



PUBLIC TRANSPORTATION

CLAIMS

SAFETY

2015 SEMINAR

# Navigating Claims of Negligent Hiring, Training and Retention When Punitive Damages Are Alleged

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## **Roadmap for Plaintiff to obtain punitive damages from the defendant employer for negligent hiring and retention**

- 1.** Establish the employer's negligence in hiring or retaining the employee.
- 2.** Establish state law standard for punitive conduct, as it relates to the employer's hiring or retention.

## Roadmap for Plaintiff to obtain punitive damages from the defendant employer for negligent hiring and retention

There is actually a preliminary step.



## Roadmap for Plaintiff to obtain punitive damages from the defendant employer for negligent hiring and retention

**STEP 0.** Plaintiff must be able to present a viable claim for negligent hiring or retention.



**What if the employer admits that its employee was acting within the scope of his employment at the time of the accident?**

Can the Plaintiff *still* pursue direct claims against the employer for negligent hiring or retention?



## Non-Preemption View:

The plaintiff **can still pursue** direct claims against the employer for negligent hiring and retention even if the employer admits that its employee was acting within the scope of his employment at the time of the accident.



## **Rationales for the Non-Preemption View:**

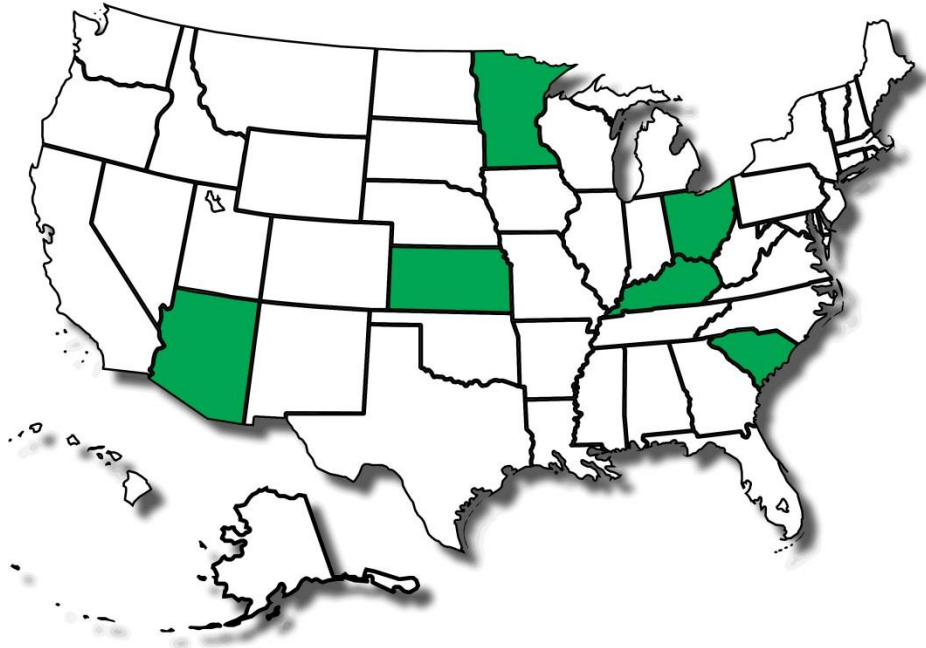
A plaintiff is often permitted to pursue multiple theories of liability in a case, to recover one set of damages. So why should one cause of action prohibit another in this instance?

The employer's liability under these theories is not derivative, it is direct.

Claims for negligent hiring and retention can provide a separate basis for an award of punitive damages.

## Non-Preemption View States:

- Ohio
- Kentucky
- South Carolina
- Arizona
- Kansas
- Minnesota





## Preemption View:

When the employer admits that its employee was acting within the scope of his employment at the time of the accident, the plaintiff is **barred** from pursuing direct claims against the employer, e.g. negligent entrustment, hiring, supervision, training or retention claims.



