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NAVIGATING THE NEXT.

**Retail Operations Update on COVID-19 Vaccine
Policies, Government Business Requirements, and
Industry Outlook**

July 27, 2021

Speakers

Annie Estevez, Miami

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Agenda

1 Employee and Customer Vaccination Updates

2 Permanent Work-from-Home (WFH) and Tax-Withholding Issues

3 Employment and Consumer Litigation Outlook as Courts Resume Trials and Move Through the Backlog

4 Sustainability Commitments and Energy Procurement

Employee and Customer Vaccination Updates

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Public Health Backdrop – Nationally



CDC and OSHA

Centers for Disease Control (CDC) and Occupational Safety and Health Administration (OSHA) have said employers can treat vaccinated and unvaccinated individuals differently



Vaccinated

Vaccinated individuals no longer need to wear masks indoors and do not need to quarantine after exposure to an infected individual



Unvaccinated

Unvaccinated individuals should continue to wear masks, practice social distancing, and quarantine after exposure

Public Health Backdrop – Delta Variant

- Since CDC's and OSHA's guidance in June, we have seen a significant increase in the Delta variant
- More transmissible and potentially more dangerous
- Los Angeles County recently required people to wear facemasks indoors, regardless of vaccination status
- Individuals are strongly recommended to wear facemasks indoors in Illinois, Nevada, Northern California counties, and St. Louis

What's a Retailer to Do?



Collection of Vaccination Information



Not a disability-related inquiry



Vaccination information must be kept confidential, just like any other medical information



Our interpretation: status is not protected; information on the vaccination card is protected

Safety Protocols and State Laws

How to Enforce Safety Protocols

- Stickers, bracelets, segregated work areas
- Human Resources; Environment, Health and Safety (EHS); manager enforcement

State Laws

- Montana – cannot discriminate on the basis of vaccination status
- Several legislators in other states have introduced similar bills barring discrimination based on vaccine status – unclear if they will gain any traction
- Vaccination Passport Laws (FL, TX, AZ, etc.) – cannot condition a customer's or patron's entry into a place of public accommodation or access to goods and services on the basis of documentation of vaccination status
 - Do NOT apply to employees

Mandate vs. Encourage?

Mandate

We are starting to see more employers mandate vaccination

Compliance

Mandates are compliant with federal law so long as employers provide reasonable accommodations for people with disabilities and those with sincerely held religious beliefs

Challenges

Biggest challenges are dealing with a significant influx of requests for reasonable accommodations and the potential for turnover

Unions

Mandates can be a required topic for union negotiations

Accommodations

What Retailers Need to Know

Must provide reasonable accommodations to those with disabilities or sincerely held religious beliefs that preclude those individuals from getting a COVID-19 vaccine unless doing so would pose an undue hardship.

Disability

There must be a nexus between an individual's disability and the inability to get vaccinated. An employer may request medical documentation.

Undue hardship: significant difficulty or expense, or an individual poses a direct threat to him/herself or others.

Sincerely held religious belief

If an employer has reason to doubt the sincerity of an individual's belief, it may ask follow-up questions.

- Describe the nature of the belief
- Any written tenets
- Letter from spiritual leader, i.e., minister/pastor/rabbi/iman
- How do your beliefs preclude you from getting vaccinated?

Undue hardship: Anything more than *de minimis* cost.

Mandates: Litigation Risk

Bridges v. Houston Methodist

“Although her claims fail as a matter of law, it is also necessary to clarify that Bridges has not been coerced. Bridges says that she is being forced to be injected with a vaccine or be fired. This is not coercion. Methodist is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients, and their families safer. Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else.”

