



OCTOBER 5, 2021

# Navigating the New Normal:

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



SHOOK  
HARDY & BACON

# Speakers

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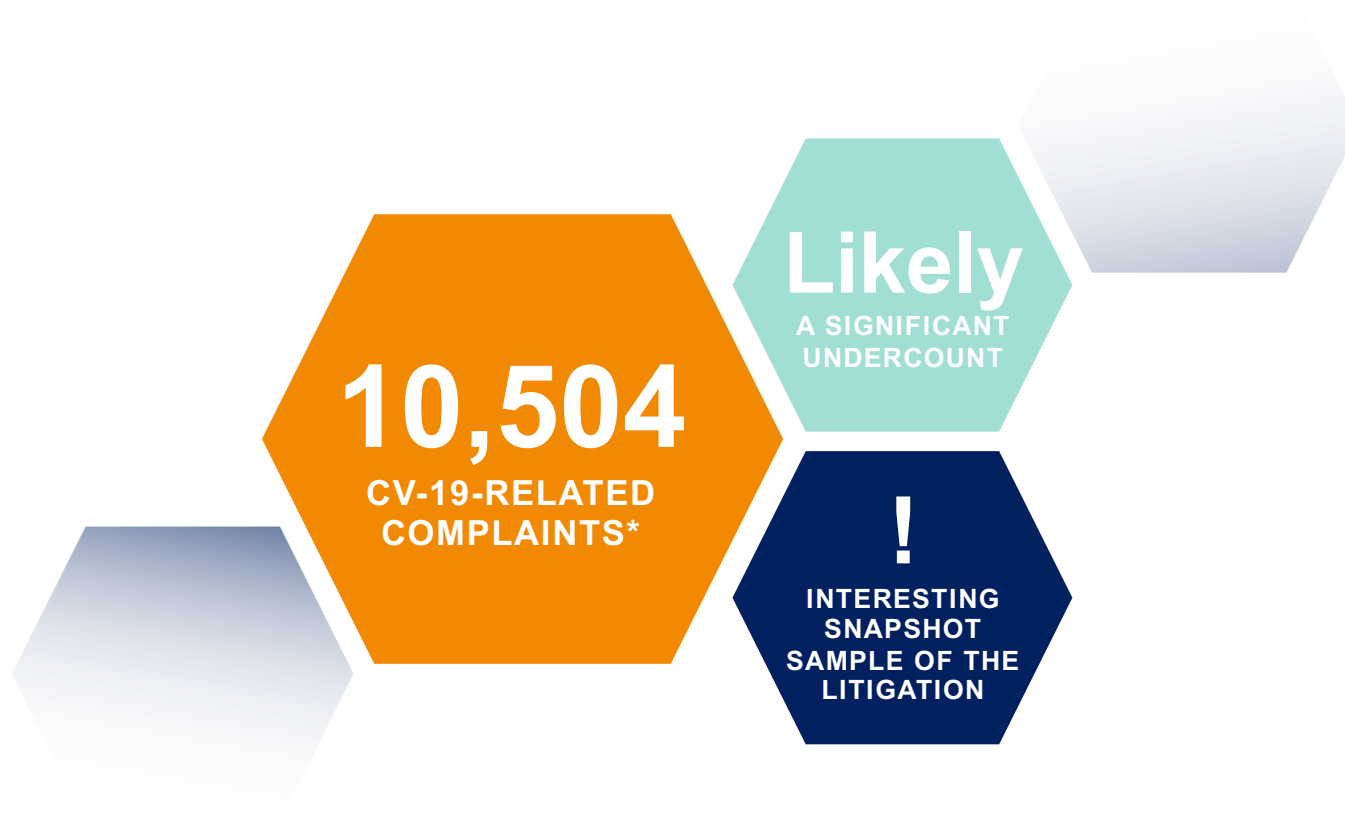


