



OCTOBER 5, 2021

Navigating the New Normal:

Legal Considerations for Businesses in the Pandemic and Post-Pandemic Era



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Speakers

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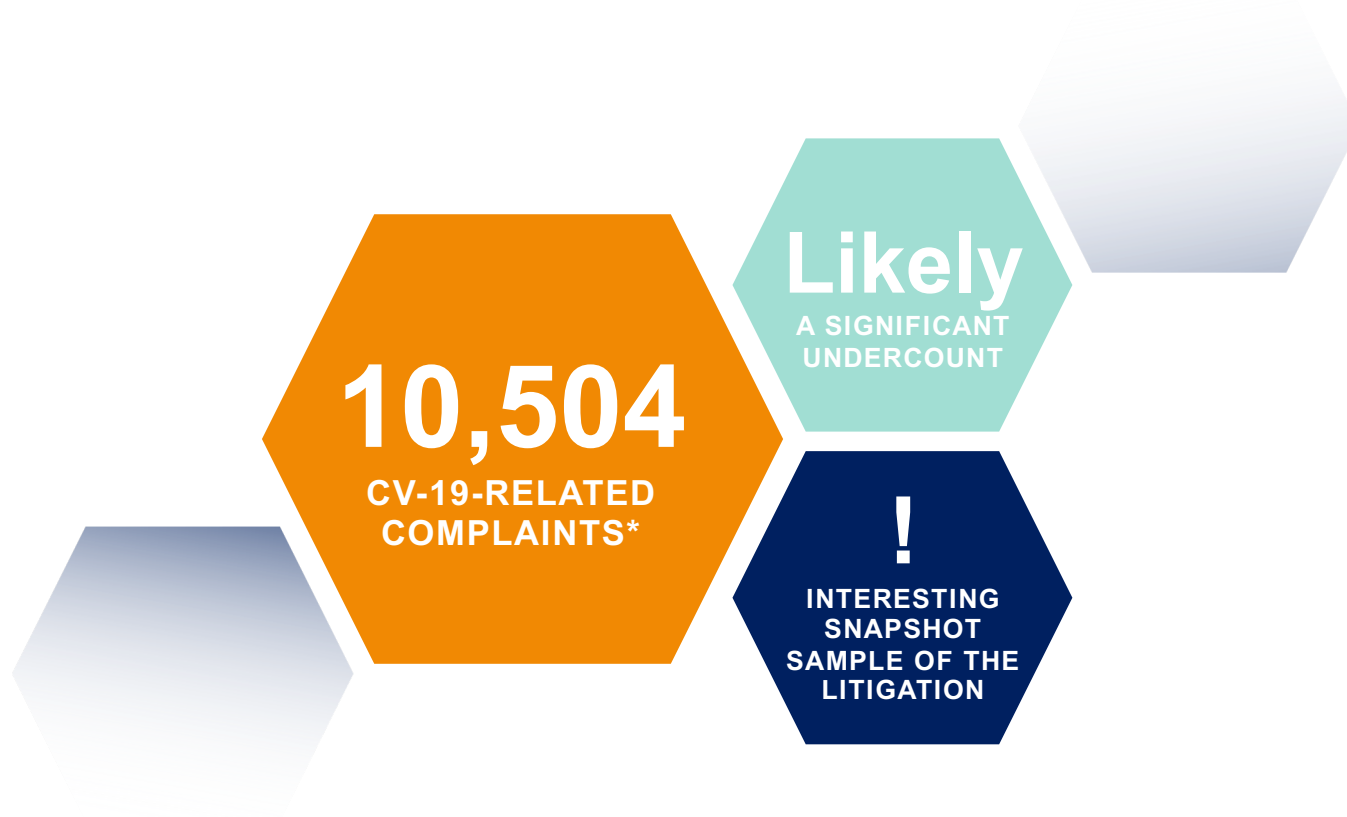


