



# D&O Liability Insurance:

## Making an Impact in the Board Room

(Trends, Strategies and Practical Uses)

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A business of Marsh McLennan

## Speaker Introduction

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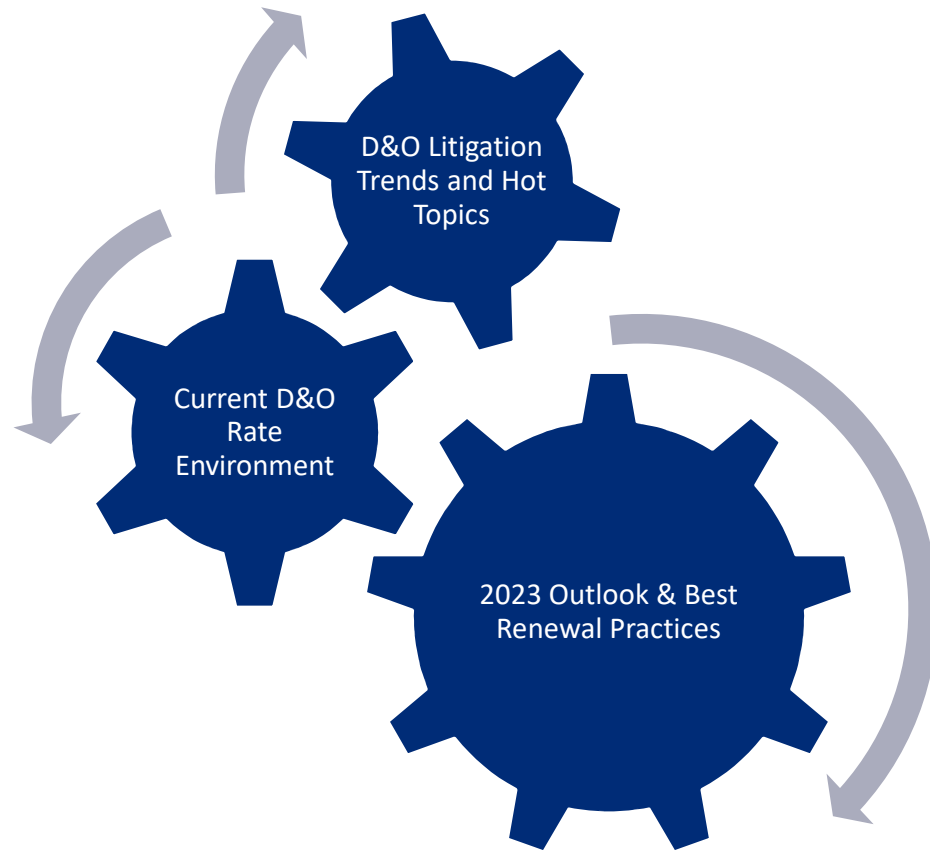
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Born in Miami, FL and a Florida State University graduate, Blake Eaton currently resides in Atlanta, GA. as part of Marsh's South East FINPRO Practice. Blake advises clients on the evaluation and design of risk transfer solutions that address financial and professional exposures, including Directors and Officers Liability, Employment Practices Liability, Fiduciary Liability and Crime Insurance.



# Executive Summary



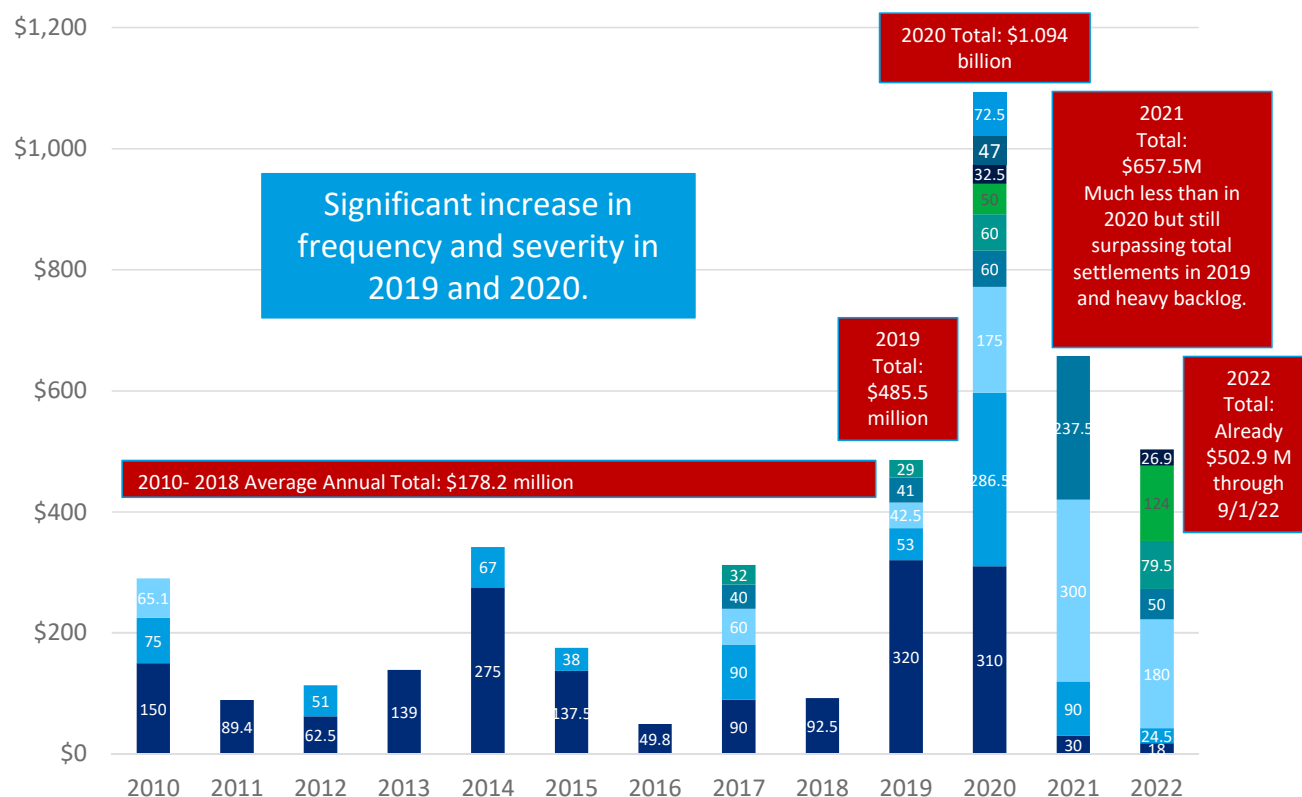
# Public Co. Directors & Officers Liability