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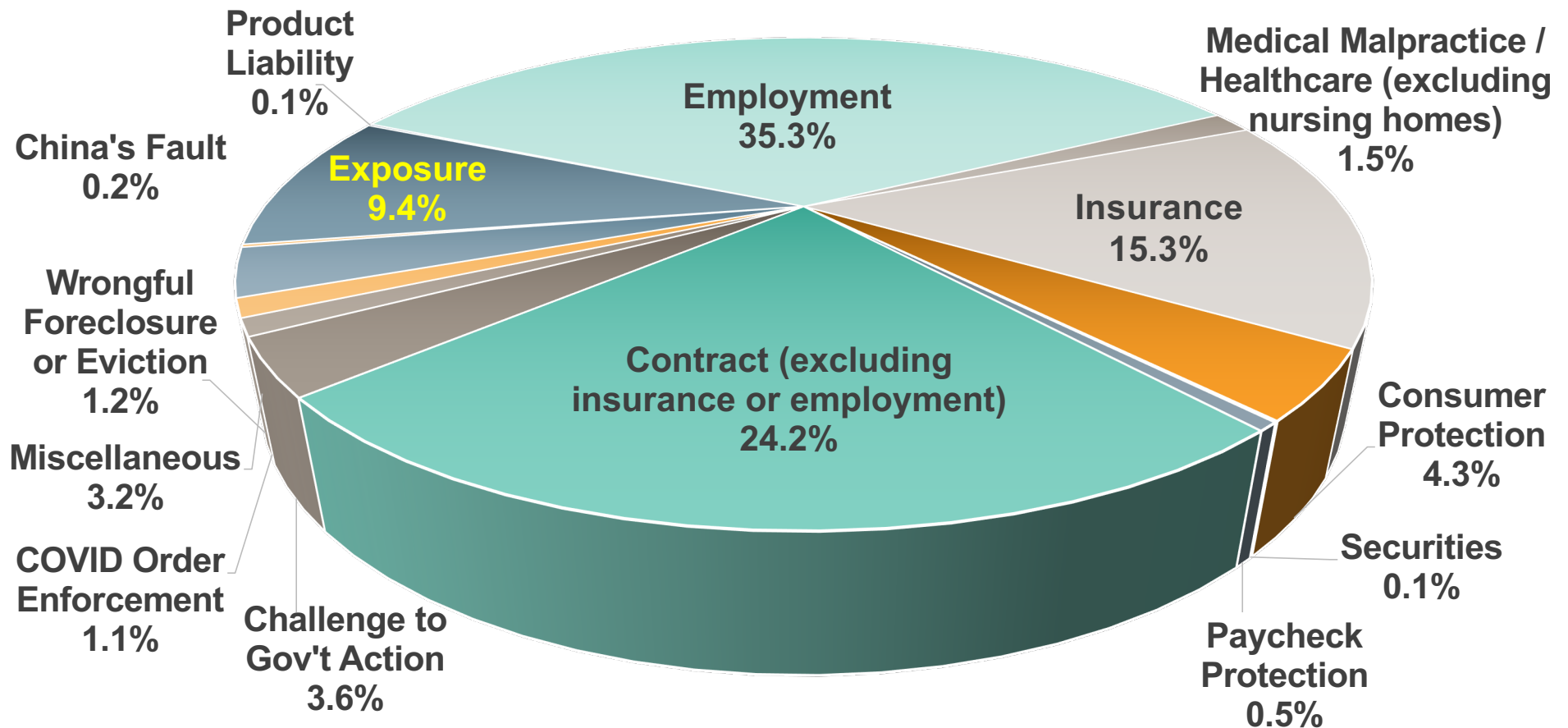
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# COVID-19 Related Litigation

