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Navigating the New Normal:

Legal Considerations for Businesses in the Endemic Era



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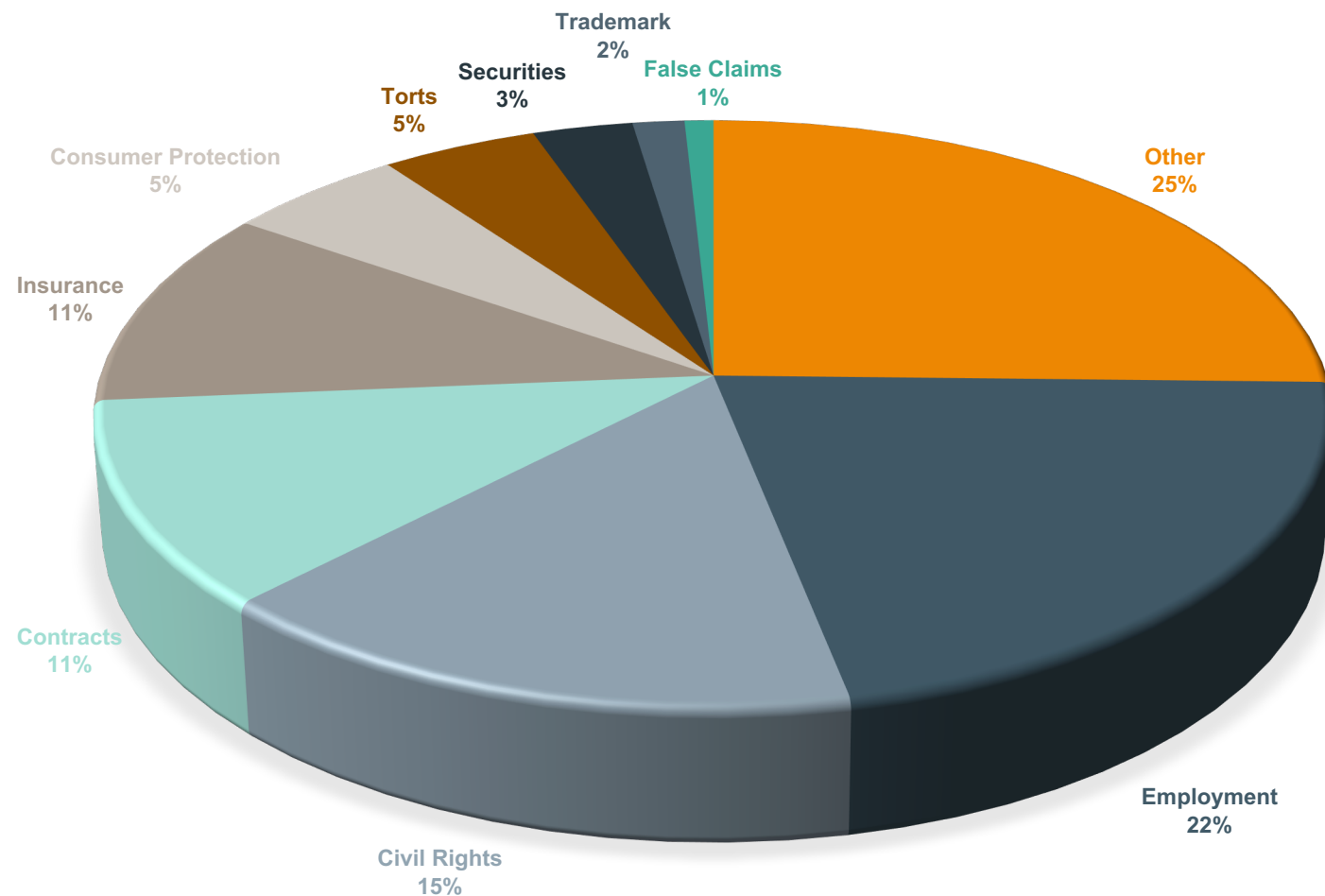


