

Welcome



KANSAS CITY,
MISSOURI

April 12, 2023

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First Quarter: Lightning Round 1



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Mission Critical – Updates on Trade Secret Litigation and Non- Compete Agreements



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Caitlin Gehlen, Lathrop GPM
Loren Hansen, Lathrop GPM
Referee: Kim Winter, Lathrop GPM

Trade Secret Basics

- Laws: Defend Trade Secrets Act (Federal) & Uniform Trade Secrets Act (State)
 - Because 48 states have adopted the UTSA, Federal Courts commonly analyze parallel claims brought under the DTSA and state trade secret statutes together.
 - California & North Carolina are outliers.
- Consideration Federal or State?
- Standard:
 - Plaintiff must show the existence of a protectable trade secret and misappropriation of that trade secret. A trade secret is “**business or technical information**” that is (1) subject of reasonable efforts to maintain its secrecy and (2) derives actual or potential independent economic commercial value from not being generally known or readily ascertainable.



Identification of Trade Secret

- Organization of Trade Secrets is Critical.
 - Critical eyes on what truly is driving value for your business, and better protection.
 - Mitigate risk of outside bad actors.
 - Mitigate risk of internal bad actors.
 - Increasing hostility to non-compete agreements.
 - Early identification of trade secrets is becoming commonplace in advance of discovery.
- New Resource: Trade Secret Case Management Judicial Guide
 - https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4360102



The Push to Ban Non-Compete Agreements

- At the Federal Level
 - In early January, the Federal Trade Commission (“**FTC**”) announced a proposed rule to ban the use of non-compete agreements in employment.
 - Prohibits future use and invalidates non-compete agreements currently in effect.
 - Prohibits any agreement that “has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker’s employment with the employer.”
 - Could impact non-solicitation or non-disclosure agreements written too broadly.
 - Although the proposed rule sounds daunting, it faces an uphill battle.
 - Public comment period extended through April.
 - Lengthy revision period.
 - Almost guaranteed litigation challenging FTC’s authority.
- Movement at the State Level
 - 2022 - 5 states effected legislation to limit or prohibit the use of non-compete agreements.
 - 2023 - 18 additional states have proposed or pending legislation.



Time to Clean House

- Even if the FTC's rule is unsuccessful, likely some of the states you are currently operating in have current or proposed restrictions on non-compete agreements.
- Legislation trends:
 - Limiting use to the protection of trade secrets only.
 - Minimum salary thresholds .
 - Time limits on post-employment restrictions (typically 12-18 months).
- How can you prepare?
 - Review template language and narrow wherever possible.
 - Especially for geographic scope, definition of competing business
 - Limit to only those with access to confidential/proprietary information.
 - Who are your key players?
 - Consider other means such as non-solicit, non-disclosure agreements.



When Goliath Borrows David's Slingshot: Big Business and its Offensive Use of State Consumer Protection Acts



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Pat Fanning, Lathrop GPM
Sara Meinhard, Legacy Infrastructure Group
Referee: Kim Winter, Lathrop GPM

How did we get here?

- Consumer protection acts emerged at another time
 - Unequal bargaining power
 - Purchase decisions based on limited information
 - Preying on the vulnerable/low educated
 - Government intervened to protect the “little guy/gal”
- Missouri Merchandising Practices Act (Ch. 407 RSMo.)
 - 1967: Authorized AG’s office to protect consumers
 - 1973: Expanded to allow private right of action/class actions (§ 407.025 RSMo.)
- Kansas Consumer Protection Act (K.S.A. Ch. 50, Art. 6) - 1973



Broad definitions . . .

“**Person**”, any natural person or his legal representative, partnership, firm, **for-profit or not-for-profit corporation**, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;

“**Advertisement**”, the attempt by **publication, dissemination, solicitation, circulation, or any other means to induce, directly or indirectly, any person to enter** into any obligation or acquire any title or interest in any merchandise;

“**Merchandise**”, **any objects**, wares, **goods**, commodities, intangibles, real estate or **services**;

§ 407.010 RSMo; see also K.S.A. § 50-624



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... and a universe of wrongs to be righted

The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in [section 407.453](#), in or from the state of Missouri, is declared to be an unlawful practice. The use by any person, in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in [section 407.453](#), in or from the state of Missouri of the fact that the attorney general has approved any thing required by this chapter as the approval, sanction or endorsement of any activity, project or action of such person, is declared to be an unlawful practice. Any act, use or employment by any person, in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in [section 407.453](#), in or from the state of Missouri, which violates this subsection whether committed by an individual or by a partnership, corporation, association, trust, partnership, or other entity, is declared to be an unlawful practice.

JUST LIKE FRAUD

**EXCEPT FOR THE RELIANCE
AND INTENT (*SCIENTER*)**

§ 407.020 RSMo; see also K.S.A. § 50-626



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What types of materials could get you in trouble?

- Product descriptions
- Emails
- Websites
- Statements in RFPs
- Sales presentations (including PPTs)
- Cover letters
- Demonstrations
- Videos
- Press releases
- Contracts—schedules, SOW, orders
- Oral communications
- Trade shows

IN OTHER WORDS, EVERYTHING

(Everywhere All at Once)



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What are some potentially problematic statements?



The expectation is a six-figure savings by moving to software “X”. I can’t say enough good things about how the cloud transformation went. as there were no issues whatsoever.