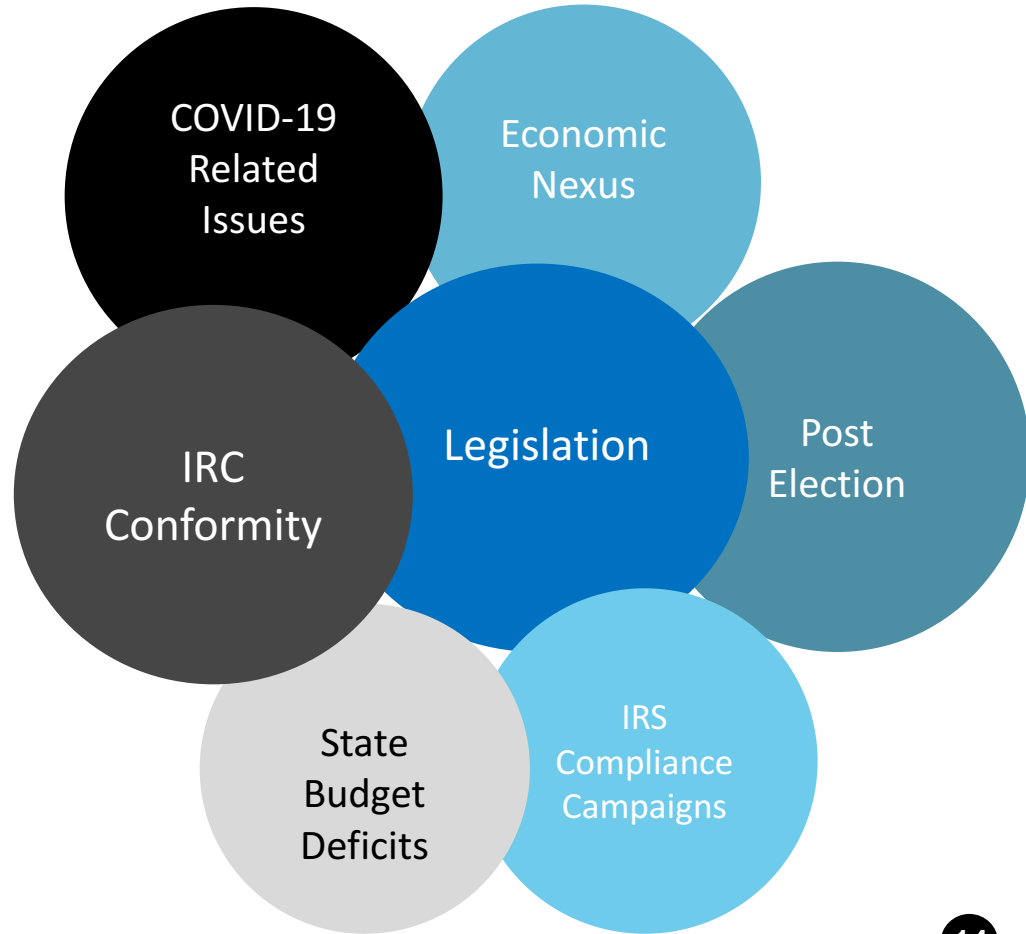
Klaasen v. Trustees of Indiana University

“The university is presenting the students with a difficult choice—get the vaccine or else apply for an exemption or deferral, transfer to a different school, or forego school for the semester or altogether. But this hard choice doesn’t amount to coercion. The students taking the vaccine are choosing it among other options, and before the shot reaches their arms, they are made aware of the risks and the option to refuse.”

Permanent Work-from-Home and Tax-Withholding Issues

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Looming State Tax Controversies



COVID-19 – Related State Tax Issues

- **Cash-Strapped States**

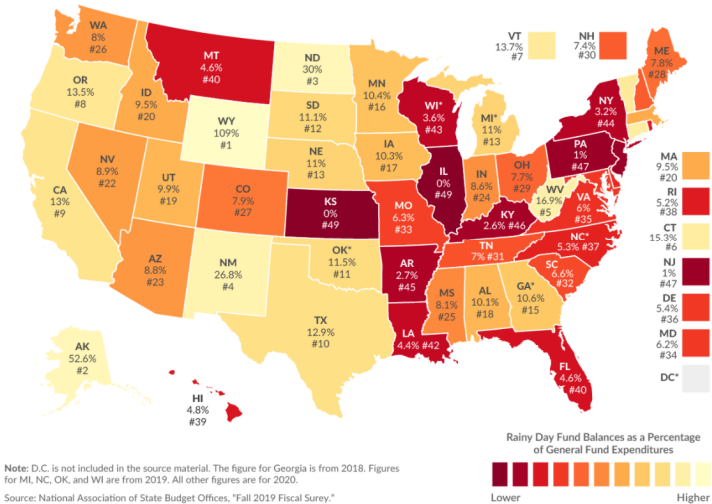
- Significant fiscal challenges as a result of COVID-19

- **Prepare for Future Audit**

- Stay up to date on state guidance
- Regularly consult with advisors
- Documentation

How Healthy Is Your State's Rainy Day Fund?