COVID-19 Litigation Overview

16,000 CV19 District Court Cases

Courts

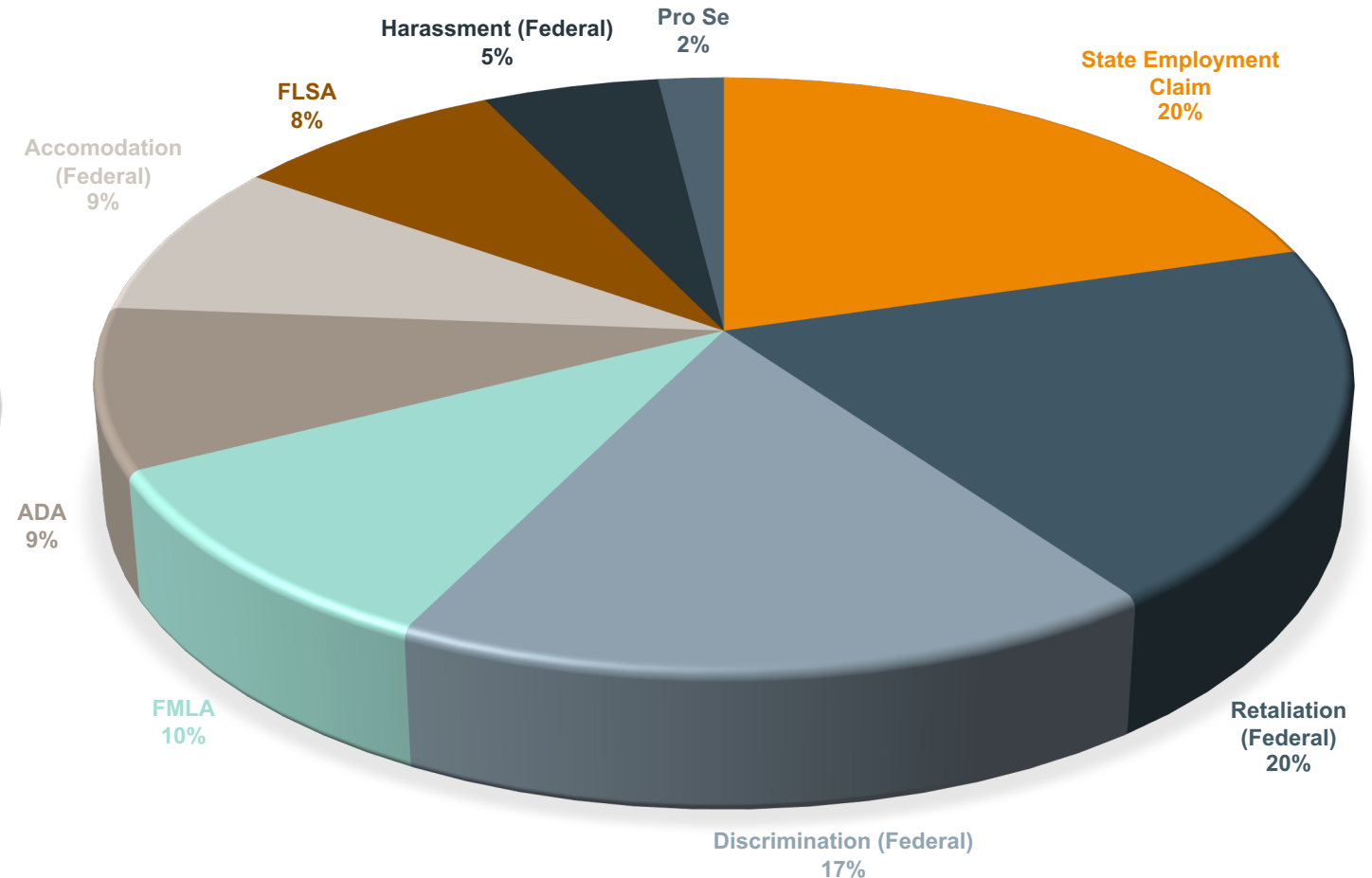
S.D.N.Y.	2,009	12%
C.D.Cal.	1,146	7%
E.D.N.Y.	1,029	6%
N.D.Cal.	592	4%
N.D.Ill.	583	4%
Other Courts	10,825	67%



3,500 CV19 Employment Cases

Courts

C.D.Cal.	240	7%
E.D.Pa.	208	6%
S.D.N.Y.	200	6%
S.D.Fla.	148	4%
M.D.Fla.	137	4%
Other Courts	2,656	74%





Endemic-Related Employment 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>
 - *Perez v. Walmart, Inc.*, 2021 WL 5741484 (W.D. Mo. Oct. 25, 2021)
 - *Howard v. Post Foods*, 2022 WL 788671 (W.D. Mich. March 15, 2022)