Unmatched service from a team of experienced professionals

- Robust reports
- Increase productivity
- Improve user productivity
- Increase staff efficiency
- Accessible anywhere
- Ensure legal compliance
- Optimize processes
- Secure access to information
- High-level of encryption



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Let's look at a pro-business state



The following unfair or deceptive acts or practices affecting the conduct of any trade or commerce are declared to be unlawful and in violation of this part:

Representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another;

(12) “Goods” means any tangible chattels leased, bought, or otherwise obtained for use **by an individual primarily for personal, family, or household purposes** or a franchise, distributorship agreement, or similar business opportunity;

(23) “Services” means any work, labor, or services including services furnished in connection with the sale or repair of goods or real property or improvements thereto; and

T.C.A. §§ 47-18-104(b) and 47-18-103



How do we protect against it?

- Explain the sophistication of both parties in the contract document
 - Number of employees
 - Revenues
 - Number of facilities/offices
 - Consultants
- Research consumer protection act as part of choice-of-law analysis in contract
- Arbitration provision
- Disclosures within marketing materials/emails themselves
- Partner with marketing on crafting of objective claims
- Cite to real-world statistics, examples, and client surveys and maintain database of sources for cited information in all marketing materials



Data Privacy & Cybersecurity: What do Regulators, Investors and Customers Expect?



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Shelli Clarkston, Lathrop GPM
Tedrick Housh, Lathrop GPM
Referee: Kim Winter, Lathrop GPM

Cyber is at the Top of GC's Radar

- New State Data Protection Laws
- Social Engineering, Data Threats & Insurance
- Banking and Financial Crimes
- Artificial Intelligence



New State Data Protection Laws

1. California Consumer Privacy Act (CCPA)
 - Amended by California Privacy Rights Act (CPRA), effective Jan. 1, 2023
 - Enforcement by AG & California Privacy Protection Agency begins July 1, 2023
2. Virginia Consumer Data Protection Act (VCDPA): Effective Jan. 1, 2023
3. Colorado Privacy Act (CPA): Effective July 1, 2023
4. Connecticut Data Privacy Act (CTDPA): Effective July 1, 2023
5. Utah Consumer Privacy Act (UCPA): Effective Dec. 31, 2023
6. Iowa just passed a new data privacy law that should go into effect January 1, 2025



New State Data Protection Laws

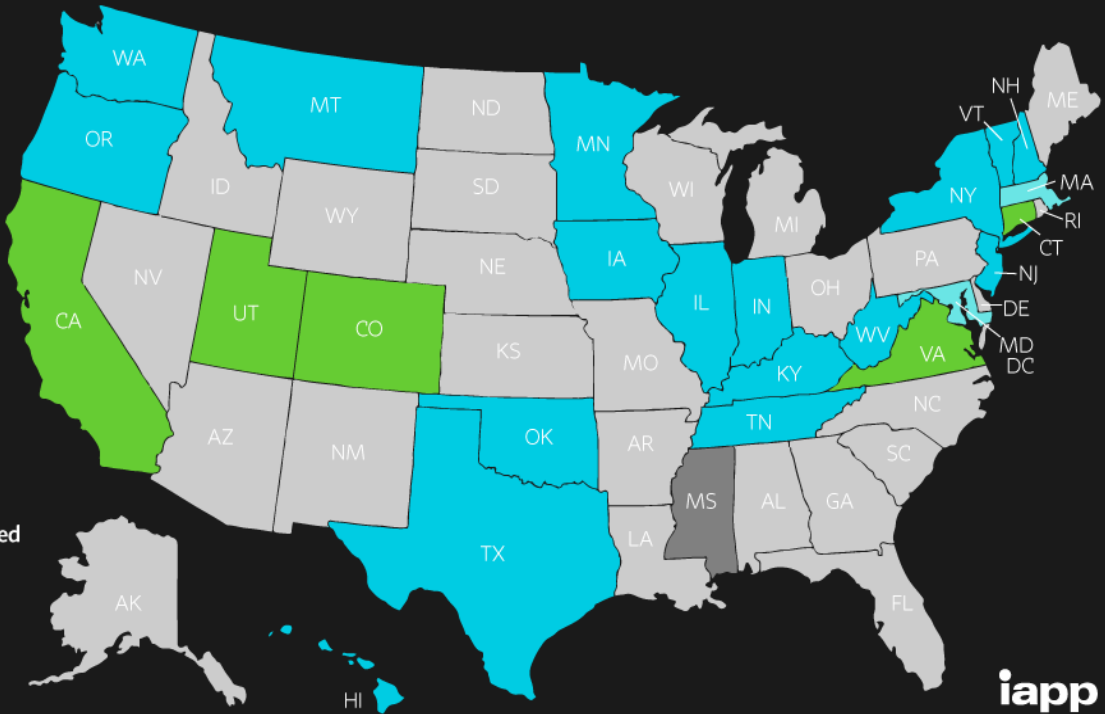
1. California Consumer Privacy Act (CCPA)
 - Employee and B2B exemption expired on Jan. 1, 2023.
 - **“Sensitive Personal Information”** = SSN, DL, biometrics, precise geolocation, race and ethnic origin.
2. Virginia Consumer Data Protection Act (VCDPA)
 - More like the EU’s GDPR than California’s CCPA.
3. Colorado Privacy Act (CPA)
 - Applies to non-profits; contains new opt-out rights for targeted advertising or data sale.
4. Connecticut Data Privacy Act (CTDPA)
 - AG has been very active in privacy enforcement.
5. Utah Consumer Privacy Act (UCPA)
 - Enforcement by AG & Division of Consumer Protection.



