FELHABER LARSON

ATTORNEYS AT LAW

The Dude Abides: Drug Testing in the Area of Medical and Recreational Marijuana

(November 8, 2021)

PRESENTATION OVERVIEW

- Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA")
- Medical Marijuana Considerations
- Recreational Marijuana
- Marijuana Use and the ADA

DATWA: EMPLOYER REQUIREMENTS:

- Testing can **only** be done under an employer's written policy
- Employer must use an accredited lab
- DATWA specifies what types of testing are allowed: job applicant, routine physical examination, random testing in some situations, treatment program testing, and reasonable suspicion

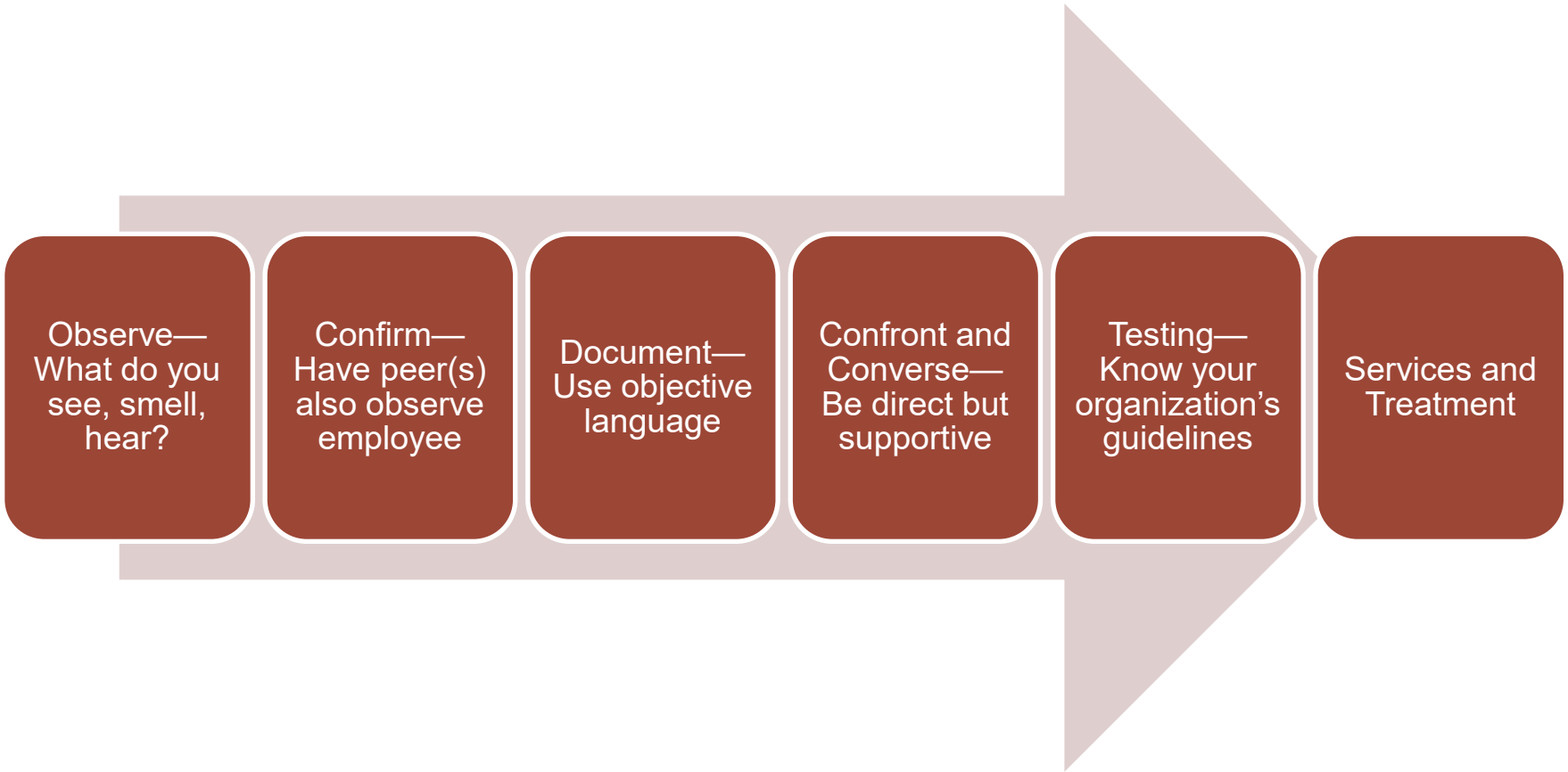
DATWA: EMPLOYEE PROTECTIONS

- Written notice requirements, including the right to explain the result, and to disclose any medications taken that could affect the reliability of the result.
- Confirmatory tests required
- Employers may not discharge an employee unless the employer has first offered the employee the opportunity to participate, at the employee's own expense or under the employee's benefit plan, in a drug or alcohol treatment or counseling program, and the employee refuses to participate in the program or fails to complete it successfully.

REASONABLE SUSPICION

- As noted above, an employer may test (pursuant to a valid written drug testing plan), if they have a reasonable suspicion that the employee is under the influence or has violated written workplace rules prohibiting the use of drugs or alcohol at work.
- However, it important that an employer take proper steps to **verify** and **document** the basis for the belief that testing is needed.

Reasonable Suspicion Process



HYPOTHETICAL #1

Donny works for House Furniture, a nationwide furniture retailer, in the rug department. For two years, Donny had been a model employee: punctual, great customer service, and was one of the top rug salesmen in the store.

However, Donny's manager Bunny starts noticing that Donny is showing up increasingly late to work, he takes longer than usual lunch breaks, and his sales have been declining.

HYPOTHETICAL #1

One day, Donny is helping a customer find the perfect rug for her dining room. Donny is trying to locate a particular rug that he thinks will suit the customer best. The customer has located an alternative rug she likes, but Donny is insistent that this one particular rug will really tie her dining room together. Bunny is working nearby and notices that Donny seems agitated with this customer and approaches to see if she can help.

Donny reiterates to Bunny that he needs this one particular rug because it will really tie the customer's dining room together. He's agitated, has bloodshot, watery eyes and Bunny detects the smell of marijuana emanating from his clothing. Bunny looks in the computer system and tells Donny that his coworker Walter sold the rug two weeks prior. Bunny steps in to help the customer purchase the alternative rug.

HYPOTHETICAL #1

After assisting the customer, Bunny asks the store's mustachioed general manager, Sam, if he will observe Donny and see if he thinks anything is "off". Sam sees Donny muttering to himself about a rug tying the room together, rifling through a pile of rugs that is in disarray, and confirms that Donny has bloodshot eyes and smells of marijuana.

At this point, can House Furniture send Donny to get drug tested? Is there anything else that should be done first?

IS TESTING NEEDED? (CONT.)

- Possession of paraphernalia (such as pipe, syringe, bent spoon, metal bottle cap, medicine dropper, glassine bag, paint can, glue tube, nitrite bulb, or aerosol can) can be used as a basis for adverse employment action.
- Similarly, taking adverse action for an employee's possession of drugs or alcohol in the workplace can result in termination without a test.

In addition to prohibiting employees being under the influence of drugs while working, policies should prohibit the possession of drugs by employees as well.

HYPOTHETICAL #2

Changing the facts, what if while Sam was observing Donny, a medicine bottle containing what appeared to be marijuana fell out of Donny's pants pocket?

Can Donny be terminated without first being sent for drug testing?

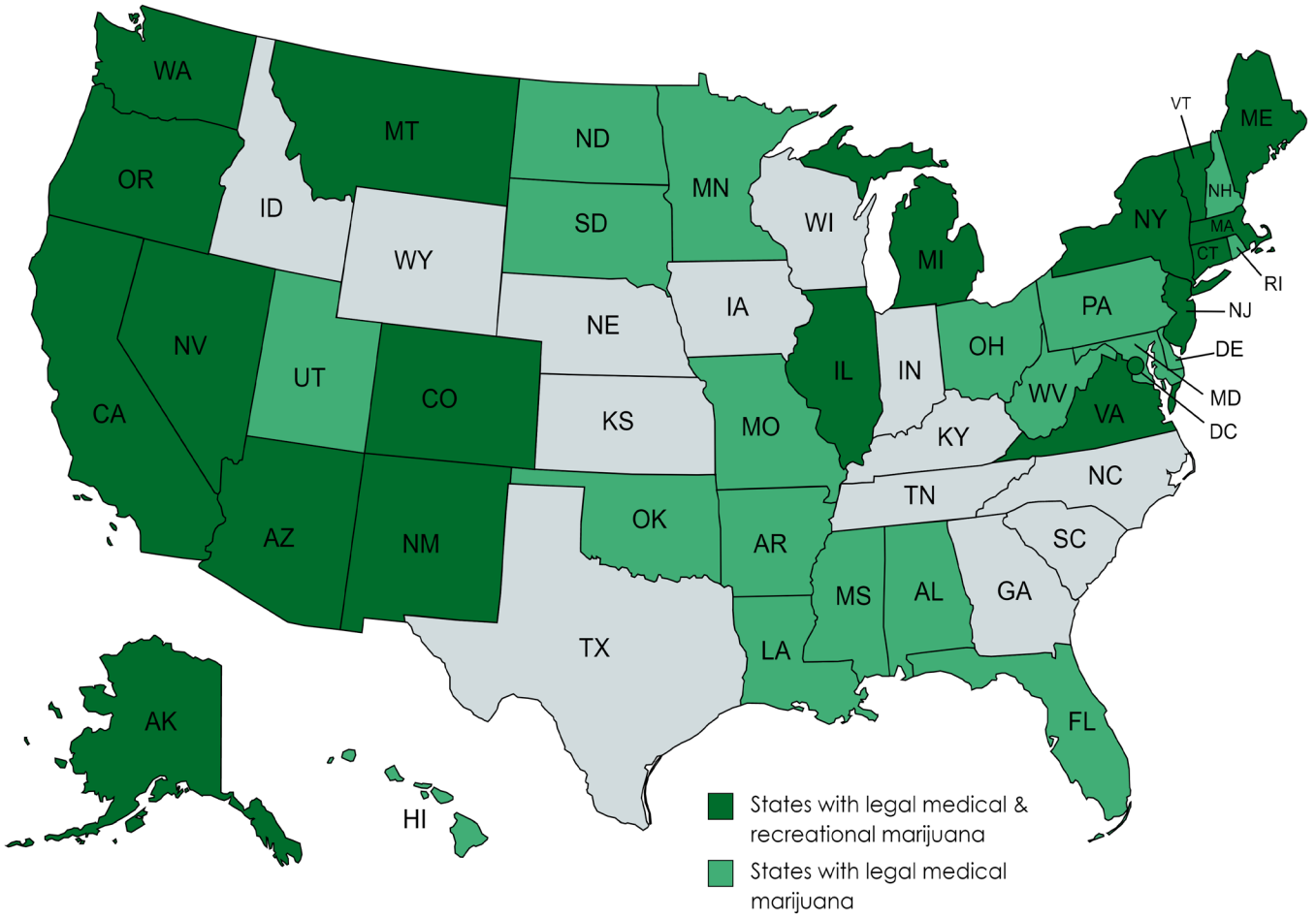
Determining Reasonable Cause – Questions to Ask

- ✓ Has some form of impairment been shown in the employee's appearance, actions or work performance?
- ✓ Does the impairment result from the possible use of drugs or alcohol?
- ✓ Are the facts reliable? Did you witness the situation personally, or are you sure that the witness(es) are reliable and have provided firsthand information?
- ✓ Are the facts capable of explanation?
- ✓ Are the facts capable of documentation?
- ✓ Is the impairment current, today, now?

Do NOT proceed with reasonable cause testing unless all the above questions are answered with a YES.