## Emerging Claims Trends and Hot Topics



# Public Co. Directors & Officers Liability

## Large Shareholder Derivative Settlements by Year – 2010 to 2022\*

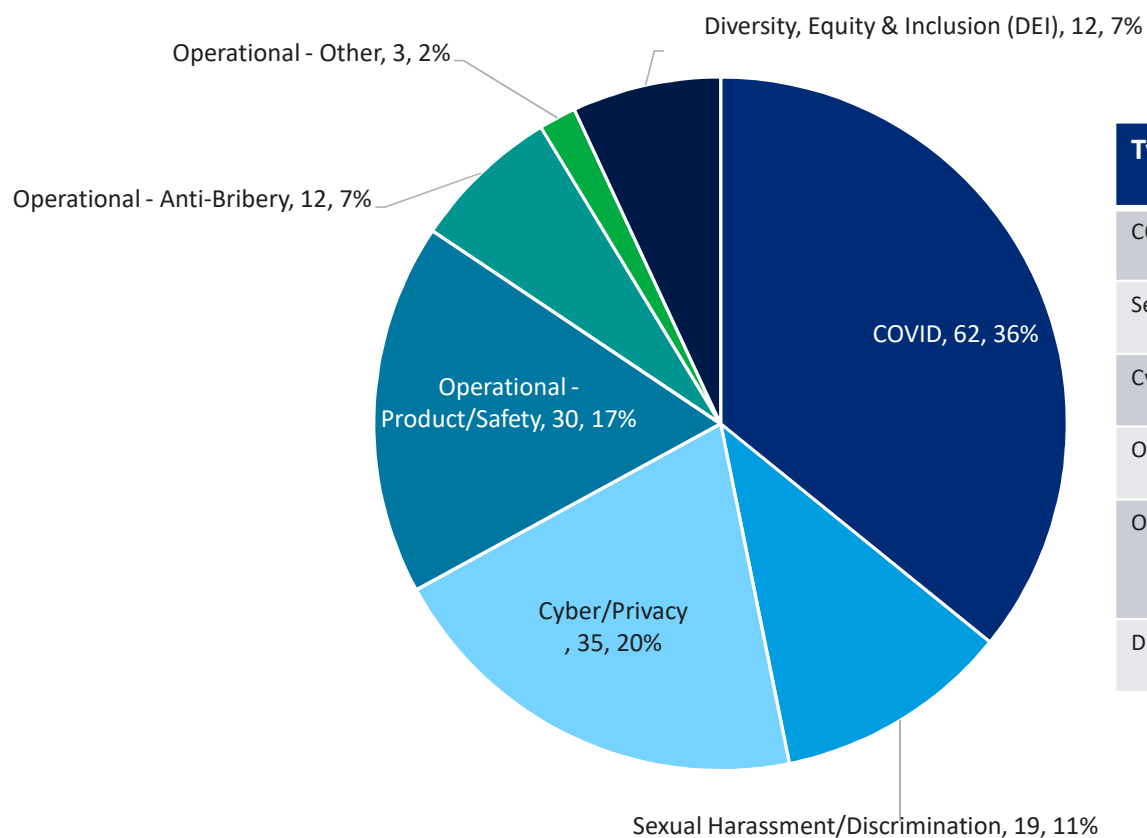


\*Each block represents a settlement over \$20 million. Not intended to be a comprehensive listing. Source: Marsh research. 2022 Through 9/1/22. Does not include defense costs.

