



# EMPLOYMENT LAW & BIG DATA

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# AGENDA

- Key Concerns When Forming and Documenting the Employment, Contractor or Intern Relationship
- Risks in the Hiring and Interview Process
- Big Data & Best Practices
  - Potential IP Associated with Data
  - Potential Obligations Associated with Data
  - Monetization of Data
  - Concerns Regarding Data Breach



FORMING AND  
DOCUMENTING THE  
EMPLOYMENT,  
CONTRACTOR OR  
INTERN RELATIONSHIP

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## INITIAL CONSIDERATIONS

Business owners must determine the terms and conditions on which they will retain individuals, considering such issues as:

- Employee vs. contractor vs. intern
- At-will employment status
- Offer letter distribution and content
- Key employee or contractor agreements

# AT-WILL EMPLOYMENT

- Texas is an at-will employment state.
  - This means that, absent a contract stating otherwise, either the employer or the employee can end the employment relationship without advance notice and without giving a reason for the separation of employment.
  - However, the employer is bound by certain federal and state laws that affect an employer's right to terminate an employee. Just because employment is "at will" does not mean that employers may fire someone for "any reason." It cannot be an illegal reason.
  - Moreover, although the law generally presumes an employment relationship is at-will, thus shielding an employer from liability for most employee claim or loss resulting from a dismissal, there are notable exceptions and restrictions.

# AT-WILL EMPLOYMENT – EXCEPTIONS AND RESTRICTIONS

At-will employment status can be altered by:

- Express terms or provisions in employment agreements
- Legislative Restrictions
  - Anti-discrimination laws
  - Statutory Prohibitions – e.g., whistleblower laws
- Judicially created exceptions
  - Public policy violations
  - Implied covenant of good faith and fair dealing
  - Contract implied in fact

## AT-WILL EMPLOYMENT – CONTRACT IMPLIED IN FACT

- **Key legal concern**: Judicial finding that at-will employment status has been modified or altered.
- Some courts, adjudicating legal claims of at-will employees aggrieved by a termination, have determined that a contractual right to employment has been implicitly created by:
  - Employee handbooks;
  - Oral representations;
  - Offer letters; or
  - Other employer statements, actions and promises



## AT-WILL EMPLOYMENT – PRACTICE TIPS

- Tips to help preserve at-will employment status:
  - Have employees sign off on their at-will employment status (offer letter; handbook acknowledgment form)
  - Avoid specific or limited assurances to act or refrain from certain action against employees
  - Ensure employee handbooks and workplace policy materials:
    - (1) Do not provide any specific assurances or promises;
    - (2) Consistently reaffirm the at-will relationship; and
    - (3) Include an appropriate disclaimer

## AT-WILL EMPLOYMENT – PRACTICE TIPS

### Examples of Appropriate Disclaimers:

- "This Handbook does not constitute a contract of employment between the Company and any employee. Nothing in this Handbook is intended to create an employment contract, either express or implied, between the Company and any of its employees."
- Employment with the Company is employment "at-will." Both you and the Company have the right to terminate your employment at any time, with or without cause or notice. Your status as an "at-will" employee may not be changed, except in writing signed by the President of the Company.

# OFFER LETTERS – KEY PROVISIONS

- Start Date
- Rate and manner of pay
  - Salary, wage, or commission
  - Whether employee is exempt or non-exempt from federal minimum wage and overtime requirements
- Hours of Work
- Eligibility for benefits
- Employment is contingent upon:
  - Successful completion of background screen
  - Agreement to abide by company policies
  - Successful execution of other employment-related agreements
- Confirmation that employment is at-will

## OTHER KEY AGREEMENTS

- To protect proprietary products and services, marketing strategies, and customer goodwill, employers should require employees to sign agreements governing:
  - Non-Competition by employees vs. contractors;
  - Non-Solicitation of employees or customers; and
  - Confidentiality and Protection of Proprietary Rights
  - Invention / IP assignment agreements
- Enforceability primarily depends on state law

# NON-COMPETITION AGREEMENTS

- Agreement between employer and employee limiting an employee's competitive activities for a specified period of time after the employment relationship ends
- Restricts former employees from working for competitors or defined groups of competitors
- Used by employers to help protect against unfair or unlawful competition by former employees
- Benefit employers by providing them with greater assurance that the company's intellectual property, confidential resources, and proprietary information will not be made available to or used by a competitor