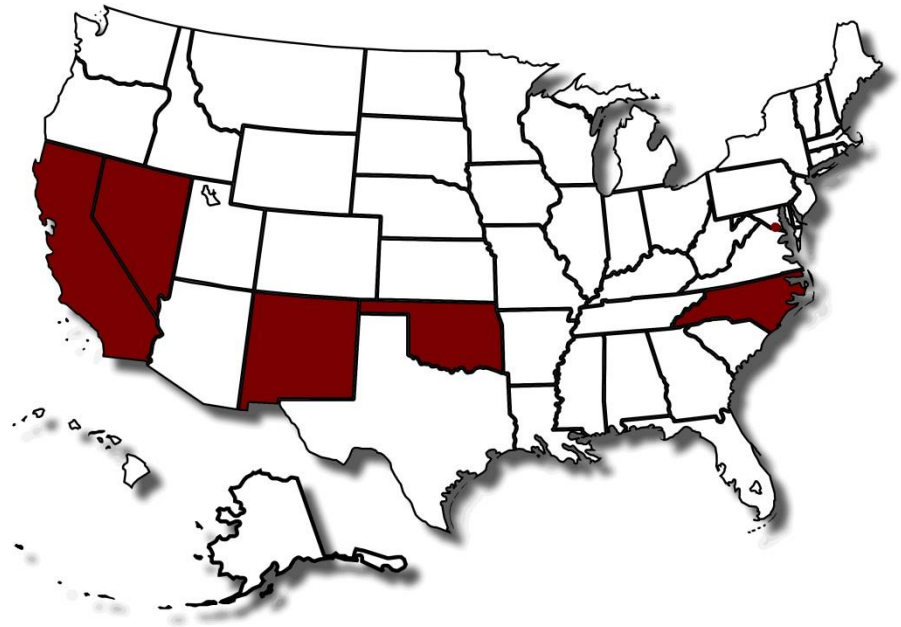
## Rationales for the Preemption View:

The employer is already liable based on respondeat superior.

Evidence concerning negligent hiring & retention claims (e.g. prior driving record, an arrest record or other records of past mishaps or misbehavior by the employee) can be **highly prejudicial** if combined with a stipulation by the employer that it will ultimately be vicariously liable for the employee's negligent acts.

## Preemption View States:

- California
- Nevada
- North Carolina
- Oklahoma
- U.S. District Court for District of Columbia
- New Mexico (in dicta)



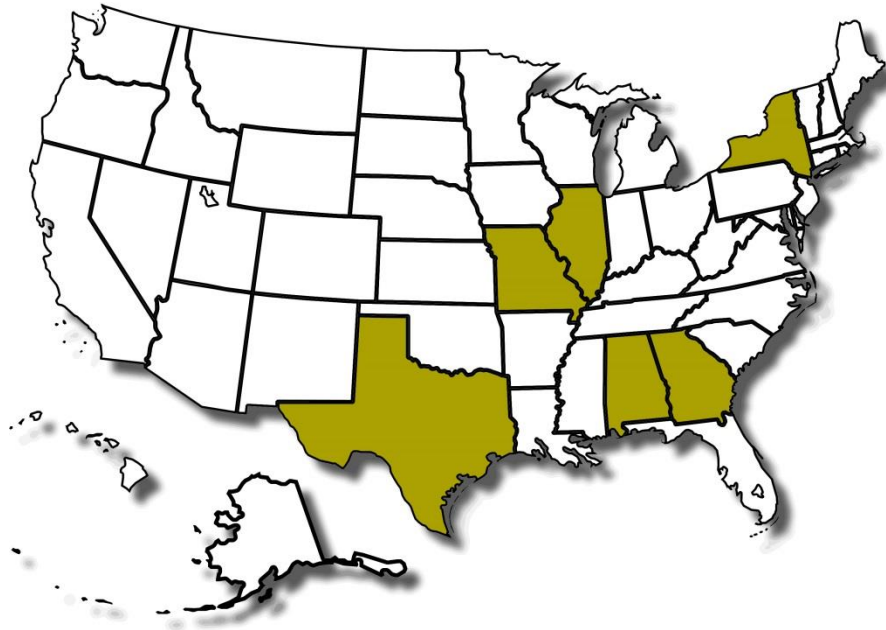
## NOTE

Some jurisdictions include an exception to the Preemption View, when a plaintiff presents a viable claim for punitive damages based on the employer's hiring and retention.