<b>2022</b> (through 9/1/22) <b>\$502.9M</b>	Southern Copper <b>\$24.5M</b>   Yelp <b>\$18M</b>   First Energy <b>\$180M</b> ( <i>final court approval still pending</i> )   Pinterest <b>\$50M</b>   Goldman Sachs <b>\$79.5M</b>   Cardinal Health <b>\$124M</b>   Tilray Inc. <b>\$26.9M</b>
<b>2021</b> <b>\$657.5</b>	Stamps.com <b>\$30M</b>   L Brands <b>\$90M</b>   RenRen <b>\$300M</b> ( <i>approval was initially rejected by court but since approved</i> )   Boeing <b>\$237.5M</b>
<b>2020</b> <b>\$1.094B</b>	Google (Alphabet) <b>\$310M</b>   VERIT (American Reality) <b>\$286.5M</b>   McKesson <b>\$175M</b>   Blue Bell Creameries <b>\$60M</b>   Tesla <b>\$60M</b>   DaVita <b>\$50M</b>   Twitter <b>\$47M</b>   Equifax <b>\$32.5M</b>   HSBC <b>\$72.5</b>
<b>2019</b> <b>\$485.5M</b>	Wells Fargo <b>\$320M</b>   New Senior Investment Group <b>\$53M</b>   Pilgrim's Pride <b>\$42.5M</b>   Wynn Resorts <b>\$41M</b>   Yahoo <b>\$29M</b>
<b>2018</b> <b>\$92.5M</b>	Starz Entertainment <b>\$92.5M</b>
<b>2017</b> <b>\$280M</b>	21 <sup>st</sup> Century Fox <b>\$90M</b>   PG&E <b>\$90M</b>   Community Health Systems <b>\$60M</b>   Sears <b>\$40M</b>   Apple REIT Ten <b>\$32M</b>

# Public Co. Directors & Officers Liability

## Event-Driven Securities Claims – 173 Filings



Type / # of Settlements	Average Settlement
COVID (4)	\$15.1 million
Sexual Harassment / Discrimination (7)	\$119 million (including non-cash components)
Cyber/Privacy (6)	\$65.8 million
Operational - Product/Safety (13)	\$91.7 million
Operational - Anti-Bribery (9)	\$104 million (this excludes the Petrobas \$2.95 billion settlement)
Diversity, Equity & Inclusion (DEI)	None settled to date.

# Private Co. Directors & Officers Liability

## Emerging Claims Trends and Hot Topics

ESG

Event Driven  
Claims

Consumer Class  
Actions

Major  
Shareholders  
w/o Board Rep.

Antitrust Losses

Macro Economic  
Headwinds

Coverage  
Modifications

Larger private companies, particularly those with revenues of more than \$1 billion, carriers may seek to limit coverage for the entity to investor-related claims only.

Carriers are seeking to impose additional restrictions on businesses deemed high-risk due to their industry, ownership structure, or financial distress. These include limiting exposure for creditor claims, bankruptcy matters and major shareholders.

Only 39% of private company respondents indicate that their board reviewed ESG-related risks and opportunities for the company and only 18% indicate that their board has assigned clear ESG oversight responsibilities to specific committees (compared to 64% of public company respondents) *Source: 2022 NACD Private Company Board Practices and Oversight Survey*

# Employment Practices Liability

## Emerging Claims Trends and Hot Topics

Social Unrest /  
Black Lives  
Matter

ESG – The “S”  
(Social)

Discrimination  
Evolution

Pay Equity /  
Pay  
Transparency

#MeToo

The Current  
Administration

COVID-19

Biometric  
Privacy Laws

ADA Claims &  
Website  
Accessibility

Wage Fixing /  
No Poach  
Agreements

Marijuana in  
the Workplace

Use of Artificial  
Intelligence

Employee  
Monitoring

Political  
Affiliation  
Discrimination

Post-Dobbs  
EPL  
Considerations



# Fiduciary Liability

## Emerging Claims Trends

Excessive Fee  
Litigation

Outdated Mortality  
Tables and Actuarial  
Assumption Litigation

Cyber Events

Underwriter Scrutiny

Since January 2020 there have been over 325 ERISA Class Action suits filed and at least 150 of those suits have involved allegations of excessive fees.

Less than 10-15% of all Excessive Fee cases are dismissed. Compared to 50% securities class actions.

We continue to see strict underwriting scrutiny, which has led to Insurers cutting capacity, increasing premium and imposing significant retentions.