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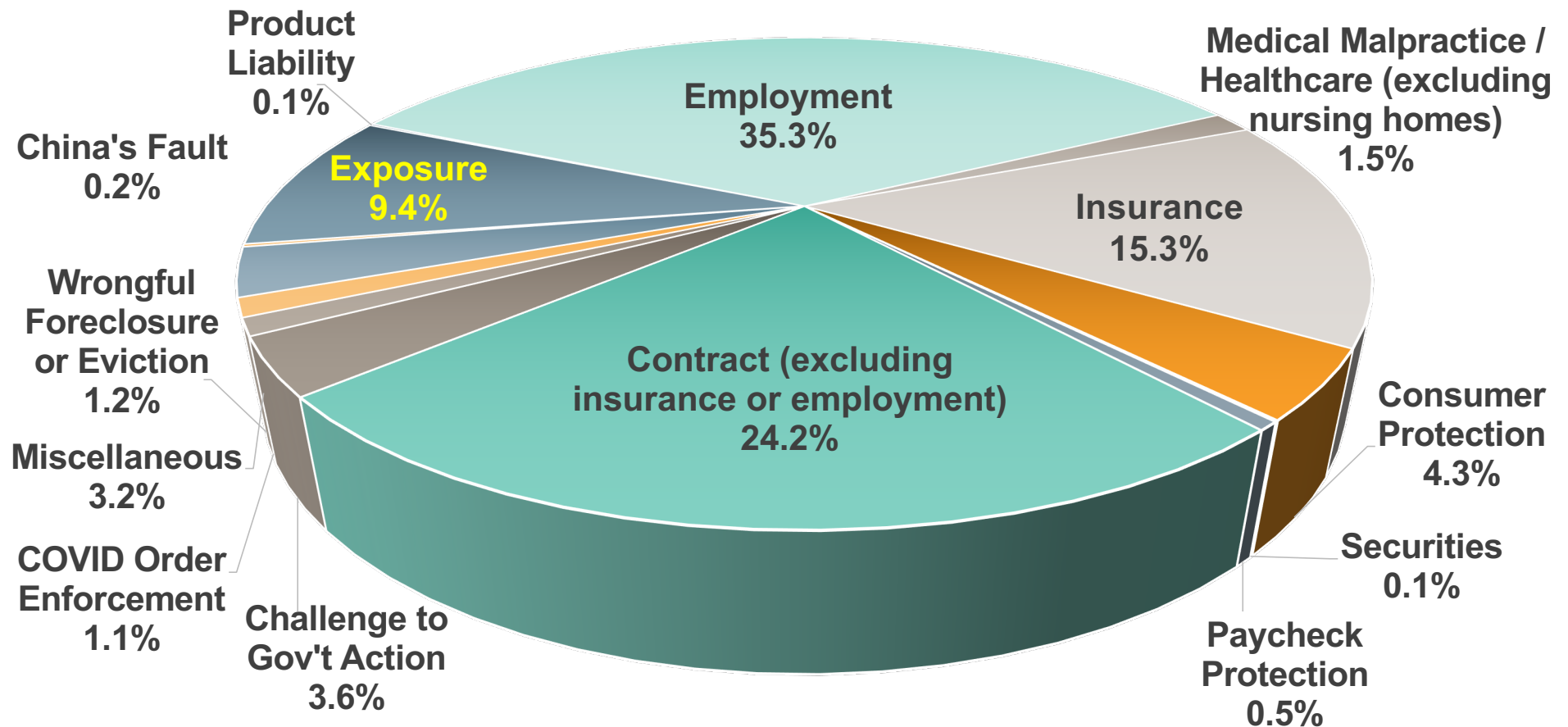
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COVID-19 Related Litigation

