed in Executive Orders pertaining to this public health emergency.
- Educational institutions (including public and private pre-K-12 schools, colleges, and universities) may be open for purposes of facilitating distance learning, performing critical research, or performing essential functions, provided that social distancing of 6 feet per person is maintained to the greatest extent possible.
- Educational institutions that were previously closed and are reopening for these purposes must perform enhanced environmental cleaning of commonly touched surfaces, such as workstations, countertops, railings, door handles, and doorknobs. Use the cleaning agents that are usually used in these areas and follow the directions on the label. Provide disposable wipes so commonly used surfaces can be wiped down by employees before each use.
- The Indiana Department of Education, in consultation with the Indiana State Department of Health, shall develop guidance for graduation ceremonies, including virtual graduation, drive-in ceremonies, and in-person ceremonies with the number of participants limited to the number allowed in the governor's executive order and provided social distancing requirements are met.

BACK ON TRACK INDIANA: STAGE 2 – MAY 4TH - 21ST

THE ROADMAP IS SUBJECT TO CHANGE BASED ON CDC GUIDANCE AND OTHER NEW INFORMATION

Stage 2 may begin on May 4 for all Indiana counties except Cass, Lake, and Marion.
Stage 2 may begin on May 11 for Lake and Marion.
Stage 2 may begin on May 18 for Cass County.
Local governments may impose more restrictive guidelines.

All Hoosiers	Some restrictions lifted	Continue remote work whenever possible	65 and older and high-risk citizens should stay at home whenever possible	Essential travel restrictions lifted; stay close to home	Recommend all residents wear face coverings in public settings	No social or mass gatherings of more than 25 people	Religious services may convene inside places of worship on May 8
Manufacturing, Industrial, Construction	Open; must meet IOSHA, CDC guidelines	Screen employees daily; utilize face coverings according to best practices guidelines	Make provisions to maintain social distancing	Consult industry best practices	Provide employees, customers w/ your COVID-19 policies		
State, County & Local Government	Some BMV branches will open by appointment only on May 4; limited public access to state buildings begins May 11		Screen employees daily; face coverings highly recommended	Make provisions for social distancing	Provide employees, customers with your COVID-19 policies	County, local governments determine their own policies	Public libraries may reopen according to their own policies
Professional Office Settings	Remote work encouraged whenever possible; as needed, return workers in small waves	Screen employees working in offices daily	Make provisions for social distancing				
Retail, Malls, Commercial Businesses	Open at 50% of capacity; pickup, delivery preferred	Mall common areas limited to 25% capacity	Screen employees daily; utilize face coverings according to best practices guidelines	Highly recommend employees & customers wear face coverings	Social distancing provisions for employees & customers	Consult industry best practices	Provide employees and customers with COVID-19 policies
Healthcare	Nursing homes remain closed to visitors	Congregate settings for seniors, adult day cares closed through at least May 31					

BACK ON TRACK INDIANA: STAGE 2 – MAY 4TH - 21ST

Restaurants, Bars with Restaurant Services	Dining room service may open at 50% capacity a week after the start of Stage 2	Bar seating closed; no live entertainment	Screen employees daily; employees must wear face coverings	Consult Indiana Restaurant & Lodging Association best practices	Provide employees and customers your COVID-19 safety plan
Bars & Nightclubs	Closed				
Personal Services (Hair, Nails, etc.)	Open by appointment only; beginning a week after the start of Stage 2	Work stations spaced to meet social distancing guidelines	Screen employees daily	Employees and customers must wear face coverings	Consult industry best practices; provide and post COVID-19 safety plan
Gyms, Fitness Centers, & Similar Facilities	Closed				
Cultural, Entertainment, Sports Venues, Amusement & Water Parks, Tourism Sites	Closed; state parks remain open with social distancing; golf courses open				
Playgrounds, Outdoor Courts, Recreational Sports, Youth Training Facilities	Closed				
Other	Campgrounds closed except for permanent RV or cabin residents	Boating allowed; must follow social gathering guidelines	Visitors to beaches and shorelines must adhere to social gathering and social distancing guidelines	K-12 buildings, facilities, and grounds closed through June 30; DOE developing special guidance for graduation ceremonies	

STAGE 3

MAY 22ND TO JUNE 13TH

LAKE, MARION, AND CASS COUNTIES MAY MOVE TO STAGE 3 ON JUNE 1

GUIDELINES FOR ALL HOOSIERS

- Hoosiers 65 and older and people with known high-risk medical conditions should limit exposure at work and in their communities
- Continue remote work when possible
- Face coverings are recommended
- Social gatherings of up to 100 people may take place following the CDC social distancing guidelines. The coronavirus is often spread among groups of people who are in close contact in a confined space for an extended period of time. This limit applies to wedding receptions, parties, and other events where people are in close physical contact for extended periods of time
- Assisted living facilities and nursing homes remain closed to visitors; this guidance will continue to be evaluated
- No travel restrictions

SUGGESTED SOCIAL GATHERINGS VENUE GUIDANCE

For a single defined space, all public and private meetings or gatherings may have up to 100 people when social distancing can be accomplished and other sanitation measures are implemented. It is highly recommended that tools be used to complete a health screening for attendees.

For locations with multiple, clearly separate areas, such as separate banquet rooms or multiple sports fields, each separate area may have up to 100 in each section or segment with these accommodations:

- Ensure separate gatherings do not commingle
- Within each segment/gathering, ensure 6 feet of social distancing between each table with no more than 6 individuals at any table, and for classroom, auditorium, bleacher or other style seating, ensure 6 feet of separation between individuals or household units
- Ensure separate and designated restroom facilities for each site/gathering that can adequately provide services for attendees
- Provide hand sanitizer or other prevention supplies
- Attendance is prohibited if individuals are sick or recently exposed to COVID-19. It is highly recommended that tools be used to complete a health screening for attendees

Multi-day meetings or gatherings are strongly discouraged.

WHAT OPENS

- Retail stores and malls may move to 75% of capacity while maintaining social distancing
- Mall common areas, such as food courts and sitting areas, are limited to 50% capacity
- Gyms, fitness centers, yoga studios, martial arts studios, and like facilities may open with restrictions. Class sizes and equipment must be spaced to accommodate social distancing. Limited class sizes. Equipment must be cleaned after each use, and employees are required to wear face coverings. No contact activities are permitted. See additional guidance
- Community tennis and basketball courts, soccer and baseball fields, YMCA programs, and similar facilities may open with social gathering and social distancing guidelines in place
- Community pools may open according to CDC guidance
- Campgrounds may open with social distancing limitations and sanitation precautions. See additional guidance
- Youth summer day camps may open on June 1. See additional guidance
- Community recreational youth and adult sports may resume practices and conditioning, adhering to social gathering and social distancing guidelines. Contact sports, such as football, basketball, and wrestling, where players typically come into contact with other players, are not permitted. Conditioning and non-contact drills may take place
- Adult day service programs offered through the state's Bureau of Developmental Disabilities Service may begin June 1; congregate senior settings remain closed. See additional guidance
- Raceways may open with no spectators. See additional guidance
- Day care facilities and day care facilities at schools are encouraged to open
- State park inns reopen

WHAT REMAINS CLOSED

- Playgrounds
- Overnight youth camps
- Bars and nightclubs
- Cultural, entertainment, and venues
- Amusement parks, water parks, and tourism sites
- Festivals, fairs, and parades
- K-12 buildings, facilities, and grounds closed for school-sponsored education, sports, and other activities through June 30; day care at school facilities encouraged to open
- Movie theaters

BACK ON TRACK INDIANA: STAGE 3 – MAY 22ND - JUNE 13TH

PLEASE NOTE THE ROADMAP IS SUBJECT TO CHANGE BASED ON CDC GUIDANCE AND OTHER NEW INFORMATION.
LAKE, MARION, AND CASS COUNTIES MAY MOVE TO STAGE 3 ON JUNE 1.
Move forward in accordance with key principles; local governments may impose more restrictive guidelines.

All Hoosiers	65 and older and high-risk citizens use caution and limit exposure in community	Continue remote work whenever possible	Recommend all residents wear face coverings in public	Social gatherings permitted up to 100 people	No travel restrictions		
Manufacturing, Industrial, Construction	Open; must meet IOSHA, CDC guidelines						
State, County & Local Government	Limited public access to state government buildings; employees return to office buildings in waves	Use tools to screen employees daily	Make provisions for social distancing	County and local governments determine their policies	Public libraries may reopen according to their own policies		
Professional Office Settings	Remote work encouraged whenever possible	Bring employees to offices in waves	Use tools to screen employees daily	Make provisions for social distancing			
Retail, Malls, Commercial Businesses	Open with restrictions of 75% of capacity; maintain social distancing	Mall common areas limited to 50% capacity	Use tools to screen employees daily	Highly recommend employees and customers wear face coverings	Make provisions for employees to maintain social distancing	Consult industry best practices	Provide employees and customers with COVID-19 policies
Healthcare	Assisted living, nursing homes remain closed to visitors; guidance will continue to be evaluated	Adult day services offered through Bureau of Developmental Disabilities Services may open June 1	Congregate senior settings remain closed				
Restaurants, Bars with Restaurant Services	Dining room service open at 50% capacity	Bar seating closed; no live entertainment	Use tools to screen employees daily; employees must wear face coverings	Consult Indiana Restaurant & Lodging Association best practices	Provide employees and customers with your COVID-19 safety plan		

BACK ON TRACK INDIANA: STAGE 3 – MAY 22ND - JUNE 13TH

Bars & Nightclubs	Closed				
Personal Services (Hair, Nails, etc.)	Open by appointment only	Work stations spaced to meet social distancing guidelines	Use tools to screen employees daily	Employees must wear face coverings; customers must wear face coverings to the extent practical	Consult industry best practices; provide and post your COVID-19 safety plan
Gyms, Fitness Centers, & Similar Facilities	Open with restrictions; see guidance	Screen employees daily; employees must wear face coverings	Class sizes or equipment must be spaced to accommodate social distancing	Equipment must be cleaned after each use	Limit class sizes
Cultural, Entertainment, Sports Venues, Amusement & Water Parks, Tourism Sites	State parks open with social distancing; state park inns open	Drive-in theaters may open	Raceways may open with no spectators; see guidance		
Playgrounds, Outdoor Courts, Recreational Sports, Youth Training Facilities	Playgrounds closed, community tennis and basketball courts, soccer and baseball fields open with social distancing and social gathering guidelines	Community pools may open according to CDC guidance	Summer day camps for children may open June 1; see guidance	Community recreational youth and adult non-contact sports practices may resume; social gathering and distancing guidelines required	
Other	Campgrounds open with social distancing limitations, sanitation precautions; see guidance	Boating allowed; must follow social gathering guidelines	K-12 buildings, facilities, and grounds closed for school-sponsored education, sports, and other activities through June 30; day care at school facilities encouraged to open	Visitors to beaches and shorelines must adhere to social gathering and social distancing guidelines	