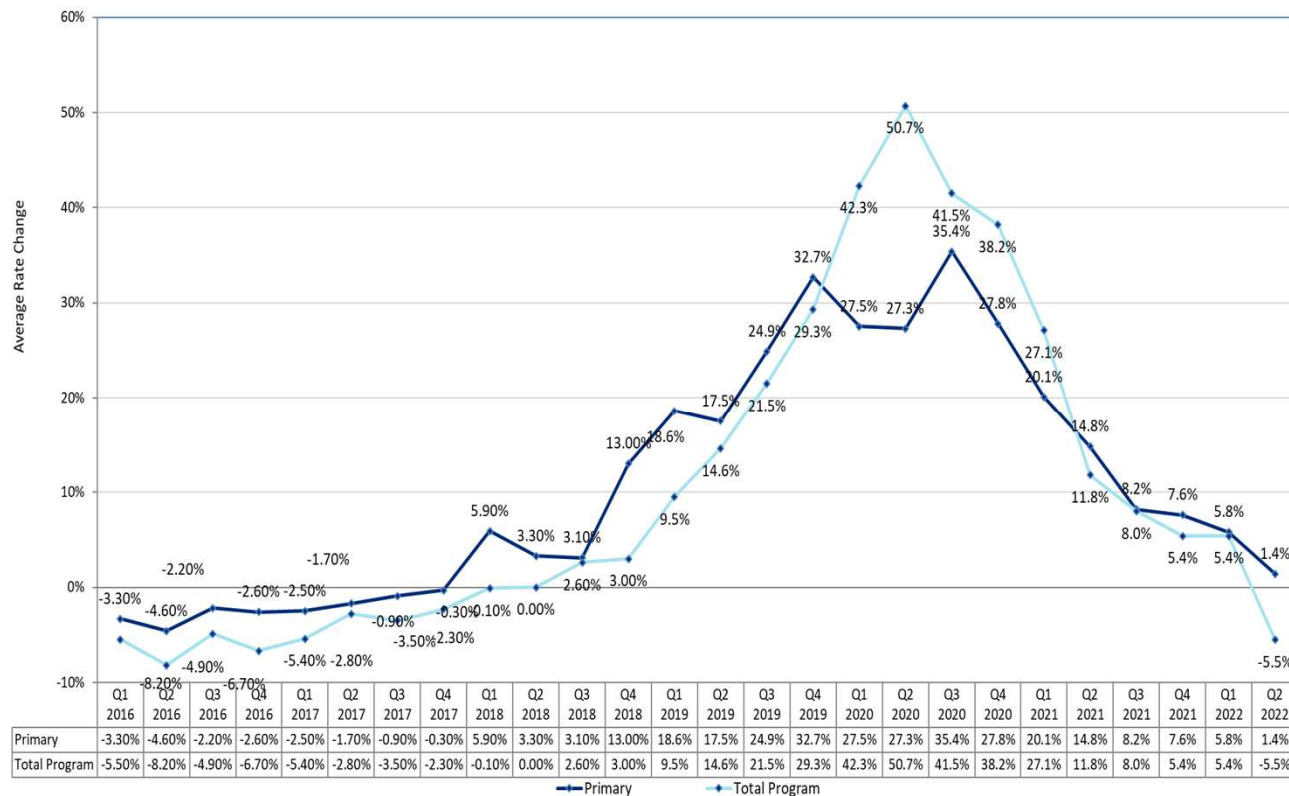
# Fiduciary Liability

## How to Improving Your Company's Risk Profile

Category	Notable Practices
Provider Diligence	<ul style="list-style-type: none"><li>• A detailed process for selecting and compensating service providers</li><li>• Regularly benchmarking provider compensation with independent data.</li><li>• Revisiting and negotiating agreements with service providers on a regular basis, preferably a formal RFP.</li><li>• Use of outside consultant for advisory</li><li>• If more than one service provider for each function is used what is the justification?</li><li>• Review of cyber and other policies and controls of service providers – particularly in light of Department of Labor new cyber guidance</li></ul>
Participant Costs	<ul style="list-style-type: none"><li>• Cap on revenue sharing, if applicable</li><li>• Flat fee per participant versus percentage of assets</li><li>• Target fees under \$30, however there is no magic number, \$40 or greater tends to drive concern but costs can be further justified based on services performed</li><li>• Most favorable approach: sponsor pays fees (rare given cost basis)</li></ul>
Investment Options	<ul style="list-style-type: none"><li>• Reasonable count of investment options</li><li>• Low cost investment class funds</li><li>• Availability of index funds: inexpensive options that lower costs to participants</li><li>• Creating an investment policy with outside counsel and following this. – clear documentation of reasoning if decisions may not adhere</li><li>• Low use of providers / funds / services that are subsidiaries or affiliates (proprietary funds)</li><li>• Limit complexity</li><li>• Limited company stock in plans</li><li>• Monitoring use and cost of actively versus passively managed funds</li></ul>
Documentation	<ul style="list-style-type: none"><li>• Document all plan meetings and decision making processes.</li><li>• Document frequency and thoroughness of investment performance and costs reviews</li><li>• Carefully document decisions surrounding use of ESG in investment decisions</li></ul>
Expertise	<ul style="list-style-type: none"><li>• Utilizing a plan consultant and outside counsel to assist in fiduciary decisions</li><li>• Educating committee members on their liability and responsibilities. Committee members should have required level of financial and business expertise to serve.</li><li>• Regular education on fiduciary matters for committee members.</li></ul>

