



2023 Fall DOECAA Conference

September 27-28, 2023

**The Omni Shoreham Hotel - Hampton Ballroom
2500 Calvert St NW, Washington, DC 20008**

2023 Fall DOECAA Conference	1
DOECAA President Letter of Greeting	4
Co-Chair Welcome	6
Conference Agenda	7
CLE Information	11
Wi-Fi Information	13
Restaurant Recommendations	14
Perspectives from DOE General Counsel	15
Samuel Walsh Bio	34
Intersection of Patents and Export Control	
Moderator Bio	36
Panelists Bios	63
	64
Introduction to DOE’s Strategy for Artificial Intelligence and Spotting Legal Issues	69
R. Reyes, H. Finkel, C. Stauffer, W. Elias Bios	70
The Promise and the Peril: Artificial Intelligence of AI in the Workplace	74
B. Kelley Bio	100
False Claims Act: Recent Developments and Emerging Trends	106
M. Wagner, T. Fulham, S. Malaveetil Bios	134
Perspectives from NNSA General Counsel	137
T. Fischer Bio	138
The Future of Diversity and Inclusion Considering Recent Supreme Court Decisions	140
C. Parlo, L. Turner, S. Schuster Bios	180
Contracting Pitfalls and Bear Traps	194
I. Gray Bio	208
Ethics Considerations for Government Contractors	210
M. Meagher Bio	211

DOECAA Board	212
Donald Murano, Board President	213
Saurabh Anand, Board Secretary	214
John Stolpa, Board Treasurer	215
Pamela Reynolds, Director at Large	216
Maxine McReynolds, Director at Large	217
Quentin Vaughan, Director at Large	218



DOECAA President Letter of Greeting



Dear DOECAA Members and Colleagues:

September 15, 2023

Welcome to the 2023 Fall DOECAA Conference!

The distinguished speakers, Conference Chairs, and Board have been hard at work in support of DOECAA's mission to advance best practices and standards of the industry through collaboration and educational excellence. DOECAA made promises in 2022 to rebrand DOECAA, as the above logo and newly revamped website display. We delivered!

We assuredly look forward to reconnecting with our DOECAA friends, acquaintances, and colleagues as we delve into a comprehensive Agenda, thanks to the tireless efforts of Rico Reyes and Eric Barzee, our 2023 DOECAA Conference Chairs. Rico and Eric toiled numerous hours to gather highly respected speakers and a series of extremely relevant topics that are intended to spark thoughtful discussion and shared insight.

During Thursday morning's DOECAA Business Meeting, Board actions and future planning will be discussed. As well, Greater-Thought will provide a guided tour through our newly developed website with its inherent functionality.

Please take part in the social side of the DOECAA collaborative process, and join us in Wednesday's happy hour, with your beverage of choice firmly in hand. We will take note of your observations and suggestions to further the DOECAA conference experience, as orchestrated by Erica Trout of HelmsBriscoe. In the event there are words of gushing praise, we will cling to your every word!

Enjoy reconnecting with your DOECAA network, as you settle in for the next day and a half of DOE centric topics. As always, your attendance and participation in thought provoking discussions is deeply appreciated.

Best Regards

Department of Energy Contractor Attorneys' Association

Donald K. Murano, Esq., CCEP, LEED AP
DOECAA President 2019-2023



Co-Chair Welcome

September 27, 2023

DOECAA Fall 2023 Conference Attendees:

Welcome to our Fall 2023 DOECAA Conference! Whether you are joining us in-person or online, we are delighted to have you with us.

The Fall 2023 DOECAA Conference includes substantive presentations and panels on perennially important topics, emerging trends, and concepts, including a segment on artificial intelligence, as well as ethics considerations for government contractors. We are especially pleased to welcome back keynote speakers Samuel Walsh, the Department of Energy's General Counsel, and Timothy Fischer, the National Nuclear Security Agency's General Counsel.

We would like to express our appreciation to the DOECAA Board, including Board President Donald Murano, Board Secretary Saurabh Anand, Board Treasurer John Stolpa, and Director Pamela Reynolds, with a special thank you to last year's Co-Chairs Maxine McReynolds and Quentin Vaughn for their vision, leadership, and guidance. To be sure, none of this would have been possible without the tireless efforts of our event planning coordinator, Erica Trout.

This year, in response to your feedback, we built in more time for networking and socializing. We hope you will have a little fun as you connect with both long established and new friends and colleagues, that you will continue those conversations and maintain those connections for years to come, and that you will return to visit with us once again in 2024.

With warm regards, we hope you find these next two days valuable and enjoyable. Thank you for coming.

Your 2022 DOECAA Fall Conference Co-Chairs,

Rico Reyes
General Counsel
Kansa City National Security Campus

Eric Barzee
Chief IP Counsel
Idaho National Labs



DOECAA

Conference Agenda

DOECAA FALL 2023 CONFERENCE

Hampton Ballroom, Omni Shoreham Hotel, Washington D.C.

Conference Chairs

Rico Reyes
General Counsel
Kansas City National
Security Campus
rreyes1@kcncsc.doe.gov

Eric Barzee
Chief IP Counsel
Idaho National Laboratory
eric.barzee@inl.gov

Wednesday, September 27, 2023

Time	Topic/Event	Speaker(s)
9:00 am	Continental Breakfast, Registration and Networking	
10:00 am	Welcome and Opening Remarks, Logistics	Donald Murano DOECAA President
10:15 am	Keynote Address: Perspectives from DOE General Counsel	Samuel Walsh DOE General Counsel
11:00 am	Networking Break	
11:15 am	Intersection of Patents and Export Control	Eric Barzee Chief IP Counsel, Idaho National Lab (Moderator)

		Joshua Miller Assistant General Counsel, IP, Kansas National Security Campus
		Michelle Wong Deputy Laboratory Counsel, Lawrence Berkley National Lab
		Marc Filigenzi IP Managing Attorney, Oakridge National Lab
		Brian Lally Chief IP Counsel, US Department of Energy
12:30 pm	Conference Lunch	
2:00 pm	Introduction to DOE’s Strategy for Artificial Intelligence and Spotting Legal Issues	Rico Reyes General Counsel, Kansas City National Security Campus (Moderator)
		Hal Finkel DOE, Office of Science, Advanced Scientific Computing Research
		Christian Stauffer Threat Hunter and Security Engineer, US Department of Energy
		William S. Elias General Counsel, Sandia National Laboratory
3:00 pm	Networking Break	
3:15 p.m.	The Promise and the Peril: Artificial Intelligence of AI in the Workplace	Bradford Kelley Shareholder

4:15 p.m. False Claims Act: Recent Developments
and Emerging Trends

Michael Wagner
Partner
Covington & Burling
LLP

Terra Fulham
Special Counsel
Covington & Burling
LLP

Sajeev D Malaveetil
EY Americas
Government Contracts
Services Practice
Leader

5:15 pm Conference Reception
Optional Happy Hour (Cash Bar)

Thursday, September 28, 2023

Time	Topic/Event	Speaker(s)
7:30 am	Continental Breakfast	
8:00 am	DOECAA Business Meeting, including: DOECAA Board Actions and Future Plans Overview of New Website	
8:30 am	Keynote Address: Perspectives from NNSA General Counsel	Timothy Fischer General Counsel NNSA
9:15 am	The Future of Diversity and Inclusion Considering Recent Supreme Court Decisions	Christopher Parlo Partner Morgan Lewis Larry Turner Partner Morgan Lewis Stephanie Schuster Partner Mogan Lewis
	Contracting Pitfalls and Bear Traps	Irvin Gray Assistant General Counsel, Procurement Kansas City National Security Campus
10:45 am	Networking Break	
11:15 am	Ethics Considerations for Government Contractors	Mark Meagher Meagher GC Law, LLC
12:15 pm	Closing Remarks	Donald Murano DOECAA President



CLE Information



DOECAA

Welcome to the DOECAA 2023 Conference.

Please note the following to seek CLE credit for your attendance.

1. Please **sign-on** (remote attendees) **or sign-in** at the registration desk (in-person attendees).
2. Online and in-person attendees, note the codes provided during the Conference. You must enter those in the attendance/evaluation form to qualify for CLE credit for those sessions attended.
3. All attendees, please complete and submit the evaluation form at the end the Conference.
4. DOECAA will provide you with Certificates of Attendance.
5. DOECAA will be seeking CLE approval from California, New Mexico, Ohio, Oregon, Tennessee, Texas, and Virginia and plan to provide you supporting documentation so that you can apply for CLE credit to Colorado, Illinois, New York, Washington State, and other States upon request.
6. If you are seeking CLE credit, please be sure that your registration information included your State Bar membership, Bar numbers, your name as included in the State Bar records, and your current email address.



Wireless Internet

Network Name: **Omni Meeting**

Access Code: DOECAA23

1. View Available Networks
2. Connect to “**Omni Meeting**” Network
3. Open up your Web Browser and you’ll see the splash page
4. Enter Access Code: DOECAA23
5. Click Connect



NEIGHBORHOOD RESTAURANTS

NEW HEIGHTS

2317 Calvert St NW

202-290-2692

New American Cuisine – Top honors for food, service, Sunday Brunch, and stylish decor.
DINNER: 5-10PM CLOSED MONDAYS

OPEN CITY CAFE

2331 Calvert St NW

202-332-2331

Classic American Cuisine – Comfort foods and drinks that embrace the diversity of the District's residents and their tastes.
OPEN DAILY: 8AM-8PM Outside Dining Available.

BISTRO BITES

2623 Connecticut Ave

202-525-1464

French Pastry Shop – Savory and sweet French crapes, pastries and coffee.
OPEN DAILY: 11AM-9PM

DISTRICT KITCHEN

2606 Connecticut Ave

202-238-9408

Trendy Seasonal American – Highlighting the Mid Atlantic's best naturally-raised and local ingredients.
OPEN: TUES-FRIDAY 4-9:30PM SATURDAY 11AM - 9:30PM SUNDAY 11AM - 4PM

LEBANSETAVERNA

2641 Connecticut Ave

202-265-8681

Mediterranean Cuisine – Local chain serving traditional Lebanese dishes & wine in a contemporary setting.
OPEN DAILY: 12PM - 8PM

MACINTYRE'S PUB

2621 Connecticut Ave

202-506-3427

Sports Bar – Elevated pub grub, beer on tap, gleaming wood bar & big-screen TVs.
OPEN: MON-FRIDAY 12PM-10PM CLOSED TUESDAYS SATURDAY & SUNDAY: 11AM -10PM

TONO SUSHI

2605 Connecticut Ave

202-332-7300

Japanese Cuisine – Japanese and Asian cuisine prepared with 100% organic ingredients.
OPEN DAILY: 5:00PM - 9:45PM

UMI JAPANESE CUISINE

2625 Connecticut Ave

202-332-3636

Japanese Cuisine – Creative sushi rolls, bento boxes, tempura & noodles.
OPEN DAILY: LUNCH 11:30 - 4:00PM | DINNER 5:00 - 9:30PM

HOT N'JUICY CRAWFISH

2606 Connecticut Ave

202-299-9448

Seafood – Popular Las Vegas seafood bar & restaurant chain. Come ready to crack your own crabs.

OPEN DAILY: SUN-THURSDAY 12:00PM - 10:00PM FRIDAY & SATURDAY 12:00PM -11:00PM

NAANWISE INDIAN CUISINE

2635 Connecticut Ave

202-450-5810

Fine Indian Cuisine – Variety of savory recipes from India's northern region with some popular south dishes.
OPEN DAILY: LUNCH 11:30 - 2:30PM | DINNER 5:00 - 10:00PM

NANDO'S PERI-PERI

2631 Connecticut Ave

202-204-1251

Afro-Portuguese Cuisine – Chain restaurant serving grilled chicken marinated in spicy PERI PERI pepper sauce.
OPEN DAILY: 10:30AM-10:00PM

PETIT MONDE BISTRO & CAFE

2653 Connecticut Ave

202-629-4622

American Cuisine – Offering fresh pastries, breakfast & lunch pizza, sandwiches, gelato and wine.
OPEN DAILY: 8:00AM - 8:00PM

RAJAJI CURRY HOUSE

2603 Connecticut Ave

202-265-7344

Fine Indian Cuisine – Offering modern interpretations of classic Indian dishes.
OPEN DAILY: LUNCH 11:30 - 2:30PM | DINNER 5:00 - 10:00PM

LILLIES RESTAURANT & BAR

2915 Connecticut Ave

202-450-4824

Italian Mediterranean Cuisine – International-modern cuisine with made from scratch dishes.
OPEN: MON-FRI 11AM-2PM, 4:00PM-10PM SATURDAY 11AM - 9:00PM SUNDAY 11AM - 6:00PM



**KEYNOTE ADDRESS:
Perspectives from DOE General Counsel**

**Samuel Walsh
DOE General Counsel**



U.S. DEPARTMENT OF
ENERGY

DOE Office of General Counsel

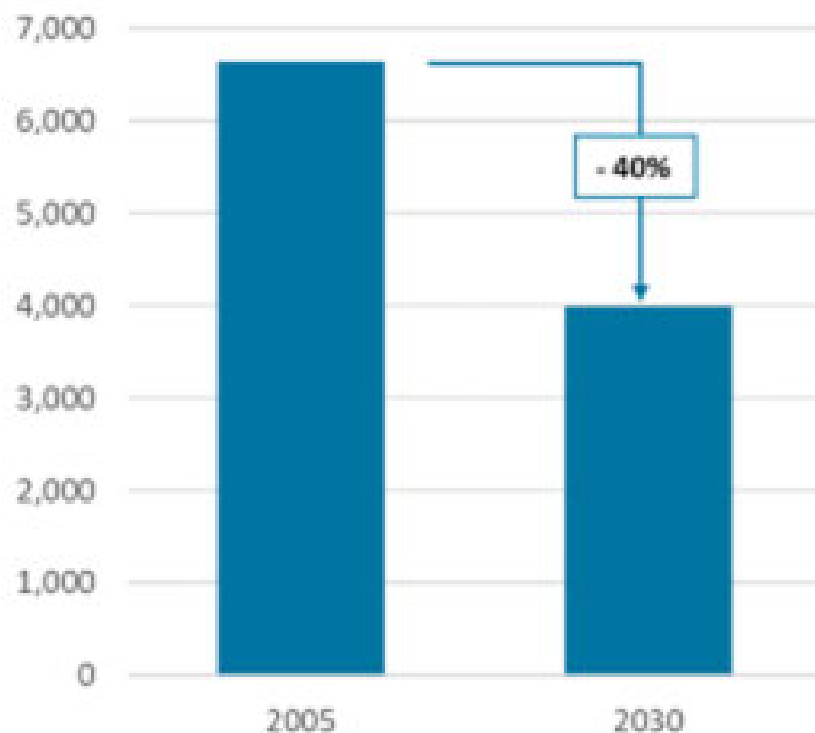
Sam Walsh

Presentation to DOECAA September 27, 2023

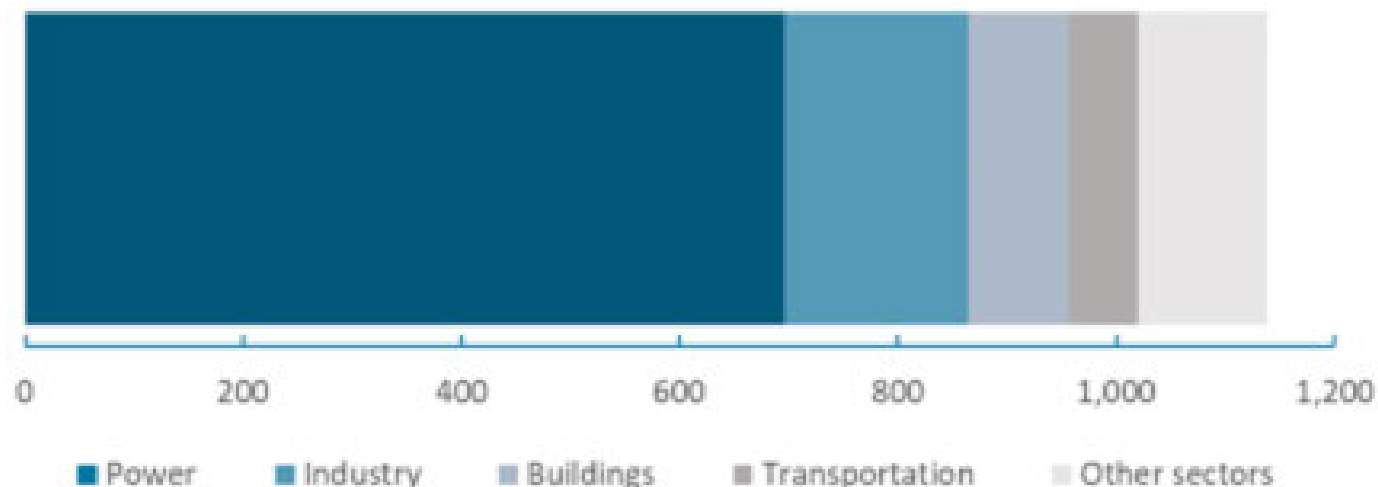


IRA and BIL's ~40% GHG pollution reduction helps position U.S. to reach overall climate goals

Net Economy-wide GHG Emissions Over Time (MMT CO_{2e})



Estimated Emissions Reductions in 2030 from Inflation Reduction Act and Bipartisan Infrastructure Law (2030, MMT CO_{2e})



[The Inflation Reduction Act Drives Significant Emissions Reductions and Positions America to Reach Our Climate Goals | Department of Energy](#)

New DOE Mandates and Unprecedented Funding



Funding Announced

- Hydrogen Hubs
- Grid Programs
- Transmission Facilitation Program
- Battery Supply Chains
- Weatherization
- State Energy Program
- Long Duration Energy Storage
- Carbon Management Programs
- Advanced Reactor Demos
- State Revolving Loan Funds
- Civil Nuclear Credit
- Energy Efficiency and Conservation Block Grants
- Direct Air Capture Hubs
- Energy Improvements in Rural and Remote Communities
- Industrial Decarbonization



**\$46
Billion**

Where we're going – \$53B more



- Advanced Energy Manufacturing & Recycling Program
- Energy Infrastructure Reinvestment Program
- Transmission Financing
- Industrial Decarbonization
- Home Energy Rebates
- Building Energy Code improvements
- Hydroelectric Incentives
- Federal Building Decarbonization (AFFECT)















New Administration Policy: EO 14104

On July 28, 2023, President Biden signed **Executive Order 14104 *Federal Research and Development in Support of Domestic Manufacturing and United States Jobs***



“[I]t is the policy of my Administration that when new technologies and products are developed with support from the United States Government, they will be manufactured in the United States whenever feasible and consistent with applicable law.”

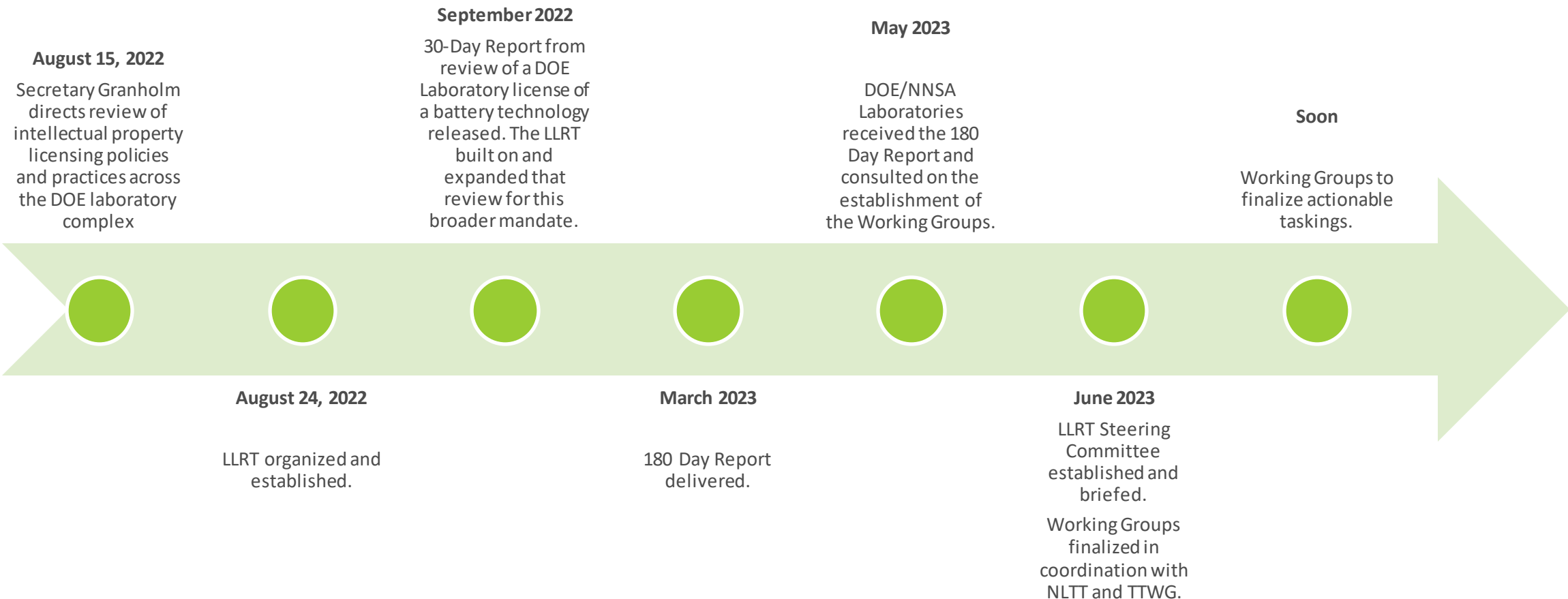
Photo courtesy the White House

This is already aligned with DOE policy per the 2021 Science & Technology Determination of Exceptional Circumstances, which applies to Lab contracts per AL-2022-01.

What will change? For DOE and the Labs, not much.

- The White House is currently running an interagency process to implement EO 14104.
- EO 14104 requires departments and agencies to consider a DEC to change the Bayh-Dole domestic manufacturing provisions. The 2021 S&T DEC already elevated the U.S. Manufacturing standard for all DOE programs to U.S. Competitiveness (subject inventions must be manufactured substantially in the United States, regardless of the manufacturing entity or where the resulting process is performed.)
- To streamline reporting across the interagency, utilization reports will use a new form, available in iEdison as of October 1, 2023.
- The interagency process is also working on a consistent waiver process. DOE revised its waiver process when implementing the 2021 S&T DEC, but some changes may be made as the interagency waiver process unfolds.