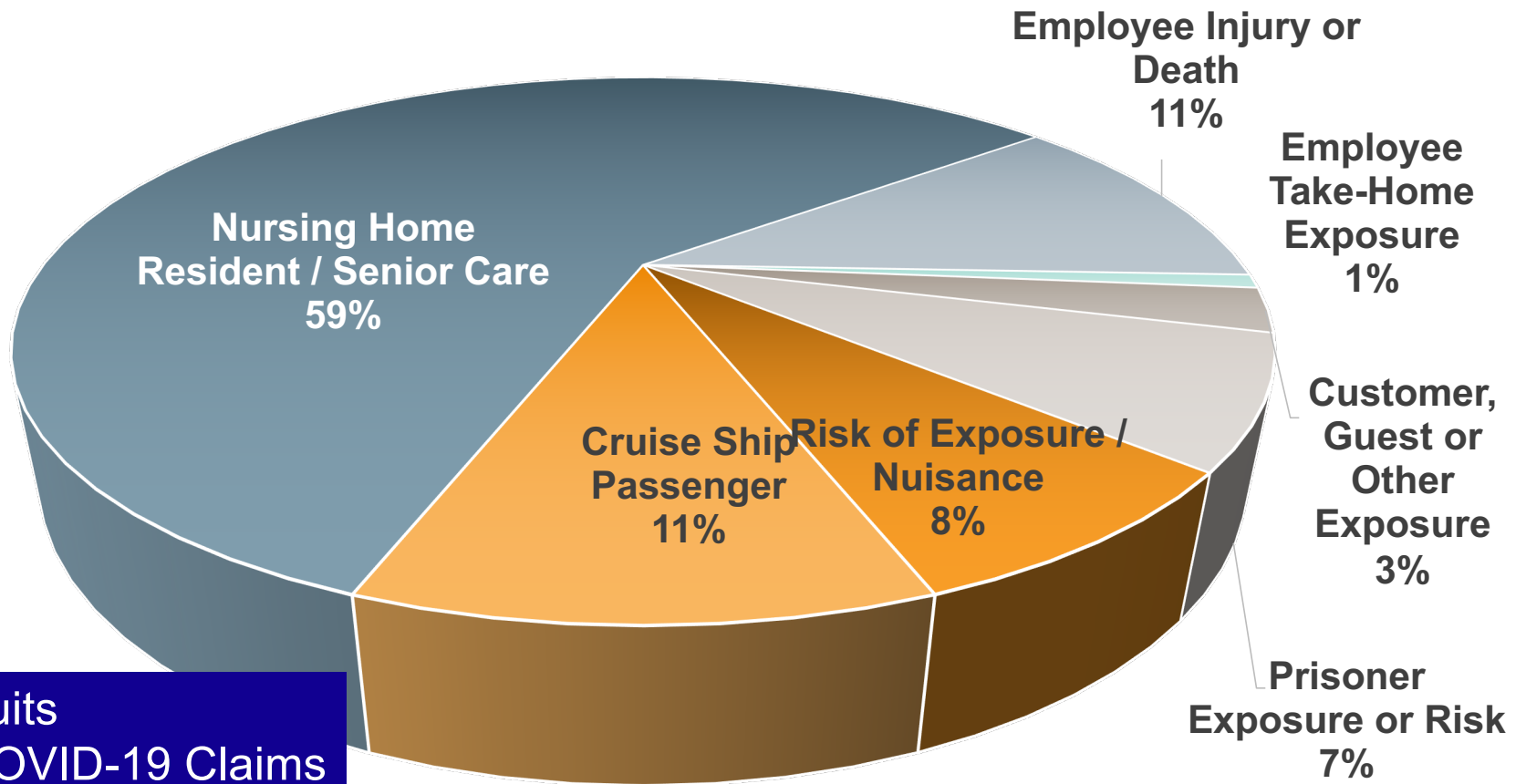


\*As September 19, 2021. Sources: Westlaw Court Wire Alerts, Court New Service (CNS) Dinger, media reports.