# Improving Rate Environment

## Public Directors & Officers Liability Quarterly Rate Change (through Q2 2022)



### Public D&O Rate Trends

#### Q3 2022 Average D&O Rate Change:

- Primary -1.2%
- Total Program -9.1%

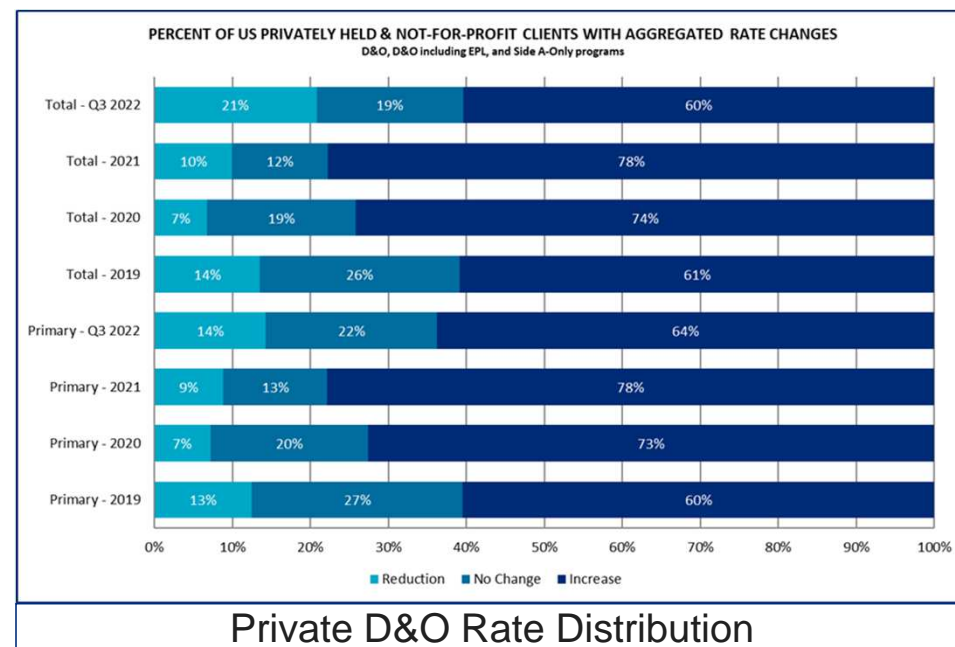
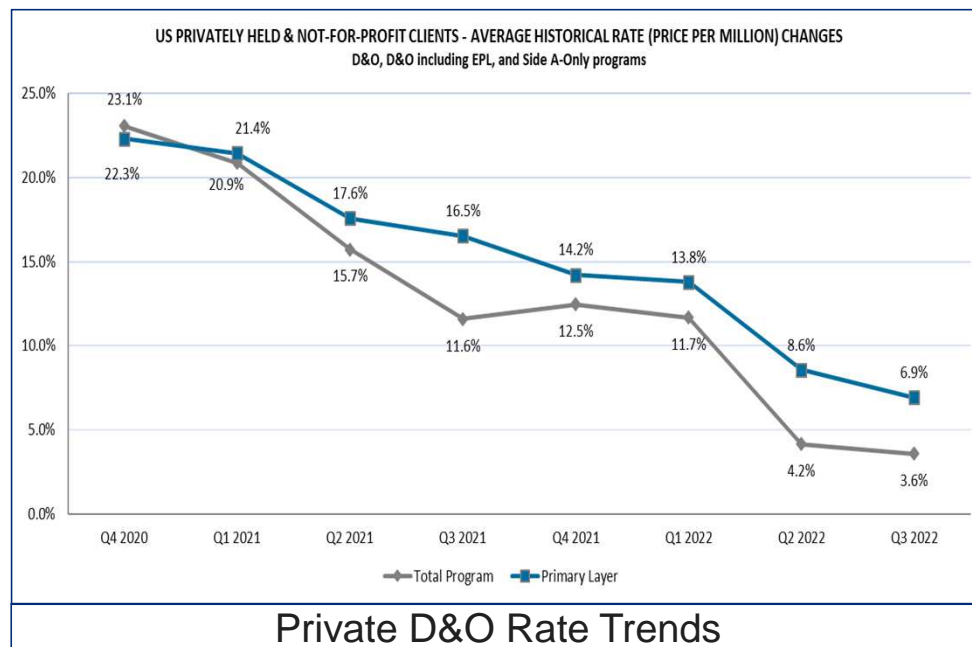
Q2 and Q3 of 2022 marks the first total D&O program reduction since 2018.

#### Reasons for Improved D&O Rate Environment:

- Increased competition and capacity from new market entrants
- Decreased transactional business (IPO's, SPAC's, De-SPAC's, M&A)
- Total number of Security Class Actions has appears to stabilize closer to historical the average