Lab Licensing Review Team



Lab Licensing Review Team

Three Working Groups that each include DOE HQ, field and lab personnel to look at minimum goals and standards per recommendations made in the 180-Day Report

1. Working Group 1

- a) IP license agreement safeguards
- b) Research, technology, and economic security (RTES) requirements for IP licenses

2. Working Group 2

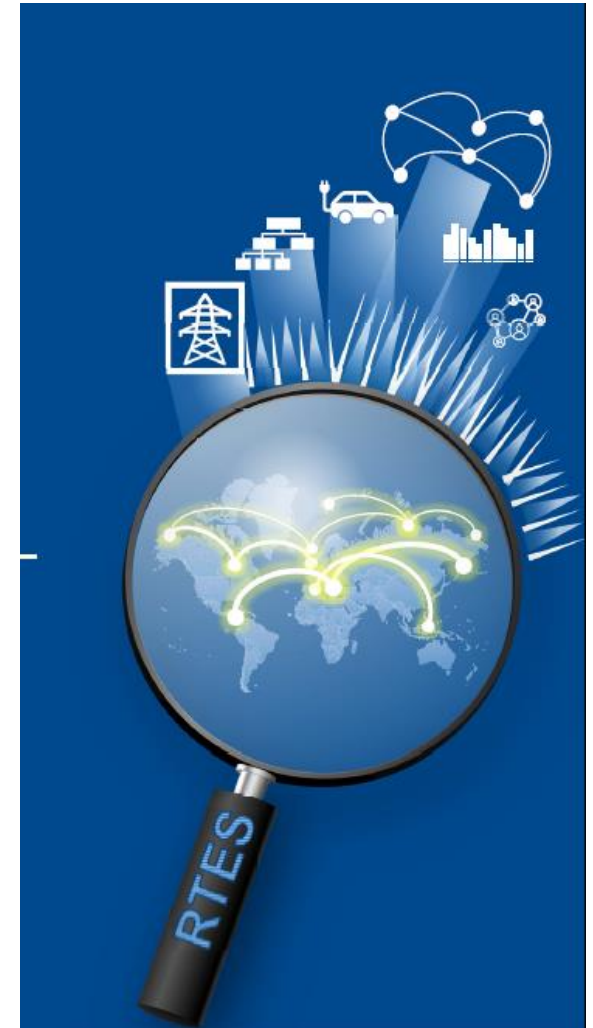
- a) IP license lifecycle monitoring
- b) Evaluation of Privately-Funded Technology Transfer (PFTT) and the U.S. Industrial Competitiveness clause for effectiveness and alignment with DOE policy

3. Working Group 3:

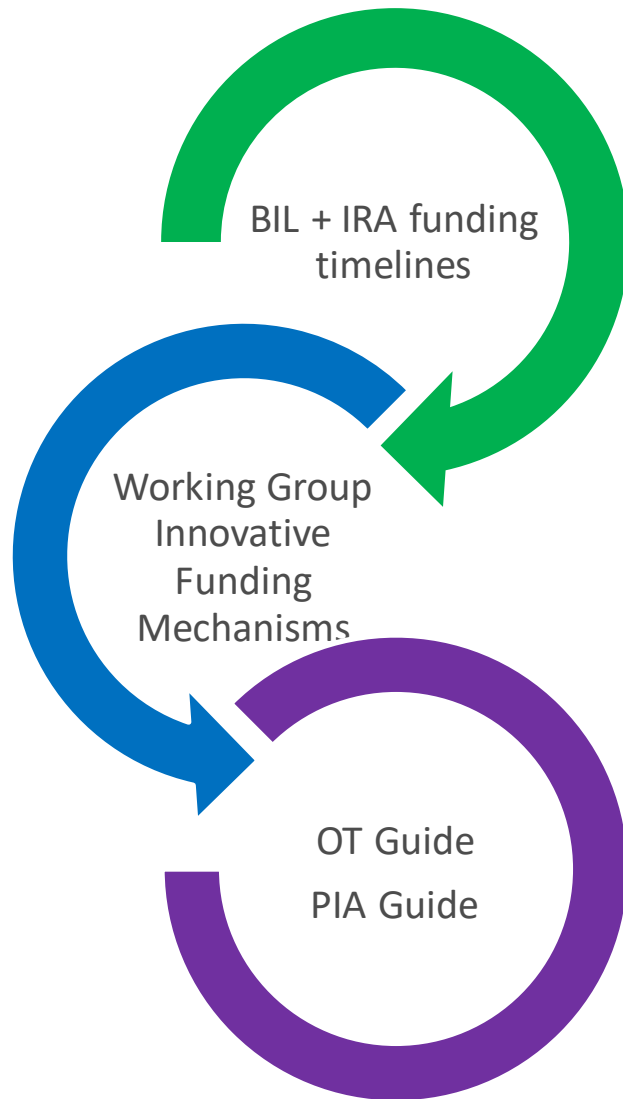
- a) Improved coordination with DOE/NNSA

The Office of Research, Technology, and Economic Security (RTES)

- RTES, or the Vetting Center, was established in early 2023 to support DOE programs in risk assessment and risk mitigation to ensure our national security, economic competitiveness, and technological leadership imperatives are duly incorporated into DOE's financial assistance and loan activities.
- The Vetting Center assessment is not applicable to acquisition contracts including the M&O contracts at this time.
- DOE Order 485.1 is a separate analysis from the Vetting Center assessment and is not handled by the Vetting Center.



New and Revised Contracting Mechanisms: OTA and PIA



The Working Group on Innovative Funding Mechanisms released two new contracting guides in response to a request by DOE senior leadership to accommodate the unique programs and provisions of the Infrastructure Investment and Jobs Act (BIL) and the Inflation Reduction Act (IRA). [PF 2023-39 Announcing the new Guide to Other Transaction Authority and the Guide to Partnership Intermediary Agreements and a new webpage devoted to Other Transaction Authority | Department of Energy](#)

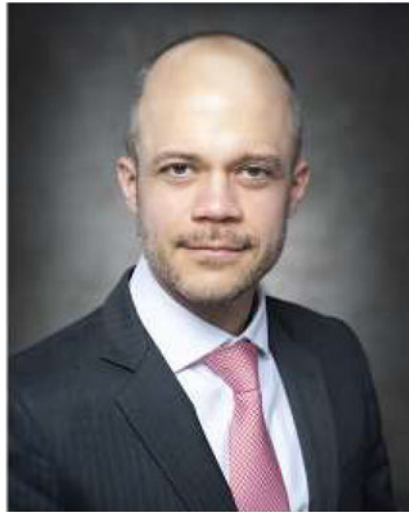
The Other Transactions Guide (September 2023) details new ways to use the DOE Other Transaction Authority beyond the Technology Investment Agreement.

The Partnership Intermediary Guide (August 2023) provides information on how to participate in DOE's pilot to use authority from the Stevenson-Wydler Act to enter into agreements with intermediaries to facilitate contracting.

Perspectives from DOE General Counsel

Perspectives from DOE General Counsel

Samuel Walsh
General Counsel
U.S. Department of Energy



Fall Meeting 2023



S. Walsh Bio

Samuel T. Walsh was sworn in as the General Counsel of the Department of Energy on August 11, 2021. Immediately prior to re-joining DOE, Mr. Walsh was a partner at the law firm Harris, Wiltshire & Grannis LLP in Washington, DC. Mr. Walsh previously served at the Department from 2010 to 2016, as Deputy General Counsel for Energy Policy, Associate General Counsel, and Senior Legal Advisor to the General Counsel. Before his former service at DOE, Mr. Walsh was an attorney in the energy group at Hogan Lovells LLP and a law clerk to the Hon. Judge David S. Tatel of the U.S. Court of Appeals for the District of Columbia Circuit. Mr. Walsh holds a B.A. from Yale College, an M.P.A. from the Harvard Kennedy School, and a J.D. from Harvard Law School.

Originally from New York, Walsh now lives in Washington D.C. with his wife and two children.



**INTERSECTION OF PATENTS AND
EXPORT CONTROL**

**MODERATOR - Eric Barzee
Chief IP Counsel
Idaho National Laboratory**

**PANEL -
Joshua Miller, Assistant General Counsel, IP
Kansas National Security Campus**

**Michelle Wong, Deputy Laboratory Counsel
Lawrence Berkley National Lab**

**Marc Filigenzi, IP Managing Attorney
Oakridge National Lab**

**Brian Lally, Chief IP Counsel
US Department of Energy**

September 27, 2023

The Intersection of Export Controls and Patents

JOSH MILLER
ASSISTANT GENERAL COUNSEL
HONEYWELL FM&T
KANSAS CITY NATIONAL SECURITY CAMPUS



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Without Written Permission from Honeywell FM&T

The Department of Energy's Kansas City National Security Campus is managed and operated by Honeywell Federal Manufacturing & Technologies, LLC under contract number DE-NA0002839



Two significant surprises in export controls

- **Large coverage**

- Zip Ties
- Horses
- Smartphone Technologies

- **Large licenses/exclusions/non-covered information**

- EAR classification for mass market (e.g., Apple products)
- Fundamental Research Exclusion (NSDD-189)
- Deference to patent office procedures

Two significant surprises in export controls

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- <https://www.apple.com/legal/more-resources/gtc.html>

- **Large licenses/exclusions/non-covered information**

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Hardware:

Hardware Product Family Name (covers all models and versions for a given product family)	ECCN
Apple Watch	5A992.c
iPad	5A992.c
iPhone	5A992.c

Software:

Software Product Family Name (covers all models and versions for a given product family)	ECCN
FaceTime	5D992.c

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90896

THE WHITE HOUSE
WASHINGTON

September 21, 1985

NATIONAL SECURITY DECISION
DIRECTIVE 189

UNCLASSIFIED

NATIONAL POLICY ON THE TRANSFER OF
SCIENTIFIC, TECHNICAL AND ENGINEERING INFORMATION

I. PURPOSE

This directive establishes national policy for controlling the flow of science, technology, and engineering information produced in federally-funded fundamental research at colleges, universities, and laboratories. Fundamental research is defined as follows:

"Fundamental research' means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons."

II. BACKGROUND

The acquisition of advanced technology from the United States by Eastern Bloc nations for the purpose of enhancing their military capabilities poses a significant threat to our national security. Intelligence studies indicate a small but significant target of the Eastern Bloc intelligence gathering effort is science and engineering research performed at universities and federal laboratories. At the same time, our leadership position in science and technology is an essential element in our economic and physical security. The strength of American science requires a research environment conducive to creativity, an environment in which the free exchange of ideas is a vital component.

In 1982, the Department of Defense and National Science Foundation sponsored a National Academy of Sciences study of the need for controls on scientific information. This study was chaired by Dr. Dale Corson, President Emeritus of Cornell University. It concluded that, while there has been a significant transfer of U.S. technology to the Soviet Union, the transfer has occurred through many routes with universities and open scientific communication of fundamental research being a minor contributor. Yet as the emerging government-university-industry partnership in research activities continues to grow, a more significant problem may well develop.

Declassified/Released on 10/23/94
under provisions of E.O. 12958
by L. Salvetti, National Security Council

COPY 14 OF 12 COPIES

F48-515

Two significant surprises in export controls

- Large coverage
 - Zip Ties
 - Horses
 - Smartphones
- Large license
 - EAR classification
 - Fundamental research
 - Deference to patent office procedures

III. POLICY

It is the policy of this Administration that, to the maximum extent possible, the products of fundamental research remain unrestricted. It is also the policy of this Administration that, where the national security requires control, the mechanism for control of information generated during federally-funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification. Each federal government agency is responsible for: a) determining whether classification is appropriate prior to the award of a research grant, contract, or cooperative agreement and, if so, controlling the research results through standard classification procedures; b) periodically reviewing all research grants, contracts, or cooperative agreements for potential classification. No restrictions may be placed upon the conduct or reporting of federally-funded fundamental research that has not received national security classification, except as provided in applicable U.S. Statutes.

Handwritten signature

Use
90896
November 21, 1985
UNCLASSIFIED
TRANSFER OF
SERIAL INFORMATION
Policy for controlling the flow
of information produced in
colleges, universities, and
defined as follows:
Basic and applied
research, the results of
which are shared broadly
and distinguished
from industrial
research and product
development which ordinarily are
of national security
importance.
Information from the United States by
which enhances their military
capabilities to our national security.
The most significant target of the
policy is science and
technology at universities and federal
laboratories. Leadership position in science
and technology in our economic and physical
environment requires a research
environment in which the
free flow of information is essential.
National Science Foundation
study of the need for
this study was chaired by Dr.
at Cornell University. It concluded
that the transfer of U.S. technology
occurred through many routes
and that communication of fundamental
research is as the emerging
relationship in research activities
which may well develop.

Declassified/Released on 10/23/96
under provisions of E.O. 12958
by L. Salvetti, National Security Council
F48-515

COPY 14 OF 12 COPIES

Two significant surprises in export controls

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- **Large licenses/exclusions/non-covered information**

- EAR classification for mass market (e.g., Apple products)
- Fundamental Research Exclusion (NSDD-189)
- Deference to patent office procedures

Why Do ECI-containing Patents Applications Matter?

- **Technology transfer mission**

- Move forward development and placement of federally-funded R&D

- **Negative results?**

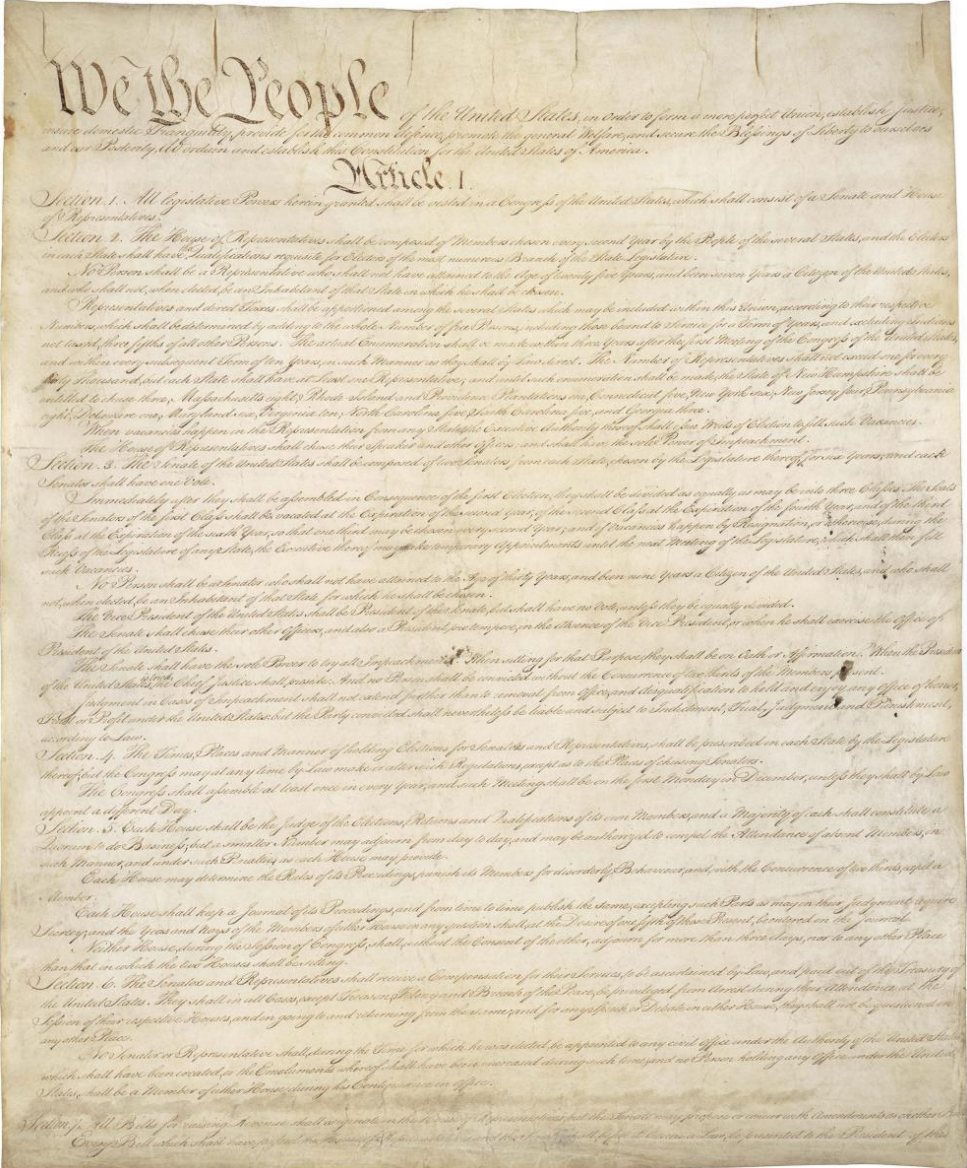
- Avoiding EC-containing patents reverses iPhone EC licensing example

EC-containing inventions are important

TIMELINE EXPLAINS THE LAW:

Patent Controls Predate Export Controls

Patents and the Constitution

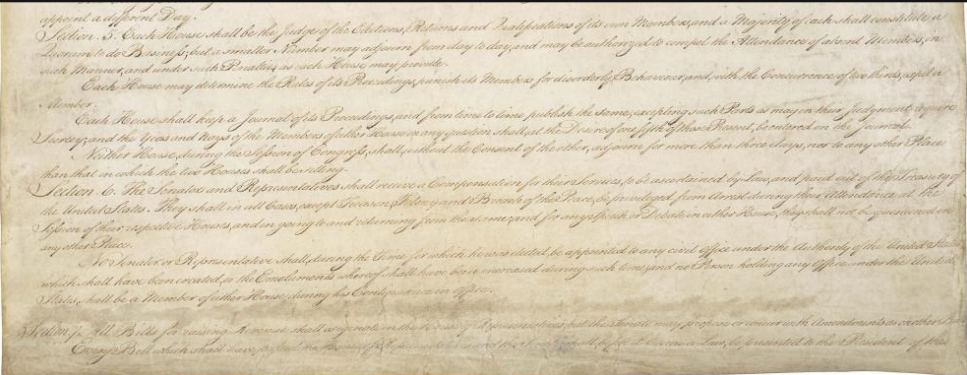


Patents and the Constitution



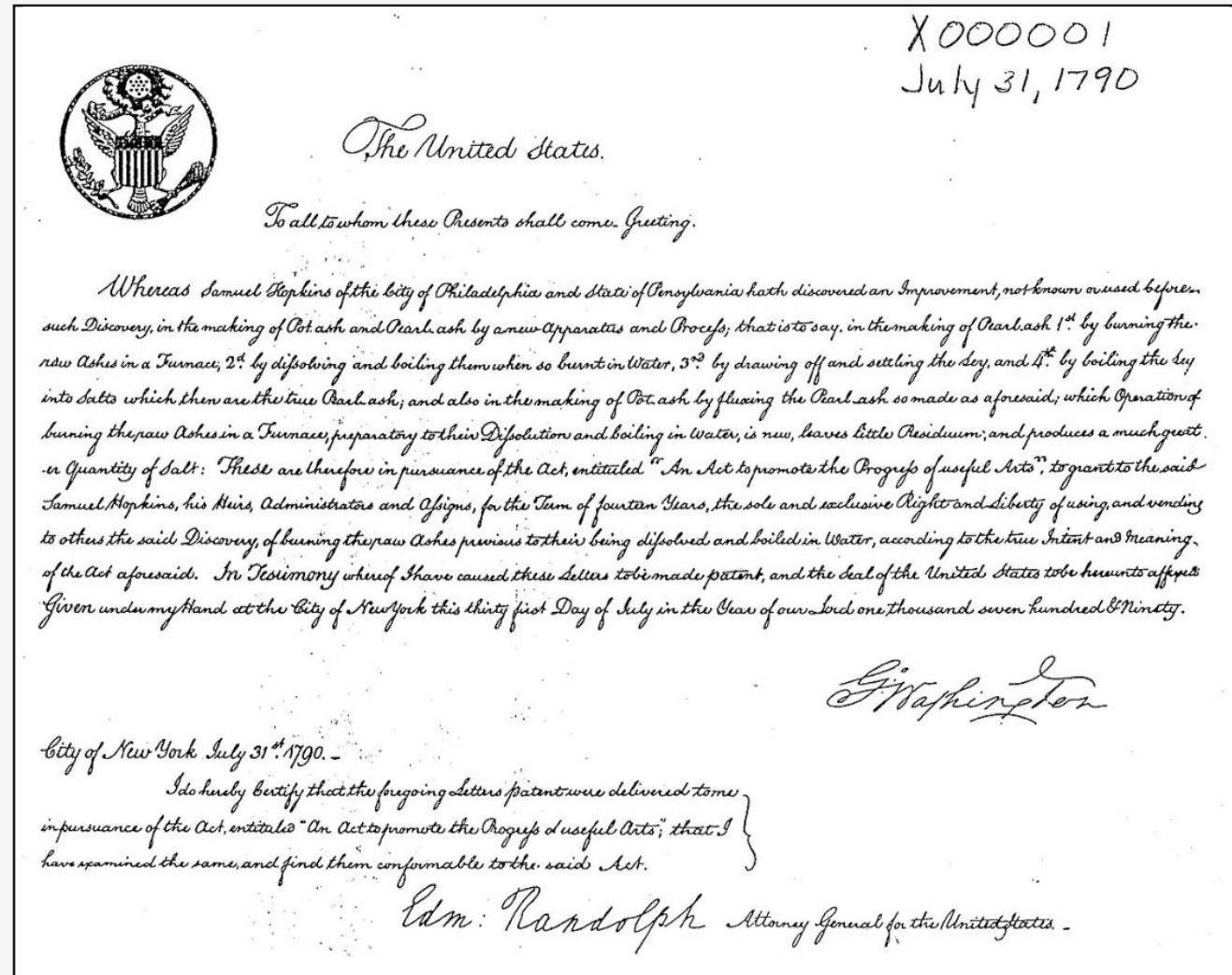
Article 1.8.8

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.



The First Patent

- Issued July 31, 1790
- Granted by George Washington
- Method for making potash



Does the US address National Security in Patents?

- **Invention Secrecy Act of 1951**
 - Patent Office Secrecy Orders
 - Legislative based classification like DOE’s authority for restricted data
 - “Gag” order with potential fines and penalties for violations.
- **Current Types of secrecy orders**
 - Type 1 DOD only
 - EAR/ITAR AND critical space/military
 - Lowest restrictions and patent application can still go to 18 countries
 - Special congressional authority -- 10 U.S. Code § 130
 - Type 2 DOD Security Agreement
 - Classified or classifiable
 - Includes notice of classification level
 - Type 3 Everything else
 - “detrimental to national security”
 - Strongest restrictions
 - Example of the “whoopsie” inventor

Long existing processes address classified/classifiable information

How do you get a Secrecy Order?

