

Excellence

A report on emerging legal trends from the attorneys of DBL Law

SUMMER 2022

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Update on Hospital Opioid Litigation

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Amid major settlements by opioid manufacturers, distributors, and retailers with states, government entities, and Native American tribes in February 2022, the outcome of the litigation brought against the opioid industry by hospitals remains to be seen.

Hospital groups, including those in Kentucky, Arizona, Missouri, West Virginia, Florida, and Alabama, have brought claims against the opioid industry to recover their costs of responding to the opioid epidemic. One of the bases of the hospitals' claims against opioid defendants is that they created a "public nuisance," which directly led to hospitals bearing the financial burden of caring for opioid victims and inflated the hospitals' costs. State plaintiffs also brought claims under local nuisance laws. Hospital plaintiffs' complaints survived Motions to Dismiss in Missouri, Florida, and Alabama.

In November 2021, courts in California and Oklahoma rejected state plaintiffs' public nuisance theories on grounds that applying the legal theory to products that do have some legitimate medical uses was too expansive of a reading of the states' public nuisance laws. However, juries in cases by two Ohio plaintiffs more recently accepted the public nuisance theory. Those juries found that the oversupply of pills and subsequent illegal diversion created a public nuisance that was continuing and foreseeable because patients turned to heroin and fentanyl when the pill supply receded.

In the hospital cases, unlike the state cases, the legal theory of public nuisance will require hospitals in some states to prove "special damages" different than that of the public. In other words, the hospitals must show that they suffered a type of harm different than that of other members of the community at large. However, hospitals are in the unique position of having quantifiable data on the resources expended to address opioid addiction, and therefore proving special damages is not expected to be an insurmountable barrier to overcome should the cases move forward to a judge or jury.



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Diversify Your Talent Pool by Creating Fair Chance Employment Opportunities

by LaKisha Miller
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As Kentucky focuses on economic competitiveness, businesses must diversify their hiring pools to include individuals from fair chance populations.

Employers may be familiar with terms like "fair chance" or "second chance employment." Fair chance employment ensures that individuals in recovery, impacted by substance use, or with justice involvement have the opportunity to re-enter the workforce. Recently, Kentucky's unemployment rate dropped to its lowest rate in recorded history, according to new labor market data.

"Kentucky's historically low unemployment rate is welcome news, and is another reminder that our economy has made a remarkable recovery from the pandemic," said Kentucky Chamber Senior Policy Analyst Charles Aull. "With that being said, the number of open jobs and our low rate of workforce participation are major challenges that continue to hold our economy back and make it very difficult for businesses in Kentucky to meet consumer demands and grow. It is critical that we focus on bringing more Kentuckians into the labor market and removing barriers to work."

This is why fair chance employment is critical in Kentucky. The Kentucky Chamber Foundation's Workforce Recovery Program supports businesses looking to become fair chance employers by providing valuable training, information, and resources to foster employment opportunities for individuals ready to re-enter the workforce.

An initiative recently launched by the Foundation's Workforce Recovery Program, the Kentucky Transformational Employment Program (KTEP), provides a pathway for businesses and employers to help more Kentuckians reach long-term recovery while supporting fair chance employment.

KTEP prioritizes workplace safety and provides essential liability protection for employers. Under Kentucky law (KRS 222.215), businesses who participate are not liable for civil action alleging negligent hiring, negligent retention, or negligent acts because of an employee's substance use disorder.

"The Kentucky Transformational Employment Program connects people with the treatment resources they need to be healthy. We see a real opportunity for this program to do some good. We encourage employers across Kentucky to make a positive impact

in their communities," said Van Ingram, Executive Director of the Kentucky Office of Drug Control Policy. "Stable employment is a critical component of long-term recovery and can provide Kentuckians with the purpose and motivation they might need to stay in remission and get their lives back."

KTEP helps improve an employer's ability to recruit, hire, and retain the workforce it needs to grow its business, and as of April 2022, more than 60 Kentucky businesses have signed up for KTEP, which impacts more than 12,000 Kentucky employees.