Rainy Day Fund Balances as a Percentage of General Fund Expenditures



Note: D.C. is not included in the source material. The figure for Georgia is from 2018. Figures for MI, NC, OK, and WI are from 2019. All other figures are for 2020.

Source: National Association of State Budget Offices, "Fall 2019 Fiscal Survey."

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Current State Payroll Tax Requirements and Audit Issues

Companies with peripatetic workforces—employees and contractors working in, and moving among, many different states, either in a single year or over the course of the vesting period for bonuses, stock options, restricted stock, restricted stock units, or other equity compensation—have special problems due to myriad state laws governing the taxation of residents and nonresidents.

State Income Tax Withholding Standards, in General

Residents

- If the employer is doing business in the state, then resident income tax withholding is generally required on all wages paid to the employee regardless of the state where the wages were earned.
- States have various rules about whether (and how much) credit is allowed against resident income tax withholding for income taxes withheld in other states.

Nonresidents

- Nonresident income tax withholding applies to all wages that are earned for work performed (or, in some states, “deemed to be performed”) in the nonresident state.
- Wages earned outside of the nonresident state are not subject to income tax withholding — but, as discussed below, exemptions apply for states with “convenience of employer” rules.

State Taxation of Workers in Multiple States: Employer Withholding

- The “employer nexus” to trigger withholding for most states is:
 - Employer office in state, or some other nexus to trigger state income tax; and
 - Payments of any wages subject to income tax in the state (or subject to contribution under the state’s unemployment compensation laws).
- Some states provide thresholds before withholding is triggered, based on days worked, dollars earned, or some combination of the two.

State Taxation of Workers in Multiple States: Risks of Employer Audits

- As with any payroll audit, it is simpler for state/local tax officials to audit employers, holding them liable for nonwithheld income taxes where allocated wages exceed the state's personal exemption, because that is more efficient than finding and auditing individual employees.
- If employers have neither reported nor withheld on the income, it is extremely unlikely that any nonresident of a state would have voluntarily paid income taxes (thereby enabling the employers to abate their liability for nonwithheld income taxes).

State Taxation of Workers in Multiple States: Difficulties for Employers to Track and Comply

- It is nearly impossible for employers to keep track of day-counting income allocation rules (or with 183+ days residency tests).
- Some states have poorly explained rules on income allocations.
- Historically, many states were not aggressive in auditing non-residents or conducting payroll audits.
- Some states (e.g., NY) have been operating “amnesty programs” or “Voluntary Disclosure Agreements” to encourage employers to voluntarily confess their withholding/reporting errors.

Convenience of the Employer Rule

- “Convenience of Employer” Rule: Several states — CT, NY, NE, DE, PA, and, per “announcement” rather than legislation, MA, and localities in MO and OH) — count services performed by any nonresident at the taxpayer’s out-of-state home (or other shelter location) that could have been undertaken at the employer’s office in one of these states as their state-sourced income, unless the services were performed out of state for the employer’s necessity, not the employee’s convenience.
- These rules make adoption of WFH programs very difficult for employees with their “regular offices” in such states.

Other State Payroll Tax Issues

- Apart from “Convenience of Employer” rules, state WFH orders may inadvertently trigger state payroll tax issues
 - Thresholds requiring state payroll tax registration and filing requirements vary significantly among states, and include no specific threshold at all, or specific wage and day thresholds
 - Reciprocal Agreements among states must be considered—confirm compliance with documentation requirements
 - Determine “Convenience of Employer” state implications in CT, DE, NE, NY, and PA
 - Track federal legislation
- Local Wage and Tax Implications (e.g., Philadelphia, etc.)