Wage + Hour Class Action Update

Compensability of COVID-19 Screening

- State Law: Jurisdictional Variances
 - *Frlekin v. Apple, Inc.*, 979 F.3d 639 (9th Cir. 2020)
 - *In Re: Amazon.com, Inc., Fulfillment Center FLSA and Wage and Hour Litigation*, 255 A.3d 191 (Pa. 2021)
 - CA DIR:
<https://www.dir.ca.gov/dlse/COVID19resources/FAQs-Testing-Vaccine.html>
 - *Boone v. Amazon.com Services, LLC*, 562 F. Supp. 3d 1103 (E.D. Cal. March 11, 2022)

Wage + Hour Class Action Update

Wage + Hour Class Action Update

Regular Rate Calculation

- Signing, Retention, Referral and Similar Bonuses
- <https://www.federalregister.gov/documents/2019/12/16/2019-26447/regular-rate-under-the-fair-labor-standards-act#p-318>
- 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

Wage + Hour Class Action Update

Misclassification Mishaps

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

Wage + Hour Class Action Update

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 WARN Act Trends

- **WARN – The Basics**
 - 60 Days' advance written notice of a “plant closing” or “mass layoff” to those who suffer an “unemployment loss”
- **≥ 50 “employment loss” in 90 days**
 - Furloughs?
 - Reduction of Hours?
 - Aggregation Rule
- **Unforeseeable Business Circumstances**
 - Notice must still be given as soon as possible

Emerging WARN Act Trends

Applicability to Remote Employees?

- **20 C.F.R. § 639.3(i)(6):** for employees who are “outstationed” or “whose primary duties involve work outside any of the employer’s regular employment sites,” their “single site of employment” is the location “to which they are assigned as their home base, from which their work is assigned, or to which they report.”
- *Meson v. GATZ Tech. Servs. Corp.*, 507 F.3d 803, 808 (4th Cir. 2007)
- *Piron v. General Dynamics Information Technology, Inc.*, 2022 WL 363958 (E.D. Va. Feb. 7, 2022)
- *Hoover v. Drivetrain LLC*, 2022 WL 3581103 (D. Del. Aug. 19, 2022)

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, return to in-person work, 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

- An employer does not have to provide a reasonable accommodation that would cause an "undue hardship."
- Generalized conclusions will not suffice.
- Requires significant difficulty or expense, either financial or otherwise.
- Whether a request would create an undue hardship takes into account the resources and circumstances of the employer in relation to the cost and difficulty of providing the accommodation.

The ADA: Reasonable Accommodations

- *The Focus Remains the Same: Highly Individualized Interactive Process and Accommodation*
- Pandemic and post-pandemic workplace accommodations:
 - Masking, social distancing, changes to physical workspace, testing
 - Modified schedule
 - Remote work
 - Reassignment
 - Unpaid leave
 - Catch 22: unvaccinated challenging exclusion from workplace; vaccinated challenging return to workplace

The ADA: Reasonable Accommodations

- NOT Reasonable Accommodations:
 - Removing essential job functions
 - Creating a new job
 - Changing a full time job to a part time job
 - Indefinite leave
 - Moving/bumping another employee
 - Changing supervisors
 - Waiving/rescinding discipline

The ADA: Reasonable Accommodations

Remote Work as an Accommodation: EEOC's Guidance

- Employer not required to continue telework instituted as a response to the pandemic.
- Employer not required to grant/continue telework if alternative forms of accommodation are available.
- ADA “never” requires elimination of essential function as an accommodation.

The ADA: Reasonable Accommodations

- Pre-Pandemic: In-person attendance as an essential function and remote work as an undue hardship.
- Now: More scrutiny
 - Has in-person work historically been treated as an essential function?
 - Job descriptions, job postings?
 - Impact on customer/client service and relationships?
 - Impact on operations (e.g., service delivery)?
 - Availability of technology, equipment?

The ADA: Reasonable Accommodations

Case Studies:

- *Peeples v. Clinical Support Options, Inc.*, 487 F. Supp. 3d 56 (D. Mass. 2020)
- *Unrein v. PHC-Fort Morgan, Inc.*, 993 F.3d 873 (10th Cir. 2021)
- *Conaway v. Detroit Public Schools Cmty. Dist.*, (E.D. Mich. Dec. 17, 2021)
- *Lin v. CGIT Systems, Inc.*, 2021 WL 4295863 (D. Mass. Sept. 21, 2021)



Panel Discussion















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Key Takeaways and Recommendations

- 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
- Be mindful of WARN obligations (and applicability to remote workforce)
- Refine reasonable accommodation policy and processes focused on interactive process and individualized inquiries

Questions?



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