- **Known classified invention?**
 - Special filing process
- **Not classified or unknown by patent applicant?**
 - Patent Office issues a Secrecy Order in response to other agencies' recommendations
- **Patent Office Foreign Filing License (“FFL”)**
 - No Secrecy Order
 - Permission to file abroad
 - Timing:
 - Explicitly granted by patent office
 - Granted by default at six months if you haven't received a secrecy order

FFL is extremely routine and granted to 99.99% of patent applications

Secrecy Order Stats

- **FY22: ~650,000 patent applications filed**
 - <100 secrecy orders issued based on FOIA data

Secrecy Orders are Extremely Rare

Secrecy Order Stats

- **FY22: ~650,000 patent applications filed**
 - <100 secrecy orders issued based on FOIA data

Patent Applications Filed in FY2022

Secrecy Orders are Extremely Rare

Secrecy Order Stats

- **FY22: ~650,000 patent applications filed**
 - <100 secrecy orders issued based on FOIA data



Patent Applications Filed in FY2022

Secrecy Orders are Extremely Rare

Why are so few patents held back?

- **Purpose of the patent system**

- Exchange information/discovery for period of exclusivity
- Frequent patent office “gag” orders frustrate that purpose
- Potential commercial fall out
 - Decreased domestic R&D and manufacturing

TIMELINE EXPLAINS THE LAW:

Export Controls Defer to the Pre-
Existing Patent Review Process

Consistent Legal Framework

- **Later-arising export controls defer to the existing FFL procedures**

Consistent Legal Framework

- Later-arising export controls defer to the existing FFL procedures

Agency	Regulation	Citation	FFL removes from controls?	FFL is correct licensing procedure
Commerce	EAR	15 CFR 734.10(c)	“not subject to this part”	
Energy	AEA	10 CFR 810.2(c)(2) and 810.3	“This part does not apply to”	
State	ITAR	22 CFR 125.2(b)		“[E]xport ... to support ... patent applications in foreign countries is subject to [FFL] regulations.”

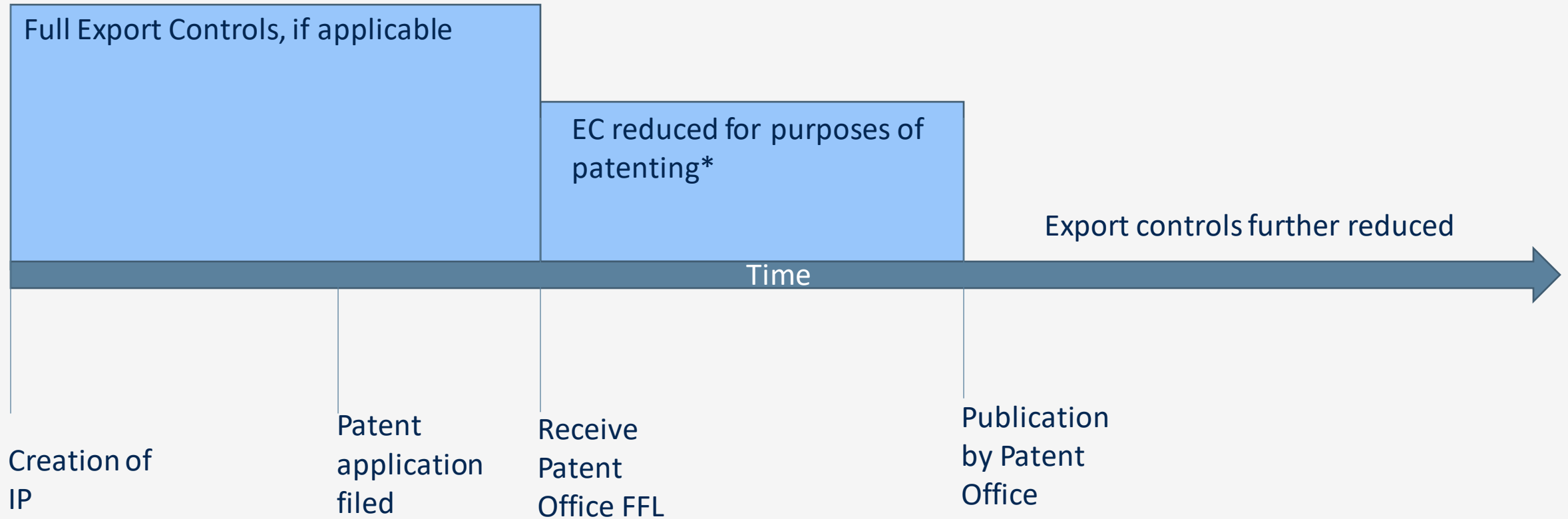
Consistent Legal Framework

- **Later-arising export controls defer to the existing FFL procedures**

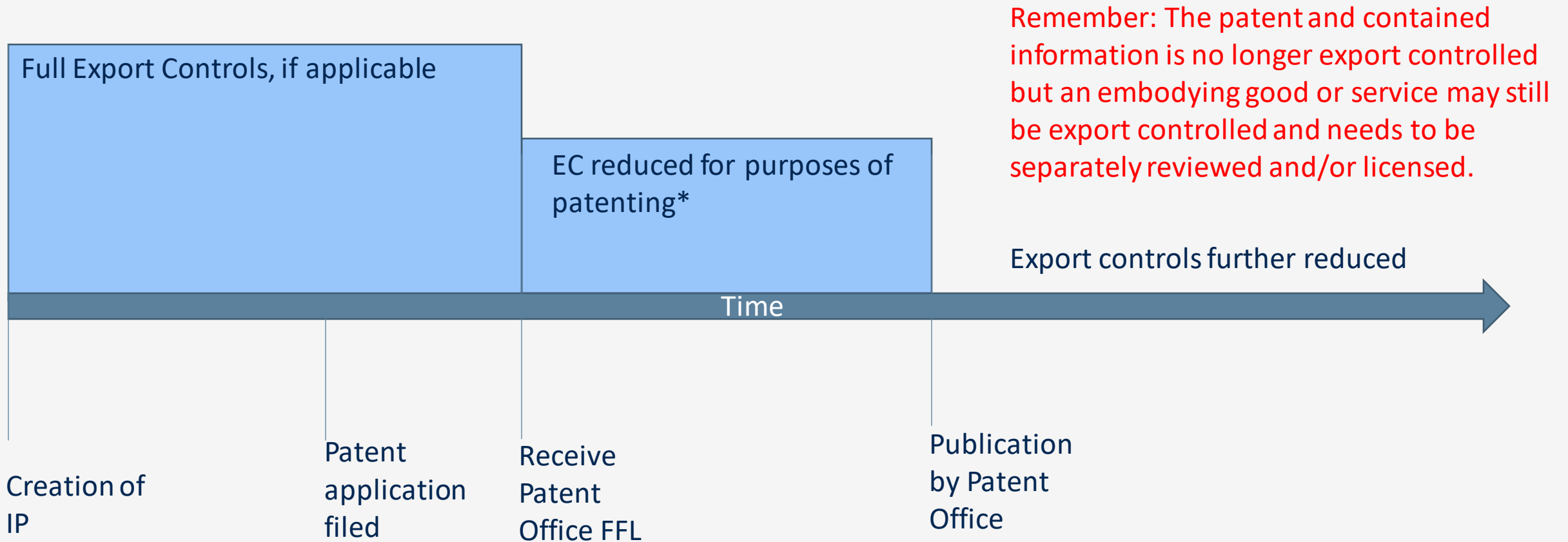
- **Patent Office at 37 CFR 5.11(c) –**

- Export licenses for foreign patenting are required under EAR (Commerce), ITAR (State), and AEA (DOE) unless you have a FFL

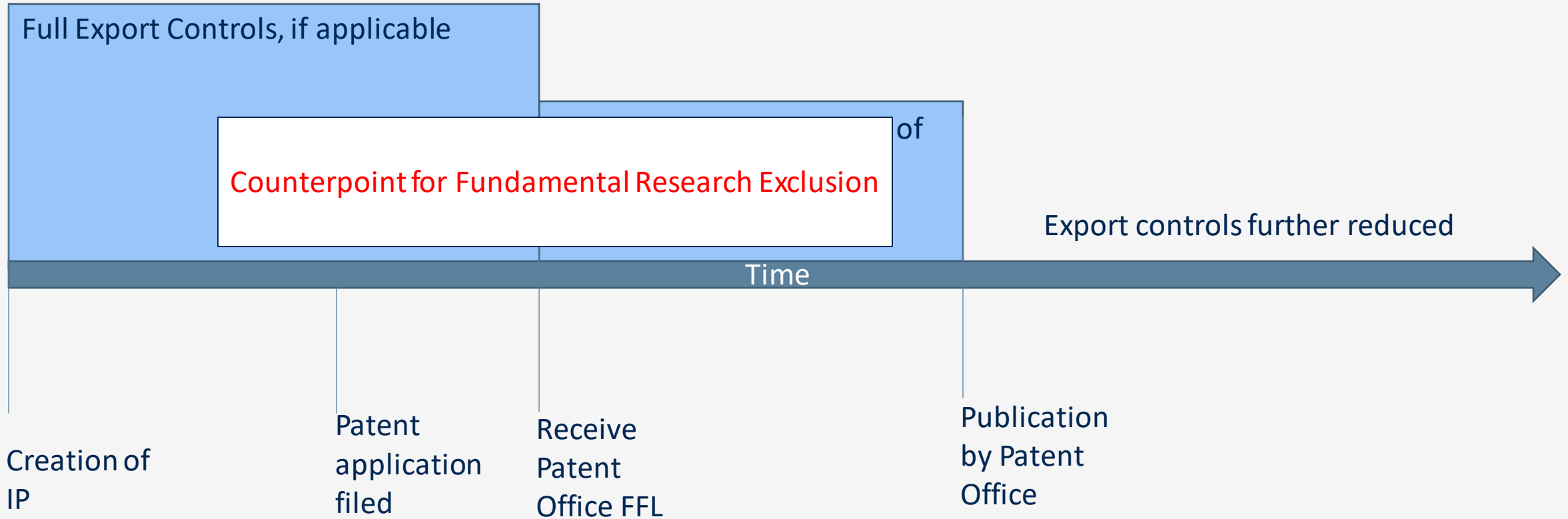
Standard Process for ECI-Containing Patent Applications



Standard Process for ECI-Containing Patent Applications



Standard Process for ECI-Containing Patent Applications



Quick Recap

- **The Timeline led to consistent legal frameworks**
 - Patents arise from the constitution
 - Storied history on how to review patents for national security
 - The FFL process
 - The later-arising export controls defer to the FFL
 - Export controls apply to a patent application when a FFL is not granted
- **Public policy supports this treatment of patent applications**

Panel Discussion



BIO – ERIC BARZEE



Eric Barzee is the Chief Intellectual Property Counsel for Idaho National Laboratory (INL). With expertise in nuclear energy, integrated energy and national security, INL has an exceptional array of scientific expertise, equipment and vision to help shape extraordinary new technologies into practical, everyday uses. Eric has been with INL since 2006 and prior to that worked in an intellectual property firm in Salt Lake City and with a start up company in Seattle. He has a BS and JD from Brigham Young University.



BIO – JOSH MILLER



Josh Miller is a dedicated and detail-oriented attorney who helps clients navigate their intellectual property (IP) landscapes from acquiring, building, and managing portfolios to handling litigation. He joined Honeywell FM&T at the Kansas City National Security Campus in 2019. As the Assistant General Counsel over IP, he oversaw a doubling in inventions reported and significant changes in prosecution practices resulting in increased success rates at the USPTO and increased licensing. Prior to joining FM&T, Josh worked at a Boston-based IP law firm where he focused on patent litigation and developed agile IP strategies adaptable to the dynamics of modern commercial enterprise. A constant theme in his practice is efficiently training employees so there is a shared passion for IP within the business.



BIO – MICHELLE WONG



Michelle Wong joined Berkeley Lab in 1998 as a Research Associate. In 2001, while in law school, she joined the Lab's Patent Group as an Intern / Patent Analyst. Within a year, she passed the USPTO Patent Bar exam and as a Patent Agent, she prepared, filed and prosecuted patent applications for Berkeley Lab. In 2004, Ms. Wong joined the California bar and continued as Patent Counsel for the Laboratory, preparing and prosecuting U.S. and foreign patent applications. She also managed several large licensed portfolios and patent litigation. Ms. Wong currently serves as Deputy Laboratory Counsel advising LBNL stakeholders on general legal, intellectual property, partnerships, procurement, data security and privacy, conflicts of interest, and compliance issues arising in various transactions including procurements, licensing, and sponsored research agreements.

Education

University of San Francisco School of Law, J.D.

University of California, Berkeley, B.A.



BIO – MARC FILIGENZI



Marc Filigenzi was hired by the UT-Battelle Legal Directorate in May of 2007 and became the IP managing attorney in 2015. His primary duties include assisting the office of technology transfer by managing the UT-Battelle patent portfolio and the law firms that prosecute UT-Battelle patent applications, and by assisting with negotiating IP license agreements.

Marc's previous job was as corporate counsel for Alticor, Inc., where he prepared and prosecuted patent applications, managed much of Alticor's patent portfolio and outside patent counsel. His litigation experience included assisting Alticor in defending against claims of patent infringement and in asserting patent infringement claims against third parties.

Prior to his work as a patent attorney for Alticor, Marc worked as a research scientist at the Spokane Research Laboratory, where his duties included the development of numerical modeling techniques used to predict instabilities in deep underground mines, and the development of virtual reality tools used for mine safety training. He holds a Bachelor of Mechanical Engineering degree and a Juris Doctor degree, both from Gonzaga University



B. Lally Bio



Brian Lally

Assistant General Counsel for Technology Transfer and Intellectual Property
Department of Energy

Brian Lally is an experienced counselor and senior executive with a track record of developing innovative solutions to complex issues. He currently serves as the Assistant General Counsel for Technology Transfer and Intellectual Property for the U.S. Department of Energy where he leads a team of legal professionals across the DOE complex that provide counsel to the Department on a wide range of legal issues and ensure robust intellectual property protection, management, safeguarding and enforcement of the Department's \$10B plus R&D budget. Brian is a believer that attorneys should be problem solvers that present decision makers with viable, risk-based options instead of being the house of no.

Brian is a recognized thought leader in federally funded intellectual property, technology transfer, research security, and enabling complex collaborations having received numerous awards including the Secretary of Energy's Appreciation Award on two occasions. Brian and his team have led a number of impactful initiatives and reforms over his two decades with the Department, including the creation and implementation of the Agreements for Commercializing Technology (ACT) mechanism that allows labs to better engage on industry- friendly terms, leading DOE's laboratory processing and liability reforms, the establishment of the Basic Science CRADA that better enables DOE researchers to collaborate on large-scale international science projects, and the development of a first in government IP and U.S. manufacturing compliance and enforcement program that has resulted in more than \$100M in additional U.S. manufacturing commitments by DOE awardees.

Brian successfully represented DOE in a landmark case at the International Trade Commission (ITC) in support of Argonne National Laboratory's (ANL) and BASF's (a licensee of ANL's lithium-ion battery technology) Section 337 action against Umicore that ultimately resulted in the ITC's decision to issue a final exclusion order prohibiting importation of infringing lithium-ion battery materials into the U.S. This was an important victory for ANL, federally funded IP, DOE's tech transfer mission and

domestic manufacturing commitments made by licensees of DOE technologies. Most recently Brian's team spearheaded the development and implementation of an enhanced U.S. manufacturing policy for the Department that was recently announced by Secretary Granholm and is now being discussed within an NSC task force for potential adoption by other research agencies.

Mr. Lally regularly addresses the D.C. Bar Association, Strafford Publications and other organizations on topics related to intellectual property and technology transfer and has been invited to speak by the Federal Lab Consortium, Indiana University - Maurer School of Law's Center for Intellectual Property Research, and many other educational, governmental and industrial organizations. Most recently Brian moderated a discussion with the Honorable Kathleen O'Malley of the United States Court of Appeals for the Federal Circuit hosted by the Intellectual Property Law Association of Chicago.

Prior to becoming Assistant General Counsel, Brian spent fifteen years in DOE's Chicago Office in a variety of legal roles, most recently as Deputy Chief Counsel for that office. Brian received an undergraduate degree from the University of Virginia, and his law degree from Indiana University's Maurer School of Law where he is a member of the law school's Alumni Board. Brian lives with his wonderful wife Angie and their three kids, Jenna, Adam, and Blake, and enjoys running, hiking, golfing and curling.



Introduction to DOE's Strategy for Artificial Intelligence and Spotting Legal Issues



BIO – RICO REYES



Rico Reyes is General Counsel for the Kansas City National Security Campus (KCNSC) managed by Honeywell FM&T. KCNSC manufactures over 80 percent of the non-nuclear components that go into our nation's nuclear stockpile and develops advanced solutions for complex national security issues.

Rico is a key member of Honeywell FM&T's senior leadership team and provides counsel on matters of strategic importance to the business. Rico leads and manages the company's 40-person legal division, which includes attorneys and subject matter experts in labor and employment, intellectual property, procurement, contracts, compliance, export controls, data privacy, government relations, and global security.

Rico earned his A.B. in government from Harvard University, as well as an MBA and J.D. from the University of Texas.



BIO – HAL FINKEL



Hal is a program manager for computer-science research in the US Department of Energy (DOE) Office of Science's Advanced Scientific Computing Research (ASCR) program and is currently the acting Division Director for ASCR's Computational Scientific Research and Partnership division. Prior to joining ASCR, Hal was the Lead for Compiler Technology and Programming Languages at Argonne's Leadership Computing Facility. As part of DOE's Exascale Computing Project (ECP), Hal was a PathForward technical lead and PI/Co-PI of several multi-institution activities. Hal also helped develop the Hardware/Hybrid Accelerated Cosmology Code (HACC), a two-time IEEE/ACM Gordon Bell Prize finalist. He graduated from Yale University in 2011 with a Ph.D. in theoretical physics focusing on numerical simulation of early-universe cosmology.



BIO – CHRISTIAN STAUFFER



Christian has been working in defensive security as a threat engineer since 2012 at the DOE's Mission Information Protection Program, running the Headquarters Security System. He is a part of the Artificial Intelligence & Technology Office (AITO) Program Committee, and contributed to the creation of the DOE Generative AI Reference Guide. His efforts have focused on leading discussion around GenAI related to information security concerns, the expanded "Attack Surface" that GenAI exposes to the enterprise, and the heightened risks of data/IP loss brought to organizations by the explosion in large language models from companies like OpenAI, Anthropic, Deepmind, Google, and others. In his spare time, he trains generative adversarial network (GAN) models and tries to get a decently fast version of ChatGPT running locally on his home machine.



BIO – WILLIAM S. ELIAS II



William Elias is the Executive Director of the Legal Division and Chief Legal Officer for Sandia National Laboratories. He also serves as Secretary of NTESS, LLC, a wholly-owned subsidiary of Honeywell International, Inc. NTESS operates Sandia National Laboratories as a contractor for the U.S. Department of Energy's National Nuclear Security Administration. Will joined NTESS in May 2017 as part of the new leadership team at Sandia. Prior to joining NTESS, Will was General Counsel at Argonne National Laboratory, the nation's oldest and preeminent multi-purpose national science laboratory, based in Illinois. Before joining Argonne, Will was General Counsel and Secretary of the Corporation at The Charles Stark Draper Laboratory, Inc., an independent, nonprofit research and development laboratory in Cambridge, Massachusetts. Draper is primarily a contractor for the U.S. Department of Defense, other national security agencies, and NASA. While at Draper, Will was also a Visiting Associate Professor of Law at the Boston University School of Law, focusing on intellectual property and business strategy. Will began his legal career as a judicial clerk for the Massachusetts Supreme Judicial Court and was an attorney in private practice with Ropes & Gray and Peabody & Brown. He received his Juris Doctorate magna cum laude at the Boston University School of Law and his Bachelor of Science degree from Tufts University.



**The Promise and the Peril:
Artificial Intelligence of AI in the Workplace**



LITTLER



Presentation

The Promise and the Peril OF AI IN THE **WORKPLACE**

Bradford J. Kelley
September 27, 2023 | Washington, D.C.

Littler

Roadmap

- Definition/How Used
 - Benefits
 - Risks
- Regulatory Landscape
 - Antidiscrimination Laws
 - National Labor Relations Act
 - Wage and Hour
- Legislative Landscape
- Best Practices

How AI is being Used in the Workplace



Scanning & Filtering Resumes

Chatbots

Monitoring & Reporting Productivity

Video Interviews

Generative AI Tools (ChatGPT)

How AI is Being Used for Wage and Hour Purposes



Risks of AI

maize. MAGAZINE PLUS INSIGHTS LIVE Obsessions Columns

ARCHIVE

What is the AI black box problem?

We do not fully understand why the algorithms behind AI act the way they, and this is a problem which we can't ignore.

Real-life Examples of Discriminating Artificial Intelligence

Real-life examples of AI algorithms demonstrating bias and prejudice

Machine Bias

There's software used across the country to predict future criminals. And it's biased against blacks.

by Julia Angwin, Jeff Larson, Surya Mattu and Lauren Kirchner, ProPublica
May 23, 2016

Discriminating algorithms: 5 times AI showed prejudice

Artificial intelligence is supposed to make life easier for us all – but it is also prone to amplify sexist and racist biases from the real world

The New York Times

Who Discriminates in Hiring? A New Study Can Tell.

Antidiscrimination Laws and AI



2 theories of discrimination:

- 1) Disparate treatment: Intentional discrimination based on a protected characteristic.
 - Bad actor intentionally feeds the machine bad data.
- 2) Disparate impact: Using a facially neutral practice that has a disparate impact on a protected characteristic.
 - Garbage in, garbage out.

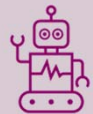
Antidiscrimination Laws and AI: Disparate Impact



For instance, does the algorithm give a lower score to women, or a lower score to attributes disproportionately associated with women?