# NON-COMPETITION AGREEMENTS - KEY PROVISIONS

- Consideration provided
- Definition of "Confidential Information"
- Defining "Prohibited Activity"
- Geographic Scope
- Duration of Restriction
- Tolling provisions
- Remedies
- Notification Provision
- Garden Leave Clauses
- Mandatory Arbitration Clauses
- Choice of Law Clauses
- Venue and Forum Selection Clauses



## NON-SOLICITATION AGREEMENTS - GENERALLY

- Agreement that prohibits an employee (either during or after employment, or both) from approaching the employer's employees, clients, customers, vendors or business partners to attempt to hire, retain, or create contractual relationships with them
- Governed by state law
  - Texas courts treat non-solicitation agreements as covenants not to compete and thus disfavor non-solicitation agreements because they limit an individual's ability to earn a living

# CONFIDENTIALITY AND PROPRIETARY RIGHTS AGREEMENTS

- An agreement concerning confidentiality and the appropriate handling of commercially valuable information, compliance with relevant security rules and policies, and the protection of intellectual property assets.
  - Requires individuals to treat certain information, as specifically defined in the agreement, as confidential
  - Prohibits individuals from using or disclosing information to 3<sup>rd</sup> parties
- Helps businesses protect valuable proprietary information, such as: trade secrets, designs, ideas, techniques, methods, processes, customer lists, and other non-public information.

# CONFIDENTIALITY AND PROPRIETARY RIGHTS AGREEMENTS

- Key considerations include:
  - Identifying the appropriate entities as parties to the agreement, including company successors, assigns, subsidiaries and affiliates
  - Providing adequate consideration to support the enforceability of the agreement and the obligations imposed on the individual
  - Diligently defining the categories of confidential and proprietary information covered by the agreement
  - Drafting the disclosure and use restrictions to reflect the company's actual business needs, without being overbroad
  - Drafting intellectual property and work made for hire provisions
  - Deciding state law that will govern interpretation of the agreement

# DEFEND TRADE SECRET ACT

## Immunity Notice:

- Part one: No individual shall be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made either (x) in confidence to a federal, state or local government official, either directly or indirectly, or to an attorney, solely for the purpose of reporting or investigating a suspected violation of law or (y) in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.
- Part two: An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual (x) files any document containing the trade secret under seal and (y) does not disclose the trade secret, except pursuant to court order.



WAGE AND HOUR ISSUES

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# FAIR LABOR STANDARDS ACT (FLSA)

When classifying workers:

- First, determine whether the worker is an "**employee**" under the Act's definition
- If so, then determine whether the employee is "**exempt**" or "**non-exempt**" from the Act's minimum wage and overtime requirements



## CLASSIFYING WORKERS UNDER THE FLSA

- Employee – "any individual employed by an employer" who is "suffered or permitted" to work. [FLSA §203]
- Workers who are not "employees" under the FLSA and thus not subject to the Act's provisions, include:
  - Family businesses
  - Independent contractors
  - Volunteers
  - Interns
  - Trainees

## CLASSIFYING WORKERS UNDER THE FLSA

- **Key Legal Concern**: Employers must be very careful when classifying workers as independent contractors, interns or volunteers – rather than as employees.
  - Since these workers are not "employees," they are not subject to the Act's minimum wage and overtime requirements.
  - However, employers can be subject to significant liability, including back wages and overtime pay, if workers in question are found to be "employees" rather than independent contractors, interns or volunteers.