STAGE 4

JUNE 12TH - JULY 3RD

GUIDELINES FOR ALL HOOSIERS

- Hoosiers 65 and older and those with known high-risk medical conditions should adhere to social distancing guidelines and remain cautious at work and in their communities
- Continue remote work as needed
- Face coverings are recommended
- Social gatherings of up to 250 people may take place following the CDC social distancing guidelines. The coronavirus is often spread among groups of people who are in close contact in a confined space for an extended period of time. This limit applies to wedding receptions, parties, and other events where people are in close physical contact for extended periods of time
- Outdoor visitation may take place at assisted living facilities and nursing homes; guidelines continue to be reviewed and updated

* Hospital visitations encouraged with precautions

WHAT OPENS

- State government building access available by appointment
- Professional office building employees may resume work at full capacity with adherence to social distancing
- Retail stores and malls open at full capacity with social distancing guidelines in place
- Dining room food service may open at up to 75% capacity as long as social distancing is observed
- Bar seating in restaurants may open at 50% capacity as long as social distancing is observed
- Bars and nightclubs may open at 50% capacity adhering to social distancing guidelines
- Cultural, entertainment, and tourism sites may open at 50% capacity. This includes museums, zoos, aquariums, and like facilities
- Movie theaters, bowling alleys, and similar facilities may open at 50% capacity, adhering to social distancing guidelines

- Non-contact community recreational sport leagues or teams, public or private, may resume games, leagues, and tournaments on June 12
- Contact community recreational sport leagues or teams, public or private, may resume games, leagues, and tournaments on June 19 when the host or sponsoring venue has submitted to the local health department and posted publicly, a COVID response plan that includes precautions in place and being taken to ensure overall protection of competitors, coaches, officials, staff, and spectators. Such plans must be submitted at least 72 hours in advance of the event. All social gathering limits must be followed. Please see Executive Order 20-32
    - The organizations at these links have prepared guidance for resuming amateur sports that may be helpful in preparing COVID response plans: **https://aiha-assets.sfo2.digitaloceanspaces.com/AIHA/resources/Reopening-Guidance-for-Amateur-Sports_GuidanceDocument.pdf**

      https://www.aspenprojectplay.org/return-to-play
- Raceways may open at 50% grandstand capacity
- Pari-mutuel horse racing may begin with no spectators at Hoosier Park and Indiana Grand facilities
- Charity gaming and casinos may open June 15 with the approval of the Indiana Gaming Commission
- Venues may open at a 50% capacity with adherence to social distancing guidelines
- Amusement parks, water parks, and like facilities may open at 50% capacity; reservations are encouraged to limit the number of customers at any one time
- Playgrounds may reopen; wash hands and use sanitizer frequently

WHAT REMAINS CLOSED

- Conventions, fairs, festivals, parades, and similar events

BACK ON TRACK INDIANA: STAGE 4 – JUNE 12TH - JULY 3RD

PLEASE NOTE THE ROADMAP IS SUBJECT TO CHANGE BASED ON CDC GUIDANCE AND OTHER NEW INFORMATION.
All counties may move to Stage 4. LaGrange and Elkhart counties should move with caution based on recent testing results. Move forward in accordance with key principles; local governments may impose more restrictive guidelines.

All Hoosiers	65 and older and high-risk citizens remain cautious and social distance	Remote work as needed	Face coverings recommended	Social gatherings permitted up to 250 people	No travel restrictions
Manufacturing, Industrial, Construction	Open; must meet IOSHA, CDC guidelines				
State, County & Local Government	State offices open by appointment	Screen employees daily	Provisions for employees to maintain social distancing	County and local governments determine their policies	Public libraries may reopen according to their own policies
Professional Office Settings	May resume in-office work at full capacity	Screen employees working in offices daily	Make provisions for employees to maintain social distancing		
Retail, Malls, Commercial Businesses	Open at full capacity; maintain social distancing	Screen employees daily	Recommend employees and customers wear cloth face coverings	Consult industry best practices; provide and post your COVID-19 safety plan	
Healthcare	Outdoor visitation may take place at assisted living facilities and nursing homes; guidelines continue to be reviewed and updated	Day services for adults with disabilities open; other congregate settings remain closed	Hospital visitations encouraged with precautions		
Restaurants, Bars with Restaurant Services	Dining room service open up to 75% capacity as long as social distancing observed	Bar seating open at 50% capacity; social distancing required	Use tools to screen employees daily; must wear face coverings	Consult Indiana Restaurant & Lodging Association best practices	

BACK ON TRACK INDIANA: STAGE 4 – JUNE 12TH - JULY 3RD

Bars & Nightclubs	Open at 50% capacity; social distancing practices must be observed	Use tools to screen employees daily; must wear face coverings	Consult industry best practices	Provide employees and customers with your COVID-19 safety plan		
Personal Services (Hair, Nails, etc.)	Appointments preferred	Work stations spaced to meet social distancing guidelines	Use tools to screen employees daily	Employees must wear face coverings; customers must wear face coverings to the extent possible	Provide and post your COVID-19 safety plan	
Gyms, Fitness Centers, & Similar Facilities	Open with restrictions; see guidance	Screen employees daily; must wear face coverings	Class sizes or equipment must be spaced to accommodate social distancing	Equipment must be cleaned after each use	Limit class sizes	
Cultural, Entertainment, Sports Venues, Amusement & Water Parks, Tourism Sites	Cultural, tourism facilities such as museums, aquariums may open at 50% capacity Racing, karting may open at 50% spectator capacity	Venues such as concert and event spaces may open at 50% capacity Many arts, venues and cultural organizations have prepared reopening guides. Examples may be found at links in the Back On Track plan	Amusement parks, water parks, etc., may open at 50% capacity; reservations encouraged	Charity gaming, casinos may open June 15 with approval of Indiana Gaming Commission	Pari-mutuel horse racing may resume with no spectators at Hoosier Park and Indiana Grand	Movie theaters, bowling alleys, similar facilities may open at 50% capacity
Playgrounds, Outdoor Courts, Recreational Sports, Youth Training Facilities	Non-contact community recreational sports games, leagues, and tournaments may resume on June 12	Contact community recreational sports games, leagues, and tournaments may resume June 19 according to Executive Order 20-32	Playgrounds may reopen; wash hands and use sanitizer frequently			
Other	Campgrounds open with restrictions	Boating allowed; must follow social gathering guidelines	K-12 buildings, facilities, and grounds closed for school-sponsored education, sports, and other activities through June 30; day care at school facilities encouraged to open	Visitors to beaches and shorelines must adhere to social gathering and social distancing guidelines		

STAGE 4.5

JULY 4TH - SEPTEMBER 25TH

Local governments may impose more stringent guidelines
K-12 schools operating according to locally determined schedules

GUIDELINES FOR ALL HOOSIERS

- Hoosiers 65 and older and those with known high-risk medical conditions should adhere to social distancing guidelines and remain cautious at work and in their communities
- Face coverings are required according to Executive Order 20-42
- Social gatherings of up to 250 people may take place following the CDC social distancing guidelines. The coronavirus is often spread among groups of people who are in close contact in a confined space for an extended period of time. This limit applies to wedding receptions, parties, and other events where people are in close physical contact for extended periods of time, particularly in indoor locations
- Outdoor and indoor visitation has resumed at assisted living facilities and nursing homes, in accordance with ISDH visitation guidelines
- Congregate meals and activities at senior centers remain closed
- Hospital visitations encouraged with precautions
- Organizations that utilize volunteers are encouraged to re-engage them for activities. Use appropriate screening and precautions. Hoosiers 65 and older and those with high-risk medical conditions should look for ways to assist online or from home

STAGE 4 RESTRICTIONS THAT CONTINUE

- Dining room food service may operate at up to 75% capacity as long as social distancing is observed
- Bar seating in restaurants may operate at 50% capacity as long as social distancing is observed
- Bars and nightclubs may operate at 50% capacity adhering to social distancing guidelines. Seated-only operations are encouraged
- Cultural, entertainment, and tourism sites may operate at 50% capacity. This includes museums, zoos, aquariums, and like facilities
- Movie theaters, bowling alleys, and similar facilities may operate at 50% capacity, adhering to social distancing guidelines
- Raceways may operate at 50% grandstand capacity

- Venues may operate at a 50% capacity with adherence to social distancing guidelines

STAGE 4 RESTRICTIONS THAT CONTINUE

- Amusement parks, water parks, and like facilities may operate at 50% capacity; reservations are encouraged to limit the number of customers at any one time
- Personal services continue operations with restrictions
- Gyms, fitness centers and other workout facilities continue operations with restrictions

IN STAGE 4.5

- K-12 school operations, extra-curricular and co-curricular activities have resumed
- Pari-mutuel horse racing and county and state fair racing may operate with 50% spectator capacity
- Youth overnight camps are allowed. See guidance
- Fairs, festivals and other similar outdoor events may open and conventions may resume. Requirements for gatherings and events are below

REQUIREMENTS FOR EVENTS

SOCIAL GATHERINGS AND MEETINGS ARE LIMITED TO NO MORE THAN 250 ATTENDEES

- A "social gathering" or meeting is an event, assembly, or convening that brings together multiple people, individually or from separate households, in a single space, indoors or outdoors, at the same time and in a coordinated fashion where a significant purpose is to interact with others — like a wedding, family reunion, party, barbecue, picnic, club, banquet, or conference.
- Social gatherings and meetings are limited to no more than 250 people.

SPECIAL OR SEASONAL EVENTS

- A special or seasonal event is an event, assembly, or convening of multiple people from separate households in a single space, indoors or outdoors, at the same time but where the significant purpose is not necessarily for the purpose of individuals interacting with others outside of one's household – like weekly summer concerts or movies-in-the-park, fairs, festivals, carnivals, parades, graduation ceremonies, community holiday celebrations, conventions, fundraisers, sport or racing competitions, outdoor shows, and other outdoor entertainment events.
- Special or Seasonal Events where the total attendance will be in excess of 250 individuals (according to capacity limits in Stages 4 and 4.5) must have an event plan approved by local health officials before proceeding.