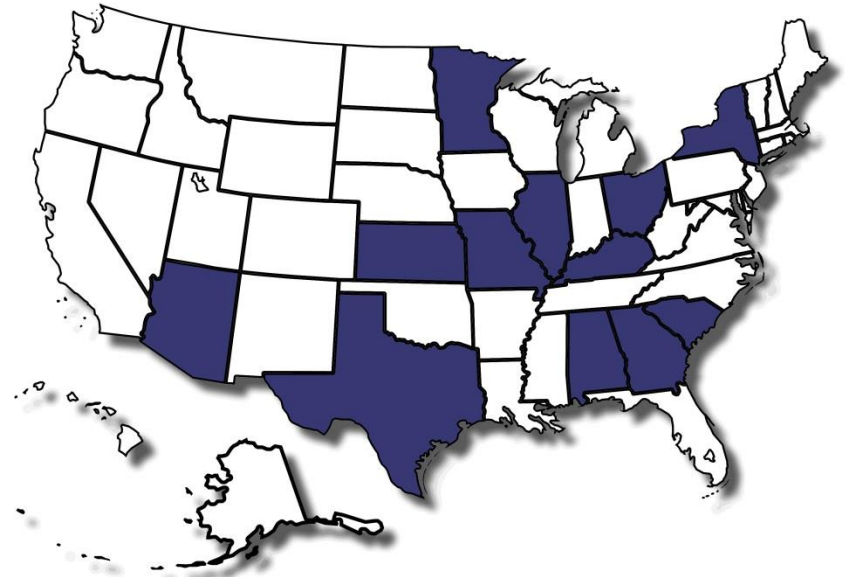
## Preemption View with Exception for Gross Negligence or Other Punitive Conduct:

- Missouri
- Georgia
- Illinois
- New York
- Alabama
- Texas



## States Where a Plaintiff Can Pursue Punitive Damages Based on an Employer's Hiring and Retention:

- Missouri
- Georgia
- Illinois
- New York
- Alabama
- Texas
- Ohio
- Kentucky
- Arizona
- Kansas
- Minnesota
- South Carolina



## Generally, the elements of negligent hiring or retention claims

The plaintiff must demonstrate:

- (1) The existence of an employment relationship;
- (2) The employee's incompetence;
- (3) The employer's actual or constructive knowledge of such incompetence;
- (4) The employee's act or omission causing the plaintiff's injuries; and
- (5) The employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries.

# When are punitive damages available for a negligent hiring or retention claim?

Standards vary by state.





## **Punitive Damages Standards**

Traditionally: Only in the traditional, intentional tort context.

That is, only if a jury found that a defendant acted with a specific intent to cause harm could it award punitive damages.

## Punitive Damages Standards

Starting in the 1960s, American courts and legislatures began to expand rapidly the situations in which punitive damages were awarded.



## **Punitive Damages Standards**

A number of states adopted a “reckless disregard” standard for punitive damages liability.

Other states adopted a three-pronged “willful, wanton or gross misconduct” standard, giving plaintiffs three separate paths to obtain punitive damages.

Both of these standards require a mental state that is something less than a specific intention to harm someone.

## **Punitive Damages Standards**

Today, most states use these two standards in some form or another.

For instance, many states use the term “gross negligence,” which is typically defined as a “wanton or reckless disregard for the safety of others.”

## **Punitive Damages Standards**

Another common standard today is a “conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.”

## Punitive Damages Standards

Yet, in other states, the bar remains high.

For instance, under Arizona law, a plaintiff must prove that a tortfeasor's "evil hand was guided by an evil mind." *Bachrach v. Covenant Trans. Inc.*, 2011 WL 1211767, at \*1 (D. Ariz. Mar. 31, 2011).

## The Burden of Proof Also Varies

**New Mexico:** Preponderance of the evidence.

**Colorado:** Proof beyond a reasonable doubt.

**Majority States:** Clear and convincing evidence.

## When have punitive damages been awarded for negligent hiring and retention?

- *Wilson v. Image Flooring*, 400 S.W.3d 386 (Mo. App. W.D. 2013)





## When have punitive damages been awarded for negligent hiring and retention?

- *MV Transp., Inc. v. Allgeier*, 433 S.W.3d 324 (KY 2014).



## When have punitive damages NOT been awarded for negligent hiring and retention?

- *Kuebler v. Gemini Transp.*, 2013 WL 6410608 (S.D. Ohio Dec. 9, 2013).

Court granted summary judgment in favor of employer on punitive damages for negligent hiring.



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FOCUSED ON WHAT MATTERS TO YOU

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