# INDEPENDENT CONTRACTORS

- An independent contractor is a worker who contracts with individuals or entities to provide services in exchange for compensation.
- An employer only has the right to control the end result of the project, but not how the independent contractor accomplishes it.
- An independent contractor typically:
  - Charges fees for service
  - Is engaged only for the term required to perform an identified service or task
  - Retains control over method and manner of work
  - Is responsible for paying his income, Social Security, and Medicare taxes
  - Is not protected by most federal, state or local laws designed to protect employees



# INDEPENDENT CONTRACTORS

- By comparison, an employee is subject to significant company oversight.
- An employer has the right to control the method and manner of an employee's work
- In addition, an employee:
  - Is paid wages (may include overtime compensation) and company-sponsored benefits
  - Is employed for a continuous period of time and performs whatever tasks the company requires
  - Pays the full amount of income taxes and a portion of Social Security and Medicare taxes, generally through amounts the employer is obligated to withhold from the employee's wages



# INTERNS

- The Department of Labor has adopted a six-part test for analyzing internship status under the FLSA.
  - (1) The internship is similar to training which would be given in an educational environment
  - (2) The internship experience is for the benefit of the intern
  - (3) The intern does not displace regular employees, but works under close supervision of existing staff;
  - (4) The employer providing the training derives no immediate advantage from the activities of the intern;
  - (5) The intern is not necessarily entitled to a job at the conclusion of the internship; and
  - (6) The employer and intern understand the intern is not entitled to wages
- If all six factors are satisfied, then an individual may be properly classified as an "intern" rather than an employee under the FLSA.

# INTERNS

- To avoid any FLSA violations, before retaining any unpaid interns, businesses should consider:
  - Whether the intern is receiving academic credit;
  - Whether the intern is doing work that otherwise would be performed by employees, or the same as work other employees are performing;
  - The degree of training provided to the intern, and whether the intern is receiving academic credit for the internship;
  - Whether the internship's duration is finite; and
  - Whether there is an expectation of future employment.

# VOLUNTEERS

- According to the Department of Labor, individuals may never volunteer to perform work for private, for-profit employers.
- Any work performed is subject to the FLSA's minimum wage, overtime pay and other requirements.
- In addition, characterizing certain work as "volunteer activity" is not enough to avoid the FLSA's requirements even if both the employer and worker agree.

## CLASSIFICATION OF EMPLOYEES UNDER THE FLSA

Under the FLSA, most employees are classified as either **exempt** or **non-exempt**, depending on the nature of their work and their salary

- Exempt employees:
  - Not subject to the FLSA's minimum wage requirements
  - Not entitled to overtime pay
- Non-Exempt employees:
  - Entitled to at least minimum wage of \$7.25 per hour for all hours worked
  - Entitled to overtime compensation for all hours worked over 40 hours in one workweek at a rate of at least 1.5 times the regular rate

# CLASSIFICATION OF EMPLOYEES UNDER THE FLSA

- Generally, to be classified as exempt from the FLSA's minimum wage and overtime compensation requirements, an employee must:
  - (1) be paid at least \$23,600 per year (\$455 per week);
    - Effective 12/1/16 – increases to \$47,476 per year (\$913 per week)
  - (2) be paid on a salary basis; and
    - Meaning employee receives predetermined salary each pay period, not subject to reduction based on the quality or quantity of work performed
  - (3) perform exempt job duties
    - As set forth in the FLSA

# FLSA – EXEMPT JOB DUTIES

- Executive Employee Duties:
  - Managing the enterprise
  - Customarily and regularly directing the work of two or more other full-time employees
  - Authority to hire or fire other employees
- Administrative Employees
  - Performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers
  - Exercise of discretion and independent judgment with respect to matters of significance
- Professional (learned) Employees
  - Performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

# FLSA – EXEMPT JOB DUTIES

- Professional (creative) Employees
  - Performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- Highly Compensated Employees
  - Employees performing office or non-manual work and paid total annual compensation of \$100,000 or more and who customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee
- Outside Sales employees
  - Making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer
  - Customarily and regularly engaged away from the employer's place of business
- Computer Professionals
  - Computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field



# RISKS IN THE HIRING AND INTERVIEW PROCESS

Recommended HR Policies and Best Practices

# DISCRIMINATION IN THE HIRING PROCESS

- Many aspects of the recruiting process may trigger an employment discrimination claim, including:
  - Advertising and describing a job vacancy
  - Conducting an interview
  - Making an offer of employment
  - Rejecting an applicant

# DISCRIMINATION IN THE HIRING PROCESS

- To minimize a risk of a discrimination claim in the hiring process, employers should:
  - Determine the applicable federal, state and local laws and the protected classes covered by each
  - Ensure that individuals involved in the recruitment process are trained to identify and avoid potentially discriminating practices
  - Identify the essential qualifications and functions of each position
  - Focus on objective criteria in the interview and selection process