MEDICAL MARIJUANA – FEDERAL LAW CONSIDERATIONS

- The Controlled Substances Act, 21 U.S.C. § 811 classifies marijuana as a Schedule 1 drug, meaning that the federal government views marijuana as highly addictive and having no medical value.
- The U.S. Department of Transportation has taken the position that medical marijuana does not constitute a valid medical explanation for a covered employee's positive drug test result.
  - When an employee is subject to mandatory testing under DOT regulations, medical marijuana does not constitute a valid explanation for the positive test result.



*Current as of 11-1-2021

MEDICAL MARIJUANA - MINNESOTA

- Minnesota's Medical Cannabis law allows for the use and possession of marijuana for medical purposes.
- Minnesota's Law passed in **2014**.
  - As of November 2021, 37 States have adopted measures regulating marijuana for medical use.

MN Medical Marijuana Program Overview

- Patients seeking medical marijuana must go through Minnesota Registry Program.
- Only legal to distribute and consume medical marijuana in pill, vapor, and liquid form.
- Smoking marijuana is unlawful.
- Cannot use marijuana in public places or at work.

QUALIFICATION – MINNESOTA

- Minnesota's Medical Cannabis Program is one of the most restrictive in the nation.
- Health care practitioners must register in the Minnesota Medical Cannabis Registry in order to prescribe program participation.
- A patient must be diagnosed with a qualifying condition and then apply to be enrolled in the Patient Registry Program.

CURRENT QUALIFYING CONDITIONS

- Cancer associated with severe/chronic pain, nausea or severe vomiting, or cachexia or severe wasting
- Glaucoma
- HIV/AIDS
- Tourettes syndrome
- Amyotrophic lateral sclerosis (ALS)
- Seizures, including those characteristic of epilepsy
- Severe and persistent muscle spasms, including those characteristic of multiple sclerosis
- Inflammatory bowel disease, including Crohn's disease
- Terminal illness, with a life expectancy of less than one year, if the illness or treatment produces severe/chronic pain, nausea or severe vomiting, cachexia or severe wasting
- Intractable pain
- Post-traumatic stress disorder
- Autism
- Obstructive sleep apnea
- Alzheimer's disease
- Chronic pain
- Sickle cell disease
- Chronic motor or vocal tic disorder

QUALIFICATION (CONT'D)

- Once approved for the registry, the patient will receive a registry card that allows them to receive marijuana from a dispensary/clinic.
- Marijuana cannot be "prescribed" by physicians or other health care professionals because it is not approved by the FDA.
- Doctors certify patient as having a qualifying condition and then pharmacists working in clinics dispense.

MINNESOTA LAW - EMPLOYEE PROTECTIONS

- Minnesota's Medical Cannabis law prohibits workplace discrimination based on:
  - The person's status as a patient enrolled in the registry program; and
  - The patient's positive drug test for cannabis components or metabolites, **unless** the patient used, possessed, or was **impaired by** medical cannabis on the premises of the place of employment or during hours of employment.

How Does an Employee "Prove" they have a Prescription?

Section 152.32, subd. 3(d) provides that "[a]n employee who is required to undergo employer drug testing pursuant to section 181.953 **may** present verification of enrollment in the patient registry as part of the employee's explanation under section 181.953, subdivision 6"

EMPLOYMENT PROTECTIONS

- Nothing in Minnesota's Medical Cannabis law allows an employee to use, possess, or be **impaired** by medical cannabis while on duty.
- In fact, all use of medical cannabis must occur during non-working hours and in such a manner that does not result in impairment at a future time on the job.
- So, employers should consider including a provision in their policy that prohibits the use of, possession of, and impairment by marijuana on company premises and during work hours.

EMPLOYMENT CHALLENGE: DRUG TESTING FOR MARIJUANA

The four most common methods of testing for marijuana are:

- **Blood tests:** Cannot identify impairment.
- **Urine tests:** Cannot identify impairment due to length of time between ingestion and excretion.
- **Hair tests:** Cannot accurately measure impairment because marijuana residue does not appear in the hair until days after first use.
- **Saliva tests:** Relatively new and less reliable test.

EMPLOYMENT CHALLENGE- WHAT IS IMPAIRMENT?

- What constitutes "impairment" of marijuana may be hard to determine.
- The National Institute on Drug Abuse has noted that the "noticeable effects of smoked marijuana [i.e. the feeling of being 'high'] generally last from 1 to 3 hours," however, detectable amounts of THC may remain in the body for days or even weeks after use.

Source: National Institute on Drug Abuse, What are marijuana's effects?, https://www.drugabuse.gov/publications/research-reports/marijuana/what-are-marijuana-effects

DRUG TESTING FOR MARIJUANA – "IMPAIRMENT"

- Minnesota's law has no definition of impairment. However, Arizona defines drug impairment as noticeable changes to an employee's:
  - speech, walking, standing, physical dexterity, agility, coordination, actions, movement, demeanor, appearance, clothing, odor
- Arizona also includes irrational or unusual behavior, negligence or carelessness, and/or a disregard for the safety of others as indicators that an individual is impaired by drugs.

CRITICAL ISSUE: IMPAIRMENT

- Unlike alcohol, is very difficult to identify whether an individual who tests positive for marijuana is “impaired.”
- Marijuana is stored in fat cells and can often remain in body (and lead to positive test) for several weeks.
- Blood and saliva tests are not reliable indicators of impairment because cannabinoids remain in the body for up to 30 days, but impairment may only last a few hours.
- The Minnesota Department of Health does not currently have any guidelines regarding what constitutes marijuana impairment.

CRITICAL ISSUE: IMPAIRMENT

- Even when testing accurately measures THC, there is still a lack of scientific agreement, and legal definition, of what levels constitute impairment.
- Colorado, Washington, and Nevada have defined the legal limit for driving under the influence of THC.
  - Colorado and Washington: 5 nanograms of active THC in the blood.
  - Nevada: 2 nanograms of THC in the blood.

CRITICAL ISSUE: IMPAIRMENT

Best Practices:

- Create clear policies for identifying impairment.
- Document everything used to support reasonable suspicion that an employee is/was impaired.
- The same criteria used to establish that an employer has reasonable cause to require employees to submit to a drug/alcohol test can be used to determine that an employee is impaired.

DRUG TESTING FOR MARIJUANA

- Isn't a positive test sufficient proof of impairment?
  - Though not in the employment context, in State v. Suber, the Minnesota Court of Appeals held that a defendant's urine test, which was positive for marijuana, could not support a conviction for driving under the influence when defendant admitted to smoking marijuana 17 hours before his arrest, the State's drug recognition expert testified that marijuana impairment lasted approximately 2-4 hours and that marijuana could be detectable in a urinalysis for 7-10 days after ingestion. State v. Suber, No. A06-2438, 2008 WL 942622 (Minn. Ct. App. April 8, 2008).
  - Other courts have held that a positive test, without more, is insufficient to prove that an employee who legally used medicinal marijuana was under the influence at work.

EXAMPLE CASE – OFF-DUTY PRESCRIBED USE

- Maude worked as a bowling alley attendant at Stars and Strikes bowling alley in Flagstaff, Arizona. Maude had an Arizona medical marijuana card which she used as a sleep aid for chronic pain related to arthritis.
- Maude was asked to refill the snack bar's ice machine, and while doing so, a bag of ice fell on her wrist. Maude informed her manager that she was experiencing pain and swelling in her wrist.
- Three days later, while not at work, Maude used medical marijuana prior to going to sleep around 2 a.m.
- At 2 p.m. that afternoon, Maude went to urgent care for her wrist as directed under Star and Strikes' policy.

EXAMPLE CASE – OFF-DUTY PRESCRIBED USE – (CONT.)

- While at urgent care, she submitted a urine sample for a post-accident drug test and returned to work.
- Upon returning to the bowling alley, Maude told Stars and Strikes, for the first time, that she had a medical marijuana card and gave the bowling alley a copy.
- Not surprisingly, Maude's drug screen tested positive for marijuana, and Stars and Strikes determined that the high levels of marijuana metabolites in her test indicated that she was impaired during her shift that day.
- Stars and Strikes suspended and later terminated Maude based on her positive drug test.

EXAMPLE CASE – OFF-DUTY PRESCRIBED USE – (CONT.)

- Maude sued, alleging that she was discriminated against in violation of the Arizona Medical Marijuana Act ("AMMA").
- Stars and Strikes argued that the AMMA did not provide Maude a private cause of action against the bowling alley.
- Stars and Strikes also argued that it terminated Maude based on the results of a drug test taken during her shift, which showed that she had the highest levels of marijuana metabolites identifiable by the test, which provided a good faith basis to believe that she was impaired during her shift.

EXAMPLE CASE – OFF-DUTY PRESCRIBED USE - (CONT.)

- The court concluded that the AMMA *did* contain an implied private cause of action for employment discrimination, since no other remedy for a violation was available.
- The court determined that the AMMA and the Arizona drug testing law can be harmonized to hold a qualifying patient may sue their employer if they are terminated for authorized use of medical marijuana unless the employer has a good faith belief that the employee was impaired by marijuana while at work.

EXAMPLE CASE – OFF-DUTY PRESCRIBED USE - (CONT.)

- While a good faith belief may be based on the results of a drug test, Stars and Strikes erred in relying solely on the results of the drug test and no other evidence of impairment.
- The court determined that proving impairment based on the results of a drug test is a "scientific matter" which required expert testimony from someone with specialized knowledge, skill, experience, training, or education.
- Here, a statement from Stars and Strike's manager was insufficient to meet this standard.

Whitmire v. Walmart Stores, Inc., 359 F. Supp. 3d 761 (D. Ariz. 2019).

MEDICAL MARIJUANA - PRESUMPTION OF LAWFUL USE

- Minnesota's Cannabis Act includes presumption that applicant or employee enrolled in registry is engaged in authorized use.
- Employee may be required to prove legal use by presenting verification of enrollment in the patient registry.
- Employer may rebut the presumption by evidence that conduct related to use of medical cannabis was not for the purpose of treating or alleviating the patient's qualifying medical condition or symptoms associated with the patient's qualifying medical condition.

Best Practices – Employees and Medical Marijuana

- Do not ask applicants or employees to disclose whether they are medical marijuana patients.
- If you learn an employee or applicant is a registered patient, do not take adverse action based on this fact alone.
- Discuss expectations regarding use of medical marijuana before work and at work and expectations regarding coming to work impaired.
- Gather evidence to support workplace impairment, use, or possession.
- Workplace policies should be clear about these procedures, and the penalties for violating these procedures.

A Note about Worker's Compensation

On October 13, 2021, the Minnesota Supreme Court issued a decision in two companion cases addressing whether employers must reimburse employees for the cost of medical marijuana used to treat work-related injuries.

Justice Anderson delivered the opinions for the court which held that the federal Controlled Substances Act preempted Minnesota's law requiring employers reimburse employees for medical marijuana treatment costs.

Bierbach v. Digger's Polaris, No. A20-1525, 2021 WL 4762642, (Minn. Oct. 13, 2021); Musta v. Mendota Heights Dental Center, No. A20-1551, 2021 WL 4767978 (Minn. October 13, 2021).

WHAT ABOUT RECREATIONAL USE?

- As of November 2021, 18 states and the District of Columbia have approved some form of recreational marijuana use for adults.
- South Dakota's ballot initiative approving recreational marijuana was struck down by a Hughes County judge who ruled the voter-approved measure was unconstitutional. The South Dakota Supreme Court heard arguments and is expected to rule soon.
- However, marijuana remains illegal under Federal law, and therefore, employers can generally still take adverse employment action against an employee who tests positive for recreational marijuana use.

WHAT ABOUT RECREATIONAL USE? (CONT.)

- Some states expressly note that employers can take adverse employment action against an individual who fails a drug test for marijuana, even if it is otherwise legal.
- For example, Illinois's recreational marijuana law specifically notes that employers can adopt:

  "Reasonable drug and alcohol testing, reasonable and nondiscriminatory random drug testing, and discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test."