# Overview of the Litigation

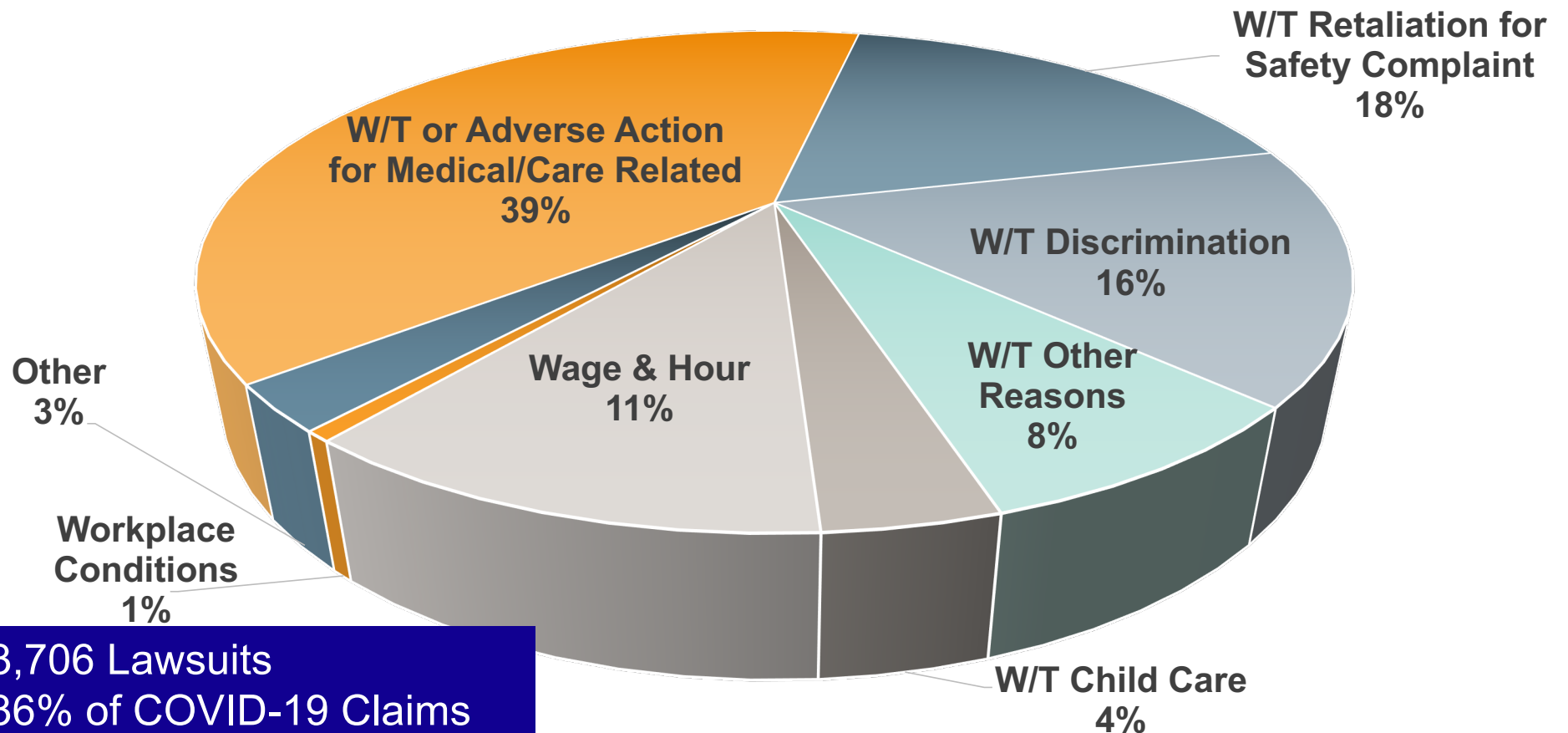


# COVID-19 Exposure Lawsuits