# INTERVIEWING APPLICANTS

- During interviews, avoid questions regarding:
  - The country of origin of an applicant's name, or where the applicant (or the applicant's parents) were born.
  - Whether the applicant observes religious holidays, or belongs to or attends a religious institution.
  - Whether an applicant is or plans to become pregnant, or whether the applicant intends to use maternity or paternity leave.
  - Whether the applicant has children, or has child care arrangements that will allow him or her to be at work when scheduled.
  - Whether the applicant is married, or how an applicant's spouse would feel about the hours or travel requirements of the job.
  - At what age an applicant intends to retire.
  - Whether an applicant is taking any medications or has been hospitalized recently.
  - Whether an applicant has been treated for substance abuse.
  - Whether an applicant has ever filed a claim for workers' compensation.

## EMPLOYMENT APPLICATION FORMS

- Do not ask for any information regarding an applicant's disability
- Do not ask questions that otherwise highlight the applicant's status in a protected group
- Note the applicable federal, state and local laws regarding inquiries into an applicant's criminal history
  - Some states and municipalities have passed "ban the box" legislation, prohibiting private employers from making any inquiry into criminal backgrounds until after an initial interview or conditional offer of employment

# BACKGROUND CHECKS

- Employers who use consumer reports (e.g., background checks) must comply with the Fair Credit Reporting Act (FCRA)
- To comply with the FRCA:
  - Employers must notify and obtain proper authorization from an individual before obtaining a consumer report
    - The disclosure and authorization can be included on one form but cannot be part of the job application, handbook or any other document
  - After obtaining a consumer report and before rejecting an applicant based in whole or in part on information contained in the consumer report, the company must provide the job applicant with:
    - A copy of his or her consumer report
    - A form entitled "A Summary of Your Rights Under the Fair Credit Reporting Act"
    - A form entitled "Notice of Potential Adverse Action"

# FITNESS FOR DUTY TESTING

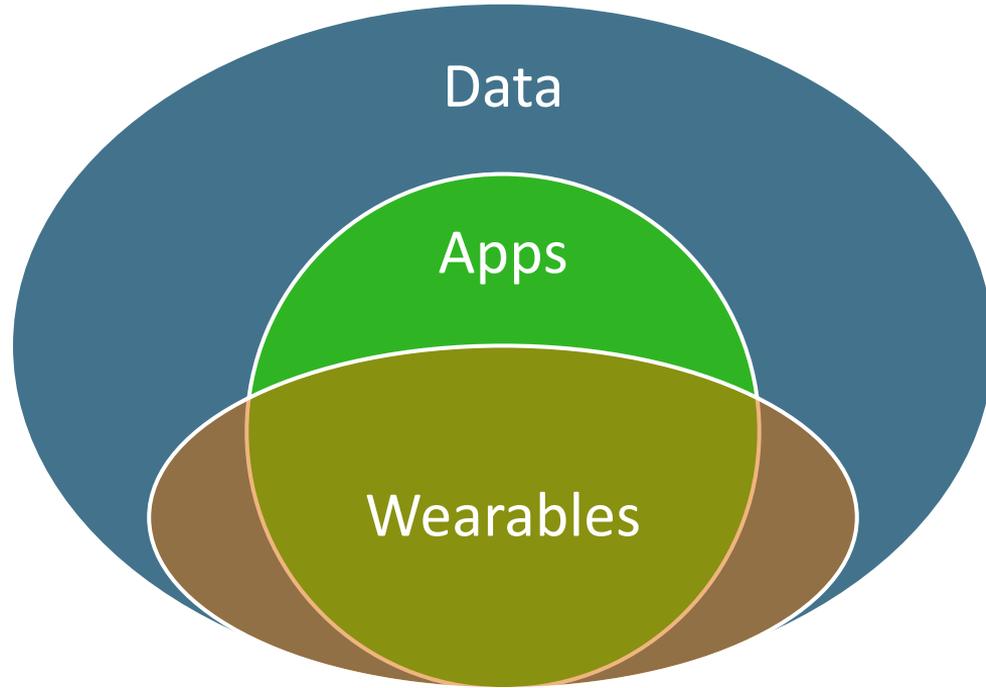
- Fitness-for-duty examinations are sometimes required by employers in order to gauge whether an employee is able to perform essential job functions.
- Federal law places several restrictions on the way the tests are conducted and what results can be used by the employer
  - A fitness-for-duty examination may only be given ***after*** a job offer has been made
  - An employer is allowed to make a job offer conditioned upon the successful completion of a medical exam only if:
    - (1) The examination is uniformly applied to all entering employees in the same job category; and
    - (2) The medical information is kept confidential.