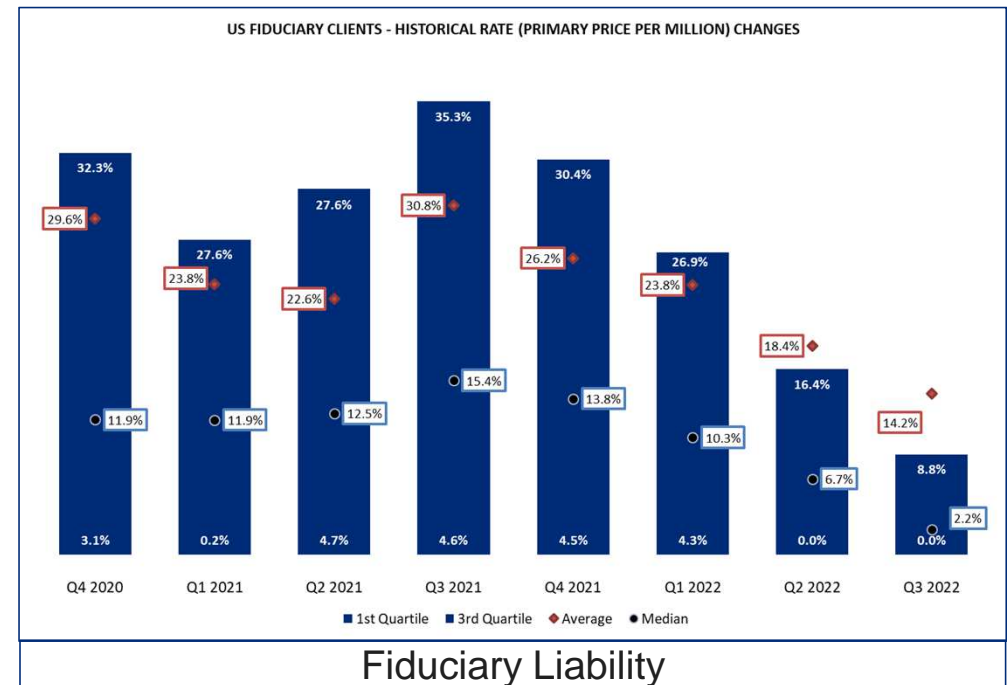
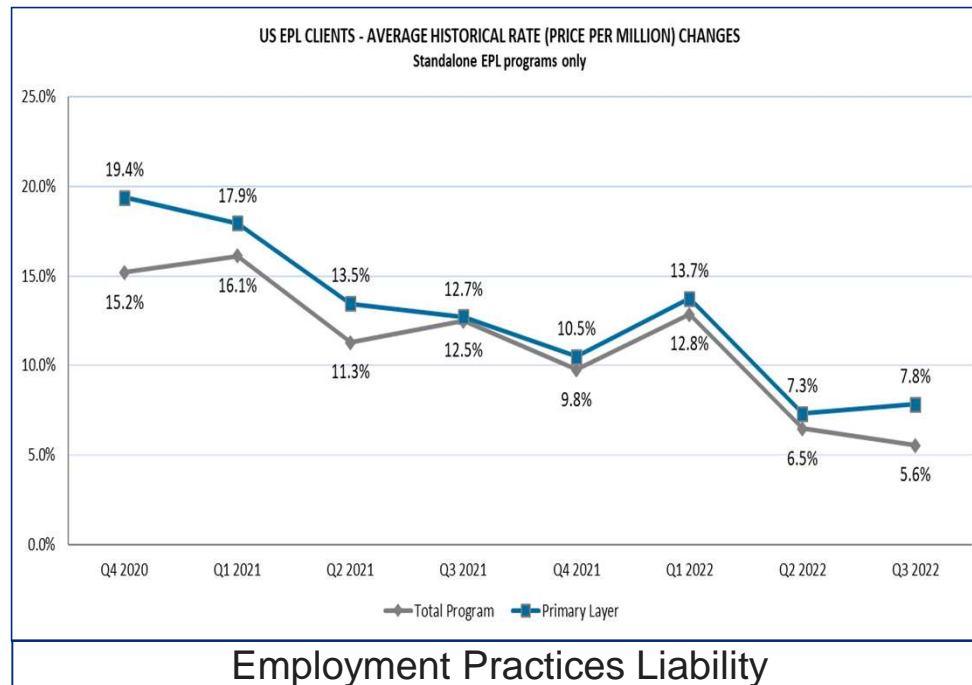
# Improving Rate Environment

## Private Co. Directors & Officers Liability Quarterly Rate Change (through Q3 2022)



# Improving Rate Environment

## Employment Practices Liability and Fiduciary Liability



# How to Achieve the Best Renewal Results?

## Start Early

- *Strategize*
- Develop a “plan of attack”
- Discuss likely pain points and alternatives
- Commit to the TIMELINE

## Communicate Often

- Facilitate real time updates
- Discuss internal goals and expectations
- Continue to be an “informed buyer”
- Develop executive level materials that are effective for sharing within the company

## Differentiate the Company

- Highlight positive underwriting characteristics to truly differentiate the firm’s risk profile
- Proactively address underwriting concerns

## Evaluate Options

- Utilize analytical tools to design the optimal program for unique needs (budget / risk / coverage)
- Assess alternative OPTIONS

## Access the Global Market

- “Cast a broad net”
- Leverage the global marketplace (London, Bermuda & the U.S.).
- Utilize Wholesale Markets

## Meet Personally

- Facilitate productive virtual or in-person meetings
- Present to “decision makers”
- Commit to impactful underwriting meetings that are tailored to underwriting concerns

## Leverage Relationships

- Leverage relationships across all lines / coverages.