WHAT ABOUT RECREATIONAL USE? (CONT.)

- Even if the state's recreational use law is silent about employment protections, employers still may be able to take adverse action against an employee for testing positive.

WHAT ABOUT RECREATIONAL USE? (CONT.)

- New York's Office of Cannabis Management ("OCM") recently published a fact sheet explaining employer's duties due to the legalization of recreational marijuana. Main takeaways:
  - Only employees are protected
  - Employers can prohibit use during working hours and on employer property
  - Impairment remains the employer's burden to determine
  - Drug tests cannot serve as the basis for concluding employee is impaired

https://cannabis.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf

RECREATIONAL USE IN MINNESOTA?

- On May 13, 2021, the Minnesota House of Representatives voted to legalize adult-use cannabis in a 72-61 vote. However, the legislature adjourned before the companion Senate bill could come out of committee. It remains to be seen whether the legislature can pass a bill when they reconvene in 2022.

ACCOMMODATING MEDICAL MARIJUANA AND THE ADA

- Courts have found that the ADA does **not** require employers to allow medical marijuana use as a reasonable accommodation.
- The ADA specifically excludes individuals engaging in "illegal" drug use from the definition of a qualified individual.
  - Even if prescribed, marijuana remains illegal under federal law.
- The ADA's definition of illegal drugs includes prescribed marijuana.

DEVELOPING EXCEPTION – STATE LAW AND MEDICAL MARIJUANA ACCOMMODATIONS

- States are increasingly, but not uniformly, finding an obligation to accommodate medical marijuana use under state law.
- As a result, employers may still need to engage in the interactive process with respect to employee medical marijuana use, even through such accommodation is not required under Federal law.

CASE EXAMPLE – ACCOMMODATING EMPLOYEE MEDICAL MARIJUANA USE

- Brandt is a camera operator for Jackie Treehorn Productions. While filming a scene for the movie Logjammin', a historical drama documenting a forlorn lumberjack's trials and tribulations in clearing an epic logjam, Brandt slipped on a log and fell into the river. Brandt broke his leg and suffered a concussion from the fall. Per the production company's protocol to drug test employees injured on the jobsite, Brandt's supervisor, Jeffrey, took him to be tested.
- Brandt knew he would test positive. Brandt suffered from severe PTSD stemming from his service in the Vietnam War, and about a year ago, his primary care physician prescribed him medical marijuana to ease his symptoms. He had last used marijuana two nights prior to the accident to help him fall asleep.

CASE EXAMPLE – ACCOMMODATING EMPLOYEE MEDICAL MARIJUANA USE

- During the drive to the testing center, Brandt disclosed his marijuana use to Jeffrey. Jeffrey told Brandt to just wait and see what the results of the drug test were. Not surprisingly, Brandt tested positive. Jeffrey and Jackie Treehorn discussed the matter and determined that Brandt's medical marijuana use violated the production company's drug-free workplace policy and terminated his employment.
- Brandt sued the production company for failing to accommodate his medical marijuana use.

CASE EXAMPLE – ACCOMMODATING EMPLOYEE MEDICAL MARIJUANA USE

- Brandt's success or failure will depend on the governing state law.
- If Brandt's claims are brought pursuant to Rhode Island, Connecticut, or Massachusetts law, for example, Brandt is likely to succeed as all three states have found an employer has a duty to engage in the interactive process to determine whether an employee's off-duty, medical marijuana use can be reasonably accommodated without imposing an undue burden on the employer.

  Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680, 2017 WL 2321181 (R. I. Super. May 23, 2017); Noffsinger v. SSC Niantic Operating Co. LLC338 F.Supp.3d 78 (D. Conn. Sept. 5, 2018); Barbuto v. Advantage Sales and Marketing, LLC, 78 N.E.3d 37 (Mass. July 17, 2017)

- Conversely, if Brandt's claims are brought pursuant to Pennsylvania law, for example, he is less likely to succeed as court there recently held that a community college was not required to accommodate a student's use of medical marijuana under the Pennsylvania Human Relations Act, based on the statute's definition that "disability" "does not include current, illegal use of . . . a controlled substance," and the fact that marijuana remains illegal under federal law.

  Harrisburg Area Community College v. Penn. Human Relations Commission, 2020 WL 6325862 (Penn. Commw. Ct. Oct. 29, 2020).

CASE EXAMPLE – ACCOMMODATING EMPLOYEE MEDICAL MARIJUANA USE

- In Wild v. Carriage Funeral Home, Inc., the New Jersey Supreme Court held that an employee's use of medical marijuana outside the workplace is protected under the New Jersey Compassionate Use Medical Marijuana Act ("CUMMA").
- The employee in this case used medical marijuana as part of his cancer treatment. After the employee was involved in a car accident, he informed his employer that he was using medical marijuana outside of the workplace. His subsequent drug test was positive for marijuana and his employment was terminated.
- The court held that CUMMA does not impose a duty to accommodate medical marijuana use in the workplace, it does not immunize actions that might violate the NJLAD, such as refusing to accommodate or discriminating against employees for medical marijuana use outside the workplace.

Wild v. Carriage Funeral Home, Inc., 227 A.3d 1206 (N.J. 2020).

MEDICAL MARIJUANA AS A REASONABLE ACCOMMODATION - MHRA

- No one has challenged whether the MRHA includes the duty to allow an employee's use of medical marijuana for a disability.
- It is unclear whether employers in Minnesota run the risk of violating the MHRA by failing to accommodate an employee's lawful medical marijuana use.
- While failing to accommodate medical marijuana use may not violate the MHRA, failing to accommodate such use may violate the Minnesota medical marijuana law itself.
  - This is because failing to do so may "discriminate" against the patient based on status as registered user.

MEDICAL MARIJUANA AS A REASONABLE ACCOMMODATION

Regardless of the applicable state law with respect to accommodating medical marijuana use, employers must still accommodate the underlying condition for which the medical marijuana was prescribed, even if not required to allow medical marijuana use.

TAKEAWAYS – MARIJUANA TESTING

1. With recreational or medicinal use of marijuana, there is no clear or reliable way to determine current impairment.
2. Prior to requesting a drug test, employers should observe and document behaviors that indicate a "reasonable suspicion" that the employee is impaired.
3. If the employee tests positive, employer may ask to see patient registry card.
4. Unless subject to federal law, Minnesota employers who choose to drug test for marijuana must follow DATWA.
5. It is extremely important to have clear policies in place and to document everything used to support a reasonable suspicion that an employee was impaired by marijuana while at work in order to reduce the legal risks involved with taking adverse action against an employee for *suspected* impairment while at work.

QUESTIONS?

Thank you.

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NLRB UPDATE

Current Makeup of NLRB

Democratic	Republican
Lauren McFerran, Chair*	John Ring
Gwynne A. Wilcox	Marvin E. Kaplan
David M. Prouty	

*President Biden named McFerran as chair on 1/20/21.

On July 22, 2021, **Jennifer A. Abruzzo** began serving as ***General Counsel*** for the NLRB

General Counsel Memos

GC Memorandum 21-06

Seeking Full Remedies

- Section 10(c) of the Act states the Board shall order those found to have committed an unfair labor practice "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act."
- GC Abruzzo: The Board has discretion to take this affirmative action to fashion remedies to match the circumstances of the case. Accordingly, she is urging Regions to seek from the Board "the full panoply of remedies available to ensure that victims of unlawful conduct are made whole for losses."
- For unlawful firings of employees for their support of a union, Regions are instructed to seek compensation for liquidated backpay, consequential damages, and front pay.

GC Memorandum 21-06

Seeking Full Remedies – Union Organizing

- Regarding unlawful conduct during a union organizing drive, the GC noted that the "laboratory conditions" necessary for a free and fair election are often difficult to restore. The following list includes remedies the GC is encouraging Regions to request from the Board:
  - requiring an employer to provide employee contact information or granting equal time to address employees, access to bulletin boards;
  - reimbursing unions for organizational costs, including costs incurred during a re-run election;
  - requiring a public reading of the Notice to Employees;
  - requiring the employer to provide training to its employees, supervisors, and managers on employee rights under the Act;
  - imposing broad cease-and-desist orders.

GC Memorandum 21-06

Seeking Full Remedies

- As for remedies in the context of unlawful failures to bargain, the GC instructs Regions to seek the following:
  - Mandatory bargaining schedules (at least twice weekly, six hours per session);
  - Submission of periodic progress reports to the Agency on the status of bargaining;
  - 12-month insulated periods where union's status as representative cannot be changed;
  - Reinstatement of unlawfully withdrawn bargaining proposals;
  - Reimbursement of collective-bargaining expenses;
  - Engagement of a mediator from FMCS to help facilitate bargaining;
  - Training of current and/or new supervisors and managers, and
  - Broad cease-and-desist orders.

GC Memorandum 21-06

Seeking Full Remedies

- Lastly, the GC instructed Regions to seek Orders expressly directing the distribution of a Notice to Employees by text messaging and by posting on social media websites and on any internal apps used by an employer to communicate with its employees.

GC Memorandum 21-07

Full Remedies in Settlement Agreements

- GC Memo 21-07 "continues the discussion of remedies, focusing on the types of remedies that Regions should seek in their informal and formal settlement agreements."
- Because Regions are less constrained by the remedies that they may seek in settlement, as opposed to those they may seek from the Board, the GC instructs Regions to "skillfully craft settlement agreements that ensure the most full and effective relief is provided to those whose rights have been violated."

GC Memorandum 21-07

Full Remedies in Settlement Agreements

- In addition to seeking no less than 100% of the backpay and benefits owed, Regions "should always make sure to seek compensation for any and all damages, direct and consequential, attributable to an unfair labor practice."
- The GC identified the following as examples of economic losses:
  - Interest or late fees on credit cards incurred by an unlawfully fired employee to cover living expenses;
  - Penalties incurred by an unlawfully fired employee from having to prematurely withdraw money from a retirement account to cover living expenses; and
  - Loss of a home or a car suffered by an unlawfully fired employee because of an inability to keep up with a loan payment.

GC Memorandum 21-07

Full Remedies in Settlement Agreements

The GC identified further examples where relevant compensation would be appropriate:

- Compensation for damages caused to an employee's credit rating following an unlawful firing;
- Compensation for financial losses suffered by an unlawfully fired employee from having to liquidate a personal savings account or an investment account to cover living expenses; and
- Fees and/or expenses for training or coursework required to obtain or renew a security clearance, a certification, or a professional license that had been denied or lost as a result of a ULP.

GC Memorandum 21-07

Full Remedies in Settlement Agreements

- Backpay, Front Pay, and Other Remedies
  - The GC stressed the importance of reinstatement. However, in some situations, an employee may not want to be reinstated. In these situations, Regions should, in addition to seeking no less than 100% of the backpay and benefits owed, "include front pay as part of their settlement calculations where reinstatement will not be attained."
  - Where appropriate, Regions should "negotiate a provision where those who voluntarily waive reinstatement may utilize an employer's in-house outplacement service or services of a third-party outplacement firm for a certain duration at the employer's expense."

GC Memorandum 21-07

Full Remedies in Settlement Agreements

- Letters of Apology
  - Where a settlement agreement incorporates a provision requiring that an employer make an unconditional offer of reinstatement to an unlawfully fired employee, the GC instructs Regions to also seek to require "that the employer draft a written letter of apology to the employee, particularly where the employee is likely to accept the offer. Such a letter may assist in de-escalating lingering tensions between the employee and the employer during the reinstatement process."
- Admissions
  - The GC reminded Regions that non-admission clauses in settlement agreements "should remain the exception and that, absent special circumstances, Regions should continue insisting on the exclusion of non-admission clauses in all settlement agreements and strongly consider the inclusion of admission clauses for repeat violators."