OTHER EVENTS NOT COVERED

- This guidance does not apply to school classrooms; areas where people may be in transit such as an airport; settings in which people are in the same general space at the same time but doing separate activities, like medical offices, hospitals, or business environments such as offices, internal meetings solely among employees of a single business, retail stores, and restaurants where people may be working, shopping, or eating in the same general area but are not gathering together in an organized fashion. Religious services are excluded. The activities of these events are subject to separate requirements and guidance.

GENERAL CONSIDERATIONS

- The more people an individual interacts with at an event and the longer that interaction lasts, the higher the potential risk of becoming infected with COVID-19 and COVID-19 spreading
- Additionally, the higher the level of community transmission in the area that the gathering or event is being held, the higher the risk of COVID-19 spreading
- COVID-19 transmission may occur more easily indoors than outdoors
- Health Departments and event organizers should continue to assess, based on current conditions, whether to significantly reduce the number of attendees for gatherings, or even postpone or cancel the event
- Per the CDC, the highest risk events are large in-person gatherings where it is difficult for individuals to remain spaced at least 6 feet apart and attendees travel from outside the local area

EVENT PLANS

The following requirements apply to special or seasonal events where there will be more than 250 people in total attendance:

a. Event organizers must develop and submit to the local health department a written plan outlining the steps to be taken to mitigate against COVID-19. Each plan must address the following issues:

- Capacity Limits – outline steps that will be taken to ensure the overall capacity does not exceed allowable limits set out in Stage 4 or 4.5 and social distancing can be achieved. For example, outdoor concert venues are limited to 50% of capacity. Event organizers should consider whether to stagger or cap attendance, limit the number of people present at any given time, issue tickets with staggered start times, limit attendance duration
- Guest Information – provide appropriate information to guests to stay home if sick or part of a vulnerable population, engage in social distancing, increase handwashing, etc. Use signage and other tools to make guests aware of COVID precautions

- Staff & Volunteer Screening – identify measures that will be taken to appropriately screen staff and volunteers for COVID-19 symptoms. Use questionnaires, take temperatures, or both
- Social Distancing Measures – identify measures that will be employed to ensure attendees engage in social distancing such as one-way flow of attendees, ground markings, seat markings, etc. Allow space for seating between vehicles
- Increased Sanitation – provide steps that will be taken to ensure the event space is appropriately cleaned and sanitized, that high touch areas have increased cleaning; and additional handwashing or hand sanitizing is available. Examples are no food samples, drink refill stations or communal condiment areas; touchless payment; water fountains used to refill bottles only; increase ventilation
- Face Coverings – face coverings are required
- Compliance – identify event staff or volunteers who will monitor and ensure compliance with the approved plan. Examples: Use staff to direct the flow or attendees, have a COVID-19 point of contact for all staff/volunteers

b. Monitoring & Enforcement – event planners must have sufficient event staff or volunteers present during the event to monitor and ensure compliance with the approved plan and other Executive Order directives

c. Plan Submission Timeline –

- Plans must be submitted at least 7 days in advance of the event

d. Local health departments must review and approve or disapprove event plans.

BACK ON TRACK INDIANA: STAGE 4.5 – JULY 4TH - SEPTEMBER 25TH

LOCAL GOVERNMENTS MAY IMPOSE MORE STRINGENT GUIDELINES

Please note the roadmap is subject to change based on CDC guidance and other new information.

All Hoosiers	65 and older and high-risk citizens remain cautious and social distance	Remote work as needed	Face coverings required, Executive Order 20-42	Social gatherings permitted up to 250 people	No travel restrictions
Manufacturing, Industrial, Construction	Open; must meet IOSHA, CDC guidelines				
State, County & Local Government	State government complex open. Visitors and state employees are required to wear masks in indoor public areas, with exceptions	Screen employees daily	Provisions for employees to maintain social distancing	County and local governments determine their policies	Public libraries may reopen according to their own policies
Professional Office Settings	In-office work at full capacity	Screen employees working in offices daily	Make provisions for employees to maintain social distancing		
Retail, Malls, Commercial Businesses	May operate at full capacity; maintain social distancing	Screen employees daily	Recommend employees and customers wear cloth face coverings	Consult industry best practices; provide and post your COVID-19 safety plan	
Healthcare	Indoor and outdoor visitation for long-term care facilities has resumed. See guidance	Congregate gatherings for seniors remain closed	Day services for adults with disabilities may operate; other congregate settings remain closed	Hospital visitations encouraged with precautions	
Restaurants, Bars with Restaurant Services	Dining room service may operate at up to 75% capacity as long as social distancing observed	Bar seating may operate at 50% capacity; social distancing required	Use tools to screen employees daily; employees must wear face coverings	Consult Indiana Restaurant & Lodging Association best practices	

BACK ON TRACK INDIANA: STAGE 4.5 – JULY 4TH - SEPTEMBER 25TH

Bars & Nightclubs	May operate at 50% capacity; social distancing practices must be observed	Seated-only operations are encouraged	Use tools to screen employees daily; employees must wear face coverings	Consult industry best practices	Provide employees and customers with your COVID-19 safety plan	
Personal Services (Hair, Nails, etc.)	Appointments preferred	Work stations spaced to meet social distancing guidelines	Use tools to screen employees daily	Employees must wear face coverings; customers must wear face coverings to the extent possible	Provide and post your COVID-19 safety plan	
Gyms, Fitness Centers, & Similar Facilities	Operate with restrictions; see guidance	Screen employees daily; employees must wear face coverings	Class sizes or equipment must be spaced to accommodate social distancing	Equipment must be cleaned after each use	Limit class sizes	
Cultural, Entertainment, Sports Venues, Amusement & Water Parks, Tourism Sites	Cultural, tourism facilities such as museums, aquariums may operate at 50% capacity	Venues such as concert and event spaces may operate at 50% capacity	Amusement parks, water parks, etc., may operate at 50% capacity; reservations encouraged	Charity gaming, casinos opened June 15 with approval of Indiana Gaming Commission	Pari-mutuel horse racing and county and state fair racing may operate with 50% spectator capacity	Movie theaters, bowling alleys, similar facilities may operate at 50% capacity
	Racing, karting may operate at 50% spectator capacity	Many arts, venues and cultural organizations have prepared reopening guides. Examples may be found at links in the Back On Track plan	Conventions may resume following the Gatherings and Events guidelines in Executive Order 20-36	Fairs, festivals and similar events may resume according to provisions of Executive Order 20-36	Requirements for events with more than 250 attendees may be found on page 24	
Playgrounds, Outdoor Courts, Recreational Sports, Youth Training Facilities	Non-contact community recreational sports games, leagues, and tournaments resumed on June 12	Contact community recreational sports games, leagues, and tournaments resumed June 19. Must adhere to Executive Order 20-32	Playgrounds open; wash hands and use sanitizer frequently			
Other	Campgrounds may operate with restrictions	Boating allowed; must follow social gathering guidelines	K-12 school operations, extra-curricular and co-curricular activities have resumed	Visitors to beaches and shorelines must adhere to social gathering and social distancing guidelines		

WHERE WE ARE GOING **STAGE 5**

START DATE TO BE DETERMINED

GUIDELINES SUBJECT TO REVISION

GUIDELINES FOR ALL HOOSIERS

- The most effective known ways to protect against COVID-19 are:
    - Wearing a cloth face mask or coverings, especially in public and when social distancing cannot be observed. Face coverings are highly recommended
    - Maintaining social distancing of 6 feet
    - Washing your hands frequently with soap and water
- Hoosiers 65 and older and those with known high-risk medical conditions should adhere to social distancing guidelines and remain cautious at work and in their communities
- Remote work optional
- Limits on the size of social gatherings TBD. The coronavirus is often spread among groups of people who are in close contact in a confined space for an extended period of time
- Outdoor visitation opportunities are required at assisted living facilities and nursing homes
- Indoor visitation opportunities are required at assisted living facilities and nursing homes

WHAT OPENS

CAPACITY GUIDELINES ARE SUBJECT TO CHANGE

- Restaurants, bars, and nightclubs may operate at full capacity
- Personal services may open at full capacity
- Gyms, fitness centers and workout facilities may operate at full capacity
- Conventions may resume at full capacity
- Amusement parks, water parks, and like facilities may operate at full capacity. Social distancing guidelines should be maintained
- Cultural, entertainment, and tourism sites may open at full capacity. This includes museums, zoos, aquariums, and like facilities
- Pari-mutuel horse racing and county and state fair racing may operate at full spectator capacity
- Raceway events may return to full capacity

BACK ON TRACK INDIANA: STAGE 5 – START DATE TBD

GUIDELINES SUBJECT TO REVISION

Move forward in accordance with key principles; local governments may impose more restrictive guidelines

All Hoosiers	65 and older and high-risk citizens remain cautious and social distance	Remote work optional	Face coverings TBD	Social gatherings size limits TBD	No travel restrictions
Manufacturing, Industrial, Construction	Open for normal operations meeting IOSHA, CDC guidelines	Face coverings recommended			
State, County & Local Government	Resume regular public operations	Face coverings required for state employees			
Professional Office Settings	Open for regular operations	Face coverings recommended			
Retail, Malls, Commercial Businesses	Open at full capacity	Face coverings recommended			
Healthcare	Outdoor and indoor visitation opportunities required at assisted living, nursing homes.	Adult day services have resumed	Face coverings required		
Restaurants, Bars with Restaurant Services	Open at full capacity	Bar seating open	Face covering requirements TBD		

BACK ON TRACK INDIANA: STAGE 5 – START DATE TBD

Bars & Nightclubs	Open at full capacity	Face covering requirements TBD	
Personal Services (Hair, Nails, etc.)	Open for full service	Face covering requirements TBD	
Gyms, Fitness Centers, & Similar Facilities	Open at full capacity	Face covering requirements TBD	
Cultural, Entertainment, Sports Venues, Amusement & Water Parks, Tourism Sites	Conventions, sports events, fairs, festivals may resume at full capacity	Pari-mutuel horse racing and county and state fair racing may begin at full spectator capacity	Face coverings recommended
Playgrounds, Outdoor Courts, Recreational Sports, Youth Training Facilities	Overnight summer camps open. See guidance.		
Other	Campgrounds open without restrictions	Boating allowed	Face coverings recommended

Indiana COVID-19 Data Report

Additional Resources

Dashboard LTC

Below results are as of **09/14/2020, 11:59 PM**. Dashboard updated daily at **12:00 PM**.
New positive cases, deaths and tests have occurred over a range of dates but were reported to the state Department of Health in the last 24 hours.