US State Privacy Legislation Tracker 2023

STATUTE/BILL IN LEGISLATIVE PROCESS

- Introduced
- In committee
- In cross chamber
- In cross committee
- Passed
- Signed
- Inactive bills
- No comprehensive bills introduced



Last updated: 2/24/2023



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Blackbaud Data Breach – Ransomware Class Action



blackbaud®



- After a ransomware attack from February-May 2020, Blackbaud paid the ransom and the threat actors promised to permanently destroy any data accessed.
- Class Action lawsuits are consolidated in the federal district court in South Carolina. For the most part, the lawsuits have been allowed to proceed.
- Recently, the MDL Court held MA, not SC, law applied. The company’s decisions made in South Carolina “may have contributed to the breach, but they were not the last act necessary to establish the cause of action.”
- Lesson: Know the jurisdictions where your data is held.



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Class Actions: Hospital Data Collection via Meta Pixel



“Facebook Is Receiving Sensitive Medical Information from Hospital Websites”

By Todd Feathers, S. Fondrie-Teitler, A. Waller, and S. Mattu (June 16, 2022).

“The Markup tested the websites of Newsweek’s top 100 hospitals in America. On 33 of them we found the tracker, called the Meta Pixel, sending Facebook a packet of data whenever a person clicked a button to schedule a doctor’s appointment. The data is connected to an IP address—an identifier that’s like a computer’s mailing address and can generally be linked to a specific individual or household—creating an intimate receipt of the appointment request for Facebook.”

<https://themarkup.org/pixel-hunt/2022/06/16/facebook-is-receiving-sensitive-medical-information-from-hospital-websites>

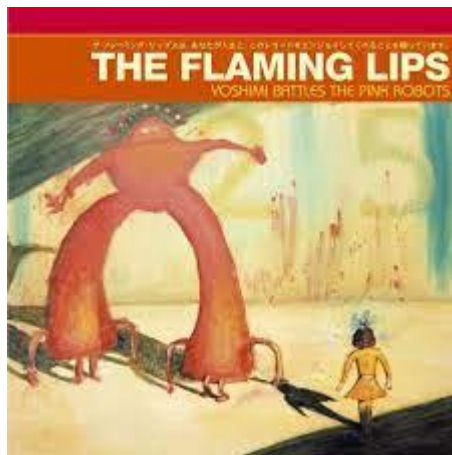


Fintechs, Banks and Financial Cybersecurity Protection

- Fintechs Beware: CFPB Builds on FTC Safeguards for Consumer Data
- In August 2022, the Consumer Financial Protection Bureau (CFPB) issued Consumer Financial Protection Circular 2022-04 for enforcers of federal consumer financial laws. The new Circular reflects the consumer watchdog's increasing focus on the data security measures required for consumer data. The guidance targets financial companies and financial technology providers (“**fintechs**”) for lack of such measures, deeming such failures a potential “**unfair practice**” under the Consumer Financial Protection Act.
- According to the CFPB, the minimum basic measures to protect consumer data include MFA, adequate password management and timely software updates.



Artificial Intelligence is Coming for White Collars



GPT-4 Passes the Bar Exam

03/15/2023 Illinois Tech News Release

Daniel Martin Katz, law professor at Illinois Tech's Chicago-Kent College of Law, demonstrates that OpenAI's latest deep learning model (GPT-4) excels in complex legal reasoning and has profound implications for the legal system.

Paper:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4389233

Yoshihimi Battles the Pink Robots:

<https://www.youtube.com/watch?v=ZdDHi5SSIIM>



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Second Quarter: Courts and Juries in 2023 and Beyond



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Emily Cantwell, Lathrop GPM
Brian Dillon, Lathrop GPM
Paula Pendley, Lathrop GPM
Paulette Robinette, JurySync LLC
Moderator: Brian Fries, Lathrop GPM

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Courts and Juries today

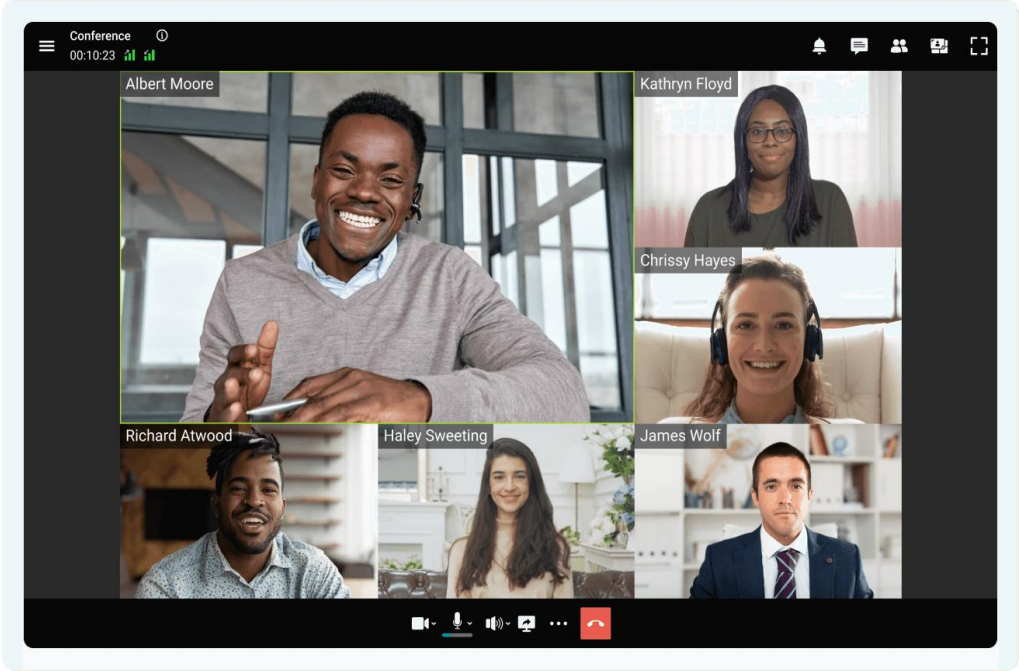
- What are we seeing with courts and juries in 2023?
- What do you need to consider when presenting your case to a jury in 2023?
- ***Need to look to where we have been the last couple of years to understand where we are today.***