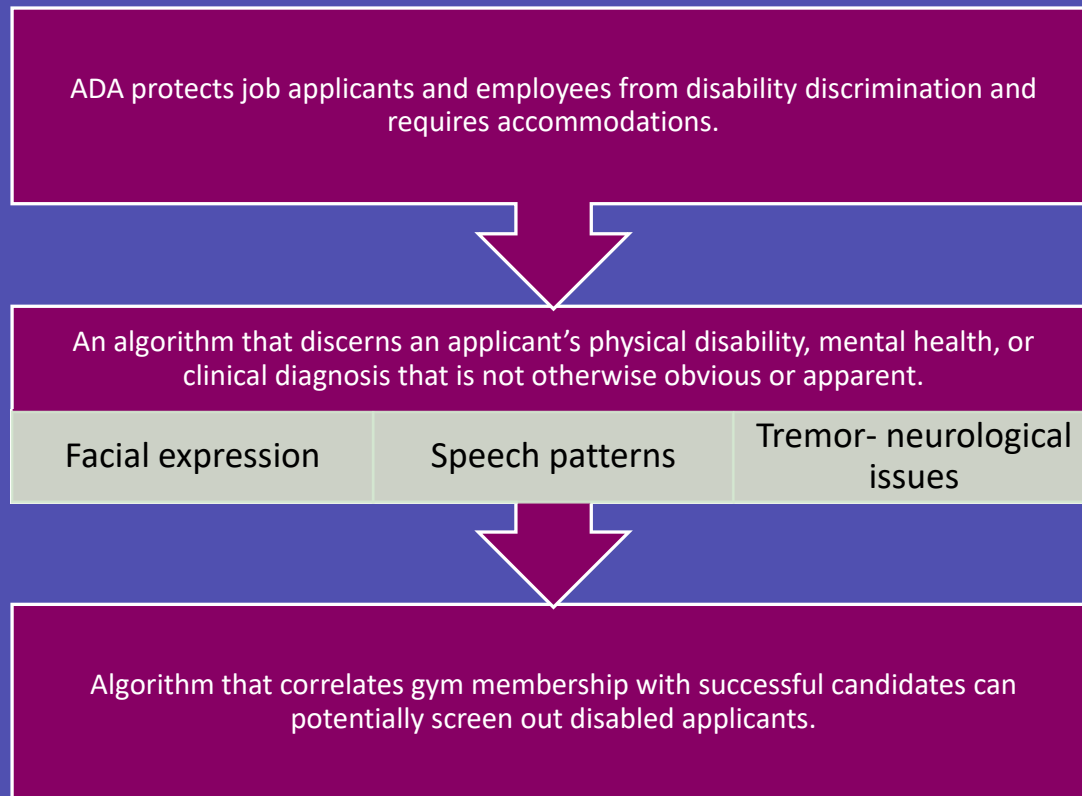


Zip codes



Chatbot that screens out applicants with gaps in their employment history

AI and Disability Discrimination



AI and Age Discrimination

ADEA

AGE

DISCRIMINATION IN

EMPLOYMENT

ACT

An employer was found to have violated the ADEA by advertising on a position within its company and limiting the audience for their advertisement to younger applicants.

Online automated hiring platforms had design features that discouraged older applicants.

EEOC AI Initiative



Establish an internal working group to coordinate the agency's work on the initiative

Listening sessions

Gather information about the adoption, design, and impact of hiring and other employment-related technologies

Identify promising practices

Technical assistance

EEOC AI Initiative



October
2021: EEOC
announces
“Artificial
Intelligence
and
Algorithmic
Fairness”
Initiative

Goal: To examine “how technology is fundamentally changing the way employment decisions are made...” and to ensure that “technologies are used fairly, consistent with federal equal opportunity laws.”

EEO Laws: ADEA



The Equal Employment Opportunity Commission (EEOC) seal hangs inside a hearing room at the headquarters in Washington, D.C.
Photographer: Andrew Harrer/Bloomberg

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f Facebook

in LinkedIn

🐦 Twitter

Aug. 10, 2023, 9:21 AM; Updated: Aug. 10, 2023, 1:46 PM

EEOC Settles First-of-Its-Kind AI Bias in Hiring Lawsuit (1)



Annelise Gilbert ✉️ 🐦

- Allegedly automatically rejected women over 55, men over 60
- Tutoring company admits no wrongdoing under consent decree

The US Equal Employment Opportunity Commission settled its first-ever AI discrimination in hiring lawsuit, reaching an agreement with a tutoring company that allegedly programmed its recruitment software to automatically reject older applicants.

iTutorGroup Inc. will pay \$365,000 to a group of rejected job seekers age 40 and over, according to a [consent decree](#) filed Wednesday in the US District Court for the Eastern District of New York.

The settlement comes amid the EEOC's [broader push](#) to target discrimination that can occur when employers rely on artificial intelligence and machine learning tools for hiring and other workplace decisions.

Sign up for The Brief, a daily afternoon newsletter showcasing Bloomberg Law's top stories.

Documents

- 📄 [EDNY Docket](#)
- 📄 [EDNY Notice of Settlement](#)

Related Stories

[Punching In: EEOC Chair Targets AI, Pay, Pregnancy As Priorities](#)

Aug. 7, 2023, 5:00 AM

[Regulate AI? Here's What That Might Mean In The US: QuickTake](#)

July 27, 2023, 2:09 PM

[Congress Weighs How To Regulate AI Without Hindering Competition](#)

June 22, 2023, 4:40 PM

National Labor Relations Act and AI: What Risks?



Critics say employers using surveillance, or giving the impression of surveillance, can violate the NLRA if it has a chilling effect on protected activities and makes workers fearful of retaliation.

GPS tracking that can give an employer an idea about which workers are gathering together.

Keystroke software could be used to identify workers' use of specific words or phrases such as "union."

National Labor Relations Act and AI: General Counsel Memo

On October 31, 2022, NLRB GC proposed burden-shifting framework.



An employer will be found to have presumptively violated the NLRA where its “surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee in engaging in activity protected by the Act.”

National Labor Relations Act and AI: General Counsel Memo

GC Abruzzo noted that several federal agencies have investigated employer monitoring and productivity tracking technology, and that any NLRB action would be in concert with other agencies, including

Federal
Trade
Commission

Consumer
Financial
Protection
Bureau

Department
of Justice

Equal
Employment
Opportunity
Commission

Department
of Labor

Fair Labor Standards Act and AI



What constitutes compensable hours worked?

Independent contractors

Joint employer status

FLSA exemptions

- Generative AI Tools

FLSA and AI: Exemptions Overview

To be eligible for the administrative, executive, or professional exemptions (“white-collar” exemptions) employees must meet three criteria:

Be paid on a salary basis

Be paid at least the minimum designated salary

Perform certain duties

Fair Labor Standards Act Exemptions



Journalist exemption



Doctor exemption



Lawyers/Paralegals

Legislative Landscape



- State Laws
 - Illinois
 - Maryland
- Local Laws
 - New York City
- Proposals
- Common Themes

AI Around the World



European Union AI Act

European Union's General Data Protection Regulation

Algorithms will always be changing as machine learning uses new data to keep predictions current.

Self-Regulation



Principles & Guidelines

Best Practices

Partnerships

Voluntary Commitments

Best Practices



Audits: Consider auditing the algorithms to confirm that there is no discrimination.



Policies: Consider adopting AI compliance policies aimed at bias prevention, the proper use of AI, and a plan to mitigate biases if they are uncovered.



Human involvement: Maintain human oversight of AI tools.

Avoid replacing discretion with algorithms wholesale – importance of human review is critical and the potential to change the decision.

Best Practices



Vendor role:

- Delegation.
- Due diligence.
- Contracts.

Situational awareness

- Navigating the legislative & regulatory environment.

QUESTIONS

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.

THANK YOU

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.



Bradford J. Kelley

Shareholder

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Focus Areas

AI in Human Resource Decisions
Robotics, Artificial Intelligence (AI) and Automation
Discrimination and Harassment
Wage and Hour
Leaves of Absence and Disability Accommodation
Workplace Policy Institute

Overview

Bradford J. Kelley has a broad practice representing employers in employment anti-discrimination and wage and hour matters. He focuses on advising clients about emerging technologies, including artificial intelligence (AI), and their impact in the workplace.

Brad is an internationally recognized workplace AI authority. He advises clients on how to maximize the benefits of using AI in the workplace while minimizing potential legal and business risks. His deep background in this area provides employers with the tools and insights they need to develop, deploy, and monetize AI and other emerging technologies to bolster business operations and efficiency. In addition, he counsels clients on how to effectively navigate the compliance requirements and litigation risks associated with evolving AI laws and regulations. Brad has published numerous articles about workplace AI, including:

- **Wage Against the Machine: Artificial Intelligence and the Fair Labor Standards Act**

Stanford Law & Policy Review, 2023

- **Filling the Void: Artificial Intelligence and Private Initiatives**

North Carolina Journal of Law & Technology, 2023 (co-authored with EEOC Commissioner Keith Sonderling)

- **The Promise and the Peril: Artificial Intelligence and Employment Discrimination**

University of Miami Law Review, 2022 (co-authored with EEOC Commissioner Keith Sonderling)

- **All Along the New Watchtower: Artificial Intelligence, Workplace Monitoring, Automation, and the National Labor Relations Act**

Marquette Law Review, forthcoming 2023

Brad also speaks nationally on these emerging issues. He has given workplace AI lectures at Duke University School of Law, Georgetown University Law Center, University of North Carolina School of Law, and George Washington University School of Law.

Prior to joining Littler, Brad was chief counsel to Commissioner Keith Sonderling at the U.S. Equal Employment Opportunity Commission (EEOC) where he provided the commissioner with legal and policy advice on federal employment anti-discrimination laws. At the EEOC, he worked on cases, policies, and regulations under all the statutes enforced by the Commission, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Equal Pay Act (EPA), the Pregnancy Discrimination Act (PDA), and the Genetic Information Nondiscrimination Act (GINA). He was also a key advisor to the commissioner regarding the EEOC's Initiative on Artificial Intelligence and Algorithmic Fairness. In this role, Brad was critical in developing, prioritizing, and implementing the Commissioner's AI agenda. During his time at the EEOC, Brad was awarded the EEOC Chair's Circle of Excellence Award for extraordinary commitment to the agency, one of the highest honors conferred within the Commission. In addition, he has been selected to serve on *Law360's* Employment Discrimination Editorial Board since 2022 and has served as an adjunct law professor teaching employment discrimination.

Before joining the EEOC, Brad was a senior policy advisor with the Wage and Hour Division (WHD) of the U.S. Department of Labor where he provided key policy and legal advice to the administrator regarding the administration, interpretation, and enforcement of the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and wage laws affecting government contractors.

A former U.S. Army infantry and intelligence officer and Iraq War veteran, Brad also defends employers against claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA), including complicated military leave issues. A leading authority on USERRA, Brad's articles on USERRA have been published in the *Penn State Law Review*, *Drexel Law Review*, *Hofstra Labor & Employment Law Journal*, and the *Military Times*.

Brad began his legal career as a clerk for a federal district judge. He graduated with Order of the Coif and *magna cum laude* honors from Louisiana State University Law Center, where he earned his law degree and a diploma in comparative law. In college, he earned a triple major and a minor and graduated with Phi Beta Kappa and *summa cum laude* honors.

Professional and Community Affiliations

- Board Member, Law360 Employment Discrimination Editorial Board

Recognition

- Recipient, Chair's Circle of Excellence Award, *EEOC*
- Order of the Coif
- Omicron Delta Kappa
- Phi Kappa Phi
- Recipient, Commendation for extensive pro bono work on behalf of veterans, *Veterans Consortium Pro Bono Program*

Education

J.D., Louisiana State University, Paul M. Herbert Law Center, *magna cum laude*

B.A./B.A., Louisiana State University, *summa cum laude*, *Phi Beta Kappa*

Bar Admissions

District of Columbia

Virginia

Courts

U.S. Court of Appeals, District of Columbia

U.S. Court of Appeals, 4th Circuit

U.S. District Court, District of Columbia

U.S. District Court, Eastern District of Virginia

Publications & Press

OFCCP Preparing to Scrutinize Federal Contractors' Use of AI Hiring Tools and Other Technology-based Selection

Procedures

Littler ASAP

September 7, 2023

Littler's Workplace Policy Institute Releases 2023 Labor Day Report

Littler Press Release

September 5, 2023

WPI Labor Day Report 2023

Little WPI Report

September 5, 2023

DoD reopens unpaid military internship program to new employers

Westlaw Today

September 1, 2023

DOL Proposes to Significantly Increase the Minimum Salary Level to Qualify for the “White Collar” Overtime Exemptions

Little ASAP

August 30, 2023

DoD Reopens Unpaid Military Internship Program to New Employers

Little ASAP

August 15, 2023

Former EEOC Chief Counsel and AI Pro Joins Littler in Washington, D.C.

Little Press Release

July 24, 2023

Filling the Void: Artificial Intelligence and Private Initiatives

24 North Carolina Journal of Law & Technology 153

2023

Wage Against the Machine: Artificial Intelligence and the Fair Labor Standards Act

34 Stanford Law & Policy Review 261

2023

The Promise and the Peril: Artificial Intelligence and Employment Discrimination

71 University of Miami Law Review 1

2022

For Whom the Leave Tolls: Short-Term Paid Military Leave and USERRA

127 Penn State Law Review 57

2022

The Sword and the Shield: The Benefits of Opinion Letters by Employment and Labor Agencies

86 Missouri Law Review 1171

2022

Veterans Employment Discrimination Guidance Updated

Military Times

February 3, 2021

Are Torts Getting Railroaded? Whether the Interstate Commerce Commission Termination Act (ICCTA) Preempts State Tort Claims Against Railroads

82 Journal of Transportation Law, Logistics and Policy 1

2016

Speaking Engagements

2023 Florida Regional Employer Conference

Miami, FL

October 12, 2023

2023 Littler AI Summit

Washington, DC

September 21, 2023

Emerging Technology and the Administrative State

University of North Carolina School of Law

January 27, 2023

Responsible Data and Emerging Technologies Fireside Chat Series

Duke University School of Law

January 25, 2023

The Promise and Perils of Artificial Intelligence in the Workplace: Navigating the Legal & Ethical Issues

Duke University School of Law

January 25, 2023

The Promise and the Peril of AI in the Workplace

Gray Matters Podcast

December 8, 2022

The Promise and the Peril: Artificial Intelligence and Employment Law

AgSafe Food & Farms Conference

October 11, 2022

A New Frontier for the EEOC: Artificial Intelligence in the Workplace

Fairfax Bar Association (Employment Law Section)

July 27, 2022

Artificial Intelligence in Employment and Hiring: Key Legal Considerations

ALI CLE

June 29, 2022



**False Claims Act:
Recent Developments and Emerging Trends**

False Claims Act: Recent Developments and Emerging Trends

DOECAA Annual Conference
September 27, 2023

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Today's Speakers



Mike Wagner
Partner
Government Contracts
Covington & Burling LLP



Terra Fulham
Special Counsel
Government Contracts
Covington & Burling LLP



Sajeev D. Malaveetil
Partner, Americas Leader
Government Contract Services
Ernst & Young LLP

Today's Agenda

- False Claims Act Overview
- Notable Cases
- Recent Resolutions
- Enforcement Trends and Focus
- Recent Policy Developments

False Claims Act Overview

Federal False Claims Act (“FCA”)

- 31 U.S.C. § 3729: FCA creates civil liability for anyone who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” or “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim”
- US Government uses FCA as an enforcement tool in investigations into procurement and contracting activity
 - Private whistleblowers can initiate actions on behalf of the government, receiving up to 30% of any amounts recovered
- FCA Liability Consequences:
 - Mandatory treble damages
 - Mandatory civil penalties (\$13,508 to maximum \$27,018 per violation)
 - Potential exclusion from future or current government contracting opportunities

Basic FCA Elements

Claim for Payment

- Liability extends to anyone who “cause[s]” the submission of a false claim

Falsity

- Factually false claim: contractor failed to render the goods or services as specified
- Legally false claim/ false certification: contractor falsely certifies compliance with terms, regulations, and laws

Knowledge

- “Knowingly” refers to actual knowledge, reckless disregard, or deliberate ignorance of the falsity of information; no specific intent to defraud is required

Materiality

- Misrepresentation must have “a natural tendency to influence, or be capable of influencing, the payment or receipt of property”

Common FCA Issues in Government Contracting

Nonconforming or defective goods & services

Defective pricing (CCPD not current, accurate & complete)

Falsely certifying supply chain compliance (BAA, TAA, 889, etc.)

Misrepresenting cyber safeguarding & reporting

Overbilling (e.g., labor categories, service codes)

Reverse false claims (i.e., failure to return overpayments)

Cost accounting violations

Misrepresenting project status and progress

Misrepresenting small business status

Recent FCA Statistics

- FY 2022 highlights from DOJ's annual FCA recovery statistics:
 - Settlements in FY 2022 totaled \$2.2 billion
 - 948 new FCA cases docketed — the most new FCA cases filed in one year since annual statistics began
 - Majority of these cases were *qui tam* matters
 - DOJ and whistleblowers were party to 351 settlements and judgments, second-highest amount in a single year
 - Healthcare Industry remains largest portion of recoveries, but government procurement still a significant driver of FCA recoveries

Notable FCA Cases

FCA at the Supreme Court:

United States ex rel. Schutte, et al. v. SuperValu Inc. et al., No. 21-1326

Holding

- The FCA scienter determination depends on a defendant's subjective belief about whether a claim was false when submitted, and not whether defendant had an objectively reasonable interpretation of the law or regulation at issue

Key Points

- Defense that interpretation of ambiguous law was "objectively reasonable" is eliminated
- Opinion did not address defense if defendant honestly believed claims were not false but they turned out to be
- Analysis of subjective intent will look to what defendant knew at the time to assess awareness of "substantial and unjustifiable" risks of submitting false claim

Consequences

- Longer, more costly discovery periods
- More challenging for FCA defendants to obtain early dismissals and summary judgment on scienter
- Company compliance policies should have stronger focus on claim accuracy and documenting basis for claim

FCA at the Supreme Court:

United States ex rel. Polansky v. Executive Health Resources Inc., No. 21-1052

Holding

- DOJ could intervene and dismiss a *qui tam* suit at any point in the litigation, even if it previously declined to intervene and that the Government's motion to dismiss would be reviewed under Federal Rule of Civil Procedure 41(a).

Key Points

- Court gave a low bar to grant government dismissal, requiring a "reasonable argument for why the burdens of continued litigation outweigh its benefit."
- Court emphasized time and resources expended in discovery as consideration for dismissal
- Decision aligns with 2018 "Granston" memo requiring DOJ to pursue dismissal in frivolous or parasitic suits.

Consequences

- May deter relators from bringing frivolous suits
- Modest reduction in future *qui tam* actions
- Burdensome discovery may emerge as a defensive tactic

FCA at the Court of Appeals

Case	Summary	Key Takeaway
<i>United States ex rel. Victoria Druding et al. v. Care Alternatives Inc.</i> , No. 22-1035 (3d Cir. Aug. 25, 2023)	<ul style="list-style-type: none">• Case involved allegations that a hospice care facility was billing Medicare without valid diagnoses of terminal illness• Another case continuing to flesh out <i>Escobar</i> materiality standard.• Third Circuit reversed summary judgment because the district court put too much weight in its materiality analysis on Medicare's continued payments after the case began.	<ul style="list-style-type: none">• Relying on a single <i>Escobar</i> factor may not be enough to show claims were not material
<i>United States ex rel. Aldridge v. Corporate Management, Inc.</i> , No. 21-60658 (5th Cir. Aug. 21, 2023)	<ul style="list-style-type: none">• Case involved allegations of the submission of false claims to Medicare.• Government waited over 8 years to intervene and made 18 requests to extend the seal on the qui tam complaint.• Fifth Circuit reduced an FCA jury award by 50% because the Government created inexcusable delay in intervening in relator's case because the government's complaint-in-intervention was sufficiently distinct from the relators' complaint that the government's complaint did not relate back for statute of limitations purposes.	<ul style="list-style-type: none">• May give courts some hesitation on seal extension requests or otherwise allow defendants to challenge the pace of litigation once case is unsealed.

FCA at the Court of Appeals

Case	Background	Key Takeaway
<i>Piacentile v. U.S. Oncology</i> , No. 22-18, 2023 WL 2661579, (2d Cir. Mar. 28, 2023)	<ul style="list-style-type: none">• Second Circuit held that public disclosure bar applied to relator’s allegations “even if the prior disclosure does not identify defendant by name,” because it still set the government “on the trail of a specific and identifiable defendant.”	<ul style="list-style-type: none">• Purpose of public disclosure bar is to determine when government was on the trail of fraud, and it can be a good tool for early dismissal
<i>United States ex rel. Toledo v. HCA Holdings, Inc.</i> , No. 21-20620 (5th Cir. Apr. 7, 2023)	<ul style="list-style-type: none">• Concerned FCA anti-retaliation provisions at 31 U.S.C. 3730(h).• Fifth Circuit held that an employee who was terminated when the decision makers were unaware of any protected conduct and the alleged conduct did not contribute to her retaliation did not fall within scope of FCA retaliation provision• Employee relied on one-off emails and questions to allege protected conduct	<ul style="list-style-type: none">• Courts are affirming that retaliation provision is not triggered if employers do not know of alleged protected conduct and the termination was unrelated to alleged conduct.

Notable Resolutions

Notable Resolutions

- Booz Allen reached \$377,453,150 settlement with DOJ to resolve allegations that from 2011 to 2021, it failed to comply with CAS by disproportionately allocating indirect costs to its government contracts and subcontracts that should have been charged to commercial or international contracts. (July 21, 2023)
- Case initiated by *qui tam* whistleblower; given incentives, copycats are likely.

Lessons Learned: Government contractors must carefully examine and document accounting practices regularly to ensure compliance with CAS. Contractors also should ensure they have effective procedures for encouraging and addressing employee compliance concerns.

Notable Resolutions

- DOJ reached an \$18 million resolution with Amphenol Corporation to settle allegations that it violated the FCA because it failed to comply with applicable regulations and contract specifications in its testing standards and manufacturing requirements. (August 4, 2023)
- As part of the settlement, Amphenol acknowledged that it had not timely completed required qualification testing or timely reported testing failures in some instances.

Lessons Learned: Contractual testing and qualification requirements are strictly enforced, and contractors must prioritize compliance efforts in this area.

Notable Resolutions

- Verizon Business Network Services LLC, of Ashburn, Virginia reached a \$4,091,317 settlement to resolve allegations that it “failed to completely satisfy certain cybersecurity controls” on services provided to federal agencies. (September 5, 2023)
- DOJ recognized Verizon self-disclosed, cooperated with the investigation, and took “a number of significant steps entitling it to credit for cooperating.”

Lessons Learned: DOJ remains serious about its Cyber Fraud Initiative, including aggressive enforcement of any knowing violations. But cooperation methods (e.g., self disclosure, initiating internal investigation, supplemental disclosures, and remediation) are valuable at the resolution stage.