Filters

Date Range Last 30 days Last 45 days Last 60 days Last 90 days

Newly Reported Confirmed COVID-19 Counts

New Tests Administered
17,789
07/16/2020 ... 09/14/2020
7,644 New Individuals Tested

New Positive Cases
758
09/14/2020 ... 09/14/2020

Positivity - All Tests
4.8 % 7-Day Rate
09/02/2020 ... 09/08/2020
6.2 % cumulative rate

New Deaths
20
09/05/2020 ... 09/14/2020

Total Confirmed COVID-19 Counts

Total Tests Administered
1,756,019
02/26/2020 ... 09/13/2020
1,254,731 Individuals Tested

Total Positive Cases
107,229
03/06/2020 ... 09/14/2020

Positivity - Unique Individuals
6.9 % 7-Day Rate
09/02/2020 ... 09/08/2020
8.5 % cumulative rate

Total Deaths
3,235
03/15/2020 ... 09/13/2020

County Distributions

Select a county below by tap or click

Cases | Deaths | Tested | Positivity | County Metrics

Below results are as of **09/06/2020, 11:59 PM**. The county metrics map is updated Wednesdays at **12:00 PM** and reflects data through the previous Sunday.
Click here to learn more about the county metrics map

Ask Barb the Bot (/2495.htm)

Map Filter Weekly Score

ISDH District Statewide

Weekly Score

- Blue (0 and .5)
- Yellow (1 and 1.5)
- Orange (2 and 2.5)
- Red (3)

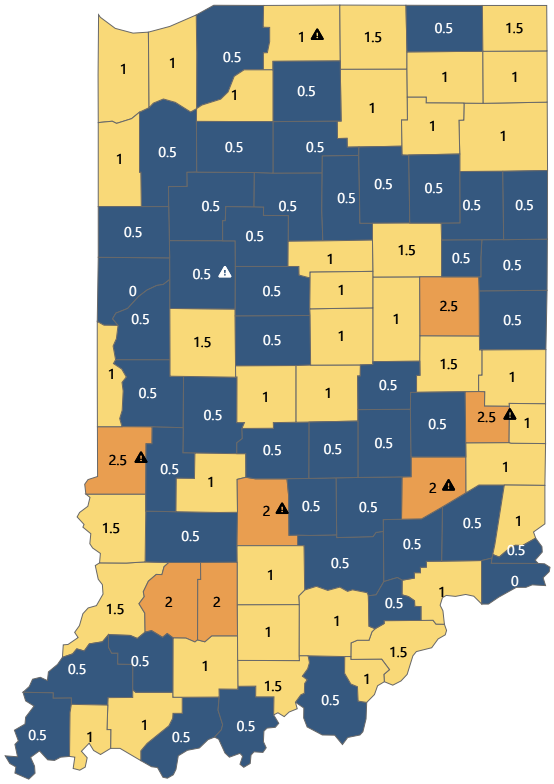
Weekly Cases Per 100,000 Residents

- Less Than 10 new cases(0)
- 10 to 99 new cases(1)
- 100 to 199 new cases(2)
- 200 or more(3)

7-Day All Tests Positivity Rate

- Less than 5% (0)
- 5% to 9.9% (1)
- 10% to 14.9% (2)
- 15% or greater (3)

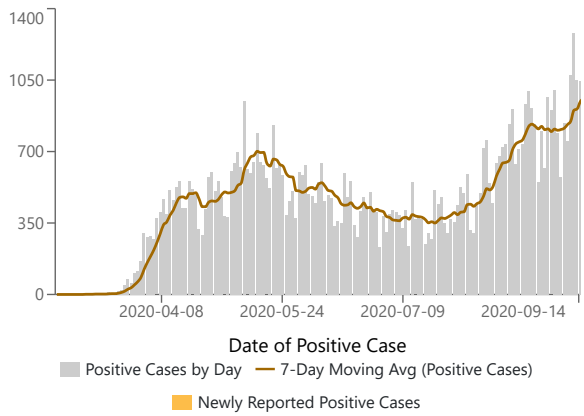
The ⚠ indicates a disclaimer alert for the county. Hover over the symbol for additional details.



Positive Cases

Statewide Positive Cases by Day

All | Newly Reported

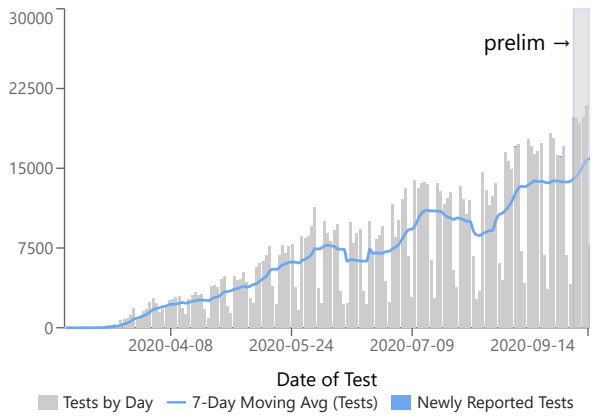


Tests

Statewide Tests by Day

All | Newly Reported

All Tests | Individuals



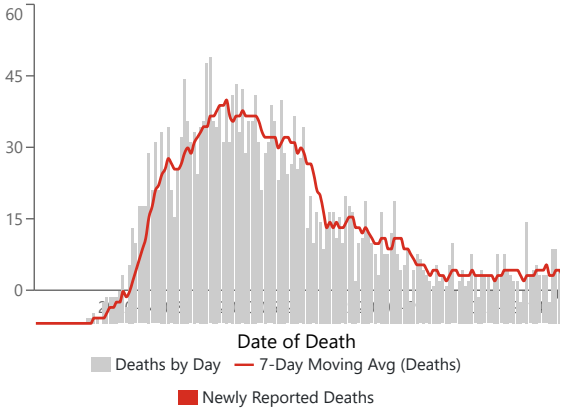
Deaths

Ask Barb the Bot (/2495.htm)

Positivity

Statewide Deaths by Day

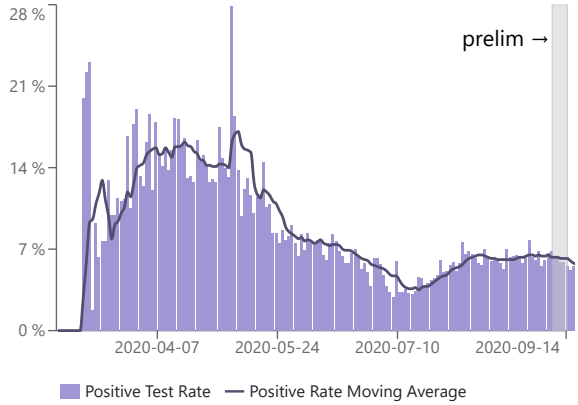
All | Newly Reported



Statewide Daily Positive Test Rate

All Tests | Individuals

What does prelim mean?

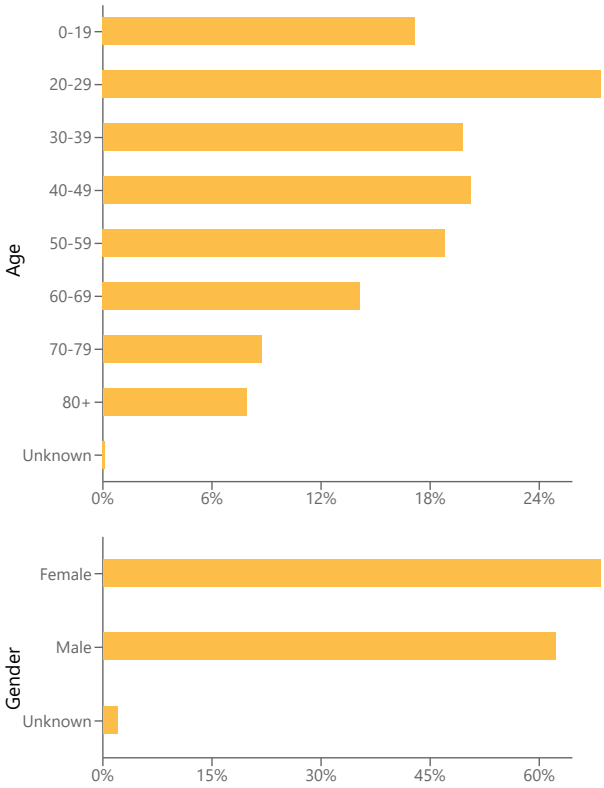


Demographic Distributions

Why do I see "Unknowns"?

Positive Cases | Deaths | Tested Individuals

Statewide Demographics for Positive Cases*



Race	% of Cases	% of Indiana Population
White	52.7 %	85.1 %
Other Race	14.6 %	2.6 %
Black or African American	9.9 %	9.8 %
Asian	1.1 %	2.5 %
Unknown	21.6 %	0 %

Ethnicity	% of Cases	% of Indiana Population
Not Hispanic or Latino	36.8 %	92.9 %
Hispanic or Latino	8.9 %	7.1 %
Unknown	54.4 %	0 %

** Indiana population percentages provided by 2019 U.S. Census Bureau; Population Estimate Program.*

Resource Usage

Ask Barb the Bot (/2495.htm)

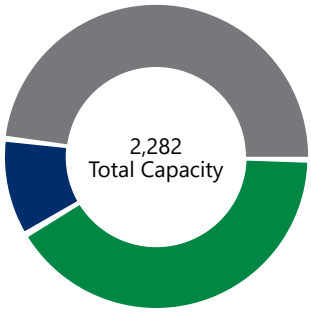
Today | By Day

Today's Statewide ICU Bed Usage

48.6%
ICU Beds in Use - Non-COVID

10.1%
ICU Beds in Use - COVID

41.3%
ICU Beds Available

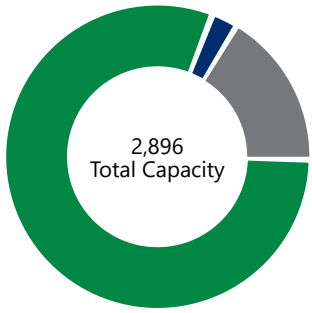


Today's Statewide Ventilator Usage

16.3%
Ventilators in Use - Non-COVID

2.3%
Ventilators in Use - COVID

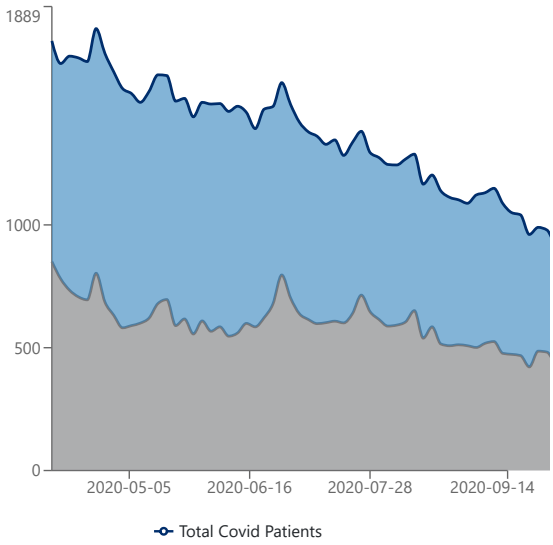
81.4%
Ventilators Available



Hospitalizations

Census | Admissions

Statewide COVID-19 Hospital Census



Probable COVID-19 Counts

Total Probable Deaths

225

Ask Barb the Bot (/2495.htm)

All data displayed is preliminary and subject to change as more information is reported to ISDH. Tests are displayed by the date the test was performed and deaths are displayed by the date the death occurred.