GC Memorandum 21-07

Full Remedies in Settlement Agreements

- Notices to Employees
  - Lastly, the GC encouraged Regions to consider "multiple and innovative provisions in their settlement agreements pertaining to the dissemination of the notice."
  - For example, the GC suggested that the notice should be sent via text message to mobile work phone numbers and to personal email addresses.
  - For settlement purposes, Regions should consider posting periods that exceed 60 days depending on the circumstances and forbid the posting of any side notices.

Significant Board Decisions

Significant Board Decisions

***Constellium Rolled Products Ravenswood, LLC,* 371 NLRB No. 16 (Aug. 25, 2021).**

- In 2013, the Employer imposed new overtime procedures, under which signup sheets were posted on a bulletin board and employees who volunteered for OT were required to sign up a week in advance.
- Union members protested the new procedures by refusing to sign up for OT and referring to the sign-up sheets as the "whore board" without disciplinary action imposed by the Employer.
- In October 2013, employee Jack Williams wrote "whore board" on the top of the posted sign-up sheets. The Employer suspended Williams and later discharged him.

Significant Board Decisions

***Constellium Rolled Products Ravenswood, LLC,* 371 NLRB No. 16 (Aug. 25, 2021).**

- In a divided opinion issued in 2018, the Board found Williams was engaged in a protected activity protesting the OT procedures when he wrote "whore board" on the sign-up sheets—and that his conduct was not so egregious as to cause him to lose the protection of the Act.
- On review, the Court of Appeals for the D.C. Circuit held the Board failed to address "the potential conflict between its interpretation of the NLRA and [the employer's] obligations under state and federal equal opportunity laws" including its obligation to maintain a harassment-free workplace.
- The court remanded the case to the Board to address the conflict between between an employer's obligation to maintain a harassment-free workplace under Title VII and other EEO laws, which create liability for employers permit sexually hostile work environment, and the NLRA, which prohibits employers from interfering with employees' right to engage in concerted activity for mutual aid or protection.

Significant Board Decisions

***Constellium Rolled Products Ravenswood, LLC,* 371 NLRB No. 16 (Aug. 25, 2021).**

- Board applied *Wright Line* standard to harmonize the potential conflict between an employer's duties under the Act and under antidiscrimination laws in cases involving offensive speech
- "Under this approach, the Board will properly find an unfair labor practice for an employer's discipline following abusive conduct committed in the course of Section 7 activity when the General Counsel shows that the Section 7 activity was a motivating factor in the discipline, and the employer fails to show that it would have issued the same discipline even in the absence of the related Section 7 activity . . . [This] will . . . avoid potential conflicts with antidiscrimination laws.

Significant Board Decisions

***Constellium Rolled Products Ravenswood, LLC,* 371 NLRB No. 16 (Aug. 25, 2021)**

- The Board held that the General Counsel met its initial burden of establishing that Williams' protected activity was a motivating factor in the Employer's adverse employment action.
- The Employer argued that Williams' use of the gender-based epithet "whore" triggered its obligations under equal opportunity laws to address and eliminate harassment in its workplace. It argued that the Board's underlying decision prevents it from eradicating such harassing workplace behavior, and thus subjects it to liability under the antidiscrimination laws.
- The Employer asserts it was committed to a zero-tolerance anti-harassment policy when it discharged Williams on Oct. 22, 2013, because some 10 months earlier the Employer had received a $1 million jury verdict against it for creating a hostile work environment for two female employees.

Significant Board Decisions

***Constellium Rolled Products Ravenswood, LLC,* 371 NLRB No. 16 (Aug. 25, 2021)**

- The Board found the Employer did not meet its *Wright Line* rebuttal burden of showing it would have disciplined Williams even absent his Section 7 activity.
- The Board noted the employer had tolerated extensive profanity and vulgarity in the workplace in the past – and employees had been calling the sign-up sheet a "whore board" for months. Only Williams was disciplined.
- Chairperson McFerran concurred. She concluded there was no conflict between the Board's decision and the employer's obligations under EEO laws. Williams' conduct – a single instance of writing "whore board" on the OT sign-up sheet – could not plausibly constitute a basis for establishing a hostile work environment claim under federal discrimination precedent.

Significant Board Decisions

***Arakelian Enterprises, Inc. d/b/a Athens Services*, 370 NLRB No. 111 (April 22, 2021).**

- Employer is a waste collection provider in Los Angeles.
- Employees at one of the Employer's facility regularly took evening meal breaks in a room the Employer used to conduct training and safety meetings during the day.
- The training room had a sink, tables, and a microwave that a supervisor brought in.
- Managers were aware that employees used the room as a break area, and never told employees they could not use the room for breaks or prevented them from using it.

Significant Board Decisions

***Arakelian Enterprises, Inc. d/b/a Athens Services*, 370 NLRB No. 111 (April 22, 2021).**

- In August 2018, a dispute arose between the employer and union over use of the room by the union's representatives.
- Specifically, the employer took issue with employees using the room to meet with a union-represented worker who was employed by the employer's competitor after the employer had previously directed the union not to bring unauthorized competitor employees on to the property.
- The following day, the employer locked the door to the room and told employees they could no longer take breaks there.

Significant Board Decisions

***Arakelian Enterprises, Inc. d/b/a Athens Services*, 370 NLRB No. 111 (April 22, 2021).**

- The Board found the employer violated Sections 8(a)(1) and (5) by failing to provide the union with notice and an opportunity to bargain over its decision to prohibit employees from using the training room during breaks.
  - The employer's actions "constituted a material, substantial, and significant change in the employees' terms and conditions of employment."
- The employer also violated Sections 8(a)(1) and (5) by failing to bargain over the effects of its decision to prohibit employees from using the training room during breaks.
- The employer had argued that the extenuating circumstances of having union trespassers and employees refusing to comply with management's security directives privileged it to act unilaterally.
- Board determined that this was not the type of "extraordinary" event with a major economic impact that would justify unilateral action.

Significant Board Decisions

Universal Health Services, Inc., 370 NLRB No. 118 (April 30, 2021).

- SEIU represented a bargaining unit of 150 workers at George Washington University Hospital in D.C. The parties began meeting in late 2016 to bargain a successor CBA.
- The Hospital informed the Union at the outset it wanted to modernize and streamline the contract. To that end, Employer put forward aggressive pro-management proposals.
- Union described the Employer's stance as ensuring that the parties "will wind up being at war. War with SEIU."
- Parties negotiated from November 2016 to October 2018.
- No wage increases since annual increase in January 2016 before CBA expired.
- Throughout bargaining, supervisors read and distributed "bargaining briefs" to employees at pre-shift meetings with the Employer's perspective.

Significant Board Decisions

Universal Health Services, Inc., 370 NLRB No. 118 (April 30, 2021).

- The Employer's proposals included the following:
  - expansive management-rights clause that (among other things) gave the Hospital the right to unilaterally reassign bargaining unit work, to discipline employees without cause, and to change employees' health insurance and benefits at any time;
  - dispute resolution proposal that replaced arbitration with non-binding mediation;
  - "non-negotiable" wage proposal by which bargaining-unit employees would be placed on hospital-wide wage scales, at the Hospital's discretion, with the same wage rates for union and non-union employees; and
  - elimination of check-off for union dues and the union-security clause.

Significant Board Decisions

***Universal Health Services, Inc.*, 370 NLRB No. 118 (April 30, 2021).**

- The Union's attorney responded to the Hospital's proposals with dismissive and colorful language.
  - He labeled one proposal as "a nothing burger" and called another "an absolute waste of everyone's time."
  - He told the employer's representatives to "kiss my a–" and to "get the f— out of here."
- At one session, the Employer noted that the Union had failed to counter 15 of its proposals, while the Employer had responded to all but two from the Union.
- The Employer did make certain concessions to proposals and withdrew at least one.

Significant Board Decisions

***Universal Health Services, Inc.*, 370 NLRB No. 118 (April 30, 2021).**

- In October 2018, the Employer received a petition signed by a majority of employees in the bargaining unit, which it considered clear and unequivocal proof the Union had lost majority support.
- The Employer withdrew recognition from the Union and unilaterally implemented its proposals, including wage increases.
- The Union filed ULPs. The ALJ found the employer engaged in bad-faith bargaining and that consequently, the Employer's withdrawal of recognition was unlawful because it committed unfair labor practices that affected the Union's status.
- The Employer appealed to the Board.

Significant Board Decisions

***Universal Health Services, Inc.*, 370 NLRB No. 118 (April 30, 2021).**

- The Board in a split decision (2-1) reversed the ALJ and noted that, while Section 8(d) requires good-faith negotiation, it "does not compel either party to agree to a proposal or require the making of a concession."

- The Board explained it will not find an employer failed to bargain in good faith "if the union assumes that the employer's initial proposals reflect unalterable positions without testing the employer's willingness to engage in the give and take of collective bargaining."

- The Employer did not engage in bad-faith bargaining by presenting a "wish list" or "kitchen sink" initial proposal. Moreover, the employer was not required to bargain against itself in response to the union's failure to put forth counterproposals.

Significant Board Decisions

***Universal Health Services, Inc.*, 370 NLRB No. 118 (April 30, 2021).**

- Chairperson McFerran dissent:
  - "Textbook case of bad-faith bargaining."
  - "an employer can make a mockery of the duty to bargain by adhering to proposals which clearly demonstrate an intent not to reach an agreement" with a union.
  - Totality-of-the-circumstances test applies.

Specific Labor Relations Issues

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

- Apparently, there is a shortage of workers, in case you haven't heard.
- We are receiving numerous inquiries from unionized clients regarding the challenges that they are facing while not having enough staff.
- Many businesses desire or need to put enhancements into place that would, for example, …
  - ✓ Incentivize external job candidates to accept positions
  - ✓ Encourage current employees to remain
  - ✓ Motivate employees to pick-up extra shifts or otherwise increase their hours

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

EXAMPLES	
Sign-on / hiring bonuses	Increase in shift differential
Retention bonuses	Bonus for increasing hours
Granting “experience credit”	Extra shift bonus
Otherwise hiring above the contractual starting rate	Paying employees above scale
Permanent increase in wage rates	

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

GENERAL OUTLINE OF CONSIDERATIONS

1) Does the labor agreement ***prohibit*** it?
2) Does the labor agreement plainly or expressly ***allow*** it?
   - Is there a notice, meet-and-confer, or bargaining requirement?
3) ***Duty to bargain*** – *i.e.*, mandatory subject of bargaining?
   - The answer is "yes," unless contract language authorizes it without bargaining.
   - "Past practice" may or may not work as theory.
4) Is there a "direct dealing" problem that would make implementation impermissible?

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

GENERAL STRATEGIES

1) *Bargain in good faith.*
   - "We are making plans to…. Please contact me if you wish to meet."
   - Do *not* state that you will not bargain or are not there to bargain.
   - Respond to information requests.
   - It is best to get the union's buy-in if possible.
   - Knowing when you've satisfied the bargaining obligation (in the absence of union buy-in) may require nimbleness and insight.
2) Push back on union requests to enter into a written agreement over something that the organization is offering *gratis.*
   - But refusing to enter into *any* agreement is likely problematic.
3) However, if you are suspending one contractual benefit in order to grant another, it *is* important to get the Union's agreement that the normal contractual benefit is being temporarily suspended.

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

SIGN-ON / HIRING BONUSES

- Start by checking the labor agreement.
- This ***is*** a mandatory subject of bargaining.
  - ✓ "We are making plans to…. Please contact me if you wish to meet."
  - ✓ Have all details worked-out before meeting with the Union.
- If the employee is required to sign an agreement, particularly with some sort of repayment obligation, this creates the potential "direct dealing" implementation problem.
  - ✓ Try to get the Union's buy-in.
- But try to avoid entering into a written *agreement* with the Union, especially one that locks-in anything.

