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BOARDROOMS ON EDGE
HR's Role in Protecting Your Brand's Reputation
37th Annual Workforce Management Briefing
Thursday, October 25, 2018
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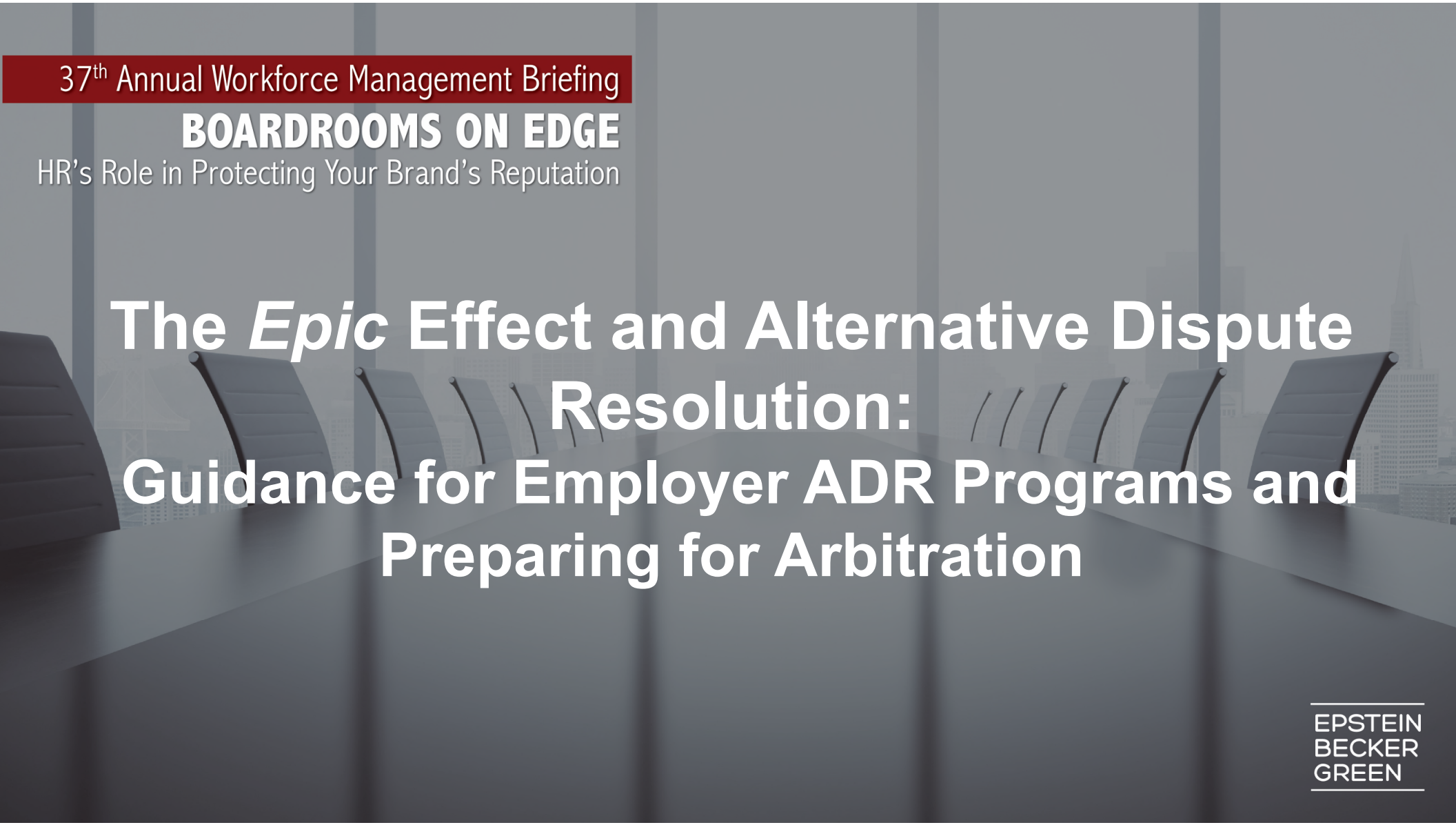
Your Workforce. Our Business.SM


37th Annual Workforce Management Briefing
BOARDROOMS ON EDGE
HR's Role in Protecting Your Brand's Reputation
The *Epic* Effect and Alternative Dispute Resolution:
Guidance for Employer ADR Programs and Preparing for Arbitration
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Presented By

Geralyn Cappelli

People Risk Solutions LLC

Senior Consultant

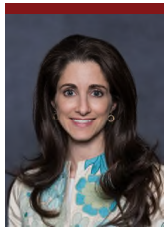
Shawndra G. Jones

Epstein Becker Green

(Seconded to Credit Suisse Securities (USA) LLC)

Senior Counsel

sjones@ebglaw.com



Jamie Kohen

JPMorgan Chase & Co.