Expect historical data to change as data is reported to ISDH.

Email Updates

To sign up for updates or to access your subscriber preferences, please enter your contact information below.

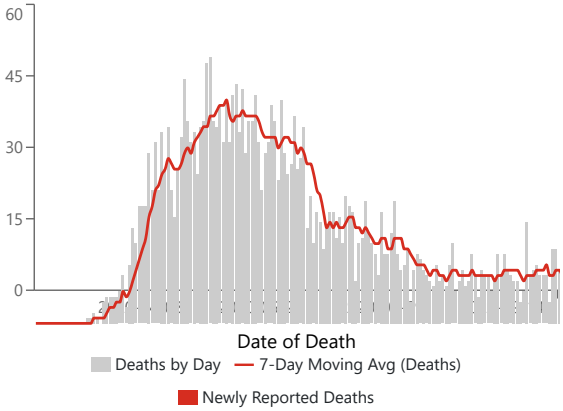
*Email Address

Submit

This site was last updated 9/14/2020 9:35 AM

Statewide Deaths by Day

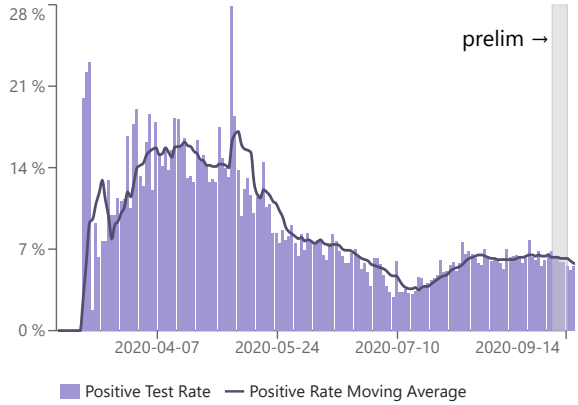
All | Newly Reported



Statewide Daily Positive Test Rate

All Tests | Individuals

What does prelim mean?

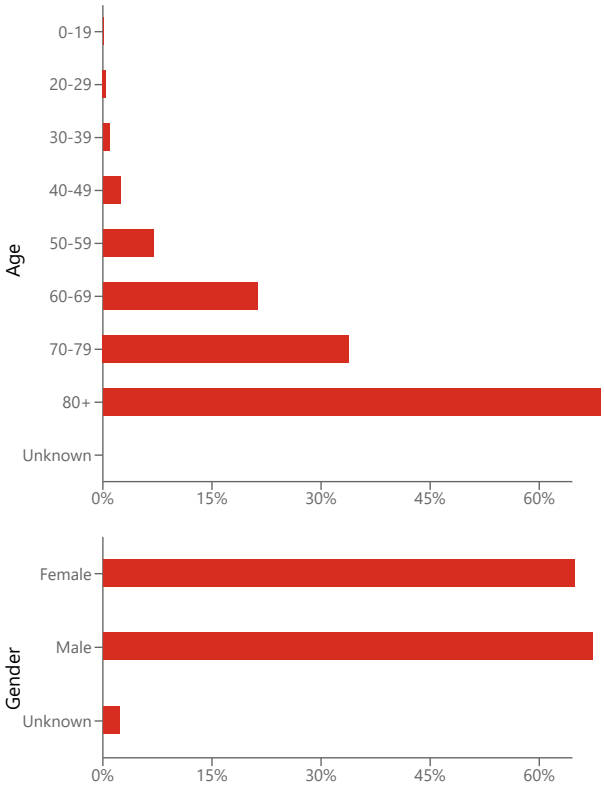


Demographic Distributions

Why do I see "Unknowns"?

Positive Cases | Deaths | Tested Individuals

Statewide Demographics for Deaths*



Race	% of Deaths	% of Indiana Population
White	65.7 %	85.1 %
Black or African American	13.6 %	9.8 %
Other Race	13.1 %	2.6 %
Asian	0.5 %	2.5 %
Unknown	7.1 %	0 %

Ethnicity	% of Deaths	% of Indiana Population
Not Hispanic or Latino	51.2 %	92.9 %
Hispanic or Latino	2.2 %	7.1 %
Unknown	46.6 %	0 %

** Indiana population percentages provided by 2019 U.S. Census Bureau; Population Estimate Program.*

Resource Usage

Ask Barb the Bot (/2495.htm)

States Respond to the Additional Assistance for Unemployed Persons

September 4, 2020

Ashley Prickett Cuttino

Greenville

Author

On August 8, 2020, President Donald Trump issued a **presidential memorandum** that addresses the need for additional assistance for workers who have lost wages due to the ongoing COVID-19 pandemic. The memorandum on wage assistance contains three parts:

- It allows for up to $400 per week in wages assistance for those persons unemployed due to COVID-19. Pursuant to the memorandum, individual states would pay 25 percent of the $400 and the federal government, through the Federal Emergency Management Agency (FEMA), would pay the other $300 per week.
- It encourages the states to use the more than $80 billion in remaining **Coronavirus Aid, Relief, and Economic Security (CARES) Act** funds to pay the 25 percent share of additional unemployment benefit (i.e., $100 per covered individual per week).
- It directs the U.S. Department of Homeland Security, acting through FEMA, to make available up to $44 billion in its Disaster Relief Fund (DRF) to states that request the funds.

On August 12, 2020, the U.S. Department of Labor (DOL) issued **Unemployment Insurance Program Letter No. 27-20** providing clarification for the states with regard to the unemployment portion of the memorandum, and provided a name for the temporary unemployment insurance benefits: "Lost Wages Assistance" (LWA). Program Letter 27-20 answers many questions raised by the individual states regarding the memorandum. The DOL program letter provides the following clarifications to states regarding the new wage assistance program.

Administration of LWA Benefits

Claimants in most unemployment insurance (UI) programs are eligible for up to $400 per week in additional benefits, starting "with weeks of unemployment ending on or after August 1, 2020," and ending December 27, 2020, at the latest. Once the allocated funds are exhausted, the LWA program will end. LWA benefits will be administered by states and territories through a grant agreement with FEMA and with support from the DOL.

Qualification for LWA

To qualify for LWA benefits, an individual must "provide[] self-certification that he or she is unemployed or partially unemployed due to disruptions caused by COVID-19," and also must confirm that he or she is receiving at least $100 of unemployment

benefits for the week for which LWA is sought through regular unemployment compensation or through any of the following unemployment programs:

- "Unemployment Compensation for Federal Employees (UCFE);
- Unemployment Compensation for Ex-Servicemembers (UCX);
- Pandemic Emergency Unemployment Compensation (PEUC);
- Pandemic Unemployment Assistance (PUA);
- Extended Benefits (EB);
- Short-Time Compensation (STC);
- Trade Readjustment Allowances (IRA); and
- Payments under the Self-Employment Assistance (SEA) programf

LWA is not available for individuals receiving assistance through Disaster Unemployment Assistance (DUA). The DOL guidance also states the following:

[A] number of state laws include provisions for extending the potential duration of benefits during periods of high unemployment for individuals in approved training who exhaust benefits, or for a variety of other reasons. Although some state laws call these programs "extended benefits," the Department uses the term "additional benefits' (AB) for these state programs to avoid confusion with the Federal-State EB program. LWA is not payable to individuals who are receiving AB payments.

LWA Program Funding and Benefit Amounts

LWA is funded by FEMA through a joint federal-state agreement and provides the states with two benefit options.

Option 1 ($400 per week benefit)

For the $400 per week benefit, an individual state must contribute 25 percent ($100) and the federal government will cover 75 percent of the cost ($300). States are encouraged to satisfy the 25 percent state match requirement and provide the additional $100 in benefits either through allocations of the state's Coronavirus Relief Funds (CRF), provided under Title V of the CARES Act, or other state funding.

Option 2 ($300 per week benefit)

For the $300 per week benefit, FEMA will fund the entire benefit. Individual states may choose to satisfy the 25 percent state match without allocating additional state funds. The DOL will consider the payment of regular state UI unemployment benefits to satisfy the 25 percent match requirement.

Duration of LWA Benefit Program

The LWA program will begin on the week ending August 1, 2020. According to the presidential memorandum and the DOL guidance, the program will end on December 27, 2020, or earlier if any of the following triggers are met:

- "FEMA expends the $44 billion from the DRF account" prior to that date;

Q "Nile balance of the DRF decreases to $25 billion"; or

- "Megislation is enacted that provides, due to the COVID-19 outbreak, supplemental federal unemployment compensation or similar compensation for unemployed or underemployed individualsf

Of important note, FEMA estimates that the LWA funds will be exhausted in four (4) to five (5) weeks based on current unemployment numbers.

Detail on Beginning and End Dates per State

The DOL clarified the timing for LWA payments for states that differ on the day of the week when unemployment starts. "[I]n states where the week of unemployment ends on a Saturday, the first week that LWA may be paid is the week ending August 1, 2020. For states where the week of unemployment ends on a Sunday, the first week that LWA is payable is the week ending August 2, 2020."