In May of 2022, the Kentucky Chamber Foundation launched the first-ever Fair Chance Academy to complement the Kentucky Transformational Employment Program. This cohort, comprised of 20 businesses representing nearly 30,000 employees across Kentucky, focuses on developing the knowledge, tools, and resources needed to hire, train, and retain talent from fair chance populations. These businesses will be the first in Kentucky to receive recognition and certification from the Kentucky Chamber Foundation as fair chance employers.

The Kentucky Chamber Foundation continues to develop business-led programs that help create the robust workforce our state needs to be competitive. The Workforce Recovery Program has been a catalyst for life-changing outcomes among people impacted by substance use, helping to reduce stigma in the workplace related to addiction, treatment, and recovery. Over the past two years, this program has recruited 32,000 fair chance jobs to help Kentuckians find stable and meaningful employment. The Kentucky Chamber Foundation encourages every business in Kentucky to take steps to become a fair chance employer.

Please visit Kentucky Talent Hub www.talenthubky.com to post fair chance job opportunities. To learn more about the Kentucky Transformational Employment Program and to participate, visit <https://kentuckycomeback.com/ktep/>.

**LaKisha Miller is Executive Director of the Kentucky Workforce Center, and Mark Guilfoyle is Incoming Chair of the Workforce Center's Board of Managers.*





DBL Law Made It Series

by Loren Wolff

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In March, DBL Law partnered with the Covington Business Council, Blue North, and Renaissance Covington to launch a morning coffee series titled “Made It.”

Branded as “A fresh, new way to start your day,” each Made It event features a relaxed discussion with two inspiring business owners – one emerging and one established. There are so many remarkable stories to be told, and the Made It series provides an opportunity to support the business community by hearing from the businesses themselves.

The Made It series is not just a speaking event – it is also an opportunity to connect with other business owners, community leaders, and service providers. Each event includes plenty of networking time before and after the speakers. DBL Law is excited to invite the public into its new Covington space to network and to have an opportunity to gain insight on resources available to businesses.

The Made It series is held every other month (with a short summer break) at 8:45 a.m. at DBL Law's new Covington office. The next Made It event will take place on August 25 at 8:45a.m. Registration is free but required at <https://www.dbllaw.com/event/made-it-series/>.



The first Made It series held on March 24th featured speakers Shannon Glover (Legendary Eatz) and Ron Washington (Covington City Commissioner and found of NKY Med Clinic).



The Made It series held on May 12th featured speaking Chris Cook (President, Cru Cutters) and Trudy Lorenz (Owner of Wild Gardens).



Relocating or Expanding Your Business? Consider These Factors

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If your business is looking to relocate or open a second location, your team has a lot on its plate. It is a complicated process and you are focused on making a major business decision.

At DBL Law, we work with clients to guide them through the entire process from site selection, real estate development, and incentives negotiation. Our multidisciplinary approach uses our collective knowledge and strategic experience to make sure your business can make the most of economic development opportunities.

Here are some factors to consider when expanding or relocating:

The Real Estate Development Process

The first step always focuses on real estate. Your business is asking big questions such as: Should we stay in our current location or move to a new location? Should we lease? Should we buy? Where should we go? We work with clients to walk them through every step of acquisition, creative forms of ownership, leasing, obtaining zoning changes, building permits, and any other required approvals.

We know that timing is everything. Your business operations cannot be interrupted, and keeping a complex real estate process moving forward and meeting your goals takes a team approach. This is especially true if you are considering economic development incentives. Under certain incentive programs, money spent on your real estate project before approval of your incentives may not be eligible for the incentives. We offer practical solutions to make sure that every step of the transaction considers timing and keeps your business goals at the forefront.

Identifying and Analyzing Incentives

When considering an expansion or relocation, it is important to take advantage of all economic development incentive programs. While Kentucky and local governments offer a wide variety of economic development incentives to new, growing, or relocating businesses, here are some key economic development tools to consider:

Kentucky Business Investment (KBI): KBI is a payroll tax incentive program. Available to new and expanding businesses in Kentucky. Depending on the location, your business may qualify for enhanced credits.



Kentucky Enterprise Initiative Act (KEIA): KEIA provides a refund of Kentucky sales tax collected on construction materials used for permanent improvements to real property for certain business ventures.