# BIG DATA

Considerations & Best Practices

# DATA IS BIG



## TYPES OF FREQUENTLY ENCOUNTERED DATA

- Individual Data
  - Patient, Employee, Student
- Collective Consumer Data
  - De-identified Data
- Financial Data
- Healthcare Data
- Location Data
- Analyzed Data
- Enterprise Metadata

## WHO OWNS DATA?

- Fragmented nature of data collection and analysis causes lots of gray areas with respect to data ownership
- Better Question - Who has what rights to access, modify, share, and monetize the various forms of the data?

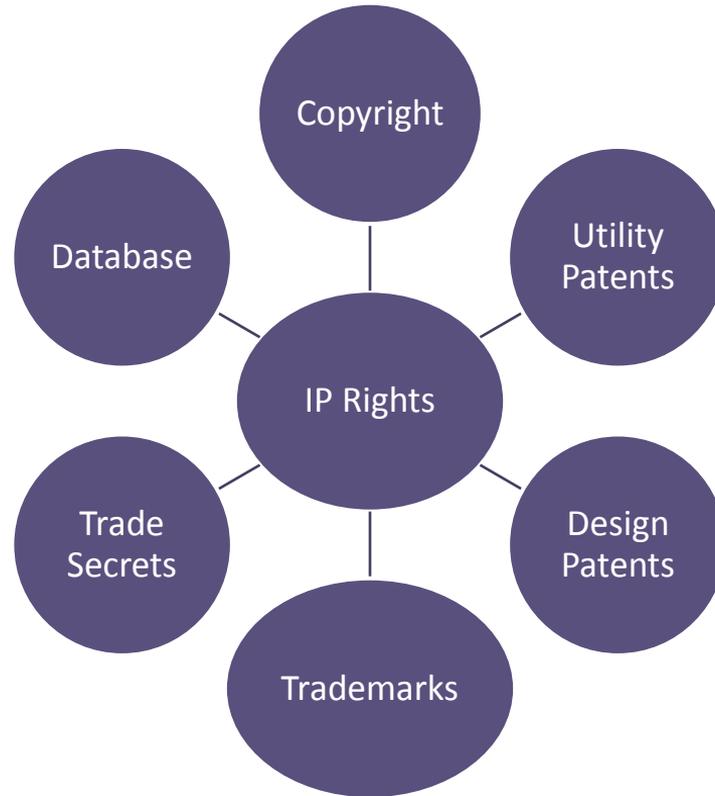
## TYPES OF DATA BASED ON MODE OF COLLECTION

Data Type	Owner	Example Dataset
Clinical Data	Service Provider	EMR, medical images
Research Data	Pharmaceutical companies, Academia	Clinical trial data sets, high throughput screening results, genomic testing data
Claims and Cost Data	Payors and Providers	Utilization of care, cost estimates, other claims data
Private user-generated data	Consumers, App Owners	Personal and social behavior, purchase history, calorie consumption, exercise profiles

## TYPES OF DATA BASED ON MODE OF COLLECTION

Data Type	Owner	Example Dataset
Private user-generated wearable data	Device Makers	Metabolite profile, heart rate
Student data	Education Provider, Private Vendor	Performance data, Engagement data
Financial Data	Bank, Service Provider	Transaction data

# POTENTIAL INTELLECTUAL PROPERTY



# WAYS TO MONETIZE DATA

- Monetization = data → \$ product/service
- Internal Use - connect the dots, decreasing waste, benchmark performance, identify risks, forecast trends
  - Startup costs, ramp up time
- Collaborative Use - make recommendations of products or services, improve delivery of products or services
- Transactional Use – direct sale or exchange for value
- Where is the value?
  - Aggregated or integrated data
  - Data analytics - descriptive or exploratory
  - Predictive models
  - Prescriptive models