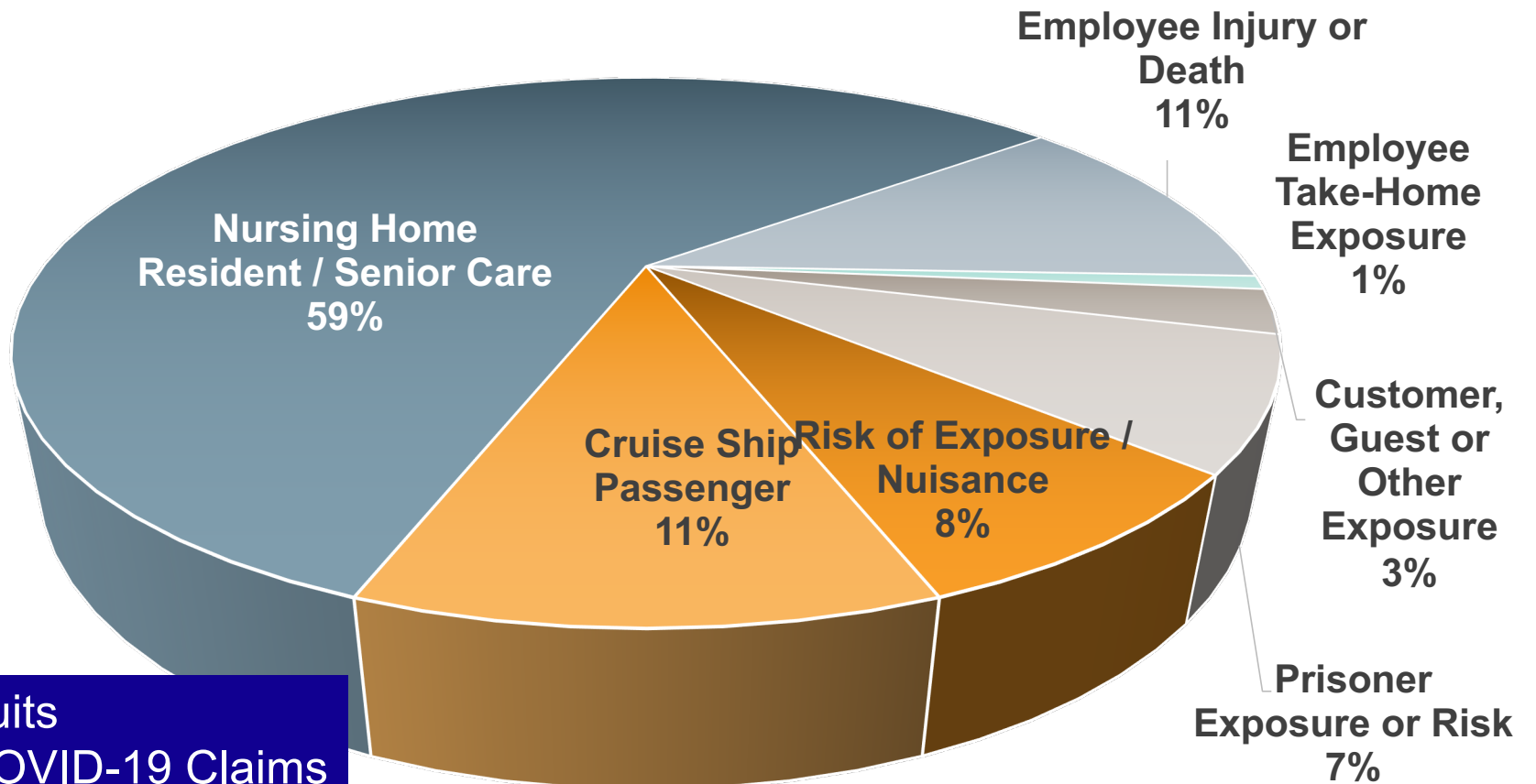


*As September 19, 2021. Sources: Westlaw Court Wire Alerts, Court New Service (CNS) Dinger, media reports.