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

RETENTION BONUSES

- Start by checking the labor agreement.
- This ***is*** a mandatory subject of bargaining.
  - ✓ "We are making plans to…. Please contact me if you wish to meet."
  - ✓ Have all details worked-out *before* meeting with the Union.
  - ✓ The Union doesn't have a lot of leverage here.
- You should be able to avoid the "direct dealing" implementation problem by simply stating that you will pay *x* amount on *y* date if they are still employed.
  - ✓ But if you "*must*" get the employee to sign a commitment agreement, getting the Union's buy-in shouldn't be difficult.
- It shouldn't be necessary to enter into any form of written *agreement* with the Union.

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

GRANTING "EXPERIENCE CREDIT"

What is "experience credit"?

- Start by checking the labor agreement.
  - And what has been the practice?
- If offering "experience credit" would be a change, then this ***is*** a mandatory subject of bargaining.
  - ✓ "We are making plans to…. Please contact me if you wish to meet."
- The Union will likely seek experience credit for existing employees as well.
  - ✓ Be prepared to address this when meeting with the Union, and that includes having a list of employees with the relevant information.
  - ✓ The Union may want an agreement or written confirmation that this will be addressed, if it would be an issue.

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

OTHERWISE HIRING ABOVE THE CONTRACTUAL STARTING RATE

What is the scenario?

- Start by checking the labor agreement.
  - But it likely isn't addressed, and this likely hasn't occurred.
- This ***is*** a mandatory subject of bargaining.
  - ✓ "We are making plans to…. Please contact me if you wish to meet."
- The Union has the same legitimate concern with respect to existing employees."
  - ✓ Be prepared to address this when meeting with the Union, and that includes having a list of employees with the relevant information.
  - ✓ The Union may want an agreement or written confirmation that this will be addressed, if it would be an issue.

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

INCREASING THE SHIFT DIFFERENTIAL

Why?

- Start by checking the labor agreement.
  - If the amount *is* specified in the labor agreement, you need the Union's agreement or consent.
  - If the amount is *not* specified in the labor agreement, this is a mandatory subject of bargaining.
    - "We are making plans to…. Please contact me if you wish to meet."
- Do you want this to be temporary or permanent?
  - If temporary, that should be specified, and options would include (a) until a specified date; (b) until the expiration of the contract; or (c) until the Employer provides notice of its discontinuance to the Union.

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

BONUS FOR INCREASING HOURS

How would this work?

- Start by checking the labor agreement, but it is unlikely that this is addressed.
- This ***is*** a mandatory subject of bargaining.
  - ✓ "We are making plans to… Please contact me if you wish to meet."
- If the bonus is paid up front, and the employee is asked to sign a commitment, especially if there is a repayment obligation, the potential "direct dealing" problem might be present. For purposes of this issue, the better option is to advise the Union and the employees that the bonus will be paid if they increase their hours in such manner for *x* period of time or through *xyz* date.
- Push back on the Union's request for an LOU, MOA, etc.

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

EXTRA SHIFT BONUS

How would this work?

- Start by checking the labor agreement.
  - If this would *change* an existing extra shift bonus, or if this would require the Union to give-up some other form of existing bonus or premium pay, the Union's agreement or consent will be needed. And it makes sense to have a written agreement governing this.
- If this would be new, and you're not trying to suspend some bonus or premium pay, this ***is*** a mandatory subject of bargaining.
  - ✓ "We are making plans to…"

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

PAYING EMPLOYEES ABOVE SCALE

What does this mean?

- Start by checking the labor agreement.
  - Look for language authorizing paying employees higher wage rates.
    - If so, is there some form of notice requirement?
  - If the language doesn't expressly authorize it, what has been the practice?
- If this isn't authorized by the contract and would be new, this ***is*** a mandatory subject of bargaining.
  - ✓ "We are making plans to…" [And see how the Union responds.]
- Consider the consequences down the line, and it is probably important to communicate or document that – e.g., what impact does this have on what would otherwise be their next contractual wage increase.

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

PERMANENT INCREASE IN WAGE RATES

How close are you to contract expiration?

- Can it wait until the normal time for contract negotiations?
  - Makes it easier to settle contract.
  - May be able to get needed changes on other issues.

  If you simply give away the wage increase outside of negotiations, you may still be involved in difficult or protracted bargaining, and you may have given up an opportunity for achieving other objectives.
- Or does it make sense to engage in early negotiations?
  - Do not "reopen" the contract early.
  - But you can still engage in early negotiations. (And *see* above.)

Even if it's mid-term in the contract, do not "reopen" the contract, and explore whether it is possible to get relief on other issues.

MANAGING STAFFING STRUGGLES AND RECRUITMENT CHALLENGES IN A UNIONIZED ENVIRONMENT

LAX ENFORCEMENT OF WORKPLACE RULES OR POLICIES, ESPECIALLY ATTENDANCE

- A major principle of just cause is "consistent treatment."
- The problem of lax enforcement can be overcome by properly ***reconstituting*** a workplace rule or policy.
  - Proof of notice is crucial.
  - Proof of enforcement and equal treatment after giving the notice is also essential.

COVID-19 VACCINATION REQUIREMENTS

KEY TIPS

- Regardless of the need or reason for imposing the requirement, ***prepare a policy***.
  - If your company is subject to certain regulations or standards, the policy obviously needs to be compliant with those.
  - The policy needs to allow for proper medical exemptions and religious exemptions.
  - For discretionary elements, prepare the policy as you would like for those issues.
- Notice to the Union: "This is the policy that we are making plans to implement and follow. Please contact me if you'd like to meet."
  - There is no need to, on the front end, state that you are unwilling to bargain over any aspects of the policy. Making such a statement should be avoided. Wait to hear what the Union has to say, and respond accordingly.
- If the Union has proposed an MOU or LOA, and is pursuing that, it is at this point important to make proposals and counter-proposals to try and reach common ground where possible and narrow the remaining issues. *Why?* ***Impasse requirement.***

Thank you!

FELHABER LARSON

ATTORNEYS AT LAW

Workers' Compensation and OSHA in 2021

Annual 2021 Labor & Employment Seminar

November 12, 2021

FELHABER LARSON

ATTORNEYS AT LAW

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OSHA'S COVID-19 ETS Rule

OSHA's ETS Rule

- The OSHA ETS Rule imposes strict requirements on employers with 100+ employees.
- **Effective dates:**
  - Rule is effective immediately.
  - Compliance with the rule is delayed 30 days (i.e., **December 6, 2021**).
  - Compliance with COVID-19 testing for unvaccinated workers is delayed 60 days (i.e., **January 4, 2022**).

Mandatory Vaccination Policy

- The rule requires covered employers to develop a mandatory vaccination policy that "requires each employee to be fully-vaccinated." Recognized exceptions include:

    1. Employees with medical contraindications;
    2. Employees who have a medical need to delay vaccination; and
    3. Employees entitled to a reasonable accommodation because they have a disability or sincerely-held religious beliefs, practices, or observances that conflict with the vaccination requirement.

Other Considerations Under OSHA's ETS Rule

- OSHA's new ETS rule also provides guidance on the following:
  - Excluded Workplaces and Employees.
  - Regular COVID-19 Testing (and Masking) for Unvaccinated Workers.
  - Costs of COVID-19 Testing.
  - PTO for Vaccination and Recovery from Vaccination.
  - PTO for Employees Who Test Positive for COVID-19.
  - Recordkeeping.

Workers' Compensation Changes

COVID-19 “Rebuttable Presumption”

- Effective April 8, 2020, the MN Legislature created a “rebuttable presumption” that certain workers are presumed to have contracted Covid-19 at work.
- How can a claimant establish the presumption applies?
  - Diagnosed with Covid-19 on or after April 8, 2020.
  - Employed as an emergency first responder, health care worker, nurse, and child-care worker*.

COVID-19 "Rebuttable Presumption" (cont'd)

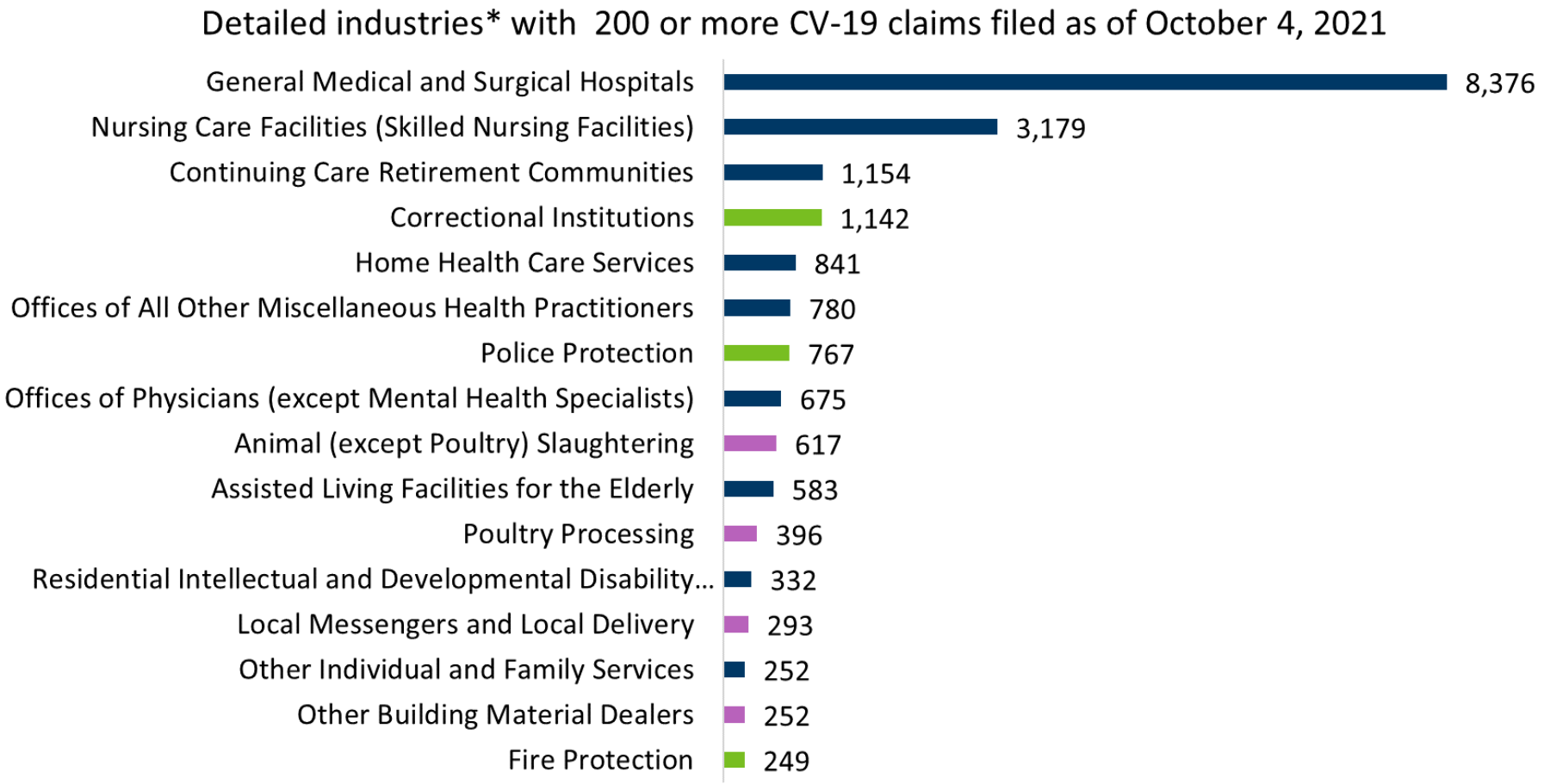
- The Covid-19 presumption was set to expire May 1, 2021, but the MN Legislature extended the sunset provision for the presumption to **December 31, 2021**.
- After January 1, 2022, the Covid-19 presumption will not apply to any Covid-19 personal injury claims.
  - Covered workers may still bring such claims, but they will have the burden of proving they contracted Covid-19 due to workplace exposure.