Assistant General Counsel

Moderator:
George C. Whipple III

Epstein Becker Green

Member of the Firm

gwhipple@ebglaw.com

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Agenda

An Overview of *Epic*

Class Action Waivers: Are They Good or Bad for Business?

Traditional Litigation vs. ADR: Is ADR Still Considered Advantageous for Employers?

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An Overview of *Epic*

Three Key Cases Leading Up to *Epic*

01

***Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016)**

02

***Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016)**

03

***Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015)**

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Epic Systems Corp. v. Lewis

- In a 5-4 decision issued on May 21, 2018, the U.S. Supreme Court held that class action waivers are enforceable under the Federal Arbitration Act ("FAA") and that they are not prohibited by the National Labor Relations Act ("NLRA").

- Seen as a victory for employers with arbitration agreements already in place, the decision may encourage other employers to implement their own agreements or alternative dispute resolution programs.

- Pre-*Epic*, circuit courts were split:
  - Sixth, Seventh, and Ninth Circuits held that arbitration agreements restricting employees' ability to pursue class or collective actions violated Section 7 of the NLRA and were thus unenforceable under the FAA.
  - Second, Fifth, and Eighth Circuits held that such provisions were enforceable pursuant to the FAA.

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Circuit Courts Post-*Epic*

How Has Epic *Been Applied?*

- ***Gaffers v. Kelly Services, Inc.***, 2018 U.S. App. LEXIS 22613 (6th Cir. Aug. 15, 2018) – Wage and Hour
- ***Cowabunga, Inc. v. NLRB***, 893 F.3d 1286 (11th Cir. 2018) – Wage and Hour
- ***Everglades College, Inc. v. NLRB***, 893 F.3d 1290 (11th Cir. 2018) – Conditions of Employment

How Might Epic *Be Applied?*

- ***Zoller v. UBS Secs. LLC***, 2018 U.S. Dist. LEXIS 44170 (N.D. Ill. Mar. 19, 2018), *appeal docketed*, No. 18-cv-01692 (7th Cir. Mar. 29, 2018)
- ***Varela v. Lamps Plus, Inc.***, 701 Fed. Appx. 670 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 1697 (U.S. Apr. 30, 2018) (No. 17-988)

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Challenges to *Epic*

- Saving Clause
- Transportation Workers – Exempt from FAA
- California Private Attorneys General Act – California State Labor Code Violations
- Sarbanes-Oxley Claims – Whistleblower & Retaliation Claims
- U.S. Department of Defense Contractors – Title VII & Tort Claims

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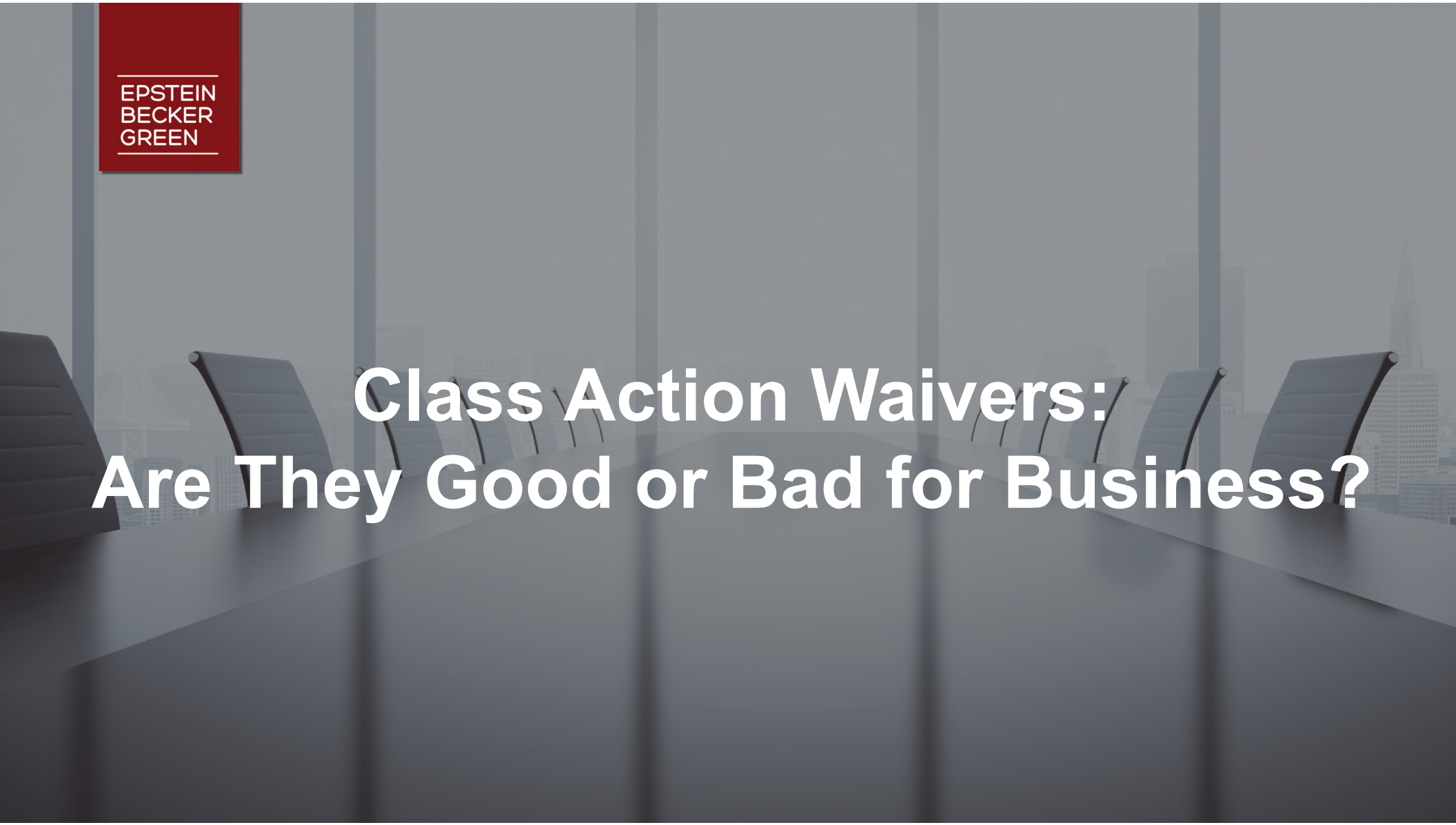
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Class Action Waivers:
Are They Good or Bad for Business?