Practical Approaches for Managing Exposure – If None of the Federal Exemptions Apply

Payroll Tax

- Establish remote work policy
- Determine company threshold for withholding
- Determine return to work/hybrid return to work plan
- Ensure that entire company is communicating when hiring employees or holding events
- Remediate historical exposure

Corporate Income Tax

- Determine economic and physical presence nexus standards in relevant states
- Determine return to work/hybrid return to work plan
- Understand proper receipts factor sourcing
- Consult with advisors to understand potential liability
- File accordingly

Employment and Consumer Litigation Outlook as Courts Resume Trials

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Employment Litigation

Litigation against employers for COVID-19-related issues continues

- Over 550 lawsuits have been filed since early March 2020 in CA
- Employment discrimination and whistleblower claims make up almost 50% of the cases.
 - Discrimination issues (primarily focused on failure to accommodate both physical and mental disabilities)
 - Anxiety due to COVID-19
 - Afraid to return to employer's facility
 - Positive diagnosis of COVID-19
 - Whistleblower claims
 - PPE complaints
 - Failure to provide safety measures
- Wage and hour
 - Expense reimbursement claims
 - Wi-Fi, phone, electricity
 - Failure to pay for time that employee is being screened for COVID-19
- Vaccination requirements
 - First case in Houston (employer prevails)

Claims Against Employers for Transmittal of COVID-19 to Nonemployee Family Members

Example 1

At least two cases have survived motions to strike and are continuing against employers. Spouses died as a result of COVID-19 and families are suing the employers for negligence in not preventing COVID-19 at the workplace, claiming that the employers' duty to prevent harm extended to the employees' families.

Example 2

The US District Court for the Northern District of California dismissed a case where an employee's spouse alleged her husband brought COVID-19 into the home on his clothes, personal belongings, and body.

- Court held that workers' compensation was an exclusive remedy, and no plausible claim was pleaded.

Employment Litigation

CALIFORNIA SUPREME COURT: MEAL, REST, AND RECOVERY PERIOD PREMIUMS MUST BE CALCULATED BASED ON HOURLY AND NONDISCRETIONARY WAGES

The California Supreme Court ruled on July 15 that California employers must calculate nonexempt employees' meal, rest, and recovery period premium payments based on both hourly wages and any other nondiscretionary wage payments. This is the same method employers must use when they are calculating an employee's "regular rate" for overtime purposes. The court ruled that its decision applies retroactively.

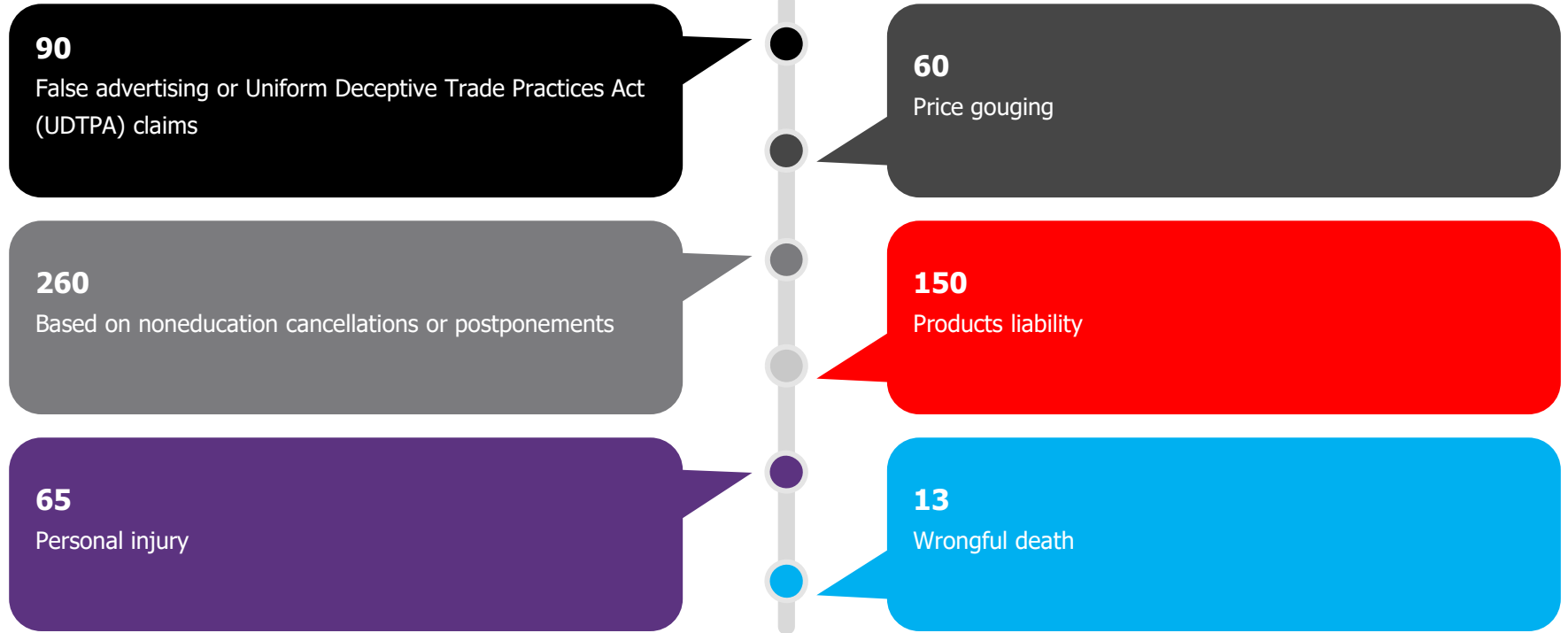
> [READ THE FULL LAWFLASH ON OUR WEBSITE](#)