Overview of the Litigation

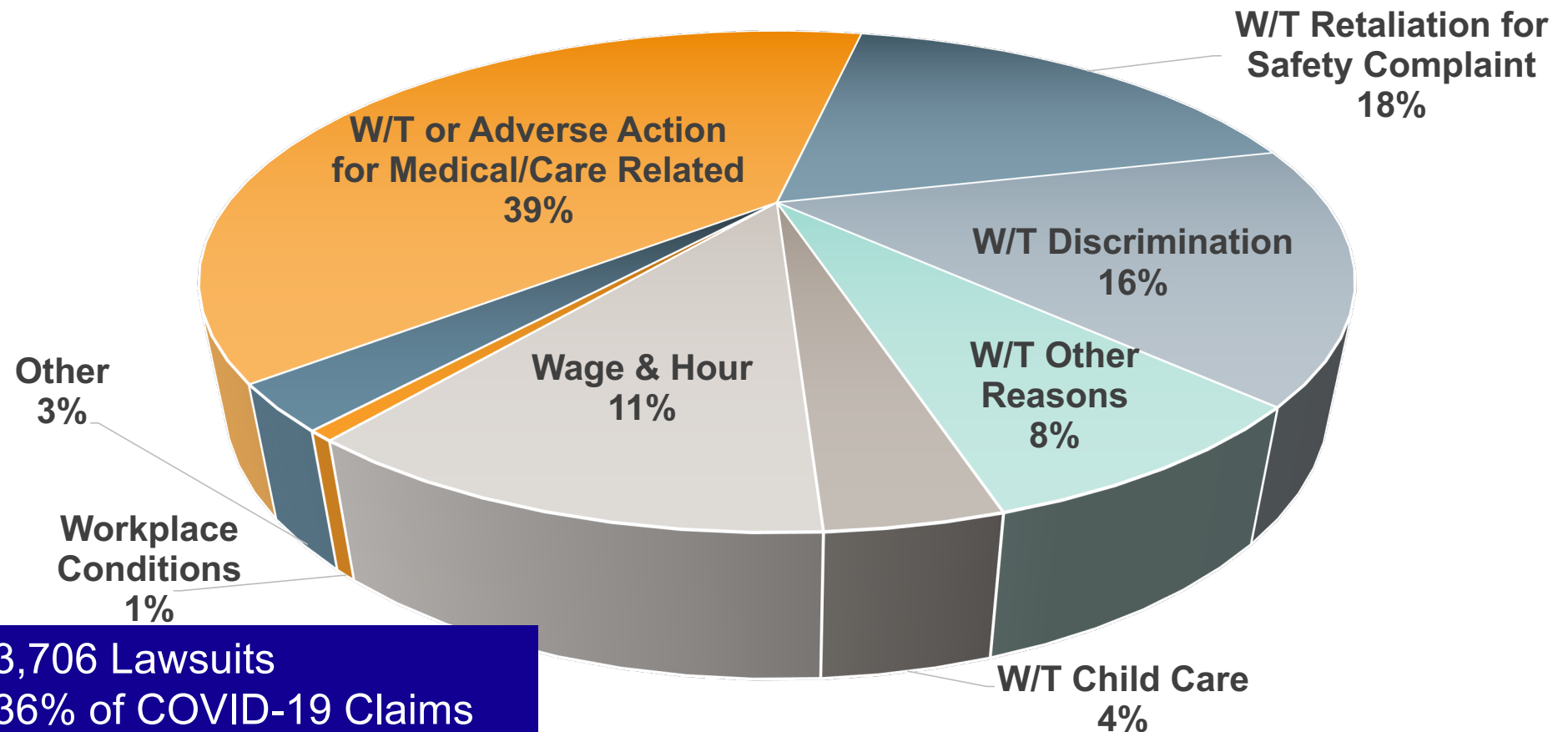


COVID-19 Exposure Lawsuits



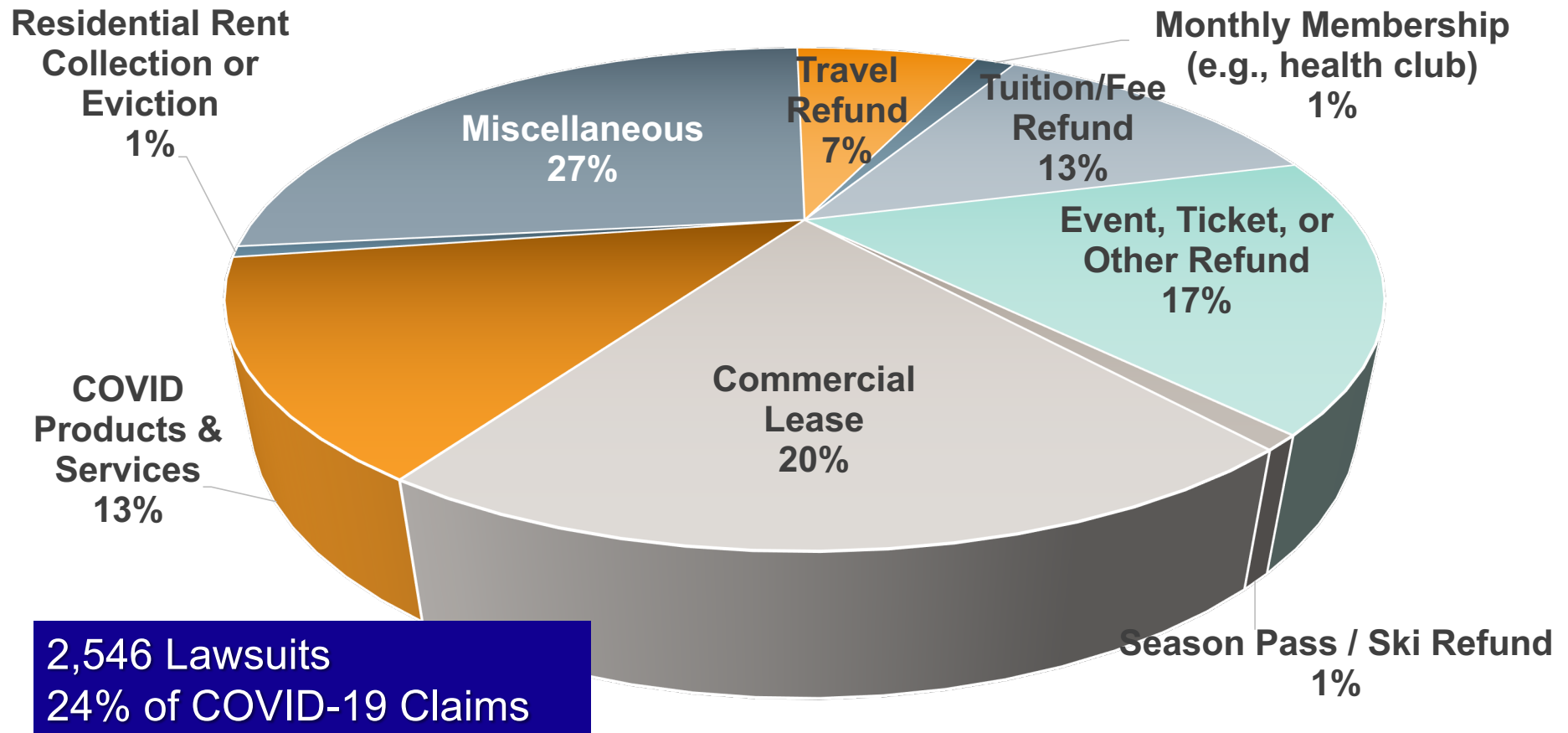
983 Lawsuits
9.5% of COVID-19 Claims