# Questions?

# Appendix



# EPL – Emerging Claims Trends and Hot Topics

Social Unrest/ Black Lives Matter	<ul style="list-style-type: none"> <li>The EEOC in the summer of 2020 released a statement committing the agency to redoubling their efforts to address institutionalized racism, advance justice, and foster equality of opportunity in the workplace.</li> <li>Publicity from the Black Lives Matter movement likely will continue to drive litigation and significant settlements as companies strive to avoid publicity associated with allegations of discrimination, and to avoid incurring the ire of social media.</li> </ul>
ESG – The “S” (Social)	<ul style="list-style-type: none"> <li>ESG is much more than just the “E” (Environmental) that many organisations focus on.</li> <li>The “S” (Social) includes addressing issues of discrimination, social and political trends, working conditions, employee benefits, strategic supplier relationships, and charity partners, among other concerns.</li> <li>Some of the questions from underwriters include: Has the company undergone a pay equity audit in order to identify any potential disparities in pay in any specific groups of employees? Has the company worked with a third party on the pay equity audit and were the results presented to the board? Has the company hired a full-time head of DE&amp;I or assigned those responsibilities to a senior leader in the organization?</li> </ul>
Discrimination Evolution	<ul style="list-style-type: none"> <li>Laws prohibiting discrimination against a person based on their natural hairstyle (The CROWN Act) attempt to prohibit discrimination against individuals with hairstyles historically associated with race. CA was the first state to put such a law in place. However, as of July 2022, 18 states along with Washington, D.C. have passed similar laws.</li> <li>There have been nine figure discrimination settlements/verdicts this year (e.g., <a href="#">\$100M</a>, <a href="#">\$118M</a> and <a href="#">\$175M</a> class action gender bias settlements).</li> <li>There have also been \$1M+ single plaintiff settlements/verdicts this year (e.g., \$365M (retaliation); <a href="#">\$15M</a> (pay disparity); <a href="#">\$4.4M</a> (racial profiling); <a href="#">\$3.8M</a> (gender discrimination)).</li> <li>The Pregnant Workers Fairness Act was passed by the House but has yet to be passed by the Senate. It is designed to ensure that pregnant workers who work for employers with 15 or more employees can receive reasonable accommodations that are often low-cost or no cost, such as additional bathroom breaks or light duty.</li> <li>Uptick in discriminatory and harassing workplace behavior toward Asian Americans and Pacific Islanders due to the pandemic.</li> </ul>
Pay Equity/ Pay Transparency	<ul style="list-style-type: none"> <li>Although the Paycheck Fairness Act failed to pass, most recently in June 2021, on March 15, 2022, the Biden administration <a href="#">announced</a> the continued commitment to advance pay equity.</li> <li>The EEOC has renewed efforts to revive pay-data collection and reporting requirements through the EEO-1 survey.</li> <li>Several states and localities have passed their own equal pay legislation that seek to address pay inequity based on gender, race and other protected categories. For example, many states enacted laws that prohibit employers from asking job applicants about salary history.</li> <li>Pay transparency laws that require disclosure of salary ranges are not new. States such as CA, CT, MD, NV, RI and WA have laws requiring employers to provide applicants and employees salary ranges at varying times, such as when requested, upon making an offer, or after an interview.</li> <li>The newest iteration of pay range disclosure laws, which requires employers to include salary ranges on job postings, pushes the envelope even further. Currently, Ithaca, NY, Jersey City, NJ, and CO have laws that require salary range disclosures on job postings. Jurisdictions with similar laws that will soon become effective include CA, New York City and Westchester County, NY.</li> </ul>