## DIFFERENT BUSINESS MODELS

- Innovative Technology is wearable hardware
  - Patches to detect metabolites in sweat
  - Contact lens measuring blood sugar
- Innovative Technology is app
  - App to help patients with diagnosed psychiatric conditions (e.g., PTSD, depression, anxiety)
  - App for asthmatics to track inhaler usage, asthma episodes experienced, location of user at the time of an attack, or environmental triggers of asthma attacks
  - App that provides wait times and electronic check-in for hospital emergency rooms and urgent care facilities

## DIFFERENT BUSINESS MODELS

- Innovative Technology is hardware + app
  - App + attachment to mobile device to measure blood glucose levels
  - App that uses accelerometer to measure the degree of tremor caused by certain diseases (i.e., a tremor transducer).
- Innovative Technology is app + trademark
  - IP that stems from the technology - Apple, Fitbit
  - IP associated to the brand - Nike, Tory Burch

# DATA STEWARDSHIP

- Obligations associated with agreements
  - Are you subjected to agreements that convey obligations (e.g. obligations to maintain, secure, etc.)
- Obligations associated with HIPAA
- Obligations associated with financial data
- Obligations associated with personal data (e.g. SS#)
- Obligations associated with non-HIPAA health data
- Obligations associated with FDA

# COMPLIANCE IS COMPLEX



# BREACH IS EVEN WORSE



## PLAN FOR BREACH

- Identify the types of data collected/ processed/ developed
- Identify persons who are/will be responsible for data management
- Identify compliance requirements according to applicable laws
- Create a risk assessment plan and mitigation plan
- Develop policies and educate all staff
- Have a reporting mechanism that is well publicized and encouraged
- Procure insurance to cover data breaches (cyber policy)
- Review vendor contracts

## TYPICAL CLAIMS

- Negligence
- Breach of Contract
- Unfair Trade Practices
- Breach of Privacy
- State Statutes

# WHEN BREACH OCCURS

- **Involve in-house/outside counsel immediately**
  - Can assert privilege to maximum extent possible
  - Use counsel to conduct employee interviews
  - Assess claims vs. affected contractors
  - Initiate Notification Protocol
  - Contact regulators
  - Notify vendors, insurance, customers
- **Investigate**
  - What data? Whose data?
  - Who are the affected parties? Customers? Vendors? Data Providers?
- **Mitigate/Remediate**
  - Recover device / data
  - Prove that breach was limited or data not accessed

## AGREEMENTS WITH USERS/CUSTOMERS

- Make sure your Terms of Use & Privacy Policy is up-to-date
  - Explain how data will be used
- Obtain lawful prior consent for use and monitoring
  - Through warnings or banners
  - Terms of use
- Notify users
  - Use of the system constitutes consent to interception of communications and
  - Results of monitoring may be disclosed to others, including law enforcement.
- If an organization is a federal, state, or local agency or a state university, its actions may implicate the Fourth Amendment
  - Inform users of diminished expectation of privacy

## AGREEMENTS WITH VENDORS

- Know how and where data will be stored, processed, and accessed
  - Vendor risk assessment and due-diligence
  - Approval before any move
- Who bears the risk?
- Reliance on industry standards
- Master policy framework – but whose?
- Implementing change
- Indemnification
- Insurance

# CONTACTS



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## About Becky

Becky counsels and represents employers in all areas of labor and employment law. She represents employers involved in federal and state court litigation and advises and represents them with respect to administrative claims. Becky's experience includes matters involving retaliation, whistleblower protection, wrongful termination, discrimination, harassment, wage and hour issues, and other employment claims.

## About Jonathon

Jonathon is both a litigator and an intellectual property lawyer. As an IP lawyer, Jonathon works to protect and monetize his clients' innovations and brands across a variety of sectors, including the energy, real estate, and technology industries. As a litigator, Jonathon is at home in the court room, where he works hard to enforce his clients' intellectual property rights and resolve complex commercial disputes relating to design and construction, real estate, energy, and technology agreements.

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