Where we start—March 2020



Covid—How the legal world adapted



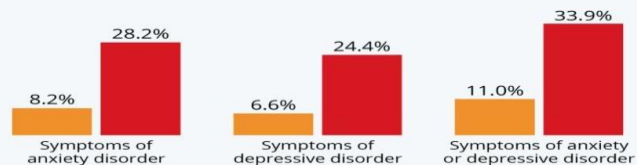
What after-effects from covid do we see with juries?



Pandemic Causes Spike in Anxiety & Depression

% of U.S. adults showing symptoms of anxiety and/or depressive disorder*

January-June 2019 May 14-19, 2020



* Based on self-reported frequency of anxiety and depression symptoms. They are derived from responses to the first two questions of the eight-item Patient Health Questionnaire (PHQ-2) and the seven-item Generalized Anxiety Disorder (GAD-2) scale.

Sources: CDC, NCHS, U.S. Census Bureau



statista

During late June, 40% of U.S. adults reported struggling with mental health or substance use*

ANXIETY/DEPRESSION SYMPTOMS



STARTED OR INCREASED SUBSTANCE USE



TRAUMA/STRESSOR-RELATED DISORDER SYMPTOMS



SERIOUSLY CONSIDERED SUICIDE†



*Based on a survey of U.S. adults aged ≥18 years during June 24-30

†In the 30 days prior to survey

For stress and coping strategies: bit.ly/dailylifecoping

06/14/2020

CDC.GOV

bit.ly/MMWR81320

MMWR



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Political Divisiveness

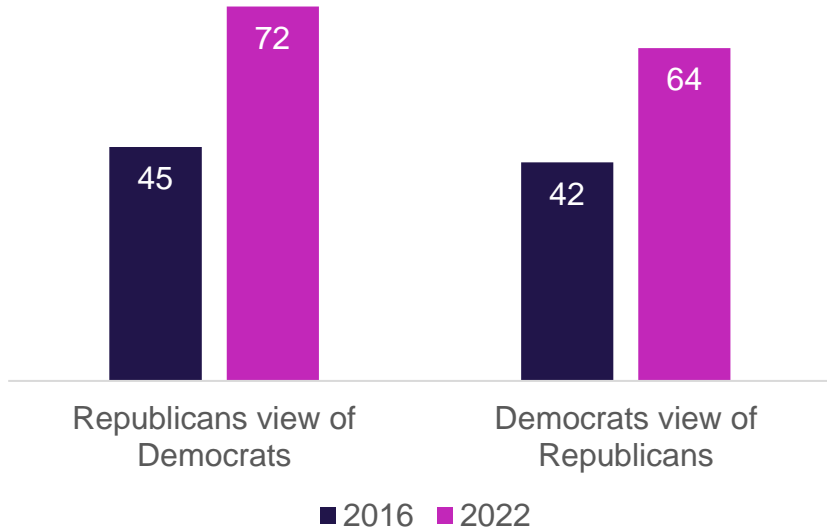


Fake news/“Woke”/Conspiracies and so much more

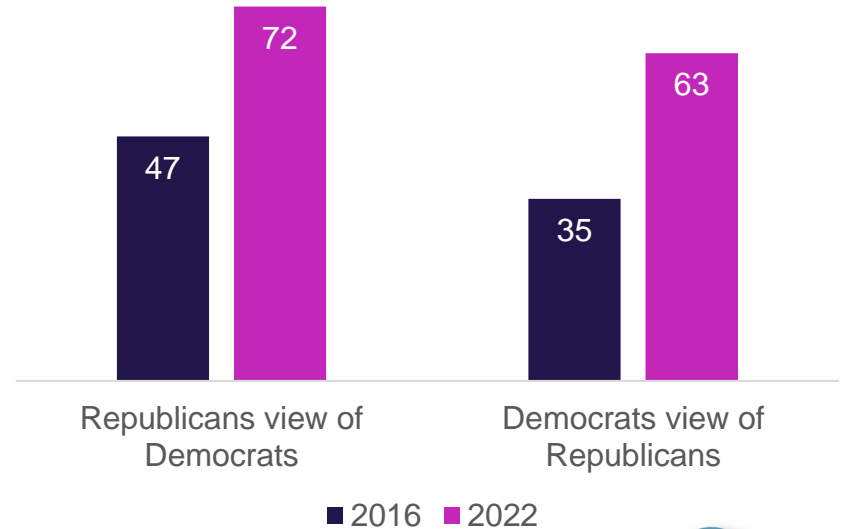


Deteriorating Views of those in Opposing Party

“Dishonest”



“Immoral”



“As partisan hostility grows, signs of frustration with the two-party system.” Pew Research Center, Washington, D.C. (Aug. 9, 2022).
<https://www.pewresearch.org/politics/2022/08/09/republicans-and-democrats-increasingly-critical-of-people-in-the-opposing-party/>