The DOL also clarified the timing for payments at the end of the program, stating the following:

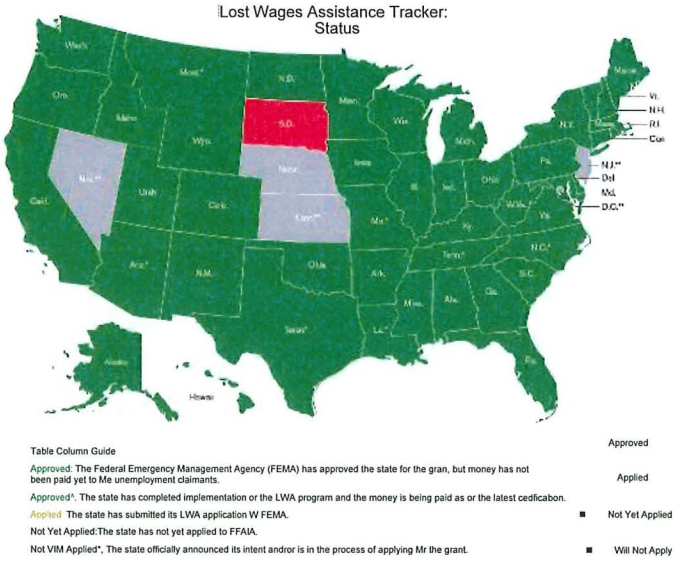
LWA is not payable for any week of unemployment ending after December 27, 2020. Accordingly, for states where the week of unemployment ends on a Saturday, the last week that LWA may be paid is the week ending December 26, 2020. For states where the week of unemployment ends on a Sunday, the last week that LWA is payable is the week ending December 27, 2020.

Self-Certification Process

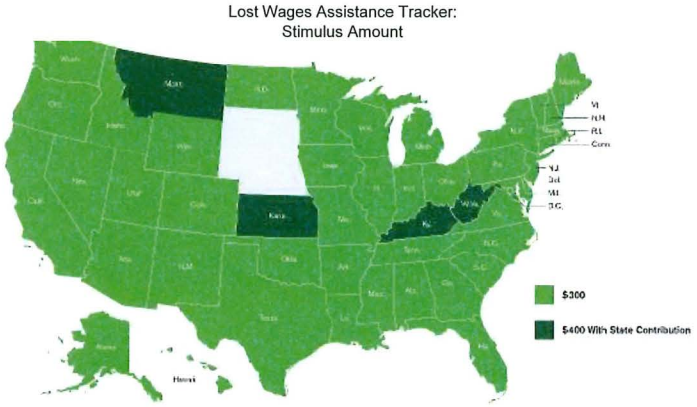
States will first have to sign on to the LWA program and determine which level of additional LWA benefit will be provided. States will then "need to develop a self-certification process in accordance with FEMA instructions for claimants to certify weekly that they are unemployed or partially unemployed due to disruptions caused by COVID-19f

State Enactment of the LWA Benefit

We are tracking state enactment of the LWA benefits. Most states have had their grants approved by FEMA. Only South Dakota has indicated that it will not apply. Nebraska has not yet given any indication as to its intent to apply or at what amount.



The stimulus amounts offered by each state total either $300 per month or $400 per month as represented by the below map.



Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm's **Coronavirus (COVID-19) Resource Center** as additional information becomes available. Important information for employers is also available via the firm's **webinar programs.**

Ogletree Deakins

COVID-19/Coronavirus, Employment Law, Healthcare, Leaves of Absence

Families First Coronavirus Response Act: DOL Gets Back on the Rail

September 14, 2020

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On September 11, 2020, the U.S. Department of Labor (DOL) partially ended the mystery of when and how it would respond to the August 3, 2020, **decision** from the United States District Court for the Southern District of New York in which the court—stating that the DOL had "jumped the rail"—struck down several provisions of the DOL's final rule implementing the emergency family leave and paid sick leave provisions of the **Families First Coronavirus Response Act** (FFCRA). Specifically, the DOL issued a **temporary rule** that is scheduled to be published in the *Federal Register* on September 16, 2020, and that revises several portions of the final rule that the DOL issued on April 1, 2020. The DOL has also updated its **Families First Coronavirus Response Act: Questions and Answers** to reflect the revised temporary rule.

The federal district court struck down the DOL's April 1, 2020, regulations regarding: (1) the requirement that employers actually have work available for employees in order for the employees to be eligible for leave; (2) the broad definition of "health care provider"; (3) the requirement that employees obtain employer approval for intermittent leave; and (4) the requirement that employees provide documentation prior to taking FFCRA leave. The court created uncertainty about the geographic reach of its decision, which left open the question as to what extent employers outside the court's district needed to comply with the decision.

The DOL still has until October 2, 2020, to appeal the court's decision, and its issuance of the temporary rule does not foreclose an appeal. However, the DOL's revisions make clear how it will interpret the FFCRA through the law's December 31, 2020, expiration date. Specifically, the DOL has reaffirmed its original interpretation of the FFCRA in large part and conceded some ground to the district court, primarily in the definition of "health care provider."

In its 53-page temporary rule, the DOL addresses the following:

- *The DOL reaffirms the requirement that employees may take FFCRA leave only if the employer has work available for the employees.*

In its decision, the court held that the FFCRA itself was ambiguous in referring to the reasons an employee is unable to work or telework, and the court concluded that the DOL's work-availability requirement was invalid for two reasons: (1) the DOL's explicit application of the requirement to only three of the six qualifying reasons for taking leave under the FFCRA's paid sick leave provisions was "unreasoned" and inconsistent with the statute's text; and (2) the DOL did not sufficiently explain the reason for imposing the work-availability requirement.

In the revised temporary rule, the DOL states that it has "carefully considered the District Court's opinion and ... explain[ed] why it continues to interpret the FFCRA to [require] ... work-availability ... for all qualifying reasons for leave—and why it has further expanded its interpretation "to explicitly include the work-availability requirement in *all* qualifying reasons for leave." (Emphasis added.)

The DOL states that "'[l]eave is most simply and clearly understood as an authorized absence from work; if an employee is not expected or required to work, he or she is not taking leave." The DOL points out that removing the availability of the work requirement would lead to an illogical result as follows:

> Typically, if an employer closes its business and furloughs its workers, none of those employees would receive paychecks during the closure or furlough period because there is no paid work to perform. But if an employee with a qualifying reason could take FFCRA leave even when there is no work, he or she could take FFCRA leave, potentially for many weeks, even when the employer closes its business and furloughs its workers. The employee on FFCRA leave would continue to be paid during this period, while his or her co-workers who do not have a qualifying reason for taking FFCRA leave would not. The Department does not believe Congress intended such an illogical result.

The DOL cautions that its revised interpretation does not permit an employer to avoid granting FFCRA leave by "mak[ing] work unavailable in an effort to deny FFCRA leave because altering an employee's schedule in an adverse manner because that employee requests or takes FFCRA leave may be impermissible retaliationf The DOL also clarifies that work unavailability may be due to situations such as an employer's ceasing operations at the employees worksite or furloughing the employee due to a downturn in business.

The DOL states the following:

> Against this backdrop, the Department interprets the FFCRA's paid sick leave and emergency family and medical leave provisions to grant relief to employers and employees where employees cannot work because of the enumerated reasons for leave, but not where employees cannot work for other reasons, in particular the unavailability of work from the employer.

The practical result of the DOL's temporary rule on this subject is that the DOL does not cede any ground to the district court and, instead, reaffirms its position that in order for employees to take leave under the FFCRA—for any reason—the employer must have work available for the employee. If the employer does not have work available because, for instance, it has laid off or furloughed workers, then employees are not entitled to FFCRA leave.

> *The DOL reaffirms and provides additional explanation for the requirement that an employee must have employer approval to take FFCRA leave intermittently.*

Consistent with the DOL's approach to the work-availability requirement, the temporary rule also reaffirms the DOL's position that employer approval is required for employees to take intermittent leave under the FFCRA. In its decision, the court held that the DOL had failed to explain adequately its rationale that intermittent leave could be taken only with employer consent. In reaffirming its position, the DOL reasoned that its approach is "consistent with longstanding [Family and Medical Leave Act (FMLA)] principles governing intermittent leave ... [which] is leave

taken in separate blocks of time due to a single qualifying reason, with the employee reporting to work intermittently during an otherwise continuous period of leave taken for a single qualifying reason:' The DOL additionally explained that, under 29 C.F.R. § 82620(a)(i)-(iv) and (vi), the regulations do not permit employees who take paid sick leave to return to work intermittently at a worksite because those employees present a risk of spreading COVID-19 to coworkers, but employees who take paid sick leave for those reasons are permitted to telework—if such telework is available—"on an intermittent basis without posing the risk of spreading the contagion at the worksite or being infected themselves:'

Very importantly, the DOL concluded that employer approval is not required when employees take FFCRA leave in full-day increments to care for children whose schools are operating on a hybrid-attendance basis (e.g., alternating day, half-day, or alternating week) because such leave is not intermittent. "Under the FFCRA," the DOL explained, "intermittent leave is not needed because the school literally closes ... and opens repeatedlyf With the DOL's additional explanation in the temporary rule, these hybrid-attendance models do not implicate intermittent leave at all and, instead, are a series of different leaves under the FFCRA. In all other circumstances, the DOL has reaffirmed its position that employer approval is required for employees to take FFCRA leave intermittently.

> *The DOL revises the definition of 'health care provider" to include only employees who meet the definition of that term under the FMLA regulations or who are "'employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient car4'" which, if not provided, would adversely impact patient care*

The DOL's temporary rule cedes to the district court the most with respect to the court's position regarding health care provided eligibility for FFCRA leave. Under the FFCRA, an employer can exclude health care providers from paid sick leave and expanded family medical leave entitlements. The district court strongly criticized what it characterized as the DOL's overly broad view of "health care provider" and opined that the DOL should focus on the nature of the employee's job and not on the employer's identity. The court criticized the DOL's rule for sweeping in certain healthcare facility employees "whose roles bear *no nexus whatsoever* to the provision of healthcare services:' (Emphasis in the original.)

The DOL has revised "health care provider" to include physicians and others who make medical diagnoses. As reflected in the temporary rule and the DOL's updated Families First Coronavirus Response Act: Questions and Answers, "health care providers" include licensed doctors of medicine, nurse practitioners, or any other health care providers who may issue an FMLA medical certification. In addition, the definition includes those who are "employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care" and that, "if not provided, would adversely impact patient care:' Finally, the "health care provider" definition includes employees who do not provide direct health care services but who are otherwise integrated into and necessary to providing those services. The DOL includes as an example of this final category a laboratory technician who processes medical test results to aid in the diagnosis and treatment of a health condition.