MN DOLI COVID-19 Worker's Compensation Claim Statistics

Number of CV-19 claims by industry sector* as of October 4, 2021

*North American Industry Classification System

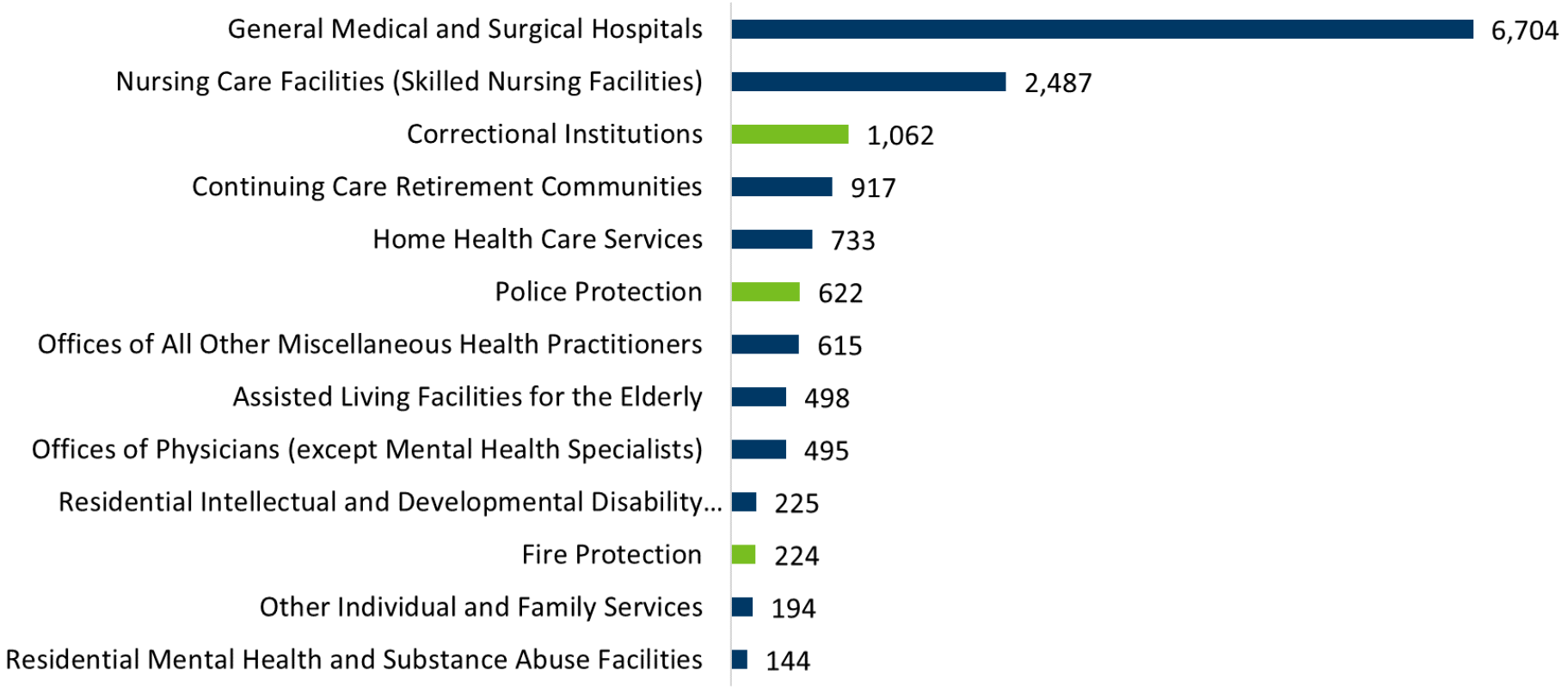
MN DOLI COVID-19 Worker's Compensation Claim Statistics (cont'd)



*North American Industry Classification System

MN DOLI COVID-19 Worker's Compensation Claim Statistics (cont'd)

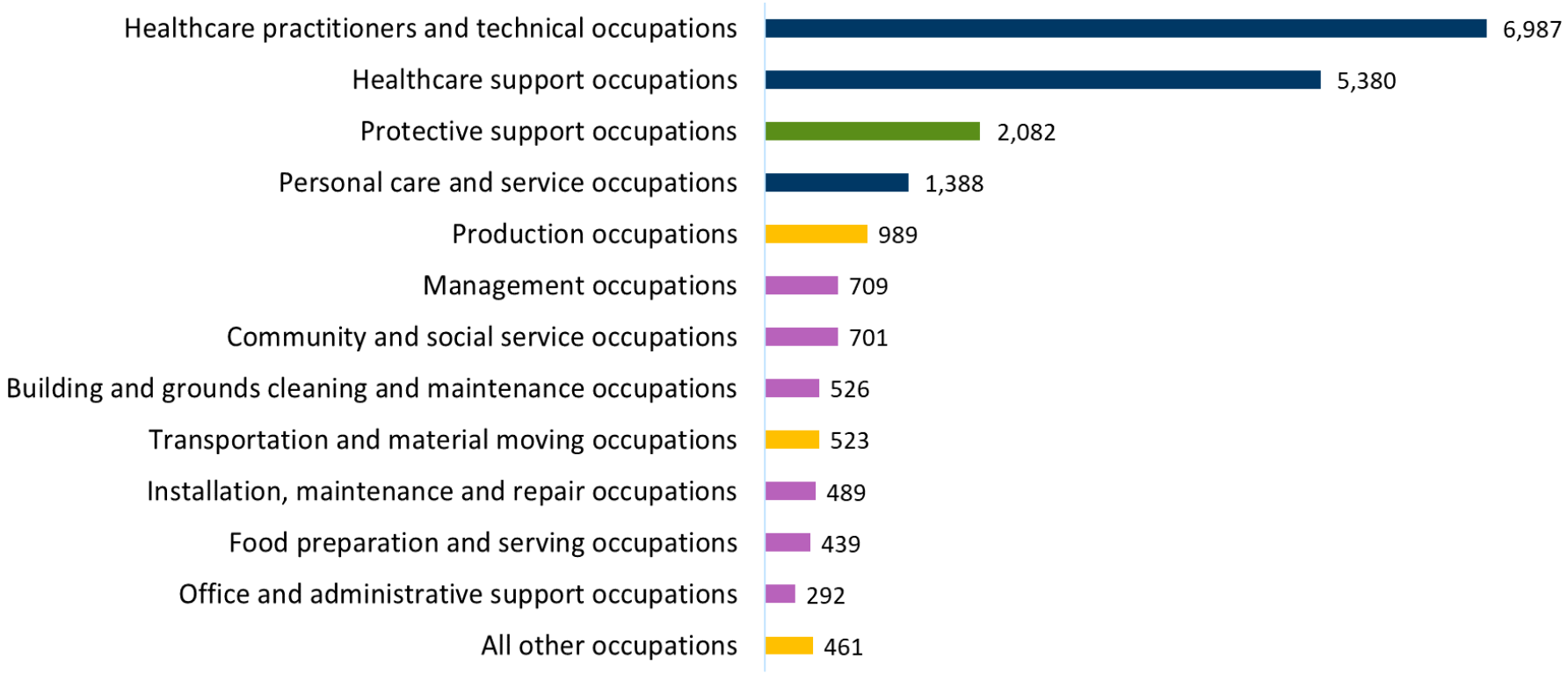
Detailed industries* with 120 or more CV-19 indemnity claims as of October 4, 2021



*North American Industry Classification System

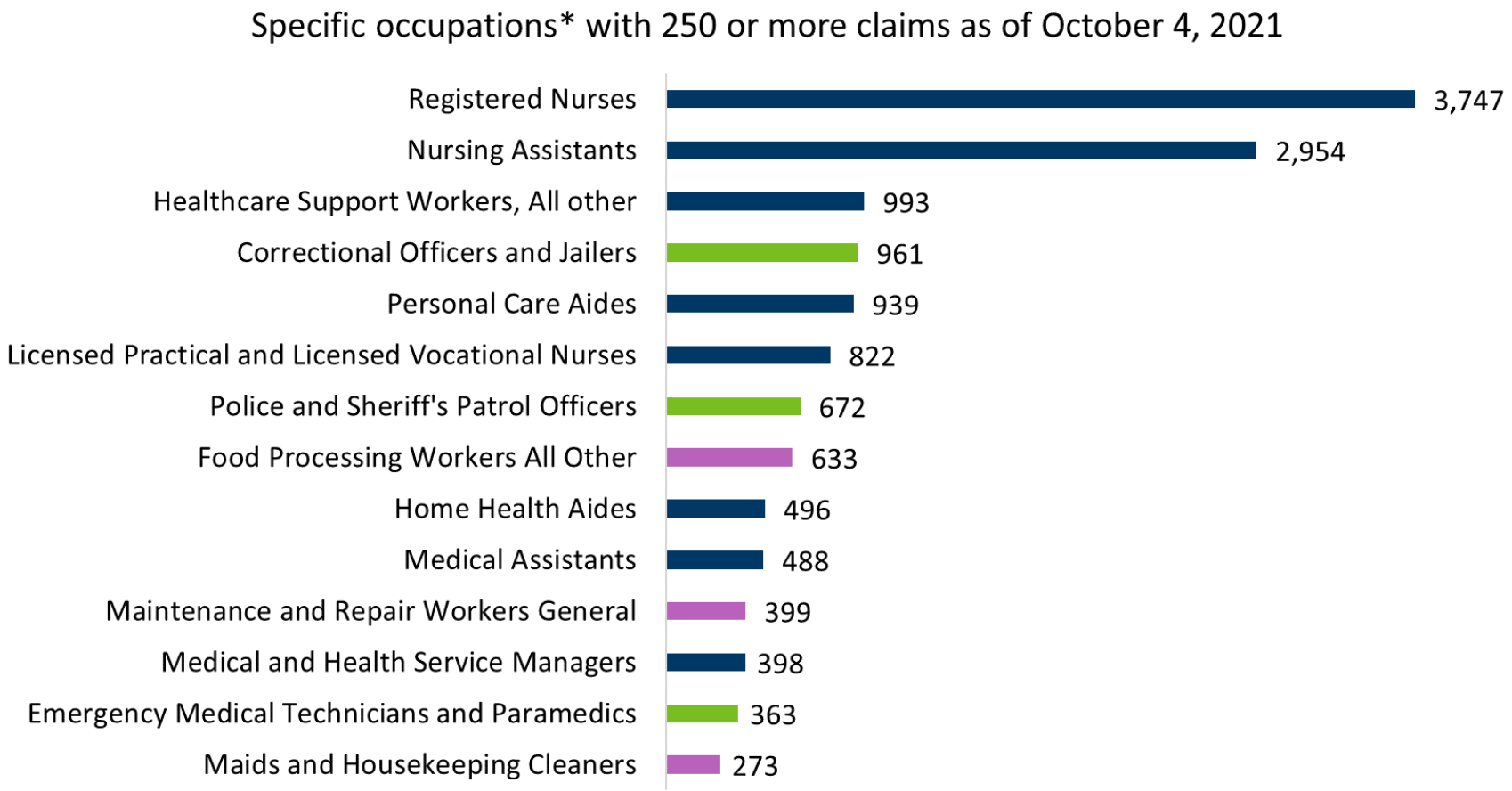
MN DOLI COVID-19 Worker's Compensation Claim Statistics (cont'd)

Number of CV-19 claims by occupation group* as of October 4, 2021



*Standard Occupation Classification. Occupation data unavailable for 2,102 claims.

MN DOLI COVID-19 Worker's Compensation Claim Statistics (cont'd)



Minimum Compensation Rate

- The MN Legislature also raised the minimum compensation rate from $130.00/week to 20% of the maximum weekly compensation payable or the employee's actual average weekly wage, whichever is less.
  - Applies to injuries from and after October 1, 2021.
  - Rate has not changed since 2000.
  - If the average weekly wage < minimum compensation, the employee's average weekly wage will be the compensation rate.