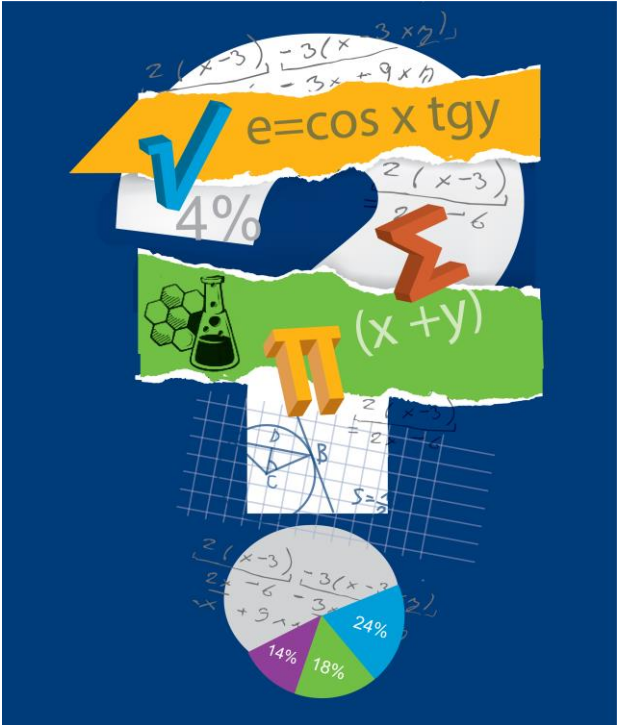
DAVE GRANLUND © www.davegranlund.com

<https://politicalcartoons.com/cartoon/104763>



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Science—Increased Skepticism?



Racial Issues: How do these play out in the jury?



“Year of the Employee”

- Escalating Pay
- Better benefits
- WFH
- No limit on PTO
- Flex time
- Sabbatical
- Emotional Fulfilment
- Mobility
- Etc., etc., etc...



Divisive views on international issues: How they impact your story

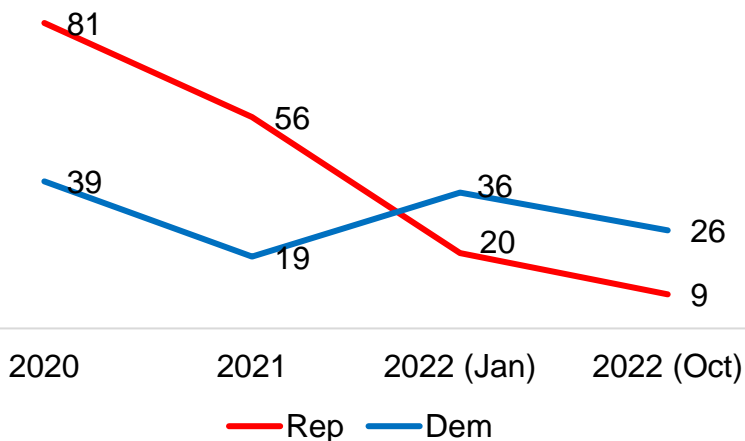


Economic Uncertainty



Economic Outlook is grim, regardless of Party

% who rate economic conditions in the U.S. today as **excellent** or **good**¹



How does economic security impact jury trials?

- Changes in jury composition—higher number of legitimate hardship requests and excusals
- Sympathy for plaintiffs—more extreme reactions, positive and negative, based on perceived severity of injury and worthiness of plaintiff
- Cynicism toward those who are profiting—success drives suspicion regarding the tactics used to profit while most are struggling to get by

¹“Midterm voting intentions are divided, economic gloom persists.” Pew Research Center, Washington, D.C. (Oct. 20, 2022).

https://www.pewresearch.org/politics/2022/10/20/midterm-voting-intentions-are-divided-economic-gloom-persists/pp_2022-10-20_midterm-voting_02-01/

So here we are...



Halftime Break



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Third Quarter: DEI Roundtable



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Angela Garcia, Kansas City Missouri Bar Association
Kristen Harris, Hallmark
Vicki Webster, GEHA
Moderator: Vanessa Vaughn West, Lathrop GPM

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Fourth Quarter: Lightning Round 2



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Marijuana in the Workplace: Does the Missouri Constitutional Amendment Block Employers from Tackling this Issue?