The temporary rule also identifies positions that are not health care providers. This nonexhaustive list includes "information technology (IT) professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and bffiers." The DOL considers these positions too attenuated to patient care.

The DOL's revised temporary rule includes specific examples of diagnostic services, preventive services, treatment services, and other services that are integrated with and necessary to the provision of patient care.

"Diagnostic services include taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting test or procedure resultsf

"Preventive services include screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems:'

"Treatment services include performing surgery or other invasive or physical interventions, prescribing medication, providing or administering or prescribed medication, physical therapy, and providing or assisting in breathing treatments:'

The "other services" category includes "bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples:'

CO *The DOL clarifies that employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable and corrects an inconsistency regarding when employees may be required to provide notice of a need to take expanded family and medical leave to their employers.*

As with the "health care provider" revision, the DOL has ceded a bit of ground to the court around what and when employees must provide notice to their employers of the need for leave under the FFCRA. Specifically, the DOL's temporary rule makes clear that documentation supporting requests for leave under the FFCRA need not be given in advance of taking such leave "but rather may be given as soon as practicable, which in most cases will be when the employee provides notice" of the need for FFCRA leave. The DOL's revision also corrects an inconsistency regarding the timing of notice for employees who take expanded family and medical leave. Specifically, the DOL's temporary rule provides that "an employer may require an employee to furnish as soon as practicable: (1) the employee's name; (2) the dates for which leave is requested; (3) the qualifying reason for leave; and (4) an oral or written statement that the employee is unable to work. The employer also may require the employee to furnish the information set forth in § 826.100(b)-(f) at the same time' regarding a qualifying COVID-19-related reason to take paid sick leave.

In the DOL's recent updates to its FFCRA Questions and Answers, the DOL made clear its position that the United States District Court for the Southern District of New York's decision applies nationwide. At this point, it appears from the DOL's temporary rule that it intends to oppose—likely through an application for stay and an appeal—part of the United States District Court for the Southern District of New York's decision. With the DOL's issuance of the temporary rule, employers operating outside the Southern District of New York likely have a good-faith basis (and ultimately a strong defense) for adhering to the DOL's ongoing and revised interpretation of the FFCRA, while employers in the Southern District of New York may want to consider strictly adhering to the court's decision.

Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm's **Coronavirus) Resource Center** as additional information becomes available. Important information for employers is also available via the firm's **webinar** itt_o•grai_an.

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COVID-19/Coronavirus, Employment Law, New Jersey, Return to Work, State Developments, Workplace Safety and Health

New Jersey Enacts COVID-19 Workers' Compensation Presumption Bill for Essential Workers

September 17, 2020

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On September 14, 2020, New Jersey Governor Phil Murphy signed **Senate Bill (SB) 2380** into law. SB 2380 creates a rebuttable presumption of workers' compensation coverage for COVID-19 cases contracted by "essential employees" during a public health emergency declared by an executive order of the governor. The law is effective immediately and retroactive to March 9, 2020.

The law defines "essential employee" as "an employee in the public or private sector who during a state of emergency":

1. is a public safety worker or first responder, including any fire, police or other emergency responders;
2. is involved in providing medical and other healthcare services, emergency transportation, social services, and other care services, including services provided in health care facilities, residential facilities, or homes;
3. performs functions which involve physical proximity to members of the public and are essential to the public's health, safety, and welfare, including transportation services, hotel and other residential services, financial services, and the production, preparation, storage, sale, and distribution of essential goods such as food, beverages, medicine, fuel, and supplies for conducting essential business and work at home; or
4. is any other employee deemed an essential employee by the public authority declaring the state of emergency.

Number four is akin to a "catchall" provision that includes any workers deemed essential through public authority, such as executive orders issued by Governor Murphy during the pandemic. Examples include:

- grocery/food store employees;
- pharmacy employees;
- medical supply store employees;
- employees in retail functions of gas stations;
- convenience store employees;
- cashier and store clerks;
- construction workers; or

0 employees providing childcare services to "essential employees:'

Under the new law, in a public health emergency declared by the governor, if an individual contracts COVID-19 during a time in which the individual is working as an essential employee in a place of employment other than the individual's own residence, there shall be a rebuttable presumption that the contraction of the disease is work related and fully compensable for the purposes of workers compensation benefits.

An employer may rebut this presumption by a preponderance of the evidence showing that the worker was not exposed to the disease while working in the place of employment other than the individual's own residence. Any worked compensation claims paid as a result of the rebuttable presumption provided in the law will not be considered in calculating an employer's Experience Modification Factor, pursuant to the New Jersey Worked Compensation and Employers Liability and Insurance Manual administered by the Compensation Rating and Inspection Bureau established by Section 2 of P.L.1995, c.393 (C.34:15-89.1) and Section 1 of P.L.2008, c.97 (C. 34:15-90.1).

Establishing a presumption of compensability for certain essential workers during the pandemic has become a growing trend among states that significantly lessens an employee's burden of proving that a COVID-19-related illness is compensable under workers compensation laws. Details of these state law amendments vary. For more detail and the latest developments, please refer to our **Workers' Compensation Coverage chart.** In states that have implemented a rebuttable presumption, such as New Jersey, employers will be faced with the difficult burden of proving that an alleged COVID-19 contraction is not work related. However, while employers in these states may be faced with an uptick in workers compensation claims, employers will also likely be insulated from civil liability pursuant to the workers compensation bar, absent some exception to the bar, such as the intentional injury exception.

Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm's **Coronavirus (COVID-19) Resource Center** as additional information becomes available. Important information for employers is also available via the firm's **webinar programs.**

Ogletree Deakins

COVID-19/Coronavirus, Employment Law, Healthcare, Ohio, Return to Work, State Developments, Workplace Safety and Health

Governor DeWine Signs Law Shielding Ohio Employers From Liability for COVID-19–Related Lawsuits

September 18, 2020

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On September 14, 2020, Governor Mike DeWine signed **House Bill (H.B.) 606** into law, providing employers with legal protections when it comes to their efforts to stem the spread of COVID-19 and making Ohio one of a growing number of states granting similar civil immunity. According to Governor DeWine, the new law accomplishes the dual goals of keeping people safe and rebuilding the state's economy.

Under the new law, Ohio businesses will enjoy state-law immunity from civil actions brought by customers, employees, or others "for damages for injury, death, or loss" related to "the exposure to, or the transmission or contraction" of the novel coronavirus "unless it is established that [the exposure, transmission, or contraction] was by reckless conduct or intentional misconduct or willful or wanton misconduct on the part of the person against whom the action is brought." The law extends protections to all Ohio entities, including schools, nonprofit and for-profit entities of any size, governmental entities, religious entities, colleges, and universities.

The law further provides that public health orders issued by the executive branch (i.e., the governor and the Ohio Department of Health), as well as public health orders "from counties and local municipalities, from boards of health and other agencies, and from any federal government agency, do not create any new legal duties for purposes of tort liability." The law is retroactive to the date of the declared state of emergency in Ohio, March 9, 2020, and will expire on September 30, 2021.

The law also protects health care providers from both professional disciplinary action and tort liability stemming from the "provision, withholding, or withdrawal" of health care services resulting from the COVID-19 pandemic. In addition, the law provides that a health care provider is not subject to professional disciplinary action, nor liable in tort, for damages arising from the provider's inability "to treat, diagnose, or test" someone for "any illness, disease, or condition, including the inability to perform any elective procedure" due to any public health order issued in relation to the pandemic. However, the law does not provide blanket protection; plaintiffs who can prove a health care provider acted with "reckless disregard for the consequences" of their actions, or engaged in "intentional misconduct or willful or wanton misconduct" can still recover damages in a civil action. Moreover, health care providers remain subject to professional disciplinary action when their actions or omissions constitute gross negligence.

The new law makes it clear that government orders may not be construed as creating new causes of action for plaintiffs to invoke in place of ordinary negligence causes of action, and it provides tha64 government order is inadmissible as evidence

that a new cause of action, legal duty, or legal right has been established. In addition to the above protections, the law provides for a complete bar of class actions based in whole or in part on allegations that a health care provider, business, government entity, or person caused "exposure to, or the transmission or contraction of COVID-19.

Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm's **Coronavirus (COVID-19) Resource Center** as additional information becomes available. Important information for employers is also available via the firm's **webinar programs.**

Ogletree Deakins

COVID-19/Coronavirus, Employment Law, Healthcare, Workplace Safety and Health

Mandatory COVID-19 Vaccination: Is It Legal and Is It Right for Your Workplace?

September 4, 2020

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By all accounts, the availability of a vaccine for COVID-19 is a matter of when, not if. According to the World Health Organization, as of **August 25, 2020**, 173 potential vaccines are currently being developed in labs across the world, 31 of which have advanced to clinical stage testing on humans. Drug manufacturers estimate that a vaccine will be ready and approved for general use by the end of this year or early 2021.

Naturally, employers are beginning to ask the question: "Can we require employees to be vaccinated against COVID-19?" In general, the answer is yes. Employers may implement **mandatory vaccination programs**, subject to limited exemptions. Although the issue is only now coming to the forefront of our national conscience, mandatory vaccinations in the workplace are not new, and are particularly prevalent among **healthcare providers**. Some variability exists under federal law and among federal agencies, but for the most part, mandatory programs are permissible, as long as employers consider religious accommodation requests under Title VII of the Civil Rights Act of 1964 (Title VII) and medical accommodation requests under the Americans with Disabilities Act (ADA).

Religious Accommodations Under Title VII

Under Title VII, a "sincerely held religious belief" is a prerequisite to establishing an entitlement to a religious accommodation; personal or ethical objections are typically insufficient. Some jurisdictions, however, interpret "religious belief" more broadly than others. In *Chenzira v. Cincinnati Children's Hospital Medical Center*, an interesting case that is somewhat of an outlier, the U.S. District Court for the Southern District of Ohio denied a motion to dismiss the employee's challenge to a mandatory flu vaccination because the court found "it plausible that [p]laintiff could subscribe to veganism with a sincerity equating that of traditional religious views." By comparison, in *Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania*, the U.S. Court of Appeals for the Third Circuit affirmed the dismissal of a Title VII claim, finding that an employee's opposition to vaccines was a personal belief that did not "occupy a place in his life similar to that occupied by a more traditional faith." Personal anti-vaccination positions generally will not support the legal requirement of establishing a sincerely held religious belief in order to obtain an exemption from a mandatory vaccination policy.