# EPL – Emerging Claims Trends and Hot Topics

#MeToo	<ul style="list-style-type: none"> <li>• Since the “Me Too” phrase reemerged on social media in 2017, sexual harassment scandals have dominated headlines and social media feeds.</li> <li>• Regulatory and legislative action by federal, state and local governments have limited the enforceability of NDAs in settlement agreements, prohibited confidentiality and non-disparagement clauses in certain employment settlement agreements, or are requiring or recommending anti-harassment training and policies.</li> <li>• The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 was signed by President Biden in March 2022. The bill bans mandatory arbitration in sexual harassment and sexual assault claims.</li> <li>• In September 2022, the U.S. Senate passed the SPEAK Out Act, which limits non-disclosure and non-disparagement agreements in cases involving sexual harassment or sexual assault. The bill now moves to the House for consideration.</li> </ul>
The Current Administration	<ul style="list-style-type: none"> <li>• The change in leadership in the White House translated directly to reversals in administrative agendas, which now seek to expand worker rights.</li> <li>• The current administration has been focused on more stringent federal equal pay laws; broader anti-discrimination laws; federal paid family leave; elimination of mandatory pre-dispute arbitration; elimination of class action waivers; increased restrictions on non-compete agreements; and pro-worker/union legislation.</li> <li>• Regarding wage and hour, the current administration is focused on increasing minimum wage and overtime rule changes.</li> </ul>
COVID-19	<ul style="list-style-type: none"> <li>• The aggregate number of COVID EPL claims continues to climb as “return to work” initiatives, remote and hybrid work arrangements, and vaccine mandates are fuelling claims. Thus far, however, individual claims have not presented significant exposure, suggesting this trend is more one of frequency than severity.</li> <li>• However, in August 2022, a health system agreed to pay \$10.3M to resolve a proposed class action from workers who claim the hospital’s requirement that they get vaccinated against COVID-19 conflicted with their religious beliefs.</li> </ul>
Biometric Privacy Laws	<ul style="list-style-type: none"> <li>• There continues to be a growing legislative trend to protect individual privacy and personal data in the employment context.</li> <li>• Illinois was the first state to regulate the collection and storage of biometric data, but other states have similar laws and several states have proposed laws.</li> <li>• In the <a href="#">first ever BIPA trial</a>, the jury found a railway company liable for violating BIPA and awarded \$228M. In April 2022, Google settled a BIPA class action for <a href="#">\$100M</a>.</li> <li>• While most EPL carriers either exclude or sublimit this coverage, there may be coverage under a cyber policy.</li> </ul>
ADA Claims and Website Accessibility	<ul style="list-style-type: none"> <li>• One of the sections of the ADA focuses on making sure that “places of public accommodation” are equally accessible to those living with disabilities, which includes websites.</li> <li>• The Department of Justice (“DOJ”) opined in 2014 that websites are considered “places” that requires public accommodation under Title III of the ADA, which requires businesses with more than 15 employees provide accessibility accommodations to enable people with disability to have the same access as non-disabled individuals.</li> <li>• Website accessibility claims allege a website is not accessible by the visually or hearing impaired. Plaintiff’s generally argue that they were unable to use a business’s website and that they were thereby denied equal access to the goods and services of a place of public accommodation.</li> </ul>

# EPL – Emerging Claims Trends and Hot Topics

## Wage-Fixing/ No Poach Agreements

- Over the past year, the DOJ has increasingly been hot on the heels of suspected anti-competitive labor violations.
- In July 2021, President Biden signed an Executive Order on Promoting Competition in the American Economy, which encourages the FTC to employ its statutory rulemaking authority to “curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”
- To date, the DOJ has brought a handful of actions against employers across industries relating to wage-fixing and no-poach agreements.
- These actions are brought as antitrust violations; and thus, would not typically be covered under an EPL policy.

## Marijuana in the Workplace

- Marijuana remains an illegal substance under federal law and therefore employers do not have to provide accommodations to employees under the Americans with Disabilities Act (“ADA”).
- In April 2022, a bipartisan group of House members moved forward with a proposal to federally regulate cannabis. The [PREPARE Act](#) would establish a federal commission to advise Congress on the most effective means of regulating cannabis. The PREPARE Act faces an uncertain future.
- At least 22 states provide varying levels of employment protections for medical marijuana users, and protections for employees’ off-duty recreational use are growing.
- An increasing number of jurisdictions (Philadelphia, Nevada, New Jersey, New York) have passed laws restricting pre-employment drug screening for marijuana and/or THC, with limited exceptions.

## Use of Artificial Intelligence

- In May 2022, the EEOC issued guidance addressing compliance with ADA requirements and agency policy when using AI and other software to hire and assess employees.
- The DOJ has also issued its own guidance on the use of AI tools.
- The guidance by both agencies was produced as part of the Artificial Intelligence and Algorithmic Fairness Initiative launched in October 2021.
- The focus is on three main areas: (1) reasonable accommodation for applicants and employees; (2) where AI decision-making tools may “screen out” individuals with disabilities; and (3) where an AI-based tool may violate ADA restrictions on disability-related inquiries.

## Employee Monitoring

- Although monitoring employee efficiency and productivity has been a long-standing practice in employers’ physical workspaces, the development of new forms of surveillance technology and the deployment of such technology inside employees’ homes and/or on employees’ personal devices have given rise to new legal considerations.
- Some states require employers to notify employee when and how they will be monitored.
- There could be potential disparate impact claims based on which employees are being tracked and then punished, fired, or demoted due to the tracking. There could also be biases in how the tools are monitoring employees.

# EPL – Emerging Claims Trends and Hot Topics

## Political Affiliation Discrimination

- Due to the heightened political environment, more employees say they are experiencing differential treatment based on their political views.
- While employers have a fair degree of flexibility, there exists some protections for employees against this behavior depending on where they live. For example, CA, NY and the District of Columbia have laws prohibiting discrimination based on political affiliation.
- In addition, conversations about political issues may be protected under the National Labor Relations Act (NLRA). For example, issues involving pay equity.

## Post-Dobbs EPL Considerations

- A few EPL coverage areas that may apply to claims arising from the U.S. Supreme Court's decision in Dobbs v. Jackson Women's Health Organization, which overturned Roe v. Wade, include:
  - Employment discrimination statutes, such as the Pregnancy Discrimination Act (PDA)
  - Job protected leave, including the Family Medical Leave Act (FMLA)
  - Americans with Disabilities Act (ADA)
  - Religious discrimination
  - Invasion of privacy
  - Hostile work environment



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