COVID-19 Employment Litigation

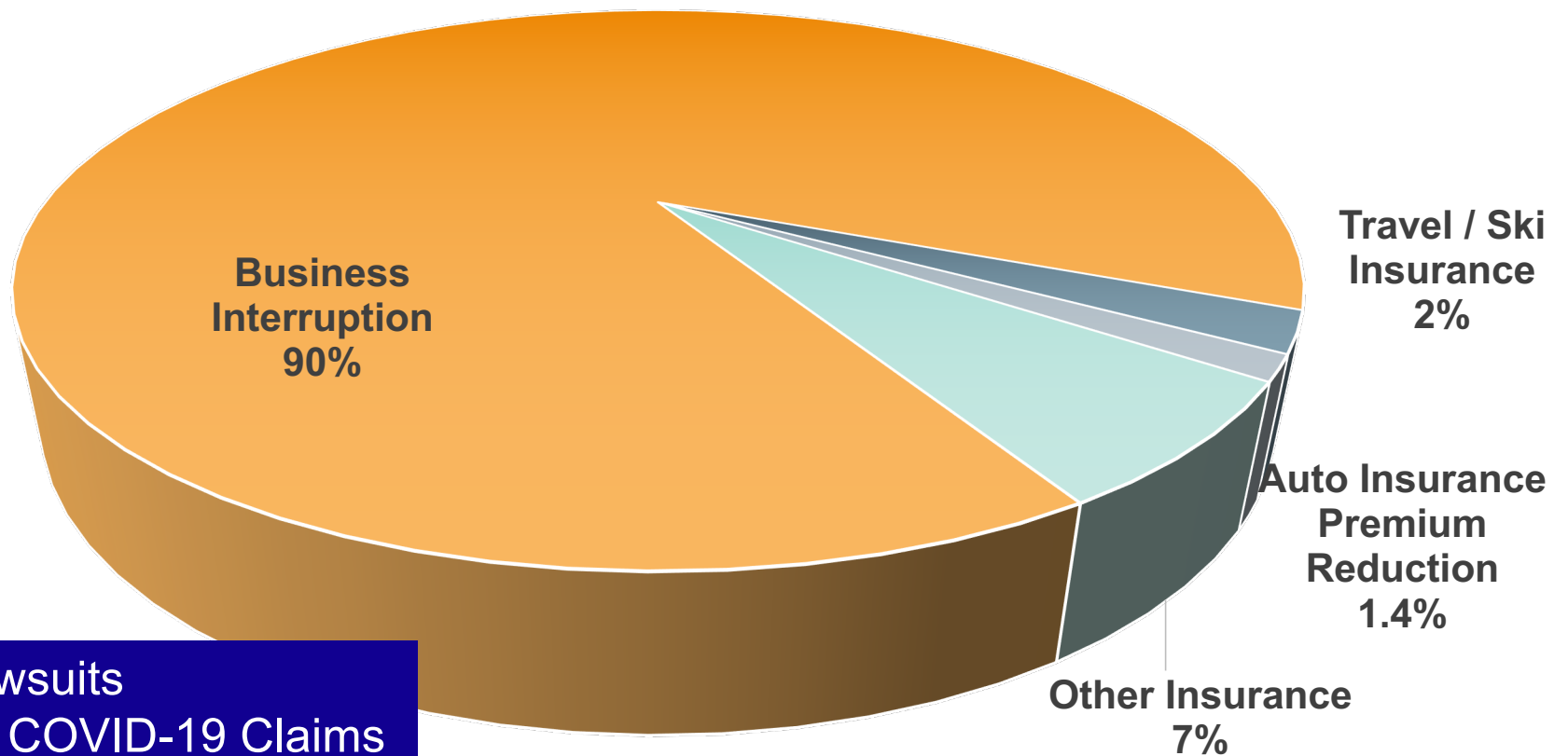


COVID-19 Contract Claims

(excluding insurance, employment, wrongful eviction/foreclosure)