Even if an employee can establish a sincerely held religious belief, the employer may deny an accommodation request if it poses an "undue hardship." The undue hardship analysis for Title VII religious accommodation requests includes consideration of harm to the employer, its employees, and third parties, such as patients. Federal courts are split on whether speculative harm is sufficient to establish an undue hardship, but at least one court—the U.S. District Court for the District of

Massachusetts, in *Robinson v. Children's Hospital Boston—has* held that exemptions to a mandatory flu vaccine would have posed an undue hardship because allowing one employee to forgo a mandatory vaccination "could have put the health of vulnerable patients at risk."

Medical Accommodations Under the ADA

Similar to the threshold requirement of establishing a sincerely held religious belief under Title VII, an employee requesting an accommodation under the ADA must establish a covered disability. In the vaccination context, there is a circuit split regarding whether sensitivity to vaccinations constitutes a covered disability. Under a similar set of facts, the U.S. Courts of Appeals for the Eighth and Third Circuits reached opposite conclusions—the Eighth Circuit held that alleged chemical sensitivities and allergies did *not* constitute a disability under the ADA, while the Third Circuit held that a history of allergies and anxiety related to the possible side effects of a vaccine qualified as an ADA-covered disability.

Assuming an employee requesting an accommodation is covered by the ADA, the undue hardship standard under the ADA is likely harder to demonstrate than the standard under Title VII. Under the standard established by the Supreme Court of the United States in *US Airways, Inc. v. Barnett,* to establish an undue hardship in the context of mandatory vaccinations, an employer generally "must show special (typically case-specific) circumstances demonstrating undue hardship:' However, employers may be able to circumvent this problem by offering an alternative vaccine that does not contain an ingredient that could trigger an employees medical condition (e.g., a vaccine that does not contain any egg, swine, or fetal cell products).

Will a COVID-19 Vaccine Be Treated Differently?

With respect to both Title VII and the ADA, it is difficult to predict how rules surrounding mandatory vaccinations will translate in the COVID-19 pandemic era. Importantly, the existing case law generally deals with employers engaged in direct patient care, where risk to vulnerable patients is a significant factor. When there is no "sick patient" involved, courts may be more inclined to find against mandatory vaccination policies.

Since the onset of the current pandemic, however, the *U.S.* Equal Employment Opportunity Commission (EEOC) has acknowledged that COVID-19 meets the ADA's **"direct threat standard:'** which permits more extensive medical inquiries and controls in the workplace than typically allowed under the ADA. A "direct threat" finding means that having someone with COVID-19 in the workplace poses a "significant risk of substantial harm" to others. Such a finding permits employers to implement medical testing and other screening measures the ADA would usually prohibit. It remains to be seen how the EEOC, which has traditionally been hostile to mandatory vaccination programs, will view a COVID-19 vaccine.

Other federal agencies take a more permissive stance, including recommendations strongly in favor of workplace vaccination policies, especially for industries deemed critical to the economy and national infrastructure. The *U.S.* Centers for Disease Control and Prevention (CDC) maintains a guidance document on this issue, titled **"Roadmap to Implementing Pandemic Influenza Vaccination of Critical Workforce'** The federal Occupational Safety and Health Administration (OSHA) is more likely to defer to employer-mandated vaccinations, although, as the agency **explained in 2009,** "an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious

illness or death ... may be protected under Section 11(c) ... whistle blower rightsf Notably, OSHA is **actively encouraging** its inspectors to get the COVID-19 vaccination when it becomes available.

Once a COVID-19 vaccine is approved, both federal and state authorities are almost certain to issue further guidance and/or regulations governing vaccinations in the workplace. In particular, employers may want to keep an eye on developments at the state level. Any such laws could significantly alter the undue hardship analysis under Title VII and the ADA if they mandate vaccinations to preserve the health and welfare of citizens (or subgroups, based on industry or job duties). For example, in its *Robinson* decision, the *U.S.* District Court for the District of Massachusetts considered a state department of health policy and guidance as support for the undue hardship defense.

What to Expect and How to Prepare

In addition to the legal issues, employers may also want to consider the politicized and polarized nature of the cultural dialogue surrounding prevention of COVID-19 transmission. Imposition of a mandatory COVID-19 vaccine will almost certainly result in a slew of accommodation requests—medical, religious, personal, and ethical —fueled by mistrust of political leaders and the healthcare industry. An August 2020 study found that **one-third of Americans would refuse a COVID-19 vaccine,** even if one were available. And, if large numbers of people feel the need to be **exempt from wearing a mask or face covering** (which is significantly less intrusive than receiving a vaccination), then employers likely can expect an equal or greater objection to a new vaccine (which may be viewed as risky and/or ineffective).

As a result, employers may want to take the following steps to prepare in anticipation of an approved vaccine.

- Consider whether a mandatory policy is truly necessary for the business in light of other alternatives, such as remote work, physical distancing, facial coverings, and other CDC-recommended steps to prevent the spread of COVID-19.
- If the company deems a mandatory vaccine policy necessary, it might consider confining the mandate to high-risk locales, departments, and/or worksites where alternative and similarly-effective means of limiting the contagion are not viable.
- Employers that decide to implement a mandatory policy may want to prepare in advance to review and administer numerous requests for accommodations, and create separate exemption request forms and doctor and religious leader certification forms. Potential accommodations may include increased use of personal protective equipment (PPE), modification of duties to remove at-risk activities, temporary or permanent transfers to other positions or work areas, and alternative forms of the vaccine that do not include objectionable ingredients (such as egg, swine, or fetal cell products).
- Some employers may find it useful to impose a vaccination deadline based on CDC recommendations and assigning the responsibilities of monitoring, compliance, and enforcement to a well-trained employee, committee, or department. Employers that impose a deadline may also want to consider preparing to address noncompliance through discipline or other corrective measures.
- Determine if it is possible to provide the vaccinations at no or little cost to the employee and consider making them available on-site at times convenient to

employees during their normal working hours.

- Consider evaluating the composition of the workforce and identifying those employees who may belong to a union. Under the National Labor Relations Act, employers with a unionized workforce will likely need to negotiate implementation of a mandatory vaccination program with the union.

- Consider reviewing state workers compensation laws and current employer insurance policies. Some employees may have a negative physiological reaction to the vaccine, and any adverse reactions to an employer-mandated vaccine could lead to a workers compensation claim. On the other hand, to the extent that a vaccination policy and program is considered part of the employer's wellness program, the worked compensation insurer may provide a discounted premium or other incentives to the employer.

- Because this is a rapidly developing area, employers may find it helpful to monitor new laws, regulations, and guidance from federal and state authorities.

If nothing else, the COVID-19 pandemic has required employers to consistently adapt to a rapidly changing environment. A mandatory vaccination policy may or may not be right for ones workplace, but as employers explore their options they may want to proceed with caution, remain nimble, and stay prepared.

For further information on mandatory vaccines, tune in to our upcoming two-part **podcast** series on accommodation issues in the COVID-19 era covering face coverings, vaccines, and the Americans with Disabilities Act.

Is a COVID-19 Mandatory Vaccine in Your Company's Future? Considerations at the Start of Flu Season

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Each year we review the validity of mandatory flu vaccinations. It is usually in the context of health care organizations, as few other employers have had the same need. In the last few years, the analysis has remained the same: (1) what is the justification (often, employee and patient safety); (2) will there be medical and/or religious exemptions; and, if so, (3) what is the accommodation (it has generally been wearing a mask all times at work).

Over the last few years, we have seen the U.S. Equal Employment Opportunity Commission (EEOC) push back both on the mandatory nature of requiring the flu vaccine and requiring wearing a mask as an accommodation.

So then comes the horrendous pandemic year of 2020 and the question of a mandatory flu vaccine may be far more important. There is a concern that a combined bad flu season on top of the continuing COVID-19 pandemic may overwhelm the U.S. health care system. The U.S. Centers for Disease Control and Prevention (CDC) is urging people to get the flu vaccine and many more employers are looking at whether to make it mandatory. Employers often offer the flu vaccine at their worksites on a voluntary basis. Now, with many employees working remotely, the logistics have changed. Even so, many pharmacies are offering flu shots free to individuals who have insurance. A well-designed robust educational campaign might encourage employees who do not wish to come into the workplace to stop by their neighborhood pharmacy instead. The time is tight, however, as health professionals are encouraging people to get the flu vaccine by late September or early October 2020.

Here is what employers that want to require flu vaccinations may need to consider. Although many jump ahead to the exemptions, the true starting point is determining the company's justification for making the vaccine mandatory. Why is it necessary for the workplace and for whom is it necessary? Does the same justification apply to all employees or only employees in specific areas? Employers may next want to determine if a vaccination program is something the company can unilaterally put into place or if there is any vehicle, such as a collective bargaining agreement, that requires bargaining over a mandatory requirement. This is the one main area where courts have curbed an employer's ability to require unilaterally mandatory vaccinations.

Employers that determine that they can support a decision to require a mandatory vaccination may then want to consider the issue of whether to allow exemptions. The EEOC's starting position has been that employers may not require a blanket vaccination program without considering employees' medical conditions and

religious beliefs. Employers also may wish to note that a number of states have expanded exemptions to include a **"philosophical exemption"** for those employees who object because of personal, moral, or other beliefs. Employers may find it useful to have policies and procedures to address the requests for exemptions and appropriate accommodations. Companies may wish to use a declination form for those who decline the vaccine and forms for specific exemptions, as well as a process for individually considering those requests. Many requests to decline the vaccine have been brought under the guise of religious objections. Employers may want to be prepared and have a plan prior to employees raising the issues.

Of course, these issues bring the looming question of mandatory COVID-19 vaccinations to the fore. The legal considerations will be the same. However, the medical community does not know all the issues that may result from the make-up of the vaccine. There are already concerns, justified or not, about vaccines being rushed and their potential safety and efficacy. People who are normally supportive of vaccinations are voicing concerns about a first-round COVID-19 vaccination. As a result, employers that mandate COVID-19 vaccinations may find an even greater education effort is necessary to explain to their employees why they are requiring the vaccine. We can only hope that the CDC will supply data and support for employers who choose this route.

Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm's **Coronavirus (COVID-19) Resource Center** as additional information becomes available. Important information for employers is also available via the firm's **webinar programs.**