Traditional Litigation vs. ADR: Is ADR Still Considered Advantageous for Employers?

Discovery in ADR: Does Arbitration Look More and More "Like the Litigation it Was Meant to Displace"?

- "And by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018)

- "This 'fundamental' change to the traditional arbitration process, the [*Concepcion*] Court said, would 'sacrific[e] the principal advantage of arbitration — its informality — and mak[e] the process slower, more costly, and more likely to generate procedural morass than final judgment.' . . . In the Court's judgment, the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace." *Epic,* 138 S. Ct. at 1623 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347-48 (2011))

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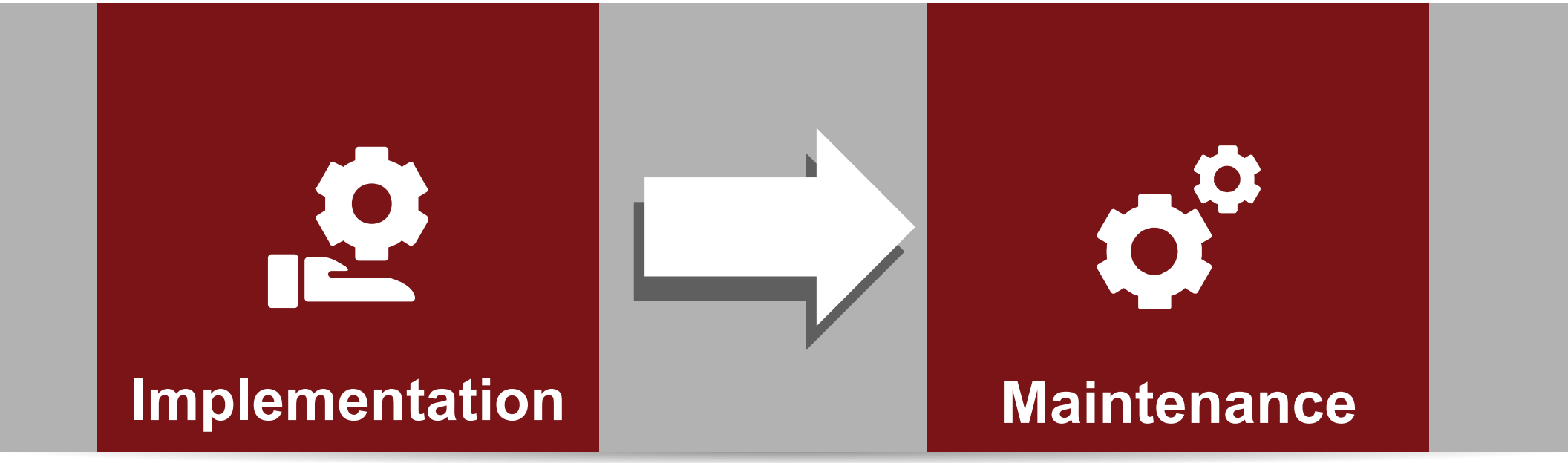
Considerations for ADR Programs



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Any Questions?