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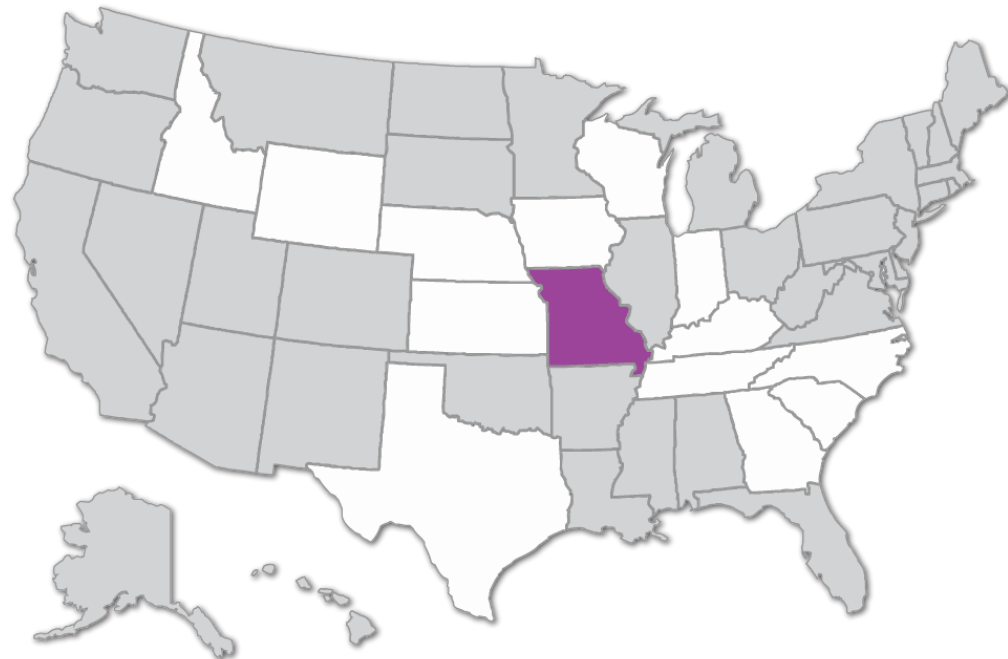
Bridget Romero, Lathrop GPM
Brian Woolley, Lathrop GPM
Referee: Kim Winter, Lathrop GPM

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An employer can prohibit...

- Use
- Possession
- Sale

**...in the workplace or
on its property.**

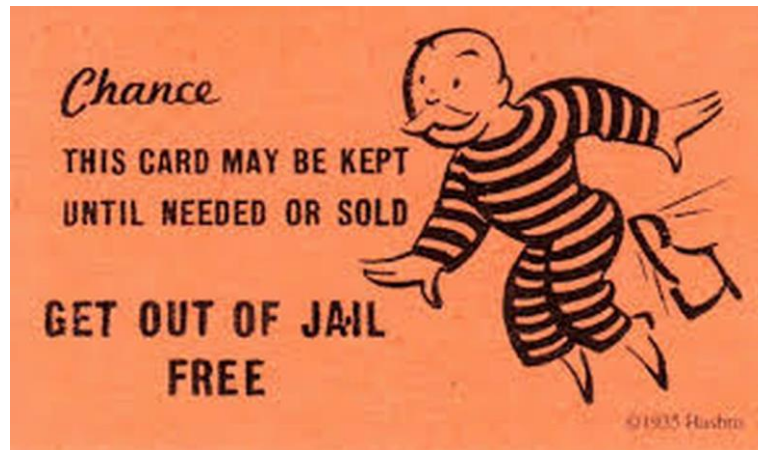


More difficult question

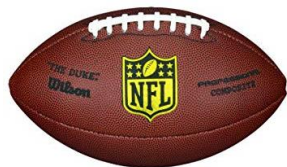
UNDER THE INFLUENCE



An employer is not prohibited from taking adverse action against a person who is working while under the influence.



Under the Influence: You can test, but is there a number?



50/15



Under the Influence: How will I know?

Check All That Apply:

<p style="text-align: center;">Speech</p> <ul style="list-style-type: none"> <input type="checkbox"/> Slurred, thick <input type="checkbox"/> Slow <input type="checkbox"/> Rapid <input type="checkbox"/> Silent <input type="checkbox"/> Loud <input type="checkbox"/> Hostile <input type="checkbox"/> Talkative <input type="checkbox"/> Incoherent <input type="checkbox"/> Difficulty speaking <input type="checkbox"/> Cursing, inappropriate <input type="checkbox"/> Nonsensical, silly 	<p style="text-align: center;">Eyes</p> <ul style="list-style-type: none"> <input type="checkbox"/> Bloodshot/Reddened <input type="checkbox"/> Pupils dilated <input type="checkbox"/> Pupils constricted <input type="checkbox"/> Repetitive jerky motion <input type="checkbox"/> Glazed appearance <input type="checkbox"/> Droopy/partially closed <input type="checkbox"/> Tearing, watery <input type="checkbox"/> Unfocused, blank stare 	<p style="text-align: center;">Odor</p> <ul style="list-style-type: none"> <input type="checkbox"/> Alcohol smell on breath or clothing <input type="checkbox"/> Chemical odor <input type="checkbox"/> Burnt rope odor <input type="checkbox"/> Other odor: _____ _____ _____
<p style="text-align: center;">Mood</p> <ul style="list-style-type: none"> <input type="checkbox"/> Hostile/ Angry <input type="checkbox"/> Elated, “up” <input type="checkbox"/> Irritable, agitated <input type="checkbox"/> Anxious <input type="checkbox"/> Combative <input type="checkbox"/> Aggressive <input type="checkbox"/> Violent <input type="checkbox"/> Evasive <input type="checkbox"/> Sad/depressed 	<p style="text-align: center;">Mental</p> <ul style="list-style-type: none"> <input type="checkbox"/> Poor judgment <input type="checkbox"/> Decreased inhibitions <input type="checkbox"/> Disoriented <input type="checkbox"/> Unpredictable <input type="checkbox"/> Distracted <input type="checkbox"/> Drowsy/sleepy <input type="checkbox"/> Restless <input type="checkbox"/> Suspicious/paranoid <input type="checkbox"/> Withdrawn 	<p style="text-align: center;">Balance</p> <ul style="list-style-type: none"> <input type="checkbox"/> Slowed <input type="checkbox"/> Normal <input type="checkbox"/> Quickened <input type="checkbox"/> Staggering <input type="checkbox"/> Swaying <input type="checkbox"/> Falling <input type="checkbox"/> Holding on <input type="checkbox"/> Unsteady/uncoordinated <input type="checkbox"/> Clumsy
<p style="text-align: center;">Movement</p> <ul style="list-style-type: none"> <input type="checkbox"/> Slowed <input type="checkbox"/> Normal <input type="checkbox"/> Quickened <input type="checkbox"/> Shaking <input type="checkbox"/> Tremors 	<p style="text-align: center;">Appearance</p> <ul style="list-style-type: none"> <input type="checkbox"/> Flushed <input type="checkbox"/> Sweating <input type="checkbox"/> Cold, clammy <input type="checkbox"/> Disheveled, messy <input type="checkbox"/> Vomit on clothing 	<p style="text-align: center;">Other</p> <ul style="list-style-type: none"> <input type="checkbox"/> Frequent use of breath mints, gum, mouthwash <input type="checkbox"/> Physical evidence (like liquor bottle, drug paraphernalia) <input type="checkbox"/> Other: _____