Notable Resolutions

- Foresee Results, Inc. and Verint Americas, Inc. (collectively Foresee) agreed to pay \$7 million to resolve allegations that they used a consumer satisfaction methodology that did not conform to contract specifications when running a website for the Federal Consulting Group, part of the U.S. Department of Interior. (July 21, 2023)
- Case was initiated by *qui tam* relators, both of which were corporate entities.

Lessons Learned: The FCA is one of the most versatile enforcement tools in the government's arsenal, and we are increasingly seeing non-traditional *qui tam* relators initiate non-traditional FCA actions.

Enforcement Trends and Focus

DOJ Task Forces and Initiatives

DOJ's Civil Cyber-Fraud Initiative

Announced October 2021

- Designed to combat emerging cyber threats to security of sensitive information through civil fraud enforcement
- Three resolutions this year, with amounts expected to continue growing

DOJ Task Forces and Initiatives

DOJ's COVID-19 Fraud Enforcement Task Force

Established May 2021

- As of August 2023, there have been 718 enforcement actions and \$836 million in alleged COVID-19 fraud

- Two more location-specific strike forces added in September 2022 with intent to increase reach and recover funds
- Civil recoveries cover range of areas from healthcare billing fraud, refundable tax credits for business, or fraud against the Small Business Administration programs

DOJ Task Forces and Initiatives

DOJ's Procurement Collusion Strike Force (PCSF)

Announced November 2019

- Coordinated national response to combat antitrust crimes and related schemes in government procurement and grant programs
- Comprised of Antitrust Division and multiple U.S. Attorney's Offices

- Expected rise in FCA enforcement activity based on DOJ's emphasis on parallel proceedings
- PCSF force is compared to DOJ's successful Health Care Fraud Strike Force

Recent Policy Developments

Proposed Legislation

- In July 2023, Senator Grassley (R-IA) introduced the False Claims Act Amendments of 2023
- Follows Senator Grassley's attempt to make similar but more extensive amendments to the FCA in 2021
 - 2021 amendments passed the Judiciary Committee but did not go further
- Amendments have bi-partisan support
 - Sponsored by Democratic Chair Sen. Durbin (D-Ill), Sen. Grassley, and Sen. Kennedy (R-La).

Proposed Legislation

■ False Claims Act Amendments of 2023 proposed changes:

Weakening Materiality Standard

- “In determining materiality, the decision of the Government to forego a refund or to pay a claim despite actual knowledge of fraud or falsity shall not be considered dispositive if other reasons exist for the decision of the Government with respect to such refund or payment.”

Expanding Retaliation Provision

- Expanding retaliation provision to include “current or former” employees.

Increasing GAO Reporting

- Requiring Office of Comptroller to report to GAO “(1) a description of the benefits and challenges of enforcement efforts . . . (2) information on the amounts recovered by the Government under the [FCA] since the date of enactment of the False Claims Act Amendments of 1986.”

Other Policy Updates

- Senate passed the Administrative False Claims Act of 2023 (AFCA).
 - Sponsored by Senators Grassley and Durbin
 - Raises statutory ceiling on the lower-dollar value fraud claims that can be resolved through the program Fraud Civil Remedies Act of 1986
 - Ceiling under AFCA raised from \$150,000 to \$1 million.

Questions?



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Mike Wagner represents companies in high-stakes disputes and enforcement matters arising in the public procurement context.

Mike regularly represents contractors in federal and state compliance and enforcement matters relating to a range of procurement laws and regulations, and he has particular experience handling investigations and litigation brought under the civil False Claims Act. He also routinely counsels clients on government contract performance issues, handles an array of complex claims and terminations, and litigates disputes before the boards of contract appeals and in the Court of Federal Claims.

Mike also has extensive experience with suspension and debarment matters, and he has successfully represented dozens of entities and individuals in such proceedings at the federal and state levels. He is the former Co-Chair of the ABA Suspension & Debarment Committee and is principal editor of the American Bar Association's *Practitioner's Guide to Suspension & Debarment* (4th ed.) (2018).

Mike serves on Covington's Hiring Committee and is Co-Chair of the firm's Summer Associate Program. He is a frequent writer and speaker on issues relating to procurement fraud and contractor responsibility, and he has served as an adjunct professor at the George Washington University Law School.



Terra Fulham
Special Counsel
Covington & Burling LLP

Terra Fulham represents corporate and individual clients in complex litigations and investigations, with particular expertise in defending government contractors against allegations of fraud and False Claims Act violations.

Terra has experience representing clients at all stages of internal and government investigations, including conducting witness interviews, managing government subpoena and CID responses, defending witnesses in government interviews, and advocating before government enforcement officials. She has litigated qui tam matters brought under the False Claims Act, including matters alleging subcontractor fraud, quality assurance deficiencies, conflicts of interest, and cost mischarging.

Terra also represents government contractors in suspension and debarment matters to ensure clients' continued eligibility to participate in federal programs and currently serves as a Vice-Chair of the ABA Suspension & Debarment Committee.



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Bachelor of Science in Accounting, George Mason University

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Memberships

American Bar Association, Vice Chair on several committees for Section of Public Contract Law
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Greater Washington Society of CPAs, Board Member
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Biography

Sajeev D Malaveetil, CPA

Partner, EY Americas Government Contracts Services Practice Leader

Professional background

- ▶ Sajeev is a Partner and leader of the Forensics Government Contracts Services Practice at Ernst & Young LLP, based in the Washington, DC area.
- ▶ Over his 29 years of experience in industry and serving clients and counsel, Sajeev has served as the lead on several high profile matters related to government contract pricing, compliance, accounting, and financing. These include matters related to alleged violations of the False Claims Act, defective pricing under Truthful Cost or Pricing Data, Cost Accounting Standards, Service Contract Act, Procurement Integrity, commercial pricing and Anti-Kickback Act.
- ▶ Sajeev leads a team of professionals across the country in assisting clients with performing internal investigations, audits and mandatory disclosures and directing forensic accounting analysis and preparing expert reports in matters related to alleged fraud, contractor claims, arbitrations, and government investigations. In addition, he has lead several bid protest matters related to price reasonableness and cost realism.
- ▶ Sajeev provides advisory services to the firm's clients, across all sectors, to help improve their understanding and compliance with regulatory and statutory government award requirements. This includes designing and implementing business process and internal control enhancements to address these requirements.
- ▶ Sajeev's experience and knowledge spans the entire lifecycle of government contracting including:
 - Proposal and pricing
 - Certifications and representations
 - Cost Accounting and Incurred Cost Submissions
 - Assessing CAS Compliance and Implementing CAS Compliant Practices
 - CAS Board Disclosure Statement Preparation and Submission
 - CAS Cost Impact Preparation and Settlement Negotiation
 - Government contract compliance due diligence, integration and restructuring
 - Preparation and Evaluation of Cost Proposals and Bid Protests
 - Cost or price analysis
 - Contract and Subcontract Administration and Compliance
 - Supporting Contractors in Government Audits and Investigations
 - Indirect Rate Design and Restructuring
 - Contractor Business Systems
 - Truthful Cost or Pricing Data and defective pricing matters
 - Commercial Item acquisitions
 - Federal Supply Schedule ("GSA Schedule") compliance
 - False Claims Act litigation support and damages analysis
 - Mergers & Acquisitions and Post-Acquisition Integration
 - Performing Internal Audits, Investigations and Mandatory Disclosures
- ▶ Sajeev has spoken and written extensively on various matters related to government contract accounting, pricing and compliance. In addition, he maintains a Top Secret clearance.
- ▶ Sajeev serves as an Adjunct Professor at George Mason University's School of Business, where he teaches Graduate courses on US Federal Government procurement business systems, compliance, and controls.



**KEYNOTE ADDRESS:
Perspectives from NNSA General Counsel**

**Timothy Fischer
General Counsel
NNSA**

T. Fischer Bio



Timothy P. Fischer
General Counsel
Office of the General Counsel
National Nuclear Security Administration

Tim Fischer is a member of the Federal Senior Executive Service (SES) and serves as General Counsel for the National Nuclear Security Administration (NNSA) at NNSA HQ in Washington, District of Columbia. In this capacity he is the chief legal officer for the NNSA, advising the Administrator and senior NNSA leadership on all legal matters, including the implications of proposed legislation and relevant laws, executive orders, court decisions, and the binding decisions of third-party judicial and administrative appellate bodies. He leads an office of forty legal, NEPA and FOIA professionals. Prior to his current assignment he served as NNSA Deputy General Counsel. Before coming to HQ, he was at the NNSA's Savannah River Site Office, serving as Site Counsel and Business Manager. Before joining the NNSA Site Office, he began his DOE career at the Savannah River Site, working in the Office of Environmental Management's Office of Chief Counsel.

Tim is a veteran of the United States Air Force serving as an active duty Judge Advocate, spending three years at Whiteman Air Force Base, Missouri, followed by a second three-year assignment to Aviano Air Base, Italy. Mr. Fischer left active duty after six years to join DOE but continued his military career in the USAF Reserves. He retired as a Lieutenant Colonel after serving as the Staff Judge Advocate at Charleston Air Force Base, South Carolina.

Tim holds a Doctor of Jurisprudence from the University of Denver and a Bachelor of Arts in Philosophy, St John's University, Collegeville, Minnesota. He has been licensed to practice law by the Supreme Court of Colorado since October 1989 and completed DOE's Nuclear Executive Leadership Training. He was born in Minnesota and Raised in Colorado. He and his wife Karen have an adult daughter.



**The Future of Diversity and Inclusion
Considering Recent Supreme Court
Decisions**

DEI STRATEGIES IN UNCERTAIN TIMES

September 2023

AGENDA

01

Current Climate

02

Analysis of the *UNC* and *Harvard* Cases

03

Potential Implications for Higher Education and Beyond

04

Mitigating Risk of DEI Strategies

05

Practical Takeaways

Current Climate

Morgan Lewis

Increasing Litigation Threat to DEI

- A coordinated and well-funded effort to challenge the legality of DEI programs under federal antidiscrimination laws and the US Constitution has grown
- The *UNC* and *Harvard* cases are prominent examples of this campaign in education, but that is not the only area affected
- Corporate DEI practices and race-conscious charitable programs have been challenged as violating federal and state antidiscrimination laws, as well as being the targets of increased activity by well-funded activist groups



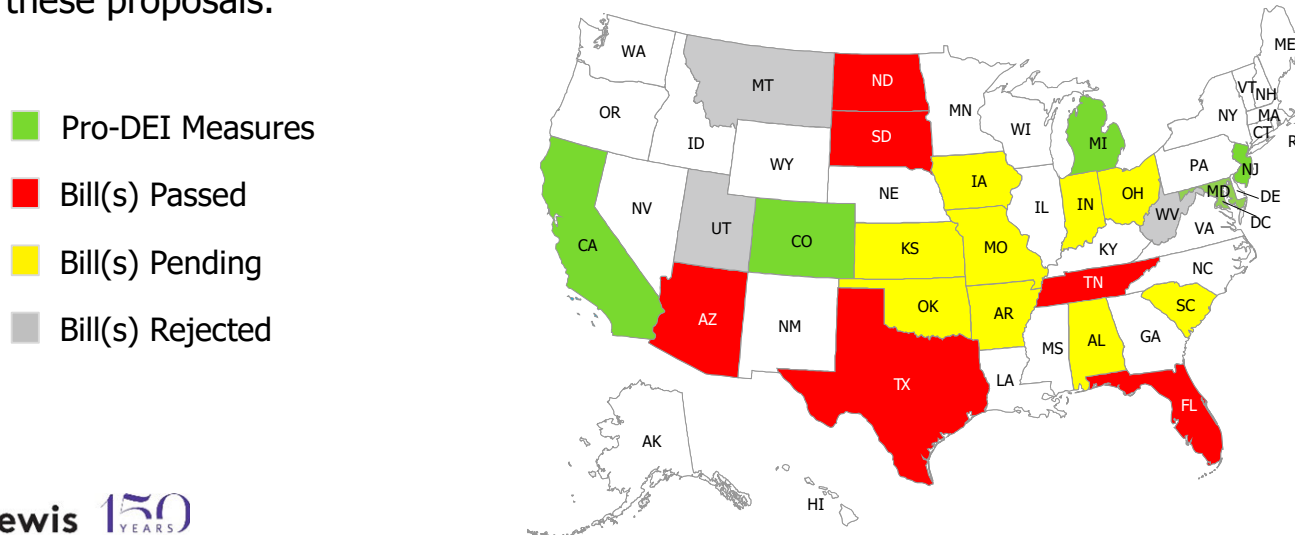


Overview of Recent Legislative Activity

- There are currently more than 30 bills across the United States targeting DEI initiatives at public colleges, which could affect employee recruiting and hiring pipelines as well.
- The bills could impact a wide range of DEI initiatives, from defunding DEI offices and officers to removing diversity statements from hiring practices.
- Given the recent *Harvard/UNC* Supreme Court decision, we expect to see an increasing number of anti-DEI legislative and litigation activity to press the contours of what types of DEI programs are permissible in other contexts such as employment.

Current Legislative Climate Regarding DEI Programming

- There are currently more than 30 bills pending (some of which have been enacted) across 18 states that challenge entities' ability to establish DEI programs or offices, or create DEI initiatives, trainings, or curriculum.
- While most of these pending laws seek to limit the activities of public entities, including public universities or schools, depending on the success of these efforts, we expect to see additional efforts to expand these proposals.



Pro-DEI Legislation and Initiatives

- **Executive Order 13985:** signed by President Biden in February 2023; calls for expanded DEI efforts across federal agencies, including directing federal agencies to conduct equity assessments of their policies and programs.
- **California Executive Order N-16-22:** advanced by Governor Newsom; establishes a state Racial Equity Commission to take additional actions to embed DEI efforts into state agencies and departments' missions, policies, and practices.
- **Colorado HB 22-1196:** requires the equity, diversity, and inclusion task force established pursuant to the "Colorado Partnership for Quality Jobs and Services Act" to contract for a pay equity study to assess pay inequities specific to gender, race, and other protected classes.
- **Maryland corporate diversity statute:** effective July 2022, conditions the corporate receipt of state grants, tax credits, or contracts in excess of \$1 million per year on demonstrated membership of underrepresented communities in a business's board or executive leadership, or on demonstrated support for underrepresented communities in its mission.
- **Michigan 2024 Budget Proposal:** advanced by Governor Whitmer; prohibits state funds from being used to "restrict or interfere with actions related to diversity, equity and inclusion." The budget also includes funding for other DEI-related efforts, such as the Michigan Department of Civil Rights' "Diversity, Equity, and Inclusion Summit."
- **New Jersey Bill 1808 (proposed):** would require public institutions of higher learning to develop faculty and student diversity plans, including specific goals to increase the recruitment and retention of students, faculty, and staff.
- **New Jersey Senate Concurrent Resolution:** filed with the Secretary of State in January 2023, urging the Governor, the Commissioners of the Board of Public Utilities, and State departments receiving federal infrastructure funds under the federal Infrastructure Investment and Jobs Act (IIJA) to renew their commitment to female, minority, and veteran owned small businesses, by increasing outreach, transparency, and monitoring of procurement practices and work to ensure that these businesses receive opportunities and contract awards for the funds provided in the IIJA.

Pending Legislation Sample

- **Arkansas Senate Bill 71:** would prohibit state entities from granting preferential treatment to any individual based on race, sex, color, ethnicity, or national origin in matters of state employment, public education, etc.
- **Indiana House Bill 1338:** would provide that teachers and administrators of public schools cannot promote certain topics related to race or sex or require students to engage in any gender or sexual diversity training or trainings on race or sex stereotyping.
- **Missouri House Bill 1196:** would, among other items, prohibit public educational institutions from requiring or soliciting any applicant to submit a DEI statement.
- **Missouri Senate Bill 680:** would, among other items, prohibit state colleges and universities from enforcing a “discriminatory ideology” that promotes the “differential treatment” of an individual based on characteristics such as race.
- **Ohio Senate Bill 83:** would, among other items, prohibit state institutes of higher education from requiring mandatory programs or trainings related to DEI and require such institutions not to endorse any “controversial belief or policy.”
- **South Carolina Bill 4290:** would, among other items, prohibit institutions of higher learning from promulgating policies, trainings, or programming with reference to race and other characteristics, and prohibit official positions of the institution related to implicit bias, cultural appropriation, microaggressions, etc.
- **Texas House Bill 5127:** would prohibit state institutions of higher education from, among other items, requiring or giving preferential consideration to certain ideological oaths or statements that undermine academic freedom and establishing or maintaining a DEI office or requiring training on DEI initiatives.

Passed Legislation Sample

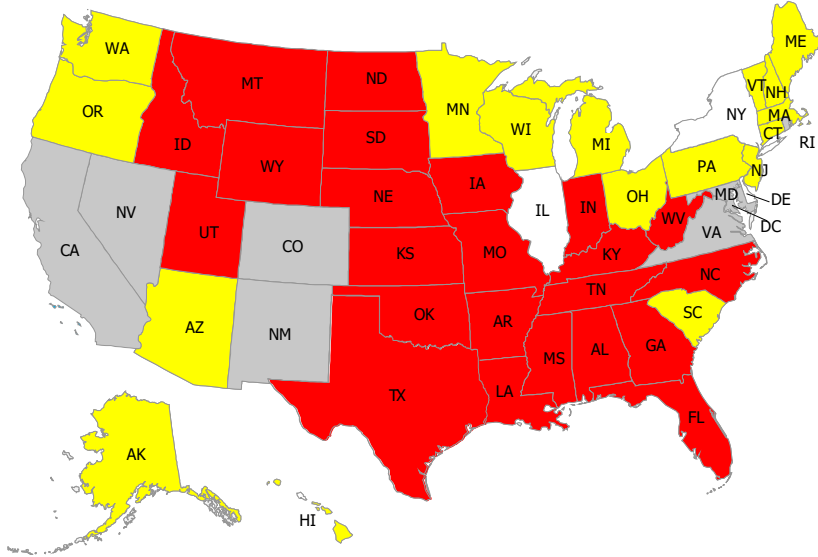
- **Arizona House Bill 2906:** prohibits any state agency, city, or town from requiring an employee to participate in training that presents blame or judgment on the basis of race, ethnicity, or sex, as well as prohibits the use of public monies for such trainings.
- **Florida Chapter 2022-72:** makes it an unlawful employment practice to subject any individual, as a condition of employment, to training or instruction on certain concepts related to discrimination based on race, color, sex, or national origin, including that an individual's status as oppressed is necessarily determined by his or her race.
- **North Dakota Senate Bill 2247:** provides, among other items, that any student or employee of a state higher education institution cannot be penalized for refusal to support specific concepts related to race, including racial superiority, and that an institution may not conduct mandatory trainings on such topics.
- **South Dakota House Bill 1012:** prohibits any institution under state control from requiring trainings that promote "divisive concepts" related to race, religion, sex, etc. Such trainings may not be a condition of enrollment or attendance.
- **Tennessee Senate Bill 817:** prohibits public institutions of higher education from requiring that an applicant for employment or admission submit a personal diversity statement or affirm agreement with institutional diversity.
- **Texas Senate Bill 17:** prohibits state institutions of learning from creating offices of DEI, giving preference based on race, or conditioning enrollment on participation in DEI training.




Rejected Legislation Sample

- **Arizona Senate Bill 1694:** would have prohibited any public entity from, among other items, requiring participation in DEI programming, spending public funds on DEI programming, or promoting theories of “unconscious or implicit bias.”
- **Montana Senate Bill 222:** would have prohibited any state entity from requiring, as a condition of employment, training related to certain concepts related to DEI.
- **Utah House Bill 451:** would have prohibited any public educational institution from granting preferential consideration to a person who provides a statement related to DEI.
- **Utah Senate Bill 238:** would have required an education committee to conduct a study on DEI endeavors.
- **West Virginia Bill 3503:** would have prohibited institutions of higher learning from requiring diversity statements in the application process, mandatory diversity training, and preferential consideration based on race, sex, color, gender, etc.

Anti-LGBTQ+ Laws by State

- Additionally, as of September 2023, 84 anti-LGBTQ+ bills have passed into law across 23 states, and 190+ bills are pending across 32 states.
- However, some jurisdictions have continued to expand legal protections for the LGBTQ+ community.



-  Has Passed Anti-LGBTQ+ Law(s)
-  Has Anti-LGBTQ+ Law(s) Pending
-  Anti-LGBTQ+ Law(s) Have Been Rejected

Litigation Climate

- We are also seeing a variety of civil litigation activity in this space, including:

Individual and
class action
litigation

Shareholder
claims

Internal
employee
concerns

Public
demand
letters

Charges of
discrimination
to the EEOC

Ongoing risk
of traditional
discrimination
claims

Post Harvard/UNC Allegations*

- An automotive insurance company violated Section 1981 by offering \$25,000 grants to Black-owned small businesses
- A venture capital fund's grant contest for Black women entrepreneurs is "a racially-discriminatory program that blatantly violates section 1981's guarantee of race neutrality"
- Two law firms' race-conscious diversity fellowships violate Section 1981
- A media company implemented a "Reverse Race Discrimination Policy" that created racial quotas, gave executives incentives to reduce the number of nonminority workers, and gave preferential treatment to minority workers in hiring, promotions, and salary
- A food manufacturer's DEI initiatives (including aspirational goals, gender-exclusive leadership development programs, and a race-exclusive fellowship program) violate Title VII

**These are all allegations and have not yet been adjudicated.*

Examples of Public Demand Letters

- The America First Legal Foundation (AFLF) asked EEOC to open an investigation into **a communication company** for violations of Title VII, and separately wrote to the CEO of Twilio demanding that management stop its DEI policies, including race-based hiring quotas, anti-racism rhetoric, apprenticeship and leadership coaching for diverse and underrepresented groups, and alleging that they violated management's fiduciary duties to shareholders (Sept. 23, 2022).
- AFLF wrote to the chair of the **multinational mass media and entertainment conglomerate** alleging that its board is breaching its fiduciary duty by permitting the creation of an unlawful hostile work environment on the basis of religion and political views, largely relating to Disney's statement in opposition to Florida's "Anti-Woke" bill (Apr. 5, 2022).
- AFLF wrote to the EEOC demanding an investigation into **Anheuser Busch** regarding alleged violations of Title VII based on its Leadership Accelerator Program for Black, Latinx, and Native American individuals; 2022 annual report highlighting DEI as a global priority; and 2022 ESG report detailing sex-based hiring and diverse scholarship funds (Apr. 17, 2023).
- The American Civil Rights Project wrote to a **pharmaceutical and biotechnology corporation** board of directors on behalf of Pfizer stockholders, alleging that Pfizer's commitment to DEI as disclosed in its ESG Report is discriminatory, including its diversity fellowship program and leadership programs (Sept. 19, 2022).
- Thirteen **Republican Attorneys General** signed a public letter to the CEOs of Fortune 100 companies, voicing opposition to employers' DEI strategies and alleging that the Supreme Court's *Harvard/UNC* decision implicates corporate DEI programs and warning of legal action if the employers do not "refrain from discriminating on the basis of race, whether under the label of 'diversity, equity, and inclusion' or otherwise" (July 13, 2023).
- Seven **Democratic Attorneys General** signed a responsive public letter promising legal defense to companies whose DEI initiatives face challenges by Republican officials, and countering that the Supreme Court decision has no influence on the hiring practices of private companies and admonishing the Republican letter for seeking to "intimidate" companies into "rolling back the progress" they have made (July 19, 2023).