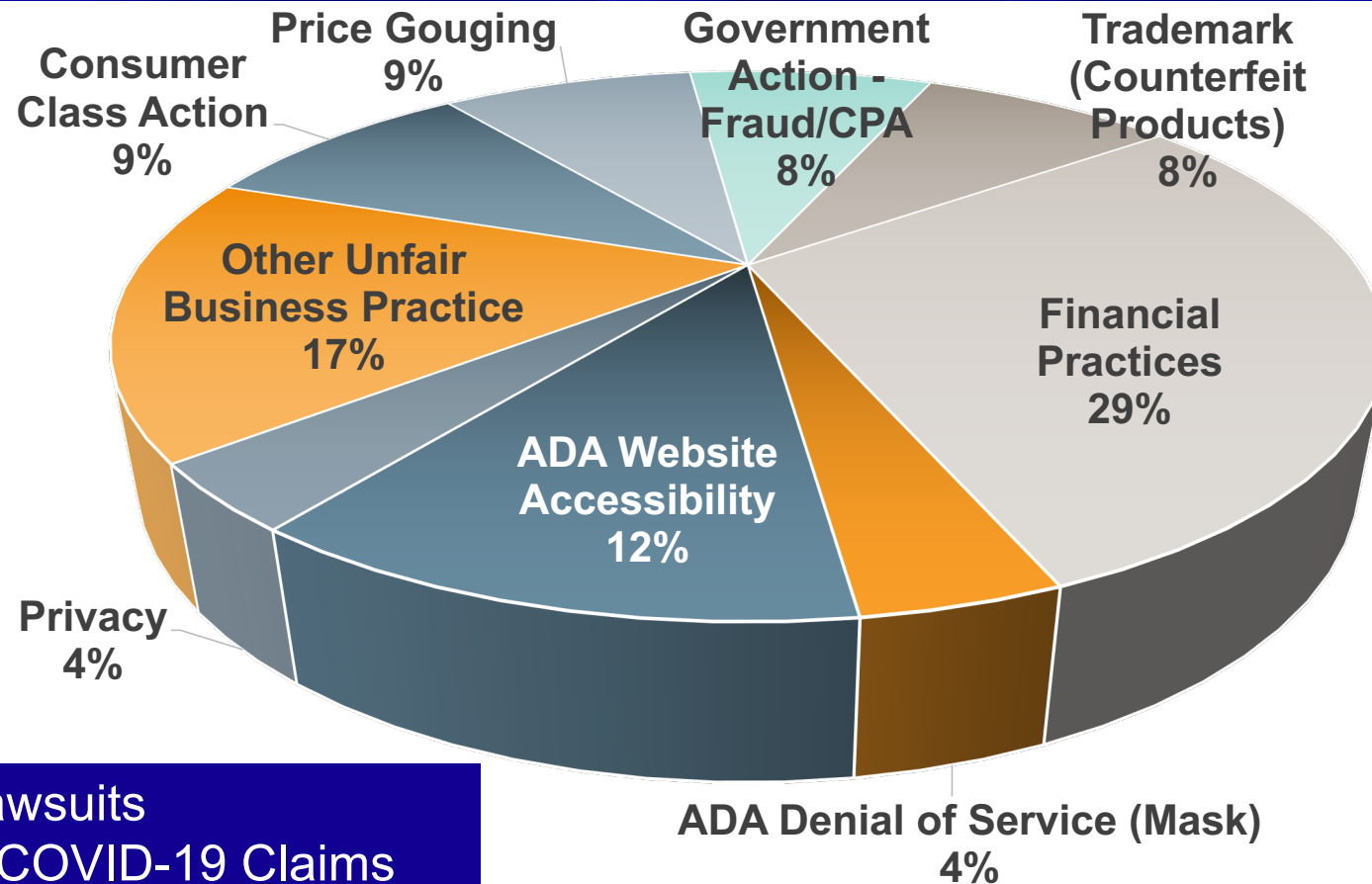


COVID-19 Insurance Litigation



1,608 Lawsuits
15.5% of COVID-19 Claims

COVID-19 Consumer Litigation





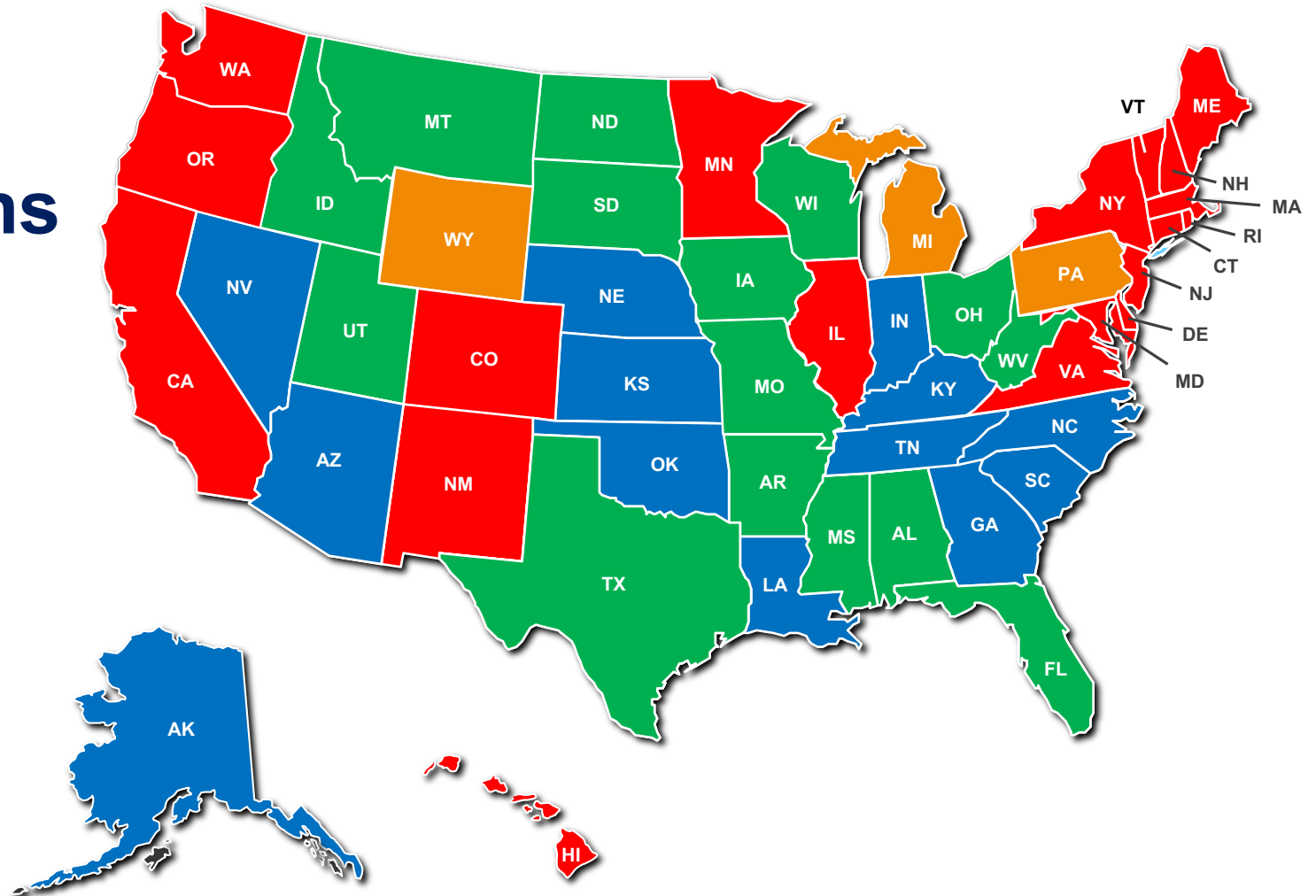
COVID-19 Statutory Liability Protections