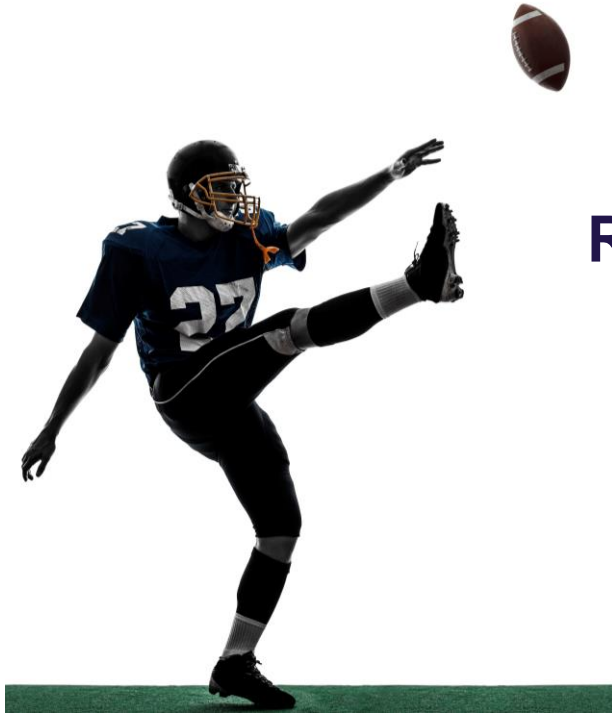


Under the Influence: What should I do?

- Observation Template
- More than One Witness
- Supervisor Training
- Safety Sensitive Position?
- Applicant?
- Union?



Medical Marijuana's Extra Kicker



Reasonable Accommodation



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Responding to Government Investigations



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Jean Paul Bradshaw, Lathrop GPM
Kathleen Fisher Enyeart, Oracle
Referee: Kim Winter, Lathrop GPM

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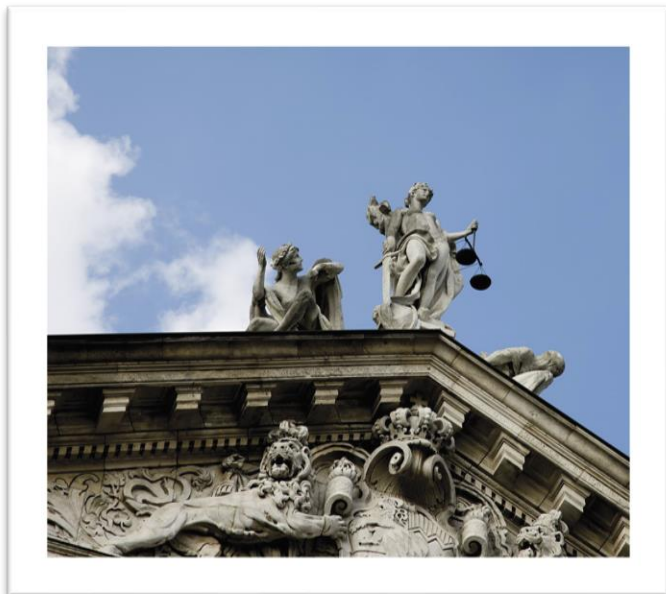


Why Compliance Programs and Internal Investigations matter – DOJ Monaco Memo September 2022

- Provides specific benefits for cooperation and details what cooperation entails.
 - Timely, complete disclosure of individual misconduct.
 - Preservation and production of non-privileged documents and information.
 - Prioritize production of evidence showing individual culpability.
- Provides further guidance on evaluation of compliance programs.
 - What was effectiveness at time of offense and time of charging decision.
 - Culture of compliance.
 - Compensation structures.
- Memo link: <https://www.justice.gov/opa/speech/file/1535301/download>



DOJ Evaluation of Corporate Compliance Programs



- Is the corporation's compliance program well designed?
- Is the program applied earnestly and in good faith?
 - In other words, is the program **adequately resourced** and **empowered to function effectively**?
- Does the corporation's compliance program work in practice?

"The starting point for a prosecutor's evaluation of whether a company has a well-designed compliance program is to understand ... how the company has identified, assessed, and defined its risk profile, and the degree to which the program devotes appropriate scrutiny and resources to the spectrum of risks."