SCOTUS:
Affirmative Action in College
Admissions Is Unconstitutional

Students for Fair Admissions (SFFA)
v.
Harvard & UNC

Relevant Precedent

Regents v. Bakke (1978)



- Plurality
- Use of race must be “precisely tailored to serve a compelling governmental interest”
- Justice Powell: “attainment of a diverse student body” is a compelling interest

Grutter v. Bollinger (2003)



- Compelling interest in “a diverse student body”
- “The Court expects that **25 years from now**, the use of racial preferences **will no longer be necessary** to further the interest approved today”
- “Plus” factor only

Fisher v. Univ. of Texas (2016)



- “[A]sserting an interest in the educational benefits of diversity writ large is insufficient. ... [G]oals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.”

SFFA v. Harvard & UNC

Race-Based College Admissions Fail Strict Scrutiny

- Split along ideological lines (6–3)
- No precedent **expressly** overruled
- Equal Protection Clause (UNC)
- Title VI (Harvard)



The Court's Issues with Harvard & UNC's Programs



1. Immeasurable goals
2. Lack of fit between means and goals
3. Necessarily use race in a “negative manner”
4. Perpetuate stereotypes
5. No meaningful end points

Some Race-Related Considerations Allowed

- **Universities** may consider “an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”
- **Governmental interests that can justify the use of race-conscious decision-making:**
 - Remediating specific identified instances of past illegal discrimination
 - Avoiding imminent and serious risks to human safety in prisons



A person in a blue suit is being lifted by another person against a sunset background. The person being lifted has their arms raised in a 'V' sign. The background shows a sunset over a body of water.

Potential Implications for Higher Education and Beyond

Implications for Colleges & Universities

- Racial diversity on campus is still a permissible goal, but institutions cannot use racial identity itself as a factor in the admissions process
- Evaluating adjustments to the admissions process and criteria based on the Court's ruling
- This decision will embolden plaintiffs to challenge other aspects of the educational setting



Next Steps for Colleges & Universities

- In what ways, if any, does our admissions process consider race or ethnicity, and what changes, if any, should be implemented now?
- How do our mission, goals, and messaging, as they relate to diversity, align with the Court's ruling?
- What education and training may be necessary for admissions officers and other key stakeholders?



Implications for Employers

- No immediate impact on private employer DEI efforts.
- Analyze each employment discrimination statute separately according to its own text and body of law.
- This decision will embolden plaintiffs and legal advocacy groups to bring challenges to employer DEI efforts.
- We will likely see equally strong resistance to such challenges from those supportive of current DEI programs



Comments from Legal Advocates

"America First Legal is holding corporate America accountable for illegally engaging in discriminatory employment practices that penalize Americans based on race and sex." – America First Legal website

"[The Supreme Court's ruling is] a helpful reminder that no employment program seeking a racial balance for its own sake can comply with our laws." – Dan Morenoff, Executive Director of the American Civil Rights Project

"The Supreme Court ruling is a warning to corporate elites to stop foisting their liberal agenda on the nation." – Scott Shepard, Director of the National Center for Public Policy Research's Free Enterprise Project.

"[M]ajor companies adopt explicitly race-based initiatives which . . . include, among other things, explicit racial quotas and preferences in hiring, recruiting, retention, promotion, and advancement. . . . Attempting to defend such racial hiring in the name of seeking racial diversity is unavailing. . . . We urge you to immediately cease any unlawful race-based quotas or preferences your company has adopted for its employment and contracting practices." – Attorneys General of 13 States to Fortune 100 CEOs

Next Steps for Employers

- Companies have adopted widely varying DEI programs/strategies, and the risk is fact-specific.
- **Key Questions:**
 - ✓ What programs or strategies consider race, gender, or other protected characteristics?
 - ✓ What is the business rationale for those programs?
 - ✓ Have we conducted appropriate statistical analyses under direction of counsel to assess legal risk?
 - ✓ What programs or strategies might employees or litigants misinterpret as providing a benefit on the basis of race or other protected characteristics?



Implications for Federal Contractor Employers

- Executive Order (EO) 11246 requires certain federal contractors to create affirmative action programs that focus on the recruitment, hiring, promotion, and retention of women and minority employees
- “Affirmative action” under EO 11246 is not used in the same sense as “affirmative action” in the Harvard/UNC cases
- Plans under EO 11246 should remain enforceable – but continue to be monitored



Implications for Race-Conscious Contracting

- Federal law (Section 1981) prohibits granting contracts or more favorable contractual terms on the basis of race.
- Many organizations seek to contract with minority and women-owned business enterprises and/or have supplier diversity programs and initiatives.
- We are seeing more challenges to diversity programs under Section 1981.





Implications for Grantmaking & Investing

- We could see similar challenges to
 - Nonprofit foundations, educational institutions, and/or government actors who seek to provide grants or benefits to underrepresented groups or minority-led organizations
 - Investment firms and funds that seek to invest with minority-led funds or fund managers or otherwise base investment decisions on factors related to gender, race, or ethnicity

Assessing Contracts, Investments, and Grants

- Questions to ask:
 - Does the program create a contract?
 - Does the program actually grant benefits on the basis of race or other protected characteristics?
 - Is the program protected by the First Amendment?





D&I Strategy Considerations

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Program Creation

- Consider replacing race-exclusive eligibility criteria with race-neutral criteria that nevertheless target underrepresented groups.
 - First generation
 - Residents of historically disadvantaged geographic areas
 - Individuals who demonstrate that they have faced barriers to the industry due to their backgrounds
- Consider providing “no-strings-attached” support to students to encourage diversity in industry without any agreement to contract.



Program Implementation

- Ensure that stakeholders understand the actual eligibility criteria for the DEI programs they support.
- Assess both technical eligibility requirements and the ultimate pool of participants.
- Ensure that internal and external communications about DEI programs are accurate and consistent.



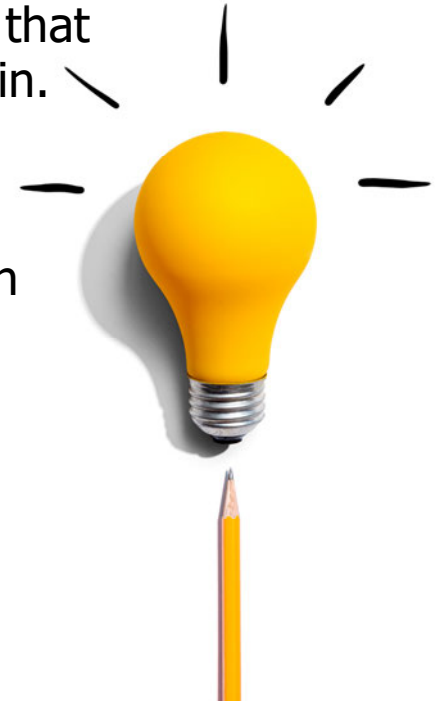
Invest in Strategies to Promote Inclusion

- Evaluate managers on:
 - How they foster inclusion
 - The cohesiveness of their teams
 - Their ability to behave respectfully in the face of stress
 - Their engagement in mentorship and sponsorship
- Rewards based on feedback regarding kindness, civility, and respect.



Invest in Strategies to Promote Inclusion

- **Hiring:** Structure interviews so every candidate is asked the same questions and evaluated the same way.
- **Engagement:** Train managers to structure meetings so that everyone participating is given the opportunity to weigh in.
- **Leadership Development:** Determine which skills are critical for promotion to leadership and ensure that all employees in the pipeline are given opportunities to learn those skills.



Takeaways and Next Steps

Takeaways

- Court did not change legal analysis under Title VII or Section 1981
- We can expect greater scrutiny/increased litigation risk
- It will take time for the law to evolve



Next Steps

- Conduct inventory of DEI practices, especially those that are race-exclusive or race-conscious
- Review messaging and communications
- Conduct refresher trainings
- Discuss level of risk tolerance with leadership
- Mitigate unnecessary risk

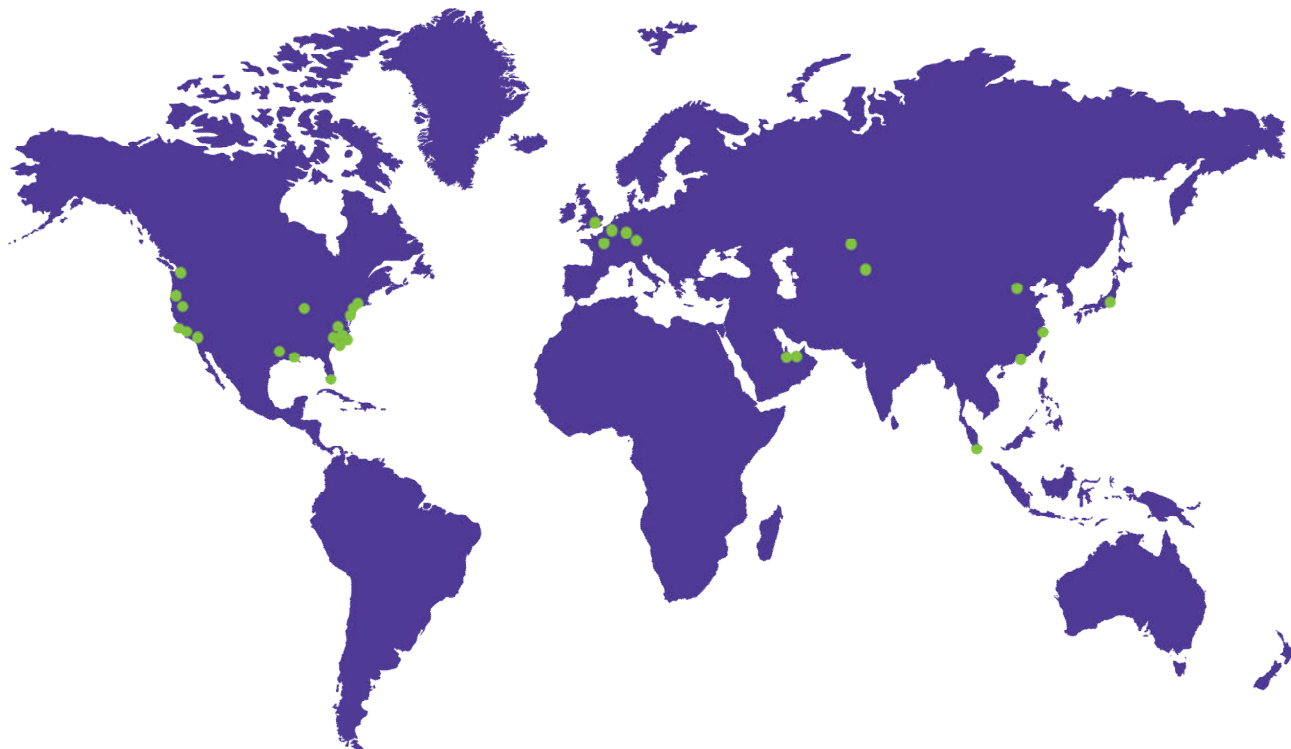


Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Astana
Beijing
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong
Houston
London
Los Angeles
Miami
Munich
New York
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
Seattle
Shanghai
Shenzhen
Silicon Valley
Singapore
Tokyo
Washington, DC
Wilmington



THANK YOU

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Christopher A. Parlo represents and counsels management clients in all aspects of labor and employment law. As co-leader of the firm's wage and hour litigation and counseling practice and its independent contractor team, Chris focuses on the defense of US federal and state wage and hour class and collective actions. He also defends employers in individual and complex employee litigation, including as lead trial counsel in both jury and bench trial settings. Chris is also a co-leader of the firm's insurance industry team, which focuses on thought leadership in the industry and coordinated representation of clients across all of the firm's practice areas.

Chris has served as lead counsel in more than 110 wage and hour class and collective actions in numerous jurisdictions throughout the United States, and has had a role in dozens more.

Chris opposes and has defeated efforts to certify classes and/or to send notice of the actions, and has experience in the decertification of actions. He has successfully compelled individual named plaintiffs into arbitration, thereby defeating class status, and obtained summary judgment on individual named plaintiff claims and on claims of the class.

Chris also has experience in the determination of complicated class-based damages and limitation of class discovery. He helps clients avoid class discovery disputes, supervises paperless electronic discovery systems involving millions of documents, and litigates privilege issues. Chris has successfully mediated and settled hundreds of actions, drafted numerous complicated settlement documents and settlement implementation processes, and supervised settlement administration in many multi-thousand-plaintiff actions.

Clients rely on Chris's counsel on wage and hour compliance and audit issues, including maintenance and enhancement of white collar, outside sales, and other exemptions; defense of independent contractor, statutory employee and franchise models; development of proactive solutions to wage and hour problems; and review and redesign of compensation and expense reimbursement policies and programs. He provides advice and counsel in connection with client self-audits and US Department of Labor (DOL) and state wage and hour audits and investigations. Chris is a frequent speaker on Fair Labor Standards Act (FLSA) issues, including how to avoid and defeat class and collective actions, and how to avoid—and if needed, litigate—independent contractor challenges. He has also participated with clients in presenting positions to the DOL to seek relief from and to change aspects of the FLSA, including through new opinion letters.

Chris also handles discrimination cases, including matters involving traditional and newly evolving employee claims against employers and corporate officers. He also represents employers in cases involving wrongful discharge, retaliation, breach of contract, and employment-related torts.

In the employee benefits context, Chris has handled major class action cases in both the nonbargaining and collective bargaining contexts. His experience includes complex litigation challenging employer plan design

decisions, and individual claims of denial of benefits, breach of fiduciary duty, and benefits discrimination.

Also a seasoned trial lawyer, Chris has tried numerous bench and jury trials, and represents clients in arbitrations and administrative proceedings at the local, state, and federal levels.

AWARDS AND AFFILIATIONS

Recognized, Leading US Corporate Employment Lawyer, *Lawdragon 500* (2020-2022)

Recommended, Labor and employment: Labor and employment disputes (including collective actions): defense, *The Legal 500 US* (2020, 2021)

Recognized, Litigation - Labor and Employment, New York, *The Best Lawyers in America* (2020-2024)

Ranked, Labor & Employment, New York, *Chambers USA* (2019-2023)

Member, Practice Group of the Year, Employment, *Law360* (2017, 2019)

Recipient, M.H. Goldstein Memorial Prize, Labor Law

Fellow, College of Labor and Employment Lawyers

ADMISSIONS

> New York

EDUCATION

> University of Pennsylvania Law School, 1988, J.D.

> State University of New York at Albany, 1985, B.A.

SECTORS

> Technology

> Financial Services

> Retail & Ecommerce

> Insurance

SERVICES

> Labor, Employment & Benefits

> Wage And Hour Litigation & Counseling

> Individual Employee Litigation & Arbitration

> Systemic Employment Litigation

> Broker-Dealer Regulation & Compliance

> ERISA/Employee Benefits Litigation

REGIONS

> North America

EVENTS

4/30/2020 - 2020 Insurance Industry Employers Roundtable

5/29/2018 - California Supreme Court Decisions with Significant Impact on California Employers

7/28/2015 - DOL's New Interpretation of Independent Contractor Classification Test: What Should Employers Do?

4/9/2015 - The Fluctuating Workweek in Flux: Recent Challenges and Solutions

6/6/2013 - NYU 66th Annual Conference on Labor: Regulation of Compensation

1/10/2013 - Independent Contractor Misclassification Issues and the 2013 Post-Election Risk Landscape
12/7/2012 - National Employment Law Institute - Employment Law Conference: Featured Panels
8/13/2012 - Brookhaven National Laboratory's 2012 Department of Energy Contractors Human Resources Meeting
5/3/2012 - Mid-Year Employment Law Conference (National Employment Law Institute)
5/14/2011 - 2011 ALIC Annual Meeting: Surviving and Thriving After Financial Reform
12/9/2010 - National Employment Law Institute's Employment Law Conference
6/24/2010 - 2010 Labor and Employment Summer Webcast Series - Independent Contractors: The Landscape of Risk for Employers
1/7/2010 - The Knowledge Congress Webcast Series: Mitigating Risks of Social Networking Activity by Your Employees

NEWS

11/11/2021 - Lawdragon's Leading Corporate Employment Lawyers of America, *Lawdragon*
10/16/2018 - Gig Economy Prime Target for Labor Department Opinions (Corrected), *Bloomberg Law*
6/28/2017 - Morgan Lewis Partners Elected Fellows of the College of Labor and Employment Lawyers
11/28/2016 - Decision Blocking OT Rule Creates Uncertainty for Employers - Lawyers, *Reuters Westlaw Practitioner Insights*
3/23/2016 - Morgan Lewis Advises Bunker Hill Capital in Sale of Smith & Wollensky to Danu Partners

PUBLICATIONS

9/1/2023 - Department of Labor Proposes Raising Salary Level for FLSA 'White-Collar' Exemptions to \$55,068
10/13/2022 - US Department of Labor Publishes Independent Contractor Proposed Rule
3/25/2022 - Recent Legal Developments Could Significantly Impact Employer Arbitration Agreements
12/20/2021 - Massachusetts SJC Adopts FLSA 'Joint Employer' Test for Minimum Wage & Overtime Laws
5/20/2020 - DOL Removes Industry List, More Employers May Qualify for Retail, Service Establishment Exemption
2/3/2020 - Seventh Circuit: No FLSA Collective Action Notice for Workers Subject to Individual Arbitration Agreements
1/30/2019 - NLRB Returns to Independent Contractor Fundamentals in *SuperShuttle*
1/22/2018 - DOL Adopts New Standard for Determining Whether Unpaid Interns Are 'Employees'
6/8/2017 - DOL Withdraws Independent Contractor and Joint Employer Guidance
12/19/2016 - NY State Prepared to Increase Salary Level for Certain Overtime Exceptions
11/23/2016 - Texas Court Enjoins Most of DOL's New Overtime Regulations
4/11/2016 - Company-Contractor Relationships Draw Scrutiny, *The National Law Journal*
4/7/2016 - New York Enacts Paid Family Leave Law and Minimum Wage Increases
1/21/2016 - DOL Issues Interpretation to Expand Joint-Employer Liability
7/16/2015 - DOL Issues Aggressive Interpretation of Independent Contractor Classification

7/7/2015 - Second Circuit Establishes New Test for Unpaid Intern Claims

6/26/2015 - Uniforms And Unpaid Interns And Minimum Wage! Oh, My!, *Law360*

6/8/2015 - Hot Topics in Wage and Hour Compliance

December 2013 - Hot Topics Under Wage and Hour Law, presented at the National Employment Law Institute Employment Law Conference

6/6/2013 - Panelist, Substantive Issues Under the FLSA, presented at the NYU 66th Annual Conference on Labor: Regulation of Compensation

May 2013 - FLSA Update, presented at the 2013 Upper Midwest Employment Law Institute

2/20/2013 - DOL Proposes Survey on Independent Contractor Misclassification

1/14/2013 - Independent Contractor Misclassification Issues and the 2013 Post-Election Risk Landscape

December 2012 - Independent Contractor Misclassification, presented at the National Employment Law Institute's Mid-Year Employment Law Conferenc

8/13/2012 - Other Hot Topics Under the Wage and Hour and Employment Laws, presented at Brookhaven National Laboratory's 2012 Department of Energy Contractors Human Resources Meeting

3/25/2012 - Independent Contractor Misclassification, presented at the National Employment Law Institute's Mid-Year Employment Law Conference

March 2011 - Independent Contractor Misclassification, presented at an Insurance Industry Roundtable

Summer 2010 - Age Discrimination: Legal Trends that Are Affecting an Aging Workforce, presented for the Morgan Lewis 2010 Labor and Employment Summer Webcast Series

7/28/2010 - Post-Quon Supreme Court Decision: The Future Landscape of Web 2.0 Technology Issues in the Workplace

6/24/2010 - Independent Contractors: The Landscape of Risk for Employers, presented for the Morgan Lewis 2010 Labor and Employment Summer Webcast Series

May 2010 - FLSA Wage and Hour Update and 2010 FLSA Update - In Depth, presented at the 27th Annual Upper Midwest Employment Law Institute

2/10/2010 - Managing Wage and Hour Investigations and Litigation, presented for a PLI Managing Wage & Hour Risks Seminar

1/7/2010 - Mitigating Risks of Social Networking Activity by Your Employees, presented for The Knowledge Congress Webcast Series

Morgan Lewis



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Larry Turner serves as co-leader of the Morgan Lewis workplace culture consulting practice and is the former co-leader of the firm's Diversity Committee. He counsels employers on corporate diversity initiatives, including best practices and litigation avoidance. He advises employers on building, maintaining, and evaluating diversity and inclusion efforts in a variety of industries, including but not limited to pharmaceutical, medical device, financial, and retail.

Larry also counsels and litigates matters involving trade secret protection, restrictive covenants and various employment matters involving independent contractor issues as well as discrimination, harassment, and wrongful termination claims. As a former co-leader of the Morgan Lewis Unfair Competition and Trade Secrets Taskforce, he advises clients on trade secret protection strategies and restrictive covenants and has served as lead trial counsel in numerous litigation actions across the country to enforce and challenge noncompete, nondisclosure, and nonsolicitation agreements as well as trade secret and various types of employment matters.

Larry tries cases in US state and federal courts involving claims under Title VII of the Civil Rights Act, state antidiscrimination laws, and the Fair Labor Standards Act (FLSA); as well as matters involving unfair competition claims and commercial and catastrophic personal injuries cases. He works extensively with pharmaceutical and medical device companies, as well as companies in the financial services industries.

A frequent speaker, his topics include building effective diversity programs, enforcing and challenging noncompete covenants, and independent contractor issues. Larry also served as an adjunct professor at Villanova Law School for the Fall 2019 semester, lecturing on trade secrets law.