Industrial Revenue Bonds (IRB): IRB's are issued by state and local governments to finance industrial buildings and improvements. The proceeds from the bonds are to be used to finance the cost of the project. In addition, the issuer (the local government entity) of the bond is not obligated to repay the debt. Instead the bondholder considers the potential revenue from the planned project to cover the debt obligation. In addition, the issuer is tax exempt from property taxes during the term of the IRB and the property may also be eligible for a reduced tax rate.

Tax Increment Financing (TIF): TIF's provide tax breaks for qualifying developments to allow a portion of new state and local tax to funnel back to the developer to assist with development costs and expenses. TIF's are available at the local and state level.

Local Incentives: In addition to state incentives there are several local incentives available to growing businesses. Local incentives are determined based on factors such as job creation, payroll, and capital investment. One of our first steps is to reach out to local officials to start a conversation about what local incentives may be available for your project.

Facilitating Connections

We have long-term working relationships with state and local governments and many years' experience working in commercial real estate. We can introduce your company to key influencers, including business leaders, state and local staff, and elected officials. If your business is considering a new or additional location, contact a DBL Law attorney who can assist you with all aspects of the decision-making process.

Firm & Attorney News more at dbllaw.com/news

Firm News

DBL Law is pleased to announce that attorneys Aaron Caskey and Colleen Fausz have been named partners.

"We are proud to announce Aaron Caskey and Colleen Fausz as DBL Law's newest partners. They have provided outstanding legal work and the highest level of professionalism throughout their careers and reflect DBL Law's deep commitment to those we serve through their hard work and dedication. We look forward to their continued success," said Bob Hoffer, managing partner.



Aaron Caskey practices in the firm's Commercial Banking, Real Estate, and Corporate Law groups. He joined DBL Law in May 2013 as a Summer Associate and is based in DBL Law's Covington, KY office.

Aaron serves on the Board of Directors for Buffalo Trace Children's Advocacy Center and the Augusta Independent Educational Foundation. He is a member of the Leadership Northern Kentucky Class of 2020. He is a member of The Kentucky Bar Association, Northern Kentucky Bar Association, Ohio State Bar Association, and Cincinnati Bar Association.



Colleen Fausz practices in DBL Law's Business and Transactional, Estate Planning and Probate, and Banking and Commercial groups. She assists trusts, estates, businesses, nonprofit organizations, and individuals with tax compliance and tax and estate planning.

Colleen represents businesses in acquisitions and divestitures, as well as consulting on a variety of business and employment tax issues.

A lawyer and Certified Public Accountant, Colleen transitioned within DBL Law from her previous position as the firm's Controller, where she was responsible for managing all financial and equipment aspects of the firm and associated staff. She is based in the firm's Covington, KY office.

Colleen serves on the Board of Directors for Family Nurturing Center. She is a member of the Kentucky Bar Association, Northern Kentucky Bar Association, Ohio State Bar Association, Cincinnati Bar Association, and the Kentucky Society of CPAs.

Attorney Spotlight



DBL Law partner Kelly Holden has been appointed to the Southwest Ohio Region Workforce Investment Board (SWORWIB). The SWORWIB is responsible for implementing the Workforce Innovation and Opportunity Act in the City of Cincinnati and Hamilton County, Ohio. The board is responsible for developing strategies to engage employers, employees, government, education, organized labor, and community-based organizations in a partnership to strengthen and expand the workforce resources of the region.

Kelly is chair of DBL Law's Employment Law practice where she represents public and private employers in all facets of employment law. She earned a J.D. degree from Salmon P. Chase College of Law, cum laude, and a Bachelor of Arts degree from Franklin College of Indiana, cum laude.

Kelly is a lifelong Cincinnati resident who also serves on the boards of CancerFree Kids, Interparish Ministries, and St. Charles Care Center. She is immediate past chair and current planning committee member of HR Collaborative and a former chair of Northern Kentucky SHRM.



DBL Law attorney Brad Steffen has been named Director of Veterans Discharge Upgrade Review Clinic for Salmon P. Chase College of Law. In this role, Brad works with law students to assist veterans seeking an upgrade to their negative discharge characterization from the military. The clinic is a way for students to get experience with government agencies and regulations, and to develop skills for working with clients.