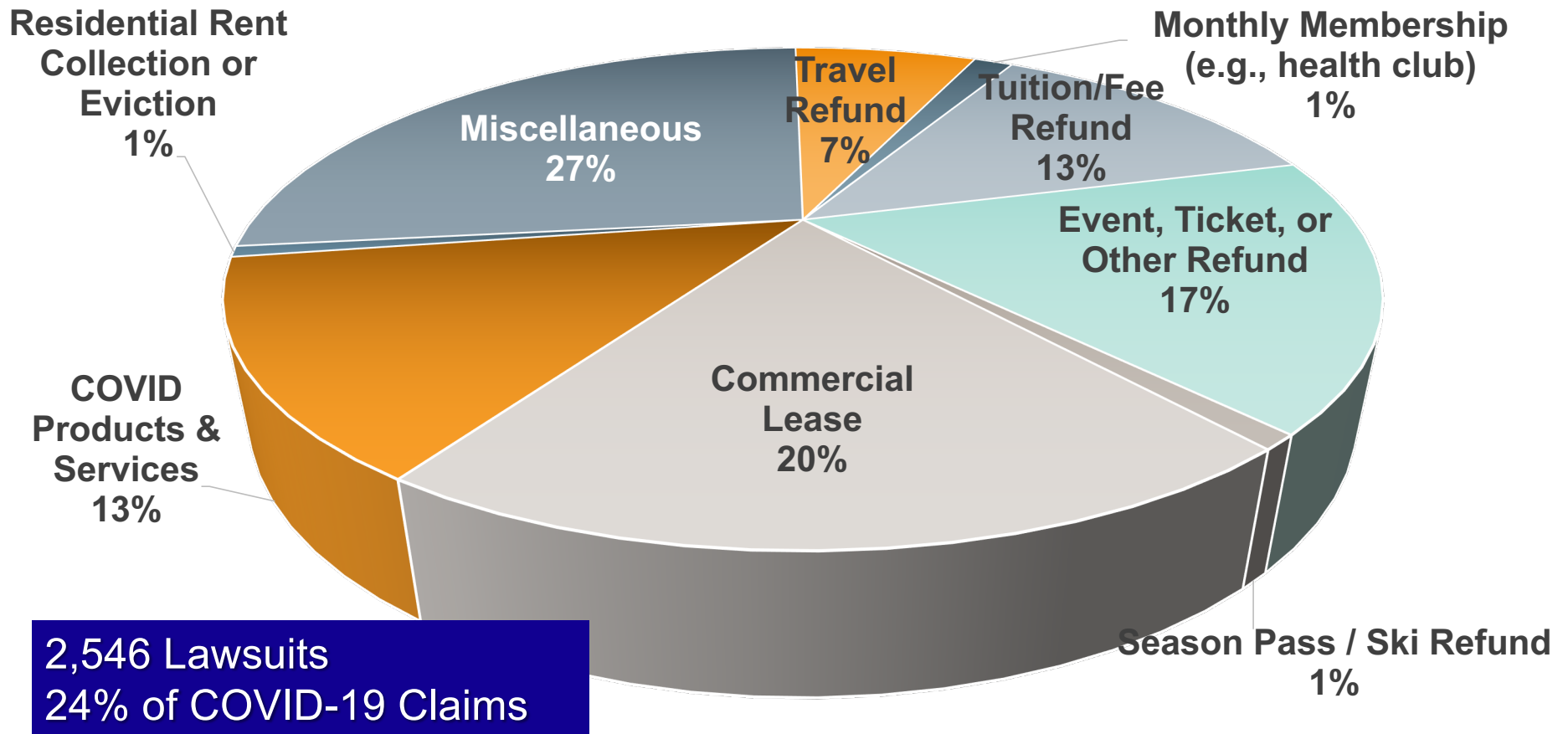
983 Lawsuits  
9.5% of COVID-19 Claims

# COVID-19 Employment Litigation