Medical Cannibis – MN Caselaw Update

Employers are Not Liable for Medical Marijuana Reimbursement Under MN WCA

- ***Musta v. Mendota Heights Dental Center*** (Filed October 13, 2021).
  - W.C.C.A. ordered employer and insurer to pay out-of-pocket expenses related to the purchase of medical cannibis for an employee who sustained a work-related injury.
  - Employer and insurer declined to reimburse citing that federal law pre-empted the MN Medical Cannabis Therapeutic Research Act.

Employers are Not Liable for Medical Marijuana Reimbursement Under MN WCA (cont'd)

- ***Bierbach v. Digger's Polaris*** (Filed October 13, 2021).
  - Employer and insurer appealed W.C.C.A. decision on similar grounds as *Musta.*
  - Here, the employee's out-of-pocket expenses for medical cannabis was $1,863.71.

Employers are Not Liable for Medical Marijuana Reimbursement Under MN WCA (cont'd)

- The MN Supreme Court held in both cases that the federal Controlled Substance Act ("CSA") preempts an order made under the MN workers' compensation law that requires an employer to reimburse an injured employee for the cost of medical cannabis to treat a work-related injury.
- In each decision, the Court emphasized federal law criminalizes aiding and abetting CSA possession.
- **Bottom Line**: Medical marijuana is not compensable under the MN Workers' Compensation law.

OSHA COVID-19 Guidance

OSHA COVID-19 Guidance: Most Employers

- In June, OSHA issued updated guidance to help employers identify COVID-19 risks to unvaccinated and at-risk employees.
- The Guidance recommends steps to prevent exposure and infection.
- The Guidance emphasized that, unless otherwise required by law, “most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure.

OSHA COVID-19 Guidance: Most Employers (cont'd)

- **Recommendations for Protection of Unvaccinated and At-Risk Workers:**
  - Get vaccinated because vaccination is the key in a multi-layered approach to protect workers;
  - Wear face coverings;
  - Socially distance from others;
  - Participate in workplace training about safety protocols; and
  - Practice good personal hygiene.

OSHA COVID-19 Guidance: Most Employers (cont'd)

- The Guidance acknowledges that workers with disabilities may be entitled to accommodations if they cannot be protected through vaccination, cannot get vaccinated, or cannot use face coverings.
- Employers should take steps to protect these workers in the same manner as they would unvaccinated workers, regardless of their vaccination status.

"Excuse me, Sir, but me and the rest of the work force think this dress code probably violates OSHA rules."

OSHA COVID-19 Guidance: Most Employers (cont'd)

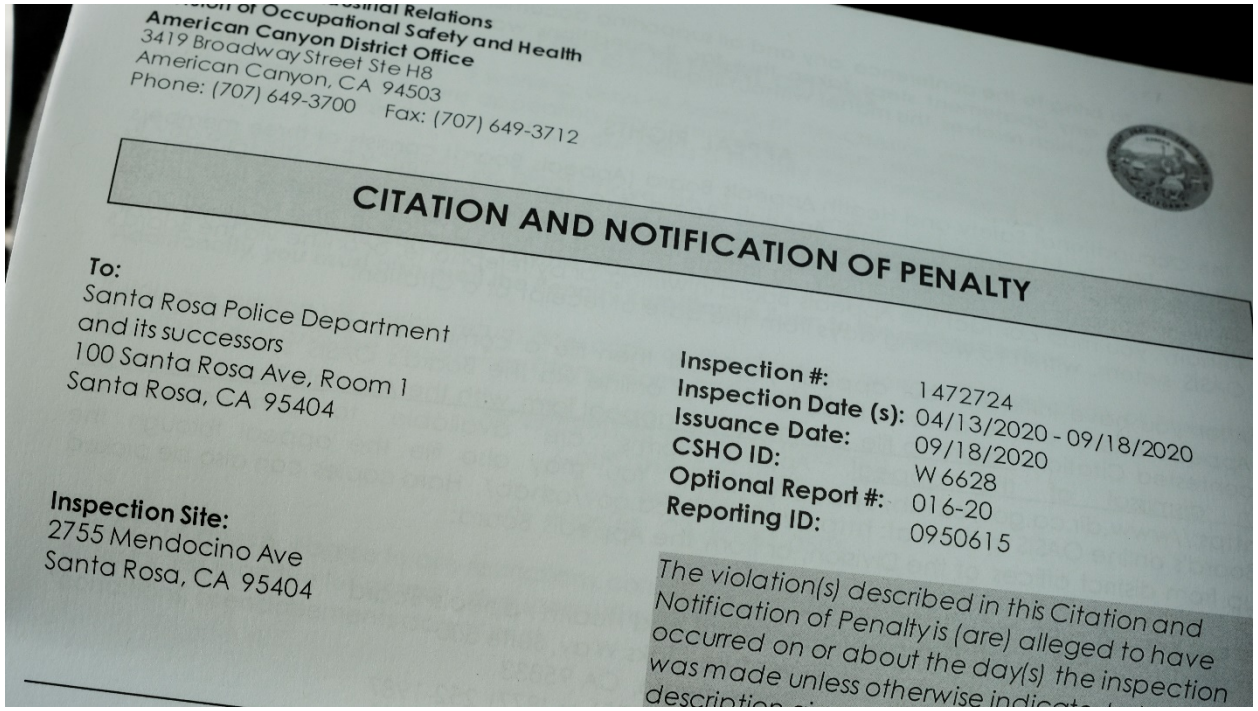
- The Guidance recommends employers engage with workers to implement a comprehensive plan to protect unvaccinated and at-risk workers, which utilizes the following:
  - Granting paid time off to get vaccinated;
  - Ensuring infected workers are excluded from the workplace;
  - Keeping people six feet apart or constructing physical barriers; and
  - Providing unvaccinated and at-risk workers with PPE (while keeping in mind anti-discrimination laws and reasonable accommodations.

OSHA COVID-19 Guidance: Most Employers (cont'd)

- Recommendations for "Higher Risk" Workplaces:
  - Higher risk workplaces (e.g., manufacturing, meat, poultry, high-volume retail, etc.) are instructed to stagger break times and arrival/departure times to avoid congregation of unvaccinated and at-risk workers.

- **Bottom Line**:
  - OSHA did not create new legal obligations on employers. Instead, the Guidance was intended to provide concrete recommendations for employers to ensure that all workers, particularly those that are unvaccinated or at-risk, are protected from COVID-19.

OSHA COVID-19 Citations



...Occupational Safety and Health
American Canyon District Office
3419 Broadway Street Ste H8
American Canyon, CA 94503
Phone: (707) 649-3700 Fax: (707) 649-3712

CITATION AND NOTIFICATION OF PENALTY

To:
Santa Rosa Police Department
and its successors
100 Santa Rosa Ave, Room 1
Santa Rosa, CA 95404

Inspection Site:
2755 Mendocino Ave
Santa Rosa, CA 95404

Inspection #: 1472724
Inspection Date (s): 04/13/2020 - 09/18/2020
Issuance Date: 09/18/2020
CSHO ID: W 6628
Optional Report #: 016-20
Reporting ID: 0950615

The violation(s) described in this Citation and Notification of Penalty is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated...

Auto Insurance Company Ignored COVID-19 Safety Requirements

- OSHA launched an investigation into the “Fred Loya Insurance Agency, Inc.” on April 21, 2021, pursuant to a complaint of unsafe working conditions and an employee death.
- OSHA found the Ins. Agency did not safely distance employees, failed to implement a health and safety plan and allowed symptomatic workers to remain on site.
- The Ins. Agency faces **$23,406.00 in penalties**.

Healthcare Facility Failed to Protect Workers from COVID-19 Hazards

- OSHA found that “Generations at Neighbors LLC” failed to implement critical elements of OSHA’s National Emphasis Program for Coronavirus and the ETS Standard for Healthcare.
- Specifically, the healthcare facility did not ensure its COVID-19 prevention plan included policies and procedures to minimize the risk of transmission for each employee.
- Moreover, the facility failed to ensure proper use of respiratory protection, conduct thorough hazard assessments, maintain social distancing and physical barriers, and determine employees’ vaccination status.
- The facility was cited for four serious health violations on August 10, 2021, and is facing **$38,620.000 in penalties**.

Caledonia Company Failed to Protect Workers from COVID-19

- OSHA inspected “Amston Trailer Sales” on May 18, 2021, and found that a 49-year-old dispatcher died from the COVID-19 on April 27, 2021, and that 11/38 employees tested positive for COVID-19 from April 12-May 18, 2021.
- Amston allowed workers to congregate closely and without face coverings in the office, and other areas on site.
- Amston was cited for a serious general duty clause violation and faces **$9,557.00 in penalties**.

QUESTIONS?

Thank You.

FELHABER LARSON

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Restrictive Covenants
Basics, Update, and Trends

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1. Restrictive Covenants: The Basics - What's enforceable?
2. Minnesota Case Law Update
3. National Trends

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Restrictive Covenant Basics – What's enforceable?

Common Provisions in Non-Compete Agreements

- Non-Compete Covenant
- Non-Solicitation Covenant
- Trade Secret/Confidentiality Provision
- Anti-Raiding Provision
- Shop Rights Provision

Requirements for an Enforceable Non-Compete

- Independent Consideration
- Protect Legitimate Business Interest
- Reasonable in Scope, Duration, and Geographic Territory

Independent Consideration

- Must confer a “real advantage” to an employee

- Common Examples of Independent Consideration:
  - New Employment
  - Increased Compensation
  - One Time Bonus
  - Stock Offer
  - Promotion

- Continued Employment is NOT Alone Sufficient

Legitimate Business Interest

- Goodwill and Customer Relationships
- Confidential Information and Trade Secrets
- Specialized Training

Reasonable in Scope

- Customer-Based or Product-Based Restrictions

- Common Issues:
  - Preexisting customers brought by employee
  - Prospective customers
  - Cold call customers
  - Limited or no direct customer contact

Reasonable in Duration

- Two Standards:
  - Length of time necessary so that employer's customers no longer identify former employee as working for employer; or
  - Length of time necessary for employer to hire and train replacement employee

- Two Years – Typically Reasonable in Minnesota

Reasonable in Geographic Territory

- Fact Specific Depending on Business and Customers
- Best Practice: Limit geographic scope to area where employee will actually work.
- Using Non-Solicitation Provisions Instead of Geographic Restrictions

Other Key Non-Compete Provisions

- Attorneys' Fees and Expenses
- Choice of Law and Venue
- Tolling of Non-Compete Period

Other Key Non-Compete Provisions

- Confidentiality Provision
- Inventions
- Return of Property
- Defend Trade Secrets Act Disclosure
- Notice to Prospective Employers/Notice to Company
- Assignability

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Minnesota Case Law Updates

Core and Main, LP v. McCabe (D. Minn. Aug. 18, 2021)

- C&M is in the business of selling Mueller fire hydrants, among other products
- Employed McCabe for almost four years
- Prior to starting his employment with C&M, McCabe entered into an employment agreement with a non-competition provision, which included a geographical restriction of 150 miles, and a non-solicitation provision

Core and Main, LP v. McCabe (D. Minn. Aug. 18, 2021)

- In early June 2021, McCabe resigned and began to work for a North Dakota company as an operations manager
- C&M demanded that McCabe not lead any training at a June 15 conference in Park Rapids
- McCabe attended the conference and led a training session about the installation and maintenance of AFC/Waterous fire hydrants, a brand of fire hydrants not sold by C&M

Core and Main, LP v. McCabe (D. Minn. Aug. 18, 2021)

- C&M sued McCabe and his new employer, seeking a TRO/preliminary injunction, enjoining McCabe from attending conferences and providing training on AFC/Waterous fire hydrants
- To establish irreparable harm, C&M argued that while working at C&M, McCabe persuaded the city of Faribault, to switch from AFC/Waterous fire hydrants to Mueller fire hydrants to show imminent harm
  - The Court rejected the argument because:
    - McCabe had a "minimal role"
    - C&M was authorized to sell Mueller, not AFC/Waterous fire hydrants (different brands)
    - C&M did not provide any allegations or evidence that Faribault was planning to buy Mueller fire hydrants from the new employer

Core and Main, LP v. McCabe (D. Minn. Aug. 18, 2021)

- C&M also argued that McCabe caused irreparable harm by teaching at the Park Rapids Conference, contending it violated the non-solicitation provision
  - Insufficient because:
    - McCabe's training was limited to AFC/Waterous fire hydrants, a product C&M did not sell
    - C&M did not allege that it actually lost any customers, nor did it provide any evidence of McCabe soliciting customers
    - *No evidence of any customer whose goodwill C&M lost when McCabe resigned, or over which McCabe acquired personal influence*

Core and Main, LP v. McCabe (D. Minn. Aug. 18, 2021)

Takeaways

- Irreparable harm is not inferred from a breach of a restrictive covenant unless the former employee obtained a personal hold on the goodwill of the former employer
- The risk of harm to customer goodwill stated in general, conclusory terms does not show a likelihood of irreparable harm that, in turn, justifies an injunction
- When not inferred, there must be some proof of irreparable damage

Virtual Radiologic Corporation v. Rabern (D. Minn. March 5, 2020)

- Rabern worked in sales for a teleradiology business called Virtual Radiologic Corporation.