Brad Steffen is an associate attorney practicing in the areas of Civil Litigation, Employment and Labor Law, and White Collar Criminal Defense. Prior to joining DBL Law, Brad served in the military as an officer in the United States Air Force JAG Corps for almost five years. During this time in the Air Force, Brad served as both a prosecutor and defense attorney.



Arbitration Agreements Still a Valuable Tool for Employers, Despite Recent Court Decision

by Nick Birkenhauer
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Following termination of employment, a former employee may file a lawsuit in state or federal court. Litigation in a courtroom is an expensive, time-consuming process for a plaintiff to bring claims before a judge and a jury of his or her peers. However, there is another option available for employers who have entered into mandatory arbitration agreements with their employees. With such an agreement in place, the employer may seek to compel the alternative dispute resolution process of arbitration and to remove the dispute from the courtroom.

Arbitration offers a legal resolution in which a neutral, third-party arbitrator renders a decision in place of a judge or jury. Due to the increasing number of employment and consumer claims, mandatory arbitration clauses are often a standard term found in company contracts. Since 1925, the Federal Arbitration Act has ensured that valid arbitration agreements are properly enforced by the courts. The purpose of the Act was to allow arbitration to be treated as an equal alternative in dispute resolution. However, over time, federal policy began to favor mandatory arbitration, and the courts frequently have noted a strong public policy which favors the enforcement of arbitration agreements. Some argue this policy results in corporate defendants being treated more favorably than an employee plaintiff.

While arbitration has remained favored by the courts for many years, an unexpected case would cause the Supreme Court to reexamine its previous treatment of arbitration agreements and the procedures by which an employer can seek to remove a case from the court system and compel arbitration. In March of 2022, the Supreme Court heard the case of *Morgan v. Sundance*. The case concerned a claim made by Robyn Morgan, a former employee of Sundance, a Taco Bell franchise owner. Allegedly, the corporation denied its employees earned overtime pay.

After nearly eight months of active litigation, the company decided it would invoke the mandatory arbitration provision found in its employment contract and moved to compel arbitration. Typically, the corporation would be unable to take such an action since it did not seek to compel arbitration at the outset of the lawsuit, instead waiting eight months to do so. However, the 8th Circuit Court of Appeals found in favor of the employer, deciding that ending litigation in the courtroom and compelling arbitration after nearly eight months would not “materially prejudice” Morgan. As a result, Morgan appealed to the U.S. Supreme Court.

On May 23, 2022, the U.S. Supreme Court entered a decision which may change the light in which courts view arbitration

agreements. Specifically, the Court found that a broad public policy favoring arbitration would no longer be appropriate. Instead, “a court must hold a party to its arbitration contract just as the court would do any other kind . . . a court may not devise novel rules to favor arbitration over litigation.” The Court’s decision rests on treating arbitration contracts fairly, rather than favoring arbitration, as has been its practice now for many years. The takeaway is that courts will now interpret and enforce arbitration agreements in the same manner as they would any other standard contract.



But what does this mean for employers? Should mandatory arbitration agreements no longer be utilized? The answer is a definitive no. This decision does not undermine the validity or enforceability of arbitration agreements. What the decision means is that arbitration agreements, and corporate defendants seeking to enforce them, will no longer receive preferential treatment when there is a dispute over the validity or the enforceability of the agreement.

Arbitration can be an especially beneficial tool to employers. It offers simplified procedures that allow for a quicker and more economical resolution to a dispute. Arbitration hearings are confidential as they do not take place in open court and transcripts of the proceeding remain private. The arbitrator is decided through an agreement by both parties and works to establish a fair and neutral resolution. No jury is needed. Further, through the language of the agreement, the employer has the ability to control the location of the arbitration, as well as which state’s laws apply. In short, compared to the court system, arbitration can provide a more controlled and predictable forum to resolve a dispute.

The *Sundance* case presents a good reminder to employers that arbitration agreements must be appropriately drafted and the terms carefully followed. A separate yet equally important consideration is the manner in which arbitration agreements are presented to employees, and the circumstances under which an employee signs the agreement. In the wake of *Sundance*, employers would be wise to consult counsel to carefully review their arbitration agreements and practices.

**Samantha Lanyi is a summer associate in DBL’s 2022 Summer Associate Program*