Consumer Litigation

- Approximately 30 states have enacted liability protections against COVID-19-related lawsuits
- Despite concerns, litigation has not been extensive with respect to consumers alleging they contracted COVID-19
- One report shows only approximately 50-60 consumer suits alleging they contracted COVID-19 in places of business
- Roughly 1,700 civil rights cases and 700 other consumer cases
- Frequency of new suits is slowly declining

Consumer Cases

Very few traditional retail consumer suits



Landlord/Tenant and Contracts



575 landlord/tenant
issues

876 contract
disputes

Many concentrated
in CA, NY, FL

Courts Reopening

- Many courts have restarted in-person trials
- Backlog of cases leading to accelerated schedules
- Courts pushing for more settlement conferences
- Anticipated increased filings generally as plaintiffs can secure trial dates
- Varying procedures related to health screenings, masks, jurors, and remote proceedings

Sustainability Commitments and Energy Procurement

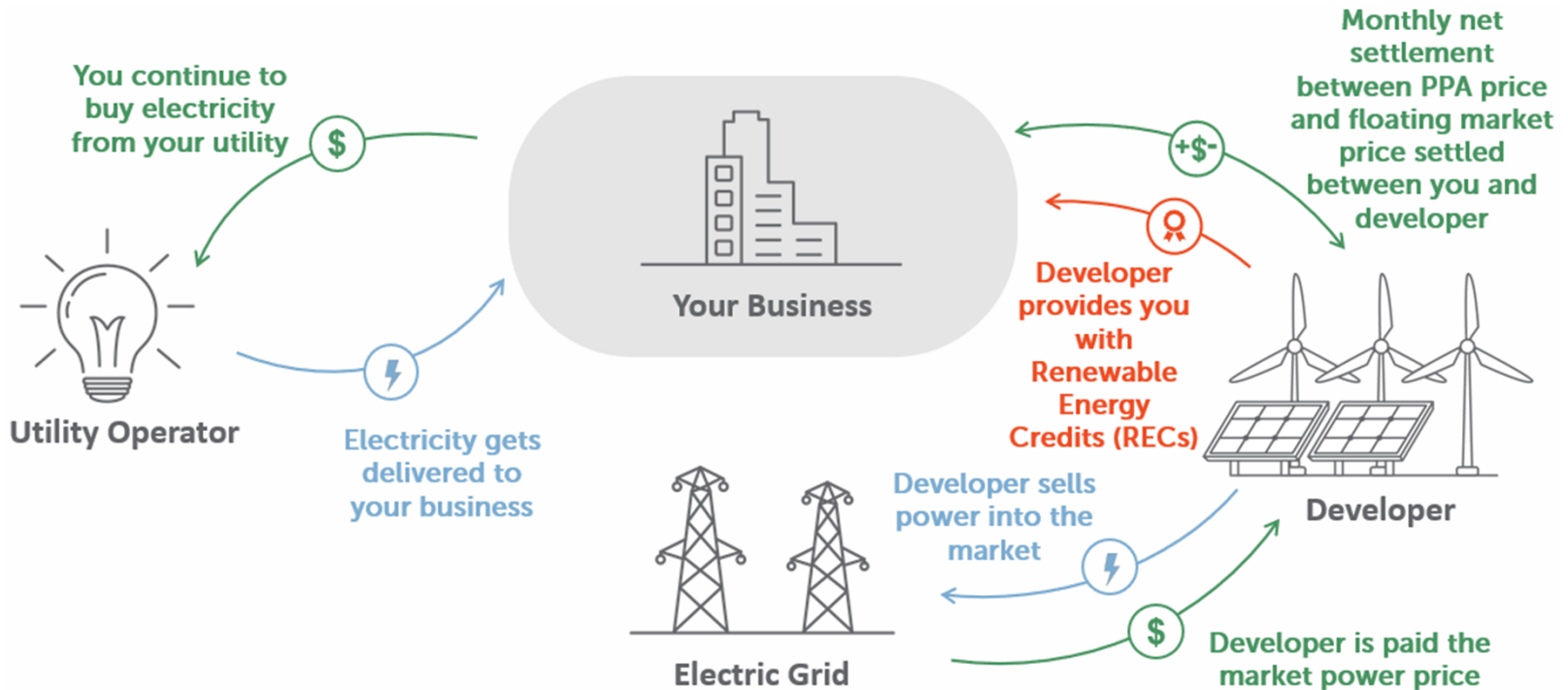
**Renewable Energy Procurement – Virtual Power Purchase
Agreements**