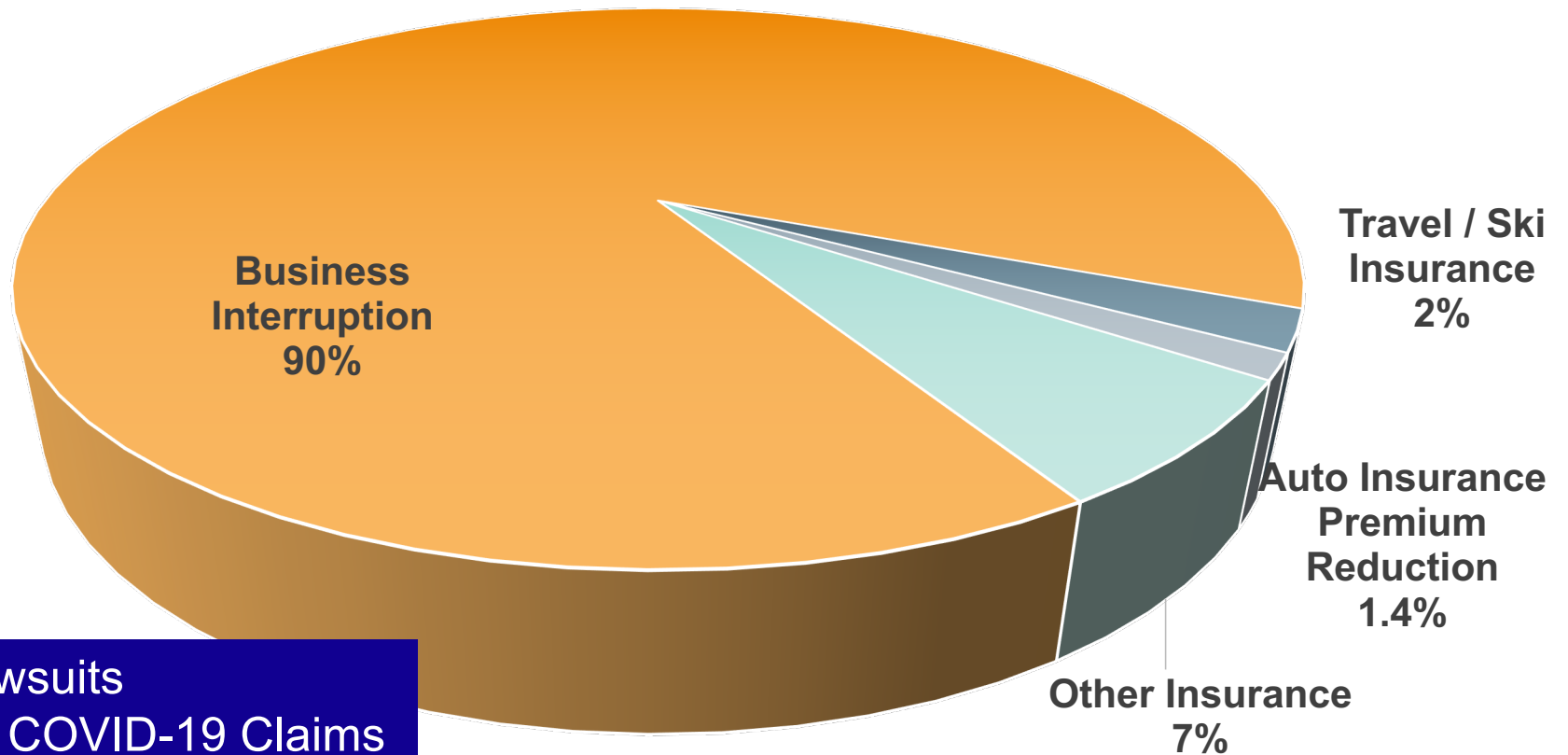


# COVID-19 Contract Claims

(excluding insurance, employment, wrongful eviction/foreclosure)