COVID-19 Statutory Protections

- **Strong Liability Protection**
 - No liability except for reckless, willful, or intentional misconduct
- **Basic Liability Protection**
 - Liable if clear and convincing evidence of gross negligence
 - In some instances, no liability if act/omission was in substantial compliance with federal public health guidance
- **Limited Liability Protection**
 - No liability for complying with all federal, state, and local requirements

COVID-19 Liability Protections

- Strong Liability Protection
- Basic Liability Protection
- Limited Liability Protection
- No Liability Protection





A Sampling of Interesting COVID-19 Litigation Outcomes



Take Home Exposure - #1

- Employee sued employer for lax safety standards and she contracted COVID-19
- Employee quarantined at home with spouse, and spouse and daughter got COVID-19 and spouse died
- Employee sued employer for spouse's death
- Court ruled claim not barred by workers' compensation exclusive remedy
- *Ek v. See's Candies Inc.*, No. 20STCV49673 (Cal. Super. Ct. L.A. County)



Take Home Exposure - #2

- Employee contracted COVID-19 at work, and spouse at home then got COVID-19 from employee
- Spouse sued worker's employer for injury
- Court ruled spouse's claim dependent on injury to employee and barred by worker's compensation exclusive remedy
- *Kuciemba v. Victory Woodworks Inc.*, No. 3:20-cv-09355 (N.D. Cal., Feb 22, 2021)



Workplace Safety/ Nuisance

- Warehouse workers sue employer for COVID-19 injuries and deaths of employees and family members
- Claims assert public nuisance and failure to follow public agency health requirements to protect employees
- Court dismissed the case
 - The issues go “to the heart of OSHA’s expertise and discretion” and OSHA should decide
 - And courts are "particularly ill-suited to address this evolving situation and the risk of inconsistent rulings is high"
- The case is now on appeal.
- *Palmer v. Amazon.com, Inc.*, No. 20-3989 (2d Cir. oral argument held May 19, 2021).



Customer/ Guest Exposure

- Many exposure suits focused on places where people are/were confined
- Claims range from emotional distress to death due to exposure to COVID-19
- One federal judge dismissed a series of lawsuits for fear of exposure to COVID-19 (no symptoms, no infection) -- allowing such cases would “lead to a flood of trivial suits.”
 - Weissberger v. Princess Cruise Lines, Ltd., No. 2-20-cv-2267 (C.D. Cal. July 14, 2020).
- Other judges have dismissed lawsuits for plaintiffs who got COVID-19 for lack of causation.
 - E.g., Wortman v. Princess Cruise Lines, Ltd., No. CV 20-4169 (C.D. Cal. Aug. 21, 2020); Rumrill v. Princess Cruise Lines, Ltd., CV 20-3317 (C.D. Cal. Aug. 21, 2020); Hsu v. Princess Cruise Lines Ltd., CV 20-3488 (C.D. Cal. Aug. 21, 2020).



Business Interruption Insurance Coverage

- Policyholders have sued insurers for losses stemming from shut downs or scaled-back operations during the pandemic
- Most rulings favor insurers
- One court held the COVID-19 virus did not “physically and directly alter the property,” and the governor and health-department’s orders “simply prohibited one’s use of the property...and through it all did not remotely cause direct physical damage to the property.”
 - *Santo Italian Café LLC v. Acuity Insurance Co.*, No. 21-3068 (6th Cir. Sept. 22, 2021)
- Similarly, another court held the COVID-19 virus and government shutdowns did not result in "direct physical loss or damage" to property.
 - *Troy Stacy Enterprises Inc. v. The Cincinnati Ins. Co.*, No. 1:20-cv-00312 (S.D. Ohio Sept. 24, 2021)



Emerging Pandemic- Related Employment Class Action Trends

Emerging Wage and Hour Class Action Trends

- Compensability of COVID-19 Screening
 - Federal Law
 - *Integrity Staffing Solutions, Inc. v. Busk*, 135 S.Ct. 513 (2014)
 - U.S. DOL:
<https://www.dol.gov/agencies/whd/flsa/pandemic>
 - State Law: Jurisdictional Variances
 - *Frlekin v. Apple, Inc.*, 979 F.3d 639 (9th Cir. 2020)
 - CA DIR:
<https://www.dir.ca.gov/dlse/COVID19resources/FAQs-Testing-Vaccine.html>

Emerging Wage and Hour Class Action Trends

- Remote Work: Best Practices
 - Refine and reiterate timekeeping practices and telecommuting policy
 - Train managers
 - Update timekeeping systems
 - Require certification of time worked
 - Properly manage meal and rest breaks
 - Be mindful of expenses incurred for remote work
 - California: CA Labor Code § 2802
 - Illinois: 820 ILCS 115/9.5
 - D.C.: D.C. Mun. Reg. Title 7, § 910.1