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Increasing Company Sustainability Commitments

- Corporate procurement of renewable energy grew during the pandemic, despite the recession, the uncertainty about the elections, and other challenges
- 2021 will be another record year, with a strong focus on environmental, social, and governance issues and investment, new policies, and continuing cost declines
- Growing focus on “science-based” targets tied to 1.5 degrees warming
- Virtual power purchase agreements (VPPAs) continue strong growth

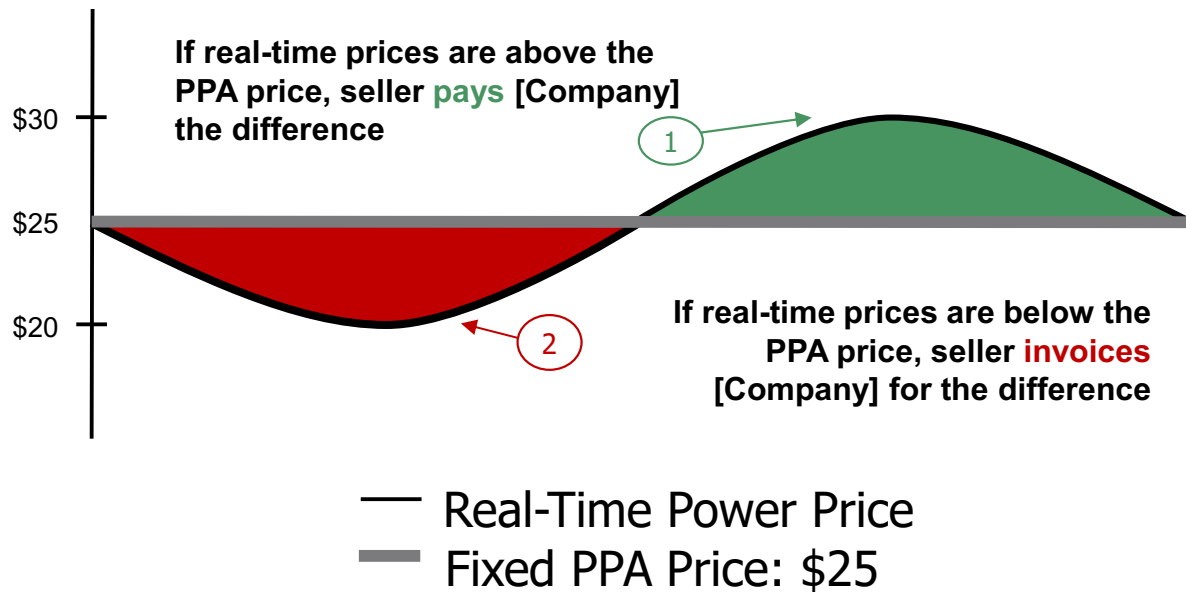
VPPA: How It Works



Source: Edison Energy

VPPA Settlements

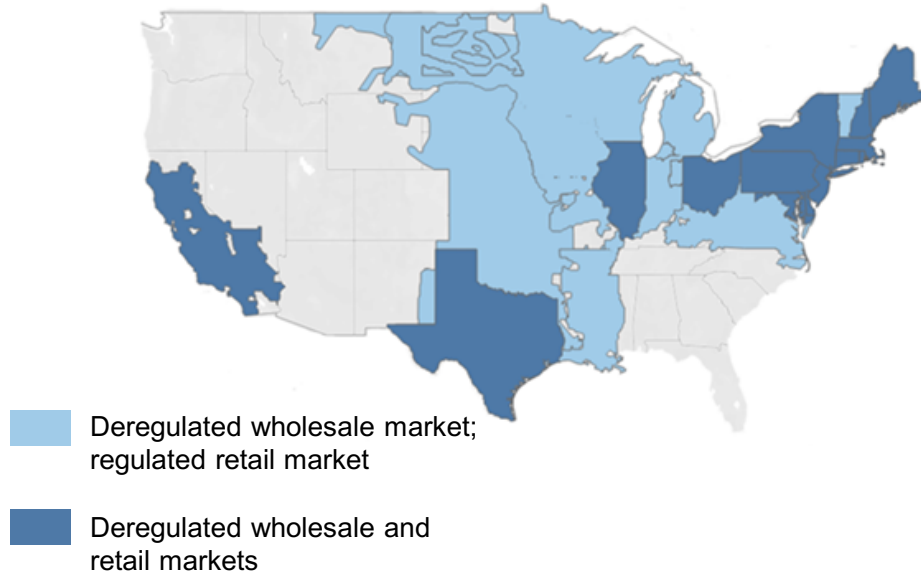
- Buyer pays fixed price per unit of energy generated (\$/MWh)
- Developer provides Buyer with the value of the energy sold on the market + RECs
- As energy is generated by the asset, Developer sells physical energy to the grid at market price, which fluctuates
- The VPPA is settled as a unit-contingent contract-for-differences
- The contract settlements are netted & invoiced monthly



Source: Edison Energy

Where Are VPPAs Occurring in the United States?

The United States is a patchwork of different electricity markets and jurisdictions, where electricity is regulated at both the wholesale and the retail level.