SELECTED REPRESENTATIONS

- Defeated temporary restraining order and preliminary injunction motion by a senior executive in the media industry against his former employer in New York state court.
- Won summary judgment in the US District Court for the Central District of California in a matter involving claims of race discrimination, harassment, and negligent supervision against an aerospace and defense contractor.
- Won preliminary injunction for an IT solution company against two former senior executives and their recently formed company in the US District Court for Delaware.
- Defeated emergency equitable relief and preliminary injunction motions by a pharmaceutical contract development and manufacturing company against one of its former employees and the employee's new employer in the US District Court for the Eastern District of Pennsylvania.
- Won summary judgment for a client in defense of claims for alleged tortious interference with nonsolicitation and noncompete provisions of an employment contract in the US District Court for the Eastern District of

Pennsylvania.

- Obtained emergency equitable relief and a preliminary injunction for a pharmaceutical manufacturer against five former senior executives in Bucks County, Pennsylvania Court of Common Pleas.
- Obtained an injunction enforcing a noncompete compelling a former employee responsible for over \$650 million of the client's business to honor a restrictive covenant agreement in the US District Court for the Eastern District of Pennsylvania.
- Member of national counsel team for a pharmaceutical and medical device manufacturer in multiple purported FLSA collective actions and single-plaintiff cases across the country.
- Lead counsel in a purported civil rights claim against a major quick service food restaurant chain.
- Secured 90% of a client's attorney fees and 100% of the client's costs stemming from enforcement of a noncompete dispute in the US District Court for the District of New Jersey.
- Member of pharmaceutical client task force to address trade secret protection issues.
- Member of pharmaceutical and medical device client task force to address joint employer and independent contractor issues.
- Won a defense verdict after a jury trial in the US District Court for the District of New Jersey in a wrongful termination and disability discrimination case for a pharmaceutical employer.
- Won a defense verdict for a financial institution employer after a jury trial in the US District Court for the Eastern District of Pennsylvania in a sex discrimination case.
- Won a defense verdict after a jury trial in Philadelphia County, Pennsylvania Court of Common Pleas and post-trial motions in a defamation and breach of contract case for a higher education institution.
- Won summary judgment in the US District Court for the District of Delaware in a religion, national origin, and age discrimination case for a pharmaceutical employer.
- Won summary judgment in the US District Court for the Eastern District of Pennsylvania in an alleged age discrimination case for a pharmaceutical employer.
- Won a motion to dismiss in the US District Court for the Middle District of Pennsylvania in an alleged whistleblower case for a pharmaceutical employer.
- Won a stay of proceedings and transfer to AAA International Arbitration (plaintiff eventually withdrew the claim) in the US District Court for the District Court of Utah in an alleged breach of medical device development contract and trade secrets case for a German pharmaceutical manufacturer and its US subsidiary.

AWARDS AND AFFILIATIONS

Recognized, Top 100 Lawyers, *The National Black Lawyers* (2022)

Recognized, Litigation - Labor and Employment, Philadelphia, *The Best Lawyers in America* (2020, 2022-2024)

Member, Practice Group of the Year, Employment, *Law360* (2017, 2019)

Recommended, Labor and Employment - Workplace and Employment Counseling, *The Legal 500 US* (2017, 2018)

Philadelphia Business Journal Minority Business Leader Award (2016)

Recognized, Employment Litigation, *Pennsylvania Super Lawyers* (2007-2009, 2014-2015, 2019, 2020, 2022, 2023)

National Diversity Council's Leadership Excellence in the Law Award (2014 and 2015)

Award of Excellence, 2013 APEX Awards for Publication Excellence Association of Corporate Counsel article "When the Non-Compete is Incomplete: Avoiding Trade Secret Litigation"

2011 Pennsylvania Multicultural Award, National Diversity Council

Distinguished Speaker Award, Litigation Counsel of America (2008 and 2010)

2010 BNA Insights Award for article titled "Independent Contractor Relationships and the Perils of Misclassification: What all Employers Should Know"

Adjunct Professor, Trade Secrets, Villanova Law School (Fall 2019)

AV Preeminent Peer Review Rated by Martindale-Hubbell
Member, University of Pennsylvania Dental Medicine Board of Overseers
Member, The William Penn Charter School Board
Board Member, Williamson College of the Trades
Member, American Bar Association
Member, American Bar Association Employment Rights and Responsibilities - Employer/Management Committee of the Section of Labor and Employment Law
Member, National Bar Association
Member, Philadelphia Bar Association
Member, Committee on Federal Labor Standards Legislation
Fellow, Litigation Counsel of America

ADMISSIONS

- > Pennsylvania
- > Supreme Court of the United States
- > US Court of Appeals for the Third Circuit
- > US Court of Appeals for the Ninth Circuit
- > US Court of Appeals for Federal Circuit

EDUCATION

- > Georgetown University Law Center, 1984, J.D.
- > University of North Carolina, 1981, B.A.

SECTORS

- > Life Sciences
- > Financial Services
- > Education

SERVICES

- > Workplace Culture Consulting & Training
- > Employment Counseling
- > Individual Employee Litigation & Arbitration
- > Labor, Employment & Benefits
- > Systemic Employment Litigation
- > Wage And Hour Litigation & Counseling
- > Trade Secrets, Proprietary Information & Noncompetition/Nondisclosure Agreements
- > Environmental, Social, And Governance (ESG) & Sustainability

REGIONS

- > North America

TRENDING TOPICS

- > US Supreme Court Affirmative Action Decision: DEI & ESG Impact

EVENTS

11/2/2023 - 2023 Morgan Lewis Annual Private Fund Investors Roundtable

9/19/2023 - The Impacts of Recent Supreme Court Decisions on Employee Benefits Plans: DEI, ESG, and Other Considerations

7/11/2023 - Affirmative Action Cases: Impact on DEI and ESG—Considerations for Universities and Colleges, Employers, and Other Organizations

6/29/2023 - Affirmative Action Decisions: An Initial Assessment

4/20/2023 - *Sports Business Journal's* ALL IN Conference

4/18/2023 - PBI's Employment Law Institute 2023

4/5/2023 - Responding to Shareholder Demands for Equity Audits

3/12/2023 - SIFMA Compliance and Legal 2023 Annual Seminar

1/24/2023 - Pending Supreme Court Cases: Impact on DEI Initiatives

10/27/2016 - 2016 Managing the Global Workforce Webinar Series - Global Developments Impacting Workplace Diversity and Inclusion

9/21/2016 - Corporate Counsel Women of Color's 12th Annual Career Strategies Conference

10/18/2015 - 2015 Association of Corporate Counsel Annual Meeting

6/17/2015 - 2015 MMI Legal & Compliance Seminar

7/24/2014 - MCCA Creating Pathways to Diversity Conference

5/29/2014 - Managing the Global Workforce Webinar Series 2014 - Navigating Global Diversity Trends and Requirements

10/16/2013 - Diversity and Inclusion Leadership Management Seminar

7/11/2013 - 2013 Labor and Employment Summer Webinar Series: Noncompete Update

5/2/2013 - The Conference Board Diversity, Inclusion, Leadership & Management Seminars: Forecasting & Measuring Diverse Human Capital Needs to Execute Business Strategy

4/4/2012 - The Conference Board's Diversity & Inclusion Management Seminar

4/27/2011 - 2011 NELC Conference

NEWS

4/20/2023 - SBJ Unpacks: Company Culture Changes Needed for DEI Efforts to Survive, *Sports Business Journal*

11/1/2022 - Affirmative Action Hangs in Doubt, *HR Magazine*

11/1/2022 - Why Should Businesses Care About Affirmative Action? Corporate Initiatives Could Be Next, *The Business Journals*

5/3/2021 - Audubon Board Addresses Workplace Culture, *Audubon*

11/23/2016 - How To Keep Trade Secrets Safe, *Law360*

11/2/2016 - Litigation Department of the Year - Working Together: Morgan Lewis Relies on Global Team, *The Legal Intelligencer*

7/22/2016 - Morgan Lewis Partner Receives *Philadelphia Business Journal* Minority Business Leader Award

PUBLICATIONS

7/14/2023 - EO 11246 Following the *Harvard-UNC* Supreme Court Cases: Why Federal Contractors Should Stay the Course For Now

6/29/2023 - US Supreme Court: Affirmative Action in College Admissions Must Come to an End

5/25/2023 - A Proxy Season Wrap-up: Shareholder Proposals Target ESG and Equity Audits

5/9/2023 - DEI Weather Report: Storms on the Horizon, Followed by Some Sunshine, *International Employment Lawyer*

2/23/2023 - Employee Resource Groups: A Critical Resource for Unionized Workforces, *HR Magazine*

January 2023 - The Trends—and Traps—that Will Shape 2023

1/18/2023 - US Supreme Court to Consider Scope of Attorney-Client Privilege in Dual-Purpose Communications

12/1/2022 - DEI and Reverse Discrimination – A Time for Reflection, *Practical Guidance*

11/5/2022 - Supreme Court Hears Oral Argument in Challenge to Harvard and UNC Race-Conscious Admission Programs, *Practical Guidance*

11/1/2022 - Supreme Court Hears Oral Argument in Challenge to Harvard and UNC Race-Conscious Admission Programs

February 2018 - We are Morgan Lewis: Larry Turner

7/17/2017 - Diversity and Inclusion Programs: Practical Tips for Employers

11/18/2016 - The Defend Trade Secrets Act and Post-Employment Restrictive Covenants, *Bloomberg BNA*

2016-2020 - Labor & Employment NOW Video Series

October 2015 - Reducing Your Company's Exposure to Trade Secret Litigation when Key Employees Come and Go

8/10/2015 - Dodd-Frank and Diversity

June 2015 - State Whistleblower Laws: Beyond Federal Protections, *Practical Law*

9/30/2014 - Panelist, Advancing Diversity in the Workplace – Challenges & Risks, presented at the Wharton Financial Services Group Special Financial Employee Relations Roundtable Session, New York

6/3/2014 - Professionalism for the New Lawyer, presented for the ABA's Judicial Intern Opportunity Program

5/29/2014 - Managing the Global Workforce Webinar Series 2014 - Navigating Global Diversity Trends and Requirements

5/29/2014 - Moderator, Building Employee Resource Groups into Your Diversity Strategy, presented for the Greater Philadelphia Chamber of Commerce Human Resources Roundtable

May 2014 - Global Diversity — One Program Won't Fit All, *HR Magazine*

4/17/2014 - Building an Effective Diversity Strategy, presented for NAAHR NJ's "In the Know" Webinar Series

September 2013 - Significance and Strategies for Employers, prepared by Morgan Lewis for the Minority Corporate Counsel Association (read the White Paper)

7/11/2013 - 2013 Labor and Employment Summer Webinar Series: Noncompete Update

4/16/2013 - Managing Risks Surrounding Diversity Issues, *The Legal Intelligencer*

3/16/2013 - State Employment Law Developments Update, presented at the 2013 Advanced Employment Law and Litigation ALI CLE Program, Washington, DC

November 2012 - When the Non-compete is Incomplete: Avoiding Trade Secret Litigation, *ACC Docket*

February 2012 - Contributor to the 2012 Mid-Winter Treatise Supplement: The Fair Labor Standards Act for the ABA Section of Labor & Employment Law Fair Labor Standards Act Subcommittee

8/1/2011 - A Practical Approach to Diversity Programs, Human Resources Executive Online

Spring 2011 - Has the Class Action Fairness Act Met Expectations for Wage and Hour Employment Litigation?, ABA's Journal of Labor and Employment Law

5/6/2011 - Can Opening Statements Be Persuasive Without Being Argumentative?, presented at the 2010 Spring Conference and Induction of Fellows of the Litigation Counsel of America (LCA)

4/27/2011 - Whistleblower Protections in the Dodd-Frank Wall Street Reform and Consumer Protection Act, presented at the 2011 National Employment Law Council Annual Conference, New Orleans, Louisiana

March 2011 - 2011 Mid-Winter Treatise Supplement: The Fair Labor Standard Act, American Bar Association

July 2010 - Independent Contractor Relationships and the Perils of Misclassification: What All Employees Should Know, BNA's MultiState Tax Report

2/3/2010 - Noncompete Jurisprudence During The Recession, Law360

Morgan Lewis



STEPHANIE SCHUSTER **PARTNER**

She/Her/Hers

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1111 Pennsylvania Ave. NW // Washington, DC 20004-2541 // United States

Stephanie Schuster is an appellate lawyer who represents clients during every stage of litigation. She has argued more than 15 appeals in federal and state courts across the country and has tried and led complex trial court litigation, bringing appellate-style advocacy to every phase of the case. Stephanie's practice is focused on high-impact issues spanning diverse subject areas, including DEI/civil rights, retail, technology, arbitration, bankruptcy, and constitutional law.

Stephanie's practice is focused on complex and cutting-edge legal issues that affect the retail, technology, and transportation industries. Clients often turn to Stephanie to defend their DEI efforts and programs against challenges under 42 USC § 1981, Title II of the Civil Rights Act, and similar state and federal laws. Stephanie also counsels and regularly litigates novel issues involving the Americans with Disabilities Act (ADA) and new technologies, such as websites, apps, and autonomous vehicles.

Stephanie has been described as "a lawyer's lawyer." She is sought for her creative approach, brief-writing excellence, and oral advocacy skills. She has litigated in the US Supreme Court, every US Court of Appeals, and numerous state appellate courts across the country. In many of these cases, Stephanie worked on the case from the beginning, developing and managing overall litigation strategy and briefing and arguing critical issues in the trial courts and on appeal.

Stephanie is a co-leader of the firm's LGBTQ+ Lawyer Network and serves as Deputy Local Practice Group Leader for Litigation in Washington, DC.

SELECTED REPRESENTATIONS

- Secured an important victory with implications for the entire retail industry in a decision affirming the dismissal of claims that retailers violate the ADA if they sell gift cards without Braille (Second Circuit)
- Secured an appellate victory for a major automobile manufacturer in a case of first impression involving the whistleblower provisions of the Moving Ahead for Progress in the 21st Century Act (MAP 21) (Eighth Circuit)
- Secured a significant appellate victory for a major ridesharing technology company in a decision imposing important limitations on Article III standing of individual plaintiffs and the scope of the private right of action for entity plaintiffs under Title III of the ADA (Seventh Circuit)
- Secured an appellate victory for a statutory retiree benefit fund in a case of first impression under the Coal Industry Retiree Health Benefits Act (Coal Act) (DC Circuit)
- Secured an appellate victory for a major US railroad on the issue of whether stock railroads transfer to employees is subject to a federal tax on "money remuneration," creating a 21-circuit split, which the Supreme Court ultimately resolved in the railroad's favor (Eighth Circuit)

- Secured a path-marking victory for a web-only marketplace in the first federal appellate decision holding that Title III of the ADA, which applies to “places of public accommodation,” does not apply to the websites of web-only businesses (Ninth Circuit)
- Secured affirmance of a district court’s ruling on behalf of a major public utility on a claim for unjust enrichment and alleged violations of the Commerce Clause and the Atomic Energy Act (Eleventh Circuit)
- Secured reversal of a district court’s decision denying an online travel company’s motion to compel arbitration on the ground that the company’s ability to modify its terms and conditions rendered the entire contract illusory (Fifth Circuit)
- Secured an appellate victory for a local school district holding that individuals lack standing to pursue Establishment Clause claims when they do not claim to have been exposed to the challenged governmental conduct (Second Circuit)
- Secured reversal of the Social Security Administration’s decision denying benefits to an individual with multiple disabilities (DC Circuit)

AWARDS AND AFFILIATIONS

Recommended, Dispute resolution: Appellate: courts of appeals/Appellate: supreme courts (states and federal), *The Legal 500 US* (2022, 2023)

Recognized, DC Rising Star, *Super Lawyers* (2022, 2023)

Recognized, DC Rising Star, *National Law Journal* (2020)

Member, Appellate Editorial Advisory Board, *Law360* (2020–2022)

Notes Development Editor, *American Criminal Law Review* (2010–2011)

ADMISSIONS

- District of Columbia
- New York
- Supreme Court of the United States
- US Court of Appeals for the First Circuit
- US Court of Appeals for the Second Circuit
- US Court of Appeals for the Third Circuit
- US Court of Appeals for the Fourth Circuit
- US Court of Appeals for the Fifth Circuit
- US Court of Appeals for the Sixth Circuit
- US Court of Appeals for the Seventh Circuit
- US Court of Appeals for the Eighth Circuit
- US Court of Appeals for the Ninth Circuit
- US Court of Appeals for the Eleventh Circuit
- US Court of Appeals for District of Columbia Circuit
- US District Court for the District of Columbia
- US District Court for the District of Nebraska
- US District Court for the Northern District of Illinois
- US District Court for the Northern District of New York
- US District Court for the Southern District of New York
- US District Court for the Western District of Michigan

EDUCATION

- Georgetown University Law Center, 2011, Juris Doctor
- University of Michigan, 2007, Bachelor of Business Administration

SERVICES

- Litigation, Regulation & Investigations
- Appellate
- ADA Public Accommodation And Accessibility Litigation & Counseling

TRENDING TOPICS

- US Supreme Court Affirmative Action Decision: DEI & ESG Impact

EVENTS

7/11/2023 - Affirmative Action Cases: Impact on DEI and ESG—Considerations for Universities and Colleges, Employers, and Other Organizations

6/29/2023 - Affirmative Action Decisions: An Initial Assessment

6/30/2021 - LGBTQ+ Advocacy and Mutual Support

5/18/2020 - CCPA - Latest Developments and Implementation in an Uncertain Time

4/30/2020 - Appeals: What Litigators Should Know About Preserving the Record

2/13/2019 - The Americans with Disabilities Act: Its Impact on Automotive and Mobility Companies

NEWS

2/2/2023 - Protecting Kids from Widespread Use of Psychotropic Drugs

11/4/2022 - *Law360* Names Morgan Lewis Lawyers, Professionals to 2022 Editorial Advisory Boards

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6/12/2019 - Morgan Lewis Elects 30 Partners

PUBLICATIONS

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6/29/2023 - US Supreme Court: Affirmative Action in College Admissions Must Come to an End

8/18/2022 - California Appellate Court Holds Web Access Claims Against Web-Only Businesses Fail Under ADA and Unruh Act

6/24/2022 - *Dobbs v. Jackson Women's Health*: Implications for Employers and Employer Plan Sponsors

4/1/2022 - DOJ Breaks Silence on ADA Web Accessibility with New Guidance

10/8/2020 - Congress Considers New ADA Section to Regulate Consumer-Facing Websites, Mobile Applications

2018-2019 - *Public Accommodations under the Americans With Disabilities Act: Compliance and Litigation Manual*, 2018-2019 Editions (Thomson West)

10/14/2019 - Supreme Court Passes On Domino's ADA Website Case

12/7/2015 - DOJ Delays ADA Regulations For The Accessibility Of Private Websites To 2018

5/5/2015 - Website-Only Businesses Must Be Aware Of ADA's Title III, *Law360*

10/19/2012 - Taking Stock of the STOCK Act



Contracting Pitfalls and Bear Traps

Bear Traps and Pitfalls

The Legend of the Flying Dorito

IRVIN GRAY

ASSISTANT GENERAL COUNSEL - CONTRACTS



NSC-614-5632 DATED 09/2023

UNCLASSIFIED UNLIMITED RELEASE



Termination Day

- Scene: January 7, 1991, Pentagon, Monday morning after Christmas break
- Navy Contracting Officer (CO) calls his legal counsel and requests a “termination for default memo”
- Legal counsel uses a termination for default memo for a similar sized program as a baseline for the draft
- Legal counsel has little background on the terminated program, has not reviewed the contractor claims for additional time and money, and has not seen the contractors’ response to a recent cure notice.
- CO does not review any of the contract documents (awarded contract, modifications to schedule), does not review FAR regulations on termination for default, or any documents related to schedule or specs
- In the afternoon, with no changes, the CO signs the draft termination for default memo that ends the program
- And so starts a 23-year saga of 60 published court opinions regarding a \$5 billion claim for the A-12 Avenger II program, also known as “The Flying Dorito”

Learning Objectives

- Describe Flying Dorito fact pattern from the 1990s
- Describe root causes, lessons learned
- Apply those causes and lessons to legal practice

A-12 Avenger II – Beginning

- Navy's requirement was to develop a carrier-based, stealth attack aircraft known as the A-12 Avenger II.
- Stealth designs were a highly classified special access program
- Navy awarded a full-scale engineering and development (FSED) contract to McDonnell Douglas/General Dynamics (MDGD) in 1988 after competition
- MDGD's Best and Final Offer (BAFO) included a weight for the aircraft ("BAFO weight") to meet carrier landing requirements
- Incrementally funded, fixed-price incentive FSED contract had a target price of \$4,379,219,436 and a ceiling price of \$4,777,330,294
 - Who has the risk of overruns above the ceiling price?
- Deliveries were 8 FSED aircraft with an option for four production lots.
- Schedule was to deliver 1 aircraft per month for 8 months starting June 1990
- Navy obligated a \$185,000,000 installment on November 1, 1990 and a \$553,200,000 installment on January 7, 1991

A-12 Avenger – Design Reviews

- May 1988 - Initial design review
- January 1989 – Preliminary design review
- March 1990 – Secretary of Defense Dick Cheney visits plant, hears some concerns, but leaves feeling confident on the deliveries.
- SECDEF Cheney reports his confidence to Congress.
- After testifying to Congress, SECDEF Cheney is told of schedule and cost problems with the A-12.
- June 1990 – Requirements review – Would the aircraft be acceptable at BAFO plus 7930 pounds? Yes, suitable aircraft for Navy's use.
- November 1990 - Joint Chiefs – “risks were understood and resolved”

A-12 Avenger – Beginning of the End

- November 28, 1990 – “Beach Report” stated that Program Manager was unreasonable in his conclusion that project could complete within the ceiling price
- November 29, 1990 – Dept of Defense Inspector General concluded that reviews were done poorly
- December 1990 – SEDEF Cheney briefs the US President George H.W. Bush, and states he will “take action to correct the situation”
- December 3, 1990 – SECDEF Cheney directs Deputy SECDEF to review the program and report back in 10 days
- These reviews coincide with budget requests routed to the Office of Management and Budget for future fiscal years.
- December 12, 1990 – Secretary of the Navy Lawrence Garrett tells SECDEF Cheney, “The Navy also will examine the grounds upon which the contract might be terminated... We will provide you our views as to whether the program should be terminated for default.”