- He was subject to an original noncompete that prevented him from working for any competitor anywhere in the world for a year.

Virtual Radiologic Corporation v. Rabern (D. Minn. March 5, 2020)

- Rabern told vRad that he was going to work for Nines, Inc., a startup company in California.
- The parties negotiated an amendment that narrowed the scope of the noncompete so that Rabern could work for Nines.
- The noncompete was drafted by in-house counsel for vRad.

Virtual Radiologic Corporation v. Rabern (D. Minn. March 5, 2020)

- vRad sued and tried to void the amendment to the noncompete, claiming that Defendant lied about the nature of his job at Nines.
- The claimed misrepresentation was not in the amendment, but was claimed to be an oral misrepresentation.
- Because the witnesses directly contradicted each other, the Court ruled in favor of Rabern.
- Further, vRad was unable to explain the purpose of the amendment if not to allow Rabert to work at Nines, and the Court was highly critical of the poor draftsmanship of the amendment drafted by vRad's in-house counsel.

Virtual Radiologic Corporation v. Rabern (D. Minn. March 5, 2020)

Takeaways

- If an employee makes a representation about his or her new job, have it in writing.
- If amending a noncompete to allow the employee to work at a particular job, have a clear goal and purpose for doing so.
- Draft any amendments with the same level of care you would put into drafting the original noncompete agreement.

Honkamp Krueger Financial Services Trilogy (December 1, 2020 – September 21, 2021)

- The "Scheme":
  - Aaron Fulton, a senior financial advisor, no longer wanted to work for HKFS because it was in the process of being acquired by a publicly-traded company
  - Fulton wanted to work for direct competitor
  - Fulton's employment agreement included non-compete, non-solicitation and confidentiality provisions
  - Fulton and the direct competitor executed a carefully orchestrated scheme to terminate Fulton's employment with HKFS in a manner that was intended to avoid triggering the non-compete clause

Honkamp Krueger Financial Services Trilogy (December 1, 2020 – September 21, 2021)

- The Problem:
  - Fulton's employment agreement distinguished between the termination of the employment agreement and the termination of his employment, meaning Fulton could terminate the agreement and yet remained employed by HKFS; and
  - Nothing in the employment agreement provided that the non-compete clause survived the termination of the employment agreement

Honkamp Krueger Financial Services Trilogy (December 1, 2020 – September 21, 2021)

- The Execution:
  - Fulton terminated his employment agreement,
  - Two minutes later, he terminated his employment,
  - immediately began to work for the direct competitor, and
  - later that afternoon sued HKFS, seeking a declaration that the restrictive covenants in his agreement were unenforceable
- Fulton and the Direct Competitor prevailed
- Since Fulton first terminated his employment agreement and then later terminated his employment, the non-compete clause no longer applied as his employment agreement was not in effect at the time he quit his job

Honkamp Krueger Financial Services Trilogy (December 1, 2020 – September 21, 2021)

- The Fix:
  - Carefully draft your employment agreements
  - Options:
    - The term of the agreement = the term of employment
    - Survival language
- The Flood Gates Open
  - Miller v. HKFS, 9 F.4th 1011 (8th Cir. 2021) (South Dakota)
    - Ms. Miller went to work for the same director competitor
    - District of S.D. issued injunction and Eighth Circuit reversed due to the same issue

Honkamp Krueger Financial Services Trilogy (December 1, 2020 – September 21, 2021)

- It Gets Worse:
  - Moeschler v. HKFS, 2021 WL 4273481 (D. Minn. Sept. 9, 2021)
  - Same direct competitor, Mariner
  - Client development manager
  - Allegedly transitioned clients with a total of $11 million of assets to Mariner

Honkamp Krueger Financial Services Trilogy (December 1, 2020 – September 21, 2021)

- Moeschler v. HKFS, 2021 WL 4273481 (D. Minn. Sept. 9, 2021)
  - Two employment agreements
    - Agreement Ancillary to Employment – customer non-solicitation provision was unintelligible and thus unenforceable ("The problem is that it is gibberish.")
    - Employee Proprietary Information Agreement
      - Enforceable confidentiality provision that prohibited use of confidential information, including client names and contact information
      - But no irreparable harm (no inference, contractual stipulation insufficient, and no actual irreparable harm)
      - The only harm identified stemmed from a mass exodus of employees and Moeschler was not subject to a non-compete
      - Moreover, the threatened loss of clients is not irreparable because lost business can be remedied with money damages

CRST Expedited, Inc. v. Swift Transportation (8th Cir. Aug. 6, 2021)

- CRST Expedited and Swift Transportation are both trucking companies.
- CRST paid for CDL training fees for new truckers, at significant cost.
- In exchange, the truckers agree to either: (a) noncompete for a certain period of time; or (b) if they wished to compete, to refund the training costs.
- Swift recruited and hired truckers from CRST.

CRST Expedited, Inc. v. Swift Transportation (8th Cir. Aug. 6, 2021)

- CRST sued for tortious interference and unjust enrichment.
- The Eighth Circuit ultimately overturned a jury verdict in favor of CRST and ordered that the claims be dismissed, because CRST's contention that merely "offering employment" to the truckers or merely "working" for Swift caused the truckers to breach the noncompete.
- Instead, the Court said the proper analysis is whether the Swift knowingly induced truckers to drive for Swift and not refund the training fees.

CRST Expedited, Inc. v. Swift Transportation (8th Cir. Aug. 6, 2021)

- While CRST offered evidence at trial that Swift did not pay the training fees, there was no evidence as to whether the truckers did.
- Further, there was no evidence as to whether Swift induced the truckers not to repay the training fees.
- Rather, Swift simply hired the truckers, and it was up to the truckers whether they repaid the fees.
- In such circumstances, the Court found that Swift did not induce the truckers to breach their agreement.

CRST Expedited, Inc. v. Swift Transportation (8th Cir. Aug. 6, 2021)

Takeways

- When drafting noncompete agreements and formulating enforcement strategy, consider whether it is more effective to enforce the agreement against former employees or new employer.

- Consider other ways of constructing fee advances/start bonuses, rather than tying it to a noncompete.

H2I Group, Inc. v. Miller
(D. Minn. Feb. 10, 2020)

- H2I is a Minnesota corporation headquartered in Minneapolis.

- H2I employed Miller as a project engineer, who oversaw projects in Texas, Arkansas, and Oklahoma.

- Miller was subject to a noncompete.

H2I Group, Inc. v. Miller
(D. Minn. Feb. 10, 2020)

- H2I subcontracted with a company known as OB1, owned by Durant.
- Durant later formed a competing company called All Seasons, and hired Miller.
- Miller left H2I to work for a competing company called All Seasons.
- When he resigned from H2I, Miller signed a severance agreement for $2,615.20, which contained a Minnesota choice-of-law provision.

H2I Group, Inc. v. Miller
(D. Minn. Feb. 10, 2020)

- H2I then learned that Miller was working for a competitor, and sued Miller, Durant, and All Seasons.
- The Court dismissed the tortious interference claims against Durant and All Seasons for lack of personal jurisdiction.
- Durant never travelled to Minnesota in connection with the OB1 subcontractor relationship, and All Seasons never did any work in Minnesota.
- Critically, there was no evidence that Durant or All Seasons knew that Miller was subject to a noncompete that would cause harm in Minnesota to a Minnesota company.

H2I Group, Inc. v. Miller
(D. Minn. Feb. 10, 2020)

- As for Miller, the Court found a basis for personal jurisdiction in Minnesota, although it was a close call.
- Miller had signed a noncompete with a Minnesota company, knowing the purpose was to protect the Minnesota company.
- The employment relationship lasted 5 years.
- Additionally, the severance agreement contained a Minnesota choice of law provision.

H2I Group, Inc. v. Miller
(D. Minn. Feb. 10, 2020)

Takeaways

- Include both a choice of law and forum selection clause in the noncompete.
- Include a provision in the noncompete requiring the employee to give notice to the new employer.
- Considering suing first in your home territory to establish presumption of forum.

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National Trend

Restrictive Covenants

- Courts in most jurisdictions have strictly construed restrictive covenants
- In recent years, more and more states have taken action to limit (or ban) employee restrictive covenant agreements
  - Ban: California and ND (prohibits most employee non-competes and non-solicitation provisions)
  - Ban: Oklahoma and Washington DC (March 2021) (virtually prohibits non-competes and limits non-solicitation provisions)
  - Limit: Illinois (2021), Maine (2019), Maryland (2019), Massachusetts (2019), New Hampshire (2019), Nevada (2021), Oregon (2021), Rhode Island (2019), Virginia (2020), Washington (2021), and Louisiana (primary focus is on low-wage workers)
- Federal regulation of noncompete agreements is on the horizon

Executive Order on Promoting Competition in the American Economy

- President Biden asked FTC to ban or limit non-compete agreements
  - FTC is to consider enacting a rule "***to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility***."
- Outright ban is unlikely. FTC will likely focus on:
  - Prohibiting non-compete agreements with low-wage workers
  - Limiting the length of restriction

Executive Order on Promoting Competition in the American Economy (cont'd)

- Unclear when FTC will begin to evaluate any proposed rules and when any rule will go into effect
- How should employers that have non-competes deal with a new FTC rule?
  - Only use them when they are necessary to protect a legitimate business interest
  - Limit the scope of your non-competes to the geographic area in which the employee works [or]
  - Lean towards using customer-based restrictions for most employees

State Legislation – "Low Wage"

- What is a low wage?

State Legislation – "Low Wage"

- Virginia
  - A "low wage" worker = employee or independent contractor making less than $62,140 annually
- Illinois
  - No non-compete provisions for employees earning less than $75,000 (increases $5K each year until it is $90K)
  - No non-solicitation provisions for employees earning less than $45,000 annually (increases $2,500 each year until it is 52,500)
- Washington/Oregon
  - A "low wage" worker is someone making less than $100,000 (Oregon – $100,533) per year adjusted annually for inflation

State Legislation

- Nevada (effective October 1, 2021)
  - Employees paid solely on an hourly basis cannot be subject to non-competes
  - Cannot prevent an employee from providing services to a customer unless the former employee solicited the customer or is otherwise violating a valid non-competition covenant
  - When a provision is blue penciled, the employee's equitable interests must be taken into account
  - Employees are entitled to attorneys' fees and costs if they sue for declaratory relief and a non-competition covenant is found invalid, or defend against an unenforceable non-compete agreement

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Thank You