Virtual Power Purchase Agreements

- › Possible anywhere there is a deregulated wholesale market

Retail Delivery

- › Possible anywhere there are deregulated wholesale and retail markets

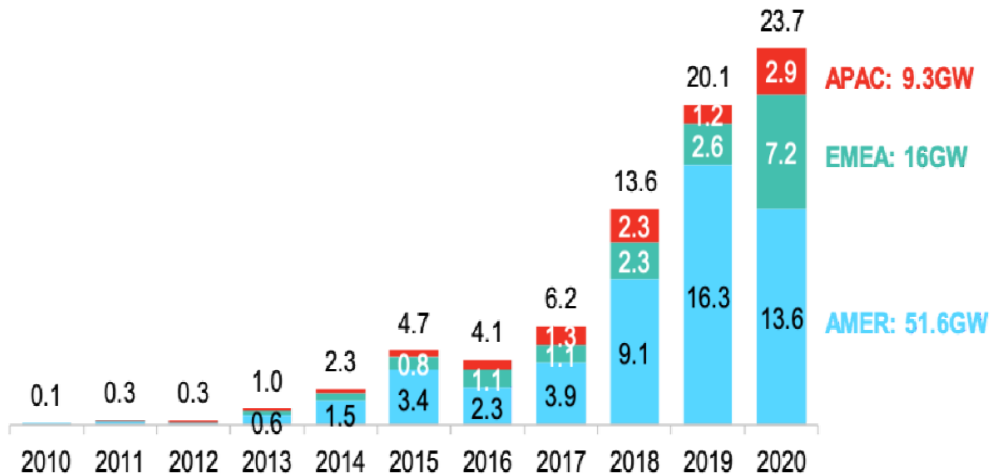
Other Contract Structures

- › May be available outside of deregulated wholesale markets

US Market Continues to Lead, but Other Regions Are Growing

Global Corporate Offsite Deals by Region

GW



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VPPA Considerations

- Project Development Provisions
- “Seller’s Market” Dynamics
- Hub vs. Node Settlement
- Biden-Harris Administration Initiatives
 - “Whole of Government” Procurement
 - Clean Energy Standard
 - Tax Incentives
 - Market Enhancements
- European Green New Deal Investments and Access

Coronavirus/ COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at

[www.morganlewis.com/
topics/coronavirus-
covid-19](http://www.morganlewis.com/topics/coronavirus-covid-19)

If you would like to receive a daily digest of all updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.

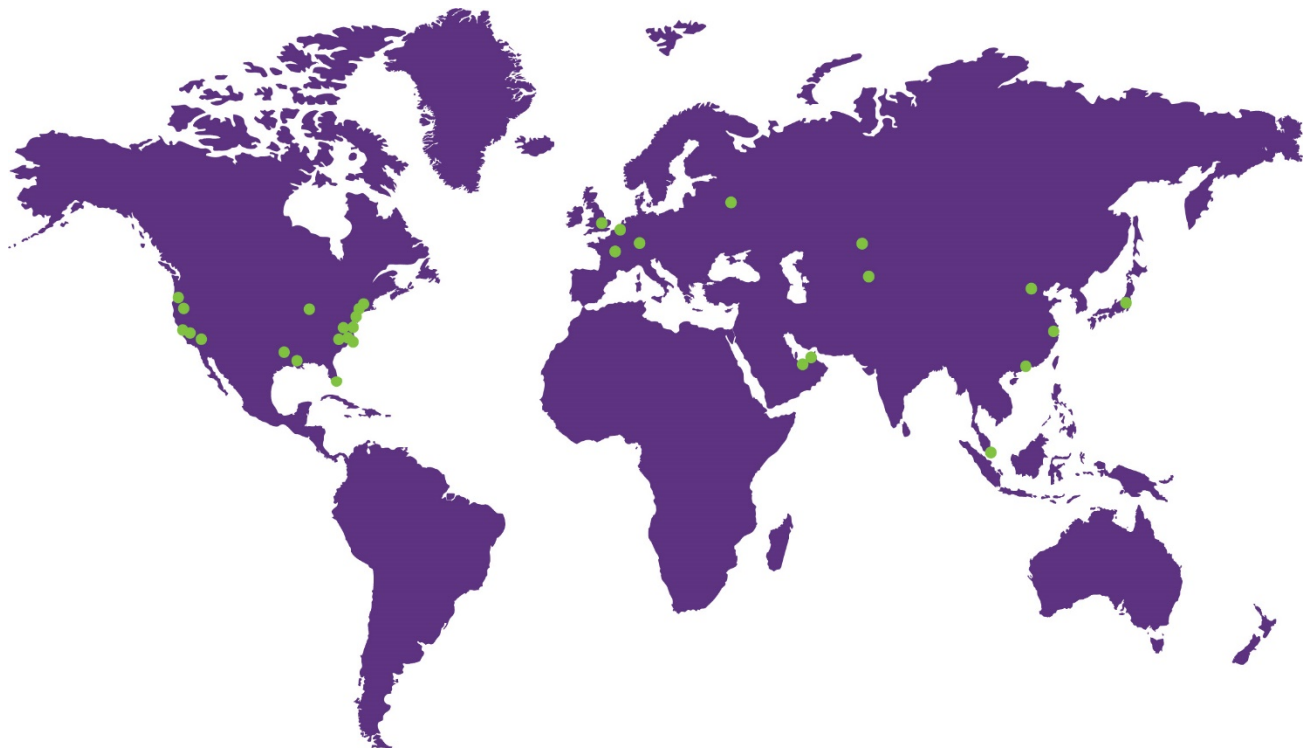


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