A-12 Avenger – End of the End

- In Summer 1990, the Navy was negotiating with MDGD and the Department of Defense to restructure the contract schedule due to technical difficulties
- In Fall 1990, the Navy issued a unilateral modification to require the first flight by December 1991 with subsequent deliveries of the next seven aircraft beginning in February 1992 and ending in February 1993.
- December 14, 1990 – SECDEF Cheney sends “show cause” notice to the Navy “The A-12 program is in serious trouble. The apparent schedule slippage, cost growth and management deficiencies are intolerable... I direct you to show cause by January 4, 1991 why the Department should not terminate the A-12 program and pursue other alternatives.”
- December 17, 1990 – Navy issues a cure notice to MDGD despite having no plans to issue a cure notice before this date
 - Cure notice states “You will not deliver the lot 1 pilot production aircraft in accordance with the contract schedule. Moreover, your failure to meet specification requirements, such as aircraft weight, jeopardizes the carrier suitability of your design. ... Therefore, unless these conditions are cured by 2 January 1991 the Government may terminate for default under the terms and conditions of the default clause of the contract.”
- December 31, 1990 – MDGD submits certified claims for equitable adjustments to adjust the contract price and schedule due to superior knowledge of the Gov’t and failure of the Gov’t to cooperate
- January 2, 1991 – MDGD disputes that they are in default, and argued that the schedule was no longer valid, and the specifications were impossible

A-12 Avenger – End of the End

- January 5, 1991 – Saturday meeting with SECDEF Cheney, SECNAV, Undersecretary of Defense for Acquisition (USD(A)), Navy General Counsel, and Chairman of Joint Chiefs
- Options presented were:
 - 1) SECDEF grants relief by providing additional funds and changing the contract type
 - 2) Direct contractors to perform, or
 - 3) Terminate the A-12.
- USD(A) recommended to “terminate for default” immediately before \$553M was obligated on January 7
- “Cheney was not well-versed in government contracts; he was not aware of the procedure or proper bases for terminating a contract.... He did not review the submitted claims from the contractors”
- SECDEF Cheney decided not to grant relief, and assumed that the Navy would terminate the contract for default

A-12 Avenger – Navy CO Implements the End

- **Sunday, January 6, 1991 – Navy Contracting Officer Admiral Morris recalled from vacation**
 - ADM Morris argues that the contract issues could be resolved
 - USD(A) states that “no additional funds would be obligated”
 - ADM Morris tells wife “It’s been a long, tough day, and I haven’t been the winner”
 - ADM calls boss and hopes the “big guns” in the Navy would push to save the program. If not, he would terminate the contract for default on Monday morning
- **Sunday, January 7, 1991**
 - Progress payment of \$553M is due
 - Navy CO calls NAVAIR legal counsel and requests a termination for default memo
 - NAVAIR legal counsel (LC) uses a termination for the P-7 Program as a baseline
 - LC had little background on the A-12, had not reviewed the contractor claims, and had not seen the contractors’ response to the cure notice.
 - Navy CO did not review any A-12 contract documents, did not review FAR provisions on termination, or any documents related to schedule or specs

Navy CO's Three Choices

1. Continue program and fail to make January 7, 1991 payment.
2. Terminate the contract for default
3. Terminate the contract for convenience

Which one would you choose, or advise the CO to choose?

And why?

A-12 Avenger – Epilogue

McDonnell Douglas vs. US became a generational 23-year “Jarndyce and Jarndyce” case for government contracts

- In 1991, the contractors brought suit in the US Court of Federal Claims to challenge the default termination, to retain the \$1.33 billion paid to that point, and to assert a claim for an additional amount well over \$1 billion, plus interest, for their purported unreimbursed performance costs.
- Litigation includes 60 total court opinions between 1991 and 2011 to include five trials, three appeals to the Federal Circuit, and a US Supreme Court decision
- Government lawyers and contractor lawyers exchanged truckloads of paper by exchanging keys to rental trucks
- One branch on the tree focused on whether a contractor could get discovery on “superior knowledge” of the government if that information is classified (e.g., prior attempts at stealth technology)
- In 2014, the contractors settled, and paid \$400M total in discounts on a guided missile destroyer and three electronic warfare planes
- In 2014, just before the settlement, the Contract Disputes Act interest on the then \$5B claim was about \$400,000 per day

A-12 Avenger II – Root Causes

- SECDEF Cheney and other stakeholders felt misled about cost increases and schedule delays
- Key stakeholders conflated “terminate the program” (based on needs of the Navy) with “terminate the contract for default” (based on contractor breach)
- Key stakeholders assumed that the prime contract was a “cost reimbursement contract” vice fixed price incentive
- The contractor was probably required to perform for the ceiling price, subject to any claims for costs/schedule
- The CO did not review key documents (to include an 18-month schedule extension that was forgotten)
- The legal counsel did not have the entire picture or the updated documents

A-12 Avenger II - Lessons Learned

- **Acquisition Plan.**

- Pick the right contract type based on the risk profile
- For hybrid contracts, ask a Cost Engineer to graph the incentive curves

- **Terminations for Default**

- For terminations for default, gather an accurate file first, and then document an informed decision.
- Consider providing a time extension.
- Termination for default is a business decision, and never mandatory.

- **General**

- Complete the hardest staffwork each year between February and May.
- Don't let the boss brief stakeholders (e.g., Congress) that everything is ok, and then the boss finds out that it's not ok.
- For aggressive moves like a termination for default, map out the countermoves before making the first move.



BIO – IRVIN GRAY



Honeywell Federal Manufacturing & Technologies, LLC
Assistant General Counsel – Contracts (2018-present)

Government Contracts Attorney since 2009
US Navy Officer from 1997-2007
Post Graduate Education - JD, MBA, LLM
NCMA Certifications – Fellow, CPCM, CFCM, CCCM

Irvin has a JD (2009, with honors) and an LLM in Government Procurement Law (2022, with highest honors) from The George Washington Law School, and an Executive MBA from the Washington University in St. Louis (2013).

He has served as a government contracts attorney with the US Army Corps of Engineers (2009-2018) and with Honeywell FM&T (2018-present).

With USACE, he gained legal experience advising on fixed-price construction and cost-reimbursement environmental remediation contracts including two USACE construction “Megaprojects” (\$440M and \$800M). With FM&T, he has gained legal experience as the procurement counsel advising on a \$1.5B/year DOE M&O prime contract.

Irvin graduated from the US Naval Academy in 1997, served as a commissioned officer in the U.S. Navy for 10 years, served as a unit commander in Stuttgart, Germany, and completed his Naval service as a Lieutenant Commander & Communications Officer in Helmand Province, Afghanistan in 2006-2007.

Teaches the “Capstone Course” for the Government Procurement Masters of Studies in Law (MSL) at the University of Dayton School of Law for federal government Contracting Officers and prime contractor contract managers.

Provides virtual and in-person training, including 5 contracts courses at Honeywell FM&T, and 3 virtual contracts courses with the Contractor Acquisition University.

National Contract Management Association (NCMA) Certifications:

Fellow (2023), Certified Professional Contracts Manager (2016), Certified Federal Contracts Manager (2011), Certified Commercial Contracts Manager (2020)

Hobbies:

Baking, 2 teenagers (17 and 15), 2 cats (Tuesday and Friday), 1 dog (Sadie the Beagle), Washington Post Sunday Crossword fan since 1997



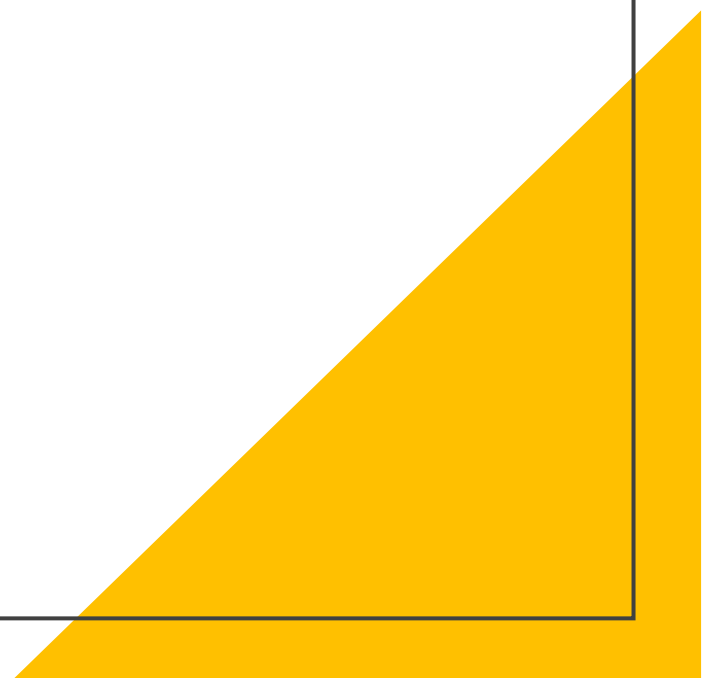
Ethics Considerations for Government Contractors

ETHICS

Mark J. Meagher

Meagher GC Law, LLC

September 28, 2023



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<p>Cert Den 375SE²496 375SE³496 Del 622A2d1090 NJ 497A2d534 42A³591s 37A⁴47s</p>	<p>—152— Jones v Combustion Engineering Inc. 1984 (170GaA730) 1A²630s</p>	<p>—164— Jones v Barnes 1984 (170GaA762) 328SE³430 328SE⁴430 328SE⁵430 328SE⁶430 f 331SE²611 f 331SE⁶611 332SE¹380 332SE⁶895 343SE¹503 367SE⁶66 393SE⁵25 396SE²30 396SE⁴30 396SE⁶30 396SE²293 396SE²293 397SE²129 405SE²112 407SE¹59 407SE⁶59 Cir. 11 951F2d⁷1231 f 645FS⁴262 f 645FS⁵262 f 645FS⁶262</p>	<p>401SE¹13 422SE²17</p>	<p>—175— Maryland Casualty Co. v Rhoden 1984 (170GaA704) j 337SE³76</p>	<p>—188— Ford Motor Credit Co. v Sullivan 1984 (170GaA718) 341SE¹500 351SE¹213 351SE³214 416SE²770 Md 492A2d1311 10A⁴897s</p>	<p>357SE⁴322 375SE⁶622 33A³17s 15A⁴1127s</p>
<p>—143— Jones v Guenter Kaussen Properties 1984 (170GaA486) Cert Den</p>	<p>—153— Price v Fulton County Commission 1984 (170GaA736) Cert Den 382SE³182 405SE²490</p>	<p>—178— Baker v Georgia 1984 (170GaA700) 369SE¹273 373SE¹283 378SE²339</p>	<p>—181— Moore v Georgia 1984 (170GaA709) 355SE⁶67</p>	<p>—191— Manning v Georgia 1984 (170GaA721) 335SE²148 377SE²737 377SE³737 419SE¹34 419SE⁶0 433SE¹03 93A⁴1097s</p>	<p>—199— Teal v Parrish 1984 (170GaA735) cc 311SE⁸63</p>	<p>—200— Paul v Georgia 1984 (170GaA746) 327SE²550</p>
<p>—144— Martin v Sears Roebuck & Co. 1984 (170GaA791) r 320SE¹74 v 325SE⁹25 327SE⁵76</p>	<p>—156— Statiras v Georgia 1984 (170GaA739) f 370SE¹515 375SE¹484 378SE¹158 383SE¹198 397SE¹170</p>	<p>—167— Stephens v</p>	<p>—182— Harriman</p>	<p>—193— Lowe v Moore 1984</p>	<p>—201— Taylor v Blackwood 1984 (170GaA747) 20A⁴1249s</p>	<p>—202— Davis v Georgia 1984 (170GaA748)</p>



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- **Ethics of AI**

- Competency (Rule 1.1)

- Supervision (Rule 5.1 & 5.3)

- Confidentiality (1.6)

- Diligence (Rule 1.3)

- Candor to Tribunal (Rule 3.3)




MA

Can you write me an argument that a lawyer must understand artificial intelligence or risk an ethical violation under ABA Model Rule 1.1?



Certainly, Mark. Here's an argument explaining why a lawyer must understand artificial intelligence (AI) to avoid an ethical violation under ABA Model Rule 1.1, which pertains to competence:




Argument:

Artificial intelligence is becoming an increasingly integral part of modern legal practice, particularly in the realm of federal government contracts. Failure to understand AI can not only hinder effective representation but may also lead to ethical violations under ABA Model Rule 1.1, which mandates that lawyers must provide competent representation to their clients.



MA

Can you write me an argument that a lawyer must understand artificial intelligence or risk an ethical violation under ABA Model Rule 3.7 pertaining to the duty of competence?

- 
1. **Duty of Competence (ABA Model Rule 3.7):** ABA Model Rule 3.7 emphasizes that a lawyer must provide competent representation to a client. Competence encompasses having the requisite knowledge, skill, thoroughness, and preparation necessary to handle legal matters effectively.




MA

Can you write me an argument that a lawyer must understand artificial intelligence or risk an ethical violation under ABA Model Rule 8.6 that explicitly obligates a lawyer to provide competent representation to the client under the duty of competence?



Certainly, Mark. Here's an argument explaining why a lawyer must understand artificial intelligence (AI) to avoid an ethical violation under ABA Model Rule 8.6, which explicitly obligates a lawyer to provide competent representation to the client under the duty of competence:

- 
1. **Duty of Competence (ABA Model Rule 8.6):** ABA Model Rule 8.6 leaves no room for ambiguity; it clearly states that a lawyer shall provide competent representation to a client. Competence, in this context, encompasses the knowledge, skill, thoroughness, and preparation necessary to handle a client's legal matters effectively.



- **Ethics of AI**


- Competency (Rule 1.1)

- Supervision (Rule 5.1 & 5.3)

- Confidentiality (1.6)**

- Diligence (Rule 1.3)

- Candor to Tribunal (Rule 3.3)



A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

ABA Model Rule 1.6, Comment 3.



- **Ethics of AI**

- Competency (Rule 1.1)

- Supervision (Rule 5.1 & 5.3)

- Confidentiality (1.6)

- Diligence (Rule 1.3)**

- Candor to Tribunal (Rule 3.3)



- **Ethics of AI**

- Competency (Rule 1.1)

- Supervision (Rule 5.1 & 5.3)

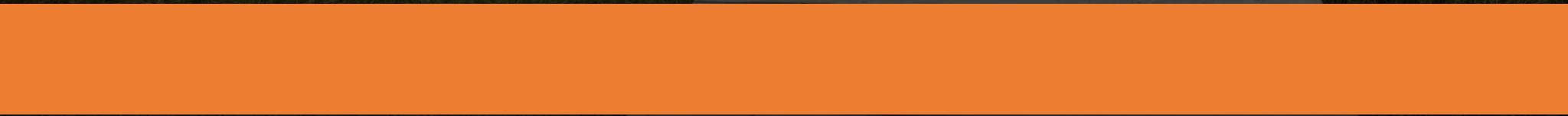
- Confidentiality (1.6)

- Diligence (Rule 1.3)

- Candor to Tribunal (Rule 3.3)

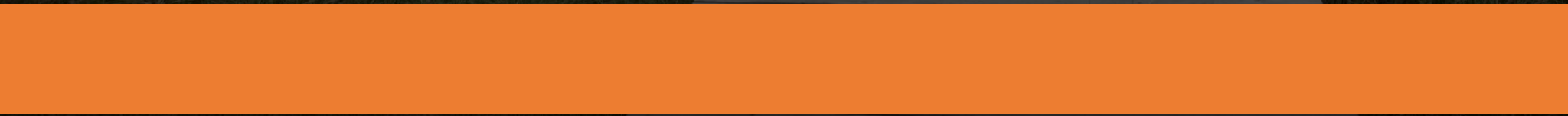


Practical Steps





Train



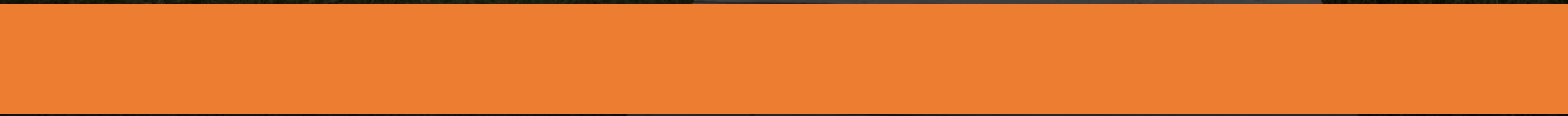


Law Office Policy





Engagement Letters



Non-Lawyer Ownership of Firms



Non-Lawyer Ownership of Firms

- ABA Model Rule 5.4 restricts non-lawyers from ownership/partnership in law practices

Non-Lawyer Ownership of Firms

- Certain States are experimenting with opting out of Rule 5.4
 - Utah
 - Arizona



Non-Lawyer Ownership of Firms

- What should consumers of legal services be focused on regarding risks and costs?
- Hedge Funds investing in firms betting on the short sale?



Practical Steps



Engagement Letters



Conflicts



Transparency



Helpful Sources

- Yale Law Journal Forum on Legal Ethics
 - S. Younger, *The Pitfalls and False Promises of Non-Lawyer Ownership of Law Firms* (Sept. 2022)
 - R. Baxter, *Dereliction of Duty: State Bar Inaction In Response to America's Access to Justice Crisis* (Oct. 2022)

Thank you!

Mark J. Meagher
Meagher GC Law, LLC



M. Meagher Bio

Mark Meagher has spent the last 30 years practicing government contracts law with a large, well-known firm in the field of federal government contracts. In that role, he has counseled clients on the full range of contract and regulatory compliance issues.

Mark is among the country's most experienced practitioners delivering legal services to DOE and National Nuclear Security Administration contractors at the national laboratories and legacy environmental clean-up sites.



DOECAA Board

Donald Murano, Board President



Donald K. Murano, Esq., CCEP **DOECAA President 2019-Present**

Mr. Murano is a proven professional with extensive legal, business, corporate compliance, and business ethics expertise. He has applied his 30+ years of knowledge in forging practical solutions to complex business challenges in the face of legal and compliance risks.

As in-house counsel for numerous environmental, engineering, and construction firms, Mr. Murano has utilized his business acumen through the development and implementation of practical risk mitigation solutions. His sound advice as in-house counsel, as well as a past litigator, enable him to analyze the complex and provide manageable solutions in the many facets of contract law, business operations, and regulatory compliance.

For over a decade, Mr. Murano litigated in state and federal courts as the principal litigator in The Murano Law Firm LLC. His firm's client list ranged from companies having fewer than five employees, to multibillion-dollar organizations. One common theme prevails in that spectrum of clients - it is preferable to avoid the legal trenches through advanced business and legal planning, rather than to extract an "at risk" enterprise from legal entanglement and the loss or reputation capital, in the aftermath.

Saurabh Anand, Board Secretary



Saurabh Anand

Chief Laboratory Counsel
SLAC National Accelerator Laboratory and
DOECAA Board Secretary, 2018-present

Saurabh Anand is Chief Laboratory Counsel for SLAC National Accelerator Laboratory, a U.S. Department of Energy National Laboratory managed and operated by Stanford University since 1962. Saurabh provides advice on the full range of legal issues affecting SLAC. He also serves as a member of SLAC's Senior Management Team and Secretary of SLAC's Board of Overseers.

Before joining Stanford University, Saurabh was an attorney at an international law firm based in Washington, D.C., specializing in government contracts law.

Saurabh received his B.S. in mechanical and aerospace engineering from Washington University in St. Louis, magna cum laude, and his J.D. from the University of Southern California, order of the coif, where he was Senior Submissions Editor of the Southern California Law Review. After law school, Saurabh clerked for Judge Stephen V. Wilson in the U.S. District Court for the Central District of California, Los Angeles.

John Stolpa, Board Treasurer



John Stolpa

General Counsel

National Renewable Energy Laboratory and
DOECAA Treasurer, 2020-present

John Stolpa has served as General Counsel for the National Renewable Energy Laboratory (NREL) since 2019, and currently manages NREL’s legal, prime contract, records, policies, and export control functions. He previously served as Deputy General Counsel and Associate General Counsel – Intellectual Property during his 14-year tenure at NREL. He also serves as Corporate Secretary for Alliance for Sustainable Energy LLC, the managing and operating contractor of NREL. Since 2020, he has served as DOECAA’s Treasurer.

Before joining NREL, Stolpa was in private legal practice as a registered patent attorney focused primarily on intellectual property and transactional law. His prior legal experience included positions with Finnegan, Henderson, Farabow, Garrett, and Dunner LLP and 3M Innovative Properties Company. Stolpa also previously investigated the molecular mechanisms of lymphocyte signal transduction at the University of Colorado and National Jewish Health.

He has a bachelor's degree in Chemistry from Colorado College and a Ph.D. in Microbiology and Immunology from the University of Colorado. Stolpa obtained his doctorate of law at the University of Minnesota Law School and is admitted to practice law in the states of Colorado and California and before the U.S. Patent and Trademark Office.



Pamela Reynolds, Director at Large

Pam Reynolds is Senior Counsel for Technical Solutions' Nuclear & Environmental Group at Huntington Ingalls Industries, Inc.



Maxine McReynolds

Associate General Counsel for Environment, Safety, and Health
Los Alamos National Laboratory
DOECAA Director-at-Large, 2022-Present

Maxine McReynolds grew up in the Pacific Northwest. She met her husband, TJ McReynolds, while they were both practicing law in Denver, Colorado. In 2014, they relocated to the Santa Fe area to be near family at San Ildefonso Pueblo and in Northern New Mexico. In addition to being partner to TJ, mom to two elementary-aged children who happen to believe that “soccer is life,” dog-mom to an adorable ‘doodle and a cat-minder, Maxine is the Associate General Counsel for Environment, Safety, and Health (ESH) at Los Alamos National Laboratory. She is passionate about national security and science missions, complex issues such as the environment and safety & health, and the law.

Maxine manages LANL’s ESH legal group, providing legal counsel to Laboratory management and organizations regarding compliance with federal and state requirements and mission-critical permitting support. The ESH legal group represents the Laboratory in enforcement actions, permit hearings, rulemaking, and a variety of actions in both state and federal district and appeals courts. She advocates before EPA’s Environmental Appeals Board (EAB), in DOE’s Office of Enterprise Assessments’ Office of Enforcement proceedings, in investigation matters with the Department of Transportation including the Federal Aviation Administration, and before state regulatory boards and commissions, including the New Mexico Water Quality Control Commission and the Environmental Improvement Board.

Prior to her role at LANL, Maxine worked for the New Mexico State Engineer in water rights matters, serving as a Special Attorney General. Prior to that, Maxine spent about a decade with the Business Law and ESH practice groups at an international law firm based in Washington DC. In addition to serving on DOECAA’s board, Maxine serves as the Vice-Chair of the New Mexico Professional Surveyors Committee and serves on the Board of the New Mexico Board of Licensure for Professional Engineers and Professional Surveyors. She earned her J.D. from the University of Colorado School of Law, an executive M.B.A. from the University of New Mexico Anderson School of Management, and a B.A. in International Political Economy from the University of Puget Sound.



Quentin Vaughan, Director at Large