Emerging Wage and Hour Class Action Trends

- Regular Rate Calculation
 - Signing, Retention, Referral, Safety, Hazard, Attendance and Similar Bonuses
 - <https://www.federalregister.gov/documents/2019/12/16/2019-26447/regular-rate-under-the-fair-labor-standards-act#p-318>
 - Vaccine Incentives
 - FLSA Method:
 - divide total compensation by total number of hours worked in the bonus period, including overtime hours
 - <https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate>
 - California Flat Sum Bonus Method:
 - divide total compensation by non-overtime hours worked in the bonus period
 - https://www.dir.ca.gov/dlse/faq_overtime.htm



Emerging Wage and Hour Class Action Trends

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- Misclassification Mishaps
 - Salary basis
 - https://www.dol.gov/sites/dolgov/files/WH%20D/legacy/files/fs17g_salary.pdf
 - “White-Collar” Exemptions:
 - https://www.dol.gov/sites/dolgov/files/WH%20D/legacy/files/fs17a_overview.pdf
 - Outside Sales Exemption
 - https://www.dol.gov/sites/dolgov/files/WH%20D/legacy/files/fs17f_outsidesales.pdf
 - California variances
 - https://www.dir.ca.gov/dlse/faq_overtimeexemptions.htm

Vaccine Mandates

- Legal in most states, subject to reasonable accommodation obligations for employees who do not get vaccinated because of a disability or a sincerely held religious belief, practice or observance
 - Recognizing an accommodation request
 - Disparate impact/treatment considerations
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- No obligation to accommodate an employee's objection to vaccination if based on strongly held personal, social, or political beliefs that are not religious in nature
- Biden mandate: more questions than answers

ADA Reasonable Accommodation: The Basics

- Provide accommodation unless there is undue hardship or direct threat.
- Compliance typically evaluated on whether the employer engaged in the **interactive process** and/or there are **reasonable accommodations** that could be made to enable the employee to perform the essential job functions.
- Reasonable accommodation = modifications or adjustments to the work environment, or to the manner or circumstances in which the job is performed.
- Extremely high burden to show “undue hardship” or “direct threat.”

How does this rule apply to vaccine mandates and other COVID-19 workplace issues?

Direct Threat

- Employers may refuse to hire or employ persons who pose a “direct threat” to the health and safety of themselves, other employees or other persons associated with the business.
- Direct Threat = “significant risk of substantial harm”
- Factors:
 - Nature of risk
 - Duration of risk
 - Severity of risk to third parties
 - Probability that disease will be transmitted and cause harm
- Assessment cannot be based on speculative or remote risk.

Factors for Consideration

Undue Hardship

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Factors for Consideration

The ADA: New Angles on the Horizon

- ADA does not prevent an employer from mandating **vaccination**, subject to reasonable accommodation provisions.
 - Absent direct threat, ADA requires reasonable accommodation of employees who do not get vaccinated due to a disability, unless accommodation would pose an undue hardship.
 - Low burden to establish “disability”
 - Interactive process.
 - Potential “reasonable” accommodations:
 - schedule changes, reallocating/redistributing marginal functions, reassignment, additional leave
 - Confidentiality.

The Focus Remains the Same: Interactive Process and Accommodation

The ADA: New Angles on the Horizon

- Pandemic and post-pandemic workplace accommodations:
 - Masking, social distancing, changes to physical workspace, testing
 - Modified schedule
 - Telework
 - Reassignment
 - Unpaid leave
- Catch 22: unvaccinated challenging exclusion from workplace; vaccinated challenging return to workplace

Reasonable Accommodation on Religious Grounds

- Employers must accommodate an employee's sincerely held religious beliefs, practices or observances absent undue hardship
- "Religious belief" broadly defined
- EEOC: assume request for religious accommodation is legitimate absent an objective basis for questioning either the religious nature or sincerity
 - Undue hardship = "More than a de minimis" cost or burden on employer's operations
 - Proportion of employees who are vaccinated
 - Extent of employee contact with non-employees
 - Alternative accommodations

Compare Packages			
	CONCIERGE	BASIC	DIY
Sample letters, documents, research	✓	✓	✓
Live online private group calls	✓	recording of one past call is included	
Get your forms signed by Pastor David	✓	✓	
Follow-up help	✓		
NEED HELP WITH YOUR ORDER? support@thehealthyamerican.org			

Source: <https://www.thehealthyamerican.org/religious-exemptions>



Panel Discussion













Outtakes and Recommendations



Steps to Protect Your Business from COVID-19 Exposure Liability

- Confirm your insurance coverage
- Document compliance with public health orders and guidance
- Post warnings and consider waivers
- Investigate positive cases at your business
- Have a public relations and response plan
- Know and support your state's liability protections

Steps to Mitigate Risk of Pandemic-Related Employment Class Action Litigation

- Evaluate compensability of any COVID-19 screening processes
- Remain vigilant on timekeeping, expense reimbursement, breaks and other wage and hour practices implicated for remote work
- Carefully analyze bonuses and other incentive compensation for potential inclusion in regular rate calculation (and be mindful of California variance for flat sum bonuses)
- Review overtime exemptions for compliance in pandemic workplace
- Refine reasonable accommodation policy and processes focused on interactive process and individualized inquiries

Questions?

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