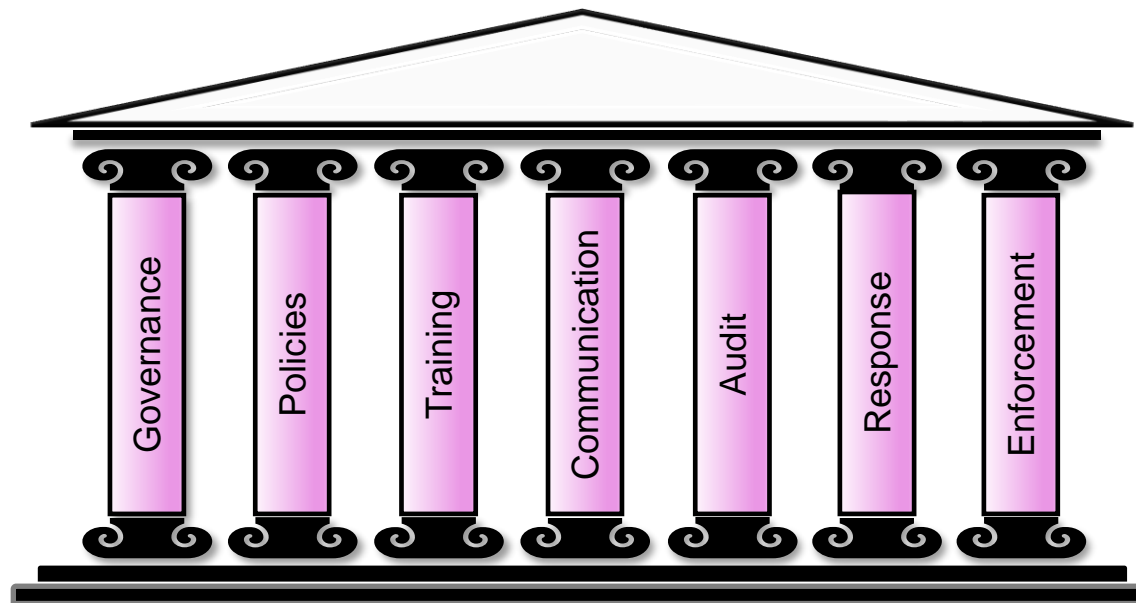
US DOJ Criminal Division, *Evaluation of Corporate Compliance Programs*, June 2020



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7 Elements of an Effective Compliance Program

Elements identified by the Department of Justice as critical to an adequate compliance program



What can trigger an internal investigation?

- Grand jury subpoena or Civil Investigative Demand
- Search warrant
- Misconduct reported to manager or HR
- Employment or other civil claims
- Notice to board, shareholders, etc.
- Social media posts
- Conflicts of interest, e.g. leadership/board member has financial interest or relationship with competitor



Internal Investigations - Confidentiality

- Ensure the investigation is directed by legal to protect privilege
- Maintain confidentiality of whistleblowers
- Consider reporting hotlines/websites and case management tools to track reports and communicate with anonymous reporters
- Note some jurisdictions limit the nature of anonymous reports that can be made, e.g. in EU countries, Switzerland, Norway, only banking, finance, accounting or audit irregularities, bribery, kickbacks or other corruption
- EU Whistleblower directive requires timely notice back to reporter



When to involve outside counsel in an investigation?

- Allegations against senior leadership
- Any time conflicts of interest may be perceived, i.e. allegations against legal or HR department leader
- Protect privilege to a greater degree
- Allegations of fraud, bribery, accounting discrepancies, serious conflicts of interest, serious employment claims like sexual harassment or abusive behavior



Investigative Plan

- Retention of emails, IMs (Teams/Slack/etc.), texts if company phones
- Gather relevant documents for review
- Coordinate interviews with witnesses and include Upjohn warnings
- Individual counsel concerns
- Think about reporting to leadership or board in a way that maintains integrity of the investigation

[R:\50726896v1_monaco memo.pdf](R:\50726896v1_monaco_memo.pdf)



Investigative Report – What to include

- What is the purpose of the report? Client and counsel discussion
- Thorough and complete
- Include investigative steps, who was interviewed, what documents were reviewed, etc.
- Should have clear conclusion as to whether allegations could be substantiated
- May also note policy violations or other misconduct that may be actionable
- If counsel has recommendations about corrective action, changes in controls, etc., may be better to offer verbally depending on what is feasible



Disclosure obligation considerations

- Publicly traded companies may have audit/SEC disclosure requirements
- Regulatory requirements, i.e. healthcare fraud and abuse, product recalls, patient safety
- Mandated reporter requirements



When should you consider Voluntary Disclosure

- New DOJ Policy on Voluntary Self Disclosure
- When company becomes aware of misconduct by employee/agent, before misconduct is publicly reported or otherwise known to DOJ, it must disclose all known relevant facts to the USAO in a timely fashion, prior to an imminent threat of disclosure or government investigation.
- In absence of any aggravating factor the USAO will not seek a guilty plea; may choose not to impose any criminal penalty, will not impose a fine greater than 50% below the low end of the Sentencing Guidelines range; and will not seek the imposition of an independent compliance monitor if the company demonstrates that it has an effective compliance program.
- Three aggravating factors that may warrant a guilty plea even with a voluntary disclosure: (1) the misconduct poses a grave threat to national security, public health, or the environment; (2) the misconduct is deeply pervasive throughout the company; or (3) the misconduct involved current executive management of the company.



Kansas City Hype



KANSAS CITY,
MISSOURI

Quinton Lucas, Mayor of Kansas City

2-Minute Warning Break



KANSAS CITY,
MISSOURI.



Post-Game Interview



KANSAS CITY,
MISSOURI

DeMaurice Smith, NFL Players Association
Interviewer: Eric Yaffe, Lathrop GPM

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Thank You!



KANSAS CITY,
MISSOURI.