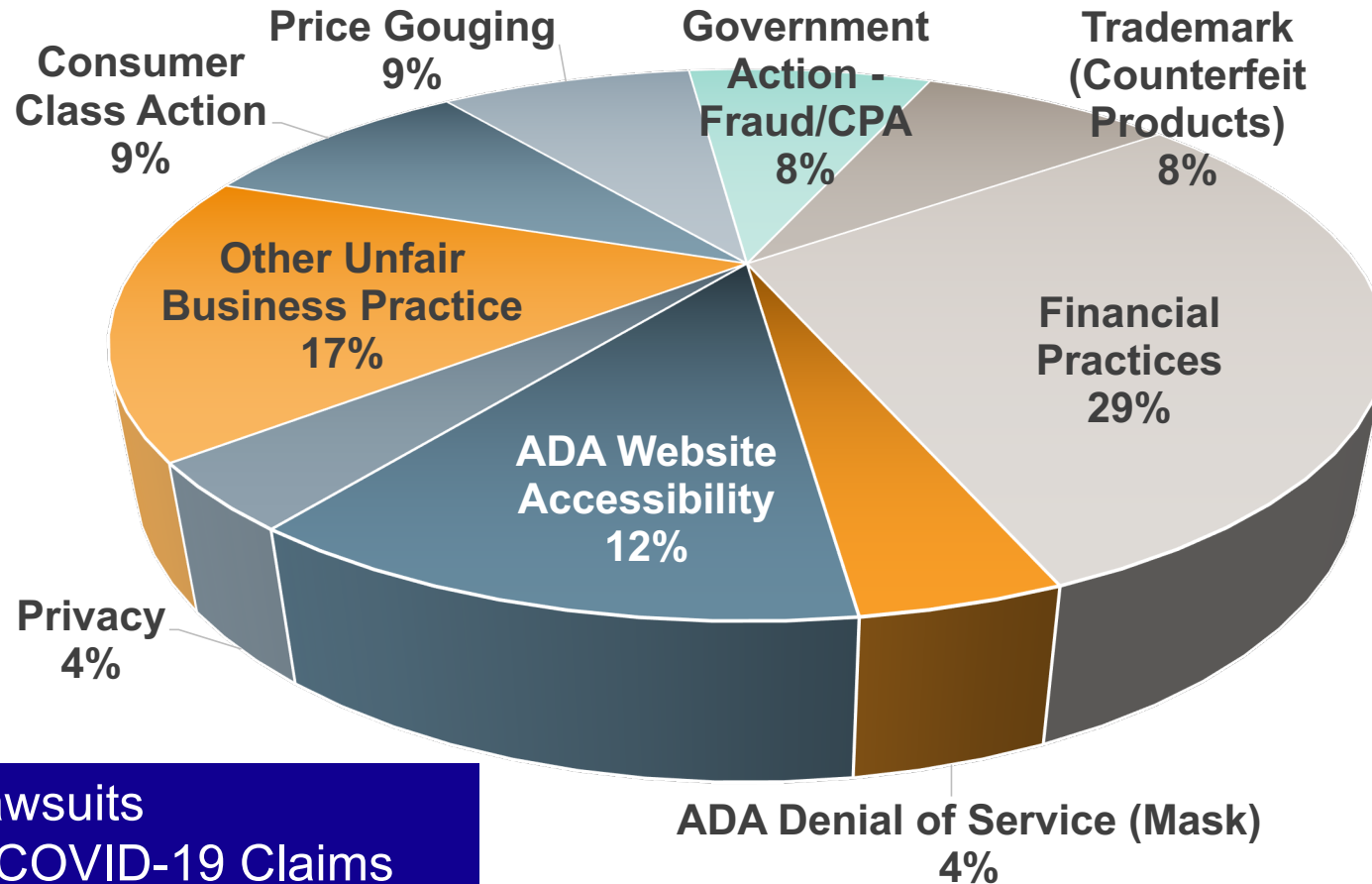
# COVID-19 Insurance Litigation



1,608 Lawsuits  
15.5% of COVID-19 Claims



# COVID-19 Consumer Litigation



451 Lawsuits  
4% of COVID-19 Claims



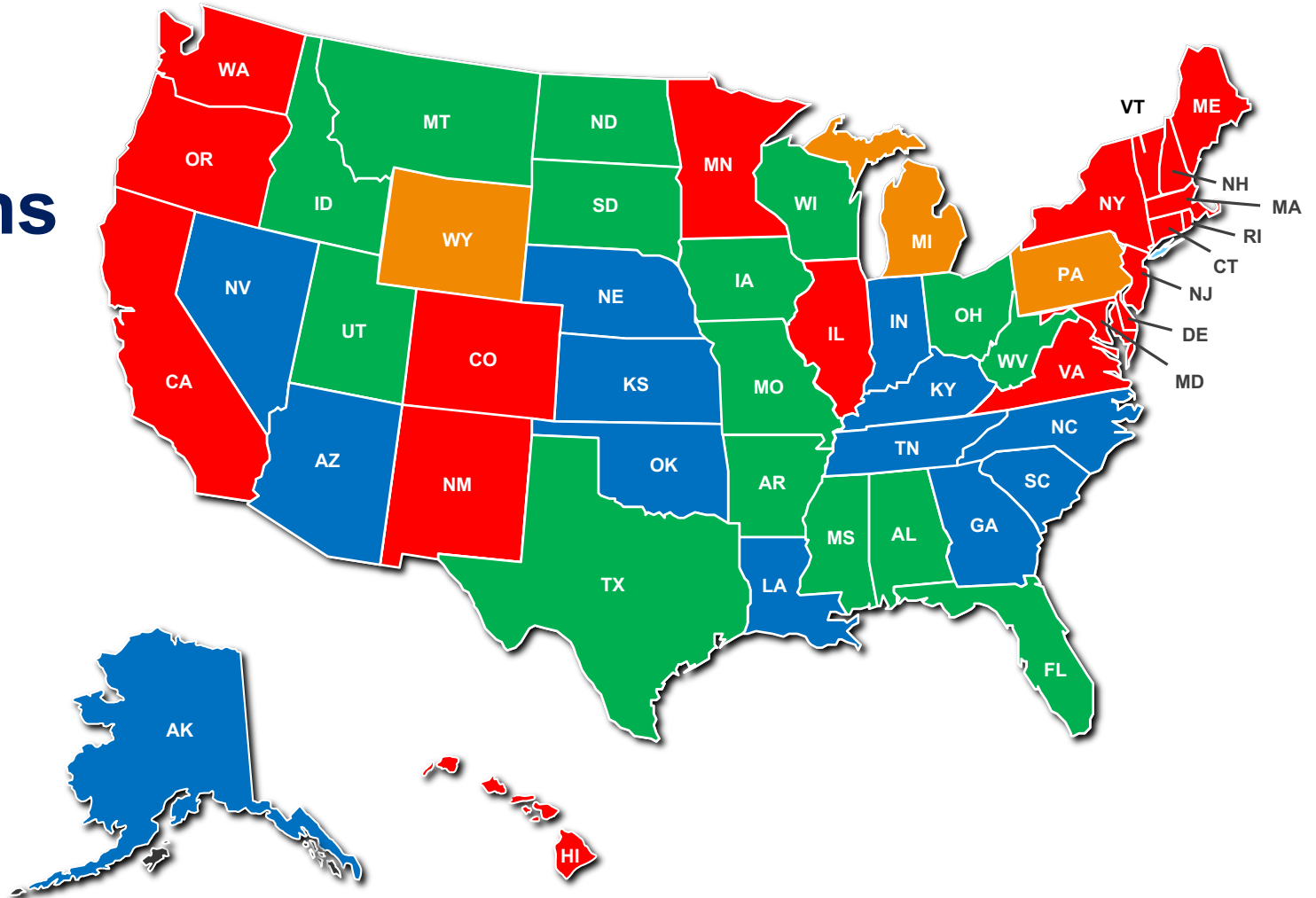
# COVID-19 Statutory Liability Protections

# 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 (6<sup>th</sup> 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

The graphic features a dark blue background with a large, stylized white number '7' that is partially obscured by a white, wavy, ribbon-like shape. A solid orange horizontal bar is positioned above the text.

# 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](https://www.dir.ca.gov/dlse/faq_overtime.htm)



# Emerging Wage and Hour Class Action Trends

- Misclassification Mishaps
  - Salary basis
    - [https://www.dol.gov/sites/dolgov/files/WH/D/legacy/files/fs17g\\_salary.pdf](https://www.dol.gov/sites/dolgov/files/WH/D/legacy/files/fs17g_salary.pdf)
  - “White-Collar” Exemptions:
    - [https://www.dol.gov/sites/dolgov/files/WH/D/legacy/files/fs17a\\_overview.pdf](https://www.dol.gov/sites/dolgov/files/WH/D/legacy/files/fs17a_overview.pdf)
  - Outside Sales Exemption
    - [https://www.dol.gov/sites/dolgov/files/WH/D/legacy/files/fs17f\\_outsidesales.pdf](https://www.dol.gov/sites/dolgov/files/WH/D/legacy/files/fs17f_outsidesales.pdf)
  - California variances
    - [https://www.dir.ca.gov/dlse/faq\\_overtimeexemptions.htm](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

- 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.
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- 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*

# 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

	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](mailto:support@thehealthyamerican.org)

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



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# 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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